OUTER HOUSE, COURT OF SESSION

[2025] CSOH 38

P646/24

OPINION OF LORD LAKE

in the petition of

JODIE TAYLOR (FE/LA)

Petitioner

for

Judicial Review of a decision to reduce community care services under the Social Work (Scotland) Act 1968

Petitioner: M Dailly, solicitor-advocate, Drummond Miller LLP
Respondents: D Blair, advocate, Ledingham Chalmers LLP

17 April 2025

Dispute

[1] The petitioner seeks review of a decision concerning an assessment of her care needs by the respondent. The decision challenged was made in response to a complaint about the process in relation to the decision making, rather than the decision as to provision of care as such, but both parties have been content to approach the matter as if it were a challenge to the care decision itself.

Background

[2] The petitioner has hydrocephalus and spina bifida. She is a wheelchair user and is disabled within the meaning of the Equality Act 2010, section 6. She has health concerns

which give rise to a need for care. That is not in dispute, and I do not set out those concerns or the care required in this Opinion. Other matters not in dispute are that the petitioner is entitled to community care under the Social Work (Scotland) Act 1968, section 12A, and, that when an assessment is to be carried out by a local authority under that section, the law requires that a two-stage process is undertaken. The local authority in question must first ascertain the needs of the applicant and then go on to determine whether those needs call for the provision of services.

[3] Until December 2022, the petitioner lived in an area for which East Renfrewshire Council was her local authority. Following a community care needs assessment by that Council, she received a care package paid for by the Council amounting to a total of 61 hours per week. This included 6 hours of respite care for her mother with whom she lived and who provided a substantial amount of care for her. In December 2022, she and her mother moved to the area of the respondents, South Lanarkshire Council. The respondents carried out an assessment of the petitioner's needs in terms of the Social Work (Scotland) Act 1968, sections 12 and 12A, and then provided her with a draft support plan. This process required meetings between the petitioner and her mother, on the one hand, and the respondent's employees on the other. To give time for this to be done, East Renfrewshire Council continued to provide support for the petitioner for a period of 12 weeks after she moved out of their area. The respondents were, however, unable to complete the work required to carry out an assessment of the petitioner's needs and devise a support plan within the 12 week period. In view of this, they undertook to continue the level of support that had been provided by East Renfrewshire Council during the process, but made it clear that this was without prejudice to the assessment and support package they would provide after they completed their work.

[4] The respondent's assessment was completed in June 2023. This assessment of needs does not state the number of hours of non-residential care that will be required. It considers a number of aspects of the petitioner's life. In relation to each, it assesses a risk level. The published policy of the respondents is that where risk is assessed to be in either the substantial or critical category, the Health and Social Care Partnership has a legal duty to provide funded support (South Lanarkshire University Health and Social Care Partnership, Eligibility Criteria Guidance for Adults and Older people and Community Care Services, paragraph 3.5). Where the risk is assessed at one of the lower levels, there is no duty to provide support. There is no dispute in relation to this petition that the adoption and application of this policy is lawful.

[5] While the outcome of this application does not turn on it, there was a dispute as to whether or not the petitioner was provided with a copy of the assessment. The petitioner maintains that she was not provided with a copy of the assessment, contrary to Scottish Government Guidance, but the respondents contended that she was. As the matter has been considered in submissions, I would record that, on the basis of the documentation that has been lodged, it appears that the assessment was discussed with the petitioner and her mother and therefore it must have been provided in some form to them.

[6] Following the assessment, there were further discussions about the support plan that the respondents would put into place. This culminated in a proposed support plan. This was set out in a colour coded table. The contents may be summarised as showing 9 hours of care to be provided by the respondents on each day from Mondays to Thursdays. This consisted of three and a half hours of personal care and five and a half hours of non-personal care. On Sunday, the plan indicated the Council providing only three and half hours of personal care. For Friday, it showed 9 hours of care (three and half hours of

personal care and five and a half hour of non-personal care) and on Saturday it showed 6 hours of care (three and half hours of personal care and two and a half hours of non-personal care). In relation to both Friday and Saturday, it showed all care being provided by the Independent Living Fund. The Independent Living Fund distributes money from the Scottish Government to support individuals who have complex disabilities to live independently. Monies are not available from the Fund as of right.

[7] The petitioner was dissatisfied with what the respondents were proposing because it was less than had been provided by East Renfrewshire Council and made a complaint regarding it. The decision in relation to that was given by letter dated 19 July 2024. That letter summarised the support plan which the respondents were willing to make available. The plan described in the letter allowed for a total of 54.5 hours of support per week, of which 15 hours would be provided from the Independent Living Fund, with the respondents providing the balance of 39.5 hours. This was the position noted in the draft support plan described above. The letter indicated that if the petitioner wished to apply for support from the ILF to pursue this option, the Council would support it. The letter said that the Council could not make the application on her behalf but that they had liaised with representatives of the ILF to ensure that the proposed level of support would be considered. The letter stated that if the petitioner did not wish to proceed with an application to the ILF, the support plan would revert to 48.5 hours of support per week. It stated that this would include the hours of personal care support required on the Friday and Saturday that would have been met through the ILF in the proposal. It said that this option would "mitigate all substantial and critical risk – while at the same time [would] meet your identified outcomes" but would have eight fewer hours of social support (ie non-personal care).

[8] Scottish Government policy on Self Directed Support means that there are a number of ways in which support such as that which the petitioner will receive can be provided, and the recipient of support should be engaged in the process of deciding how best that be done. In the circumstances of this case, there is no dispute as to how support should be provided. The respondents offered to provide it by means of direct payment to the support provider and this was the method preferred by the petitioner.

Issue

[9] The petitioner contends that the respondents have offered support at a level which is less than had been indicated as required by a needs assessment. She contends that they have "reduced" the hours of non-residential social care and claims that this is unlawful in terms of the Social Work (Scotland) Act 1968, that this decision is irrational, and that this decision is in breach of the public sector equality duty imposed by the Equality Act 2010. The respondents' answer is that the petitioner's approach misconstrues the factual position. They maintain that there has been no "reduction". They contend that the decision in question provided 100% of her needs as assessed by them and also made provision for additional care if she wished to take advantage of it. In that situation, they contend that it is not irrational and satisfied the public sector equality duty.

Submissions for the petitioner

[10] The petitioner contends that in relying on the ILF to provide part of the support assessed as required, the respondents were breaching the requirements of the 1968 Act and were acting *ultra vires*. It was submitted that the local authority are not entitled to purport to rely on a third party to meet a share of the statutory assessed care needs. Because the draft

support plan relies on the ILF providing care - including care required to meet needs assessed as critical or substantial - for two days each week, it was said that this was unlawful. It was noted that a published policy in relation to the Fund states that "ILF Scotland funds are not designed to meet statutory needs as assessed by an HSCP/HSCT" (Independent Living Fund Scotland, Policy 41 – Use of ILF Scotland).

[11] The petitioner also contended that the respondent's decision was unlawful as she had had medical procedures in February 2024 that meant she had increased needs. The respondent had failed to take this into account, and it failed to revise its care assessment from June 2023. This was said to be irrational on the basis there was no logical indication as to why the respondent considered that the petitioner's social care needs have not increased.

[12] The last challenge was that in reducing the community care services to be provided, the respondents had failed to discharge the public sector equality duties incumbent on it under the Equality Act 2010, section 149. It was contended that the respondents had failed to have due regard to the need to achieve the goals identified in section 149(3)(a) – (c) which state the requirement to have due regard to the need to:

> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

By reference to *R. (on the application of Bracking)* v *Secretary of State for Work and Pensions*, [2013] EWCA Civ 1345, it was noted that.

> "The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument"

Submissions for the respondents

[13] A key element of the response to the petitioner's case by the respondents was that she had misconstrued what the support plan represented. It was said that the needs had not been assessed as 54.5 hours a week with 15 hours of care funded by the ILF. The level of support to be provided had been assessed at the lower level of 48.5 hours of care. The Council had considered use of the ILF to augment that provision. The draft support plan envisaged a level of support which went beyond that which the respondent was required to provide in terms of the 1968 Act. The provision of 54.5 hours would involve meeting all that was required and would also provide an additional 6 hours of social support. Although the proposed plan indicated that some of the 48.5 hours was to be provided by the ILF, the council submitted that this had been an arrangement that would be efficient for them and the ILF. The respondents nonetheless accepted that the bottom line requirement was to provide care at the level of 48.5 hours per week. There was no question of the petitioner being provided with only 39.5 hours of care a week. The figure of 39.5 hours was what they would provide if the ILF were providing a further 15 hours, and the figure of 48.5 was what they would provide if the petitioner did not wish to take up the option involving the ILF. This meant that the move from 54.5 hours to 48.5 hours per week did not represent a reduction against the assessed need at all. It simply represented a level of provision which matched the needs assessment but no more than that. The additional hours would only be allowed or available if the petitioner applied for and was successful in obtaining monies

from the ILF. It was important to understand that the needs assessment was not that the petitioner be provided with 54.5 hours and that there was no intention that the Council would provide only 39 hours per week – the amount that was shown in the draft plan that they would provide as part of the total of 54.5 hours a week.

Discussion

[14] It seems that part of the petitioner's concern about a reduction in the proposed provision of care stems from the fact that what the respondents will provide is less than was provided by East Renfrewshire Council. The respondents emphasised that this was not an appropriate contrast as it was not comparing like with like as the East Renfrewshire Council support package included some respite care which theirs does not. However, the key point is that it is not appropriate to compare the respondent's figure with that for East Renfrewshire Council and consider it a reduction. The respondents were obliged to make their own assessment of needs and provide their own support plan. The change from the level provided by East Renfrewshire Council reflects the respondent's different assessment and cannot in isolation support a ground of challenge.

[15] It is also possible to see why some confusion has set in as to precisely what level of support had been assessed as being needed and what level would be provided by the respondent. The proposed support plan provided is set out in a way which makes it look as if part of the support necessary to cover the critical and substantial risks would be provided by the ILF. It appears at first that the Council would only provide 39 hours support as opposed to the 48.5 hours. However, on careful reading of the letter and as the matter has been explained to me in submissions and by affidavits, it is apparent that the respondent accepted all along that they would provide 48.5 hours in order to meet the assessed need for

care. They would provide 39 hours only if there was a successful application to the ILF and there was an arrangement in terms of which the ILF would provide personal care on the two days a week in which they provided social support. Because the respondents are willing to provide the 48.5 hours of care, and that was sufficient to meet the substantial and critical risks identified by them, it cannot be said that there is a reduction from the level of care assessed to be needed.

[16] The conclusion that when the offer from the respondents is properly construed it does not represent a level of care less than has been assessed to be required is an answer to all the petitioner's grounds of challenge. The respondents are not relying on discretionary funding from the ILF in order to meet assessed need. They are using it to provide something in addition to the assessed need. Although there might be an arrangement whereby the ILF provide some element of care required to address critical or substantial risks, that is not a necessary element of the proposed plan and the respondents will provide a baseline level that is sufficient. They have therefore not acted in a way that is *ultra vires*. Neither can it be said their decision meets the high test for irrationality. The purpose of the assessment is to implement the public sector equality duty, and it addresses the factors identified in section 149(3)(a)-(c) of the 2010 Act. The assessment has been carried out in accordance with policy and the merits of the decision are not the subject of challenge.

[17] In these circumstances, I refuse the remedies sought in the petition. I reserve issues of expenses.