Easter Term
[2012] UKSC 23
On appeal from: [2011] EWCA Civ 682

JUDGMENT

R (on the application of KM) (by his mother and litigation friend JM) (FC) (Appellant) *v* Cambridgeshire County Council (Respondent)

before

Lord Phillips, President
Lord Walker
Lady Hale
Lord Brown
Lord Kerr
Lord Dyson
Lord Wilson

JUDGMENT GIVEN ON

31 May 2012

Heard on 7 and 8 February 2012

Appellant
Ian Wise QC
Stephen Broach
Ben Silverstone
(Instructed by Scott-Moncrieff & Associates LLP)

Respondent
J Richard McManus QC
Jonathan Auburn
Benjamin Tankel
(Instructed by Cambridgeshire County Council Legal Services)

Interveners (The National Autistic Society; The Guide Dogs for the Blind Association; SENSE; The Royal National Institute of Blind People)
Richard Gordon QC
Victoria Wakefield
(Instructed by Irwin Mitchell LLP)

Intervener (Secretary of State for Health)
Nathalie Lieven QC
Tim Buley
(Instructed by DWP/DH Legal Services)

LORD WILSON (WITH WHOM LORD PHILLIPS, LORD WALKER, LORD BROWN, LORD KERR AND LORD DYSON AGREE)

A: INTRODUCTION

1. The appellant, KM, is a profoundly disabled man aged 26. He lives in Cambridgeshire with his mother, by whom he acts in these proceedings, and with his brother aged 19 and his sister aged 18.

2. In the proceedings, brought by way of judicial review, the appellant challenges a determination made by Cambridgeshire County Council ("Cambridgeshire") and communicated, at the latest, by a letter dated 3 June 2010 to pay him (in round numbers and as an annual sum) £85k in discharge of its duties to him under section 2(1) of the Chronically Sick and Disabled Persons Act 1970. He contends that the determination was unlawful either because it was not adequately supported by reasons or because it was irrational. He asks that the determination be quashed and either that Cambridgeshire should conduct a re-determination of it or that the court should itself substitute for it a determination that the annual sum payable to him be £120k.

3. On 26 November 2010 His Honour Judge Bidder QC, sitting as a deputy judge of the Queen's Bench Division, Administrative Court, refused to grant the appellant permission to make the application for judicial review: [2010] EWHC 3065 (Admin). The Court of Appeal (Sir Anthony May, President of the Queen's Bench Division, and Jackson and Tomlinson LJJ) granted the permission which the judge had withheld and ordered pursuant to CPR 52.15(4) that it should itself conduct the hearing of the substantive application for judicial review. On 9 June 2011, however, by a judgment delivered by the President on its behalf, [2011] EWCA Civ.682, (2011) 14 C.C.L.Rep.402, the court dismissed the application. It is against its dismissal of his application that the appellant appeals.

4. In its judgment the Court of Appeal gave four reasons for its decision. Its first, set out at para 23, was as follows:

> "(a) the local authority, whose funds are not limitless, are both entitled and obliged to moderate the assessed needs to take account of the relative severity of all those with community care needs in their area..."

5. It is true that constraints upon its resources are a relevant consideration during one of the stages through which a local authority must pass in computing the size of a direct payment owed under section 2 of the 1970 Act. In paras 15 and 23 below I will identify four such stages; and constraints upon an authority's resources are undoubtedly relevant to the second stage. But the leading exposition of the law in this respect is to be found in the speeches of the majority of the appellate committee of the House of Lords in *R v Gloucestershire County Council ex p Barry* [1997] AC 584; and, if and insofar as it was there held that constraints upon resources were also relevant to what I will describe as the first stage, there are arguable grounds for fearing that the committee fell into error: see the concerns expressed by Baroness Hale in *R (McDonald) v Kensington and Chelsea Royal London Borough Council* [2011] UKSC 33, [2011] PTSR 1266, at paras 69 to 73.

6. Mr Ian Wise QC, who represents the appellant in the present proceedings, drafted the grounds of appeal to this court on the very day, namely 6 July 2011, when its judgments in the *McDonald* case were delivered. Such were the circumstances in which he sought to fortify his challenge to the Court of Appeal's reference to the relevance of constraints upon Cambridgeshire's resources with a ground of appeal ("the third ground") that the decision of the committee in the *Barry* case had been wrong and that, pursuant to *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, this court should depart from it. Following its grant of permission to appeal, this court granted permission to four charities to intervene in the appeal and thus to make submissions; but the court limited the scope of their intervention to the third ground. The court also granted permission to the Secretary of State for Health to intervene; and, although it did not formally define the scope of his intervention, the primary basis of his application had been a wish to make submissions upon the third ground.

7. When, however, on 7 February 2012, the hearing of the appeal in this court began, it soon became apparent that, in referring to the relevance of constraints upon a local authority's resources, the Court of Appeal had introduced a point which Cambridgeshire had not itself put forward and which – in the context of the particular inquiry for which the proceedings called - it felt unable to defend. As I will explain, the inquiry relates to the lawfulness of its determinations at what I will describe as the third and fourth stages of the exercise mandated by section 2 of the 1970 Act; and it is common ground that, subject to one matter, constraints on an authority's resources are irrelevant to either the third or the fourth stage. The one matter is that it is always open to an authority to decide to meet a particular need by the provision of a cheaper service - so long as it duly meets it - rather than of a more expensive service; such is an elementary aspect of financial management and is better not even included within the debate about the relevance of constraints upon an authority's resources to the discharge of its duty under section 2 of the 1970 Act. It thus also quickly became clear at the hearing that the issues about what the *Barry* case had decided in relation to the first stage of the exercise, and, in

the light thereof, about whether this court should depart from the decision, were irrelevant. The court therefore ruled that it would not, after all, hear argument on the third ground; and perhaps apologies are due in that regard, in particular to the charities and those who represent them. In what follows it will therefore be important to say as little as possible – and certainly nothing controversial – about the decision in the *Barry* case.

B: THE APPELLANT'S CIRCUMSTANCES

8. The appellant was born without eyes and suffers septo-optic dysplasia, which has manifested itself as a lack of optic nerves and an abnormal development of the part of his brain which should have connected with the optic nerves. He has other medical problems, including a growth hormone deficiency, spinal disease and lung and hearing problems. He has learning difficulties and an autistic spectrum disorder. But he is intelligent and articulate. He can type and use Braille. He has obtained GCSE passes in French and music. He spends substantial periods in his music room, playing the piano, the clarinet and the drums. He is keen on jazz and composes his own rhythm and blues music. When in 2006 a Welsh social worker visited him, he went to the piano, played the Welsh national anthem and sang it correctly in Welsh. That is remarkable.

9. The appellant needs substantial support in feeding and self-care and in many other aspects of daily living. He struggles to tell the difference between hot and cold and has a fear of burning himself. He needs assistance in the use of a knife and fork. Outside the home he needs a guide. The burden of caring for him has been a source of acute stress for his mother and, to a lesser extent, for his brother and sister. In 1995 the family moved to Cambridgeshire and there is a long history of conflict between the appellant's mother and Cambridgeshire about the scale of support to be provided for him. She accuses Cambridgeshire of being too slow to respond to his needs and it accuses her of being consistently uncooperative and antagonistic towards its officers. But the stress upon her of caring for the appellant provides significant mitigation for any regrettable conduct of that sort.

10. In the years prior to 2008 the appellant was the subject of various residential placements, funded by Cambridgeshire. For different reasons they all broke down. Since May 2008 he has been living back at home. In 2010 he began to attend college for three days a week; but after several months he ceased to do so. Until October 2010 the family lived in council accommodation which was unsuitable for his needs. It also had only three bedrooms so, even at their ages, his brother and sister had to share a bedroom. Now, however, the family occupies more suitable privately rented accommodation, with four bedrooms, in the same village.

C: THE DUTY UNDER SECTION 2 OF THE 1970 ACT

11. Section 29 of the National Assistance Act 1948, as amended, assigns specified functions to local authorities in relation to disabled people. Still cast largely in the language of that era, it provides:

> "(1) A local authority may, with the approval of the Secretary of State, and to such extent as he may direct in relation to persons ordinarily resident in the area of the local authority shall, make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons who are blind, deaf or dumb, or who suffer from mental disorder of any description and other persons who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other disabilities as may be prescribed by the Minister. "

Subsection (4) of the section gives examples of the arrangements which the authority might make under subsection (1). In the event the Secretary of State has given wide-ranging approvals, but relatively limited directions, pursuant to subsection (1): see Appendix 2 to the Local Authority Circular issued by the Department of Health numbered LAC (93) 10. The result is that, had it not been for further legislation, the authority's functions under the section would largely have consisted only of powers rather than of duties.

12. In enacting section 2 of the 1970 Act Parliament's purpose was to elevate the functions of local authorities in relation to disabled people under section 29 of the 1948 Act to duties in specified circumstances. Section 2 provides:

> "(1) Where a local authority having functions under section 29 of the National Assistance Act 1948 are satisfied in the case of any person to whom that section applies who is ordinarily resident in their area that it is necessary in order to meet the needs of that person for that authority to make arrangements for all or any of the following matters, namely –
>
> (a)...
> ...
>
> (h)...

> then subject to the provisions of section 7(1) of the Local Authority Social Services Act 1970 (which requires local authorities in the exercise of certain functions, including functions under the said section 29 to act under the general guidance of the Secretary of State)... it shall be the duty of that authority to make those arrangements in exercise of their functions under the said section 29."

The list of matters set out at (a) to (h) of the subsection is often described as the service list. It includes the provision, at (a), of practical assistance in the home; at (b), of radio, television, library and other recreational (presumably now including computer) facilities; at (c), of lectures, games, outings or other recreational facilities outside the home; at (d), of facilities for travel for specified purposes; at (e), of assistance in carrying out works of adaptation in the home; at (f), of facilities enabling holidays to be taken; at (g), of meals; and at (h), of a telephone.

13. Thus the kernel of section 2 of the 1970 Act is that, if "it is necessary in order to meet the needs" of a person disabled within the meaning of section 29 of the 1948 Act to make arrangements for any of the matters set out in the service list, then, subject to guidance given by the Secretary of State pursuant to statute, the local authority has a duty to make them in exercise of its functions under section 29.

14. Section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986 provides that, upon request by or on behalf of a disabled person, a local authority "shall decide whether the needs of the disabled person call for the provision by the authority of any services in accordance with section 2(1) of the 1970 Act". No one suggests that those words emasculate the extent of the duty under section 2 set by the terms of that section itself. The same should be said of section 47 of the National Health Service and Community Care Act 1990 which, by subsection (1)(a), obliges an authority to conduct an assessment of a person's need for a variety of community care services, including under section 2 of the 1970 Act, if it appears that the person may be in need of them, and which, by subsection (2), obliges it, following any such assessment of a person who appears to be disabled within the meaning of the 1986 Act, to proceed to make the decision required by section 4 thereof. These are important obligations but they are procedural. For the ambit of the substantive obligation, the court should look no further than at the terms of section 2(1) of the 1970 Act itself.

15. When a local authority is required to consider whether it is "necessary in order to meet the needs of that person for that authority to make arrangements for" the provision of any of the matters on the service list, it is required to ask itself three questions and should do so in three separate stages:

(i) What are the needs of the disabled person?

(ii) In order to meet the needs identified at (i), is it necessary for the authority to make arrangements for the provision of any of the listed services?

(iii) If the answer to question (ii) is affirmative, what are the nature and extent of the listed services for the provision of which it is necessary for the authority to make arrangements?

There is a fourth potential stage of the inquiry which I will identify in para 23 below.

16. Section 2 of the 1970 Act provides that the duty imposed by it is subject to the general guidance of the Secretary of State given pursuant to section 7(1) of the Local Authority Social Services Act 1970, being guidance under which, in the words of that subsection, a local authority "shall... act". The current guidance is entitled "Prioritising need in the context of *Putting People First*: A whole system approach to eligibility for social care", published in February 2010. The Guidance, as I will call it, extends beyond the discharge of an authority's duty to a disabled person under section 2 of the 1970 Act to its various other statutory responsibilities for adult social care. But, although the language of the Guidance is not bespoke to section 2, it fits perfectly with the three stages which I have identified.

17. Thus, in para 47 of the Guidance, the Secretary of State says:

> "In this guidance, the issues and support needs that are identified when individuals approach, or are referred to, councils seeking social care support are defined as "presenting needs". Those presenting needs for which a council will provide help because they fall within the council's eligibility criteria, are defined as "eligible needs". Eligibility criteria therefore describe the full range of eligible needs that will be met by councils, taking their resources into account."

Transposed into the context of section 2 of the 1970 Act, the reference in the Guidance to "presenting needs" is a reference to the needs identified in answering the question at the first stage. Transposed into the same context, the reference to "eligible needs" is a reference to the needs for the meeting of which there is the necessity identified in answering the question at the second stage, namely the

necessity for the local authority to make arrangements for the provision of any of the services listed in section 2.

18. In para 44 of the Guidance the Secretary of State advises local authorities to specify their "eligibility criteria" in accordance with an "eligibility framework" which he proceeds to set out in para 54 and he reaffirms that, in setting their eligibility criteria, they should take account of their own resources as well as of local expectations and local costs. His eligibility framework has four categories – critical, substantial, moderate and low – and he gives examples of the types of presenting needs which should fall into each category.

19. One important aspect of the question raised at the second stage is to ask whether the presenting needs of the disabled person can reasonably be met by family or friends (which I will describe as natural support) or by other organs of the state, such as the NHS, or by charities etc, or indeed out of the person's own resources. But it will by now be clear that the question at the second stage goes far further and, in particular, encompasses consideration of the relationship between the scale of the local authority's resources and the weight of other demands upon it, in other words the availability of its resources. The interesting debate about whether the notion of a necessity to make arrangements is sufficiently elastic to embrace consideration of the availability of resources has already taken place. It took place in the *Barry* case [1997] AC 584 and, albeit by the narrowest possible margin, the ayes had it. Whatever else was – or was not – decided in that case, the decision was that the availability of resources was relevant to the question at the second stage: see Lord Clyde at p610E-H, Lord Nicholls at p605E-F and p606B and Lord Hoffmann at p606C-D, but, to the contrary, Lord Lloyd at p597H-598C and Lord Steyn at p606C. Any statutory guidance given by the Secretary of State which ran counter to the legislative provision in relation to which it was given would be of no effect. But the Guidance, which states that the availability of resources is relevant to the question asked at the second stage of the inquiry, is precisely in accordance with the law.

20. Like other local authorities, Cambridgeshire has decided, presumably only for the time being and subject to review, that, in the light of the other demands on its resources, it is not necessary to make arrangements for the meeting of such needs of a disabled person as are to be categorised as moderate or low. In that, as I will explain, it categorised all the appellant's needs as critical, Cambridgeshire's decision in relation to moderate and low needs does not fall for review. It is on any view highly regrettable that any needs of a disabled person, whatever their category, should not be met. Nevertheless it may well be that any inquiry, however difficult, into the relationship between the present scale of Cambridgeshire's resources and the weight of the other demands upon it would yield a conclusion that its decision in relation to moderate and low needs was rational. At the other end of the spectrum a decision by Birmingham that it could afford to meet only

critical needs was recently held unlawful because of deficiencies in the process which had led to it: *R(W) v Birmingham City Council* [2011] EWHC 1147 (Admin), (2011) 120 BMLR 134.

21. It is common ground that, once the second stage has been passed, as it was in the case of all of the appellant's presenting needs, by an identification of the requisite necessity and thus of the eligibility of the needs, the duty of the local authority to make provision for them in accordance with the third and fourth stages of the inquiry becomes absolute. The second reason put forward by the Court of Appeal, at para 23, for the dismissal of the appellant's application was that "(b) the local authority are not obliged to meet an individual's needs in absolute terms". Had the present inquiry been into Cambridgeshire's decision at the second stage, the Court of Appeal's observation would have been impeccable. But, in the context of an inquiry into its decision at the third and fourth stages, it was, with respect, erroneous. The Court of Appeal sought to fortify its observation by adding "see para 18 of *Savva*, where the submissions in paras 16 and 17 are rejected". Its reference was to a decision of a different constitution of that court, reached several months earlier, in *R (Savva) v Kensington and Chelsea Royal London Borough Council* [2010] EWCA Civ 1209, [2011] PTSR 761, which, like the present, required review of an authority's determinations at the third and fourth stages of its inquiry into its obligations under section 2 of the 1970 Act. Unfortunately even only a cursory reading of paras 16 to 18 of the judgment of Maurice Kay LJ in the *Savva* case demonstrates that in the present case, no doubt under pressure, the Court of Appeal misunderstood them. Indeed, in para 18, Maurice Kay LJ said:

> "once Mrs Savva's eligible needs had been assessed, it was under an absolute duty to provide her with the services that would meet those needs or a personal budget with which to purchase them."

22. The above reference by Maurice Kay LJ to a personal budget with which to purchase the necessary services leads to a consideration of the fourth stage of the inquiry. Section 1 of the Community Care (Direct Payments) Act 1996 conferred upon a local authority a discretion to make to specified service-users in the field of adult social care a payment which they might themselves apply to the purchase of such services as the authority would otherwise have provided in order to meet their eligible needs. In relation to England and Wales the 1996 Act was repealed by the Health and Social Care Act 2001, which provided for the making of regulations which would substantially extend the system whereby an authority made a direct payment to the service-user in lieu of its provision to him of the requisite services in kind. The current regulations are the Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009, SI 2009 No.1887. Once it is satisfied that the person's need for the relevant service can be met by securing the provision of it by means of a direct payment, the authority is in many cases under a duty, with that person's consent, to make such a payment,

the amount of which must equate to the reasonable cost of securing the provision: see regulations 7(1)(c) and (2) and 9(1), together with section 57(4)(a) of the 2001 Act. The admirable idea is to empower him with control over his own budget.

23. So, in cases like the present in which a disabled person qualifies for a direct payment in lieu of its own provision of services to him, the local authority is required to proceed to the fourth stage as follows:

> (iv) What is the reasonable cost of securing provision of the services which have been identified at (iii) as being those for the provision of which it is necessary for the authority to make arrangements?

24. How does a local authority approach the exercise of answering the question at the fourth stage? To set about costing each of the services identified in answer to the question at the third stage upon, as it were, a blank sheet of paper would be unacceptably laborious and expensive. So a mechanism has been devised in order to give the exercise a kick-start. It is called a Resource Allocation System (a "RAS"); and many authorities, including Cambridgeshire, have developed one for their own use.

25. Under a RAS the local authority ascribes a number of points, within a prescribed band, to each of the eligible needs in the particular case. It then calculates the total points and consults a table within the RAS which ascribes an annual sum to the total points. For example, under the model adopted by Cambridgeshire, one point equates to £455 and 55 points (being the maximum under its model) equates to £61k. Crucial to a RAS is a realistic nexus both between needs and points and between points and costs. Cambridgeshire developed its nexus by taking a group of 260 of its service-users who were in receipt of a direct payment, by analysing each of the eligible needs for which the payment was made and by seeking to make a realistic attribution of part of the payment to each need. It conducted various counter-checks in order to test the robustness of its attribution.

26. It follows that the sum identified by application of a RAS is not the product of a direct, individual costing of each of the requisite services in the particular case. For that reason the use of a RAS is only the first step in a local authority's search for the answer to the question posed at the fourth stage. As an "approximate" indicator of the appropriate payment, a RAS collects the Secretary of State's approval in the Guidance: see para 130. As the generator of a "ball-park" figure, subject to adjustment up or down, it wins the endorsement of the Association of Directors of Adult Social Services in its publication, dated October 2009, entitled "Common resource allocation framework": see p 4. A contention

that a RAS is an unlawful tool for an authority to deploy even only "as a starting point" was rejected in the *Savva* case, cited above, at p 768F; and it is rightly not revived in the present appeal.

27. Some service-users have eligible needs which require so high a level of services that under Cambridgeshire's RAS they score total points beyond its maximum of 55. The appellant is a case in point: he scored 62. In order to cater for such cases Cambridgeshire has developed a second indicative tool. It is called an Upper Banding Calculator (a "UBC"). It reflects in effect three factors which, in Cambridgeshire's experience, often greatly elevate the requisite level of services, namely a requirement for a carer to remain awake at night, for two carers to operate simultaneously and for a carer to have specialist expertise. In a case in which its RAS has identified a figure above the maximum, Cambridgeshire asks whether any of these three factors is present and, if so, it calculates, by reference to them, an appropriate annual sum for addition to the principal sum of £61k identified by the RAS. Cambridgeshire insists that it regards the additional sum identified by the UBC as only the second part of the starting-point. On that basis I will put aside my failure to understand how Cambridgeshire can discern within the total of £61k the sum for which allowance has already been made for such of the three factors as require an addition under the UBC.

28. What is crucial is that, once the starting-point (or indicative sum) has finally been identified, the requisite services in the particular case should be costed in a reasonable degree of detail so that a judgement can be made whether the indicative sum is too high, too low or about right. Such is an exercise which, in accordance with the Guidance at para 121, Cambridgeshire carries out, usually and preferably in conjunction with the service-user himself, and it is called the making of a "support plan". It may therefore be seen that, in effect, Cambridgeshire provides the answers at stages three and four as a result of a composite inquiry.

D: CAMBRIDGESHIRE'S COMPUTATION OF £85k

29. Following his arrival back home in 2008 Cambridgeshire set about answering in relation to the appellant the questions set at the four stages. Back in 2006, in relation to the first and second stages, there had been an assessment of his presenting needs in accordance with section 47 of the 1990 Act and of their eligibility in accordance with section 4 of the 1986 Act. In April 2009, following what it considered to be obstruction on the part of his mother towards any re-assessment, Cambridgeshire resolved that the 2006 assessment should be taken as remaining valid. It accepted all of the appellant's presenting needs as critical and thus as eligible. So it turned to address the answers at the third and fourth stages. In April 2009, in order to identify the nature and extent of the requisite services, one of its officers completed a "support questionnaire". In the completion of the

questionnaire the mother did co-operate. But her co-operation had a negative feature. This related to her own contribution to the appellant's care, which she was then providing at a very substantial level and for which she was in receipt of an annual carer's allowance of £5k designed to enable her to purchase limited respite from caring for him. No doubt she reasonably considered that the level of her care of the appellant should be reduced: she claimed in answer to the questionnaire that it was having a critical impact on her lifestyle and could not continue. Yet it seems extraordinary that she should have caused the officer to record, in relation to all of the seven areas of need identified in the questionnaire, that the "unpaid support... offered by families" was "none". No other evidence in the proceedings suggests that the mother has refused to continue to play any role in the care of the appellant – living, as he does, within her home; on the contrary, see para 32 below. It is hard to avoid concern about the motives of the mother in having made such representations.

30. It is clear that, irrespective of the outcome of the appeal, Cambridgeshire made three significant mistakes in its analysis, and presentation to the appellant, of the extent of its duty to him under section 2 of the 1970 Act. The first was in its treatment of the mother's representations, through the answers to the questionnaire, that in the future he would receive no natural support. Inevitably it did not accept the representations; but it never stated, whether in writing to the mother or orally to the appellant or otherwise, that it did not accept them. It lulled the appellant and the mother into thinking that, for some extraordinary reason, it did accept them. Even if, in the interests of co-operation, Cambridgeshire was prepared to proceed on that basis, it should have put down a marker that it did not accept them. When, in May 2009, by reference to the questionnaire, it performed its RAS and UBC calculations, it made no allowance for natural support. The RAS figure was £61k and the UBC addition was £6k: the total was thus £67k. Had allowance been made for a reasonable level of future support by the mother, the RAS figure would have been about £46k and so there would have been no UBC addition at all.

31. There is no need to dwell on Cambridgeshire's offer to the appellant of £67k made in May 2009. By his solicitors, the appellant rejected it but, without prejudice, they agreed to accept it on an interim basis; and agreement was reached that Cambridgeshire should fund a re-assessment of his needs by an independent, jointly instructed, social worker, later identified as Mr C. I will not refer to him by name since I propose to make a criticism of him to which he has had no opportunity to respond.

32. By report dated 30 September 2009 Mr C made a detailed assessment of the appellant's needs and classified them all as critical. Cambridgeshire accepted both his assessment and his classification: so the first and second stages were again passed. Of relevance for present purposes was Mr C's report that, out of the funds

provided to the appellant on the interim basis, outside carers were being paid to look after him for eight hours during weekdays and for five hours at weekends. Mr C added that the family considered that paid care for 14 hours per day would be preferable. He also recorded, however, contrary to the mother's answers to the questionnaire, that both she and indeed the appellant's two siblings were, as one would expect, willing to continue to provide a significant, albeit lesser, degree of care for him.

33. Cambridgeshire and the appellant, by his solicitors, then agreed that, by an addendum report, Mr C should address the third and fourth stages, namely the nature and extent, and the cost, of the services requisite for the meeting of his needs. Mr C's addendum report, dated 10 December 2009, was a most unhelpful document. It was not an expert's report: it was a presentation of what the appellant and his mother wanted. Mr C's costings totalled £157k. Into his figures he brought forward the suggestion that paid care for the appellant was required to be purchased for 14 hours (thus, for example, from 8:00 am to 10:00 pm) on each day of the year, at (so Mr C wrote) £18 per hour, i.e. £92k. Mr C did not suggest that, in his expert view, paid care of that magnitude was necessary, still less did he explain why such should be. He said only that it was "reported" that it was necessary: the "report", of course, had come from the family and no doubt in particular from the mother. Mr C also identified 13 different educational, therapeutic and leisure activities in which the appellant might engage for a total of 32 hours each week (while the paid carer was presumably expected to sit and wait, as also during the substantial periods to be spent by the appellant in his music room) at a cost of £40k; and, among his remaining provisions, Mr C included two two-week holidays each year for the appellant, his mother and a paid carer, at a cost of £19k.

34. Unfortunately the uncritical endorsement of the wishes of the appellant and of the mother by Mr C in his addendum report led them to believe that he had become entitled to provision of such magnitude. Even more unfortunately Cambridgeshire's response to the report fortified their belief. The authority considered that, in relation in particular to the level of paid care but also to the suggested activities and holidays, Mr C's presentation of the requisite services and their cost was manifestly excessive. But it did not say so; and such was its second significant mistake. No doubt allowance falls to be made for the need for an authority to try to co-operate harmoniously with the service-user in the future and thus for it to avoid any unnecessary injection of conflict. But to the appellant Cambridgeshire gave the impression, in particular, that it was putting forward calculations on the basis of a requirement for 14 hours of paid care on each day of the year not just for the sake of argument but because it considered such a requirement to be reasonable. Thus, again on the curious footing that no natural support would be available to the appellant, it re-conducted its RAS calculation, which again, of course, produced the maximum of £61k. Then it re-conducted its

UBC calculation but, on this occasion, it did so on the premise that there should be an uplift referable to the cost of specialist, paid care for the appellant for 14 hours on each day of the year: the calculation produced an extra £24k. Thus it was that, by letter to the appellant's solicitors dated 5 January 2010, Cambridgeshire, by then acting through its legal department, made the offer of £85k which became the subject of challenge in the proceedings. It pointed out that specialist paid care for 14 hours on each day of the year, at (so it suggested) just under £15 per hour, would cost £75k and that on that basis £10k would remain for educational, therapeutic and leisure activities. Such may therefore just about be characterised as a support plan, albeit of an extremely general character.

35. By its letter dated 5 January 2010, Cambridgeshire had thus explained how the offered £85k might be deployed; but it had not explained how it had been computed. In a series of good letters sent during the following five months the appellant's solicitors pressed Cambridgeshire to provide such an explanation; but, without prejudice, they agreed to accept payments in accordance with the increased offer on an interim basis and such increased payments have been made to the appellant to date. Contrary, no doubt, to appearances, the offered figure, being the product of the RAS and the UBC, was not, of course, the result of any detailed costing of the services which Cambridgeshire regarded as requisite for the meeting of the appellant's eligible needs. But, as Cambridgeshire accepts, the different basis of the two elements of the computation should, in broad terms, have been explained; and such was its third significant mistake. Even a session of mediation which took place in May 2010 proved abortive for want of the explanation; but at least the mediator facilitated the extraction from Cambridgeshire of a commitment to provide it within 14 days. In the event Cambridgeshire finally provided a full explanation under cover of a letter dated 3 June 2010; and it described the offer of £85k as an "envelope" within which any reasonable support plan might be accommodated. But the process of its arrival at an intelligible explanation of the offer had been, as the Court of Appeal observed, tortuous. Meanwhile, in April 2010, it had provided another, rather more detailed, support plan in order to reflect the fact that, by then (albeit, as it was to transpire, not for long), the appellant was attending the college so needed less paid care. On that basis, as the plan indicated, a very substantial sum namely £28k, would remain available to the appellant for application to other outside activities.

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.

37. In the *Savva* case, cited above, Maurice Kay LJ gave helpful guidance as to the proper approach to the provision of reasons in this class of case as follows:

> "21. In many cases, the provision of adequate reasons could be achieved with reasonable brevity. In the present case, I would consider it adequate to list the required services and assumed timings... together with the assumed hourly cost. That would not be unduly onerous. I appreciate that some recipients require more complicated arrangements which would call for more expansive reasoning but if that is what fairness requires, it must be done."

The appellant does indeed require more complicated arrangements than did Mrs Savva. Even in a more complicated case, however, it may be enough for the authority, as here, to attribute a compendious cost to a group of requisite services of similar character, particularly if there are reasons for concluding that general assumptions have been made which, if reflective of error, would reflect error in the service-user's favour.

38. Notwithstanding what, with respect, were the deficits in its own process of reasoning which I have sought to identify, the Court of Appeal was in my view correct to conclude that Cambridgeshire's determination to offer £85k to the appellant survives his twin challenges. His challenge to its *rationality* may quickly be rejected. Mr Wise has failed to make out his case that the offer did not reflect a rational computation of the cost of meeting the appellant's eligible needs. It was rational for Cambridgeshire to use the RAS and the UBC provided that the result was cross-checked in the manner to which I have referred. Indeed, apart from additional, more minor, features with which I decline to clutter this judgment, the false premise behind the RAS calculation that the appellant would not continue to receive any natural support, taken together with the arresting premise behind the UBC calculation that he required no less than 16 hours of paid care on each day of the year, generates a provisional conclusion, which there is no evidence to dislodge, that any flaw in the computation is likely to have been in his favour. His challenge to the adequacy of the *reasons* for the offer is more arguable. Notwithstanding that, in the light of the conflict as to the sufficiency of the offer, it

could not produce a support plan reflective of it in conjunction with the appellant, Cambridgeshire should have made a more detailed presentation to him of how in its opinion he might reasonably choose to deploy the offered sum than in the plans put forward in January and April 2010. In particular Cambridgeshire should have made a presentation of its own assessment of the reasonable cost of the principal item of the appellant's future expenditure, namely the cost of paying for carers for him. Its belated explanation in June 2010 of the different basis of the indicative calculation, though necessary, did not repair that deficit. Nevertheless, in the light of the amplification of Cambridgeshire's reasoning in the mass of evidence filed on its behalf in response to the application for judicial review issued in July 2010, which has enabled the appellant, by Mr Wise, to lead a fully informed inquiry into its determination in courts at three different levels, the result of which leaves no real doubt about its lawfulness, it would be a pointless exercise of discretion to order that it should be quashed so that the appellant's entitlement might be considered again, perhaps even to his disadvantage.

E: CONCLUSION

39. So I would dismiss the appeal.

LADY HALE

40. I agree that this appeal must be dismissed for the reasons given by Lord Wilson. The case is, and has always been, a challenge (a) to the rationality, and (b) to the adequacy of the reasons given for the local authority's decision to pay the appellant an annual sum of (in round figures) £85,000 in discharge of their duty to him under section 2(1) of the Chronically Sick and Disabled Persons Act 1970. But his advisers were no doubt emboldened to add an invitation to this court to reconsider the decision of the House of Lords in *R v Gloucestershire County Council, Ex p Barry* [1997] AC 584 by some remarks of mine in *R (McDonald) v Kensington and Chelsea Royal London Borough Council* [2011] UKSC 33, [2011] PTSR 1266. It was for that reason that a court of seven justices was convened and four charities (The Royal National Institute of Blind People, The National Autistic Society, The Guide Dogs for the Blind Association and Sense) and the Secretary of State for Health intervened in the proceedings. If apology is due, it is certainly due from me more than any other member of this court, but after considering what both Lord Wilson and I have to say, they may feel that their journey has not been entirely in vain.

41. At the hearing, it rapidly became apparent that the issue with which *Barry* was concerned – to put it as neutrally as possible, the extent to which the resources

of a local authority may be taken into account in making decisions under section 2 – simply does not arise in this case. The local authority do not rely at all upon resource constraints to justify or to explain their decision. Rather they rely upon equity between all their disabled clients. The appellant is indeed very severely disabled and all his needs have been assessed as "critical" within the meaning of *Prioritising need in the context of Putting People First: A whole system approach to eligibility for social care*, the Department of Health's statutory Guidance on Eligibility Criteria for Adult Social Care (2010). The local authority say that the figure which they have arrived at is more than sufficient to meet the appellant's needs.

42. The appellant's advisers were understandably baffled by the explanations given by the local authority for how they had arrived at the various figures given in the course of negotiations with the family. The figure generated by the Resource Allocation System (RAS) is not intended to be an item by item calculation of what it will cost to meet each of the applicant's enumerated needs. Rather, as the Association of Directors of Adult Social Services (ADASS) explain in their *Common resource allocation framework* (October 2009, p 4), it is a "ballpark figure for the majority of users which can be adjusted up or down, depending upon those individual circumstances". In Cambridgeshire, the framework has been devised by reference to the total costs of the care packages for a number of disabled people. The figure generated by the framework (the maximum) has then been adjusted upwards by reference to the authority's upper banding calculator. This does give the impression that the whole calculation is based upon an itemised bill of costs. Hence some of the confusion. But the object is rather to produce a total sum which the authority are satisfied can meet the reasonable costs of securing the services he needs. It is then up to the applicant (or in this case his mother) to use that sum as suits him best. Given that the authority have never thought that he needed all the items claimed at the cost claimed for them, it is scarcely surprising that they consider that the total offered is more than sufficient for this purpose. This court cannot conclude that that decision is irrational and however confusing the explanations have been, the family and the court do now have an explanation which makes sense.

43. As resources did not come into the local authority's decision-making at any stage, it was the unanimous decision of this court that we should not undertake a re-examination of the *Barry* decision. Even if a majority had taken the view that it was wrongly decided, this could not be the *ratio decidendi* of this case. Thus it would not be binding authority in any later case where the issue actually mattered. As Lord Wilson observes, it is "important to say as little as possible – and certainly nothing controversial – about the decision in the *Barry* case" (at para 7 above).

44. I would only add that this wise observation applies as much to any account of what was in fact decided in *Barry* as it does to any observations about whether

that decision was a correct interpretation of section 2(1) of the 1970 Act. We have not heard argument on either point. Mr Richard Gordon QC, appearing on behalf of the four intervening charities, has argued that *Barry* has been widely misunderstood. He may well be right. As Lord Wilson has offered an analysis, it is worth while digging just a little deeper.

45. It is possible to break down the decision-making involved in section 2(1) in a number of different ways. Lord Wilson has broken it down thus (at paras 15 and 23): (i) what are the needs of the disabled person; (ii) is it necessary for the local authority to make arrangements to provide any of the listed services in order to meet those needs; (iii) if so, what are the nature and extent of the services for the provision of which it is necessary for the local authority to make arrangements; and (iv) if the disabled person qualifies for a direct payment, what is the reasonable cost of securing the provision of those services?

46. That division is by no means crystal clear from the speeches in *Barry*. The clearest analysis is that of Lord Lloyd, in the minority, who stated that section 2 involved three stages: (i) assessing the needs of the disabled person; (ii) deciding whether it is necessary for the authority to make arrangements to meet those needs; and (iii) making the necessary arrangements (direct payments had not then been invented). In his view, there was "not much dispute" about the second and third stages. It was agreed that once stages (i) and (ii) were passed, (iii) was an absolute duty. It was also agreed that there had to be flexibility over (ii). It was "over the first stage that the battle was joined" (pp 597H to 598C). In his view, Parliament had not intended that resources be taken into account in assessing need (p 599H). But it is also clear that in his view, the majority favoured taking resources into account at stage (i) as well as at stage (ii). That may be what Lord Nicholls meant when he said that "cost is a relevant factor in assessing a person's needs for the services listed" (p 605D). But he also said that his reasons were "substantially to the same effect" as those of Lord Clyde (p 606B). Lord Clyde does not break the decision-making down into clear stages; but he does distinguish between the "assessment of the severity of the condition or the seriousness of the need" and "the level at which there is to be satisfaction of the necessity to make arrangements", and then observes that "If my resources are limited I have to need the thing very much before I am satisfied that it is necessary to purchase it" (pp 610G to 611A). That would be consistent with taking resources into account at Lord Wilson's stage (ii) and balancing them against the severity of the need objectively established at his stage (i). Lord Steyn simply agreed with Lord Lloyd (p 606C) and Lord Hoffmann simply agreed with Lord Nicholls and Lord Clyde (p 606D). Mr Gordon, on behalf of the disabled applicants in *Barry*, had in fact argued that resources were not to be taken into account in either stage (i) or stage (ii) (p 591G).

47. It is, of course, possible to break the analysis of section 2(1) down in a slightly different way (see *McDonald*, at [69]): (i) what are the needs of the disabled person, (ii) what arrangements are necessary to meet those needs, and (iii) which of those arrangements is it necessary for the local authority to make? But whichever way it is broken down, the one clear message which emerges from the majority in *Barry* is that the local authority are entitled to take their resources into account in deciding whether it is necessary for them to make the arrangements to meet the disabled person's needs. This message is then encapsulated in the distinction drawn in the Departmental Guidance, between *presenting needs*, the needs which the disabled person actually has, and *eligible needs*, the needs which the local authority consider it necessary for them to meet (at [47]). The Guidance tries to achieve consistency of assessment among local authorities, by setting out objective criteria for distinguishing between *critical*, *substantial*, *moderate* and *low* levels of need (at [54]). But it is left to each local authority to decide which level of need will be eligible for the services which they provide or arrange. The unpalatable result is that exactly the same level of presenting need will be eligible for services in one authority area but not in another. But that is currently the law.

48. All of this is consistent with the view that resources are *not* to be taken into account at stage (i). Indeed, as the above analysis reveals, it is doubtful that the majority in *Barry* thought that they should be. Their speeches and conclusions are just as consistent with resources only being relevant at Lord Wilson's stage (ii). And as he observes (at para 5 above), if they did hold resources relevant at stage (i), there are indeed arguable grounds for fearing that they fell into error. But, having considered the matter with some care, it would appear to me that they did not fall into *that* error (it is a separate question whether their conclusion at stage (ii) was also in error).

49. These observations, along with those of Lord Wilson on this subject, are strictly by the way, but I am grateful to him for the opportunity he has given us to clarify the debate.