Trinity Term
[2011] UKSC 33
On appeal from: [2010] EWCA Civ 1109

JUDGMENT

R (on the application of McDonald) (Appellant) *v* Royal Borough of Kensington and Chelsea (Respondent)

before

Lord Walker
Lady Hale
Lord Brown
Lord Kerr
Lord Dyson

JUDGMENT GIVEN ON

6 July 2011

Heard on 4 and 5 April 2011

Appellant
Stephen Cragg
Stephen Broach
(Instructed by Disability Law Service)

Respondent
Kelvin Rutledge
Sian Davies
(Instructed by Royal Borough of Kensington and Chelsea Legal Services)

Intervener (Age UK)
Ian Wise QC
(Instructed by Irwin Mitchell LLP)

LORD BROWN

Introduction

1. Ill health can be dreadfully cruel. Some 30 years ago the appellant was the prima ballerina of Scottish Ballet. Alas, in September 1999 (then aged 56) she suffered an incapacitating stroke leaving her with severely limited mobility and other disabilities besides. In April 2006 she fell heavily and broke her hip in several places, remaining in hospital for four months. She then suffered two further falls each leading to further hospitalisation. The problem at the centre of these proceedings, however, is that the appellant suffers also from a small and neurogenic bladder which makes her have to urinate some two to three times a night. Up to now she has dealt with this by accessing a commode with the help of a carer provided by the respondent Royal Borough as part of a package of care services to ensure her safety. For some years past, however, the respondents have been proposing instead that the appellant should use incontinence pads or special sheeting (hereafter "pads") which would avoid the need for a night-time carer. The respondents say that this would provide the appellant with greater safety (avoiding the risk of injury whilst she is assisted to the commode), independence and privacy, besides reducing the cost of her care by some £22,000 per annum. The appellant, however, is appalled at the thought of being treated as incontinent (which she is not) and having to use pads. She considers this an intolerable affront to her dignity. Whether night-time care can be provided on this revised basis is the critical issue in these proceedings.

The history of the proceedings

2. The respondents' decision to reduce the sum allocated to the appellant's weekly care was communicated by letter dated 21 November 2008 and was sought to be challenged by the appellant's judicial review application made on 22 December 2008. The application came before Frances Patterson QC sitting as a Deputy High Court Judge in the Administrative Court on 5 March 2009 at a "rolled up hearing" (the application for permission and substantive inter-partes hearing being dealt with together), at the end of which permission was refused. A Needs Assessment dated 2 July 2008, completed on 28 October 2008, on which the impugned decision had been based, had described the appellant's needs as "assistance to use the commode at night" and the deputy Judge resolved in the respondent's favour what she described as the "very narrow" issue arising, namely whether that need fell to be read literally or whether, as the respondents contended, it was permissible to examine its underlying rationale and treat it as a need for safe

urination at night. Given that it was the latter, the deputy judge held that it was open to the respondents to meet that need in the more economical manner, ie by the provision of pads. Article 8 of the European Convention on Human Rights had also been invoked, but not as a freestanding ground of challenge.

3. Permission to apply for judicial review having thereafter been granted by a single Lord Justice, and the case reserved to the Court of Appeal, the substantive challenge came before Rix LJ, Wilson LJ and Sir David Keene on 29 April 2010. At the Court of Appeal hearing the arguments were expanded. The respondents sought to rely not only on their Needs Assessment of 2 July 2008 but additionally upon their subsequent Care Plan Reviews of 4 November 2009 and 15 April 2010. The appellant for her part again sought to invoke article 8 (this time, submits Mr Cragg, wrongly understood by the Court to be again merely ancillary to the appellant's primary ground), and for the first time sought also to rely on section 21E of the Disability Discrimination Act 1995 ("the DDA 1995"), as inserted by section 2 of the Disability Discrimination Act 2005.

4. By their reserved judgment dated 13 October 2010 the Court of Appeal disagreed with the deputy judge that the Needs Assessment of 2 July 2008 could properly be understood as a need for the management of the appellant's night-time urination rather than (as the "deliberately chosen" language of the assessment put it: para 49) as "assistance to use the commode at night", so that, at the time when the proceedings were commenced, the Court of Appeal held the respondents to have been in breach of their statutory duty. But the court held that, since the December 2008 decision was not in fact put into operation, and since the need had been reassessed in the Care Plan Reviews of November 2009 and April 2010, the appellant had no substantial complaint. The court also rejected the appellant's claims under article 8 and under the DDA 1995. Rix LJ gave the only reasoned judgment: [2010] EWCA Civ 1109, (2010) 13 CCL Rep 664.

The issues before this Court

5. Four issues are identified by the parties as arising for decision on this appeal:

> (1) Was the Court of Appeal correct to hold that the 2009 and 2010 Care Plan Reviews are to be read as including a reassessment of the appellant's community care needs?

(2) Did the respondents' decision to provide pads interfere with the appellant's article 8 rights and, if so, was such an interference justified and proportionate?

(3) Were the respondents operating any relevant policy or practice for the purposes of section 21E(1) of the DDA 1995 and, if so, was this policy justified as a proportionate means of achieving a legitimate aim, namely the equitable allocation of limited care resources?

(4) Have the respondents failed to have due regard to the needs specified in section 49A of the DDA 1995 ("the general disability equality duty") when carrying out their functions in this case? (The appellant needs the court's leave to raise this issue, permission to invoke section 49A having been refused by a single Lady Justice before the Court of Appeal hearing and not sought afresh from that court.)

Issue One – the 2009/2010 Care Plan Reviews

6. With regard to the first three issues – and, indeed, the entire framework of this appeal, both factual and legal – I really cannot hope to improve upon Rix LJ's judgment below. I could, of course, lengthen it: one can always do that. But I prefer instead to refer any interested reader to it and to confine myself to a substantially shorter summary of the reasons why for my part I agree with its conclusions. I cannot, however, escape a brief recitation of the main legal provisions governing care arrangements. I shall start with section 47 of the National Health Service and Community Care Act 1990 ("NHSCCA 1990") since it is common ground here that (i) the appellant is "substantially and permanently handicapped" within the meaning of section 29(1) of the National Assistance Act 1948 ("NAA 1948"), (ii) the respondents are required under that section to make arrangements for promoting her welfare, (iii) the respondents are satisfied that it is necessary in order to meet the appellant's needs to make arrangements for "the provision of practical assistance" for her in her own home within the meaning of section 2(1)(a) of the Chronically Sick and Disabled Persons Act 1970 ("CSDPA 1970"), and (iv) the respondents are accordingly pursuant to that section under a duty to make those arrangements, acting under the Secretary of State's general guidance issued pursuant to section 7(1) of the Local Authority Social Services Act 1970 ("LASSA 1970").

7. Section 47 of NHSCCA 1990 provides:

> “(1) . . . where it appears to a local authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such services, the authority –
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> (a) shall carry out an assessment of his needs for those services; and
>
> (b) having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of any such services. . . .
>
> “(4) The Secretary of State may give directions as to the manner in which an assessment under this section is to be carried out or the form it is to take but, subject to any such directions . . ., it shall be carried out in such manner and take such form as the local authority consider appropriate.”

8. Before turning to the Secretary of State’s guidance issued under section 7(1) of LASSA 1970 (the Fair Access to Care Services (FACS) Guidance) and directions issued under section 47(4) of NHSCCA 1990, I should say a word about the relevance of a local authority’s social care resources both to the assessment of the handicapped person’s needs and to the way in which such assessed needs may then be met. It was decided by the House of Lords in *R v Gloucestershire County Council Ex p Barry* [1997] AC 584 (by a majority of three to two) that need within the meaning of section 2(1) of CSDPA 1970 is a relative concept and that “needs for services cannot sensibly be assessed without having some regard to the cost of providing them. A person’s need for a particular type or level of service cannot be decided in a vacuum from which all considerations of cost have been expelled.” (Lord Nicholls of Birkenhead, at p 604). The position now established is that the local authority are under a duty to make an assessment of needs under section 47(1)(a) of NHSCCA 1990 and in doing so may take account of their resources. Assuming, as in the present case, that the need falls into one of the four bands – “critical”, “substantial”, “moderate” or “low” as described in the FACS Guidance – which, having regard to their resources, the local authority have indicated that they will meet, then meet it they must, although in deciding how to do so they are once again entitled to take account of their resources. None of this, I may say, was in dispute before us; least of all did the appellant suggest that we might like to revisit the decision in *Barry*, controversial though at the time that was.

9. I come then to the FACS Guidance issued on 1 January 2003 – which remained in force until fresh guidance (for present purposes not materially different) was issued in February 2010. Amongst its most directly relevant passages are these: “Councils should ensure that . . . within a council area,

individuals in similar circumstances receive services capable of achieving broadly similar outcomes" (paras 1 and 54); "Reviews should be undertaken at regular intervals to ensure that the care provided to individuals is still required and achieving the agreed outcomes. These reviews should include a re-assessment of an individual's needs" (para 4); under the heading "General principles of assessment", "it is important for assessment to be rounded and person-centred and for the evaluation of assessment information to lead to appropriate eligibility decisions and services that promote independence" (para 35) and "the evaluation of risks should focus on the following aspects that are central to an individual's independence: autonomy and freedom to make choices, health and safety including freedom from harm, abuse and neglect ... , the ability to manage personal and other daily routines, involvement in family and wider community life . . ." (para 40); under the heading "Reviews", "Reviews should: establish how far the services provided have achieved the outcomes, set out in the care plan, re-assess the needs and circumstances of individual service users, help determine individuals' continued eligibility for support, confirm or amend the current care plan . . ." (para 58), "the re-assessment part of the review should follow the general principles of assessment in this guidance" (para 59), "reviews should be scheduled at least annually or more often if individuals' circumstances appear to warrant it" (para 60).

10. Finally before returning to the facts of the present case I should note the following paragraphs within the Secretary of State's Directions – the Community Care Assessment Directions 2004 – issued under section 47(4) of NHSCCA 1990:

> "2(2) The local authority must consult the person, consider whether the person has any carers and, where they think it appropriate, consult those carers.
>
> 2(3) The local authority must take all reasonable steps to reach agreement with the person and, where they think it appropriate, any carers of that person, on the community care services which they are considering providing to him to meet his needs."

11. The care plan reviews of 4 November 2009 and 15 April 2010 are both lengthy documents, the latter extending to 15 pages. The following brief quotations from the 2010 review (in large part foreshadowed in the 2009 review) must suffice:

> "Toileting/Substantial Risk: Ms McDonald has been diagnosed with having a neurogenetic bladder, which makes [her] want to go to the toilet more frequently. Ms McDonald needs assistance to access the

> toilet during the day, and if she uses it at night. Ms McDonald and the carers confirm that she needs to go to the toilet two to three times during the night. . . . no issues were raised about the need to open her bowels at night. Ms McDonald did not want to discuss the option of using incontinence pads or Kylie sheets as a way of meeting her toileting needs. Ms McDonald said that she is not incontinent and has repeatedly said that she is opposed to wearing a pad to meet her toileting needs. Ms McDonald became angry and upset when discussing this. As Ms McDonald has not consented to a referral to the Continence Service, it has not been possible to fully explore how all of her needs can best be managed. . . .
>
> <u>Conclusion</u>: Ms McDonald continues to live safely at home. There have been no hospital admissions since she was discharged in early 2007. Ms McDonald has chosen not to take up the offer of assistive technology to help monitor her safety, has declined the offer of moving to one of the borough's extra care sheltered housing schemes and she has to date refused to consider incontinence pads as a means to manage risk when she cannot safely get to the commode unaided. . . . it remains social services' view that the use of incontinence pads is a practical and appropriate solution to Ms McDonald's night-time toileting needs. . . .
>
> I remain of the opinion that Ms McDonald's need to be kept safe from falling and injuring herself can be met by the provision of equipment (pads and/or absorbent sheets). She has, however, consistently refused this option, refusing even to try the pads or to discuss the absorbent sheet option. I am aware that she considers pads and/or sheets to be an affront to her dignity. Other service users in my experience have held similar views when such measures were initially suggested but once they have tried them, and been provided with support in using them, they have realised that the pads/sheets improve quality of life by protecting them from harm and allowing a degree of privacy and independence in circumstances which, as a result of health problems, are less than ideal. The practicalities can be managed within the existing care package to accommodate Ms McDonald's preferred bedtime and to allow her to be bathed in the morning and/or have sheets changed. If Ms McDonald were willing to try this option, she might similarly alter her views."

12. In the light of those passages from the reviews and the Secretary of State's FACS Guidance and Directions it seems to me impossible to disagree with Rix LJ's conclusion on this first issue:

> "53. In my judgment, the 2009 and 2010 reviews are to be read as including a reassessment of Ms McDonald's needs. It is irrelevant that there has been no further separate 'Needs Assessment' document. Such a document is not, it seems, necessary in the first place, because a care plan could incorporate a needs assessment; but in any event FACS itself contemplates that a care plan review will incorporate a review of assessed needs. As for the 2009 and 2010 reviews in this case, it is noticeable that they no longer assess Ms McDonald's needs as including assistance to access the commode at night, although they recognise that that is what Ms McDonald wants. On the contrary, they refer to Ms McDonald's night-time toileting needs in much more general terms (as the earlier needs assessments had at one time done). Thus they speak of 'need for support at night' and that the 'need should be managed through the use of incontinence pads'. They specifically consider that the elimination of the risk of injury is best achieved by avoiding a transfer to the commode, and that Ms McDonald's desire for independence and privacy is best accommodated by dispensing with a night-time carer. Ms McDonald needs assistance safely to access the toilet only if she uses it at night, but, with the use of pads there is no need for such use. The issue is whether pads should be used or not 'to meet her toileting needs'. The use of pads is 'a practical and appropriate solution to Ms McDonald's night-time toileting needs'. Ms McDonald did not want to discuss the use of pads 'as a way of meeting her toileting needs'. Her 'need to be kept safe from falling and injuring herself can be met by the provision of equipment".

13. I would add that to my mind the respondents could hardly have gone further in compliance with the Secretary of State's Directions in their efforts to consult the appellant and if possible agree with her the services they were considering providing to meet her needs. The 2010 Review rightly described the appellant's position on this as "entrenched" and the situation reached as an "impasse". The respondents also fully consulted the appellant's partner, Mr McLeish who, although not in fact her carer – indeed, he himself has experienced health problems and is no longer actually living with her – for a time assisted with her night-time needs.

14. Before leaving issue one, I should just note that, as I understood Mr Cragg's argument, it was no part of the appellant's case that the respondents were not *entitled* under domestic legislation to re-assess her need as "night-time toileting need" or "need for safe urination at night" or some equivalent designation, and to meet such need, as proposed, by pads (together with whatever further assistance might be advised following the proposed referral of the appellant to the Continence Service). Rather the case, as clearly reflected in the terms in which issue one has

been formulated, is that the 2009 and 2010 reviews in fact contained no such reassessment so that the respondents remained bound to continue the same care provision as had been made under the differently worded 2008 needs assessment. I add for good measure that in any event I am clear that there can be no objection under domestic law (leaving aside the other issues) to the respondents identifying and meeting the appellant's night-time needs in the manner proposed.

Issue Two – Article 8

15. Article 8 is too well known to require citation again here. There is no dispute that in principle it can impose a positive obligation on a state to take measures to provide support and no dispute either that the provision of home-based community care falls within the scope of the article provided the applicant can establish both (i) "a direct and immediate link between the measures sought by an applicant and the latter's private life" – *Botta v Italy* (1998) 26 EHRR 241, paras 34 and 35 – and (ii) "a special link between the situation complained of and the particular needs of [the applicant's] private life": *Sentges v The Netherlands* (2003) 7 CCLR 400, 405.

16. Even assuming that these links *do* exist, however, the clear and consistent jurisprudence of the Strasbourg Court establishes "the wide margin of appreciation enjoyed by states" in striking "the fair balance . . . between the competing interests of the individual and of the community as a whole" and "in determining the steps to be taken to ensure compliance with the Convention", and indeed that "this margin of appreciation is even wider when . . . the issues involve an assessment of the priorities in the context of the allocation of limited state resources" – *Sentges*, at p 405, *Pentiacova v Moldova* (Application No 14462/03 (unreported) 4 January 2005, p 13) and *Molka v Poland* (Application No 56550/00 (unreported) 11 April 2006, p 17). Really one only has to consider the basic facts of those three cases to recognise the hopelessness of the article 8 argument in the present case. *Sentges* (considered by Rix LJ at para 64 of his judgment) concerned a sufferer from muscular dystrophy complaining of a refusal to supply him with a robotic arm. Without it he depended on others for every single act and so was unable to develop and establish relationships with others; with it, his "severely curtailed level of self-determination would be increased": 7 CCLR 400, 404. The applicants in *Pentiacova* suffered from renal failure and complained of insufficient funding for their haemodialysis treatment. The applicant in *Molka* was confined to a wheelchair and, for want of positive assistance, was unable to vote in local elections. The complaints in all three cases were unanimously held to be manifestly ill-founded and thus inadmissible.

17. This approach is consistent too with the domestic jurisprudence on the point. The appellant seeks to rely on *R (Bernard) v Enfield London Borough*

Council [2002] EWHC 2282 (Admin); [2003] HRLR 111; [2003] LGR 423 (considered by Rix LJ at para 63 of his judgment). But really what is striking about *Bernard* is the contrast between that case and this. The claimants there were husband and wife. They had six children. The wife was severely disabled and confined to a wheelchair. In breach of their duty under section 21(1)(a) of NAA 1948, the respondent council failed for some 20 months to provide the family with accommodation suited to her disability. The consequences were appalling. The wife was doubly incontinent and, because there was no wheelchair access to the lavatory, was forced to defecate and urinate on the living-room floor. And she was unable to play any part in looking after her six children. Small wonder that Sullivan J, at para 31, described the article 8 case as "not finely balanced" and awarded £10,000 damages.

18. The leading domestic case on the positive obligation to provide welfare support under article 8 is *Anufrijeva v Southwark London Borough Council* [2004] QB 1124; [2003] EWCA Civ 1406. It concerned three separate asylum-seekers, one complaining of a local authority's failure to provide accommodation to meet special needs, the other two of maladministration and delay in the handling of their asylum applications. All three failed in their claims. Giving the judgment of the court, Lord Woolf, CJ observed (at para 33) that: "It is not possible to deduce from the Strasbourg jurisprudence any specific criteria for the imposition of such a positive duty [ie the duty 'to provide positive welfare support']". At para 43, however, the court concluded that *Bernard* was rightly decided – "family life [having been] seriously inhibited by the hideous conditions prevailing in the claimants' home" - but that:

> "We find it hard to conceive . . . of a situation in which the predicament of an individual will be such that article 8 requires him to be provided with welfare support, where his predicament is not sufficiently severe to engage article 3. Article 8 may more readily be engaged where a family unit is involved. Where the welfare of children is at stake, article 8 may require the provision of welfare support in a manner which enables family life to continue." (*Bernard* was said to illustrate that.)

19. There is, of course, a positive obligation under article 8 to respect a person's private life. But it cannot plausibly be argued that such respect was not afforded here. As already indicated, the respondents went to great lengths both to consult the appellant and Mr McLeish about the appellant's needs and the possible ways of meeting them and to try to reach agreement with her upon them. In doing so they sought to respect as far as possible her personal feelings and desires, at the same time taking account of her safety, her independence and their own responsibilities towards all their other clients. They respected the appellant's human dignity and autonomy, allowing her to choose the details of her care

package within their overall assessment of her needs: for example, the particular hours of care attendance, whether to receive direct payments in order to employ her own care assistant, and the possibility of other options like extra care sheltered housing. These matters are all fully covered in paras 5, 42 and 66 of Rix LJ’s judgment below. Like him, I too have the greatest sympathy for the appellant’s misfortunes and a real understanding of her deep antipathy towards the notion of using incontinence pads. But I also share Rix LJ’s view that the appellant cannot establish an interference here by the respondents with her article 8 rights. I add only that, even if such an interference *were* established, it would be clearly justified under article 8(2) – save, of course, for the period prior to the 2009 review when the respondents’ proposed care provision was not “in accordance with the law” – on the grounds that it is necessary for the economic well-being of the respondents and the interests of their other service-users and is a proportionate response to the appellant’s needs because it affords her the maximum protection from injury, greater privacy and independence, and results in a substantial costs saving.

Issue Three – Section 21 of the DDA 1995

20. All the relevant parts of section 21 are to be found set out in Rix LJ’s judgment below (at para 68) and need not be repeated – all, that is, save for section 21D(5) (referred to in section 21D (2)(b)):

> “Treatment, or a failure to comply with a duty, is justified under this subsection if the acts of the public authority which give rise to the treatment or failure are a proportionate means of achieving a legitimate aim.”

21. Mr Cragg’s argument under these provisions, if I understand it, is that, in substituting incontinence pads for a night-time carer to meet the appellant’s night-time toileting need, the respondents are manifesting or applying “a practice, policy or procedure which makes it - (a) impossible or unreasonably difficult for disabled persons to receive any benefit that is or may be conferred, or (b) unreasonably adverse for disabled persons to experience being subjected to any detriment to which a person is or may be subjected, by the carrying-out of a function by the authority” within the meaning of section 21E(1), so that, as provided by section 21E(2), it is their duty “to take such steps as it is reasonable, in all the circumstances of the case, for the authority to have to take in order to change that practice, policy or procedure so that it no longer has that effect”. If that be right, then, by virtue of section 21D(2)(a) and 21B(1), a failure to comply with that duty constitutes unlawful discrimination by the respondents against the appellant unless the respondents can show pursuant to section 21D(2)(b) that this failure is justified

under section 21D(5), namely that its acts are "a proportionate means of achieving a legitimate aim".

22. The argument to my mind is hopeless. In the first place I find it impossible to regard the respondents' decision in this case as the manifestation or application of anything that can properly be characterised as a "practice, policy or procedure" within the meaning of this legislation. Rather, in taking the impugned decision, the respondents were doing no more and no less than their statutory duty as fully described under issue one above. Secondly, even were that not so, it follows from all that I have already said (not least with respect to article 8(2)) that the respondents' acts here must be regarded as constituting "a proportionate means of achieving a legitimate aim" within the meaning of section 21D(5) (even assuming that there were otherwise steps which it would have been reasonable for them to take to change their practice, policy or procedure within the meaning of section 21E(2)). Here again, therefore, I agree with the views of the court below except only that, whereas Rix LJ was merely "sceptical as to whether any relevant policy or practice for the purposes of section 21E(1) exists in this case" (para 73), I am clear that it does not.

Issue Four – Section 49A of the DDA 1995

23. Having permitted Mr Cragg to advance his section 49A argument, it must be dealt with albeit not at any great length. So far as material, under the heading "General duty", section 49A provides:

> "(1) Every public authority shall in carrying out its functions have due regard to –
>
> . . .
>
>> (c) the need to promote equality of opportunity between disabled persons and other persons;
>>
>> (d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons; . . .".

As Dyson LJ held in an analogous context in *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141; [2008] LGR 239, "due regard" here means "appropriate in all the circumstances" – see too in this regard *R(Brown) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2008] EWHC 3158 (Admin); [2009] PTSR 1506. It is Mr Cragg's submission that, no express reference to section 49A being found in the respondent's documentation in this case, it is to be inferred that, in determining how to assess and meet the appellant's needs, they failed in their general duty under this section.

24. This argument too is in my opinion hopeless. Where, as here, the person concerned is ex-hypothesi disabled and the public authority is discharging its functions under statutes which expressly direct their attention to the needs of disabled persons, it may be entirely superfluous to make express reference to section 49A and absurd to infer from an omission to do so a failure on the authority's part to have regard to their general duty under the section. That, I am satisfied, is the position here. The question is one of substance, not of form. This case is wholly unlike *Pieretti v Enfield London Borough Council* [2010] EWCA Civ 1104; [2011] PTSR 565 (which held that the section 49A duty complements a housing authority's duties to the homeless under Part 7 of the Housing Act 1996).

25. For the sake of completeness I should just add that both section 21 and section 49A of the DDA 1995 have now been superseded by broadly comparable provisions in the Equality Act 2010.

26. I would dismiss this appeal.

27. Since writing the above I have read the judgments of both Lady Hale and Lord Walker. I cannot but agree with everything that Lord Walker says. I add only that it seems to me, with great respect to Lady Hale's acknowledged expertise in social care law, particularly surprising to find her saying (in para 77) that logically, on the majority's view, the local authority could properly withdraw care "even though the client needed to defecate during the night and thus might be left lying in her faeces until the carers came in the morning" or, indeed, "withdraw this help during the day." One might just as well say that logically, on Lady Hale's approach, it would be irrational not to supply a night carer to take the client to the commode, irrespective of cost, if there is any likelihood of the client having to urinate even once during the night. The true position is that the decision is one for the local authority on the particular facts of the case and, on the particular (and undisputed) facts here, it is nothing short of remarkable to characterise the respondents' decision as irrational. As to the cost, Lady Hale says (at para 74) that "it might well have been open to the local authority . . . to provide her with the sort of night time care that she was asking for . . . in one of the Extra Care Sheltered Housing Schemes in the borough." As, however, may be seen from the "Conclusion" to the borough's 2010 review (quoted in para 11 above), the appellant "has declined the offer of moving to one of the borough's extra care

sheltered housing schemes." In other words, the appellant specifically refused that very solution which Lady Hale mentions.

LORD WALKER

28. I agree with Lord Brown and Lord Dyson that this appeal should be dismissed, for the reasons given in their judgments, which address the issues which were argued before the court. But I feel bound to say something about the dissenting judgment of Lady Hale. Having expressed the view that the appeal has focused on a narrow issue which is not a point of law of general public importance, she makes some strongly-worded observations on an issue – *Wednesbury* irrationality – which was not referred to in the agreed statement of facts and issues, and was not argued by Miss McDonald's counsel. It was raised only in a single paragraph of the written submissions on behalf of the intervener, Age UK.

29. Lady Hale states that the idea that anyone should be obliged to go into a care home in order to be treated with ordinary dignity is extraordinary. Leaving aside the problems of managing functional incontinence in care homes (which are addressed in paras 37 to 46, and in particular para 39, of the witness statement of Mr Harrop, the Director of Policy and Public Affairs at Age UK), I can see no evidence that the respondent ("RBKC") is not well aware of Miss McDonald's right to have her dignity respected. She is a courageous and determined lady and RBKC's Adult Social Care Department have tried hard to find a solution to her problems. In successive reviews and assessments they have fully and fairly recorded her feelings and wishes, even when those show antipathy towards RBKC. They have invited her to choose how to deploy, in terms of timing and duration of visits, the weekly sum of £450 available for carer's visits. In 2008 they offered to put her in touch with the Home Share Scheme, under which someone such as a female student might have given Miss McDonald help at night in return for rent-free accommodation, but she declined because she did not want a stranger living in her house. In 2010 they offered her a move to one of RBKC's Extra Care Sheltered Housing schemes, but Miss McDonald did not want to consider this.

30. Miss McDonald is not incontinent. She can control her bodily functions, but she does need to urinate, sometimes quite frequently, during the night. But paragraphs 74 to 78 of Lady Hale's judgment, agreeing with Age UK's argument that RBKC have been "irrational in the classic *Wednesbury* sense", seem to me to ignore completely the evidence of Mr Thomas Brown, the very experienced Head of Assessment at RBKC's Adult Social Care Department. In his second witness statement dated 22 September 2009 he stated (paragraphs 11-12):

> “The court should be aware that the solution of incontinence pads in a case of this nature is not exclusive to RBKC, nor did the suggestion that the claimant should wear them originate from social services, as my previous statement makes clear. In my experience the use of incontinence pads for patients who are not clinically incontinent is both widespread and accepted practice in the provision of social services.
>
> Whilst RBKC accepts that the claimant is not clinically incontinent of urine, it is important to emphasise that her difficulty is that, due to impaired mobility, she cannot safely transfer from bed to a commode at night. In practical terms this presents substantially the same problems as a person who is incontinent. A person with this condition is often described as ‘functionally incontinent’” . . .

He then referred (in a passage which seems to have some words missing) to the website of the St Helens and Knowsley Teaching Hospitals NHS Trust.

31. In his third witness statement dated 16 April 2010 Mr Brown stated (paragraphs 13-16):

> “It is my experience based on 16 years in social care (most of them working with older people) and another four years working in a large general hospital that, in medical and residential care settings, it is general practice in the management of functional incontinence to use night-time incontinence pads or absorbent sheets as a means of enduring safety in patients/residents with severely compromised mobility. This management technique was suggested to the council by the claimant’s GP Dr Parameshwaran on 19 September 2006 and also by the district nursing service, and the suggestion is consistent with my own knowledge of the care management of such persons.
>
> The management plan would remain the same if the claimant needs to pass faeces at night, although good practice would be to encourage toileting last thing at night when her night-time carer visits and to encourage appropriate dietary changes. The need for morning bathing will arise whether or not faeces are passed at night and it is practical within the care package offered by the council. It should be noted that the need to pass faeces at night was not raised as an issue at the most recent review held in March 2010.

> I am aware of guidance (DOH 2000) to the effect that incontinence pads should not be offered 'prematurely' in order to prevent dependence on them. I am also aware that aids and adaptations should be explored before such an option is considered. Unfortunately the claimant's situation is such that there is no equipment or adaptation which will enable her to access the toilet or commode without assistance. In any event any movement, even assisted, carries a risk to the claimant's safety. The primary care need of the claimant is to ensure her safety by protecting her from the risk of further falls, and I remain of the view that the use of night-time pads and/or absorbent sheets maximises the claimant's safety.
>
> Having regard to the guidance and to the particular circumstances of the claimant as well as to the cost indications of the care options, I remain satisfied that the use of continence products is appropriate notwithstanding the claimant's objections. I note her concerns about privacy and dignity and about the need to maintain her relationship with her partner. It is the council's view that the use of continence products provides greater privacy and dignity than the presence of a carer assisting with personal and intimate functions at night-time."

Miss McDonald strongly differs from this view, and so may others. But I do not see how it could possibly be regarded as irrational.

32. It will be noted that in his last witness statement Mr Brown referred to a possible need to pass faeces at night, but noted that it had not been raised as an issue at the most recent review. In view of this I find it rather regrettable that Lady Hale's judgment makes so many references to defecation. She says, at the end of para 77, that the consequences (of what she describes as the logical implications of the majority decision) do not bear thinking about. But in this case we do have to think about urine and faeces. For an adult to use incontinence pads for urination may be quite unpleasant for both the user and the carer, but most people would agree that it is a good deal less unpleasant and undignified than their use for defecation. I totally disagree with, and I deplore, Lady Hale's suggestion that the decision of the majority would logically entitle a local authority to withdraw help from a client so that she might be left lying in her faeces day and night, relieved only by periodic changes of absorbent pads or sheets.

33. On top of her other misfortunes Miss McDonald has had to have some very personal and private matters aired at public hearings in court. I am sorry to add anything more to that, but I think it should be recorded that according to the very full documentary evidence Miss McDonald has not complained of bowel trouble

since an episode about five years ago, when her general health was very frail. As already noted, she did not raise any issue about this at her last assessment. It is true that in her witness statements she did refer to the possibility of "sitting around in my own urine or faeces" but the latter point was not relied on or even mentioned by her counsel at the appeal hearing. Only counsel making written submissions on behalf of Age UK, saw fit to give it prominence both in the first paragraph and in the last paragraph of his written submissions.

LORD KERR

34. Not without regret, I agree that this appeal must be dismissed but I have formed a somewhat different view on the first issue than that expressed by Lord Brown and Lord Dyson.

35. I consider that the respondent authority did not purport to carry out a re-assessment of the appellant's needs when it conducted the reviews of 4 November 2009 and 15 April 2010. The documents that these reviews generated are both entitled "Care Plan Review". By contrast the assessments of the appellant's needs which were conducted in February and July 2008 were recorded on forms with the heading, "Needs Assessment". The Care Plan that was carried out in November 2008 contained a section in which the appellant's needs were specified and particulars were given as to how those needs were to be met. There is nothing in the forms of 4 November 2009 and 15 April 2010 which suggests that an assessment of the appellant's needs was being undertaken on either occasion.

36. Rix LJ in para 53 of his judgment (quoted by Lord Brown in para 12 above) stated that the 2009 and 2010 reviews "are to be read as including a reassessment of Ms McDonald's needs". If by this Rix LJ meant that the respondent had carried out a re-assessment of Ms McDonald's needs, I would, with respect, disagree. In so far as there is any reference to her needs in the report of 4 November 2009, it is to the effect that they remained as before. See the passage from the report quoted by Lord Brown at para 11 – "Ms McDonald needs assistance to access the toilet during the day, and if she uses it at night". The needs were therefore defined as being associated with *access* to the lavatory, in other words, difficulties with mobility. The same holds true for the report on the review on 15 April 2010. Again the only reference to needs in this report was in relation to mobility problems.

37. The decision to change the care plan was not prompted by any change in the view about Ms McDonald's needs but by the conclusion that the *arrangements* that were in place to meet the needs exceeded what was required. And this was the basis on which the case was presented both to the deputy High Court judge and the

Court of Appeal. The clinching document in this regard is a letter from the respondent to Ms McDonald dated 4 November 2010 which stated unequivocally that if Ms McDonald's needs had not changed from the previous review, then generally a care plan review would take place. That was precisely what had happened in November 2009 and 15 April 2010. Clearly, if on those dates a re-assessment of needs was deemed necessary, a form of review different from that which took place on each of those occasions would have been undertaken and a different type of form would have been completed. The fact that in November 2009 and again in April 2010 a care plan review was undertaken (the very type of review which the November 2010 document stated was appropriate when there had been no change in the appellant's needs) demonstrates clearly that it was not the intention of the respondent to carry out any re-assessment of the appellant's needs on either date.

38. In my opinion, therefore, the Court of Appeal's decision can only be upheld on the basis that, although the respondent did not intend to carry out a re-assessment of the appellant's needs on 4 November 2009 or 15 April 2010, in fact the exercise then conducted yielded sufficient information to allow the court to conclude that the appellant's needs could properly be re-cast and warranted a change in the means by which those needs may legally be met.

39. This is, at first sight at least, not an easy conclusion to reach. Ms McDonald's needs were precisely the same as they had been when they were originally assessed. The change had come about not because there had been any authentic re-evaluation of what the appellant's needs were but because it was felt necessary to adjust how those would be expressed in order to avoid undesired financial consequences. And one, somewhat absolutist, way of approaching the case is to say that the appellant is not incontinent. Incontinence pads are provided for use by those who are. She needs help to move and she needs to move during the night. Her needs are therefore related to her difficulty with mobility, not to a problem with incontinence. Properly understood, she needs help with movement, not services which eliminate the need to move. On this approach, the deputy High Court judge was wrong to describe the need as the safety of the claimant and the Court of Appeal was likewise wrong to describe the need as a need to urinate safely at night. Ms McDonald has no problem in urinating safely at night. She does not need assistance to do so. She does need to be helped to move to a place where she can urinate, however.

40. After some hesitation, I have concluded that this is to take a rather too technical and inflexible approach to the issue. And I certainly do not think that it can be said that where the respondent has decided what needs are on one occasion, it is forever bound to that assessment. The essential question on the first issue, it seems to me, is whether "needs" partake partly of the means by which the disabilities of the appellant may be catered for, as well as the actual nature of the

disability and, on reflection, I think that this is the correct approach. In the Guidance on Eligibility Criteria for Adult Social Care document (issued by the Department of Health on 28 May 2002) the issues and problems that are identified when individuals contact, or are referred to, councils seeking social care support are defined as "presenting needs". If needs are defined as the issues and problems that the particular individual presents, that would appear to open the way to taking a rather broader view of what needs means and includes not only the narrow connotation of needs but also how those needs may be met. On that basis, it can be said that the reviews in 2009 and 2010, although it was not their purpose, in fact involved a re-assessment of the appellant’s needs and that they may now be regarded as the need to avoid having to go to the lavatory during the night. Viewed thus, the needs can be met by the provision of incontinence pads and suitable bedding. Not without misgivings, I have therefore concluded that it was open to the respondent to re-assess the appellant’s needs, to re-categorise them as a need to avoid leaving bed during the night and to conclude that that need could be met by providing the appellant with the materials that would obviate the requirement to leave her bed. Although that is not the way in which the respondent actually dealt with the appellant’s case, this was no more than a technical failure on its part and is moreover one that could easily be overcome. Even if it can be said, therefore, that the respondent did not comply with the legal requirement that it re-assess the appellant’s needs before deciding to change the means by which those needs should be met, quite clearly it could – and doubtless would, if required – do so. In these circumstances, the appellant’s challenge would have to fail in the exercise of the court’s discretion

41. I agree with all that Lord Brown has had to say on the other issues that arise on the appeal. There is nothing that I could usefully add to his admirable judgment on all of those matters.

LORD DYSON

42. I agree that, for the reasons given by Lord Brown, this appeal should be dismissed. I wish to add some words of my own on the first issue. Mr Cragg makes two points in relation to the 2009 and 2010 Care Plan Reviews. The first is that they contained no reassessment of Ms McDonald’s needs which remained as “needs assistance to use the commode at night”. The second is that, if the Care Plan Reviews did reassess her care needs, the reassessment was unlawful because it was undertaken in breach of the Community Care Assessment Directions 2004 (“the 2004 Directions”) and the Fair Access to Care Services (“FACS”) guidance.

43. Ms McDonald suffers from a small and neurogenic bladder so that she needs to urinate some three times during the night. The combination of this and the

fact that, as a result of a stroke, she has very limited mobility (and is therefore liable to fall) means that she cannot safely access a commode without assistance. The history of the respondent’s assessments of her care needs is set out in detail by Rix LJ (2010) 13 CCL Rep 664, paras 10 to 27. The following is a summary. A Needs Assessment with a start date of 22 January 2007 (signed off on 9 February 2007) stated that “frequent toileting still appears to be the major issue”. It also stated that Ms McDonald had refused to use incontinence pads and that she was requesting seven hours of care each night to assist her with using a commode. One of her needs was described in these terms: “3. Ms McDonald needs support with health needs including medication and continence issue. Substantial need.”: para 12.

44. So at this early stage, her needs were described in general terms as being assistance with toileting. This general description was to be repeated later in the Care Plan Reviews for 2009 and 2010 which contained several references to Ms McDonald’s “toileting needs”. The 2007 Assessment showed that two very different ways of meeting these needs had been identified: the provision of a carer to assist her with the use of a commode and the provision of pads. Ms McDonald made it clear that she wanted the former and was implacably opposed to the latter. That has always been her position.

45. A Care Plan dated 27 April 2007 recorded the fact that Ms McDonald did not use pads because she found them undignified and was in any event not incontinent and that she preferred to have assistance in using the toilet during the day and the commode at night. The plan stated that her needs were to be met inter alia by providing “assistance with toileting when it is required during the night. Ten hours over night care...”. The “summary of key problems/needs” stated: “Miss McDonald needs assistance to manage continence at night. Substantial Need”. This summary description was, however, later amended to read “Miss McDonald needs assistance at night to use the commode. Moderate Need”.

46. The explanation for the change in the description of the need is given by Thomas Brown who is the Service Manager in the respondent’s Adult Social Care Department. He says at paragraph 8 of his first witness statement that the respondent made it clear to Ms McDonald from January 2007 that there would be no funding for night care. But it agreed to provide such funding on a short-term basis pending her application to the Independent Living Fund (“ILF”) for financial support on the basis that this would be refunded by the ILF to the respondent if her application was successful. Mr Brown says that this was a concession on the part of the respondent. It is not clear from the evidence whether Ms McDonald made this application and, if so, with what result.

47. A further Needs Assessment was made in February 2008. There had been no change in Ms McDonald’s condition or in her attitude. She was still requesting assistance with using a commode at night and was still opposed to the use of pads. Her relevant need was expressed in these terms: “Miss McDonald needs assistance to use the commode at night Substantial Need”. In other words, the need was expressed in the same terms as in the Care Plan of 27 April 2007, although it was now described as a “substantial” rather than a “moderate” need.

48. On 17 October 2008, the respondent decided to reduce the amount allocated for Ms McDonald’s weekly care to reflect its view that she did not need a night-time carer and that pads would meet her toileting needs. This decision was recorded in a letter dated 21 November 2008. Nevertheless, the Needs Assessment started on 2 July 2008 (and signed off on 28 October 2008) and the Care Plan dated 17 November 2008 repeated the description of Ms McDonald’s need as “assistance to use the commode at night”.

49. In the Care Plan Review dated 4 November 2009, the respondent stated formally that it had concluded that the current care arrangements exceeded those reasonably needed to meet Ms McDonald’s toileting needs. It said that it remained of the view that the use of pads “is a practical and appropriate solution to Ms McDonald’s night-time toileting needs”. The same view was expressed in the Care Plan Review dated 15 April 2010 from which Lord Brown has quoted at para 11 above.

50. From this history, the following points emerge. First, it was never in dispute that Ms McDonald had “toileting needs” and those needs did not change throughout the relevant period: she needed to urinate three times a night and could not use a commode unaided. Her toileting needs could be met either by providing a carer who would assist her to use a commode or by providing pads. No other way of meeting the needs was canvassed as a possibility. Secondly, Ms McDonald was always opposed to the use of pads. Thirdly, the respondent was always of the view that the most practical and appropriate way of meeting her toileting needs was by using pads. Pads were safer (there was no risk of falls) and cheaper. But in the knowledge that Ms McDonald was opposed to the use of pads and as a concession, the respondent agreed to fund the provision of night-time care pending her application for funding to the ILF. Fourthly, the reassessment of her need in the Care Plan dated 27 April 2007 (as amended) as “needs assistance at night to use the commode” did not reflect the respondent’s view either of her need or of the most practical and appropriate way of meeting it. It was clear that it remained of the view that the most practical and appropriate way of meeting her toileting needs was by using pads and that she therefore had a need for the provision of pads.

51. In these circumstances, I am very doubtful that it was necessary or appropriate for the respondent to reassess Ms McDonald's needs in 2007. Her condition had not changed and the respondent's view as to how to deal with it remained constant. The fact that, as a concession, it made a grant of funding for night-care (refundable if the application to the ILF was successful) did not require it to reassess her care needs. Nevertheless, the fact is that the respondent did describe her need in the 2007 documentation as "assistance to use the commode at night" and the question raised by the first issue is whether it reassessed her need in the 2009 Care Plan Review.

52. Like Lord Brown, I entirely endorse para 53 of the judgment of Rix LJ. It is not in dispute that it is open to a local authority to reassess a person's needs in a Care Plan Review. Nor do I understand it to be in issue that the fact that a person's underlying presenting need has not changed does not prevent a local authority from making a reassessment. Provided that it does not act in a *Wednesbury* unreasonable way or in breach of a person's rights under the European Convention on Human Rights, it is open to an authority to make a reassessment in circumstances including that (i) there has been a change in the eligibility criteria for the assessment of needs; (ii) there have been relevant medical or technological developments which justify a change and (iii) the authority has simply had further thoughts and changed its mind as to what is the proper assessment of the need.

53. In construing assessments and care plan reviews, it should not be overlooked that these are documents that are usually drafted by social workers. They are not drafted by lawyers, nor should they be. They should be construed in a practical way against the factual background in which they are written and with the aim of seeking to discover the substance of their true meaning. Adopting that approach, I am in no doubt that the Care Plan Reviews of 2009 and 2010 contained reassessments of Ms McDonald's needs. My reasons are essentially those given by Rix LJ. I would merely add the following. It is true that the Care Plan Reviews did not explicitly purport to be reassessments of Ms McDonald's needs. This is because the documents stated that it *remained* the respondent's view that the use of pads was a practical and appropriate solution to Ms McDonald's night-time toileting needs. As I have said, the respondent's view as to her night-time toileting needs had not in fact changed and Ms McDonald could have been in no doubt about that. It is true that the night-time care needs had been differently described in the 2007 documentation, but that was only as a concession and on a temporary basis. Following the decisions of 17 October and 21 November 2008, it must have been clear that the respondent was withdrawing its concession and that the need was no longer being assessed as "assistance to use the commode at night". It is true that the Care Plan Reviews did not state in terms that the need was being reassessed from "assistance at night to use the commode" to "toileting needs" or "the provision of pads for night-time use". But there can be no doubt that this is the effect of the words used in the documents. In substance, the respondent was

saying in the Care Plan Reviews that it was adhering to the view it had always held and which had been reflected in the documentation at all times except during the period of the concession.

54. As regards Mr Cragg's second point, he submits that there has been a breach of Direction 2 of the 2004 Directions (set out by Lord Brown at para 10 above) and a breach of the requirements of the FACS guidance that "councils should ensure that individuals are active partners in the assessment of their needs" (para 28) and "councils should recognise that individuals are the experts on their own situation and encourage a partnership approach to assessment".

55. There is a history of consultation in this case. Since 2006, as Mr Brown makes clear in his statements, the respondent's officers have sought to maintain a productive dialogue with Ms McDonald and her representatives as regards her care needs. She was consulted in relation to each care plan review. These were scheduled reviews of which she was given advance warning. Since the meeting on 17 October 2008 (if not before), the respondent sought to agree the care package with her. Rix LJ was fully justified in concluding at para 42 that:

> "It is clear from the facts stated above that the Royal Borough has taken great pains to consult both Ms McDonald and [her partner] about Ms McDonald's needs and their assessment and solution, and to seek agreement with Ms McDonald about such matters."

56. For these reasons (as well as those given by Lord Brown) I would dismiss this appeal. I should add that, since writing this judgment, I have read the judgments of Lord Walker and Lady Hale. Like Lord Brown, I entirely agree with what Lord Walker says.

57. Ms McDonald needs to urinate three times a night and cannot safely use a commode unaided. Her need can be met either by providing a carer or by the provision of pads. These two very different ways of meeting her need are not themselves her needs. Of course, if (as Lady Hale does) you define them as needs, then it is irrational to confuse the two and meet one need in the way that is appropriate to the other: it obviously makes no sense to say that the need for help to get to the commode can be met by the provision of pads.

58. But Lady Hale is only able to say that the authority's decision is irrational because she has chosen to define the two ways of meeting Ms McDonald's need as needs themselves. If the provision of help to get to the commode and the provision of pads are seen as different ways of meeting Ms McDonald's need (described

above as her "toileting needs"), then the only question is whether the authority's decision to opt for the pads solution is unlawful.

59. The unchallenged evidence of Mr Brown cannot be brushed aside in the way that Lady Hale seeks to do. The use of incontinence pads for patients who are not clinically incontinent is "both widespread and accepted practice in the provision of social services" and is "general practice…as a means of ensuring safety in patients/residents with severely compromised mobility". The use of pads was suggested in this case by Ms McDonald's own GP. In these circumstances, in my view it is impossible to characterise the authority's decision as irrational.

60. It is no answer to this evidence to say that there is no evidence that it is accepted practice "in effect to oblige the client to accept it". The fact that the client may have no alternative but to accept the accepted practice does not mean that to adopt the general practice against the wishes of the client is irrational. And if it is not irrational, it is not unlawful.

LADY HALE

61. This case is about a really serious question which could affect any one of us: is it lawful for a local authority to provide incontinence pads (or absorbent sheets) for a person who is not in fact incontinent but requires help to get to the lavatory or commode? It raises an important point of law on the proper interpretation and application of section 2(1) of the Chronically Sick and Disabled Persons Act 1970 (Alf Morris's Act). Unfortunately the parties have not addressed themselves to this point. Instead, most of the argument has focussed upon a much narrower question which is essentially one of fact: whether two documents prepared by the local social services authority entitled "care plan review" were to be taken also as a reassessment of the appellant's community care needs. This is not a point of law of general public importance. But there is ample precedent for this court addressing itself to an important point which has not been argued by the parties (see, for example, *Granatino v Radmacher (formerly Granatino)* [2010] UKSC 42, [2011] 1 AC 534) and in this case we have a relevant intervention from Age UK, the principal charity working for older people in this country. I propose, therefore, briefly to address the question which we might have been asked.

62. To do so, it is necessary to explain a little of the background to the assessment of and entitlement to social care. Since the foundation of the welfare state in the post war years, local authorities have had power to provide a range of social services for adults who need them, usually because of age, ill-health or disability. It is, perhaps, unlikely that the original framers of the legislation

envisaged that any of these powers would give rise to an individual entitlement to be provided with a particular service: they were framed in terms of devising schemes to provide such services which would be approved by the Minister. Means-tested benefits, on the other hand, became available to fund accommodation in residential care. More and more public money was being spent on old and other vulnerable people living in private or voluntary nursing or care homes without any professional assessment of whether they actually needed to be there. This was not only wasteful and inefficient; it was also inconsistent with the policy aim of enabling people to live independent lives in their own homes for as long as possible. The system was changed following reports from the Audit Commission, *Making a Reality of Community Care* (1986) and Sir Roy Griffiths, *Community Care: Agenda for Action: A Report to the Secretary of State for Social Services* (1988), and a White Paper, *Caring for People: Community Care in the next Decade and Beyond* (1989, Cm 849). Local social services authorities were to be given the task of assessing people's needs and either providing or arranging appropriate services for those who needed them to do so.

63. Thus, section 47(1)(a) of the National Health Service and Community Care Act 1990 requires a local authority to carry out an assessment if it appears that any person for whom they have power to provide or arrange community care services may be in need of them. Section 46(3) of the 1990 Act defines "community care services" as those which a local authority may provide or arrange under four different statutory regimes, all of which pre-dated the 1990 Act. These include Part III of the National Assistance Act 1948. Part III was amended to draw a clear distinction between two sorts of service: residential accommodation for people who because of "age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them", under section 21(1)(a), (as amended by section 42(1) of the 1990 Act; and a range of other services for disabled people, under section 29. As amended by section 195 of, and paragraph 2 of the Schedule 23 to, the Local Government Act 1972, both sections provide that the local authority "may with the approval of the Secretary of State, and to such an extent as he may direct shall" provide the service described for the identified client group. The requisite approvals and directions are contained in the Department of Health Local Authority Circular LAC (93)10. This requires that services be provided for, among others, people who are ordinarily resident in the local authority's area. This appellant is a disabled person who ordinarily resides in the area of the respondent local authority.

64. But are these merely "target" duties, owed towards the relevant population as a whole, or do they give rise to individual rights? It was held in *R v Sefton Metropolitan Borough Council, Ex p Help the Aged* [1997] 4 All ER 532, that section 21(1)(a) of the 1948 Act does give rise to an individual entitlement to accommodation once the local authority have decided that the individual fulfils the statutory criteria. No-one has since challenged that decision and, indeed, it has

been assumed to be correct in more than one decision of the House of Lords: see *R (M) v Slough Borough Council* [2008] UKHL 52, [2008] 1 WLR 1808.

65. Logically, the position should be the same for both section 21 and section 29, as the relevant wording has been identical since 1972: the observation in *R v Islington London Borough Council, Ex p Rixon* [1997] 32 BMLR 136, 139, that the duties in section 29 were merely "target" duties pre-dated the decision that section 21(1)(a) created individual rights. (Incidentally, the Law Commission, in its recent report, Adult Social Care (2011) (Law Com No 326), has recommended that there should be an enforceable right to all the community care services required to meet the individual's eligible needs: para 6.12, recommendation 16.)

66. In any event, it is quite clear that section 2(1) of the Chronically Sick and Disabled Persons Act 1970 was intended to create an individual right to services if its criteria were met. So far as relevant to this case, it reads as follows:

> "Where a local authority having functions under section 29 of the National Assistance Act 1948 are satisfied in the case of any person to whom that section applies who is ordinarily resident in their area that it is necessary in order to meet the needs of that person for that authority to make arrangements for all or any of the following matters, namely –
>
> > (a) the provision of practical assistance for that person in his home; . . .
>
> then, . . . , it shall be the duty of that authority to make those arrangements in exercise of their functions under the said section 29."

67. The 1970 Act thus specified certain services which had to be provided for disabled people who needed them under section 29 and gave those people an enforceable right to those services. Implicit in that right was a right to have one's needs assessed, at least if the local authority were asked to do so. But the matter was put beyond doubt by section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986. This requires that, when requested to do so by or on behalf of a disabled person, "a local authority shall decide whether the needs of the disabled person call for the provision by the authority of any services in accordance with section 2(1) of the 1970 Act". Significantly, this wording draws a clear distinction between the "needs of the disabled person" and the services which should be provided in response.

68. The duty in section 4 of the 1986 Act remains in force despite the enactment of the more comprehensive duty in section 47(1) of the 1990 Act. As section 2(1) services are provided in the exercise of the authority’s functions under section 29 of the 1948 Act, it has been held that they are also included in the definition of “community care services” in section 46 of the 1990 Act and thus within the duty to assess the need for them in section 47(1): see *R v Kirklees Metropolitan Borough Council, Ex p Daykin* (1996) 1 CCLR 512. Having carried out an assessment under section 47(1)(a), section 47(1)(b) requires that the authority “having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of any such services”. But not all community care services are a right, so section 47(2) of the 1990 Act expressly preserves the special position of disabled people who are entitled to services under section 2(1) of the 1970 Act. If at any time during an assessment of needs under section 47(1)(a) it appears that the client is a disabled person, then the authority must proceed to make a decision as to the services which he requires under the 1970 Act without being requested so to so. This underlines the fact that Parliament intended to treat the needs of disabled people as a special case. Otherwise, it is hard to see why they did not simply subsume the former provisions in the new.

69. In sum, disabled people have an individual right to certain services under section 2(1) of the 1970 Act and a right to have their entitlement to such services assessed and a decision made under both section 4 of the 1986 Act and section 47 of the 1990 Act. Clearly, it is for the local authority and not the court to make that assessment. It is for the authority to be satisfied that the criteria are met. But in doing so they have to ask themselves the right questions and provide rational answers. The key question is what is meant by “necessary in order to meet the needs” of the disabled person in section 2(1) of the 1970 Act. These words contain two separate questions: first, what are the needs of the disabled person; and second, what is necessary to meet those needs? The second question is then supplemented by a third: having decided what is necessary to meet those needs, is it necessary for the local authority to arrange it?

70. In *R v Gloucestershire County Council, Ex p Barry* [1997] AC 584, the issue was whether it was lawful for the local authority to take their resources into account in answering those questions. It was common ground that there was “a good deal of flexibility” in the arrangements which could be made to meet a person’s assessed needs. So the authority’s resources could be taken into account at the second stage, provided always that the need was met. The dispute was over whether those resources could be taken into account in assessing what the person’s needs were. Lord Lloyd of Berwick, with whom Lord Steyn agreed, held that they could not. Lord Nicholls of Birkenhead and Lord Clyde, with whom Lord Hoffmann agreed, held that they could.

71. The subsequent Guidance on Adult Social Care, *Fair Access to Care Services, Guidance on Eligibility Criteria for Adult Social Care* (2003) sought to make sense of the distinction which the House of Lords had elided. Thus it distinguished between a person's "presenting needs" and her "eligible needs": paragraph 2. The presenting needs were those which the client actually had. The eligible needs were those which the authority were prepared to meet. This depended upon whether they were assessed as being "critical", "substantial", "moderate" or "low": paragraph 16. The authority could decide which categories of need they would meet. This was designed to achieve a good degree of consistency within authorities as to the needs which would be met, but obviously produced a considerable disparity between those authorities who would meet only critical and substantial needs and those authorities who would also meet moderate or even low needs. The lesson which I learn from this guidance (and from its replacement, *Prioritising Need in the Context of Putting People First: A Whole System Approach to Eligibility for Social Care* (2010)) is that there is an obvious distinction between what people need and what the authorities are prepared to do to meet that need. How otherwise can it be the case that a person with a particular level of need in one local authority area will have that need met but a person with the same level of need in another local authority will not?

72. Hence I confess that I find the reasoning of the minority in *Barry* much more convincing, both as a matter of statutory construction and as a matter of everyday life, than the reasoning of the majority. There is a clear distinction between need and what is done to meet it. We all need to eat and drink. Resources do not come into it. But there are various ways of meeting that need and it is perfectly sensible to choose the most efficient and economical way of meeting it. Our nutritional needs can met by simple, wholesome food, rather than by giving us the expensive foods that we prefer.

73. I could have wished, therefore, that counsel had taken the opportunity presented by coming to this court to argue that *Barry* was wrongly decided. It was, after all, a comparatively recent decision, taken by a bare majority, on a highly arguable point of statutory construction. Lord Nicholls acknowledged (at p 604C) that the contrary argument was, at first sight, compelling. The majority view was obviously heavily influenced by the impossible position in which the local authority had been put by the government of the time: wishing to maintain the services which their clients needed but unable to do so because of the combination of rate-capping and reduction in the central government grant. The principled view, taken by the minority, was that this was not a good enough reason to interpret the authority's statutory duties otherwise than in accordance with their plain meaning.

74. Without the decision in *Barry*, it would be easy to answer the question in this case. If resources did not come into the assessment of need, it would be easy to

state what a particular individual needed. Everyone needs to urinate and defecate. People who can control their bladder and/or bowels need a safe and hygienic place in which to do so. People who cannot control their bladder and/or bowels need equipment designed to cater for the fact that they cannot avoid performing these natural functions in the wrong place. The former group of people do not need the latter equipment although they may need help in getting to the safe place. Once the need is accurately identified, the most efficient and economical way of meeting it can be chosen. Just as any parent has to choose whether to use disposable or re-usable nappies (to take an obvious example), a local authority can choose the most efficient and economical equipment to meet the need. Likewise, if the need is for help to use the lavatory or commode, there may be all sorts of choices available – as to when, how or even where to offer the service. Thus, it might well have been open to the local authority to say to Ms McDonald that it was too expensive for them to provide her with the sort of night time care that she was asking for in her own flat, but that they could do so in one of the Extra Care Sheltered Housing Schemes in the borough, or in her own flat through the Homeshare scheme. She too can be expected to co-operate with the authority in choosing the most economical and acceptable way of meeting the need that she has.

75. However, I do not think that it is necessary to hold that *Barry* was wrongly decided in order to allow this appeal. Section 2(1) clearly does ask two separate questions. Nothing in *Barry* denies that. Both of those questions have to be answered, and answered rationally, in relation to the individual disabled person. It seems to me that the need for help to get to the lavatory or commode is so different from the need for protection from uncontrollable bodily functions that it is irrational to confuse the two, and meet the one need in the way that is appropriate to the other. Of course, there may well be people who are persuaded that this is in fact a more convenient, comfortable and safer way of solving the problem; then it is no longer irrational to meet their need in this way. The authority suggest that this is “accepted practice” but they cannot point to evidence that it is accepted practice in effect to oblige the client to accept it. Such Department of Health Guidance as there is points the other way: that people should not be offered this form of assistance prematurely, in case they become unnecessarily dependent upon it. The client should not have to have one need met with the solution to another

76. It is clear from the evidence that this local authority have never been prepared to fund the night time care which Ms McDonald wants. They only agreed to do so as a temporary measure while the application to the Independent Living Fund was being processed. It is not clear why their offer of payment lapsed. But ever since then they have been trying to reduce the care to the figure which they have allocated for her. No-one can blame them for that. I dare say that they have not found Ms McDonald an easy person to deal with. But the fact that they have been trying so hard for so long to persuade her to accept their point of view does

not mean that it is a rational view or one which she is bound to accept. For the reasons already given, I do not think that it is.

77. Furthermore, I am troubled by the implications of the contrary view. A person in her situation needs this help during the day as well as during the night and irrespective of whether she needs to urinate or to defecate. Logically, the decision of the majority in this case would entitle a local authority to withdraw this help even though the client needed to defecate during the night and thus might be left lying in her faeces until the carers came in the morning. This is not Ms McDonald's problem at the moment, but her evidence leaves one in no doubt that this is one of her fears. Indeed, the majority view would also entitle an authority to withdraw this help during the day. The only constraint would be how frequently (or rather how infrequently) it was deemed necessary to change the pads or sheets, consistently with the avoidance of infection and other hazards such as nappy rash. The consequences do not bear thinking about.

78. I therefore agree with the argument of the interveners, Age UK, when they say that it is "irrational in the classic *Wednesbury* sense" to characterise the appellant as having a different need from the one which she in fact has. As I understand it, it would not be regarded as acceptable to treat a hospital patient or care home resident in this way. Regulation 17 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 (SI 2010/781) requires a registered person, so far as reasonably practicable, to make suitable arrangements to ensure the dignity, privacy and independence of service users. The Care Quality Commission's Guidance, Essential Standards of Quality and Safety (2010), p 117 requires that people who use services have access to toilets, baths and showers that enable them to maintain privacy and dignity and are in close proximity to their living areas. The Commission's recent Review of Compliance at Ipswich Hospital NHS Trust found that dignity was not always sufficiently considered because people were not taken to a toilet away from their bed-space and commodes were used all the time: p 8. There is no suggestion that people with mobility problems should not be able to enjoy the same access to toilet facilities as those who do not. There is no suggestion that it would be acceptable to treat patients in hospital in the way that it is suggested that someone living in her own home should be treated. But the overall cost of admitting anyone to residential or nursing care is usually greater than providing them with what they need in their own homes. The policy aim underlying all the recent guidance is to help people to live independently in their own homes for as long as possible.

79. As Lord Lloyd put it in *Barry* "in every case, simple or complex, the need of the individual will be assessed against the standards of civilised society as we know them in the United Kingdom" (p 598F). In the United Kingdom we do not oblige people who can control their bodily functions to behave as if they cannot do

so, unless they themselves find this the more convenient course. We are, I still believe, a civilised society. I would have allowed this appeal.