Neutral Citation Number: [2023] EWHC 1449 (Admin)

Case No: CO/2073/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 June 2023

Before :

Dexter Dias KC
(sitting as a Deputy High Court Judge)

- -

Between :

RW	**Claimant**
- and -	
Royal Borough of Windsor and Maidenhead	**Defendant**

- -
- -

Ms Emma Foubister (instructed by **Leigh Day**) for the **Claimant**
Mr Ben Mitchell (instructed by **Joint Legal Team, Reading Borough Council**) for the **Defendant**

Hearing dates: 23 March 2023
Written submissions submitted: 3 April 2023

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JUDGMENT

Dexter Dias KC:

1. This is the judgment of the court in an application for judicial review.

2. The judgment of the substantive hearing is divided into **eight** sections, as set out in the table below, to assist parties and the public follow the court's line of reasoning.

3. The claimant is a vulnerable adult who lives with disability. Due to his vulnerability and risk of exploitation, the court has made an anonymity order to protect him. Therefore, he will be known as RW and his mother as LW. He is represented by Ms Foubister of counsel. The defendant is the Royal Borough of Windsor and Maidenhead. The defendant is represented by Mr Mitchell of counsel. The court is grateful to counsel for their submissions.

4. The challenged decision is the defendant's decision not to deem activity costs incurred when the claimant attends a local support group as "disability-related expenditure" ("DRE") for the purposes of paragraph 4 of schedule 1 to the Care and Support (Charging and Assessment of Resources) Regulations 2014 ("the Charging Regulations"). This materially affects the claimant's available income and, he says, creates hardship. The case raises important questions of principle about our collective duty towards members of the community who live with disabilities that make their daily life more difficult.

B123: electronic core bundle pages; SB456: supplementary bundle; CS/DS: claimant/defendant skeleton

§I. FACTS

5. The claimant was diagnosed with autism when aged 4 and now, in his twenties, has a diagnosis of Autistic Spectrum Disorder ("ASD"), an umbrella term that includes autism. His disability impacts many aspects of his life, and especially his ability to function in the community, forge social relationships, communicate, travel on his own and live independently. He is unable to understand non-verbal communication, which makes it difficult to make and maintain friendships. His disability renders him vulnerable to exploitation. Sometimes when he is frustrated by his inability to communicate or cope, he self-harms.

6. In June 2021, the defendant in collaboration with the claimant developed and agreed the claimant's recent care plan. The defendant funds the claimant's care and support through a "direct payment" (in fact paid to his mother LW as the claimant has difficulties dealing with money). The claimant can then choose how to spend that "personal budget".

7. As part of the care plan, the claimant attends a social and life skills group, the Step Together Group ("ST Group"), three times a week and has one-to-one sessions with ST staff at his home twice a week to assist him with grocery shopping, budgeting, cleaning and life activities. In order to attend the Group sessions, the claimant must pay for the activities that are on offer each day ("the ST Activities").

8. The cost of attending the ST Group is £80 plus VAT per day ("the Daily Charge"), which includes staff costs and transportation to and from the ST Activities. The claimant pays the Daily Charge out of his Personal Budget. However, the cost of the activities is "on top" and variable, but comes out at approximately £15 per session as a general approximation. The claimant says the activity fees are reasonably incurred expenditure related to his disability. He is not able to attend the ST Group without paying the activity fees - there is no group function without the activities.

9. However, the defendant refuses to classify the activities as disability-related expenditure ("DRE"). The defendant says that the claimant has "chosen" these activities, which other people might choose to do anyway. Thus they are not disability-related. His need is for support from staff not the activities. There are cheaper ways for the claimant to have social interaction with a variety of other providers and in any event such expenditure is part of his "care and support" and thus should be payable out of his personal budget and not as additional expenditure. This artificially and impermissibly inflates the money he is entitled to receive.

10. This is flatly refuted by claimant. He points to the way that the defendant has continued to change its position, devising new objections to fulfilling its duty to authorise reasonable expenditure which manifestly supports him in countering the deficits arising from his disability. The activities are "inextricably linked" to the ST Group, and without the activities, there is no group. Such are the forensic battlelines in this case. The parties being unable to agree, the court must decide.

11. The agreed chronology includes the following:

Date	**Event**
Summer 2018	Claimant begins attending Step Together Group (commissioned directly by the defendant)
July 2021	Defendant produces care plan for claimant
20 July 2021	Claimant enters into agreement to receive Direct Payments

11 October 2021	**Defendant provides claimant with Financial Assessment decision: it refused to accept the ST Group activities and associated costs as DRE**
10 December 2021	Claimant appeals Financial Assessment decision
11 March 2022	**Defendant refuses appeal and makes final decision ("impugned decision")**
25 April 2022	Claimant sends pre-action protocol letter
10 May 2022	Defendant sends pre-action protocol response
10 June 2022	Claimant brings claim for judicial review
21 September 2022	Mr Anthony Dunne sitting as a Deputy High Court Judge refuses permission
24 November 2022	Ms Clare Padley sitting as Deputy High Court Judge grants permission following oral hearing
23 March 2023	Substantive hearing

§II. IMPUGNED DECISION

12. The dispute about whether ST activities did constitute legitimate DRE has raged between the defendant and the claimant (through his mother) for many months. Thus it was in a letter dated 26 April 2021, that the defendant said:

> "It has been explained on a number of occasions that the Council would fund Care and Support… and that any other activities which a service user [RW] choose would be self-funded" (SB208-10).

13. The defendant relied on its Adult Social Care Contribution Policy 2021-22 ("the Charging Policy"). In a financial assessment under the Care Act 2014 ("CA 2014"), the defendant declined to deem the ST expenditure as DRE. The claimant appealed. The refusal decision was confirmed by a decision on 11 March 2022 by Louise Freeth. Ms Freeth, Head of Revenues, Benefits, Library and Residents Services, stated:

> "Having considered these matters, the Royal Borough's position remains unchanged, and the decision is therefore confirmed that the costs of the Step Together activities are not to be treated as DRE as they are being paid from council provided funding (the direct payment)." (CB 131)

14. This is factually wrong. The DRE payments were never part of the direct payment. Thus the defendant proceeded to argue that the payments were not disability-related; were not necessary, nor reasonably incurred, and in any event are care and support payments.

§III. ISSUES

15. Parties agreed the following issue for determination by the court:

> "Was the Defendant's decision of 11 March 2022 that the costs of the Claimant's Step Together activities are not "disability-related expenditure" unlawful?
>
> The two types of costs claimed are:
> - 'ST Activities costs', incurred during the Step Together group sessions; and
> - 'ST Associated costs', incurred during evening events with Step Together."

16. The court informed parties that this prime issue should be further subdivided into its three constituent elements:

> (1) Whether the costs were disability-related;
> (2) Whether the costs were necessary and reasonably incurred;
> (3) Whether the costs were for care and support.

Parties agreed. They made submissions in conformity with this rubric.

§IV. LEGAL AND REGULATORY FRAMEWORK

17. It is important not to overcomplicate the legal situation.

18. The Care Act 2014 is important consolidating legislation with one of its chief aims being to better promote the well-being of adults with care and support needs. This nation has a history of legal intervention to care for and protect vulnerable people. In the aftermath of the Second World War, the government introduced the National Assistance Act 1948, that permitted people unable to care for themselves adequately or safely to be removed from their home and placed in state care. After a series of scandals about the abuse of elderly people, concern about other vulnerable adults began to emerge, particularly those with mental health and learning needs. Concern continued to grow about the treatment of vulnerable adults in care homes but also about other adults with vulnerabilities living in the community. In July 2006, the death of Steven Hoskin shocked many people. He was a vulnerable young man with learning disabilities who was exploited, abused and then pushed to his death from a viaduct in St Austell, Cornwall. With the Care Act 2014 ("the Act"), the government sought to introduce a statutory framework that would better protect vulnerable adults and help them live lives free from abuse and neglect.

19. The Act does this by placing the well-being of the vulnerable individual at the heart of the law. It imposes a positive duty on the relevant local authority to promote the individual's well-being (s.1(1)). Well-being is defined in detail in s.1(2) and explicitly makes the point that the local authority must promote protection from "abuse and neglect" (s.2(c) and s.3(g)) and promote the individual's "mental and emotion well-being" (s.2(a)) and "personal relationships" (s.2(g)).

20. The plain reading of these statutory duties is supplemented by statutory guidance ("the Guidance"). The Guidance makes clear that well-being "is a broad concept" (§1.5) and that:

> "Wellbeing covers an intentionally broad range of the aspects of a person's life and will encompass a wide variety of specific considerations depending on the individual." (§1.7)

21. There is "no set approach" (§1.8). Instead, the modern approach marks a break with previous models of care provision:

> 1.9 The Act therefore signifies a shift from existing duties on local authorities to provide particular services, to the concept of 'meeting needs'

and

> 1.10 The concept of meeting needs recognises that everyone's needs are different and personal to them. Local authorities must consider how to meet each person's specific needs rather than simply considering what service they will fit into. The concept of meeting needs also recognises that modern care and support can be provided in any number of ways, with new models emerging all the time rather than the previous legislation which focuses primarily on traditional models of residential and domiciliary care.

22. A local authority may charge an adult when meeting their non-residential care and support needs (s.14 CA 2014). Section 17 of the same Act requires local authorities to assess an adult's financial resources before charging them. In assessing the person's income, certain matters can be left out of the assessment if they meet specified conditions. DRE is one such excluded item. Thus, if expenditure is deemed DRE, it is viewed as necessary expenditure and does not form part of the person's income. This is of benefit to the person because how much the local authority charges for providing care and support depends on the assessed available income.

23. The sole issue for the court is whether the defendant has acted unlawfully in not treating the activity and associated costs as DRE. The pertinent provision is the definition of DRE in para. 4 of schedule 1 of the Charging Regulations. It states:

> "disability-related expenditure" includes payment for any community alarm system, costs of any privately arranged care services required including respite care, and the costs of any specialist items needed to meet the adult's disability.

24. The regulations are supplemented by policy guidance, issued pursuant to s.78 CA 2014, the Care and Support Statutory Guidance ("the Guidance"). Annex C of the Guidance states:

> This annex covers the treatment of income when conducting a financial assessment in all circumstances. This is divided into:
>
> - care homes
> - all other settings

The purpose of this annex is to provide local authorities with detailed guidance on how to apply to the Care and Support (Charging and Assessment of Resources) Regulations 2014, in terms of how to treat different types of income when calculating what a person can afford to contribute to the cost of their eligible care needs.

Disability-related expenditure

39) Where disability-related benefits are taken into account, the local authority should make an assessment and allow the person to keep enough benefit to pay for necessary disability-related expenditure to meet any needs which are not being met by the local authority.

40) In assessing disability-related expenditure, local authorities should include the following. However, it should also be noted that this list is not intended to be exhaustive and any reasonable additional costs directly related to a person's disability should be included:

(a) payment for any community alarm system

(b) costs of any privately arranged care services required, including respite care

(c) costs of any specialist items needed to meet the person's disability needs, for example:

(i) Day or night care which is not being arranged by the local authority

(ii) specialist washing powders or laundry

(iii) additional costs of special dietary needs due to illness or disability (the person may be asked for permission to approach their GP in cases of doubt)

(iv) special clothing or footwear, for example, where this needs to be specially made; or additional wear and tear to clothing and footwear caused by disability

(v) additional costs of bedding, for example, because of incontinence

(vi) any heating costs, or metered costs of water, above the average levels for the area and housing type

(vii) occasioned by age, medical condition or disability

(viii) reasonable costs of basic garden maintenance, cleaning, or domestic help, if necessitated by the individual's disability and not met by social services

(ix) purchase, maintenance, and repair of disability-related equipment, including equipment or transport needed to enter or remain in work; this may include IT costs, where necessitated by the disability; reasonable hire costs of equipment may be included, if due to waiting for supply of equipment from the local council

> (x) personal assistance costs, including any household or other necessary costs arising for the person
>
> (xi) internet access for example for blind and partially sighted people
>
> (xii) other transport costs necessitated by illness or disability, including costs of transport to day centres, over and above the mobility component of DLA or PIP, if in payment and available for these costs. In some cases, it may be reasonable for a council not to take account of claimed transport costs – if, for example, a suitable, cheaper form of transport, for example, council-provided transport to day centres is available, but has not been used
>
> (xiii) in other cases, it may be reasonable for a council not to allow for items where a reasonable alternative is available at lesser cost. For example, a council might adopt a policy not to allow for the private purchase cost of continence pads, where these are available from the NHS
>
> 41) The care plan may be a good starting point for considering what is necessary disability-related expenditure. However, flexibility is needed. What is disability-related expenditure should not be limited to what is necessary for care and support. For example, above average heating costs should be considered.

25. The claimant relies on *R (Hodkin) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77 as authority for the general public law proposition that erroneously applying a statutory instrument amounts to an error of law. The statutory instrument in this case is the above Charging Regulations. The standard of review should not be unduly onerous. In *R (KM) v Cambridgeshire CC* [2012] UKSC 23 Lord Wilson stated:

> "36. I return at last to the appellant's twin challenges to the lawfulness of Cambridgeshire's determination to offer him £85k. I agree with Langstaff J in *R(L) v Leeds City Council*, [2010] EWHC 3324 (Admin), at para 59, that in community care cases the intensity of review will depend on the profundity of the impact of the determination. By reference to that yardstick, the necessary intensity of review in a case of this sort is high. Mr Wise also validly suggests that a local authority's failure to meet eligible needs may prove to be far less visible in circumstances in which it has provided the service-user with a global sum of money than in those in which it has provided him with services in kind. That point fortifies the need for close scrutiny of the lawfulness of a monetary offer. On the other hand respect must be afforded to the distance between the functions of the decision-maker and of the reviewing court; and some regard must be had to the court's ignorance of the effect upon the ability of an authority to perform its other functions of any exacting demands made in relation to the manner of its presentation of its determination in a particular type of case. So the court has to strike a difficult, judicious, balance."

26. Thus the court must be mindful of the "distance" between the local authority decision-maker and the court of review. There must be respect for the decision, not slavish deference towards it.

27. The defendant relies on the concept of severability. It has received various legal expressions. In *R v Secretary of State for the Home Department, Ex parte Pierson* [1998] AC 539 (HL), the court said at 532:

> "The principles of severability in public law are well settled: see de Smith, Woolf and Jowell, Judicial Review of Administrative Action, pp. 355-357, paras. 6-101-6-102; Wade, Administrative Law, pp. 329-331. Sometimes severance is not possible, e.g. a licence granted subject to an important but unlawful condition. Sometimes severance is possible, e.g. where a byelaw contains several distinct and independent powers one of which is unlawful. Always the context will be determinative. … It is an obvious case for severance of the good from the bad. To describe this result as a rewriting of the policy statement is to raise an objection to the concept of severance. That is an argument for the blunt remedy of total unlawfulness or total lawfulness. The domain of public law is practical affairs. Sometimes severance is the only sensible course."

28. The defendant maintains in written submissions made following the substantive hearing that the claimant's case is "all or nothing". Thus, if the court were to conclude that associated costs were not erroneously discounted, the claim should fail completely. This analysis is disputed by the claimant, who submits that severability applies to striking down offending parts of enactments rather than decisions about enactments. The further authority the defendant cites appears to support Ms Foubister's submission. In *R (Hemming) v Westminster City Council* [2017] UKSC 50 the court stated at [9]:

> "… the correct analysis is simpler than some of the submissions made would suggest. The scheme which the council operated was only defective in so far as it required payment up front at the time of the application. Its invalidity was limited. Contrary to the respondents' case, European law permits a fee to cover the costs of running and enforcing the licensing scheme becoming due upon the grant of a licence. There is no imperative under European law, as incorporated domestically by the 2009 Regulations, to treat the whole scheme as invalid, rather than to invalidate it to the extent of the inconsistency: see *Edward and Lane on European Union Law* (2013), para 6.16. Even under purely domestic law principles, a test of substantial severability is appropriate, rather than a rigid insistence on textual severability: see eg *Director of Public Prosecutions v Hutchinson* [1990] 2 AC 783, 811D-G and 813E-G. Any remaining element of the scheme which can stand by itself is able to do so."

29. The consequence of the defendant's submission is that if the defendant's refusal to deem ST activity costs as DRE were unlawful, it should still stand if the ST associated costs were lawfully deemed as not DRE. I am not convinced that severance is appropriate in this case. This point was not argued by the defendant during the substantive hearing. The notice of it came in an email with the joint note on law. If there is substantial unlawfulness in the decision-making, it seems to me wrong to permit the decision to stand. It should be quashed and remade. I emphasise that the function of this court is not to make merits decisions on each item of expenditure and decide if it is DRE or not. The sole question, as agreed between parties before the hearing, is whether the defendant's decision that ST activity costs are not DRE is unlawful. I make it plain that my approach in the circumstances of this case is that if there is substantial unlawfulness in the decision-making, I judge that this would be sufficient to quash the decision. The reason is that this court has not heard argument about each of the activity

or associated cost items claimed. That would not be proportionate. It is not the function of this court.

30. Therefore, the court examines the decision, which amounts to an overall or blanket refusal of all the activity and associated costs. If there is substantial unlawfulness of approach, that would suffice, in my judgment, to quash the decision. The critical question is whether that in fact is the case.

§V. Issue 1: whether costs disability-related

31. The defendant submits that the cash payments for activities are not disability-related. It is argued that it cannot sensibly be claimed that every time the claimant chooses to incur an activity cost it necessarily must be treated as DRE. To test that proposition, the defendant states that it would be unreasonable if the claimant chose to attend exorbitant or extravagant excursions which the defendant would then be obliged to treat as DRE. The defendant concludes that what is "disability-related" about the claimant's engagement with Step Together "is the support they [staff members] provide him that enables him to do the activities" (DS/§32). Thus the argument is that it is the support not the activities that are disability-related.

Analysis

32. The defendant is correct that it is wrong to assume an activity is disability-related just because accessed through ST. But the defendant provides its own answer to the key question. It "necessarily depends on the claimant's needs" (DS/§31). An individual's care plan should be taken as a valuable starting point for determining what constitutes DRE (§41, Annex C, Guidance); to assess it, flexibility is required (ibid.). The claimant's identified needs are clear from the care plan. Of particular relevance is that:

> "[he] needs support to develop and maintain personal relationships." (§4.1, 4.2, 4.3)

33. This need arises from the particular effects of his autism. The claimant's filed evidence (without complaint filtered in the words of his solicitor) includes:

> "Due to my ASD, I can have difficulties communicating. I have expressive and receptive language problems and it takes me longer to process information. I therefore often struggle to make myself understood. I can also struggle to understand what is required of me by other people. I become easily overwhelmed if people talk too much and if I am required to attend meetings and formal events (though as I get older, I am gradually getting better at this). My difficulties with language, communication and understanding cause me to have quite significant anxiety, particularly when I don't understand what is required of me." (B136/§12)

34. He cannot simply make or keep social relationships as most other people are able to do. The reason that members of staff attend the activities is to facilitate the activities and support the participants in their interactions and ability to engage in the activities. This is a particularly important need that must be addressed. It is a vital building block towards an independent life and disability-related expenditure needed for independent

living is envisaged as "normally" being allowable under the defendant's Charging Policy:

> "3.23. The overall aim is to allow for reasonable expenditure needed for independent living by the disabled resident. Items where the resident has little or no choice other than to incur the expenditure in order to maintain independence of life, will normally be allowed." (B31-32)

35. The question then is whether the activities themselves are disability-related and whether the claimant has "little or no choice" to incur their cost. To determine that, the two-part test at para. 40 of the Guidance should be run: relevance and reasonableness. One must keep returning to the test. But the evidence reveals very clearly that the purpose of the activity is not just the activity. This is evidenced in the email correspondence exchange between Ms Mole asking questions on behalf of the defendant and Ms Chesney providing answers as managing director of Step Together. Ms Mole did not include this exchange in her statement to the court. However, it is important. Ms Chesney exhibits it to her witness statement (B205):

> *b. Would RW be able to attend and do no activities at all?* ***No - The whole point of coming out with the group is to join in and learn how to work together as a team and enjoy the activities.***
>
> *c. Could RW just attend and socialise without activities?* ***The socialising during the day is done through the activity and learning to support each other.***

36. In her evidence Ms Chesney states:

> "the activities at Step Together are designed and structured in such a way that would not be necessary for non-disabled people. There would not be such an emphasis on non-disabled people building upon their social skills and on their confidence whilst undertaking these activities. For non-disabled people these activities would mainly be done for enjoyment purposes (if at all). In addition, non-disabled people are unlikely to need to attend activities with their peer groups on a daily basis" (B206/§16)

Ms Chesney continues:

> "apart from the obvious benefit of developing the particular skill that is associated with the particular activity, such as cooking skills, at Step Together we encourage socialisation between peers during the course of the activities and we find that the activities provide a really valuable framework for building on the participants' social skills. Going out as a group is very beneficial for participants to learn how to work and interact with each other and encourage each other to achieve their full potential. These are the kind of social skills that non-disabled people take for granted." (B204/§11)

37. The claimant states that the reason he attends the activities is because they help him develop "skills" he needs to participate in the community and "lead an independent life" (B140/§28). The ST website describes some of the activities as follows:

> **Travel Training**
> Gaining experience of how to deal with different public transport options.
>
> **Budgeting**
> Learning to be budget aware and developing independence, great for taking steps towards supported living.
>
> **Socialising**
> Meeting new people and dealing with new situations together. The world is less daunting when you've got someone to give a helping hand. (SB75)

38. The defendant repeatedly referenced one arranged event, a bowling trip. I agree that some of these activities may look like activities that non-disabled people might take part in at their own expense. However, this ignores the fact that the activities at Step Together are designed and structured in such a way that would not be necessary for non- disabled people. There would not be such an emphasis on non-disabled people building upon their social skills and on their confidence whilst undertaking these activities. Isolating one event seems an artificial approach. The bowling needs to be seen alongside budgeting activities to view the matter fairly and reasonably. However, this court is not in this judgment making a merits review of the decision in respect of each and every activity. It examines the approach of the defendant to the DRE question.

Conclusion Issue 1

39. The ST Group is part of the defendant's care plan for the claimant. Unquestionably there are activities that have been disallowed which are capable of being DRE, and in the judgment of the court undoubtedly are, such as budgeting and travel training. These assist the claimant develop his social interaction skills, ability to communicate, function in group and social settings, and develop independence. Individual activities may be on one side or another of the line. However, what is plain is that given the needs arising from the claimant's disability, a significant number of activities are capable of constituting DRE. The approach of the defendant to blanket-disallow them as not disability-related is flawed.

§VI. Issue 2: whether costs necessary and reasonably incurred

40. The defendant's argument is that there are cheaper alternatives that would not necessitate the activity payments. Thus the expenditure is not "necessary". They are not reasonably incurred, but "chosen" by the claimant, and the claimant does not evidence how cheaper alternatives are not suitable (DS/§25). The claimant accesses other activities without ST and thus it is perfectly possible for RW to have a composite set of arrangements including activities not provided by ST.

41. The claimant submits that this misunderstands the nature of the qualifying test and ignores the context and importance of the ST activities for the claimant over time. The term DRE is not defined in the regulations and should be given its natural and ordinary

meaning. Although the defendant agreed that the expenditure must be necessary and reasonably incurred, there was a dispute about what "necessary" meant.

Analysis

42. This was a prime area of contestation in the case. The issue needs careful analysis by parsing it into its constituent elements. Therefore, I deal in turn with:

a. Meaning of necessary
b. Cost
c. Overall proportionality

(a) Meaning of necessary

43. The word "necessary" is not in the Para. 4 regulation, although the word "required" is, which is broadly synonymous with necessary. What "necessary" means at para. 39 of the Guidance needs to be interpreted in the context of the surrounding provisions as a whole. It is clear from para. 41 that the concept of DRE should be flexibly and not dogmatically interpreted. Although the Guidance provides several examples, the clearest definition is provided at paragraph 40. It is clear that there are two conditions:

(1) that the expenditure is related to the disability;
(2) that the additional cost is reasonable.

44. The fact that RW has "chosen" to make these cash payments is just one factor; that choice must be seen in context of what the ST activities provide the claimant. The question must constantly be referred back to the two-part para. 40 test. To my mind, each of the constituent parts adds something of value. The "related to" element ensures relevance and materiality to the disability. The "reasonable" element provides a necessary brake on extravagance. It ensures that even where relevant, expenditure that is unreasonable, inflated, exorbitant or excessive will not be deemed DRE. This is a necessary objective check and balance.

45. But what does "necessary" mean? I am cautious about interpreting lines in a guidance document as if they were subsections in the statute. They are not. The purpose of guidance is to do just that: guide decision-makers. If the point needed reinforcing, the Supreme Court recently confirmed the proper approach in two decisions (*R (A) v Secretary of State for the Home Department* [2021] UKSC 37 ("*A v SSHD*"); *R (BF (Eritrea) v Secretary of State for the Home Department* [2021] UKSC 38 ("*BF*"), both co-authored by Lord Sales and Lord Burnett). Thus, guidance and policies are not the law; they exist to guide and shape the exercise of (often wide) discretionary power by the executive:

> *"They constitute guidance issued as a matter of discretion by a public authority to assist in the performance of public duties. They are issued to promote practical objectives thought appropriate by the public authority."* (*A v SSHD* at [39])

46. Put shortly: "policies are different from law" (ibid. [3]). The vital term "necessary" is interpreted in markedly different ways by parties in this case. That difference is not just a question of arcane semantics, but must affect the decision of the court. It is important to get it right. Is there a strict necessity test (the effect of defendant's

submissions)? Does necessary mean something less strict in the context of these regulations and their guidance (claimant position)? The starting-point is clear. The first approach, as set down Bennion (*Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020)), is the "natural and ordinary meaning" of the words in question:

> "The starting-point in statutory interpretation is to consider the ordinary meaning of a word or phrase." (§22.1(1))

47. It seems to me, without being prescriptive, that this is a sensible way to approach guidance, asking what ordinarily "necessary" means. This primary approach has been recently confirmed by the Supreme Court in *R (Project for the Registration of Children as British Citizens and O) v Secretary of State for the Home Department* [2022] UKSC 3 ("PRC"). Lord Hodge at [29] said that the words used are "therefore the primary source by which meaning is to be ascertained." But the words must be understood by looking at their context. This entails another question: what "context"? Lord Hodge explained in PRC at [29]:

> "A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context."

48. This is the approach I adopt, allowing for the fact that this is not a statute. To begin, the word "necessary" is ordinarily used in two similar but distinct senses. The Oxford English Dictionary definitions include "needed for a purpose or a reason". The Cambridge Dictionary includes a very similar definition: "needed in order to achieve a particular result". These should be contrasted with the Merriam-Webster definition that includes examples with a higher degree of essentiality: "inescapable, logically unavoidable, compulsory". Which is correct for the use of necessary in the regulations and relevant guidance?

49. The word undoubtedly gains colour from the examples provided. The Guidance offers the example of a fictional visually impaired person called Zach.

> **"Example of disability related expenditure**
> Zach is visually impaired and describes the internet as a portal into the seeing world – in enabling him to access information that sighted people take for granted. For example he explains that if a sighted person wants to access information they can go to a library, pick up a book or buy an appropriate magazine that provides them with the information they need.
>
> The internet is also a portal into shopping. For example without the internet if Zach wanted to shop for clothes, food or a gift he would have to wait until a friend or family member could accompany him on a trip out, he would be held by their schedule and they would then have to explain what goods were on offer, what an item looked like, the colour and would inevitably be based on the opinion and advice of said friend. A sighted person would be able to go into a shop when their schedule suits and consider what purchase to make on their own. The internet provides Zach with the freedom and independence to do these things on his own."

50. Thus, for Zach payment for internet services charges is legitimate DRE because it helps Zach shop online for himself for items such as gifts for other people. Buying presents for other people when he is alone is not strictly or "inescapably" necessary for Zach as part of his daily living with disability. He could wait to buy them presents with the assistance of friends or family or carers. Thus, funding the internet service charge that makes such purchases possible is DRE because it is a reasonable expense and is connected to his disability. Thus, using the Oxford and Cambridge definitions, the expenditure (internet fees) is "needed" to achieve the "particular result" or "purpose", the ability to purchase presents online, so he can do so autonomously despite his visual impairment. I note how this example in the Guidance underscores the link between legitimate DRE and the independence and freedom of the individual person living with disability. There would be cheaper ways of Zach being able to buy gifts without incurring internet service charges, but it would require him to wait until he is assisted, and thus undermines his autonomy and sense of independence. Thus, while the alternatives are "cheaper" (Example (c)(xiii)), it would be unreasonable to expect him to wait and be dependent upon others.

51. Therefore, I judge that the principled approach one should take to the word "necessary" in the regulations and Guidance is to:

> (1) identify the needs arising out of the disability; and
> (2) examine whether the expenditure is needed to meet that need in the sense that it allows the need to be met.

52. I do not see that the word "necessary" means anything more than this. I cannot think it means that the solution must be the only way to meet the need or the only logically necessary one. It must instead be closely connected to the need and operate to meet or help alleviate it, viewed fairly and objectively.

(b) Cost

53. In argument, the defendant cited Example (c)(xiii) in the Guidance. It states that the local authority:

> "might adopt a policy not to allow for the private purchase cost of continence pads, where these are available from the NHS" ((c)(xiii))

54. Might is not must. What is clear is that the expenditure must be reasonable and not extravagant or disproportionate to the need it addresses. This must be viewed, it seems to me, rationally but also humanely. It is not a requirement to relentlessly search for the cheapest possible way to meet the need and restrict oneself to that no matter what. Context is important; flexibility is. This is about supporting people living with disability; a sense of proportion must be applied. This ethos infuses the Guidance in respect of assessing personal budgets. The Guidance makes plain that while value for money is important (this is limited taxpayer money), the local authority must not lose sight of the principle that outcomes and decisions should not be made exclusively for financial reasons. This is stated explicitly at §11.27:

> "Decisions should therefore be based on outcomes and value for money, rather than purely financially motivated."

55. If this is the case for the personal budget itself, I cannot see how this animating spirit does not similarly apply to the assessment of DRE. While value for money is important, the local authority must consider outcomes. It would be wrong to consider that a cheaper alternative must always be chosen irrespective of the wider implications and context beyond the bottom-line cost. There must be a fair balance struck and an evaluation of the trade-offs. That is why the Guidance says "may". I take from that while cost is an important factor, it is not the sole yardstick and not necessarily determinative. It must be weighed and balanced against other consequences of the alternatives and these include the outcomes.

56. The consideration of outcomes requires the assessment of the impact of alternatives on the individual. How would the alternative affect her or his life? Further, it is essential that these contemplated alternatives are considered in the context of the wishes and feelings of the person. Their thoughts and ambitions cannot simply be ignored. That would be to revert to a former and less enlightened age when the autonomy, agency and preferences of the individual in question were given little if any priority and their needs were forced into a limited number of existing care models. That time has gone. The entire ethos of the Care Act 2014 is to finally place the individual front and centre of this decision-making process. It requires that their wishes and feelings, while not being determinative, are taken seriously. An important dispute in this case is whether the defendant has done that in respect of RW. To return to the Guidance, opting for "lesser cost" continence pads in Example (c)(xiii) makes good sense. If continence pads are available for free from the NHS, it would usually make sense to source them there, subject to supply issues in remote locations and so on (context again vital). In the instant case, the defendant argues that there are "cheaper" alternative services that RW could access and that therefore his choice of ST is unreasonable. But support services for people with diagnosed disabilities are not interchangeable like sourcing continence pads. They are not mere commodities. Any argument advancing such equivalence fails to weigh the human cost and consequences of the differing alternatives. This court cannot be blind to these. Thus in assessing whether an alternative is a reasonable option, one must understand the context. That involves the history of connection between the individual and the service. Here RW had been supported by ST since 2018. Therefore, when issues between the defendant and the claimant intensified in 2021 leading to the March 2022 decision letter, RW had been supported by ST for several years. He had benefitted from it. Ms Chesney states:

> "since starting Step Together RW's whole personality and confidence has changed and developed" … [he] "has developed strong bonds with some of the other participants" and "socialising with them has become hugely important to his life." (B202/§7)

57. ST was not marginal or incidental to the improvements in his functioning in the world; it made a very significant difference to the quality of his life. A further vital context in the assessment of reasonableness is his wishes and feelings and how a change of support service would affect him. Ms Chesney writes:

> "I think it would cause huge difficulties for RW if he had to attend a group or organisation with people that he didn't know. It is really important for RW to be familiar with the group of peers he attends Step Together with. I feel if RW attended another organisation or group it would take a very long time, if ever, for him to get to the stage of comfortability he has finally reached with Step

> Together. He has finally become confident enough to talk about his feelings and the things that worry him and cause him stress. He knows that we understand him and understand how his autism can affect him and his behaviours. I believe if RW started another group or organisation he would struggle to build up relationships*"* (B202/§8)

58. Perhaps sensing the force of these arguments, during oral submission the defendant began to backtrack. The defendant suggested that RW could "just not go for all three days [Monday, Wednesday, Friday] and thereby save money". This was a logically inconsistent argument. The defendant submits to the court that *none* of the activities constitute DRE. I cannot see how it can also credibly argue that instead the claimant should attend fewer activities that are not covered by the regulations. This vividly exposes flaws in the defendant's core position. The attended activities would still be unrelated to his disability and unreasonable, on the defendant's case. I was not impressed by this line of argumentation. If it is true that none of the activities were DRE, the inescapable consequence is that there would be little point in the claimant attending ST. The daily administration charge only exists to facilitate the activities on activity days, plus transport to and from the activities. I asked whether there was some half-way house whereby the claimant could pay the daily charge and attend a venue to socialise without the activities. There is no such facility. The two services available are at-home support, which the claimant benefits from on Tuesday and Thursday, and then the activity days which requires the daily charge as an entry point to the activity, which may have an additional cost. The fact that activity costs are distinct and must be paid separately is clear from ST's website that was drawn to the court's attention during the hearing.

59. As to the question of the claimant attending less frequently, there is evidence about his functioning without the group. The claimant's General Practitioner Dr Catherine Wellington provides her assessment of the situation in a letter dated 22 October 2019 (SB323). The letter was written to Adult Social Care in support of additional support funding for the claimant. She wrote that he had "benefitted greatly" from joining ST (this was a year after joining). Her professional judgement was that:

> "if he doesn't have daily stimulation in the form of the group, his condition regresses. He spends his days stuck in his room with his blinds down and becomes depressed." (SB/323)

60. The claimant's progress has been with the assistance and support of ST and crucially the activities it facilitates. This should be contrasted with when he gets overwhelmed, when he can "self-harm by banging my fists on my head or thighs" (B136/§12). Therefore, I am not impressed with the suggestion that the claimant should attend the group sessions less frequently. What is clear is that the ST organisation, through activities and home visits, provides the claimant with support every day of the working week and this has demonstrably been of benefit to the quality of his life and ability to function.

(c) Overall proportionality

61. There is one further factor one must consider in respect of reasonableness. It is the question of the cost of the activities in relation to the whole care package. Proportionality involves looking at the parts in relation to the whole.

62. First, no one has disputed what ST says that it does its best to secure reduce admission and other costs for group participants. It passes on savings to the group members, again not disputed. That strikes me as a very reasonable and indeed responsible way to proceed.

63. Next, I must consider the overall cost picture. The figures are clear. The care plan details the "total personal budget" as being £28,935.40 annually or £556.45 per week (SB107-08). The average daily cost of the group activities is £13.50 (SB351: Chesney-Mole email, 7 December 2022). The claimant attends group activities on three days a week. Therefore, the activity cost is 7.3% of the personal budget (£40.50/£556.45). It is not 7.3% actually of the budget as it is additional to it. Thus it is better to compare that figure to the total budget to gauge an order of magnitude. Standing back, I cannot see how this is unreasonable expenditure in proportion to the whole budget.

Conclusion Issue 2

64. The defendant is undoubtedly correct that just because it funds the ST core sessions through the DP, that does not mean that ST activities must necessarily be DRE. It depends. It seems to me that the real question is not whether such costs are "inextricably linked", as the claimant would have it, to the daily charge, but whether they are rationally related to the claimant's disability needs and reasonable in amount. It will depend on a case-by-case analysis, fairly and sensitively examining the claimant's needs and flexibly interpreting the objects and purposes of the Care Act 2014, the relevant regulations, as explained by the statutory guidance and informed by the ethos of the UN Convention on the Rights of People with Disabilities. For example, in respect of the question of "associated costs" such as meals and evenings out, such matters will have to be examined carefully and a decision made by the defendant about whether any particular item is sufficiently connected to the disability-related need. The court is here assessing the lawfulness of the decision, not making a merits decision.

65. The defendant argues that RW does not evidence how the alternatives listed by Ms Mole are not suitable. That ignores the evidence of RW, LW and Ms Chesney. Together, there is no doubt that the alternatives, some of which are cheaper, others not, are not as suitable for RW as the ST activities given the history of the claimant's connection with ST and the people connected to it, both staff and participants. The fact that an alternative is cheaper is simply one factor to be weighed. It is not the statutory guidance or the defendant's policy that the cheaper alternative must be chosen. The expenditure must be "reasonable" (Policy §3.24). In weighing the reasonableness, one must also make allowance for how suitable it is. For example, a cheaper alternative that would inflict additional, avoidable and unnecessary social anxiety on RW is not, to my mind, one that is reasonable. There is evidence before the court on behalf of the claimant that the alternatives fall into that category. Against this are the assertions and claims in the statement of Ms Mole, a social worker employed by Optalis, which provides Adult Social Care services on behalf of the defendant. She has been indirectly engaged by the defendant in this way for six years (CB208-10). But beyond her assertions, vitally, there has been no meaningful assessment of the suitability of the alternatives or any adequate analysis of the impact on the claimant.

66. The defendant is correct that RW does access some other services outside ST and further it is not necessarily the case that all service provision must come from one supplier. It will depend on the circumstances. What the statutory guidance makes clear

is that the local authority must look at the individual's life holistically and carefully examine the individual circumstances. The days when there were a restricted number of standard models of care that the vulnerable adult had to fit into have gone. The modern ethos places the individual at the centre. It asks anxiously about her or his need arising from the specific disability. It looks at whether there is additional expenditure beyond the care and support package. It then asks whether it is relevant to the disability ("related to") and reasonable.

67. The claimant's need to develop and maintain personal relationships as a result of his impairment due to his disability, does not sit in isolation – human beings are complex with connected needs. Developing social skills is a way to enhance capacity to function in the world autonomously. He has in significant measure been able to materially improve his social skills during the ST activities that are arranged and facilitated by staff. The activities are specifically designed and structured to use the framework of the activity as a basis to develop social interaction skills, teamwork, resilience and social confidence, all essential to autonomous and independent living. These vital soft skills are very hard for a person with the claimant's disability to develop, something decidedly not his fault.

68. I now consider whether, broadly viewed, the ST activities incurred reasonable cost. It would be wrong in principle, and contrary to the spirit of the Guidance, to make that judgment purely on financial grounds. It may be correct that there are "cheaper" alternatives. But the defendant is not obliged to insist upon them. It "may" (Guidance (c)(xiii)); or it may not. It has chosen to do so. The fact is that there is no point paying the daily charge on activity days without attending the activities. That is the point of the day: to promote social relationships and social confidence and ultimately autonomy through group activities, not by sitting in a room in some building (which in any event is not available as an option). If activities are not deemed DRE, given the structure of ST's offering, the claimant would not be able to attend them. In assessing whether it is reasonable for him not to attend and choose other options – which must be the logic of the defendant's position – one cannot only or principally ask whether those alternatives are cheaper (the defendant's approach). That would be to fall into the trap of deciding the matter on purely financial considerations, contrary to the Guidance. There is a strong sense that this is precisely what the defendant has done. At no point do I see any satisfactory analysis of how not participating in ST's group activities would impact the claimant. I do not detect any or any adequate consideration of the weight to be placed on the fact that he has built up relationships with participants at the group and that these are his best friends. As the claimant says:

> "Mostly importantly, the other attendees of the ST Group are my go-to friends circle and support system. I otherwise have difficulty making and maintaining friendships and without social contact I can get very low." (B143/§38)

69. What thought has been given to how difficult it is to develop new friendships and relationships? The difficulty these social interactions cause the claimant is obvious. Indeed, in Ms Mole's second witness statement dated as recently as 28 February of this year, she records that he "finds changes difficult" (Mole 2/Exhibit/§2). The defendant appears to accept that the alternatives suggested would not offer the defendant a comprehensive package as ST presently does – through ST, he has contact with the same organisation all five weekdays. As Ms Mole puts it:

> "It is accepted that some activities do not provide such a level of support, however it is not envisaged that RW would only have to choose one activity from the list provided. RW could partake in a combination of the activities offered which combined could be arranged to provide him a stable schedule of activities." (Moles 2/§14)

70. I find this a surprising suggestion. Mr Mitchell makes the submission that the care plan does not stipulate that the claimant should only have one support provider. That is true. But this argument lacks any material analysis of the impact on a person with ASD such as RW of having to source services from a several providers. There is no adequate thought given to the fact that RW has a particular disability that creates social anxiety and makes it difficult for him to interact with new and numerous people. The suggestion that ST could be replaced by a "combination of activities" without any analysis of how that might impact his well-being is of concern. The defendant has a statutory duty under the Care Act 2014 to promote his well-being. Section 1 provides, insofar as it is material:

> **Promoting individual well-being**
>
> (1) The general duty of a local authority, in exercising a function under this Part in the case of an individual, is to promote that individual's well-being.
>
> (2)"Well-being", in relation to an individual, means that individual's well-being so far as relating to any of the following—
>
> (a) …
>
> (b) physical and mental health and emotional well-being;
>
> (c) …
>
> (d) control by the individual over day-to-day life (including over care and support, or support, provided to the individual and the way in which it is provided)

71. I asked the defendant during the course of oral submissions what it considered the impact of not attending ST group sessions would be on the claimant. I received no answer. That was highly revealing. The court repeated the question, being so central to this claim. At that point, the defendant resorted to the submission that the claimant could attend fewer ST activities. As indicated, this is a logically inconsistent argument and fails to consider at all the impact of, as Ms Foubister succinctly put it, "foregoing" the relationships he had built up over the years with the staff and his friends there and the additional social anxiety several new services would cause. As the claimant is recorded in the care plan as saying, "these are the only group of friends that I have" (SB/102). That has not been disputed by the defendant. No or no sufficient thought has been given to this. If the defendant were properly evaluating ST and alternative activities, all these matters should have been carefully weighed in the analysis. I see no basis to find that they were.

72. I emphasise that it is not for me to make a merits decision. I must simply assess whether the decision the defendant made was lawful. I find that the ST activities were necessary in the sense I have identified. That is because the relevant need is the need to develop and maintain personal relationships, including that goal's contribution to personal autonomy. They are not necessary in the sense of logical inescapable necessity, but this

is not the test. Necessary means needed to achieve an objective, in the sense of furthering the achievement of the goal. By this measure, are the ST activities "necessary"? Yes.

73. The extraordinary feature of the defendant's approach is that without any sufficient analysis it has discounted expenditure that permits this person living with disability to develop his social skills and confidence through the arranged groups activities in the context of an environment he feels secure in. The defendant placed emphasis on the observation in Ms Mole's second statement that the defendant had expressed reservations about ST and he had found it recently "pretty tedious" (Mole 2/§15). This was a purported rebuttal of the fact that the defendant had not been listening to RW and his wish to continue with ST. But when one examines what in fact the claimant was telling his social worker (Ms Duncan-Stollery), it is clear that his concern about ST was the lack of sufficient activities, not the fact of ST itself. One must read on where he told his social worker in terms that "things were starting to get better as there were more days out and events planned over the coming weeks" (Mole 2/Exhibit/§2). He was concerned not about the activities, but a temporary insufficiency of them.

74. When I consider whether the activity costs are reasonably incurred, I judge that one must weigh in the balance the value the claimant places on the ST group, the obvious negative impact it would have should he not attend the group activities, and the difficulty and additional social anxiety he is likely to encounter in forming new relationships not just in one new group, but, as is likely, in several - the defendant's suggested "combination of activities". I find that the defendant has not or not sufficiently evaluated these competing considerations. If it did, it would conclude that the cost savings of sourcing support services elsewhere would be significantly outweighed by the negative impacts on the claimant.

75. If decision-making is to truly be made with the affected individual living with the disability at its heart, if the defendant takes seriously its statutory duty to promote the claimant's well-being and work collaboratively with him taking into account his wishes and feelings, and if it did give proper weight to the adverse emotional impact on him of having to source support from different and several additional providers, I cannot see that these "cheaper" alternatives could have been found to be reasonable – or the ST activity costs unnecessary and unreasonable. Thus, I find that the defendant has simply not taken into account relevant factors and has given far too much weight to financial matters in precisely the way that the Guidance seeks to prevent.

76. When the defendant concluded that the ST activities were not disability-related, it was wrong. When the defendant failed to deem the ST activity costs DRE, it was wrong in that it did not take into account or not sufficiently important factors around adverse emotional impact, social anxiety, the claimant's wishes and feelings, autonomy and choice. Instead, the defendant gave disproportionate, excessive and unreasonable weight to financial considerations and did not consider the limited cost of the activities compared to the total personal budget.

77. I recognise that I must give due weight to the original decision-maker (*R (KM) v Cambridgeshire CC* [2012] UKSC 23 at [36]). But the court is not bound to accept the decision or slavishly defer to one that has been forged on false bases. Here it is plain that the wrong approach has been taken and factors that are obviously relevant have not been considered. Undue emphasis has been placed on the question of cost without

properly considering impact on the person living with disability at the heart of this case who needs the support of the community as part of the vindication of his right under the UN Convention to live independently and autonomously.

§VII. Issue 3: whether costs for care and support

78. The defendant argues that if cash payments are disability-related, then they are part of his care and support and should be paid out of his personal budget. Impermissibly, RW now seeks to supplement his personal budget by treating the activity costs as DRE and requiring the defendant to pay for them as well.

Analysis

79. The logic of this submission is that if something is disability-related, then it is part of the care and support. It fails to understand that there is a separate category of expenditure both in the regulations and the statutory guidance on disability-related expenditure. DRE should not be limited to what is necessary for care and support (§41, Annex C, Guidance). Why does DRE exist as a specific separate category? It is because the regulations and Guidance recognise that there may be additional expenditure that arises beyond the support and care package.

80. Thus, I do not accept the defendant's analysis of this third argument. It fails to engage with the nature and structure of the regulations and supporting guidance. They make it plain, completely understandably, that there is a distinct category of discretionary expenditure arising beyond personal budget. DRE is expenditure that goes beyond what is necessary for care and support.

Conclusion Issue 3

81. I reject the defendant's argument on this issue.

§VIII. DISPOSAL

82. The claimant is a vulnerable adult living with disability. He has eligible needs that it is the duty of the defendant to meet. I judge that in an important and material respect, in refusing to recognise the ST activity costs as disability-related expenditure, the defendant has failed to do that. The UN Convention states in clear terms that:

> "**Preamble**
> Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination.
>
> **Article 3 – General principles**
> The principles of the present Convention shall be:
>
> a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

b. Non-discrimination;
c. Full and effective participation and inclusion in society"

Article 19 - Living independently and being included in the community

States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

b. Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community"

83. The claimant's agreed needs include "support to develop and maintain personal relationships". The activities at ST are specifically designed to help the claimant develop his social confidence, strengthen relationships, and thus access the community better as a step towards limiting his social isolation, depression and occasional acts of self-harm. The activities have already measurably helped him. This is an important step towards assisting him develop his ability to live independently. This is a critical life skill, a general principle recognised by the UN Convention (Article 3a.), made far more challenging and as a direct result of the disability RW lives with daily. ST and its activities have helped. The activities are plainly disability-related (Issue 1). They are necessary, that is needed, to help him counteract his deficits arising from his disability. They are not excessive in cost when compared to the overall annual budget. They are thus reasonable, especially when balanced against the emotional and personal cost of losing them and diverting to new service providers (plural) with the inevitable social anxiety that would produce in RW (Issue 2). The argument that if they are related to his disability, they are part of the care and support package and thus should be part of the personal budget, is not legally valid. It is overly and unnecessarily reductionist. It would mean that everything disability-related gets swallowed back into the personal budget and core care package. It renders the separate category of disability-related expenditure, recognised in both regulations and statutory guidance, effectively meaningless (Issue 3). I reject it.

84. The purpose of the support ST provides is to strengthen the claimant's autonomy, part of the essence of being human. The example of Zach provided in the Guidance recommends expenditure to bolster the autonomy of someone living with disability of being visually impaired. The claimant's disability makes his capacity to live autonomously difficult in another way. Yet it is still something invaluable worth striving for. The social and human importance of such ambition was noted by Professor Ronald Dworkin (*Life's Dominion: An Argument about Abortion and Euthanasia*, 1993, London: Vintage Books):

"Recognizing an individual right of autonomy makes self-creation possible. It allows each of us to be responsible for shaping our lives according to our own coherent or incoherent – but, in any case, distinctive – personality. It allows us to lead our lives rather than be led along them, so that each of us can be, to the

> extent a scheme of rights can make this possible, what we have made of ourselves." (p.224)

85. This is what ST and its activities are assisting the claimant to do. It is no small thing.

86. As a result of my conclusion on Issues 1, 2 and 3, the defendant made a public law error in its application of paragraph 4 of schedule 1 to the Care and Support (Charging and Assessment of Resources) Regulations 2014 in respect of disability-related expenditure. This is certainly the case in respect of the defendant's erroneous approach to ST activity costs. This was a very substantial part of the claim. With regard to associated costs, it seems to me, without determining the issue on an item-by-item basis, that some of the social activity is capable of being DRE. But it is not the function of this court to sift through each expense and make a decision. That is a classic merits review. I have indicated that I do not find severance an appropriate course in this case and the claimant's case is made out by the very substantial unlawfulness in respect of the ST activities.

87. That said, judicial review is a discretionary remedy (*R v Panel on Take-overs and Mergers ex p. Guinness PLC* [1990] 1 QB 146 at 177E, per Lord Donaldson MR). Some errors are not material and would have made no real difference to outcome if not made; others are central and pivotal. The court must ask whether the legal error in respect of activity costs was "material". That means it was an error that strongly connected to and affected the decision itself. Lord Browne-Wilkinson said in *R v Hull University Visitor ex p. Page* [1993] AC 682 at 702C:

> "a relevant error of law, i.e. an error in the actual making of the decision which affected the decision itself."

88. Here the decision to disallow all the ST activity costs suffered from the legal fallacy that the activities were not related to the claimant's disability and were unnecessary and unreasonable. I find that the public law error was central and material. I have received no argument about s.31(2A) of the Senior Courts Act 1981 that the outcome would not have been "substantially different" if a lawful approach had been taken in respect of the three issues. I would have ruled against such a submission. The impugned decision cannot survive the defendant's error. Therefore, there cannot be any credible course but to quash. The defendant must remake its decision.

89. It is not the function of the court to dictate what the final outcome should be. This is made all the more vivid since at one point the claimant suggested that I make a declaration as part of the relief in this case. I indicated that I considered it inappropriate. In fact, that submission was advanced by the claimant in error and the relief historically pleaded was for a quashing order. That, I judge, is precisely the right remedy to seek. Exercising the discretion of the court, I grant it.

90. The purpose of DRE is to support people living with disability counter and reduce the impact of deficits that affect their daily lives which a large majority of the population are fortunate enough to suffer from. The expenditure cannot be limitless or open-ended. There must be a logical connection to the need. But once there is, the rules and guidance must be interpreted not only broadly and reasonably (Paragraph 4 of Part 1, Schedule 1 of the Charging Regulations; para 40 of Annex C of the Guidance), but with a genuine and humane understanding of difficulties people living with disabilities face. The high

legal obligation, deriving from international jurisprudence about the importance of autonomy for people with disabilities, is to put them at the centre of the decision-making. The Preamble of the United Nations Convention on the Rights of People with Disabilities unmistakably recognises:

> "…the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices" (Preamble, (n))

91. The power contained in the DRE regulations has as its existential purpose the reasonable and fair assessment of the ways that we as a community can support people living with disability. This is the approach the defendant must take.

92. That is my judgment.