

Challenging Community Care Decisions After *McDonald* and *KM*

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INTRODUCTION

1. After a gap of over a decade since the decision of the House of Lords in *Barry*¹, the Supreme Court has now considered the adult community care scheme twice in recent years. First, in *McDonald*², the Supreme Court held (Lady Hale dissenting) that there was nothing unlawful about Kensington and Chelsea's decision to withdraw night-time care from Mrs Elaine McDonald and instead provide her with incontinence pads, even though she was not in fact incontinent. Second, in *KM*³, the Supreme Court held unanimously that the funding allocation to a severely disabled young man by Cambridgeshire was not irrational and unlawful.
2. On first consideration the decisions in *McDonald* and *KM* seem to provide little comfort for community care lawyers representing those in need of care and support. In both cases, the service provision decisions made by local authorities withstood the scrutiny of the highest Court. However in this paper we argue that on closer consideration these decisions leave significant space for future community care challenges to be brought and that *KM* in particular has the potential to assist in such challenges.
3. Below we consider the consequences of each case in turn, before setting out some general conclusions on their impact on future community care challenges.

¹ *R v Gloucestershire CC ex p Barry* [1997] AC 584

² *R (McDonald) v RB Kensington and Chelsea* [2011] UKSC 33; [2011] P.T.S.R. 1266

³ *R (KM) v Cambridgeshire CC* [2012] UKSC 23; [2012] P.T.S.R. 1189

McDonald

4. The appellant was a disabled ex-ballerina who needed assistance at night because of a weak bladder. A 2008 assessment stated that her need was to “access the commode at night” and direct payments to fund a waking carer were provided to meet this need.
5. The local authority made a decision to cut this funding, arguing that its needs assessment was not meant to lead to a permanent provision of a waking carer, and that the appellant’s needs could be met by the provision of incontinence pads, even though she was not incontinent. The appellant challenged this decision on the basis that her underlying needs had not changed and should continue to be met.
6. The High Court dismissed the claim, deciding that the appellant’s underlying need was not as assessed, but to be kept safe, and the provision of pads met this need.
7. The Court of Appeal disagreed with this conclusion and found that Mrs McDonald’s need, at the time of the decision, had been for assistance to use the commode at night and that the local authority had acted unlawfully in withdrawing this service. However, the Court of Appeal dismissed the appeal because it said that the local authority had, since the High Court ruling, carried out two care plan reviews which had effectively re-assessed the appellant’s needs, and made it clear that her needs were now for help with toileting, and this need could be met by the provision of pads. The Court of Appeal rejected arguments that the withdrawal of services from the appellant was a breach of Article 8 ECHR or amounted to discrimination.
8. The appellant appealed to the Supreme Court on the basis that the care plan reviews could not be said to be new assessments of need, and that in

9. The appeal was dismissed. Lord Brown (with whom Lord Dyson and Lord Walker agreed)) found that the care plan reviews of 2009 and 2010 fully consulted and considered the Appellant's views about her needs, and did in fact contained a re-assessment of need, which re-cast her needs as "need for support at night". This allowed the local authority to conclude that those needs could be met by the provision of pads, and the local authority was not therefore tied to the earlier needs assessment that she needed assistance to use the commode at night.

10. Lord Dyson thought that the real issue was that the appellant had what he described as "toileting needs" that did not change from 2007, and these needs could be met by provision of night time care or by the provision of pads. The assessment changed to an assessment of need for night time care, but as per Lord Brown, the care plan review amounted to a reassessment of need. In relation to reassessments of need, it was open to the council to re-assess even where there had not been a change in the underlying presenting need. A re-assessment which was not irrational or a breach of Convention rights could be justified where eligibility criteria had changed, different services were available, or even where the local authority had had further thoughts and changed its mind about the proper assessment of need.

11. However, Lord Kerr was of the view the care plan reviews had not contained a reassessment of needs and the council had not intended to carry out such a reassessment. The appellant's needs were as before, namely that her needs were about "accessing the lavatory" and thus concerned mobility (rather than toileting needs). However, the Court could

12. Baroness Hale (dissenting) said that the legislation and the statutory guidance drew a very real distinction between a person's needs and what local authorities are prepared to do to meet the need. If it were not for the decision in *Barry* then it would be "easy" to decide what a person needed because resources would not be taken into account when carrying out the assessment. There was a clear difference between people who needed equipment because they could not control where and when they urinated or defecated, and those who could control these functions but needed help getting to a safe place to perform the function. It was irrational to meet a need to get to the lavatory with equipment designed for the protection from uncontrollable bodily functions. Lady Hale memorably stated that "In the United Kingdom we do not oblige people who can control their bodily functions to behave as if they cannot do so, unless they themselves find this the more convenient course. We are, I still believe, a civilised society".

13. The majority were of the view that although Article 8 ECHR could in principle impose a positive obligation on the state to take measures to provide community care services where there was a special link between the disability and the services required, the local authority had a wide margin of appreciation in balancing the competing interests of individuals the community as a whole, especially where scarce resources were involved. There was no breach of the positive obligation in Mrs McDonald's case.

14. Finally, the actions of the local authority were not discriminatory and they had borne in mind at all times the appellant's disabilities and the effect that withdrawal of services might have upon her.
15. It is striking from the above holdings the number of different ways in which the judges thought that a person's needs for community care services could be described. For the majority of the Supreme Court Justices there was nothing fixed about the description of needs and they could be re-cast by a new assessment, which could then lead to a different approach to the services required to meet the needs. For Lady Hale, dissenting, once needs were defined, it was irrational to change the definition and the services required to meet the need when there was no change in the person's condition or presentation. Lady Hale would have liked to have re-opened the *Barry* decision from 1997, but as is apparent from the later discussion in *KM* (see below) it does not appear that *Barry* has anything to say about the role of a local authority's resources in assessment of need, only in whether it is 'necessary' to meet the need by the provision of community care services. As such it is far from clear why Lady Hale considered that the decision in *McDonald* in any way turned on the correctness or otherwise of *Barry*.
16. Now may well be a good time for the government to introduce further guidance as to exactly how needs should be assessed by social workers, given that there are clearly a number of ways of approaching the issue, which will not always produce the same result.
17. The outcome of the case is that it is possible for local authorities to re-assess needs as part of a care plan review, without informing a service user that this is happening. Further guidance may be required to clarify that the two functions (assessment and review of a care plan) are in fact separate. In addition, the Community Care Assessment Directions 2004

18. In relation to Article 8, the Court accepted that there could be a positive duty on the State to provide support if there was a direct and immediate link between the measures sought by a person and that person's private life. But Lord Brown went on to emphasise the wide margin of appreciation available to the state, especially where issues involve an assessment of priorities in the context of the allocation of limited state resources. The case indicates that even showing that withdrawal of services will have a significant effect on the dignity of an elderly or disabled person, will not lead the courts to demand any particular justification from a local authority if "tight resources" are the reason for the withdrawal.

19. Prioritising resources was also a main reason for dismissing the discrimination arguments, with Lord Brown giving short shrift to the argument that the disability equality duty in s49A of the Disability Discrimination Act 1995 had not been complied with, in a situation where all the decision making had taken place in the context of the appellant's need for services to meet her disability.

20. The following conclusions can be drawn about the legal obligations surrounding future community care assessments and reviews following *McDonald*:

(a) The scope for arguing that the public sector equality duty can be a tool for arguing that an assessment is unlawful is lessened by the judgment. Because community care assessments inevitably involve judgments about the level of service that a disabled person will

(b) it is important to note that the majority did agree that Article 8 can impose positive obligations to provide community care services in certain circumstances. See here judgment of Lord Brown at [15]; 'There is no dispute that in principle [Article 8] can impose a positive obligation on a state to take measures to provide support and no dispute either that the provision of home-based community care falls within the scope of the article provided the applicant can establish both (i) "a direct and immediate link between the measures sought by an applicant and the latter's private life" (Botta v Italy (1998) 26 EHRR 241 , paras 34 and 35) and (ii) "a special link between the situation complained of and the particular needs of [the applicant's] private life" (Sentges v The Netherlands (2003) 7 CCL Rep 400 , 405). However, the Court took the approach that it will need to be shown that the effect on the disabled person comes very close to what would be described as "inhuman treatment". Is this setting the standard too high? Will the ECtHR take the same approach in *McDonald v UK*? Would the domestic courts decide a case differently where the issue is a refusal to provide any service to meet an important community care need (perhaps a 'substantial' need in a 'critical only' authority) rather than a dispute about the type of service to be provided?

(c) What it is that can be described as a need is uncertain, and some local authorities will be tempted to draft the description of a person's needs very broadly to ensure that they have the maximum leeway as to how to meet the needs. This would extend to changing the description of

(d) However notwithstanding the problems caused by the majority's approach in *McDonald*, both the Supreme Court and Court of Appeal agreed that until the definition of the need was changed in the belated care plan reviews the local authority had acted unlawfully and potentially in breach of Article 8, because its actions were not in accordance with the domestic law. This demonstrates that disabled people continue to have an absolute right to have their eligible needs met at least until such time as the local authority changes its assessment of their needs.

KM

21. The facts of *KM* were that the Appellant was a young man (aged 26 at the time of the Supreme Court hearing) with a constellation of severe disabilities, including autism and a learning disability. He was born with no eyes and required, on all accounts, a very high level of care.

22. Prior to proceedings being issued *KM*'s mother had been engaged in a long-running dispute with the Local Authority as to the nature and extent of *KM*'s care needs and the level of provision required to meet those needs. This dispute led to the joint instruction of an Independent Social Worker, who assessed *KM*'s needs as 'critical' in all the domains prescribed by the *Prioritising Need* guidance (the successor to the earlier *Fair Access to Care Services* guidance). This assessment was accepted by the local authority as accurately reflecting *KM*'s needs.

23. However the assessor did not initially calculate the level of provision required to meet these eligible needs, and only did so once requested

24. This service provision decision was challenged through judicial review proceedings. KM lost in both the High Court and (for different reasons) in the Court of Appeal. By the time his appeal reached the Supreme Court, a further issue had arisen, being whether KM's case was affected by the approach of the majority in *Barry*, who had held that a local authority's resources could be taken into account in determining (for the purposes of the duty under section 2 of the CSDPA 1970) where it was 'necessary' to meet a person's needs (and arguably when determining whether the presenting requirements of an individual amounted to 'needs' at all).

25. Given that there was no dispute that it was 'necessary' to meet all KM's needs, the question of whether *Barry* was correctly decided did not appear to arise on the facts of his case. However the judgment of the Court of Appeal in *KM* suggested that resources are relevant to the extent to which it was necessary to meet a person's eligible needs, see [23]:

23 In our view, the assessment of needs was adequate. It consisted essentially of Cambridgeshire's accepting Mr Crompton's assessment of

KM's needs, although not of course his assessment of the services required nor their costings. There has of course to be a rational link between the needs and the assessed direct payments, but, in our judgment, there does not need to be a finite absolute mathematical link. This is because (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 – see paragraph 7 of *Savva*; (b) the local authority are not obliged to meet an individual's needs in absolute terms – see paragraph 18 of *Savva*, where the submissions in paragraphs 16 and 17 are rejected;

26. However as the Supreme Court was quick to identify, in reaching these conclusions the Court of Appeal had misdirected itself as to both the *ratio* of *Barry* and to the approach adopted by the Court of Appeal in the earlier case of *Savva*⁴, another challenge to a RAS decision. What the Court of Appeal in *Savva* in fact held (at [18]) was that ‘once Mrs Savva’s eligible needs had been assessed, [the local authority] 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’; directly the converse of the Court of Appeal’s conclusion in KM’s case.

27. Once the Supreme Court had identified this confusion on the part of the Court of Appeal and resolved it in KM’s favour⁵, it became clear that the true *ratio* of *Barry* was not in fact relevant in determining his appeal. As such all members of the Court declined to consider the correctness of *Barry* on the basis that any conclusions they drew would be *obiter*.

⁴ *R (Savva) v RB Kensington and Chelsea* [2010] EWCA Civ 1209; [2011] P.T.S.R. 761

⁵ See judgment of Lord Wilson at [7]; ‘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.’

28. However at [5] Lord Wilson (with whom Lords Phillips, Walker, Brown, Kerr and Dyson agreed) stated that if the House of Lords in *Barry* had decided that resources were relevant to the assessment of need then 'there are arguable grounds for fearing that the committee fell into error'.⁶ Lady Hale stated at [48] that in her view it was doubtful that the majority in *Barry* considered that resources should be taken into account in the assessment of need, but that if they did they arguably fell into error, and that whether they erred in concluding that resources are relevant to the question of whether it is necessary to meet a person's needs was a separate question.

29. Turning to the real issues in KM's appeal, at [15] and [23] Lord Wilson identified four questions which must be answered by a local authority determining potential entitlement to support for a disabled person through the provision of direct payments:

- a. What are the needs of the disabled person?
- b. In order to meet these needs, is it necessary for the LA to make arrangements for the provision of any of the listed services (in CSDPA 1970 s 2)?
- c. If yes, what are the nature and extend of the listed services for which it is necessary for the LA to make arrangements?
- d. What is the reasonable cost of securing provision of the services which have been identified as those for which it is necessary for the LA to make arrangements?

30. The first three of these questions arise from the language of section 2 of the 1970 Act. The final question derives from section 57 of the Health and Social Care Act 2001.

⁶ This was supported by reference to Lady Hale's judgment in *McDonald* at [69]-[73]

31. Because Cambridgeshire employed a RAS to assist it in answering the fourth question (and arguably also the third question), Lord Wilson gave significant consideration to the application of the RAS in KM's case in his judgment at [24]-[28]. Firstly, and perhaps most controversially, Lord Wilson found (at [24]) that it would be 'unacceptably laborious and expensive' to start from a 'blank sheet of paper' each time a financial calculation was made for an eligible service user. As such the RAS could give the exercise a 'kick start' and generate an 'approximate' or 'ball-park' figure.⁷ Lord Wilson held that the contention made in *Savva* that the use of the RAS was unlawful as a starting point was 'rightly not revived in the present appeal'.

32. Those familiar with the operation of the community care scheme prior to the introduction of 'personalisation' mechanisms such as the RAS may be surprised at the finding that it would be 'unacceptably laborious and expensive' to develop an individual care package based solely on assessed needs – particularly given that the statutory duty to meet eligible needs under section 2 of the 1970 Act is, in fact, absolute.⁸ However it is important to stress Lord Wilson's reference to the RAS calculation as providing nothing more than an 'approximate' or 'ball-park' figure. To emphasise this limited role for the RAS calculation, Lord Wilson stated at [28] that:

'What is crucial is that, once the starting-point or indicative sum has finally been identified, the requisite services...should be costed in a reasonable

⁷ See [26], where Lord Wilson cited with approval guidance from the Secretary of State and the Association of Directors of Adult Services containing these descriptions of the RAS.

⁸ Although KM did not contend that the use of a RAS was unlawful *per se*, it was certainly not conceded that a RAS was in any way necessary to the process of calculating the appropriate level of support in any individual case.

degree of detail so that a judgment can be made whether the indicative sum is too high, too low or about right’.

33. Of course in KM’s case the RAS calculation was recognised by the local authority to be insufficient, and so an additional sum was allocated to him through the Upper Banding Calculator (UBC). On this point, Lord Wilson held at [27] that because the UBC produced ‘only the second part of the starting point’ he would ‘put aside my failure to understand how Cambridgeshire can discern within the total of £61,000 the sum for which allowance has already been made for such of the three factors as require an addition under the UBC’.

34. Lord Wilson next considered the application of the RAS to KM’s case, identifying in his discussion three ‘significant mistakes’ made by the local authority in his case:

- a. Failure to inform KM’s mother that it did not accept that she would provide no ‘naturalistic support’, see [30]
- b. Failure to state that ISW’s presentation of required services was ‘manifestly excessive’, see [34]
- c. Failure to explain the different basis of the calculations carried out under the RAS and Upper Banding Calculator, see [35]

35. Before answering the question of the lawfulness of the sum allocated to KM, Lord Wilson then gave guidance on two important questions which will arise in most community care cases:

- a. Firstly, on the contentious question of the appropriate standard of review, Lord Wilson held that ‘in community care cases the intensity of review will depend on the profundity of the impact of their determination. By reference to that yardstick, the necessary intensity of review in a case of this sort is high’, see [36]. The consequences of this for future cases is discussed below.

- b. Secondly, on the question of the requirement to give reasons for financial allocations, Lord Wilson approved the approach of the Court of Appeal in *Savva* but added that '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 assumptions generous to the service user have been made]', see [37]. Following *KM* therefore it may be sufficient for a local authority to explain a global figure for a particular element of the care package, but it will still be necessary for the local authority to show that the funding is in fact reasonably sufficient to meet the eligible assessed needs.

36. Lord Wilson's determination of the appeal on its facts is at [38] in his judgment and needs to be cited in full to be properly understood:

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 £85,000 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.

37. Lord Wilson therefore held that the local authority's financial allocation to *KM* was rational because in substance it was sufficient to meet his eligible assessed needs, notwithstanding the deficiencies in the local authority's reasoning process and the lack of any direct link between the sum allocated and *KM*'s needs. This merits-based approach may be surprising, but it may simply be the consequence of the intense degree of scrutiny which Lord Wilson determined was appropriate in community care cases such as *KM*.

38. However it appears that *KM*'s reasons challenge did succeed in principle; Lord Wilson held that the local authority should have given reasons for its assessment of the cost of carers for *KM*, and its final explanation 'did not repair that deficit'. However because there was no real doubt about the substantive lawfulness of the financial allocation, Lord Wilson held that it would be a 'pointless exercise of discretion' to quash the decision for insufficiency of reasons – particularly as (in his view) a fresh decision may in fact be disadvantageous for *KM*.

39. Again, this is on its face a surprisingly merits-based approach for a Court to take to an application for judicial review. The expected approach in such an application would be for the Court to quash a decision on the basis of a flawed process and require it to be taken again, unless to do so would be obviously academic. However following *KM* it seems likely that reasons challenges to community care decisions will only result in any relief from the Court where it appears arguable that the care package or financial allocation is in substance insufficient.

40. We would suggest that the Supreme Court's judgment in *KM* has three major consequences for future community care challenges:

- a. In cases like *KM*'s where the challenge is to the sufficiency of financial allocations, any allocation which is wholly unreasoned or derived solely from a RAS calculation is highly likely to be unlawful. However it may not be necessary for a local authority to cost the care package in minute detail, but merely to provide reasons to show that the sum allocated is reasonably sufficient to meet the person's eligible needs. Furthermore any reasons challenge is likely to need to be supplemented by a rationality challenge to the substance of the care package or financial allocation to result in relief – unless, as was perhaps the case in *Savva*, the Court simply has no way of knowing for itself whether the services or funding will be sufficient.
- b. In all community care cases, the Court must decide on the appropriate intensity of review based on the profundity of the consequences for the individual concerned. Given the nature of community care cases and the vulnerability of most claimants it is likely that the intensity of review in most cases will be high. This decides the long-standing debate⁹ about the approach the courts should take to reviewing community care decisions in favour of a more hands-on approach than previous authorities would suggest.
- c. In a case where the *ratio* of *Barry* is directly in play, in that a local authority has taken account of its resources in deciding that it is not necessary to meet some or all of a disabled person's presenting needs, there is some suggestion in the judgments of both Lord

⁹ See discussion by Langstaff J in *R (L) v Leeds CC* [2010] EWHC 3324 (Admin) at [55]-[59], which informed Lord Wilson's approach in *KM*.

Wilson and Lady Hale that the Supreme Court would be willing to hear an appeal on the basis that *Barry* was wrongly decided. This will of course only remain relevant so long as Parliament does not insert a resource-sensitive eligibility approach into the statutory scheme, as it may well do through the forthcoming Care and Support Bill.

CONCLUSIONS

41. Both cases considered in this paper were, at root, about the procedures adopted by the local authority in carrying out assessments and re-assessments. In *McDonald*, the complaint was that it was wrong to record the need as one thing and seek to meet the need by a service designed to meet a differently defined need. Moreover it was argued that if a recorded need was to be changed this had to be done by a process which was clearly identifiable as a rational re-assessment of needs. Both of these arguments did not find favour with the majority of the Supreme Court, as set out above.
42. In *KM* the complaint was that the disabled person and his carers were unable to understand why a particular level of funding was awarded to meet his needs. While again this argument failed on the facts, this was because in substance the financial allocation was held to be sufficient to meet KM's needs, or in fact to be arguably more generous than was required. In reaching this conclusion the Supreme Court gave important guidance on the need for rational decision making in future cases.
43. However, in both cases the Court seemed anxious to bend over backwards to allow the local authorities huge leeway in the way they made

44. While the lawfulness of the approach in *Barry*, the application of Article 8 and the relevance of equality duties and the UN Convention on the Rights of Disabled Persons may all be issues for future cases, at least disabled people should be entitled to expect that the rigour with which the Courts enforce public law standards in decision-making in other areas is applied to decisions on eligibility and funding for community care services. The clear statement by Lord Wilson in *KM* that careful scrutiny is required by the Courts in resolving important community care disputes gives hope that this will happen.

5th October 2012

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