EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 5
P1412/15

Lord Brodie
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD BRODIE

in the reclaiming motion

by

PQ AS ATTORNEY OF MRS Q

Petitioner and reclaimer

against

GLASGOW CITY COUNCIL

Respondent

Petitioner and reclaimer: Mitchell QC, Crawford; Drummond Miller LLP
Respondent: Poole QC, Roxburgh; Glasgow City Council (Corporate Services)

17 January 2018

Introduction

[1] In terms of section 12 of the Social Work (Scotland) Act 1968 it is the duty of every local authority to promote social welfare by making available certain things, including assistance in kind or in cash, to relevant persons. These things are referred to in the Act as "community care services": 1968 Act section 12A (8). As might be anticipated, community care services include services which may be necessary to assist a person with any aspects of

day-to-day living which that person, by reason of age, ill-health or other disability, is unable to carry out unaided. Provision is made in section 12A of the 1968 Act for the assessment by local authorities of a person's need for community care services.

[2] Mrs Q is a person who, it is agreed, has a need for community care services. She is an 87-year-old widow who lives in Glasgow. She is in poor health. She suffers from peripheral vascular disease and vascular dementia. On 17 May 2010 she underwent a below knee amputation in one leg. The petitioner in this application for judicial review, and now reclaimer, is her son, PQ, who holds power of attorney in respect of Mrs Q by virtue of a grant by her dated 17 February 2010 and registered in the Books of Council and Session on 9 March 2010. Glasgow City Council, the respondent in this application and now respondent in this reclaiming motion, is the local authority having statutory powers and duties in relation to the provision of community care services to Mrs Q. It is the contention of the petitioner that the respondent has failed properly to exercise its powers and therefore has failed to fulfil its statutory duties towards Mrs Q. This reclaiming motion is in respect of an interlocutor of the Lord Ordinary dated 5 October 2016 in the second of two petitions presented by the petitioner (the "Second Petition") refusing the orders sought and dismissing the petition.

[3] The Second Petition challenges the lawfulness of decisions relating to the provision of community care services to Mrs Q which decisions were intimated to the petitioner by letter from the respondent dated 26 May 2015. As appears from the averments in the petition, there is a preceding history, extending over some five years, including a hearing before the respondent's Social Work Complaints Review Committee on 23 January 2015, but for present purposes it is sufficient to note that by the early part of 2010 Mrs Q was living at home with domiciliary support organised through the respondent's social work department.

As she was finding it increasingly difficult to cope, the respondent commissioned an assessment of her care needs. That assessment is contained in a report dated 19 March 2010. The report noted that Mrs Q

> "now requires 24 hour care to reduce the risk of falling and ensure that she receives an appropriate level of care. She is currently supported overnight by care purchased privately. This cannot be sustained indefinitely due to financial implications and placement in nursing care is required urgently."

Mrs Q was admitted to Glenlivet nursing home on 28 April 2010. As a result of the deterioration in her vascular problems Mrs Q was admitted to hospital where she underwent the below knee amputation to which we have already referred. She returned to the nursing home on 24 June 2010. She thereafter went back to her own home, for what was intended to be a short break, on 25 July 2010. She has continued to reside there ever since.

[4] Shortly after Mrs Q's return home the respondent carried out a further assessment of her needs, in terms of section 12A of the 1968 Act. The report on that assessment was dated 26 August 2010 and 23 September 2010. Thereafter, the petitioner applied on Mrs Q's behalf for a direct payment for the purpose of securing the relevant community care services, as was then provided for by section 12B of the 1968 Act. The respondent has subsequently been made direct payments, although, as is observed by the Lord Ordinary, it is not clear from the petition and answers when payments commenced. What is not in dispute is that up to 1 November 2012 weekly direct payments of £594.70 were made to the petitioner. Following a review, these payments were reduced to £493.36 per week. The difference represents the assessed client contribution which initially had been waived on a discretionary basis but which was deducted from the direct payment from 1 November 2012.

[5] That position, as we understand it, has subsisted since 2010: Mrs Q being cared for at home under arrangements made on her behalf by the petitioner, with the cost of these arrangements being funded, in part, by direct payments made by the respondent. We note what the Lord Ordinary has to say about these arrangements in paragraph [18] of his opinion. In his view there is no doubt that Mrs Q is exceptionally well cared for. The Lord Ordinary explains that Mrs Q lives in a one-bedroom bungalow which has been adapted to take a wheelchair. There is a wet room for her washing and toileting needs where she can be discreetly observed. There is a carer on hand 24 hours a day who is not distracted by other clients or patients. During the night the carer sleeps in a pull-down bed in the living room. Mrs Q is happy, content and safe. She is recorded as not wishing to move from her home. It is the wish of the petitioner that his mother continues to enjoy her current high level of care. It is his position that because Mrs Q is constantly at risk of falling she requires to be cared for at home with 24 hour care on a one-to-one basis. Because of her dementia Mrs Q forgets that she has had a leg amputated. Accordingly, when she rises to get to her feet she fails to take account of that fact and is prone to falling and injuring herself. She may also try and rise from bed and again is then at risk of falling. No nursing home, the petitioner suggests, will provide the kind of 24 hour one-to-one care that is required and accordingly Mrs Q can only be cared for in a home setting with a nurse or carer with her 24 hours a day. The petitioner takes issue with the respondent's assessment that Mrs Q's needs could be adequately met within a nursing home and accordingly at a lesser cost than that required to provide 24 hour one-to-one care at home. That is the nub of the dispute between the parties which the petitioner has brought to court by way of the Second Petition.

The Relevant Statutory Duties

[6] In terms of section 12A of the 1968 Act, where a local authority is under a duty or has a power to provide community care services to any person, it is under a duty to make an assessment of the relevant needs of that person. The duty is expressed in the following terms:

> "**12A. Duty of local authority to assess needs**.
> (1) Subject to the provisions of this section, where it appears to a local authority that any person for whom they are under a duty or have a power to provide, or to secure the provision of, community care services may be in need of any such services, the authority—
> (a) shall make an assessment of the needs of that person for those services; and
> (b) shall then decide, having regard to the results of that assessment, and taking account—
> (i) where it appears to them that a person ("the carer") provides a substantial amount of care on a regular basis for that person, of such care as is being so provided; and
> (ii) in so far as it is reasonable and practicable to do so, both of the views of the person whose needs are being assessed and of the views of the carer (provided that, in either case, there is a wish, or as the case may be a capacity, to express a view),
> whether the needs of the person being assessed call for the provision of any such services"

[7] It will be recollected that a local authority is empowered to provide community care services in kind or in cash. Thus, in the event of a local authority determining that the needs of a person call for particular services these may be provided for by way of payment of a sum of money in such an amount as will secure these services. As we have already foreshadowed, this is further regulated by statute. As was explained by Lord Jones in *Smart's Guardian* v *Fife Council* 2016 SLT 384 at para 3, until the repeal of section 12B(1) of the 1968 Act on 1 April 2014, if a local authority decided that the needs of the person called for the provision of a community care service, and if the person was not of a description specified in regulations, the local authority had a duty under that section to make to the person, "in respect of his securing the provision of the service, a payment of such amount…

as they determine to be appropriate". From 1 April 2014, the duty under section 12B has been replaced by the duty, under section 5 of the Social Care (Self-Directed Support) (Scotland) Act 2013, to offer to such person the choice of a number of funding options, one of which is the making of such a payment. The options, described as "options for self-directed support", are set out in section 4(1) of the 2013 Act.

[8] Section 5(1) and (2) of the 2013 Act provide as follows:

> "**5 Choice of options: adults**
> (1) This section applies where a local authority decides under section 12A(1) (b) of the 1968 Act that the needs of an adult (the "supported person") call for the provision of community care services ("support").
> (2) The authority must give the supported person the opportunity to choose one of the options for self-directed support unless the authority considers that the supported person is ineligible to receive direct payments. …"

The options referred to in section 5(2) are those set out in section 4(1). Option 1 is the making of a direct payment by the local authority to the supported person for the provision of support. As appears from section 4(2), "direct payment" means a payment of the relevant amount by a local authority to a supported person for the purpose of enabling the person to arrange for the provision of support by any person (including the authority). The "relevant amount" means the amount that the local authority considers is a reasonable estimate of the cost of securing the provision of support for the supported person.

The Decisions under Challenge

[9] The petitioner challenges the lawfulness of two decisions taken by officers of the respondent acting under delegation of the respondent's statutory powers both of which were intimated to the petitioner by the letter of 26 May 2015 (47 in the joint list of documents) and which relate to the assessment of the level of Mrs Q's needs and the calculation of the direct payment consequential on that assessment. The first of these

decisions was made in terms of section 12A (1) of the 1968 Act which required the respondent to make an assessment of Mrs Q's needs. It is set out in a 20 page pro forma document headed Support Needs Assessment and completed by a social worker, Ms G (45 in the joint list). The second decision was the determination of the "relevant amount", being the amount that the respondent considered a reasonable estimate of the cost of securing the provision of the community care services which were called for having regard to the Support Needs Assessment, as required by sections 4 and 5 of the 2013 Act. It is set out in a three page pro forma document headed Resource Allocation Group Minute and completed by Mr M (46 in the joint list). The result of the second decision was to authorise a direct payment of £31,009.44 per annum (effectively the same rate as had applied before the Support Needs Assessment was carried out). We shall refer to the second decision as the Calculation of Direct Payment.

The Grounds of Appeal

[10] The petitioner reclaims against the Lord Ordinary's dismissal of the Second Petition.

[11] In terms of Rule of Court 38.13(2)(a), a party wishing to reclaim must lodge, by a date which conforms with the timetable issued by the Keeper of the Rolls, grounds of appeal. In terms of Rule of Court 38.13(2)(c) that party must lodge, by a later date again conforming to the timetable issued by the Keeper, a note of argument. These documents have different functions. As is provided by Rule of Court 38.18(1), grounds of appeal shall consist of brief specific numbered propositions stating the grounds on which it is proposed to submit that the reclaiming motion should be granted. "Brief" means brief and "specific" means specific. In this context a proposition is a statement containing a premise which the reclaimer proposes to make out and which, if made out to the satisfaction of the court, will, according

to the reclaimer, have the necessary result that the reclaiming motion should be granted. The purpose of grounds of appeal is to give notice to the parties and to the court of the grounds on which the reclaiming motion is to be argued: *Eurocopy Rentals Ltd* v *Tayside Health Board* 1996 SC 410, Lord President Hope at 413G. The note of argument, on the other hand, is intended to provide an outline of the argument which is to be advanced in support of the grounds of appeal in the form of a concise summary of the submissions to be developed, set out as a numbered list of the points which the party wishes to make under reference to the passages of evidence, documents and authorities on which a party wishes to rely: Practice Note 3 of 2011, paragraph 86. The note of argument will therefore be more expansive than the grounds of appeal although, again, regard must be had to the terms of the Practice Note; "concise" means concise.

[12] We have been prompted to make these observations, which are really no more than a restatement of the relevant provisions in the Rules of Court and the Practice Note, by reason of the terms of the grounds of appeal in the present case. In so far as they relate to the Second Petition they extend over some eight pages. Some of what appears there would be more appropriate for the note of argument; some of it is simply discursive. By adopting this approach to drafting, a reclaimer risks obscuring what his case is about, which is the very antithesis of the purpose of grounds of appeal. Mr Mitchell QC, who appeared for the reclaimer, accepted that Rule of Court 38.18 (1) had not been scrupulously followed but he pointed out that there can be found in the present grounds of appeal, albeit amidst much else, two propositions which can be taken as encapsulating the grounds which the reclaimer puts forward. These are:

> (First) The Lord Ordinary erred in his finding that [the Support Needs Assessment] was not unreasonable or irrational; and

> (Second) The Lord Ordinary erred in his finding that there was a proper and rational basis for [the Calculation of Direct Payment] being made by the respondent to Mrs Q under [the Support Needs Assessment].

We shall proceed on the basis that these are the grounds to be considered.

The First Ground of Appeal – the Support Needs Assessment

[13] The respondent had a statutory responsibility to make the Support Needs Assessment. It required an investigation of primary facts and then an evaluation of these facts using professional judgement. At paragraphs [16] and [17] of his opinion the Lord Ordinary recalled a number of fundamental principles which guide the court in the judicial review of such decisions. We respectfully agree with and would adopt the way in which the Lord Ordinary articulated these principles:

> "[16] …First it is not for the court to take a decision which Parliament has empowered to a local authority. It is only if the local authority has acted outwith its powers, failed to take into account a relevant matter, omitted to take into account a relevant matter or the decision was *Wednesbury* unreasonable that the court can intervene. Even if there has been an error in law it will be for the local authority to remake the decision, possibly under the guidance of the court, not for the court to remake it.
>
> [17] Secondly local authorities have finite resources and the court has to recognise that it is for the local authority to determine where resources should be spent and in what manner. In *R(G)* v *Barnet LBC* [2004] 2 AC 208 Lord Nicholls of Birkenhead drew a distinction between a local authority exercising a power and one exercising a duty. A local authority is obliged to comply with a statutory duty regardless of whether, left to itself, it would prefer to spend its money on some other purpose. A power need not be exercised but a duty must be discharged (para 12). The extent to which a duty precludes a local authority from ordering expenditure priorities for itself varies from one duty to the other. This is especially so in the field of social welfare.
>
> > "As a general proposition the more specific and precise the duty the more readily the statute may be interpreted as imposing an obligation of an absolute character. Conversely, the broader and more general the terms of the duty, the more readily the statute may be construed as affording scope for

> a local authority to take into account matters such as cost when deciding how best to perform the duty in its own area."(para 13).

Thirdly courts require to exercise particular care in construing reasoned decisions which are not drafted by lawyers and read them in the context within which they are made. In the case of assessments the observations of Lord Dyson JSC in *R(Macdonald)* v *Kensington and Chelsea Royal London Borough Council* [2011] UKSC 33, [2011] PTRS 1266 at paragraph 53, are particularly apt:

> "In construing assessments and care plan reviews, it should not be overlooked that these are documents that are usually drafted by social workers. They are not drafted by lawyers, nor should they be. They should be construed in a practical way against the factual background in which they are written with the aim of seeking to discover the substance of their true meaning."

[14] Consistent with the first of these principles, Mr Mitchell accepted that in order to establish that the respondent had failed in its statutory duty to make an assessment of Mrs Q's needs for community care services, he had to show that the conclusion of the Support Needs Assessment was perverse. However, notwithstanding that necessary concession, in paragraphs 2.3 to 2.6 of the grounds of appeal and paragraphs 4 to 19 of the note of argument for the reclaimer, there is set out the contention that the Lord Ordinary should be taken to have erred because he was misled as to the qualifications of the author of the Support Needs Assessment and that therefore his decision should be reversed.

[15] As already indicated, the author of the Support Needs Assessment was Ms G. She is the assessor for the purpose of the pro forma. Ms G is a social worker employed by the respondent. However, she has also qualified as a nurse. In the course of the Support Needs Assessment she identifies her experience "both as a nurse and as a social worker" and "when working as a nurse and while working as a social worker". There was reference to this before the Lord Ordinary. At paragraph [19] of the Lord Ordinary's opinion he states in relation to the Support Needs Assessment, "It was carried out by an experienced social worker who, I was informed, is also qualified as a nurse". That Ms G qualified as a

registered nurse and thereafter worked as a nurse is accurate. The point which is sought to be made on behalf of the reclaimer is that in 1999 Ms G allowed her registration with the Nursing and Midwifery Council to lapse. While accepting that what the Lord Ordinary was told was not untrue, at paragraph 13 of the note of argument for the reclaimer it is stated that to describe Ms Grant as "also qualified as a nurse" was highly misleading and likely to lead to a false understanding on the part of the Lord Ordinary that Ms G was a nurse and entitled to practise as such. At paragraph 14 it is submitted that the Lord Ordinary proceeded on the basis of a material error of fact and at paragraph 17 it is submitted that it is in the interests of justice to interfere with the Lord Ordinary's decision on the basis of what is now known to be the correct information about the status of Ms G.

[16] We did not encourage Mr Mitchell to develop these submissions at any length. We consider them to be wholly without merit. The currency of Ms G's registration is of no obvious relevance, it being borne in mind that while Ms G was the assessor she was assisted by an occupational therapist and by a district nurse and, moreover, that she is a social worker. Further, we see no basis for the suggestion that the Lord Ordinary had been misled. The terms of paragraph [19] of his opinion indicate that he was aware that Ms G was a social worker who had "also qualified as a nurse", as indeed she had. That is the meaning we would take from the expression in the Support Needs Assessment "when working as a nurse [past tense] and while working as a social worker [present tense]". However, a more fundamental objection to the relevancy of an argument to the effect that "had the Lord Ordinary been aware that the social worker carrying out the assessment was not qualified as a nurse, it may reasonably be inferred that it would have changed the view to which he came on the reasonableness of the Assessment made by [Ms G] in reliance upon her own judgement, contradicted as it was by the other professionals all of whom possessed

relevant nursing qualifications and expertise", is that it was not the Lord Ordinary's function to weigh the opinion of Ms G (or indeed that of the occupational therapist and district nurse) against the opinions expressed in the reports of Grace Consulting, Sally Ann Dickinson and Professor Lynn Kilbride, which were relied on by the reclaimer. Rather, his function was, and our function is, to consider the contention that there was no rational basis for Ms G's opinion as expressed in the Support Needs Assessment that while Mrs Q required 24 hour supervision due to her risk of falls, her needs could be met within a residential setting without the necessity for one-to-one care. While this is a reclaiming motion against the decision of the Lord Ordinary, the focus of challenge remains the decisions which the petitioner seeks to review. Were we persuaded that the Lord Ordinary had been misled on some material matter of fact with the result his decision could be impugned for that reason (which we are not), that of itself would not lead to the reclaiming motion being granted. As Mr Mitchell accepted, for the petitioner to succeed it would remain necessary that he demonstrate to this court that the decision that Mrs Q's needs could be met without one-on-one care was perverse.

[17] The note of argument for the reclaimer also attacks the Lord Ordinary's decision on the ground that he erred in law in finding that there was a basis for Ms G's assessment in the matters referred to at paragraph [37] of his Opinion. These matters, so it is said in the note of argument, had not been addressed by either counsel and had not been the subject of any submissions. There was no sufficient basis, the note of argument continues, for the Lord Ordinary's finding.

[18] The way in which this is couched again, inappositely in our opinion, focuses on the Lord Ordinary's decision rather than the respondent's decisions, but in any event we do not

see this criticism as being well made. Two paragraphs of the Lord Ordinary's Opinion are relevant. They are as follows:

> "[37] Although neither counsel addressed me on this it is apparent that the assessor, with input from the occupational therapist, had suggested a number of measures that could be put in place to reduce the level of risk from falling. These included visual prompts to remind Mrs Q not to attempt to get up without assistance. These were rejected by the family on the basis that Mrs Q would not understand them. The assessor and the occupational therapist noted that Mrs Q was able to read and do cross words and considered that she might well be able to understand them. They had suggested a cognitive assessment but this was rejected by the family on the basis that her cognitive ability had deteriorated since the last assessment and there was nothing to be gained from a further assessment. The assessment noted that the carers put a small table with items on it in front of Mrs Q and they used the sound of it moving when they were away from her to alert them to the fact that Mrs Q was attempting to get up. During the night they used a baby alarm to alert them to Mrs Q moving. There was [a] bed guard to prevent her from falling out of bed.
>
> [38] There was therefore a basis for the assessor to reject the petitioner's expert evidence and to rely on her own judgement assisted by colleagues. It appears that this is a careful assessment of this elderly lady's needs in which the assessor and those assisting her brought their own experience and expertise to bear on the subject. They conclude that Mrs Q requires 24 hour supervision but they considered that that level of care could be provided in an appropriate residential setting."

The information referred to by the Lord Ordinary appears in the Support Needs Assessment. The Lord Ordinary had been invited to find that the decision expressed in the Support Needs Assessment had no rational basis. He was therefore entitled, if not obliged, to have regard to its whole terms when considering the petitioner's submission, even where, as the Lord Ordinary acknowledges, counsel had not focused on everything that appeared there. What appears in paragraphs [37] and [38] of the Lord Ordinary's Opinion provides an entirely relevant reminder that there are strategies which may be useful in minimising the risk of a cognitively and physically impaired person falling and which do not require the constant and immediate presence of a carer. In the present context it is not for the court to evaluate such strategies but then the Lord Ordinary did not do so. It can also be noted that earlier in his Opinion (paragraph [30]) the Lord Ordinary recorded that Ms G and the

occupational therapist had worked with service users with similar needs to Mrs Q whose needs were met within a 24 hour care setting (such as a nursing home – see page 6 of the Support Needs Assessment). Ms G was entitled to draw on such experience in making her assessment (see page 17).

[19] We turn then to the contention that the decision expressed in the Support Needs Assessment was perverse. Ms Poole QC for the respondent submitted that the petitioner's contention, although articulated as a rationality challenge, was truly no more than a merits challenge, in other words an argument to the effect that on the facts a different judgement should have been made as to the nature and extent of the services which Mrs Q's needs call for; that, Ms Poole submitted, is not a question for the court. We agree.

[20] We reiterate that in discharging its section 12A duty the respondent was required to exercise a judgement, or perhaps two judgements; it had to make an assessment of "needs" and it had to decide whether the needs "call for" the provision of community care services. As we would see it, implicit in the duty to decide whether in any particular case the needs which have been assessed call for the provision of community care services is a duty to decide what is the nature and extent of the community care services which are called for. That would seem to be supported by what appears in paragraph 23 of the judgment of Lord Wilson, with which the other members of the Supreme Court agreed, in *R (KM)* v *Cambridgeshire County Council* [2012] UKSC 23, [2012] PTSR 1189, a decision commended by the reclaimer as setting out (in paragraphs 23 ,23 to 26) the proper approach to the calculation of payments such as the direct payments provided for in terms of sections 4 and 5 of the 2013 Act. The reclaimer in his note of argument points to the divergence of opinion as between Lord Lloyd of Berwick and Lord Clyde in *R* v *Gloucestershire CC ex p Barry* [1997] AC 584 as to the disjunction or otherwise as between needs and the resources

available to meet them. Lord Lloyd could not accept that assessing the reasonable needs of the individual required consideration of the local authority's ability to meet those needs (at 600B). Lord Clyde, on the other hand, while finding it unnecessary to hold that cost and resources are always an element in determining necessity, took the view that they may be a proper consideration (at 611B). Although Lord Clyde was part of the majority of the Appellate Committee in *Barry*, Lord Hardie subsequently took a position more consistent with that of Lord Lloyd in concluding, in the specific context of the duty imposed by section 12A(1) of the 1968 Act, that the resources available to a local authority are irrelevant to the exercise of assessing an individual's needs: *MacGregor* v *South Lanarkshire Council* 2001 SC 502. Having drawn attention to these decisions on the possible relationship between needs and resources, the reclaimer's note of argument goes on to explain that this is not a live issue in the present case. We can agree with that, but before leaving *Barry* we would note Lord Clyde's observation at 610E that "needs" is a relative expression admitting a considerable range of meaning. Lord Clyde was considering the construction of "needs" in the context of section 2(1) of the Chronically Sick and Disabled Persons Act 1970 but his comment applies equally to section 12A(1) of the 1968 Act.

[21] If then the Support Needs Assessment involved the making of judgements which were for the respondent, through its officers, to make, on what basis can it be said that its conclusion was perverse?

[22] It is no longer argued on behalf of the petitioner and now reclaimer that the respondent failed to have regard to relevant evidence when making the Support Needs Assessment. Such an argument had been advanced before the Lord Ordinary and rejected by him, in our opinion correctly. The Lord Ordinary also rejected arguments based on textual analysis of the Support Needs Assessment. Again we consider that he was right to

do so. The Support Needs Assessment is not a conveyancing document nor a judicial opinion. It was drafted by a social worker not a lawyer and, as was said by Lord Dyson in *Macdonald*, it should accordingly be construed in a practical way against the factual background in which it was written with the aim of seeking to discover the substance of its true meaning. Read in that way we consider its meaning to be clear with none of the inconsistencies or irrelevancies which Mr Mitchell had sought to attribute to it when appearing before the Lord Ordinary. What remains is the contention that no rational decision-maker could conclude, on the basis of the material referred to in the Support Needs Assessment, that Mrs Q's admitted need for 24 hour care could be met in a residential setting which did not provide for one-to-one supervision and attention. That contention depends on the fact that because of her cognitive impairment Mrs Q forgets that she has had an amputation and therefore cannot stand unaided, and is therefore liable to fall as she attempts to rise from a chair or bed, and on the opinions expressed in the expert reports from Grace Consulting dated 18 June 2013; Sally-Ann Dickinson, a registered general nurse with expertise in, amongst others, care of the elderly, dated 12 January 2015; and Professor Lynn Kilbride, Head of the Department of Nursing and Community Health at Glasgow Caledonian University dated 13 January 2015. That Mrs Q's combination of impairments puts her at particular risk of falling and the opinions expressed in the expert reports relied on by the reclaimer may provide support for the proposition that Mrs Q's needs call for one-to-one care, but it does not follow that the respondent's assessment which concludes that these needs call for a less intensive degree of care is irrational or perverse. The Support Needs Assessment was carried out by a social worker assisted by an occupational therapist and a district nurse. On the basis of their consideration of what is the relevant material they came to a different conclusion from that expressed in the reports

relied on by the reclaimer. That is a difference of opinion on a question of judgement which by its nature may admit of more than one answer. It does not demonstrate perversity. We reject the first ground of appeal.

The Second Ground of Appeal – the Calculation of Direct Payment

[23] The second decision which is challenged by the petitioner and now reclaimer is the Calculation of Direct Payment. As is explained above, the Calculation of Direct Payment is the respondent's determination of the amount that it considered to be a reasonable estimate of the cost of securing the provision of the community care services which were called for having regard to the Support Needs Assessment.

[24] The operative part of the Calculation of Direct Payment, as set out in 47 in the joint list of documents, is in the following terms:

> "Current service £31,009.44 as a Direct Payment
> The social work assessment is clear that [Mrs Q's] needs could be met within a 24 hour care home setting however as [Mrs Q] and her family wish to maintain her within her own home, then supports should be provided to facilitate part of this care. There is no significant risk with the current plan, however, if there were changes in these arrangements, then need would require to be reviewed. It is not assessed by the social worker that [Mrs Q] does require 1:1 support as there are incidences [sic] documented in reports where shared hours would be appropriate.
> [Estimated Budget] calculated from [Support Needs Assessment] £27,553.34
> As current plan, with additional private support is meeting [Mrs Q's] needs, with the assumption that [Mrs Q] or [her attorney], if active, have considered any associated risks with maintaining the current plan.
> [Agreed Estimated Budget] £31,009.44
> This will ensure continuity for [Mrs Q] and maintain current plan.
> If [Mrs Q] was to move into a nursing home the cost would be £30,451.51"

[25] What appears on the face of the Support Needs Assessment is supplemented by the respondent's averments in answer 14 to the petition as follows:

> "[The respondent] also carried out the 2015 assessment. It found an eligible need for 24 hour care. It found that need could be met in a nursing home. It followed its standard procedures in reaching a decision as to the level of direct payment to make

> consequent on the 2015 assessment. It applied its resource allocation tool, which seeks to provide a fair, equitable and transparent allocation of resources between all services users, in order to reach an estimated budget. It noted that estimated budget on page 19 of 20 of the 2015 Assessment, which was £27,553.34 per annum. The agreed estimated budget was determined at a Resource Allocation Group ("RAG") on 5th May, 2015, having regard to the 2015 Assessment. The RAG approved an agreed estimated budget of £31,009.44 a year (only part of which was a recurring cost), which was a budget of £594.70 a week. The sums approved exceeded the estimated budget reached under the resource allocation tool. The RAG noted that if Mrs Q was to move into a nursing home (where 24 hour care is available) the cost would be £30,451.51 a year. Telecare services were approved. An Outcome Based Support Plan ("OBSP") was then prepared based on the agreed estimated budget. The OBSP noted that of the agreed estimated budget £30,824.33 was a recurring cost. The decision as to the actual individual budget was taken in the OBSP on 12th June, 2015 by approval being given to an individual budget of £30,824.33. By a finance enquiry form dated 27th July, 2015 the finance officer, applying "[The respondent's] standard charging policy, determined a client contribution of £101.34 a week should be implemented. Accordingly weekly direct payments of £493.36 a week are made to the Petitioner. "[The respondent] is not required to pay for a more expensive package of care (such as the cost of individual care in a house) when it has assessed needs as being capable of being met by a less expensive alternative (such as placement in a residential nursing home)."

[26] The averments in the petition which support the proposition that the Calculation of Direct Payment did not have a proper and rational basis are to be found in statement 28 of the petition. There it is averred that Mrs Q's assessed need for 24 hour care:

> "…requires to be provided in such a manner as meets her particular needs …She is at constant risk of falling and the 24 hour care requires to be at such a level as to control that risk. It requires the nursing home to have staffing levels sufficient to address and minimise that risk. …The respondent has not sought nor obtained any indication of the likely cost of such care were it to be provided in a nursing home. …In the event that such care could be provided, it would require exceptional staffing levels in the nursing home and is likely to be more expensive than the home care package presently implemented by the petitioner."

Put short, that is a reiteration of the contention that Mrs Q's needs are highly special because of the particular combination of physical and cognitive impairment from which she suffers and the consequent constant risk of falling and the further contention that a Calculation of Direct Payment arrived at by reference to the cost of a move into "a nursing home" is inadequate and therefore irrational because that cost would not cover the exceptional

staffing levels required by Mrs Q's special needs. On the petitioner's approach what should have been done was to match Mrs Q's needs against the levels of care which particular nursing homes were able to provide and then adopt the cost of the appropriate level of care as the reasonable estimate of cost for the purposes of sections 4 and 5 of the 2013 Act. Before us Mr Mitchell referred to such an exercise as "bench-marking". A further argument was advanced before the Lord Ordinary (see Opinion paragraphs [54] and [55]) to the effect that, as appeared from answer 14, the respondent had purported to use a resource allocation score but there were no relevant averments and no evidence as to what that score, or the tool to determine it, in fact were. That further argument is not foreshadowed in the copy of the Reclaiming Print with which we were provided. We take it that the Reclaiming Print incorporates the petition and answers as they were provided to the Lord Ordinary because at paragraph [54] of his Opinion he describes the further argument as not focussed in the petition. It is however explained in the grounds of appeal that he was mistaken in this, in that an adjustment had been made to the petition at a late stage prior to the hearing (but presumably not included in the version of the pleadings made available to the Lord Ordinary), which adjustment had included a call on the respondent to disclose what its resource allocation tool was, upon what assumptions it was based, how it operates and how it was applied in the present case.

[27] These arguments were maintained before this court, it being contended that the Lord Ordinary had erred in rejecting them. We would summarise the submissions for the reclaimer as follows. The Support Needs Assessment assesses Mrs Q as having a need for 24 hour care. Among the desired outcomes of the Support Needs Assessment, under the heading "staying safe", are "To remain safe at all times" and "[Mrs Q] to be supported in any environment to ensure her health and wellbeing and that her risk of falling are reduced

as far as possible". In making the Calculation of Direct Payment it was the duty of the respondent to make a reasonable estimate of the cost of the services required to meet Mrs Q's needs and to achieve the identified desired outcomes. While the estimate was for the respondent to make, it had to be made on a rational basis. Associated with the duty to make a rational assessment and arising from it was an onus on the respondent to demonstrate, in a way that was transparent, that there was a proper and rational basis for the amount brought out by Calculation of Direct Payment. As was apparent from the respondent's failure to carry out any benchmarking exercise, an estimate by reference to the cost of "a nursing home", in the sense of simply any nursing home, was irrational. Moreover, given the averments in answer 14 that a calculation had been made by the use of a resource allocation tool, the nature of the operation of which was unexplained, the respondent had failed to demonstrate, as it was for it to do, that there was a proper and rational basis for the Calculation of Direct Payment.

[28] Although articulated in terms of irrationality the second ground of appeal can be said to focus on reasons; the sufficiency of the reasons that were given and the absence of reasons which were not given.

[29] We have no difficulty with the proposition that where a local authority has a duty to make a reasonable estimate of the amount of money which is intended for the provision of community care services, the estimate requires to be made on a rational basis which should be amenable to explanation and, further, that this explanation should be provided to the supported person. The reclaimer relied on what was said by Maurice Kay LJ, with whom Longmore and Patten LJJ agreed, in *R (Savva)* v *Royal Borough of Kensington and Chelsea* [2010] EWCA Civ 1209, [2011] PTRS 761, at para 20:

> "In the present case, the Deputy Judge concluded that fairness required the provision of reasons. He emphasised the consistent theme in the guidance emanating from the Department of Health and the Association of Directors of Social Services – the need for transparency in the decision-making process. In my judgment, he was right to do so. When a local authority converts an established right – the provision of services to meet an assessed eligible need – into a sum of money, the recipient is entitled to be told how the sum has been calculated. … If a local authority were entitled to notify a bald figure without any explanation, the recipient would have no means of satisfying himself or herself that it was properly calculated. As the guidance from the Association of Directors of Social Services puts it, explanations of decisions 'make it possible for people and families to challenge these decisions'. Or, to put it the other way round, an absence of explanations may make it impossible to mount such a challenge, whether by way of complaint or by way of litigation."

We agree with that. It follows that there is an onus on the respondent to the extent of providing, in a reasonably comprehensible way, an explanation of how it has calculated what it would claim is a reasonable estimate of the cost of securing the provision of such community care services as it considers are called for. Such an explanation may then be challenged, either on the ground that its reasoning is insufficient or that the amount calculated on the basis of that reasoning is not in fact a reasonable estimate. In the latter case we would see the onus as being on the supported person to establish that the estimate is not reasonable.

[30] Returning to the instant case, it is convenient first to address the argument that because no explanation has been given about the respondent's "resource allocation tool", the respondent has failed to provide an adequately reasoned estimate of cost. Were the respondent's estimate to depend on an application of its resource allocation tool we would see force in that argument. Having read the judgments in *Savva* and *KM*, the members of this court have some idea of what a resource allocation tool is (in this context a computer programme designed to allocate numerical values to needs-based claims) and what it is intended to achieve, but if we had been dependent on what appears in the Calculation of Direct Payment and answer 14 we would have remained completely ignorant of the matter.

Essentially, that would have still have been the case even after we had read *User Guidance Carefirst RAS Calculator* (61 in the joint list), a document lodged by the respondent with the intention of explaining its system. It may be that, with an eye to other cases, the respondent should give consideration to following the suggestion in paragraph 21 of *Savva* and publishing on its website in a user-friendly format a description of its resource allocation tool and an explanation of how it is used. However, be that as it may, in this case we do not see the respondent's estimate to depend on an application of the resource allocation tool. Rather, as Ms Poole QC put it in submissions, having started on a resource allocation exercise the respondent rejected that exercise in favour of a simple estimate of the cost of services. The application of the resource allocation tool produced a figure which was lower than the estimated cost of a nursing home but, more critically, the tool and the figure it produced became irrelevant where it had not been used to provide a basis for the respondent's estimate. We accept that submission. Mr Mitchell for the reclaimer argued for a reading of answer 14 which indicated that the estimate had been arrived at by applying a discretionary uplift to the figure produced by application of the tool. That is not what the averments say.

[31] That leaves the argument that because Mrs Q's needs were "highly unusual, even if they were not unique", as it is put in the reclaimer's note of argument, an estimate which proceeded on a broad estimate of what a care home might charge for 24 hour care with no attempt to benchmark particular care homes or particular care regimes was so inadequate as to be irrational. To an extent, that is to rerun the argument advanced as the first ground of appeal. We have rejected that argument. We have accepted that the respondent was entitled to conclude that Mrs Q's needs were not so different from other elderly persons at risk from falls, that while 24 hour care was called for, that could be provided in a care home

without one-to-one supervision and attention. Having concluded that Mrs Q's needs could be met in a care home without one-to-one care, the respondent arrived at the Calculation of Direct Payment by reference to what is charged by providers for admission to residential care. The Lord Ordinary considered that approach to be a reasonable one. As had been submitted to him by Ms Poole, the respondent pays for a substantial number of its citizens in care and may be expected to have a close and ongoing relationship with care providers giving it an intimate knowledge of the cost of residential care in Glasgow and an ability without too much difficulty to make a reasonable estimate of the cost of securing the relevant services. We would agree with the Lord Ordinary. Mrs Q's needs are of course individual to her but, when listening to Mr Mitchell it did seem to us that he was in danger of over-elaborating and unduly complicating the task of estimating the level of care which these needs call for. We see it as important not to lose sight of what was required of the respondent in making the Calculation of Direct Payment. As Ms Poole pointed out, where a supported person has opted for a direct payment sections 4 and 5 of the 2013 Act require a local authority to make payment of "the relevant amount". It is the relevant amount which was the subject of the Calculation of Direct Payment and which was advised to the petitioner in terms of section 5 (4). As is provided by section 4 (2) of the 2013 Act, the relevant amount is "the amount that the local authority considers a reasonable estimate of the cost of securing the provision of support for the supported person". What "the local authority considers is a reasonable estimate" is just that. It is for the local authority and not anyone else to make. It is an estimate rather than anything more precise, and while it must be reasonable, as is very familiar, that is a concept which affords significant leeway to the designated decision-maker. Here the respondent arrived at what it considered to be a reasonable estimate of the cost of securing the relevant services for Mrs Q having regard to

the level of the cost charged by nursing homes within its local authority area for providing equivalent services. We see it as having been fully entitled to do so. We reject the second ground of appeal.

[32] We have not been persuaded that either of the decisions challenged by the petitioner was irrational and therefore unlawful. We do not find the Lord Ordinary to have erred in dismissing the Second Petition. We shall refuse the reclaiming motion.