OUTER HOUSE, COURT OF SESSION

[2024] CSOH 44

P1023/23

OPINION OF LORD BRAID

In the petition

BB

Petitioner

for

Judicial Review of Glasgow City Council's Social Work Services Social Care Charging Policy

Petitioner: M Dailly, Sol Adv; Drummond Miller LLP
Respondent: Crawford KC, D Blair; Harper Macleod LLP

19 April 2024

Introduction

Section 87 of the Social Work (Scotland) Act 1968

[1] Health and social care services under the Social Work (Scotland) Act 1968 are delivered in Glasgow by the respondent, Glasgow City Council, and NHS Greater Glasgow and Clyde. Section 87(1) of the 1968 Act permits a local authority to recover the costs of providing social care services to the extent that the authority considers it reasonable to do so. Section 87(1A) restricts the sums that can be charged to what the authority considers to be "reasonably practicable" having regard to the service user's means. What is reasonably practicable is a question left to the local authority to determine as a matter of discretion, subject to its obligation to act fairly and rationally and to have regard to relevant

considerations and to ignore irrelevant considerations: *McCue* v *Glasgow City Council* 2023 SC (UKSC) 69 at para [42]. The onus is on the service user to satisfy the local authority as to what is reasonably practicable (section 87(1A)(b).

The petitioner

[2] The petitioner, BB, is 40 years of age and single. He is a person who has a disability in terms of section 6 of the Equality Act 2010, suffering as he does from several conditions including autism spectrum disorder, grand mal epilepsy, bilateral keratoconus and severe irritable bowel syndrome. He is assessed as requiring 15.5 hours of social care services each week, which he duly receives from the respondent in discharge of its duty under the 1968 Act. The respondent meets the cost of providing these services subject to a weekly charge which it levies on the petitioner under section 87.

[3] The petitioner's income comprises Income-related Employment and Support Allowance of £225.45 per week and Disability Living Allowance of £95 per week. During the year 2022/23 he was charged £62.30 per week. There is no suggestion that that amount was either excessive, or discriminated against the petitioner in comparison with other persons in receipt of social care services. From 10 April 2023, the charge increased to £68.59 per week in line with an increase in welfare benefits of 10.1% from 6 April 2023, and the petitioner expressly takes no issue with that increase. However, from 24 April 2023 the charge to the petitioner for the services provided to him was, as a result of a change to the respondent's charging policy, increased to £103.14 per week. That increase is the subject of challenge in this judicial review on the grounds that it unlawfully discriminated against the petitioner in the various ways set out below. That said, a financial reassessment of the petitioner's means was carried out shortly before the substantive hearing in the petition,

resulting in the respondent agreeing that certain items of expenditure incurred by the petitioner should be considered as Disability Related Expenditure (DRE). The result of that exercise has been that the petitioner's weekly social care charges have been reduced to £72.59, calculated as set out in para [6] (backdated to 24 April 2023). Thus, the petitioner has suffered an increase of only £10.59 on the amount he was paying in 2022/23; and an increase of only £4 on the amount he would have had to pay in 2023/24 had there been no increase on 24 April 2023. Nonetheless, he still contends that the change to the respondent's charging policy was unlawfully discriminatory.

The respondent's charging policy

[4] Local authorities across Scotland exercise their right to charge for the provision of at least some social care services. In the respondent's case, it does so in accordance with a social care charging policy which it updates annually. The policy sets out the charges that apply to service users, and contains various mechanisms designed to ensure that a service user is not charged more than is reasonably practicable. Stated shortly, the process requires the following steps:

i. Assessment of the total charges which have been incurred for the provision of non-personal care services, having regard to the rates in the charging policy.

ii. Assessment of the service user's total income, including state benefits (but excluding various sources of income).

iii. Application of a Minimum Income Threshold (MIT) relative to the service user. The MIT is fixed by reference to similar income thresholds fixed by the DWP for certain state benefits including Income Support, Personal Allowance, Disability Premium and Pension Credit. A 25% "buffer" is applied to those

benefit rates (ie, they are enhanced by 25%) to arrive at the actual MIT, which is therefore more generous than it need be.

iv. Deduction from the service user's income of any DRE.

v. Application of a taper to any remaining income above the MIT. This gives the maximum amount which the service user may be charged.

vi. Consideration of any request by the service user that the specific circumstances of the case require the charge to be waived or abated to avoid excessive hardship.

[5] The MITs for 2023/24 are:

Single person below 60	-	£156 per week
Single person above 60	-	£252 per week
Couple below 60	-	£238 per week
Couple above 60	-	£384 per week

[6] The policy is applied to the petitioner as follows. The cost of providing him with non-personal care services is £282.79. His total assessed eligible income is £293.55. Deduction of his DRE, now assessed at £40.77, reduces that to £252.78, which is £96.78 in excess of the MIT applicable to him, as a single person below 60, of £156. The taper of 75% is then applied, thus capping the petitioner's liability for social care charges at £72.59, which is the amount he is charged.

The petitioner's case/ grounds of challenge

[7] As alluded to in para [3], the petitioner's challenge is not to the respondent's charging policy as a whole but to the respondent's decision to increase the taper, which took effect from 24 April 2023. The petition, drawing on the language of sections 19 and 20 of the

2010 Act, categorises the increase to the taper as the respondent's "provision, criterion, or practice" (PCP) which is challenged. The petitioner has one procedural and four substantive grounds of challenge. The latter overlap to the extent that all are founded on the same factual matrix, namely that as a single, severely disabled person under the age of 60, the petitioner has suffered a greater percentage increase in his charges as a result of the increased taper, than the other groups to whom he compares himself - less severely/non-disabled persons under 60; single persons over 60; and couples of any age. The substantive grounds of challenge are:

i. Unlawful discrimination contrary to the Human Rights Act 1998.

ii. Unlawful indirect discrimination contrary to the 2010 Act, sections 19 and 20.

iii. Unlawful discrimination contrary to the 2010 Act, sections 15 and 29.

iv. Failure to make reasonable adjustments under the 2010 Act, sections 20 and 29(7).

[8] The procedural ground of challenge is that the respondent failed to undertake an adequate Equality Impact Assessment (EIA) in terms of section 149 of the 2010 Act and the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 before implementing the change to its charging policy; and, separately, that it breached its duty at common law to consult service users about the proposed change.

[9] The petitioner seeks declarators in respect of the various grounds of challenge; reduction of the PCP; and an order under section 45(b) of the Court of Session Act 1988 for specific performance of the respondent's duty to undertake a competent EIA in relation to its PCP and charging policy (albeit this latter remedy appeared to be departed from at the substantive hearing, possibly because the respondent has already embarked upon

the 2024/25 review of its policy, in the course of which it will be undertaking a further EIA in any event).

[10] I will look at each of the grounds of challenge in turn, but first will make some general observations. The petitioner has provided a number of worked examples, in which he compares the effect of the increased taper on him (prior to the deduction of DRE) with its effect on the other groups to whom he compares himself, on the assumption that such persons will receive either 2, 2½ or 3 hours care per week. Thus, he avers that a single person under 60, with income, after application of the taper, of £65.41, receiving 2 hours of care each week costing £39.74, would pay £39.74 before and after the change, and would therefore be unaffected by the increase. Further examples are given of single persons under the age of 60 in receipt of slightly more hours of care. It is fair to say that I cannot follow how the petitioner arrives at some of the figures, but the precise arithmetic is irrelevant: the thrust of the petitioner's point is that service users receiving fewer hours care than him each week will be less severely impacted than him by the increase in taper, in that their percentage increase will be less; he complains that any disabled person who is single, under the age of 60 and who requires more than 3 hours of social care each week will require to pay 50% more in charges due to the increase; whereas those who receive fewer than 3 hours care will sustain either no increase (as in the example cited above) or, as in other worked examples, will sustain an increase of either 13% or 37%.

[11] There are various problems with that approach. First, as senior counsel for the respondent submitted, the calculations in themselves are meaningless, in that it would be possible to come up with an infinite array of examples, depending on the personal characteristics of the service user, the amount of income received and the number of hours of social care provided. Indeed the respondent has provided worked examples of its own,

designed to show that the increase in the taper is not discriminatory (see para [24] for one such example). It is self-evident, and not in itself discriminatory, that the more care a person receives, the more it will cost and the greater the charge likely to be levied. To adopt counsel's somewhat fruity mixed metaphor, the examples given by the petitioner appears not only to compare apples with pears, but to involve a degree of cherry picking.

[12] Second - and I will come back to this when discussing "other status" below - it is not entirely clear to what extent the petitioner relies on a status of being "severely disabled" as opposed to being disabled, and, in terms of the number of hours of care received per week, where the line is to be drawn between disabled and severely disabled. At times in the petition and note of argument, he claims that the respondent's PCP discriminates against disabled persons such as him; at other times, that it discriminates against severely disabled persons. In that the comparator group to which he compares himself includes disabled persons requiring less than 3 hours care per week, it seems that he is relying on a severe disability, but it remains unclear where the line is to be drawn between disability and severe disability. For example, is a person who receives 5 or 6 hours care per week to be regarded as severely disabled, and what percentage increase would such a person, whether disabled or not, suffer by virtue of the increase? The petition does not make that clear. If, as seems to be the case from the petition, all single persons under the age of 60 who receive more than 3 hours social care week will suffer a 50% increase, then it would appear, at least on the petitioner's approach of comparing one percentage increase with another, that the petitioner is being treated in precisely the same way as those who are less disabled than himself (which, if nothing else, highlights that the reason why the petitioner may suffer a harsher impact than others, if that is the case, is more to do with his age and marital status than with his degree of disability).

[13] Third and more fundamentally, it seems to me that the petitioner's entire approach, which is to categorise as the PCP under challenge the decision to increase the taper, rather than the level of the resultant taper or the charging policy as a whole, is misconceived. As seen above, a comparison of percentage increases in the amount paid is relatively meaningless. As senior counsel for the respondent submitted, the PCP in question is the policy itself. The question ought therefore to be whether the application of a 75% taper is discriminatory, irrespective of what the taper was before the increase. To demonstrate that this must be correct, suppose that a different local authority has always applied a taper of 75% but otherwise has a charging policy identical to that of the respondent. It cannot be the case that the respondent's policy is discriminatory only because it previously applied a more generous taper and the effect of the increase is felt more keenly by some persons than others; but that the other local authority's policy is not discriminatory. Either both, or neither, must be discriminatory.

[14] Thus, it seems to me that in training his sights on the impact of the percentage increase, the petitioner is aiming at the wrong target. That all said, I will now consider the individual grounds of challenge.

The Human Rights Act challenge

Introduction

[15] Section 6 of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. It is accepted that the respondent is a public authority. Article 14 of ECHR provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language,

> religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 1 of Protocol 1 (A1P1) provides that every natural or legal person is entitled to the peaceful enjoyment of his possessions, and that no-one shall be deprived of his possessions except in the public interest and subjection to the conditions provided for by law. It is accepted by the respondent that A1P1 is engaged in this case. However it is disputed that the petitioner has an "other status", or that he has been discriminated against.

[16] The approach to Article 14 claims was considered by the Supreme Court in *R (Stott)* v *Secretary of State for Justice* [2020] AC 51, in which Lady Black set out the four elements which must be established to found such a claim: first, the circumstances must fall within the ambit of a Convention right; second, the difference in treatment must have been on the ground of one of the characteristics listed in Article 14 or "other status"; third, the claimant and the person who has been treated differently must be in analogous situations; and fourth, objective justification for the different treatment must be lacking.

[17] The solicitor advocate for the petitioner founded heavily on *R (SH)* v *Norfolk County Council and another* [2021] PTSR 969 in support of his human rights argument. In that case, the claimant was a 24-year-old woman with a severe learning disability and physical problems caused by Down syndrome. Her only income came from state benefits. The local authority provided services for her care and support for which she was charged on a means-tested basis. The authority's charging policy provided for a minimum income guarantee, which had previously been well in excess of that required by the legislation, and also provided the authority with a discretion as to what income it would take into account in means testing a person's ability to pay. By a change to its policy, the authority introduced a phased reduction to the minimum income guarantee, and moreover indicated that all

income which did not require to be disregarded would always be taken into account. The effect of that was that the claimant was charged the maximum permissible amount while at the same time experiencing a reduction in her minimum income guarantee; income which had not previously been taken into account (disability living allowance) was now taken into account and her overall income was substantially reduced. It was held, first, that the claimant, as a severely disabled person, did have an "other status". Although "other status" could not be ascertainable only by reference to the discrimination allegedly suffered (*R (Clift)* v *Secretary of State for the Home Department* [2007] 1AC 484), the claimant's level of disability could be associated with her entitlement to ESA and PIP at enhanced rates by virtue of her "severely limited ability to carry out daily living activities"; and that as they were capable of assessment, and both had been assessed as was required for the enhanced benefits, being "severely disabled" was sufficiently precise to qualify as a relevant status. As regards difference in treatment and whether any difference could be justified, the court held that the situation of the severely disabled was analogous to that of everyone else being charged under the charging policy, because all were receiving local authority services covered by the policy; that the treatment was different because the charging policy meant that a higher proportion of *SH's* earnings was assessed than was the case for others, with the result that *SH* was charged proportionately more than they were, and thus there had been a difference in treatment between two persons in an analogous situation; and that the difference in treatment was neither proportionate nor reasonably linked to the authority's legitimate aims of encouraging independence, having a sustainable charging regime and following the statutory scheme, since those aims were not sufficiently important to justify discriminating against the most severely disabled as compared with the less severely

disabled; and the discrimination was unlawful as being manifestly without reasonable foundation.

Submissions

[18] The petitioner's solicitor advocate submitted that, although not identical to the present case, *SH* was sufficiently analogous that the same conclusion should be reached. The petitioner and those in his group were disproportionately affected by the change to the respondent's charging policy because they paid a higher percentage of their income than those who did not share their characteristics. The group had the lowest MIT at £156 per week; if the respondent provided the petitioner with the same MIT as a single person above 60, his weekly charges would reduce by £72. Those with social care needs with no disabilities and who required only 2 or 3 hours care per week had a lower *pro rata* increase. The primary reason the petitioner required 15.5 hours social care each week was because he had severe disabilities. The fact that mitigation was available in the form of financial assessment or the application of DRE did not mean that the policy was not discriminatory in respect of its disproportionate impact.

[19] In reply, senior counsel for the respondent pointed out that the petitioner relied not only on his disability, but on his characteristics of being under the age of 60 and single. That resultant status was identified by regard to the cumulative demographic which he argued faced the highest increase in social care charges. In effect, he had identified through worked examples the group who stood to face the highest potential social care charges as a result of the change to the taper and had identified that group as being those who held the relevant status. The status therefore arose as a result of the differential treatment, but such an approach was impermissible as "other status" could not be defined by reference to the

treatment itself: *R (Clift)*, above. Further, the petitioner had failed to identify a comparator in an analogous situation. Those who received only 2 or 3 hours of social care per week were not in an analogous situation to those who received more. Finally, the policy was objectively justified and proportionate. It lay within the sphere of socio-economic policy. The respondent had to balance its budget. In such circumstances, for the policy to be challenged successfully, it was necessary to demonstrate that the policy was manifestly without reasonable foundation: *R (DA)* v *Secretary of State for Work and Pensions* [2019] 1 WLR 3289, para [59]; this the petitioner had not done.

Decision on the Human Rights challenge

[20] On the basis of *SH* and the authorities reviewed therein, the question under consideration is whether the respondent's charging policy has a disproportionately adverse effect on the petitioner in comparison with others who are charged by the respondent for social care services. It follows that those in an analogous situation to the petitioner are all those who are charged for social care services, including those who receive and are charged for 2, or 2½ or 3 hours care per week. To that extent, I agree with the petitioner's submissions.

[21] However, I do not agree that any adverse effect is as a result of an "other status" which the petitioner has. In the first place, his description of himself as "severely disabled" in comparison to others is not precisely defined. Following *SH*, I accept that being "severely disabled" can in principle amount to an "other status". However, the applicant in *SH* was found to be severely disabled by reference to the nature of the benefits she received, whereas the petitioner has no averments to that effect; rather he defines himself as severely disabled purely by reference to the number of hours care received per week, which is a somewhat

more elusive and elastic concept; and as I have pointed out above, by that criterion it is unclear where the boundary lies between severe and other disability and whether the dividing line is three, five, ten or some other number of hours of care. Even if severe disability were the only characteristic relied upon, the petitioner would face a difficulty.

[22] That difficulty is compounded by the fact that the petitioner does not rely solely on his severe disability to show that he has been discriminated against; he relies also on his age and marital status. The respondent submitted that the petitioner has done no more than identify a status which arises as a result of the differential treatment itself which, on the authority of *R (Clift)*, above was not permissible. However, that argument goes too far, as was made clear by Lady Black in *Stott*, above, paras [70] to [75], where she cautioned against spending too much time on an analysis of whether the proposed status has an independent existence from the treatment complained of (which, as she pointed out, was in any event not an easy concept to grasp) as opposed to considering the situation as a whole as encouraged by the ECtHR in *Clift* v *United Kingdom* [2010] ECHR 1106. In that case it was pointed out by the ECtHR that the words "other status" have generally been given a wide meaning, the court stating, at para [60], that it was not persuaded that the argument that the treatment complained of must exist independently of the "other status" on which it was based found any clear support in case law. The court went on to say in that paragraph that the question whether there was a difference of treatment based on a personal or identifiable characteristic in any given case is a matter to be assessed taking into consideration all the circumstances of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective. (For a full discussion of the two *Clift* cases and of the underlying reasoning in each, see *Stott*, above, Lady Black at paras [15] to [34].) Accordingly the approach is more nuanced than suggested by the

respondent and a consideration of all of the circumstances is required. I have come to the view in all the circumstances of this case that the cumulative characteristics relied upon by the petitioner are too disparate, and in the case of his disability, vague to amount to other status. The claimant in *SH* was in an entirely different position because she was able to define her status of severe disability by reference to the enhanced nature of the benefits she received, whereas the petitioner, insofar as he founds upon the degree of his disability, appears to define his status purely by reference to the number of hours care received beyond which the percentage increase becomes 50% as opposed to a lower figure. That in my view is insufficient to give rise to "other status".

[23] Further, in *SH*, it could clearly be seen that the claimant was treated less favourably than a disabled, but not severely disabled, person: such a person might have earnings from employment, which, under the authority's policy, were disregarded in calculating the charges which would be levied. In the present case, if the petitioner is treated less favourably than a single person over 60 that is not necessarily because of any difference in their degree of disability but because of the difference in age; and, unlike *SH*, there is no suggestion here that the petitioner is treated less favourably because earned income is not taken into account in assessing the ability to pay. It is not sufficient for the petitioner to show that he is severely disabled; he must also show that it is that disability alone which has resulted in unfavourable treatment; which he has been unable to do.

[24] The foregoing discussion presupposes that the petitioner has been treated differently from those who do not share his characteristics, but I do not agree that that is so. It is not being treated differently to be charged a greater sum for a higher provision of care. As already made clear, the petitioner's gripe is with the increase in the taper, rather than with the respondent's charging policy or the application of a taper *per se* and it is possible, by

varying the age and marital status of the hypothetical service user, and the number of hours of social care required, to come up with almost any example to fit one's argument. However, one example put forward by the respondent, in an affidavit sworn by Sharon Wearing, the respondent's Chief Officer for Finance and Resources, illustrated that a single person below 60 receiving non-personal care services at a cost of £1,745 per week, would have a maximum contribution of £103.14 with a 75% taper, and of £68.76 with a 50% taper; whereas a single person above 60, receiving non-personal care services at a cost of £479.25 per week, would have a maximum contribution of £19.29 per week with a 75% taper, and of £12.86 with a 50% taper. It is difficult to see that the increase in taper treated the one differently from the other: the effect of the increase from 50% to 75% in each case was to increase the contribution by 50%. If there is any unfairness in approach, resulting from the former person having to pay considerably more than the latter, that could equally have been said of the 50% taper; but the petitioner does not challenge it as being discriminatory.

[25] Finally, even if I am wrong in all of the foregoing, it cannot be said that the respondent's policy (or, for completeness, the decision to increase the taper) is manifestly without reasonable foundation. Rather, it is a proportionate means of achieving a legitimate aim and, as such, has an objective justification. The respondent's decision to charge service users is motivated by, amongst other things, socio-economic features including the need to balance its budget. It currently has around 12,718 users of which 9,300 are charged for non-residential care and 3,418 for residential services. I accept the respondent's argument that it is appropriate for it to seek to reduce its budget spend in circumstances where public finances are limited. It cannot be said to be inappropriate that those who make greatest use of social care services are required to contribute the most for those services (to the extent

that it is reasonably practicable for them to do so), which is in any event a policy decision. As the respondent also points out, the taper is but one lever in the charging policy used to determine how much it is reasonably practicable for a person to pay. The petitioner has access to other levers, including DRE (not available to non-disabled service users). He can apply for a waiver or abatement in circumstances of actual hardship. I accept the respondent's submission that the charging policy is not a rigid system producing blanket results, but is designed to create a framework for decision-making while still allowing flexibility to reflect the specific circumstances of the case. The solicitor advocate for the petitioner complained that limited guidance was given to those in receipt of social care about how to apply for waiver or DRE, and pointed to the fact that only 691 assessments had been done, out of 8,652 adults subject to non-residential care charges. In rebuttal of that argument, senior counsel for the respondent advised me that the number of adults in receipt of social care was now 9,300 but of that number 7,163 received tele-care for which the weekly charge was £1.68 per week. That left 1,988 service users, of whom 1,600 had requested financial assessments. I take from all of this that the right to request a financial assessment is well known, and does provide an effective safeguard against a person being charged more than is reasonably practicable for them to pay; and there is no material before me to justify any conclusion that it is any more difficult for a disabled, or severely disabled person, to request an assessment than it is for other groups.

[26] For all these reasons, the petitioner's case that his Article 14 right has been infringed must fail.

The sections 15 and 29 challenge

Introduction

[27] Section 15 is in relatively straightforward terms, and, insofar as material, provides:

> "(1) A person (A) discriminates against a disabled person (B) if
>
> > (a) A treats B unfavourably because of something arising in consequence of B's disability; and
> > (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

For completeness, section 29 provides, insofar as material:

> "...
> (2) A service provider (A) must not, in providing the service, discriminate against a person (B) –
>
> > (a) as to the terms on which A provides the service to B;
> > (b) by terminating the provision of the service to B;
> > (c) by subjecting B to any other detriment."

[28] Unlike Article 14, section 15 of the 2010 Act does not depend on a comparison with a non-disabled person, but raises two simple questions of fact: what was the relevant treatment, and was it unfavourable to the claimant: *McCue*, above, para [57], citing *Swansea University Pension and Assurance Scheme Trs* v *Williams* [2018] UKSC 65.

Submissions/discussion

[29] As in relation to the human rights challenge, the solicitor advocate for the petitioner submitted that the respondent had treated the petitioner unfavourably because of his disability, in that the increase to the taper had a disproportionate financial impact on him because he had higher social care needs arising in consequence of his disabilities. It did not result in increased charges on a *pro rata* basis across all person requiring social care services in Glasgow but had a disproportionately harsher impact on disabled persons such as the

petitioner who were single, under 60 years of age and required 3.5 or more hours of social care each week

[30] As with the human rights claim, the immediate flaw in that argument is the reliance on the petitioner's characteristics of being single and aged under 60. As soon as the petitioner has to rely on those, he cannot say that he has been treated unfavourably because of something arising in consequence of his disability. Rather, any unfavourable treatment equally arises out of his age and marital status.

[31] Further, the respondent submitted, in reliance on *McCue*, that the petitioner's true complaint was not that he was treated unfavourably, but that the policy was not generous enough. The respondent was under no obligation to apply a taper at all. The treatment of the petitioner could be viewed as the application of section 87 to him, in assessing how much he should pay. That was not unfavourable treatment. Even if the treatment in question was the application of an increased taper, the fact that the respondent had previously applied a more generous taper than the one currently applied was not unfavourable treatment.

[32] The solicitor advocate for the petitioner submitted that the facts in *McCue* could be distinguished, in that here the petitioner was not arguing that his DRE was not generous enough, but that the change to the policy affected him more harshly because of his greater care needs in comparison with the comparator group.

[33] However, while it is correct that *McCue* did not concern a policy alteration, the underlying rationale is the same. In reality, the petitioner's argument is that the taper is not as generous to the group of which he perceives himself to be a part as he would wish. It might be different if he were arguing that the respondent's entire approach to the calculation of charges was discriminatory but that is not his argument; his challenge is restricted to the

increase in the taper, and ultimately relies upon an argument, similar to that which was rejected in *McCue*, that the taper is not generous enough. In reaching this view, I take into account what Lord Sales said at para [62] of *McCue*, to the effect that the mere fact that there is a favourable feature for disabled persons in a council's approach does not necessarily rule out the possibility of a claim of unlawful discrimination under section 15. The example he gave of where such a claim might arise was if a claimant was able to show that the council had applied a stricter standard to claims for DRE than it applied before allowing deductions for other forms of necessary expenditure which might be incurred by both disabled and non-disabled people. While that was just one example, it is far removed from the petitioner's argument in the present case.

Decision on the section 15 challenge

[34] Accordingly, whether the treatment of the petitioner consists of the approach to section 87, or the increase in taper, or the resultant level of the taper, the respondent has not treated the petitioner unfavourably by reason of his disability.

[35] Even if that conclusion is wrong, the respondent's treatment of the petitioner is a proportionate means of achieving a legitimate aim, for the reasons set out in para [26].

[36] For all the foregoing reasons, the section 15 challenge also fails.

The section 19 challenge

Introduction

[37] Section 19 of the 2010 Act provides:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's, if-

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are-

age;
disability;
..."

Decision on the section 19 challenge

[38] The section 19 challenge is a claim of indirect discrimination, applying a different statutory framework to the same factual matrix as before. The short answer to this challenge is, again, that the petitioner relies on a combination of characteristics as giving rise to the alleged discrimination: disability, age and marital status. As the respondent submitted, that is not a permissible approach under the 2010 Act. Section 14 of the Act provides, among other things, that a person (A) discriminates against another (B) if, because of a combination of two relevant characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics; but that provision is not yet in force. The solicitor advocate for the petitioner did not dispute that a challenge could not be made on the basis of dual characteristics, but submitted that the petitioner's case arose because he was severely disabled with additional care needs. One had to have regard to the other characteristics to consider the effect on him, but that effect would not occur but for his care needs arising from his severe disability.

[39] However, that is not correct. I can accept the petitioner's argument to the extent that it is possible to envisage a situation where a reduction in income had a harsher impact on an older person (for example, because they might be more prone to suffer from insufficient funds to heat their home); but that is not the petitioner's case. His case is that his treatment by the respondent arose at least in part because of his age in conjunction with his disability. That is a dual challenge, which cannot succeed under the 2010 Act as presently enacted.

[40] Even if that is wrong, the respondent's treatment of the petitioner is a proportionate means of achieving a legitimate aim, for the reasons set out in para [26].

[41] For these reasons, the section 19 challenge must also fail.

The section 20 challenge

Introduction

[42] Insofar as material section 20 of the 2010 Act provides:

> "(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

By virtue of section 29(7) a duty is imposed upon a service provider to make reasonable adjustments.

Decision on the section 20 challenge

[43] It is worth setting out the petitioner's averments directed to this branch of his case (which appear in Statement 7 of the petition):

> "The respondent ought to have made reasonable adjustments to its PCP [ie, to the increase in the taper] to ensure that disabled persons with the petitioner's group characteristics did not suffer a disproportionate financial impact in relation to increased weekly social care charges. The respondent ought to have ensured that the percentage of the increased cost of charges applied more equally on a *pro rata* basis to anyone receiving social care charges. It could have done this in a number of ways, including adjusting its MIT, the financial taper to be applied and/or the costing of hourly or daily social care services."

[44] Several observations fall to be made about these averments. First, by referring to the MIT and to the cost of services, the petitioner is making clear that in reality his challenge is to the respondent's policy as a whole, rather than to the decision to increase the taper in isolation. Second, insofar as the petitioner asserts that the respondent ought to have *ensured* certain results, he is seeking to hold the respondent to a higher standard than the section requires. Finally, as the respondent pointed out, the averment that the respondent ought to have "ensured that the percentage of the increased cost...applied more equally on a *pro rata* basis to anyone receiving social care services" is hopelessly unspecific in its terms; the way in which the averment is couched appears to involve a concession that a policy such as this which contains a taper is always likely to give rise to some differences; and the petitioner does not specify what level of inequality would be acceptable.

[45] The solicitor advocate for the petitioner submitted that it was not for the petitioner to micro-manage how the respondent might make reasonable adjustments, and it was sufficient that it could have been done in a number of ways; but he did not explain what the desiderated approach might have looked like in practice.

[46] Senior counsel for the respondent submitted that the respondent has in fact made reasonable adjustments, by the availability of DRE and financial waivers, as indeed it has.

[47] Standing the reduction of the increase in charges to a mere £4 more than the petitioner would have otherwise had to pay, the argument that the respondent has failed to make reasonable adjustments for the petitioner is simply unsustainable; and the section 20 challenge must also fail.

Failure to undertake an adequate Equality Impact Assessment or to consult

The EIA

[48] Since the respondent now admits that it failed to undertake an adequate EIA, I can take this briefly. The duty to conduct an EIA arises from section 149 of the 2010 Act and regulation 5 of the 2012 regulations. The requirements on an authority were explained by Lord Boyd of Duncansby in *McHattie* v *South Ayrshire Council* 2020 SLT 399 at para [24].

[49] The consultation undertaken by the respondent is explained at Part 2 of the EIA as follows:

> "A survey was carried out for 3 weeks during January and February 2023 where 5,600 service users were invited to participate along with third sector organisations. There were 118 responses and although the number of respondents was lower than anticipated, there was a good range of protected groups and feedback. People with disabilities felt that the charging policy was unfair due to their higher cost of living. A change to the financial assessment in respect of disability related expenditure is proposed to assist in addressing these concerns."

The petitioner avers that the survey response rate of 2.1% of those contacted was very low. The EIA failed to make it apparent how accessible the survey was for those with disabilities and/or those who were digitally excluded. The consultative group of 5,600 was far below the number of people in Glasgow receiving social care services. The EIA was a screening process rather than a full impact assessment that complied with the 2012 regulations; it was

essentially a desk based tick box exercise based upon a restricted and very small element of consultation which was inadequate to fulfil the respondent's duties under section 149 of the 2010 Act and the 2012 regulations. In response, the respondent now admits that it did not have sufficient regard to the public sector equality duty in reaching its decision to change the charging policy and in particular it admits that the EIA undertaken was insufficient to discharge that duty, having regard to the specific proposal to alter the level of taper. It further avers that the EIA of 20 March 2023 was informed by the results of a survey dated 20 February 2023 which illustrated the views of disabled and non-disabled service users in relation to the charging policy and that web based and telephone services were made available. 5012 service users were asked if they wished to contribute to the survey, which was emailed to care staff and was posted on the HSCP's social media channels. The vast majority of participants were disabled, and economically inactive.

[50] In light of its admission, the respondent consents to decree of declarator that it failed to comply with its section 149 duty. I come back to the question of reduction below.

Duty to consult at common law

[51] However, the respondent does not accept that it breached any duty to consult at common law, nor does it consent to decree of reduction. As regards the duty to consult at common law, the starting point is to note that there is no general duty to consult before a decision is made: *R (Stirling)* v *Haringey London Borough Council* [2014] 1 WLR 3947, Lord Reed at para [35]. Lord Reed did, however, note that a legitimate expectation of consultation can arise because of either (i) a promise or practice of consultation or (ii) a sufficient interest in the subject matter to found such an expectation.

Submissions

[52] The petitioner founded upon two recent Scottish cases in which it was held that there was a legitimate expectation of consultation. In *McHattie*, above, Lord Boyd held that the guardian of a severely disabled adult who had attended an adult care centre for 13 years had a legitimate expectation that he would be consulted on a proposal to close the centre, and that a failure to consult went to the heart of the decision making process. In *B* v *Scottish Borders Council* 2022 SLT 1311, which also related to a decision to close an adult day care service, Lady Carmichael summarised at paras [28] and [29] the circumstances in which a legitimate expectation to be consulted may arise at common law, including that it may arise from an interest which is held to be sufficient to fund such an expectation. It is an aspect of procedural fairness, the requirement for which determines how it is to be fairly carried out. Consultation will avoid the sense of injustice which the person who is the subject of the decision will otherwise feel. The decision maker's obligation, where there is a duty to consult, is to let those who have a potential interest in the decision know what the proposal is and to give sufficient reasons for any proposal such as to permit intelligent consideration and response, with adequate time being given for a response.

[53] Senior counsel for the respondent resisted the suggestion that the respondent had been under any duty to consult the petitioner in the present case. There had never been any promise of consultation in relation to changes made to the charging policy, and the petitioner held no sufficient interest such as to give rise to an expectation of consultation. The circumstances might have been different if the respondent had sought to wholly rewrite the approach taken to calculation of social care charges, but, as it was, the increase in the taper was similar to the increase in court fees challenged in *R (Hillingdon London Borough Council)* v *Lord Chancellor* [2008] EWHC 2683 in which Lord Dyson said at para [48]:

> "It is not the law that authorities must necessarily consult those who are liable to be disadvantaged by a proposed decision before they can made the decision. Government and administration would be impossible if that were the case."

[54] In support of this submission senior counsel referred to the survey carried out by the respondent, the responses to which made clear (a) that individuals within the petitioner's group did respond and (b) that the broad consensus amongst service users was that charges were too high. It was clear to the respondent that such service users would not be supportive of changes which increased their liability to pay.

Decision on failure to consult

[55] I prefer the respondent's submissions. While it is true that in *Hillingdon BC* Dyson LJ concluded that the increase in court fees did not deprive the claimants of a benefit (whereas here, the increase in the taper did deprive the petitioner of a benefit), he also made clear that his view would have been the same even had the claimants been so deprived. In a context where the respondent is entitled to charge for the provision of services and is not under any duty to apply a taper at all, I have come to the view that the decision to increase the taper was one on which the petitioner did not have any legitimate expectation to be consulted; putting that another way, the decision was not of the magnitude of those under consideration in *McHattie* and *B*, above and I do not detect any aspect of procedural unfairness.

[56] I will therefore grant declarator that the respondent failed to properly exercise its duties to undertake an adequate Equality Impact Assessment in terms of section 149 of the 2010 Act and the Equality Act 2010 (Specific Duties) (Scotland) Regulations before implementing its PCP, but *quoad ultra* will refuse the declarator sought insofar as it refers to a failure to properly consult.

Remedy

[57] That leaves the question of remedy for the failure to comply with the section 149 duty. The petitioner seeks reduction of the PCP (in other words, of the decision to increase the taper). His solicitor advocate submitted that if the respondent had acted unlawfully in altering its charging policy, the policy should be returned to the *status quo ante*, which would leave the taper at its previous 50% level. Reduction was admittedly an equitable remedy, and it was equitable to reduce (in the sense of quash) the increase in taper in all the circumstances of the case, including the impact the policy had had for many severely disabled people in Glasgow, although he was not able to be any more specific as to what that impact was and how many people had been affected.

[58] The respondent opposed reduction, primarily on the basis that maintenance of the *status quo* would not have the effect of ossifying an unlawful decision. That was because the respondent was already developing proposals for its charging policy for 2024/25, which were likely to come into effect shortly after the substantive hearing in this case. Senior counsel further submitted that the court could not simply "redline" the increase in taper, but would require to reduce the entire policy.

[59] Since the petitioner is merely challenging the increase in the taper, not the respondent's entire policy, reduction would have the effect of restoring the *status quo ante.* However, it is unclear to me what the benefit of that, if any, would be, given the availability in any event of the right to seek a financial assessment, as the petitioner has in fact done, and given that the respondent has already embarked upon the process of reviewing its charging policy for the year 2024/25. It would be unduly burdensome to compel the respondent to recalculate all of its charges for the year 2023/24, the more so when, as I have found, the

increase to the taper did not in fact discriminate against the petitioner. Accordingly, I do not consider it equitable to grant decree of reduction.

Disposal

[60] I have sustained the petitioner's fifth plea in law, and granted decree of declarator to the extent indicated in para [56]. Otherwise, I have sustained the respondent's fourth and fifth pleas in law, repelled the petitioner's remaining pleas in law and refused the petition.