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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

McClean's (Kathleen) Application [2011] NIQB 19

IN THE MATTER of an Application by Kathleen McClean for Judicial Review

McCLOSKEY J

I INTRODUCTION

[1] The focus of this application for judicial review is the adequacy of the social care provision made for the Applicant by the Respondent, the Western Health and Social Care Trust ("*the Trust*"), in certain discrete respects.

[2] The Applicant, Mrs. Kathleen McClean, was born on 29th August 1935 and is now aged seventy-five years. She suffers from impaired physical mobility and, as a result, mobilises in a wheelchair. It is documented that she has a history of atrial fibrillation, osteoarthritis, peptic ulcer, depression with anxiety and oedema of her legs. Her upper body mobility is described as minimal. She lives alone in a specially adapted bungalow forming part of a supported housing environment. It is apparent that Mrs. McClean leads a fairly solitary existence, with limited social contact. It would appear that, apart from care assistants, her only visitor with any degree of frequency is a son.

[3] Mrs. McClean's social care needs have been assessed by the Trust, in the exercise of its statutory functions, from time to time. As a result, she has an extant care plan, which has been revised and updated periodically. Since around September 2008, her approved domiciliary care provision has consisted of the Trust's care assistants providing the following daily services:

(a) Assistance in dressing and preparing breakfast for half an hour daily.

(b) Assistance in preparation of lunch and dinner and the application of cream to her legs for one hour daily.

(c) Evening assistance for essentially the same purpose, of one hour's duration, daily.

Thus the total weekly provision is seventeen and a half hours. It is common case that until September 2008, the Trust also provided domiciliary cleaning services for one and a half hours per week, probably dating from around 2003. This service was withdrawn, in circumstances which have proved somewhat controversial, and has not been reinstated subsequently. The withdrawal and non-restoration of this particular service represents the first limb of Mrs. McClean's challenge. She avers that this service had previously consisted of hoovering all carpets and washing the kitchen and bathroom floors, for one and a half hours per week. During this period, Mrs. McClean claims that she secured additional domestic cleaning and laundry services out of her own finances. She complains that since the Trust withdrew this service, she has been obliged to fund all of her domestic cleaning services at a cost of £6 per hour for between six and eight hours weekly (totalling £36/£48 per week).

[4] The second limb of Mrs. McClean's challenge relates to the non-provision by the Trust of a service to assist her in transferring from bed to toilet during the night. This represents the evolution of an earlier complaint, encapsulated in paragraph 7 of her second affidavit:

> "*The Trust offered me a bedtime service which consisted of a care worker coming to my home to dress me and put me to bed at 7.00 pm each evening. I did not mind being dressed for bed at 7.00 pm but did not wish to go to bed so early. I therefore asked if it would be possible for a care worker to come later in the evening to put me into bed. This proposal was refused. I have to employ someone privately to dress me and put me into bed. She comes at 10.00pm.*"

It is clear from the presentation of her case that the issue of a 'bedtime provision' service is not under challenge. Rather, Mrs. McClean complains about the Trust's failure to provide her with an 'overnight carer's attendance' service. It is asserted that this service costs her some £140 weekly (at a rate of £20 per night). Mrs. McClean further avers:

> "*I have little left from my income to pay for the essentials such as food and fuel charges. I am often stressed by the worry of my finances …*
>
> *I do not want to go into residential care until I am unable to live independently. I have two particular needs which I believe should be met by the Trust given my age, infirmity*

and health – cleaning and night time care for transfer to and from bed for toileting."

These latter averments confirm the correctness of the court's assessment of the two limbs of the challenge.

[5] The factual résumé rehearsed above, stripped of subjective claims and opinions, is basically uncontentious. It is clear from all the evidence that Mrs. McClean is a proud and independent lady who wishes to preserve her independence, privacy and dignity for as long as possible. Her case is that the Trust's refusal to provide the two services in question is unlawful. The illegality of which she complains is founded, firstly, on two separate statutory provisions:

(a) Article 15 of the Health and Personal Social Services Order (Northern Ireland) 1972.

(b) Section 2 of the Chronically Sick and Disabled Persons (Northern Ireland) Act 1978.

Although the amended Order 53 Statement invokes certain other statutory provisions, these did not feature in the presentation of Mrs. McClean's case. At the outset, Mr. Potter (of counsel) helpfully clarified that Mrs. McClean's challenge is based primarily on Article 15 of the 1972 Order. As will become apparent, there are certain departmental criteria governing how Trusts are to discharge their functions under the statutory provisions in question (see Chapter III, *infra*). The thrust of Mrs. McClean's challenge is that the Trust has not applied these criteria lawfully in her case.

[6] Mrs. McClean's challenge has a second legal basis, which materialised during the course of the hearing. It is based on a Departmental Circular addressed to all Trusts, dated 3rd June 1999. This contains the following directive:

"*In cases where community care services have been limited solely because clients are in receipt of the higher rate of benefit, the Minister has decided that receipt of Attendance Allowance or other disability related benefits should not be taken into account in decisions about the provision of community care services*".

[I shall describe this as "*the 1999 directive"].*The Applicant makes the case that the Trust has acted in contravention of this prohibition. During the hearing, the court granted permission to amend the challenge to incorporate this additional ground, an adjournment ensued and the Trust responded accordingly. The Trust's response confirms that this directive remains in vogue, unabated and unmodified.

II STATUTORY FRAMEWORK

[7] It is unnecessary to rehearse extensively either the relevant statutory framework or the related decided cases as both are set out fully and recently in ***Re LW's Application*** [2010] NI 217, at paragraphs [18] – [45]. Article 15 of the 1972 Order lies at the heart of the Applicant's challenge. This provides:

> "*In the exercise of its functions under Section 2(1)(b) of the 2009 Act the* [Department] *shall make available advice, guidance and assistance, to such extent as it considers necessary, and for that purpose shall make such arrangements and provide or secure the provision of such facilities (including the provision or arranging for the provision of residential or other accommodation, home help and laundry facilities) as it considers suitable and adequate*".

Section 2 (1) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 enshrines the Department's "target" duty to promote "*social care designed to secure improvement in the social wellbeing of people in Northern Ireland*".

The submissions of both parties highlighted particularly paragraph [45] of the judgment in ***Re LW,*** which contains the court's analysis of the anatomy of Article 15 of the 1972 Order and its inter-relationship with established public law principles:

> "*[45] In my opinion, Article 15 of the 1972 Order is to be analysed in the following way:*
>
> > *(a) It constitutes the more detailed outworkings of the general, unparticularised duty enshrined in Section 2(b) of the 2009 Act (formerly Article 4(b) of the 1972 Order), which is to be construed as a "macro" or "target" duty, akin to a general principle (per Lord Hope in* ***Barnett LBC,*** *supra).*
> > *(b) It is for the authority concerned to make available advice, guidance and assistance to such extent as it considers necessary. This plainly invests the authority with a discretion, to be exercised in accordance with well established principles.*
> > *(c) For the purpose of making available advice, guidance and assistance to such extent as it considers necessary, the authority shall make such arrangements and provide or secure the provision of such facilities as it considers suitable and adequate. This language also clearly confers a discretion on the authority.*
> > *(d) Bearing in mind the present context, it is expressly provided that such "facilities" may include*

the provision or arranging for the provision of residential or other accommodation.
(e) Once a decision on what the authority considers "necessary" and/or "suitable and adequate" has been made, the discretion in play is exhausted. The assessment having been made, a duty of provision arises.

This analysis accommodates the proposition that, in making the assessment in each individual case, the authority can properly take into account factors such as available resources, the demands on its budget, the particular circumstances of the individual concerned and their family, including their resources, the availability of facilities and its responsibilities to other members of the population. The ingredients of this proposition are a process of reasoning by analogy with the decision in ***Barry*** *and the well established principles of public law summarised in* ***Administrative Law*** *(Wade and Forsyth, 10th Edition) pp. 321-322. Thus factors of this kind can properly influence the assessment to be made in an individual case. However, when the assessment has been made, I consider that discretion is supplanted by duty. This, in my view, is the effect of the presumptively mandatory "shall", which contra indicates any suggestion that discretion should prevail from beginning to end. Had the latter been the legislative intention, one would expect to find its expression in the discretionary "may".*"

Neither party challenged the correctness of any aspect of this passage.

III THE ASSESSMENT CRITERIA

[8] The Trust discharges its statutory functions in this sphere in accordance with certain criteria annexed to the Departmental Circular ECCU2/2008, dated 27th May 2008, entitled "Regional Access Criteria for Domiciliary Care" (hereinafter "*the Circular*"). This was designed to introduce uniform assessment criteria throughout the departmental region of Northern Ireland. Trusts were directed to implement these criteria with immediate effect. In the Introduction to the Circular, the overarching purpose and philosophy are expressed thus:

"*The key principle behind these eligibility criteria is that people should be helped wherever possible to live independent lives with safety and dignity in their own home*".

The Circular continues:

> "*Trusts have a responsibility to use their resources fairly and wisely. These eligibility criteria are designed to determine how vulnerable a person is, what risk they face now and in the future and to ensure that those at greatest risk are given the highest priority …*
>
> *Wherever possible domiciliary care services should be 'rehabilitative' in nature, enabling people to help themselves, maintaining existing skills and developing appropriate new ones, rather than 'doing' to or for them. The primary responsibility is to those at greatest risk, either to themselves, their carers or others*".

Thus the primary meaning of "*risk*" in this context relates to the safety of the individual and carers. Its further shade of meaning appears to be *risk to independence*, bearing in mind the "key principle". I accept the submission of Mr. McGleenan (of counsel, on behalf of the Trust) that within these passages one can identify the aims of encouraging and perpetuating autonomy and self-sufficiency – and, in my view, simultaneously reducing the cost to the public purse.

[9] It is clear from the Circular that the omnibus term "*domiciliary care*" embraces a combination of personal care and associated domestic services. The definition provided is:

> "*The provision of **personal care** and associated domestic services that are necessary to maintain an individual person in a mutually agreed measure of health, hygiene, dignity, safety and ease in their home*".

The Circular contains a series of provisions governing the methodology of domiciliary care assessments. In particular, they are to be conducted in a transparent and informative fashion and are designed to enable the person affected to "*understand the basis on which decisions are reached*". Under the rubric of "Assessment", the Circular establishes a dichotomy of (a) "*presenting needs*" and (b) "*eligible needs*":

> "***Presenting needs** are the issues and problems identified when an individual lis referred to the Trust for social care support. **Eligible needs** are those 'presenting needs' for which the Trust will provide help because they fall within the eligibility criteria*".

Thus a person's presenting needs can potentially qualify as eligible needs, but will not necessarily do so. The determination of whether a person has eligible needs and, if so, what these are is made following a so-called "*person centred assessment*". The

Circular further emphasizes the importance of a properly conducted assessment. In particular, as regards the assessment of risk to the individual's independence:

> "*This risk assessment will take account of the client's autonomy, health and safety, ability to manage daily routines and involvement in family life*".

[10] The Circular establishes a hierarchical rating, or grading, system. Paragraph 9 states:

> "*While the assessment should determine overall risk, different needs can pose varying risks and should, therefore, be banded accordingly. It is therefore essential that 'the individual' is NOT banded. Identified risks to independence, or personal safety, should then be compared to the eligibility criteria (and banded as critical, substantial, moderate or low), thus enabling eligible needs to be identified*".

The thrust of this somewhat opaque paragraph appears to be that a person's needs, rather than the person concerned, are to be assessed and rated accordingly, while a global approach to the exercise is to be avoided.

The Circular continues:

> "*The determination of eligibility in individual cases should take account of the support from carers, who have a statutory entitlement to have an assessment in their own right. Carers may include family members, friends and neighbours who can help them* [sic] *individuals meet their presenting needs. If, for example, an individual cannot perform several care tasks, but assistance can be accessed from another source, then this would not be classed as an eligible need*".

These passages make clear that a person may have evident, or presenting, needs which do not qualify as "*eligible*" within the meaning of the Circular, which then provides:

> "*Appropriate domiciliary care services will be provided if the individual risk assessment identifies a critical or substantial risk to independence and help cannot be sourced from elsewhere. Commissioners will determine with Trusts which services can be provided to those individuals who following a risk assessment are determined to fall within the categories of moderate or low priority. This determination will be reached on the basis of resources available*".

Accordingly, the effect of the Circular is to allocate the Trust's resources primarily to those individuals who, following assessment, are deemed to have a **critical or substantial** risk to independence and have no available source of assistance. Such individuals, by definition, have "*eligible needs*" and qualify for the receipt of "*appropriate domiciliary care services*". The **measurement** of the appropriate service represents the second stage of the exercise: this does not arise in the present challenge. In contrast to the assessed members of the 'critical or substantial risk' group, those to whom the third or fourth ratings (viz. moderate and low) are allocated may not receive any domiciliary care services from the Trust.

[11] In short, the scheme of the Circular is to give priority to those whose social care needs are assessed as critical or substantial, as defined. It envisages that those who receive a rating of moderate or low are unlikely to receive any Trust provided service to address the identified need. In particular, as regards the "low" grading [which is engaged in this case], the Circular states:

> "*Low priority ('low risk') – where a service cannot be provided, individuals should be given advice and information about assistance available from other organisations*".

The Circular continues:

> "*Alternatives to the need for domiciliary care assistance must always be explored during the assessment to include the availability of contributions from own resources/family/ wider community/voluntary sector/other agencies …*
>
> *Where services cannot be provided a register of 'unmet need' should be collated by the Trust for use in future planning and service enhancement and development*".

This latter provision is consistent with the dichotomy of eligible needs and ineligible needs. The Circular concludes:

> "*Review is an essential in ensuring that appropriate domiciliary care is available to those most in need of it. All individuals should be advised at their assessment that this will be reviewed on a regular basis and that any services provided may be changed (including reduction or withdrawal) if their needs and risks have changed*".

The unspoken message conveyed with tolerable clarity by the Circular is one of progressively emasculating public resources with a consequent reduction in Trust financed domiciliary care provision for the population. Stated succinctly, the policy aims to distribute the Trust's finite resources (viz its social care budget) amongst

those members of the population assessed as having the greatest needs. I observe, in passing, that from the perspectives of propriety, rationality and legality, this policy seems unimpeachable.

IV THE TRUST'S RECORDS AND REPORTS

[12] I shall concentrate only on the salient features of these materials, which confirm that Mrs. McClean has been assessed and reassessed by the Trust from time to time. Focussing on the period under scrutiny, the first significant record is dated 31st July 2008. This notes, in material part:

> "*Kathleen is interested in giving up one and a half hours cleaning for half an hour a.m. Saturday and Sunday but also wants other half hour for one bedtime and she would pay someone for other bedtime*".

Here, Mrs. McClean was expressing a preference for an increase in personal care and was apparently discussing a *quid pro quo* with the Trust's social worker. It was, in simple terms, a bartering exercise. On 4th August 2008, it was recorded that Mrs. McClean was undecided about this rearrangement. The next record is dated 15th August 2008. This documents a further discussion with Mrs. McClean relating to alterations to her care plan:

> "*Cleaning one and a half hours taken out – Kathleen will pay a private cleaner –*
>
> *Teatime – one hour reduced to three-quarters of an hour x 7*
>
> *Task of rubbing on cream on legs taken out …*
>
> *Instead – new provision – care ½ x 7 nights 8.15 – 8.45 – help to bed, rub cream on legs and secure house …*
>
> ***Kathleen happy with arrangements***".

[Emphasis added].

What one distils from these particular records is a reconfiguration of the Trust's social care provision for the Applicant, entailing no additional allocation of resources, apparently on a consensual basis.

[13] Next, on 21st August 2008, the outcome of an assessment of handling risks relating to the Mrs. McClean's care was a grading of "low risk". On the same date, Mrs. McClean transmitted a six page letter to the Trust, which contained two requests. The first was to "*cancel bedtime carers*". Allied to this was a request for overnight care. Secondly, she expressed her unwillingness to pay for domestic cleaning. It would appear that Mrs. McClean had suffered a fairly abrupt change of

mind. The record of a social worker's visit to Mrs. McClean's home on 2nd September 2008 includes the following:

> "*Currently no identified unmet need. Kathleen has changed her mind, does not want evenings to continue because she needs to go out to get shopping …*
>
> *Kathleen wants to revert back to old care plan, but cleaning will not be put back because of policy directive …*
>
> *One and a half hour cleaning time saved has been approved to cover Saturday and Sunday morning home help half an hour* ***if*** *this is available from domiciliary care …*".

This was, effectively, a reassessment of Mrs. McClean's needs which resulted in reinstatement of the original care plan, omitting the cleaning service. Thus, from this date, Mrs. McClean's social care provision has consisted of the three daily services listed in paragraph [2] above. It would appear from other records that the entity "Flexicare" then began to provide Mrs. McClean with domestic cleaning services of one hour's duration, apparently once weekly, but did so only for the briefest of periods. Mr. Potter informed the court that this ended because the Applicant considered the cost to be excessive.

[14] Around one year later, on 14th August 2009, Mrs. McClean was the subject of an assessment review, the outcome whereof was documented in the following terms:

> "*Kathleen is managing at home with input from home help and equipment in situ. She stated she gets anxious and feels isolated but declined referral to day care. Did accept referral to Flexicare for social contact outings. Also requested application for transfer to Rose Fold*".

The next material development consisted of a letter dated 2nd November 2009, written by the Law Centre on Mrs. McClean's behalf. This signalled the beginning of a correspondence phase. I would compliment the parties and their representatives for the obvious care taken in the compilation of these exchanges, having regard to the pre-proceedings Protocol. The central complaint enshrined in this initial letter concerned the withdrawal of the cleaning service, Mrs. McClean's physical inability to undertake domestic cleaning and her consequential need to fund this service "*… out of her state benefits which is financially burdensome for her*". This letter also raised the issue of overnight care provision. In response, the Trust's Chief Executive stated, by letter dated 30th November 2009:

> "*In October 2008 Mrs. McClean's care package was redesigned, at her request, to provide a seven day service for personal care which resulted in the dispensing of the*

> *cleaning service; and later she requested that the plan be revised to include cleaning. This was not possible to reinstate as it did not meet the Regional Fair Access Criteria for Domiciliary Care*".

Two comments about this letter are appropriate. Firstly, it did not explain *why* in the Trust's estimation, the criteria were not satisfied. Secondly, it confirms the direct nexus between the withdrawal of the cleaning service and the extension of the personal care service provided to Mrs. McClean: the 'price' for the latter was relinquishment of the former. Further correspondence ensued, culminating in the Trust's agreement to carry out "*a full comprehensive assessment of Mrs. McClean's needs*". On 16th June 2010, these proceedings were initiated. The correspondence suggests that, at that stage, the Law Centre were unaware that the comprehensive reassessment had recently been completed [and this was later acknowledged in a solicitor's affidavit].

[15] It is clear that the mid-2010 comprehensive reassessment of Mrs. McClean's needs involved, in sequence, three separate disciplines: nursing, occupational therapy and social care. The "Nursing Assessment Record" is dated 25th March 2010. It documents the need for an occupational therapy assessment of Mrs. McClean's ability to transfer from bed to wheelchair and from wheelchair to toilet. She is described as "*wheelchair bound*". The contemporaneous notes do not record any definitive outcome. Next, there were two occupational therapy visits to Mrs. McClean, giving rise to a report dated 11th May 2010, which records:

> "*Ms McClean appears to have good family support from her son who lives nearby and he was present during both … assessments …*".

With regard to toileting viz. transferring from wheelchair to toilet, concerns were recorded, giving rise to the fitting of a raised toilet seat which Mrs. McClean apparently removed "*… as the client reports that it becomes loose, she does not wish to reconsider the use of any toileting aid*". Under the rubric "Home Management", the report records:

> "*Ms McClean requires someone to attend to all domestic activities of daily living. She would be unable to complete any household chores such as meal preparation, laundry or cleaning. It was apparent during visits that Ms McClean's son assists her in these areas*".

The report concludes:

> "*Ms McClean's ability to carry out all activities of daily living is extremely compromised both by her physical presentation and by her refusal to properly use adaptive equipment. She is adamant that equipment will be of no*

benefit to her and that her transfer techniques are the most suitable for her. It has been emphasized to the client that by continuing with unsafe transfer techniques and refusing adaptive equipment she is increasing her risk of falls and subsequent injury."

[16] The third of the reports generated during this comprehensive reassessment of Mrs. McClean's needs was a social care assessment report, dated 20th May 2010 entitled "Summary of Assessment". This records, *inter alia*:

"***Family and Community Support***

Kathleen reports she has a son who lives close by and visits on a daily basis. He assists her with home management chores …

Risks

Kathleen would be at risk of falls. The occupational therapist has offered equipment and advised on transfer techniques, however Kathleen is unwilling to avail of these …

Social worker has offered morning and evening carers to assist with personal care, Kathleen has declined this and stated she prefers to try to be as independent as possible …

Kathleen was offered a private cleaning service from MCDI [viz. …]. *Kathleen declined this offer.*"

In short, this report documents a series of refusals on the part of Mrs. McClean, which were: to decline an offer of more suitable seating; to refuse to avail of certain more appropriate toileting methods and aids in her home; to refuse to demonstrate how she transferred into and out of bed; and to decline a continence assessment. There appears to be no controversy about these discrete matters. Next, in June 2010, Mrs McClean reported that "*… she is paying too much for overnight stays and would like a carer to get her ready for bed and return later to put her to bed*". The response was:

"***Bedtime slot not available at present***. *Unmet need form to be completed*".

This response is difficult to interpret, since it does not incorporate any eligibility rating. Subsequently, on 19th August 2010, it was recorded that Mrs. McClean had three unmet needs:

"*Carer a.m. …*

Carer p.m. …

Home help for cleaning."

It is appropriate to recall, in this context, that pursuant to the scheme of the Circular *unmet needs*, if properly assessed and identified, appear to equate with *ineligible needs.* However, once again, there is no recorded eligibility rating.

[17] There is some controversy regarding the domestic services, if any, provided by Mrs. McClean's son. In her second affidavit, sworn in November 2010, she avers that her son is not in good health and has been living in sheltered accommodation, some two miles from her home, since mid-2010. She asserts that he does not perform any household chores for her. There are certain related averments in the second affidavit sworn by Ms Southern of the Law Centre:

> "*I contacted the fold/housing development where he resides and spoke to … the Scheme Co-ordinator. She confirmed that John is in sheltered accommodation and that he was allocated this accommodation because of his poor health. She said that he would not be able to do much for himself, and that she is in the process of preparing a support plan for him …*
>
> [John] *told me that whilst he visits* [his mother] *regularly he does not do any household chores for her and is not fit to care for his mother or help with her household management*".

Notably, none of the aforementioned averments by Mrs. McClean or her solicitor is contested by the Trust. Mrs. McClean describes her current social care provision in the following terms:

> "*The Trust provides me with a care worker for two hours and thirty minutes every day. A care worker comes to my home at 8.00am each morning and helps me dress. She also prepares and serves me breakfast. She is allocated thirty minutes for these tasks. A care worker comes each day at 12 noon. She prepares and serves my lunch and is allocated forty-five minutes for this task. She also rubs cream into my legs as they are permanently swollen. She has fifteen minutes allocated for this task. A care worker comes in at 4.00pm each day to prepare and serve my dinner. She has forty-five minutes allocated for this task. She also rubs cream into my legs and is allocated fifteen minutes for this task.*"

These averments chime with the résumé of Mrs. McClean's care plan contained in paragraph [3], *supra* and is uncontentious.

[18] Following the initiation of these proceedings, in June 2010, the correspondence between the Law Centre and the Trust's legal representatives continued. The Law Centre's letter dated 24th June 2010 includes the following assertions:

> "*The position remains that Mrs. McClean requires assistance with getting into and out of bed at all times…*
>
> *The Trust has identified a need for someone to attend to all my client's domestic activities including laundry and cleaning. Please explain the extent of the need in terms of hours and tasks and advise how the Trust intends to meet the need for laundry and cleaning …*
>
> *Mrs. McClean insists that her son, John McClean, does not assist with these activities. He suffers from a heart condition and a number of other illnesses and would not be able to assist her…*
>
> *He merely provides her with social interaction during his visits …*
>
> *The Trust has identified that Kathleen is at risk of falls …* [she] *has to get up three or four times during the night to use the toilet. At these times she requires the assistance of another person …*
>
> *Mrs. McClean's health is at serious risk without a cleaning service in place. I would remind you that my client is confined to a wheelchair and continues to be in very poor health.*"

In response, the Trust's solicitor asserted, *inter alia*, that Mrs. McClean had declined to deploy aids and adaptations offered to facilitate her transfer from bed to toilet and suggested that the provision of a higher toilet was being explored. The letter of 1st September 2010 continues:

> "*A bedtime call has been identified for Mrs. McClean …*
>
> *Her assessed need would be one call to prepare and put her to bed. Mrs. McClean's full care package at present is 2 x 1 hour calls and one 30 minute call 7 days per week; this provision will be reviewed to meet her changing needs …*".

With regard to domestic cleaning, the letter refers to the Circular, but does not explain Mrs. McClean's assessed rating. Notably, the assertions regarding her son

are unchallenged, with the exception of a vague, unparticularised assertion that Mrs. McClean "*… is supported by her son who lives close by*".

[19] In the same letter, the issue of Mrs McClean's financial resources surfaced clearly for the first time. It asserts that she is in receipt of state pension and other benefits totalling approximately £283 per week:

> "*Mrs. McClean lives in a Housing Association bungalow which is purpose built for people with disabilities and is supported by her son who lives close by. Mrs. McClean is in receipt of benefits which are £186.25 per week (State Pension, SDP* [viz. **Severe Disability Premium**] *and Pension Credit). She also receives DLA weekly at £49.85 mobility component and £47.80 care component.*
>
> *Unfortunately the Trust is not in a position to provide a cleaning service due to the high demand of critical and substantial needs of clients across the Trust area. The Trust has commissioned Flexicare services from the community and voluntary sector …*
>
> *Mrs. McClean has been informed* [of] *and referred to this service but has not availed of same.*"

It is appropriate to observe, at this juncture, that Flexicare is not a philanthropic voluntary organisation, rather a private commercial operation. In a subsequent letter from the Trust's solicitor, dated 12th October 2010, it was stated:

> "*The Trust instructs that all of Mrs. McClean's circumstances have been taken into account in relation to her assessment of need for a cleaning service. Following assessment by professional staff it was identified that Mrs. McClean requires a cleaning service. This need has been categorised as priority 4 and … has also been registered as Unmet Need ….*
>
> *I am instructed that a full Occupational Therapy Assessment has been carried out; however, Mrs. McClean refused to fully co-operate with the assessment process …*
>
> *As you are aware a profiling bed was provided to Mrs. McClean, however after two days Mrs. McClean notified the Trust that she wished to return the bed. Mrs. McClean has refused to use alternative equipment …*
>
> *Mrs. McClean has difficult in dressing her lower half and requires assistance with this task. A need was identified for*

> *assistance at bedtime and she is priority two on the waiting list for this care. I am advised that the social worker discussed changing her one hour care slot at teatime to half an hour, allowing for a further half hour care later in the evening, however I understand that Mrs. McClean has refused this*".

It would appear from this passage that bedtime assistance has been assessed as an eligible need for Mrs. McClean and this is confirmed by a corresponding record. Unfortunately, once again, the underlying rating is not clearly expressed.

[20] In a subsequent letter, dated 1st November 2010, the Trust's solicitor highlighted the suggestion in the occupational therapy report of April 2010 that Mrs. McClean's son *apparently* assisted her in household chores. This letter also repeated the suggestion in the social work assessment report of 20th May 2010 that her son lives nearby, visits daily and assists in home management chores. The letter continues:

> "*The Trust's assessment took into account the present state of home environment* ***and ability to utilise resources available to your client*** *to ensure maintenance of same which is currently being met with no level of critical or substantial risk evident*".

[My emphasis].

It is tolerably clear from the text of this passage and the immediately ensuing paragraph that it is directed to the domiciliary cleaning service issue. Finally, the letter adverted to instructions from the relevant social worker that Mrs. McClean's home "*… is always clean and tidy and poses no risk to her health …*". According to the affidavit sworn on behalf of the Trust, Mrs. McClean's need for a night time [*semble,* bedtime] visitation has also been recorded as an unmet need. However, once again, the rating, in Circular terms, is not provided. The affidavit reiterates the clean and tidy presentation of Mrs. McClean's home, asserting simultaneously that "*other support mechanisms for cleaning are evidently available to her*". With regard to the issue of night time care, the deponent avers:

> "*The Applicant has not been assessed as needing overnight care to assist her with toileting. The Trust have previously identified the Applicant's poor technique of transferring to the toilet and have offered advice and equipment which has been rejected by the Applicant.*"

In summary, there was an extensive ventilation of views and issues between the parties and their representatives, in correspondence and affidavits, as these proceedings progressed. Regrettably, this did not bring about any consensual resolution.

V COMPETING ARGUMENTS AND CONCLUSIONS

[21] I would observe that in its original incarnation Mrs. McClean's challenge was advanced on grounds which may fairly be described as extensive, imaginative and diffuse. At earlier hearings, the court ruled that some of these were plainly unarguable, while others constituted repetition or surplusage. In consequence, ultimately, the legal framework of the challenge was reduced to that summarised in paragraph [5] and [6] above. As regards the first ground of challenge, the focus of the court's attention is the question of how the Trust has applied the Circular to Mrs. McClean, taking into account its statutory functions and duties. I make clear, at the outset, that I am treating this as a process, not a merits, issue.

[22] The central submission advanced by Mr. Potter on behalf of Mrs. McClean was that the Trust has failed to assess Mrs. McClean's needs in accordance with the criteria enshrined in the Circular. It was submitted that the assessment was rendered unlawful by virtue of the Trust's approach to the twin factors of the Applicant's financial resources and her supposed family support. Mr. Potter further submitted that illegality had occurred by virtue of the Trust's failure to conduct a proper assessment of Mrs. McClean's means and outgoings and to measure the cost of the contentious non-provided services. The gradings applied to Mrs. McClean were also challenged and, in this respect, Mr. Potter highlighted that the "Grade 4" (low priority) rating allocated to Mrs. McClean is not documented in the contemporaneous records and did not emerge until the Trust's legal representative made this assertion in a letter dated 12th October 2010 to the Law Centre. As regards the second ground of challenge, it was submitted that the Trust has impermissibly taken into account the fact that the Applicant is in receipt of certain disability related benefits, in contravention of the 1999 Departmental directive. Finally, Mr. Potter submitted that there were indications in the evidence of an unpublished blanket policy operating to Mrs. McClean's detriment.

[23] The riposte of Mr. McGleenan (of counsel), on behalf of the Trust, highlighted, *inter alia*, those aspects of the evidence which suggest that, on occasions, Mrs. McClean has been somewhat unco-operative or reluctant in her dealings with Trust personnel. Particular emphasis was placed on the series of refusals recorded in paragraph [16] above. Mr. McGleenan submitted that a breach of Section 2 of the 1978 Act cannot be established, for the simple reason that the assessments to which Mrs. McClean has been subjected have not resulted in decisions that the two contentious services must be provided: rather the contrary. As regards Article 15 of the 1972 Order, it was submitted that no irrationality in the exercise of this discretionary statutory power has been demonstrated. The apparently elective decisions made by Mrs. McClean, a competent adult with no cognitive impairment, also featured in Mr. McGleenan's submissions.

[24] It was further submitted that the court should be especially slow to second guess the judgments made by professional social workers and, in this context, Mr.

McGleenan reminded the court, firstly, of the statement of Lord Lloyd in ***R –v- Gloucestershire County Council and Another, ex parte Barry*** [1997] AC 584, at p. 598:

> "*The assessment of the needs of the disabled individual against contemporary standards is left to the professional judgment of the social worker concerned, just as the need for a bypass operation is left to the professional judgment of the heart specialist*".

To like effect is the more recent formulation of Rix LJ in ***R(McDonald) –v- Royal Borough of Kensington and Chelsea*** [2010] EWCA. Civ 1109:

> "[36] … *In the present case, however, the Royal Borough has assessed Ms McDonald's need and the question is whether it can be glossed and reinterpreted by the judge …*
>
> ***The assessment of need is primarily a matter for the local authority and not the court***".

[My emphasis].

Mr. McGleenan's final submission was that the evidence fails to establish that the Trust acted in contravention of the 1999 Departmental directive.

Conclusion - First Ground of Challenge :
The Circular

[25] As already noted, the statutory provision upon which this challenge is primarily founded is Article 15 of the 1972 Order. Both parties accept the correctness of the analysis in ***Re LW***, paragraph [45]:

> "*This analysis accommodates the proposition that, in making the assessment in each individual case, the authority can properly take into account factors such as available resources, the demands on its budget, the particular circumstances of the individual concerned and their family, including their resources, the availability of facilities and its responsibilities to other members of the population*".

In short, viewed through the prism of public law, these are all admissible considerations which may properly inform the exercise of the statutory power in play. In the present matrix, these considerations are also rehearsed in the Circular, thereby intermingling with the criteria which the Department/Trust have chosen to adopt as governing the exercise of the discretionary powers enshrined in Article 15. I consider the correct analysis of the Circular to be a promulgation of the Trust's

policy relating to how it will exercise these statutory powers. In my view, this gives rise to a public law obligation on the part of the Trust to apply correctly and properly the provisions of the Circular. Any failure to do so can potentially give rise to a finding of illegality by the court. In determining whether such conclusion is appropriate, I accept Mr. McGleenan's submission (in terms) that the court should not mercilessly parse the Circular or construe it as a statute or legal instrument.

[26] As already highlighted, I consider that, in its resolution of the first of the grounds of challenge, the focus of the court must be on the assessment methodology, rather than the evaluative judgments formed by the professionals concerned. This case belongs firmly to the former territory. Ultimately, the question becomes: has the Trust, in its assessments of Mrs. McClean's social care needs, acted in accordance with the Circular? This question must be applied to the two contentious services under consideration. The first of these is the overnight attendance service which Mrs. McClean would wish to receive. I observe that this discrete complaint is of comparatively recent vintage, reflected in an amendment of the Order 53 Statement. Having considered the available evidence, I can find no error in the Trust's approach in this respect. Reports have been compiled by professionals belonging to appropriate disciplines – occupational therapy, nursing and social care – and further assessments have followed. These give rise to the averments in the Trust's affidavit:

> "*The Applicant has not been assessed as needing overnight care to assist her with toileting. The Trust have previously identified the Applicant's poor technique of transferring to the toilet and have offered advice and equipment which has been rejected by the Applicant*".

These averments, in my view, are duly supported by the available evidence which, viewed in its totality, establishes that there has been no failure to comply with the Circular in this respect. No procedural or methodological flaw has been demonstrated. Accordingly, this aspect of Mrs. McClean's challenge fails. I would simply add that an updated assessment by the Trust of this discrete asserted need, coupled with some increased flexibility and willingness on Mrs. McClean's behalf, might facilitate resolution of this particular impasse. Mrs. McClean's circumstances are not static and I would suggest that, in any reassessment, the Trust should also consider seeking information from the overnight carer whom Mrs. McClean is apparently paying.

[27] The second element of the challenge relates to the non-provision of a Trust funded domiciliary cleaning service. Once again, the court's resolution of this discrete challenge places the spotlight on the methodology and thoroughness of the Trust's evaluation of Mrs. McClean's needs and circumstances. The evidence, in my view, establishes that the Trust's 'category 4' rating of this particular need has been based on, *inter alia*, two main factors. The first is the Trust's view of the support and services provided to Mrs. McClean by her son. The second is Mrs. McClean's

apparent financial resources. The materiality of both factors in the Trust's evaluation and conclusions is beyond dispute, as the terms of the social care assessment report of 20th May 2010, subsequent letters and the Trust's affidavits confirm. However, the affidavit evidence and correspondence on behalf of Mrs. McClean contain averments and assertions, *essentially uncontradicted*, that her son has **not** been providing services of this nature. While it is possible that the Trust's *initial* evaluation of this issue was sustainable, the evidence now points to the opposite conclusion. Moreover, the various records fail to acknowledge this circumstance or, as a minimum, this contentious issue and do not document any resulting reassessment.

[28] I consider that, as a minimum, the assertions in the Law Centre letters and the ensuing affidavits of Mrs. McClean and Ms Southern required the Trust, in accordance with the Circular, in the exercise of its statutory powers and in conformity with well established public law principles, to thoroughly reinvestigate this discrete issue. The evidence establishes that this did not occur. This gives rise to an error plainly in conflict with the Circular, which, both explicitly and implicitly, requires assessments to be thorough, accurate and up to date. Furthermore, review, or reassessment, is described as "*an essential element*" in the scheme. I consider that the letters and affidavits submitted on behalf of the Applicant during a protracted period established ample grounds for a careful reassessment of eligibility. However, none has taken place. Stated succinctly, the Trust has not acted in accordance with the policy enshrined in the Circular. This gives rise to a finding of illegality.

[29] I conclude, further, that the Trust has been guilty of a comparable failure in its evaluation of the factor of Mrs. McClean's financial resources. The Trust's entitlement to take this factor into account, both as a matter of statutory construction and through the vehicle of the Circular, is not in dispute. However, once again, the question which arises is the procedural one of *how* this factor has been duly considered and evaluated. The evidence of Mrs. McClean, unchallenged, is that for a period in excess of two years she has been obliged to fund domestic cleaning services, she has had to fund also overnight care services more recently, that this has given rise to a significant strain on her limited financial resources and all of this has been the cause of resulting distress and worry. I consider that, from the point of the crossroads which was reached in August/September 2008, the Trust have proceeded on the assumption that Mrs. McClean is well able to afford the cost of domestic cleaning services. However, there is no evidence whatsoever of any proper consideration of Mrs. McClean's income (which features for the first time, belatedly, in a solicitor's letter in mid-litigation) or of any simple means/outgoings analysis, a failure which is exacerbated in circumstances where, by virtue of her unchallenged assertion of the more recent purchase of a private sector overnight care service, the depletion of Mrs. McClean's personal resources appears to be increasing. I am satisfied that, as a matter of law, the Trust was at all times entitled to have regard to Mrs. McClean's resources. However, I consider that, in purporting to do so, it had a corresponding duty to undertake a proper assessment and analysis of this kind. A simple exercise, falling far short of an accountancy audit, is all that is required. The

evidence, in my view, is clearly indicative of something at most cursory and superficial which, I find, is incompatible with the Circular.

[30] In summary, the Circular contains the policy, or criteria, governing the exercise by the Trust of the statutory powers under scrutiny. The court's assessment of illegality is based on a finding that the Trust has failed to give proper effect to the Circular, in the respects identified above. The alternative analysis, in public law terms, is that the Trust has failed to make fully informed decisions, based on all material facts and considerations. The well established public law duty to take into account all material considerations and disregard all immaterial considerations is sometimes viewed through the prism of the relevant public authority's duty of inquiry. This is commonly described as the ***Tameside*** duty:

> "*The question for the court is did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?*"

(***Secretary of State for Education and Science –v- Tameside MBC*** [1977] AC 1014, at p. 1065B, per Lord Diplock).

This has also been described as the obligation of the public authority decision maker "*to equip himself with the information necessary to make an informed decision*" (R (***DF) –v- Chief Constable of Norfolk Police*** [2002] EWHC 1738Admin, paragraph 45). Furthermore, Laws LJ has observed, pertinently:

> "*The decision maker's duty to have regard to relevant considerations may require him to take into account the affected person's views about the subject matter*".

(***R***(***Khatun) –v- London Borough of Newham*** [2004] 3 WLR 417, paragraph 27).

The close association between this principle and the procedural, or methodological, requirements of the Circular is at once apparent. Both require the Trust to take such steps and make such inquiries as are necessary to ensure that social care provision decisions are as fully informed and researched as is reasonably practicable. For the reasons elaborated above, I find that the Trust has not measured up to this standard.

Conclusion - Second Ground of Challenge: the 1999 Directive

[31] In my estimation, the resolution of this discrete ground of challenge requires the court to make a finding of fact. It is common case that *if* the Trust, in its assessment and reassessment of Mrs. McClean's eligible needs under the Circular, took into account her disability related benefits it was acting in contravention of the prohibition enshrined in the 1999 directive. In determining this issue, it is

incumbent on the court to consider all the material evidence, in the round. The suggestion that the Trust *did* take into account the benefits in question emerges most clearly from its solicitor's letters of 1st September and 1st November 2010. In the former, there is an extensive recitation of Mrs. McClean's "State" income, including the details of her Severe Disability Premium and Disability Living Allowance. In the second letter, there is a reference to "*… ability to utilise resources available to your client to ensure maintenance of* [her home] …". This seems to me more compatibly to refer to Mrs McClean's State benefits than the supposed physical contribution of her son to cleaning her home. Furthermore, in one of the Trust's earlier records, there is a reference to Mrs. McClean's apparent ability to "*pay a private cleaner*". This is reiterated in a later record.

[32] I have already observed that the letters exchanged between the parties and their legal representatives were obviously compiled with meticulous and commendable care. I infer readily that the letters transmitted by the Trust's solicitor were based on instructions provided. Based on all the evidence, there is nothing to suggest that the Trust at any time made a distinction between Mrs. McClean's disability related benefits and her other sources of "State" income. The relevant matrix here was formed by two separate policy instruments. The first (the Circular) authorised the Trust to take into account Mrs. McClean's resources. The second (the 1999 Departmental directive) qualified this, by excluding from the scope of permissible consideration any disability related benefits. I conclude, on the balance of probabilities, that the Trust acted in contravention of this prohibition, in its approach to the issue of the domiciliary cleaning service only. While this may have occurred inadvertently, or imperceptibly, in a sphere of ever increasing legal and policy complexity, this factor cannot operate to alter the court's conclusion.

[33] The court, inevitably, sympathises with the dilemmas and challenges posed for all public authorities such as this Trust by the phenomenon of ever diminishing resources. The Circular is an admirable attempt to ensure, so far as humanly possible, that the beneficiaries of the progressively shrinking "cake" are those members of society in greatest need. In both human **and** legal terms, those members of the population who have the good fortune to benefit from support from family members and others and/or have some financial resources cannot expect to receive publicly funded services to the same extent as those who have not. Fairness, balance and proportionality lie at the heart of the Circular and its associated statutory framework. To ensure that these objectives are properly fulfilled, all decisions on the allocation of the Trust's limited social care budget must be as carefully processed and as fully informed as possible. While the court has found certain material shortcomings in the decision making processes under scrutiny in these proceedings, it is appropriate to add that the social care personnel and other professionals who have interacted with Mrs. McClean, and continue to do so, have plainly been discharging their duties assiduously and conscientiously. The Trust may wish to consider some updated instruction and education of the relevant members of its workforce in an attempt to prevent recurrence of the methodological shortcomings

identified in this judgment. There is a related need to ensure that assessment ratings are both carried out and assiduously recorded.

A Concealed Policy?

[34] Finally, I find no evidence of the existence of any surreptitious means tested social care provision policy operated by the Trust. The suggestion of such a policy flickered occasionally in the submissions of Mr. Potter, based mainly on isolated words in the social work professionals' records such as "*policy directive*". I am satisfied that terms such as these should properly be construed as references to the Circular and nothing else. Furthermore, they are an accurate description of the latter: it constitutes a policy (as I have held) which may properly be described as a "directive" to members of the target audience. In passing, it is appropriate to recall that by virtue of Section 2(3)(a) of the 2009 Act, it is *obligatory* for the Department to develop policies of this kind. I would observe that it is a policy which establishes "eligibility criteria", the latter being, in the language of Lord Lloyd in ***Barry*** (at p. 599) "*the departmental way of describing the standard against which an individual's needs are judged*".

[35] I would merely add that the assessment methodology in the Circular requires social workers to apply one of four ratings to a person's identified needs: the evidence in the present case suggests inadequate observance of this important requirement. The relevant records should always document the rating applied to the need in question. This specific requirement is of no little importance and it too might be addressed in the updated instruction and education suggested in the preceding paragraph.

VI <u>DISPOSAL</u>

[36] Accordingly, this application for judicial review succeeds. Having regard to the court's findings and conclusions and the overall context, and taking into account the relief claimed, I propose to make a declaration that in withdrawing Mrs. McClean's domiciliary cleaning service and failing to reinstate same, the Trust has acted unlawfully [a] by failing to ensure that all material information and considerations were taken into account and [b] by impermissibly taking into account Mrs. McClean's disability related benefits. I have opted for this particular remedy on the premise that it will stimulate a reassessment of Mrs. McClean's needs which will entail a full inquiry into all material facts and considerations and fresh, fully informed decisions. This will hopefully ensue promptly. As a precaution, the order of the court will also incorporate a provision giving the Applicant liberty to apply for further or other relief. Subject to further argument, costs will follow the event.