



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 56

P1224/18

OPINION OF LORD BRAILSFORD

In the petition

ANDREW LENNON

Petitioner

against

NHS HIGHLAND AND ANOTHER

Respondents

**Petitioner: Leighton; Balfour + Manson LLP**  
**Respondents: Khurana, QC; NHS Scotland Central Legal Office**

28 May 2021

[1] The petitioner receives payments under a scheme established under the Social Care Self-Directed Support (Scotland) Act 2013 (hereinafter “the 2013 Act”). In the circumstances of the present petition the respondents are Highland Health Board who as agent for the relevant local authority deliver the support package to which the petitioner is entitled under the provisions of the 2013 Act.

[2] In terms of his pleadings the petitioner challenges a draft Personal Outcomes Plan (“POP”) dated May 2018, challenged by appeal by the petitioner, which appeal is averred to have been refused by the respondents on 3 September 2018. It should be noted that the

respondents characterised the challenge to their decision, which they aver was dated 21 May 2018, as a “complaint”. In terms of the submissions made before the court nothing of materiality appears to turn on either the slight difference in dating or the linguistic divergence. The petitioner seeks (a) declarator that the respondents have acted and are acting unlawfully in restricting the choice of the petitioner to choose what support he wishes and (b) declarator that the petitioner is entitled to choose what support he wishes to meet the outcomes specified in his personal outcome plan.

[3] After sundry procedure spread over a relatively protracted period of time which, as I understand it, was largely occasioned because parties sought to resolve the issues underlying this petition without the need for judicial determination, the court, on 26 October 2020, allowed a substantive hearing confined to the petitioner’s third plea-in-law and the respondents’ seventh plea-in-law. The petitioner’s third plea-in-law provided that he: “... having an entitlement to choose his support declarator to that effect should be pronounced.” The respondents’ seventh plea-in-law stated that they were “... entitled to determine whether the expenditure under an Individual Service Fund Agreement was legitimately linked to the outcome sought under the Personal Outcome Plan.”

[4] The petitioner further lodged a “Note of Issues” in terms of which the following was identified as representing what remained in dispute between the parties:

“What the legal consequences are of [the petitioner] choosing option 2 in terms of the Social Care (Self-directed Support) (Scotland) Act 2013 (‘the 2013 Act’). In particular, whether and to what extent the respondents are permitted to regulate his choices of support in terms of that option. What limitations are in fact in place in relation to the petitioner, including what policies the respondents are applying to the petitioner’s case.”

## Statutory framework

[5] The statutory scheme which is relevant in the present petition is set forth in the 2013 Act. Section 1 thereof provides:

- “(1) A local authority must have regard to the principles in subsections (2) to (4) in carrying out its functions under - part 2 of the 1968 Act
- (2) A person must have as much involvement as the person wishes in relation to—
- (a) the assessment of the person’s needs for support or services, and
  - (b) the provision of support or services for the person ...
- (4) A local authority must collaborate with a person in relation to—
- (a) the assessment of the person’s needs for support or services, and
  - (b) the provision of support or services for the person.”

[6] The 1968 Act referred to therein is the Social Work (Scotland) Act 1968.

[7] In relation to the issue of options for self-directed support, section 4 of the 2013 Act provided four options. It was common ground between the parties to this petition that the petitioner in agreement with the respondents elected to proceed under option 2. Option 2 as set forth in section 4 of the 2013 Act is as follows:

“The selection of support by the supported person, the making of arrangements for the provision of it by the local authority on behalf of the supported person and, where it is provided by someone other than the authority, the payment by the local authority of the relevant amount in respect of the cost of that provision.”

Beyond that the court’s attention was drawn to the fact that there is a statutory code, entitled “Statutory Guidance to accompany the Social Care (Self Directed Support (Scotland) Act 2013.”<sup>1</sup> In terms of the introduction to the said document it was provided;

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<sup>1</sup> No 9 in the Core Bundle.

“The local authority must have regard to this guidance. It must follow both the letter and the spirit of the guidance. It must not depart from the guidance without good reason.”

### **Petitioner’s argument**

[8] The petitioner’s position was that he is a person in need of support. It was maintained that the purpose of the scheme in the 2013 Act was to provide people who need support with such support in a way that best suits their needs. It was noted that in the present case the responsible local authority had contracted out their duties under the 2013 Act to the respondents. My understanding was that none of these propositions were contentious.

[9] As to the procedure for implementing obligations under this Act and delivering services to persons in need of support the submission was that such persons were assessed, which process included identification of the outcomes which the support provided should seek to achieve. The information obtained and determined as a result of the assessment process was thereafter incorporated in a POP. The funding of the POP was the responsibility of the respondents. Again I did not understand that analysis submitted by the petitioner to be contentious.

[10] The contentious issue and, on the submission of the petitioner, the issue for determination by the court, came at the next stage in the process and was whether the petitioner was entitled to choose the support to meet his outcomes as determined by the POP or whether it was the respondents who made that determination. The petitioner’s argument was, not surprisingly, that he was the person who should make that decision.

[11] Developing the argument counsel for the petitioner contended that it was for the petitioner to choose the support to which he is entitled. He advanced an alternative

argument to the effect that the respondents, had not indicated the policies they utilised in their provision of support and, further, that their provision of support was inconsistent with the policies as disclosed to the petitioner. Notwithstanding the alternative argument counsel accepted that in terms of the aforesaid interlocutor of 26 October 2020 the hearing was confined to his first contention, that the petitioner was the decision-maker in relation to choosing support.

[12] The argument in support of the petitioner's proposition was based upon the wording of option 2 in section 4(1) of the 2013 Act. It was said that so long as the petitioner directs the funds available to him towards the aims of the POP it was not for anyone else to say what he uses the funds for in terms of the scheme. It was for him to decide if any item of support meets these needs or not. Beyond accepting that the petitioner required to act "lawfully and rationally" in making his choice of support counsel's submission was stark, it was for no one other than the petitioner. Failure to acknowledge that would, as a matter of submission negate the statutory scheme and render any choice what counsel characterised as a "fiction". It was said there was no justification within the scheme for providing for any overriding of the petitioner's choice by any other person. Support for this approach was said to be found in the statutory guidance section 4, paragraphs 8.2-8.25 and paragraphs 11.39-11.46.

### **Respondents' submission**

[13] At the outset of his submission counsel for the respondents whilst accepting the restrictions imposed upon the hearing by the interlocutor of 26 October 2020 submitted that it was necessary "... for the efficient disposal of the petition 'that his' ... other preliminary pleas" in so far as they relate to the respondents' seventh plea in law fell to be determined.

The pleas in question appeared to be the third, prematurity of the petition, and the eighth plea-in-law of time bar.

[14] As I understood it, counsel for the respondents' primary position was that the present petition was misconceived as a matter of fact. The petition was predicated on a decision dated 3 September 2018 when the respondents refused the petitioner's appeal against their decision of May 2018 reducing his entitlement to direct support payments and restricting their use. Given that the petition was based upon a decision of May 2018 alleged to restrict the petitioner's choice of support, it was said to be incumbent upon the petitioner to prove that the said decision as a matter of fact altered matters for him. If it did not so do then any striking out of that decision or declarator in relation to that decision, was said to be meaningless. Three reasons were advanced in support of the proposition that the petitioner had not proved this essential matter.

[15] First, it was submitted that the relationship between the petitioner and respondents was governed by a contract, referred to as the "tripartite agreement". The existence of this contract was a matter of express averment by the petitioner.<sup>2</sup> The contract was entered into in 2017. The petitioner was a signatory of the contract. A copy of that contract was produced.<sup>3</sup> The petitioner's position was that the respondents have "not conducted themselves in accordance with the agreement".<sup>4</sup> In these circumstances, if the petitioner's contention in relation to failure to comply with the contract by the respondents is of merit, then the petitioner's remedy is not truly one of administrative law habile to judicial review

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<sup>2</sup> See paragraphs 2 & 7 of the petition.

<sup>3</sup> No. 5 in Index of Documents for the petitioner, contract dated 1 May 2017.

<sup>4</sup> See paragraph 13 of the petition.

but should be based on the law of contract and advanced by means of a claim in respect of alleged breach thereof.

[16] The submission was developed by reference to the fact that it was a matter of agreement that the tripartite agreement was entered into in 2017. If, contrary to the argument of the respondents, the correct remedy was by way of judicial review, then the present petition having been raised more than three months after any alleged breach of the agreement, was out of time. The present petition was time-barred.

[17] A further development of the submission was that, again contrary to the primary position of the respondents, if the May 2018 decision did reduce the number of hours of support available to the petitioner then this was reversed following discussions between the parties in August 2019. The respondents' understanding was that the petitioner accepts this issue and the petition is accordingly no longer relevant.

[18] The second submission was that, following discussions between the parties, the level of support which the petitioner enjoyed was now subject to a new POP. It followed that any decision in relation to the superseded POP of May 2018 was no longer relevant.

[19] The respondents' third submission drew the court's attention to issues as to whether there had been any restriction on the petitioner's spending of the fund. It was maintained that this had not been established by the petitioner. In relation to restriction on spending the petitioner appeared to rely on expenditure of funds on a private tennis club membership. The contention appeared to be that the respondents did not permit this. Affidavits lodged on behalf of the petitioner in fact show that such subscriptions continue to be met and the respondents have made no effort to recoup same. Similarly, the contention that the respondents seek to restrict the petitioner's spending by use of policy was unproven and in fact contradicted by information provided by the respondents.

[20] The final matter advanced by the respondents was that the declarator sought by the petitioner was too wide and was accordingly unenforceable.

### **Analysis and decision**

[21] The question for determination by the court involves a determination of the rights and obligations of respectively the petitioner and the respondents in terms of the 2013 Act. A consideration of the relevant provisions of the 2013 Act must therefore be undertaken.

[22] The relevant provisions are section 1, which sets forth general principles to which regard must be had by persons, such as the respondents, implementing the provisions of the Act. The other relevant provision is section 4 which provides statutory options which shall be utilised in providing self-directed support. It is plain from the general principles set forth in section 1 that a person who is entitled to support

“... must have as much involvement as the person wishes in relation to - (a) the assessment of the person’s need for support or services, and (b) the provision of support or services for the person.” (Section 1(2)(a), and (b)).

The section goes on to provide that the person who requires support must be provided with assistance to enable him to express any views he may have about the options for self-directed support and to make an informed choice about these matters. The provision further requires the service provider to act in a collaborative way with the person to whom support is provided (section 1(4)).

[23] Section 4 of the 2013 Act sets forth four options for the delivery of self-directed support available to the recipient of such support with the intent of giving such a person a choice in the selection of the means of delivery of support which best suits his needs.

Option 2, the method of delivery chosen by the petitioner, provides for

“... the making of arrangements for the provision of it by the local authority on behalf of the supported person and, where it is provided by someone other than the local authority, the payment by the local authority of the relevant amount in respect of the cost of that provision.”

It is clear from the statutory provision that this option imposes obligations on the local authority, or their agent in the delivery of service, to make arrangements for the provision of the service and thereafter to make payment for the same.

[24] The foregoing statutory provisions are expressed in clear language.

Notwithstanding that consideration, the legislator determined in March 2014 to issue guidance expressly directed at local authorities as to the implementation of the 2013 Act.

The guidance, in so far as directed at local authorities, was in mandatory language;

“[T]he local authority must have regard to this guidance. It must follow both the letter and the spirit of the guidance. It must not depart from the guidance without good reason.”<sup>5</sup>

Paragraphs 8.20-8.25 of the 2013 guidance are directed at the delivery of option 2 of section 4 of the 2013 Act. The guidance provides that option 2,

“... describes an arrangement where the supported person selects the support that they wish and the authority, or subsequently a provider acting under the person’s direction, makes the relevant administrative arrangements on the supported person’s behalf.”<sup>6</sup>

The guidance further explains that “[T]he purpose of option 2 is to facilitate greater choice and control, making it easier for people to choose the provider of their choice, with the authority (or subsequently the provider) the servant of the support person, making arrangements on their behalf. In a later part of the 2013 guidance the following is provided:

“[T]he authority’s approach to option 2 should be based around the general principles in the 2013 Act ie collaboration, informed choice and involvement. The authority should involve users and carers, key user and carers’ groups, support and

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<sup>5</sup> Statutory guidance to accompany the Social Care (Self-Directed Support) (Scotland) Act 2013 (“the 2013 guidance”), paragraph 1.1.

<sup>6</sup> 2013 guidance, paragraph 8.20.

information providers and providers in designing and delivering their option 2 arrangements.”<sup>7</sup>

[25] In the present case it is not in dispute that the relevant local authority, the respondents as that authority’s agent and the petitioner had discussions as to how the support to which the petitioner was entitled should be delivered under the provisions of the 2013 Act. Again it is not in dispute that there was agreement as to how this should be achieved. That agreement was encapsulated in a document entitled “Individual Service Fund Agreement” which was entered into between the respondents, the petitioner and a private corporate body, Keltic Care Ltd. That agreement was dated 1 May 2017. As already noted the document is a production in this petition. The document is signed by all three parties. The level of support, entitled “ISF Agreement Budget” is stipulated as is the cost thereof. It is plain, and this was not in dispute, that the provisions in that agreement were intended to be implemented. The document has all the *indicia* of a contractual document. It was characterised in the argument before me as being a contract and I can see no reason why it should not be so considered.

[26] On the basis of the pleadings and, beyond that, in terms of the submissions I heard there is no doubt that the agreement entered into in May 2017 was implemented and acted upon by the signatories to the agreement. Moreover the agreement appears to have been a genuine attempt by the respondents to implement the obligations incumbent upon them in relation to providing support under the 2013 Act. There appears to be no dispute that the document followed upon a process of assessment in relation to the petitioner’s needs and that the respondents proceeded as envisaged by the legislation and the 2013 guidance in a collaborative manner involving participation of the petitioner.

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<sup>7</sup> 2013 guidance, paragraph 11.40.

[27] The issue in the present petition does not however concern the creation and implementation of the 2017 agreement but events subsequent thereto in May-September 2018. The complaint giving rise to the petition is set forth in paragraph 9 of the petition and is stated to be a decision of the respondents to reduce the payments made to the petitioner by way of support from 15 hours per week to 10 hours per week. In fairness there is some elaboration of this complaint in paragraphs 12 and 13 of the petition but these refer to matters at a later date in 2019 and, moreover, appear to involve issues of detail rather than of principle. The respondents' explanation for the change in the POP in May 2018 is set forth in the answers. In essence it is explained that the change occurred following an application from the petitioner which was appropriately considered by the respondents. The petitioner was consulted about it and was a participant in the discussions anent the proposal. The outcome of this consultative process was a reduction in the hours of support provided.

[28] It is clear that the petitioner disagreed with the outcome of his application and accordingly appealed or complained to the respondents about the same. That in turn was considered and the appeal rejected on 1 September 2018.

[29] I am not prepared to accept the petitioner's stark proposal that the process I have just described constituted a failure by the respondents to implement their obligations under the relevant provisions of the 2013 Act. The process I have described is, in my opinion, not only compatible with but, more strongly, appears to be an illustrative example of the operation of the relevant provisions of the 2013 Act as envisaged and described in the guidance of 2014 to which I have alluded. In essence the petitioner's position, as reflected in the two declarators sought, amount to a contention that he must choose what support he wishes and that the respondents must therefore provide the same. I do not consider that is what the statute

envisages. By contrast the statute envisages a proper assessment carried out by responsible officials in collaboration with the petitioner. When this is done the result of the assessment requires to be delivered by the respondents, again in collaboration and co-operation with the petitioner, but such a process does not, again in my view, deprive the respondents of discretion as to the means of delivery. Further, it cannot be ignored that in the context of the present case the third party, Keltic Care Ltd, were the agreed party to implement delivery of the service. The detailed complaints in paragraph 13 of the petition appear to be the responsibility of that company. It is difficult to see in the context of the tripartite agreement how responsibility for any issue in relation to delivery of care could lie with the respondents.

[30] Applying the foregoing considerations to the petition I have concluded that it has not been established that the respondents acted in breach of obligations incumbent upon them in relation to the provision of personal support under the 2013 Act. It follows that the first declarator sought has not been established. Equally I am not satisfied that there is any need for the second declarator. I should however state that I would in any event have reservations as to the terms of that declarator. They are extremely wide, "to meet the outcome specified in the personal outcome plan". Such a declarator ignores, for example, the method of delivery of the POP and who is directly responsible for such delivery. In the context of, as is the case here, a tripartite agreement involving a third party service deliverer the declarator as framed is, in my view, both lacking in specification and at least arguably misdirected.

[31] Whilst my foregoing conclusions are sufficient to determine the present petition I should, having regard to the scope of the respondents' submissions, make a number of further observations. First, there does appear to me to be force in the submission that the

complaints enunciated by the petitioner arise as a result of disagreements in relation to obligations expressed and arising from the Individual Service Fund Agreement of May 2017. Whilst the underlying rights and obligations giving rise to this agreement are plainly based upon the provisions of the 2013 Act, it does appear that the method of proceeding, consonant with the provisions of that Act, was by means of this agreement. I have already indicated that the agreement appears to be contractual in nature. It follows that I consider there is merit in the respondents' contention that the appropriate remedy in relation to obligations arising from the agreement are in private law and not by way of judicial review.

[32] I was, further, invited to have regard to the respondents' eighth plea-in-law, one of time bar. I would simply say that I am not prepared to consider that in the context of the hearing on the seventh plea-in-law. This is primarily because of lack of notice. Whilst counsel for the respondents raised the matter at the beginning of his submission, it was plain that counsel for the petitioner had not anticipated the same, which having regard to the terms of the interlocutor of 26 October 2020 was an entirely reasonable position. I accordingly make no determination in relation to the respondents' eighth plea-in-law.

[33] Having regard to all the foregoing, I sustain the respondents' seventh plea-in-law and dismiss the petition.