

BETWEEN

THE QUEEN on the application of
LUKE DAVEY

Appellant

and

OXFORDSHIRE COUNTY COUNCIL

Respondent

EQUALITY & HUMAN RIGHTS COMMISSION

INCLUSION LONDON

Interveners

SUBMISSIONS ON BEHALF OF INCLUSION LONDON

1. Inclusion London is a charity run by and for Deaf and Disabled people promoting equality and inclusion by supporting Deaf and Disabled People’s Organisations (“DDPOs”¹) and by campaigning for rights for Deaf and Disabled people in the UK. Inclusion London supports over 70 DDPOs and, through them, over 70,000 Disabled people. DDPOs, as an important concept, grew from the Disabled people’s rights movement to play a pivotal role in promoting and progressing equality for Deaf and Disabled people. Inclusion London, through its own work, and in supporting other DDPOs, is particularly well-placed to speak on behalf of Disabled people on issues that directly affect them, such as how their care needs are met, and how the Care Act 2014 is implemented by local authorities. Being run by Disabled People themselves, gives Inclusion London a unique perspective about the experience of Disabled people in receipt of care.

¹ An organisation is a DDPO if its Management Committee or Board has at least 75% of representation from Deaf and Disabled people; at least 50% of its paid staff team are Deaf and Disabled people (represented at all levels of the organisation); and it provides services for, or works on behalf of, Deaf and Disabled people.

2. Inclusion London was heavily involved in all stages of the development of the Care Act and the drafting of the statutory guidance, including meeting the then Minister of State for Care and Support, Norman Lamb. It prepared a number of detailed consultation responses, and supported numerous other DDPOs doing the same. Particularly important, was its work in lobbying on the wording of the legislation and guidance, such as the inclusion of references to independent living and Article 19 of the UN Convention on the Rights of People with Disabilities (“UNCRPD”), including preparing amendments tabled by the then Shadow Minister for Care, Liz Kendall MP. Inclusion London continued to be the only organisation lobbying on this point and succeeded in ensuring that the statutory guidance referred to Article 19 UNCRPD. Inclusion London relies on the submissions by the EHRC focussing on the meaning and relevance of the Convention in applying the Care Act 2014, and which rely on the statutory guidance which refers expressly to Article 19 of the UNCRPD.
3. As a DDPO working with its many member DDPOs and large numbers of Disabled people, Inclusion London represents not just those Disabled people now in receipt of care under the new legislation, but also those that took part in the consultation exercises, lobbying and campaigning about what that legislation should look like and how it should be implemented. In relation to the two points made below, Inclusion London is concerned (given its involvement in that process) to help the Court – the members of which may not have personal familiarity with or understanding of the pressures faced by Disabled people – to understand the purpose, intention² and importance of the legislation when considering the issues in the appeal. Underpinning all that is being clear about the fundamental aim of the Care Act, namely to **transform** the experience of Disabled people in receipt of care from the state, (see for example the ministerial foreword to the White Paper³) something specifically

² To be ascertained by reference to the applicable provisions of the Act in the context of the rest of the Act, the legislative history and all facts concerning the subject matter of the Act: **Bennion** section 202.

³ To which the court is entitled to refer in understanding the legislative purpose: **Black Clawson** [1975] AC 591.

articulated time and again throughout the various stages of the Bill and the consultation exercises by the Minister. The Explanatory Notes to the Act confirm that Part 1 was to give effect to policies in the White Paper and to meet the Law Commission recommendations in its report on Adult Social Care such that those recommendations are material which can be used in the interpretation of the Act⁴ as follows. Two particular issues are of relevance to the points in the Appeal.

Unpaid carers

4. The Care Act was plainly intended to ensure that all unpaid carers had specific protection which had not previously been the case under the earlier legislation. Linked to this was the clear intention that decisions as to care provision by a local authority would no longer be based on an assumption that “informal carers” would fill the gap and provide free care if services were not provided, i.e. that needs assessments should be “carer-blind”. Accordingly, recommendation 11 of the Law Commission’s report stated that the assessment regulations must “require assessors to consider all needs during an assessment, irrespective of whether they can or are being met by a third party and to take into account if a third party is willing and able to meet a need at the care planning stage”.

5. Contradicting that here, Mr Justice Morris relied on the Defendant’s assertion as to the availability of volunteers or family members (see judgment #149-155 and Appellant’s skeleton #34). But the statutory guidance specifically says (p79 #6.5): *“During the assessment, local authorities must consider all of the adult’s care and support needs, regardless of any support being provided by a carer”*; (see also p175 #10.40 on support planning). It is plain that an assessment and the consequent care and support planning based on the assumption that unpaid or informal carers will provide care would significantly undermine the Disabled person’s care package, their independence and ability to meet the outcomes specified in the Regulations and underpinning the Act’s purpose. That would be a very surprising result, and plainly not consistent with the underlying purposes or intention of the Act and Guidance.

⁴ See Bennion section 21.

Wellbeing and future needs

6. The Care Act's clear and plain aim was that "the focus of care and support will be to promote people's well-being and independence instead of waiting for people to reach a crisis point" (as articulated in the White Paper, in July 2012), i.e. that judgements need to be made about future as well as current well-being, and that any assessment should consider the significant impact of future events on a person's well-being. The White Paper (p 19) described this as one of the "two major ways" in which the new legislation would "transform care and support". The Law Commission report stated (#3.4) that, "We agree that the provision of prevention and early intervention services is a key aspect of adult social care"; section 2 of the Act is entitled "Preventing needs for care and support", all emphasising the forward-looking nature of the process.

7. However, contradicting that too, the Judge here held that there was no need to make judgements about the future (see judgment #171, Appellant's skeleton #51). Yet, that was part of one of the key principles and standards set out in the statutory guidance at paragraphs 1.14 and 1.20, namely that well-being "*must include a focus on delaying and preventing care and support needs*".

8. It is clear here too that such a failure to consider future needs, particularly in relation to the breakdown in a team of carers, risks jeopardising a Disabled person's entire care package; and is thus of fundamental importance for those Disabled people. Again, that would be a very surprising result, and plainly not what the Act intended.

Overall

9. Inclusion London invites the court to have in mind, when interpreting and applying the Care Act and Guidance in this appeal, the underlying principles and intentions described above, recognising their fundamental importance to the lives and independence of Disabled people.

David Wolfe QC, Matrix

Louise Whitfield, Deighton Pierce Glynn

7 August 2017