Neutral Citation Number: [2019] EWCA Civ EWCA Civ 1614

Case No: C1/2018/063

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
His Honour Judge Graham Wood QC (sitting as a Judge of the High Court)
[2018] EWHC 220 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/10/2019

Before :

LORD JUSTICE FLAUX
LORD JUSTICE MOYLAN
and
LORD JUSTICE HADDON-CAVE

- -

Between :

THE QUEEN (ON THE APPLICATION OF CP, BY HER FATHER AND LITIGATION FRIEND JP)	**Appellant**
- and -	
NORTH EAST LINCOLNSHIRE COUNCIL	**Respondent**

- -
- -

David Wolfe QC and David Lawson (instructed by **Helen Gill of Sinclairslaw**) for the **Appellant**
David Lock QC and Jacqui Thomas (instructed by North East Lincolnshire Council Legal Department) for the **Respondent**

Hearing date : 19th June 2019

- -

Approved Judgment

Lord Justice Haddon-Cave:

Introduction

1. This case raises issues concerning the parallel duties owed by a local authority under the Care Act 2014 ("Care Act 2014") and the Children and Families Act 2014 ("CFA 2014").

2. The Appellant ("CP") appeals, by her litigation friend and father ("Mr JP"), against the order and judgment of HHJ Wood QC, sitting as a Judge of the High Court, dated 9th February 2018 ([2018] EWHC 220 (Admin)), whereby he dismissed CP's challenge to the Respondent's ("the Council") failure or refusal to make certain payments to CP. The dispute concerned the cost of CP's attendance at a weekday placement at an establishment called Fix n'Kiks, run by a charity, Disability Active, organised by CP's father, Mr JP. The Council has paid £10,800 per annum into CP's personal budget in respect of CP's attendance at Fix n'Kiks in effect, since 17th November 2017. This JR relates to the Council's refusal to pay the cost of CP's attendance at Fix n'Kiks during an earlier period from 11th April 2016 to 17th November 2017.

3. CP is a 22-year old woman with global development delay, learning difficulties and an autistic spectrum disorder. She does not communicate verbally. She can communicate to an extent by behaviour, gesture and vocalisation. She cannot be left alone at any time, is doubly incontinent and requires assistance with washing and dressing. Her behavioural difficulties can make her challenging. She wakes every night and requires a carer to be with her. She uses a wheelchair when in the community. She lives with her parents in Lincolnshire.

Background facts and litigation history

4. It is necessary to set out the background facts and litigation history of this case in some detail. The complexity arises from the fact that the case involves overlapping statutory care regimes and overlapping Tribunal and JR proceedings.

Early years

5. CP's developmental problems were evident from her early years. On 5th March 1999, the Council issued the First Statement of Special Educational Needs ("SEN") in respect of CP. On 21st April 1999, CP started attending P School. She received input from speech and language therapy, teachers and partner agencies and made better than expected progress. On 25th January 2001, Dr Jeremy Turk, Consultant Child and Adolescent Psychiatrist, issued a report diagnosing probable autism and lifelong severe learning difficulties, along with marked motor and sensory integration problems and ritualistic and obsessive tendencies.

6. On 29th January 2009, when CP was aged 13, the first core assessment under the Children Act 1989 (assessing social care needs) was completed by the Council. On 19th September 2012, a further assessment of CP's social care needs was made with a direct payment of £185.79 a week to cover social stimulation and carer respite. On 24th May 2013, a further assessment of CP's social care needs was made with a direct payment of £135.79 a week, plus £50 a week comprising "carers direct payment".

7. Mr JP set up Disability Active and Fix n'Kiks in about 2013 as a resource for pupils from P School and other children with SEN. Fix n'Kiks comprised a number of classrooms, a gym and a badminton court.

Aged 18 years onwards

8. On 24th February 2014, CP's parents wrote to the Council, noting they had been asking the Council for a day provision within the Council's area with an "Education, Health and Care programme." They asked for an extra year for CP at P School, and Fix n'Kiks as a second choice. On 31st March 2014, the request for CP to be permitted to remain at Humberston Park School for the academic year 2014-2015 was refused by the Council. On 10th April 2014, a Learning Difficulty Assessment was issued for CP by the Council (the former system for post-19 educational provision under s. 139A of the Learning and Skills Act 2000, since repealed by the CFA 2014). On 12th May 2014, a Continuing Healthcare checklist was completed by Adult Social Care ("ASC"). On 19th June 2014, a further assessment of CP's social care needs was made with direct payment of £337.50 a week, plus a "carers direct payment" of £50 a week.

9. On 27th June 2014, CP left P School, and her Statement of Special Education Needs ("SEN") lapsed. On 29th July 2014, the Council withdrew CP's Learning Difficulty Assessment ("LDA"). On 6th August 2014, CP's parents made a formal complaint about the withdrawal of CP's LDA. On 15th August 2014, the Council answered the complaint stating that, since CP had now left school, her social care needs would be reassessed, and it was likely that there would be an increase in her personal budget.

CP attends Fix n'Kiks – September 2014

10. On 29th September 2014, CP started attending Fix n'Kiks during the day, accompanied by a care worker (called Trish). As I have mentioned, Fix n'Kiks was run by a charity called Disability Active organised by CP's father, Mr JP (and continues to operate). On 11th December 2014, a Decision Support Tool ("DST") for NHS Continuing Healthcare was completed by Ms Gemma Hare (Continuing Health Care ("CHC") Nurse Assessor) and Ms Gemma Laister (social care practitioner). The assessment concluded that CP did not meet the criteria for NHS continuing healthcare, as she did not have "a primary health need." On 16th December 2014, the DST was submitted to North East Lincolnshire Clinical Commissioning Group ("CCG"). CP's parents lodged a complaint about the DST claiming that CP's LDA had not ceased.

11. On 30th January 2015, the Council answered the complaint on a similar basis as before, namely that CP was no longer in education, but the matter could be reviewed in due course should CP wish to undertake further education at some point in the future. On 2nd April 2015, CP's solicitors issued a pre-action letter, asking for CP's complaint to be reopened, for the Council to agree that CP's LDA had not lapsed and for the Council to agree on a plan to fund CP's education and training in compliance with its duties under the Care Act 2014 Act. On 15th April 2015, the CCG wrote to CP's mother to advise her that it had accepted the recommendation that CP was not eligible for CHC funding.

12. On 5th May 2015, the Council sent its pre-action response to CP's solicitors stating as follows:

> "CP and her family have been informed that provision at Fix n'Kiks could be purchased using her Personal Budget which would be reassessed once she ceased to attend school. They were also advised in the response to the complaint in July 2014 …[to]… request an Education, Health and Care (EHC) Needs Assessment… It appears to be the case that if your clients were to request an EHC Needs Assessment and CP does access some mutually agreed form of further education, then her attendance at 'Kixs and Fixs' [sic] could be provided for through a Personal Budget pursuant to health/social care provision, but of course my client does not accept that is education."

Council's refusal to carry out EHC assessment– July 2015

13. On 22nd July 2015, CP's parents asked the Council to carry out an Education, Health and Care ("EHC") Needs Assessment for CP. This request had to be repeated several times and a pre-action letter issued before the Council finally agreed, on 16th October 2015, to carry out an EHC Needs Assessment. On 27th October 2015, a Social Care Advice form was completed by Ms Laura Orton (a social worker at the Council) relating to EHC Needs Assessment which noted:

> "[CP] currently receives a weekly direct payment from Adult Services which she uses to fund 2 personal assistants at different times during the week to support her to travel to and attend Fix 'n'Kiks/Disability Active Monday-Friday 9-3 and also support her to access the community."

14. On 11th December 2015, CP's solicitors wrote to the Council setting out their concerns, including the Council's assertions that an EHC plan could only be issued where a young person was formally enrolled with a registered educational establishment.

15. On 16th December 2015, the Council notified its refusal to make an EHC plan for CP stating:

> "(CP's) learning needs could more appropriately be met through the co-ordinated approach of Fix N Kiks, home and activity in the community than in a specialist education or training setting…The provision that [CP] is accessing through Fix N Kiks is funded by her Adult Social Care Personal Budget…the provision and support at Fix N Kiks are meeting [CP's] needs."

CP issues appeal to FTT – February 2016

16. On 4th February 2016, CP's parents appealed to the Special Educational Needs and Disability Tribunal ("SENDIST"), part of the First-tier Tribunal ("the FTT"), on CP's behalf against the refusal by the Council to make an EHC plan for her (see further below).

Adult Social Care Assessment – 11th April 2016

17. On 11th April 2016, the Council completed an ASC Assessment in relation to CP's social care needs and a support plan which included a direct payment of £387.50 per week. The assessment noted (on p. 9) under the heading "Accessing and Engaging in Work, Training, Education or Volunteering" as follows:

> "[CP] is usually supported by PA (Trish) to attend Disability Active in Cleethorpes 9am till 3pm 5 days per week (Monday to Friday). During [CP's] 'classroom activities' (as described by PA) she spends one to one time with her PA in a classroom practising previously learned skills and developing new skills, with support. [CP] is fully supported by her PA at all times whilst she attends Disability Active and spends some of the time accessing the community."

18. The sum of £387.50 included payment for CP's Personal Assistant Trish's support during CP's attendance at Disability Active but did not include any element for the use of Disability Active's facilities at Fix n'Kiks itself. This was the central focus of the dispute which followed.

CP issues JR proceedings– July 2016

19. On 5th July 2016, CP's solicitors sent a pre-action letter to the Council requesting the Council to provide CP with a direct payment which could provide for appropriate care and support. A JR claim form was issued on 11th July 2016. CP's challenge to the Council's April 2016 ASC assessment comprised essentially three allegations: (1) a failure to calculate a personal budget which was transparent, as required under s. 25 (1)(e) of the Care Act 2014, in circumstances where a direct payment was proposed but no personal budget indicated; (2) insufficiency of the amount identified to meet CP's needs, and the requirements of a lawful direct payment; and (3) unlawfully taking into account family support outside the day-care provision. In addition, CP's solicitors challenged the local authority's failure to provide an EHC plan in relation to her placement at Fix n'Kiks.

20. On 31st August 2016, the Council sought a stay of the JR claim until 31st September 2016 on the basis that CP's entitlement to support could and should be reviewed after the FTT had determined CP's need for an EHC plan in September 2016. CP's solicitors opposed the Council's stay application on the basis that the FTT would "not set levels of provision."

FTT appeal heard – September 2016

21. On 21st September 2016, the FTT heard CP's appeal against the Council's refusal to make an EHC plan, which included evidence from experts concerned with CP's well-being. On 17th October 2016, the FTT issued its determination allowing CP's appeal. The FTT stated "we regard the activities that [CP] undertakes at Fix n'Kiks as educational; they are life skills and, to some limited extent, intellectual activities" (at [46]). The FTT further emphasised "An EHC plan would ensure not only that [CP's] needs are met but there would be monitoring by the Annual Review, ensuring [CP] does not slip through the net again" (at [52]). The FTT held: "[CP] needs speech and

language therapy which would be delivered and monitored through an EHC plan. For these reasons, the FTT ordered the Council "to make and maintain" an EHC plan for CP.

22. On 6th December 2016, the Council made a further ASC plan and personal budget for CP (although a copy was not supplied to CP's solicitors and parents until March 2017). The ASC Plan gave CP an increased direct payment of £519.70 per week but this still did not include any element for CP's access to Disability Active's facilities.

23. On 15th December 2016, James Goudie QC, sitting as a Deputy High Court Judge, stayed the JR proceedings pending determination of the proceedings before the FTT.

Council issues final EHC plan – January 2017

24. On 27th January 2017, the Council issued CP's final EHC plan confirming CP's weekly personal budget payment of £519.70 (which amounted to £27,024.40 annually). The final EHC plan listed in Section F (see the section descriptions in the Code of Practice and reg 12 of SI 2014/1530) CP's numerous educational needs and her social care needs (in Sections H1 and H2). However in the ''Educational Placement'' section (Section 1) the EHC plan simply referred to as to the setting as "Education Otherwise Than in A Post 16 institution", *i.e.* a non-specific placement.

25. On 23rd March 2017, CP appealed against the EHC plan and the non-specific nature of the placement.

26. On 27th March 2017, permission for JR was granted by Mr Rhodri Lewis QC sitting as a Deputy High Court Judge. On the next day, the Council provided CP's solicitors with a copy of the ASC support plan dated 6th December 2016. CP's solicitor argued that the increased direct payment still did not meet CP's social care needs and the calculation of her personal budget remained "opaque".

27. On 13th June 2017, the Council's officer, Kelly Mansfield (Advanced Practitioner), emailed staff in the Council's ASC department with the following candid assessment:

> "… Unfortunately it transpires that there is no legal footing to justify us not funding this provision and having liaised with [X] the funding below was agreed: 10 weeks transport to Disability Active (education will continue to fund 38 weeks); Disability active provision 7 hrs per day (35 hrs per week) for 48 weeks (full costings are in the attached documents; [X] advised that a request for re-assessment will be forwarded to [Y]. In light of this the provision has not been changed as it requires exploration as to how this funding will be delivered, i.e. by direct payment or otherwise." (emphasis added)

FTT hears CP's second appeal – 27th July 2017

28. On 27th July 2017, the FTT heard CP's second appeal. The Council conceded that CP's Educational Placement had to be specific and that Fix n'Kiks had to be named at Part I of CP's EHC Plan. On 28th July 2017, the FTT adjourned the appeal pending preparation by the Council of a toileting assessment.

The split JR hearing – 5th October and 7th December 2017

29. CP's JR challenge comprised five main contentions: (1) The Council's 2017 ASC plan continued to provide an unlawful personal budget because it was not transparent, containing a matrix allocating payments to different bands and needs, and which did not afford an understanding as to how the additional direct payment of £105 had been arrived at. (2) The revised personal budget and direct payment did not adequately cover CP's needs, insufficient allowance being made for the amount of extra support which CP required and which her mother could not provide: central to the challenge was the continuing failure to provide for payment in relation to the cost of CP's placement at Fix n'Kiks. (3) There was an unreasonable expectation of familial support for care (in particular from CP's mother) in breach of the eligibility regulations. (4) The manner in which the Council integrated its services in respect of educational and care provision was contrary to the guidance under the Care Act 2014, as exemplified by the fact that it had been necessary to pursue a two-pronged challenge to both the FTT and the Administrative Court and there was still no provision for CP's attendance at Fix n'Kiks, or transport to the placement. (5) CP was entitled to "recompense of expenditure'' in respect of her attendance at Fix n'Kiks, alternatively, restitution.

30. However, shortly before the JR hearing, on 12th September 2017, following discussions with CP's parents, the Council signalled acceptance of the principle of payment for an educational provision for CP at Fix n'Kiks and agreement to an ASC plan for CP with an increased direct payment in the sum of £720.67 per week which expressly included provision for the following: "Monday to Friday – Attendance at Fix n'Kiks – 9 Hrs per day (7:30am – 4:30pm) this is to provide 1:1 personal care (P/C) support both before, during & after the provision, 9 hrs x £8 per hr = £72 x 5 days = £360 pw (45 Hrs)".

31. As the Judge noted in his judgment (at [20]), the precise basis upon which the parties thereafter remained at loggerheads was not entirely clear. It is clear, however, that the Council maintained a visceral resistance to pay any monies to Disability Active on the basis that CP's father was the ultimate beneficiary.

32. On 5th October 2017, Day 1 of the final JR hearing took place. However, there was insufficient time to complete submissions and the matter had to be adjourned. A resumed hearing was fixed for 7th December 2017.

33. During the adjournment, on 17th November 2017 the Council formally agreed to pay a sum in respect of CP's placement at Fix n'Kiks amounting to £10,800 per annum (the total sum of £25,000 had originally been claimed by CP but the issue was compromised at the figure £10,800 which was certified by the District Auditor as the objectively reasonable price for the service Fix n'Kiks offered to CP). There were also further discussions between the parties regarding some of the remaining details in the EHC Plan.

34. On 20th November 2017, the FTT ordered the Council to amend CP's EHC Plan to incorporate all changes agreed earlier between the parties in 2017, and to incorporate the subsequently agreed wording concerning toileting provision.

35. On 7th December 2017, Day 2 of final JR hearing took place. The focus of the hearing was primarily on the Council's past liability to pay for the cost of CP's attendance at Fix n'Kiks. An updated final version of the EHC Plan was issued after the hearing.

36. On 9th February 2018, the Administrative Court (HHJ Graham Wood QC) handed down judgment dismissing the Appellant's JR claim, as aforesaid.

The legal framework

37. This case concerns two overlapping legislative regimes under the Care Act 2014 and the CFA 2014.

The Care Act 2014

38. The local authority is the statutory provider under the Care Act 2014 of social care services for adults whose needs meet the eligibility criteria. The relevant provisions of the Care Act 2014 are as follows:

    (1) Section 9 sets out the duty to carry out a "needs assessment".

    (2) Section 13 sets out the relevant approach to making the determination as to whether a person whose needs are being assessed meets the "eligibility criteria".

    (3) Section 18 confirms the duty to ensure that those "needs" are met.

    (4) Section 24 describes the next steps for the local authority to make after an assessment of need, essentially the preparation of a "care and support plan".

    (5) Section 25 sets out the requirements of a care and support plan, which includes the preparation of a "personal budget" (under section 26).

    (6) Section 26 sets out the requirements of a "personal budget", which must specify "the cost to the local authority of meeting the adult's needs under [section 18]".

39. Section 26 of the Care Act 2014 provides as follows:

> "26 Personal budget
>
> (1) A personal budget for an adult is a statement which specifies—
>
> (a) the cost to the local authority of meeting those of the adult's needs which it is required or decides to meet as mentioned in section 24(1),
>
> (b) the amount which, on the basis of the financial assessment, the adult must pay towards that cost, and
>
> (c) if on that basis the local authority must itself pay towards that cost, the amount which it must pay.
>
> (2) In the case of an adult with needs for care and support which the local authority is required to meet under section 18 , the personal budget must also specify—

> (a) the cost to the local authority of meeting the adult's needs under that section, and
>
> (b) where that cost includes daily living costs—
>
> (i) the amount attributable to those daily living costs, and
>
> (ii) the balance of the cost referred to in paragraph (a)."

The Children and Families Act 2014

40. The local authority is also the provider of special educational services, for children and young people with special educational needs and disabilities, under the CFA 2014. The relevant sections of the CFA 2014 are as follows:

(1) Section 20(1) provides the circumstances where special educational needs arise, namely where a child or young person has "a learning difficulty or disability which calls for special educational provision to be made for him or her".

(2) Section 21 defines the different types of educational provision, and the extent to which they may overlap with social care.

(3) Section 25 requires a local authority to integrate its health care and social care provision, with educational provision.

(4) Section 37 provides that where an assessment is made that special educational needs should be provided for and made the subject of an education, health and care ("EHC") plan, the local authority has an absolute duty to prepare and maintain that plan.

(5) Section 40 requires the local authority to name a particular school or other institution in the EHC plan.

(6) Section 51 provides for a right of appeal where a parent or young person is dissatisfied with specific decisions in relation to the EHC plan.

41. Section 21 provides:

> "Special educational provision, health care provision and social care provision
>
> (1) "Special educational provision", for a child aged two or more or a young person, means educational or training provision that is additional to, or different from, that made generally for others of the same age in—
>
> (a) mainstream schools in England,
>
> (b) maintained nursery schools in England,
>
> (c) mainstream post-16 institutions in England, or

(d) places in England at which relevant early years education is provided. …

(4) "Social care provision" means the provision made by a local authority in the exercise of its social services functions.

(5) Health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision)."

42. Section 25 provides:

"25 Promoting integration

(1) A local authority in England must exercise its functions under this Part with a view to ensuring the integration of educational provision and training provision with health care provision and social care provision, where it thinks that this would—

(a) promote the well-being of children or young people in its area who have special educational needs or a disability, or

(b) improve the quality of special educational provision—

(i) made in its area for children or young people who have special educational needs, or

(ii) made outside its area for children or young people for whom it is responsible who have special educational needs."

43. Section 37 provides:

"37 Education, health and care plans

(1) Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan—

(a) the local authority must secure that an EHC plan is prepared for the child or young person, and

(b) once an EHC plan has been prepared, it must maintain the plan.

(2) For the purposes of this Part, an EHC plan is a plan specifying—

(a) the child's or young person's special educational needs;

(b) the outcomes sought for him or her;

(c) the special educational provision required by him or her;

(d) any health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs; …"

44. Section 40 provides:

"40 Finalising EHC plans: no request for particular school or other institution

(1) This section applies where no request is made to a local authority before the end of the period specified in a notice under section 38(2)(b) to secure that a particular school or other institution is named in an EHC plan.

(2) The local authority must secure that the plan—

(a) names a school or other institution which the local authority thinks would be appropriate for the child or young person concerned, or

(b) specifies the type of school or other institution which the local authority thinks would be appropriate for the child or young person. …"

45. Where a parent or young person is dissatisfied with a number of specified decisions in relation to the EHC plan, there is a right of appeal under s. 51:

"51 Appeals

(1) A child's parent or a young person may appeal to the First-tier Tribunal against the matters set out in subsection (2), subject to section 55 (mediation).

(2) The matters are—

(a) a decision of a local authority not to secure an EHC needs assessment for the child or young person;

(b) a decision of a local authority, following an EHC needs assessment, that it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan;

(c) where an EHC plan is maintained for the child or young person—

(i) the child's or young person's special educational needs as specified in the plan;

(ii) the special educational provision specified in the plan;

> (iii) the school or other institution named in the plan, or the type of school or other institution specified in the plan;
>
> (iv) if no school or other institution is named in the plan, that fact;
>
> (d) a decision of a local authority not to secure a re-assessment of the needs of the child or young person under section 44 following a request to do so;
>
> (e) a decision of a local authority not to secure the amendment or replacement of an EHC plan it maintains for the child or young person following a review or re-assessment under section 44;
>
> (f) a decision of a local authority under section 45 to cease to maintain an EHC plan for the child or young person.

Statutory Guidance

46. Statutory Guidance is issued by the Department of Health pursuant to section 78 of the Care Act 2014. The most up-to-date Guidance was issued in October 2018 ("the Guidance").

47. Paragraph 10.26 deals with the division of responsibilities between the local authority and the carer (or parent):

> "Needs met by a carer
>
> 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."

48. The following paragraphs of the Guidance are relevant to the question of personal budgets:

> "11.3 The personal budget is the mechanism that, in conjunction with the care and support plan, or support plan, enables the person, and their advocate if they have one, to exercise greater choice and take control over how their care and support needs are met. It means:
>
> knowing, before care and support planning begins, an estimate of how much money will be available to meet a person's assessed needs and, with the final personal budget, having clear

information about the total amount of the budget, including proportion the local authority will pay, and what amount (if any) the person will pay

being able to choose from a range of options for how the money is managed, including direct payments, the local authority managing the budget and a provider or third party managing the budget on the individual's behalf (an individual service fund), or a combination of these approaches

having a choice over who is involved in developing the care and support plan for how the personal budget will be spent, including from family or friends having greater choice and control over the way the personal budget is used to purchase care and support, and from whom."

"11.4 It is vital that the process used to establish the personal budget is transparent so that people are clear how their budget was calculated, and the method used is robust so that people have confidence that the personal budget allocation is correct and therefore sufficient to meet their care and support needs. The allocation of a clear upfront indicative (or 'ball-park') allocation at the start of the planning process will help people to develop the plan and make appropriate choices over how their needs are met."

"The personal budget

11.7 Everyone whose needs are met by the local authority, whether those needs are eligible, or if the authority has chosen to meet other needs, must receive a personal budget as part of the care and support plan, or support plan. The personal budget is an important tool that gives the person clear information regarding the money that has been allocated to meet the needs identified in the assessment and recorded in the plan. An indicative amount should be shared with the person, and anybody else involved, at the start of care and support planning, with the final amount of the personal budget confirmed through this process. The detail of how the personal budget will be used is set out in the care and support plan, or support plan. At all times, the wishes of the person must be considered and respected. For example, the personal budget should not assume that people are forced to accept specific care options, such as moving into care homes, against their will because this is perceived to be the cheapest option."

"Elements of the personal budget

11.10 The personal budget must always be an amount sufficient to meet the person's care and support needs, and must include the cost to the local authority of meeting the person's needs

> which the local authority is under a duty to meet, or has exercised its power to do so. This overall cost must then be broken down into the amount the person must pay, following the financial assessment, and the remainder of the budget that the authority will pay."

Article 2 Protocol 1

49. The Claimant relied upon a section 6 Human Rights Act claim derived from Article 2 of the First Protocol to the European Convention on Human Rights ("A2P1") in relation to the Council's alleged failures to secure and approve the placement at Fix n'Kiks prior to resolution by the FTT. A2P1 provides as follows:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

Judgment below

50. The Judge summarised the five issues which he had to determine as follows:

> (1) Is a local authority acting unlawfully and/or in such a way that is challengeable by judicial review where it does not address the social care aspect of special educational provision, or the cost of any special educational needs placement when there is an outstanding appeal to the FTT under section 51 of the Children and Families Act 2014 in relation to those matters?
>
> (2) Has the Council lawfully discharged its duties under the Care Act 2014 and the Children and Families Act 2014 towards the Claimant in respect of the 2016 and 2017 care plans (excluding the revised plan)?
>
> (3) If it has not, does this entitle the Claimant to pursue a challenge by way of judicial review, bearing in mind that there is no present objection to the care plan/direct payment, and no issue going forward which the court is being asked to determine?
>
> (4) Has there been a breach of A2P1?
>
> (5) If the Claimant is entitled to declaratory relief in relation to any alleged unlawfulness, does this give rise to a claim to monetary compensation by restitution or otherwise?

51. His conclusions can be summarised as follows:

> (1) Where a claimant had lodged an appeal to the FTT under s. 51 of the CFA 2014 in respect of the social care aspect

of special educational provision, or the cost of any special educational needs placement, there was no obligation on the local authority to address these matters until the tribunal determination had been made (see [117]).

(2) The Council lawfully discharged its duties under the Care Act 2014 and the CFA towards CP in respect of the 2016 and 2017 care plans (save in one limited respect referred to in paragraph [94]) (see [118]).

(3) Even though the Council had acted unlawfully in one limited respect, this was not susceptible to challenge by way of JR for the reasons stated in paragraph [95] (see [120]).

(4) There had been no breach by the Council of A2P1 (see [121]).

(5) CP had no entitlement to monetary compensation by restitution or otherwise and the claim for JR failed (see [122]).

52. On this basis, therefore, the Judge refused the Appellant relief and dismissed the application.

Issues in the appeal and cross-appeal

53. There are five issues for determination (of which three issues were raised by CP on her appeal and two were raised by the Council on its cross-appeal):

(1) **Issue 1** (Appeal ground 1): Was the judge wrong in law in holding that (Judgment [95]) "Whether or not the local authority has acted unlawfully in relation to past matters is irrelevant for the purposes of JR , unless that unlawfulness has continuing effect on or consequence for CP's rights and entitlements."

(2) **Issue 2** (Appeal ground 2): Was the judge also wrong in law (Judgment [108-109]) in holding that, once the Appellant's parents had commenced an appeal to the FTT in relation to the Council's obligations under the Children and Families Act 2014, the Council was acting lawfully in doing nothing in respect of its obligations under the Care Act 2014; and that the court also could not or should not scrutinise the legality of its alleged failures under the Care Act 2014 during that period.

(3) **Issue 3** (Appeal ground 3): What relief should the court grant?

(4) **Issue 4** (Cross-appeal): Should the Judge have held that CP's father and litigation friend could not pursue a claim to secure public money to be paid to him for CP's use of the Fix n'Kiks premises.

(5) **Issue 5** (Cross-appeal): Given that the placement at Fix n'Kiks was accepted by the judge to be solely an educational placement (see Judgment [109]), were the Council entitled to defer to the Tribunal to determine if it should be funded?

Submissions

Appellant's submissions

54. Mr Wolfe QC and Mr Lawson summarised CP's submissions on each of the grounds as follows:

55. Issue 1: The Council's mid-hearing acceptance of the principle of payment did not make irrelevant the unlawfulness of earlier plans. The Judge should have so found and given relief (including costs in CP's favour). Reliance was placed on R(*Hunt*) v. *North Somerset Council* [2015] 1 WLR 3575. The Council's reliance on the circumstances in which academic claims should not be brought, or JR permission should be refused, are not applicable; likewise cases on the costs situation where a claimant withdraws following a change of situation; likewise cases where it is "too late to unwind what has been done". The points (Judgment at [98-99]) about 'family support' were separate.

56. Issue 2: The Council's case was that the placement at Fix n'Kiks was social care but, while including other costs associated with attendance in the Care Act 2014 plans, it did not include placement cost in those plans. CP was granted permission for JR (while the second SENDIST appeal was ongoing) to challenge the legality of those care plans. The Council also resisted making an EHC plan, and then resisted specified placement in that plan. That CP could have appealed and did against the CFA 2014/ EHC plan decisions did not excuse the Council from making lawful Care Act 2014 social care plans. Section 21(5) of the CFA 2014 deems 2014 deems "social care provision" which educates or trains to be SEP, but only for the purposes of CFA 2014 and not so as to displace the Care Act 2014 obligations, let alone while the Care Act 2014 points are subject to JR challenge. Contrary to the Council's submission, that is not changed by the SEN Code, nor the JR stay pending the first appeal (*i.e.* against the refusal to make an EHC plan), following which permission for JR was granted. The Council's Detailed Grounds of Response following JR permission did not then argue 'alternative remedy'. The Court should have determined the legality of the Care Act 2014 plans starting with the 2016 plan first challenged.

57. Issue 3: The Court should allow the appeal, declare that the earlier plans were unlawful, quash and order a lawful redetermination of those plans; and order that the Council should pay CP's costs of the claim and appeal.

58. Issue 4: The fact that CP's litigation friend (her father) would also benefit from the claim did not make for a conflict of interest, let alone to deprive CP of relief. The situation is common and would require professional litigation friends in a wide range of cases.

59. Issue 5: Up to at least July 2017 (when the SENDIST concluded that Fix n'Kiks should be specified as an educational placement in section I of the EHC plan), the Council was asserting that the placement was social care which its ASC plan lawfully covered; yet, even after July 2017, the Council did not accept liability for payment for the placement cost until mid JR hearing (as the Judge found at [26]). While the Council maintained the placement to be social care and still refused to fund it, a JR challenge to its Care Act 2014 plans was still entirely appropriate (and led the Council to increase other elements of ASC provision albeit not the cost of the Fix n'Kiks placement). The SENDIST could (and in the end did) decide that the placement was educational for EHC plan purposes. But none of that affected whether it still needed to have been included and funded within the Council's ASC plans, particularly before it was included in section I of the plan (and of course without double recovery).

Respondent's submissions

60. Mr Lock QC and Ms Thomas summarised the Council's submissions as follows:

61. Issue 1: The Judge was right: (a) to conclude at [98] that the Council's April 2016 assessment of CP's needs was lawful, (b) to conclude at [99] that the Appellant had other means of raising concerns about the personal budget flowing from that assessment other than JR but had failed to use those other means, (c) to conclude at [102] that the court should not adjudicate on the claimed unlawfulness of a past claim of errors in administrative decision making where the Appellant had other means of resolving those disputes and the issues were now academic. Hence the Judge was fully entitled to exercise the wide discretion open to the Court in public law proceedings by refusing to adjudicate on past, academic disputes where CP had failed to use alternative means of resolving those disputes.

62. Issue 2: This is not the decision the Judge made. The Council did not do nothing. On the contrary it conducted regular reviews when asked to do so by CP. However, the Council did not agree that Fix n'Kiks was the right venue to provide support to CP, and, in any event, it was a facility provided by CP's parents. It was thus not a social care need that the Council was required to fund under paragraph 10.26 of the Guidance as noted by the Judge at [47]. The Judge held (rightly) that the parties had an alternative forum for deciding the question as to whether Fix n'Kiks was a suitable place to provide educational services to CP and thus no challenge by way of JR to that decision was appropriate.

63. Issue 3: The Judge was entitled to grant no relief for the reasons he gave. The order sought by CP seeks to circumvent the rule in *O'Rourke v. London Borough of Camden* [1997] UKHL 24 by turning public law proceedings into a private law action.

64. Issue 4: If the Judge's reasoning had got this far, the Judge should have refused this claim on the grounds that CP's father and litigation friend had a plain and obvious conflict of interest (see CPR 21.4(3)(b)). This was litigation for his benefit, not CP's benefit.

65. Issue 5: The Council were entitled to take the position that this was an inappropriate social care facility selected and provided by CP's parents. Hence, in respect of Fix n'Kiks as a place to support social care needs, the Judge was wrong at [94] because of a combination of his finding at [109] and his failing to apply the Guidance at [47].

Analysis

Introduction

66. CP has sought to enforce her legal rights by the various legal avenues open to her. CP's first challenge was by way of JR proceedings and was issued as long ago as 25th July 2016. CP claimed the Council had acted unlawfully because the ASC plan dated 11th April 2016 did not include a personal budget able to meet her needs (i.e. attendance at a day centre such as Fix n'Kiks during the week, plus the cost of travel). CP was entitled also to explore the SENDIST / FTT appeal avenues open to her.

67. The Council resisted CP's claim in respect of Fix n'Kiks at every turn and conducted what turned out to be a fruitless rear-guard action for the next 18 months. It is not necessary to rehearse the entire interstices of the chronology of the litigation again. The Council sought to justify its refusal or reluctance to pay for CP's attendance at Fix n'Kiks in a variety of different ways; but, at each turn, was required to give ground. The Council initially contended that once CP had achieved adulthood, she was no longer likely to benefit from any educational provision. However, the FTT disagreed and on 17th October 2016 ordered the Council to issue an EHC plan. The Council subsequently contended that it had no obligation to name Fix n'Kiks as a placement for CP since it comprised little more than empty rooms and a gym and provided little or no educational value to CP. However, by June 2017, the Council was privately conceding that it was legally liable to pay for CP's attendance at Fix n'Kiks (see Ms Mansfield's email to colleagues referred to above). This was not surprising given, e.g., the report from Dr Heather Forknall (educational psychologist) and Dr Rob Ashdown (special schools expert) which made it clear that CP was benefiting educationally from her attendance at Fix n'Kiks. On 27th June 2017, the Council accepted in principle the naming of Fix n'Kiks in Section 1 of CP's EHC plan. The Council continued, nevertheless, to refuse to accept liability for funding Fix n'Kiks as the relevant placement.

68. It was not until November 2018 that the Council finally and formally accepted the principle of payment for the educational provision for CP at Fix n'Kiks and agreed to pay £10,800 per annum as from 17th November 2017 in respect of CP's placement at Fix n'Kiks i.e. backdated to 17rh November 2017. The Council has continued to pay this sum to date. The remaining claim was, therefore, historical and related to the outstanding period of 2 ½ years from 11th April 2016 to 17th November 2017.

Was the Council in breach of the statutory scheme and guidance?

69. The starting point is to consider the Council's duties and liabilities under the statutory scheme and guidance.

70. The Care Act 2014 requires local authorities to meet the needs for care and support of those who meet the eligibility criteria (see ss. 13, 18, 19, 24 and 25 of the Care Act 2014). Where an adult's needs meet the statutory eligibility criteria, a local authority must consider what could be done to meet those needs (s. 13(3) of the Care Act 2014). In the present case, CP's support plan dated 11th April 2016 found that CP had seven unmet needs. There is no question, therefore, that CP met the eligibility criteria. Accordingly, the Council came under a duty to consider what must be done to meet those needs.

71. Where a local authority is required to meet needs, it must prepare a care and support plan (pursuant to s. 24(1) of the Care Act 2014). A care and support plan must specify, *inter alia*, (a) the needs identified by the needs assessment, (c) what needs the local authority is going to meet and how it is going to meet them, and the personal budget for the adult concerned (pursuant to ss. 25(1)(a) and (c) respectively).

72. A personal budget must specify the cost to the local authority of meeting the adult's identified needs which it is required to meet or decides to meet (pursuant to s. 26(1)(a) of the Care Act 2014). A personal budget is the total sum which a local authority has identified is necessary to meet the needs of an individual (and a direct payment may be made from this). Where a service user lacks capacity (such as CP), an appropriate person may on their behalf request a direct payment to meet the needs provided for by the personal budget (pursuant to ss. 32 and 33 of the Care Act 2014).

73. A local authority must act in accordance with the general guidance of the Secretary of State in the exercise of its functions under the Care Act 2014 (pursuant to s. 78 of the Care Act 2014). The concept of "meeting needs" is an important concept which is intended to be broader than a duty merely to provide or arrange a particular service (see the Guidance, paragraph 10.10). A "personal budget" is a mechanism to enable a service user to exercise greater choice and take control over how their care and support needs are met; it is vital that it is transparent; and must be an amount which can provide for a person's needs (see the Guidance, paragraphs 11.3, 11.4, and 11.10).

74. The provision and placement at Fix n'Kiks covered both CP's educational and social care needs. The fact that a provision is "education and training" under s.21 of the CFA 2014 does not mean that it cannot also provide an element of social care; and vice-versa. The two matters are complimentary, not mutually exclusive.

75. For these reasons, in my view, the basic statutory position is clear: the Council's failure when drawing up CP's support plan dated 11th April 2016 to ensure that CP's personal budget included adequate payment for her needs, including her weekly attendance at Fix n'Kiks, represented a failure by the Council *ab initio* to comply with its statutory duties under s. 26 of the Care Act 2014 (and the linked duties under ss. 18, 24 and 25 of the Care Act 2014) read in the light of the statutory Guidance.

Was the Judge in error?

76. The Judge got part of his analysis right but then fell into error.

77. First, the Judge correctly noted that the Council finally accepted the principle of payment for the placement at Fix n'Kiks in the course of the second half of the JR hearing in late 2017 and that the issue before him related to past liability (at [26]):

> "26. There was a further development before the resumed hearing in December [2017]. The principle of payment for the educational provision at Fix n'Kiks was now accepted, although the amount being sought, and the method by which it would be paid remained in dispute. Neither counsel suggested that these were matters which concerned the court. Further, the cost of transportation to and from the placement had been the subject of agreement. In these circumstances, this court in the final analysis has been concerned with historical matters only, and although CP still sought declaratory and mandatory relief, the outcome of the JR was not going to affect the ongoing provision of direct payments for CP, and the way in which the social care and educational programme was being managed because of the agreement which had been reached. ..."

78. Second, the Judge correctly held that the central question was whether payment for CP's attendance at Fix n'Kiks should have been provided for in CP's Care Act 2014 personal budget from the beginning when CP's ASC plan was first drawn up in April 2016. The Judge said at [91]:

> "91. At the heart of the dispute between the parties is the cost of attendance at Fix n'Kiks. Whilst this will have to be met from here on by the local authority in some form or another when a suitable vehicle for payment is established, the question arises as to whether or not from the time of first placement, payment should have been included in the care package. If the Defendant has acted unlawfully in any respect by not making such inclusion, then the further and subsidiary question arises as to whether this is a justiciable matter within JR proceedings to entitle a direction for compensation in relation to past losses.

79. Third, the Judge also correctly held (at [94]) that the Council's failure to ensure that CP's personal budget included payment for Fix n'Kiks represented a failure to comply with s. 26 of the Care Act 2014 and the Guidance. He dismissed the explanation of one of the Council officials, Deborah Harding, that inclusion in the personal budget of the cost of the placement at Fix n'Kiks presented a difficulty, and that this was a matter which could only be addressed after the FTT had resolved the question. He pointed out that provision was being made for other social care and support costs during the day. He said at [94]:

> "94. The duty is a clear one derived from section 26 of CA 2014 , and any failure to provide a transparent budget in a care and support plan represents a *prima facie* breach of that duty which

> in my judgment would be susceptible to legal challenge by way of JR, assuming that it was otherwise uncorrected. CP provides a compelling argument in respect of the earlier plans which were defective in providing this transparency. I am unconvinced by the explanation of Deborah Harding that inclusion in the personal budget of the cost of the placement at Fix n'Kiks which was disputed presented a difficulty, and that this was a matter which could only be addressed after the FTT had resolved the question. Provision was still being made for care and support costs during the day (when CP was attending Fix n'Kiks) as well as other aspects of professional social care to supplement that provided by the family. I do not see how this would have prevented compliance with the duty under section 26, and it did not represent effective following of the guidance."

80. However, having made these findings, the Judge, thereafter, fell into error. He said at [113]:

> "113. I have not identified any unlawfulness in relation to the Defendant's decision-making process, assessments or compliance with its duties save in the very limited respect referred to in paragraph 94 above (the personal budget in previous plans). Accordingly, for the most part this question does not arise. In relation to the failure to identify a personal budget, it is difficult to see how any question of restitution is relevant, in any event, because of the breach of duty here related to a lack of clarity/transparency rather than a shortfall in provision." (emphasis added)

81. The Judge's conclusion in [113] does not sit well within his earlier finding in [94]. In [94] he found the Council in *prima facie* breach of its duty under s. 26 of the Care Act 2014 and Guidance to provide a proper and transparent budget in CP's ASC plan. He nevertheless went on in [113] somehow to discount the breach on the basis that this was, to use his words, a breach only "in a very limited respect".

82. In my view, the Judge's approach and decision on this basis was wrong and heterodox. A breach of a statutory duty is a breach of statutory duty. It is, by definition, unlawful conduct. Unlawful conduct by a public body cannot merely be discounted or ignored. Moreover, s. 26 is no minor matter. A local authority's statutory duty under s. 26 of the Care Act 2014 to provide a personal budget to meet a person's care and support needs is fundamental to the operation of the care and support scheme which the Care Act 2014 underpins.

83. In the present case, having found the Council in breach of its statutory duties, he should have gone on to hold that the Council had acted unlawfully and, accordingly, was liable in principle to compensate CP in respect of any monetary shortfall in accordance with normal public law principles of legal accountability of public bodies.

The Council's arguments

84. Mr Lock QC deployed a number of arguments in support of the Council contention that it had no liability to pay for CP's attendance at Fix n'Kiks prior to 17th November 2017. In my view, none of Mr Lock QC's arguments has any substance.

85. First, Mr Lock QC argued that the question of whether or not the Council should, as he put it, 'pay a fee to Mr JP for CP's use of a room at Fix n'Kiks' was a matter to be determined by the FTT (the JR proceedings having been stayed pending the outcome of the decision of the FTT); and, until a decision was taken by the FTT at the hearing in July 2017 to name Fix n n'Kiks as the placement, the Council had no liability for facility payments prior to that date, *i.e.* any decision by the FTT was merely prospective as to the Council's future liability. In my view, this argument is misconceived. The key dispute between the parties throughout was whether the Council had acted unlawfully and was in breach of s.26 of the Care Act 2014 in failing to make provision for payment for CP's attendance at Fix n'Kiks in CP's personal budget in CP's original ASC plan drawn up in April 2016. As the Judge rightly found at [94], the Claimant was in breach of the s. 26 duty. The fact that the Council was held by the FTT also to have been in breach of its duty to issue an EHC plan under the overlapping provisions of s. 37 of the CFA 2014 (see the FTT's decision on 21st September 2016) in no way replaced or expunged the separate breach of s. 26 of the Care Act 2014. The question of liability under s.26 could in no sense be 'ceded' to the FTT.

86. Second, Mr Lock QC argued that whether or not the Council had acted unlawfully in relation to past matters was irrelevant unless, again as he put it, 'that unlawfulness had continuing effect on or consequence for CP's rights or entitlement'. This was the argument that appears to have found favour with the Judge, who said (at [79]): "…it seems to me that even if past unlawfulness is established in relation to the way in which the local authority drew up the support plans, and in particular identified (or failed to identify) the personal budget, that is a failure of form, rather than substance, because it does not impact directly on CP if it is subsequently corrected". In my view, the Judge was wrong to accept this argument. The Council had acted unlawfully in failing to comply with its statutory obligations properly to fund CP's care and needs between 11th April 2016 and 17th November 2017; and as a result, CP has remained out of pocket ever since. The Council's unlawful failure has, therefore, had a continuing effect on CP since her financial position has remained less than it should have been. Accordingly, CP is entitled to compensation to reimburse her (in respect of her legal liability to Disability Active).

87. Third, Mr Lock QC argued that CP's father and litigation friend was the 'real claimant' in these proceedings and was, in effect, 'using the proceedings inappropriately to profit from the claim' since Disability Active (which owned Fix n'Kiks) was a charity organised and controlled by him. In my view, this argument is misconceived. There is no conflict of interest on the part of Mr JP. The claim is brought in the name of CP because it is her legal rights which have been breached and it is her legal entitlement to compensation from the Council for failing to fulfil its statutory duty to provide fully for her care needs. Further, there was no basis for suggesting that Disability Active was not a perfectly lawful charity, run on an arms-length basis. If and in so far as the facilities were adjudged suitable for CP, there is no reason why Disability Active should not charge for their use, just as they would any other user.

88. Fourth, Mr Lock QC argued that the Council had no liability for Fix n'Kiks because, pursuant to paragraph 10.26 of the Guidance, the Council had no duty to meet any needs that were being met by a carer and CP's attendance at Fix n'Kiks was, in effect, her needs being met by her father, Mr JP. In my view, this is wrong for the reasons set out above, in particular, there is no basis for suggesting that Disability Active was not an arms-length charity.

89. Fifth, Mr Lock QC further argued that there should be no recovery or relief in the present case because (as he put it) 'breach of a public law duty did not give rise to private law rights'. In my view, this argument is specious. CP is not asserting private law rights: like other social security and benefit claimants, she is simply asserting an orthodox public law right to be paid monies due to her under the Care Act 2014 and which the Council has unlawfully failed or refused to pay.

90. Accordingly, Mr Lock QC's arguments are rejected.

Summary

91. Whilst the background facts and history of the legal proceedings are complex, in my view, the correct legal analysis in this case is quite straightforward.

92. As the Judge noted, at the heart of this case is a dispute as to whether the Council should have included the cost of CP's attendance at Fix n'Kiks in CP's original Care Act 2014 personal budget from the moment when CP's ASC plan was first drawn up on 11th April 2016, and whether compensation is now due to CP to make good the period for which she was not funded for these costs, namely from 11th April 2016 to 17th November 2017.

93. In my judgment, the answer is 'yes'. The Council's failure to ensure that CP's personal budget included payment for the cost of attending Fix n'Kiks from the outset (i.e. from 11th April 2016) amounted to a clear breach by the Council of its duty under s. 26 of the Care Act 2014, and its linked duties under ss. 18, 24 and 25 of the Care Act 2014, as well as a breach of the relevant statutory guidance. Contrary to the submissions of Mr Lock QC and the Judge's findings, it was not a 'limited' breach and nothing that transpired thereafter extinguished the Council's liability to make good its original breach or relieved the Council of its continuing obligation to comply with its said duties under the Care Act 2014. Accordingly, the Council remains liable to compensate CP for her accrued right to the cost of her attendance at Fix n'Kiks during the period from 11th April 2016 to 17th November 2018.

Conclusion

94. For the above reasons, in my view, CP's appeal should be allowed. The Council must compensate CP for her accrued right to the cost of her attendance at Fix n'Kiks during the period from 11th April 2016 to 17th November 2017.

Lord Justice Moylan:

95. I agree.

Lord Justice Flaux:

96. I also agree.