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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

DM's Application [2012] NIQB 98

**IN THE MATTER OF AN APPLICATION BY 'DM'
(A PERSON UNDER DISABILITY) ACTING BY HIS NEXT FRIEND,
KATHLEEN McCOLLUM, FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION OF THE NORTHERN
HEALTH AND SOCIAL CARE TRUST**

HORNER J

Introduction

[1] The applicant in this case was born in 1963. He is 49 years of age. He suffers from a mild learning disability. He also has a host of physical infirmities, some of which restrict his mobility. The combined effect is that he has problems with his personal care and hygiene. He brings this application to quash a decision of the Northern Health and Social Care Trust ("the Trust") to offer him £21 per day by way of direct payments in respect of the provision of social care.

[2] The applicant is fortunate in having the support of Kathleen McCollum. She was a friend of the applicant's sister who has since died and acts as his next of kin. She has been a proverbial rock for the applicant. In 2002 the applicant was in a bad place. He was mixing with the wrong crowd who took advantage of his good and trusting nature. He was guilty of substance abuse and he stood in real danger of losing the house he rented from the NIHE because his behaviour and those of his companions was causing considerable annoyance and distress to his neighbours. In 2002 he secured funding from the Trust to go to the Bridge Training Centre ("the Bridge"). This is a non-profit making organisation and is closely connected to

Concrete Ideas which is profit making. It was agreed for the purpose of this judicial review that I need not distinguish between the Bridge and Concrete Ideas. The applicant has thrived at the Bridge and has discovered among other things, a talent for flower arranging. He has made friends and has achieved "much needed routine and stability, friendship and stimulation" according to Ms McCollum. In truth it does appear that the Bridge has turned his life round.

[3] The historic cost of providing these facilities for the applicant had been approximately £63 per day. That sum was made up of a contribution of £21 from the Trust and this is matched by equal contributions from the European Social Fund ("ESF") and the Department of Education and Learning ("DEL"). However the outside funding from ESF and DEL was time limited and is no longer available. Accordingly the entire burden now falls upon the Trust. It is currently paying the Bridge approximately £47 per day, pending resolution of these proceedings.

[4] The applicant has applied for direct payments as he is legally entitled to do to cover the cost of his social care. The Trust has offered £21 per day which the Bridge says is less than 50% of what they require to provide the necessary services to the applicant, namely £47 per diem. The Trust claim that the Bridge is effectively holding it to ransom. It complains that the Bridge has enlisted the support of the applicant and some of its other trainees. It claims that they have failed to cooperate and that the claim for direct payments is part of an attempt "to force the Trust's hand" and make it pay what it considers to be excessive payments to the Bridge. It is clear that the applicant has been caught up in a war. It is most unfortunate that the applicant should find himself in such an invidious position.

[5] This is a difficult case. Judicial review is in general concerned with the process not the outcome. The allocation of resources is usually said to be not amenable to judicial review for a number of different reasons: see 5.130 of de Smith on the Principles of Judicial Review (6th edition). It can be very difficult, for example, to distinguish between "target duties" and "enforceable duties" and what those mean in respect of the fair division of finite funds. However my task is made considerably easier by:

- (a) The good sense of counsel who have agreed what can reasonably be agreed both in respect of the facts and the law.
- (b) The comprehensive skeleton arguments submitted by each side.

The Respective Cases

[6] The essential thrust of the case made on behalf of the applicant is, inter alia, that:

- (a) The Trust has failed to properly construe, interpret and apply the relevant legislation in looking at the issue of direct payment to the applicant.
- (b) The Trust has failed to properly assess the needs of the applicant and accordingly has offered a sum which is completely inadequate to purchase the social care required for the applicant's needs.

The claims in respect of Article 6 and 8 of the European Convention on Human Rights have not been pursued.

[7] The Trust has defended the claim on a number of grounds including:

- (a) The applicant's construction and interpretation of the statutory framework is incorrect.
- (b) The applicant has ignored the issue of resources and the finite nature of those under the control of the Trust.
- (c) The sum of £47 per day offered by the Trust is not manifestly insufficient given the numerous other day opportunities which can be provided should the Bridge close or not be in a position to offer the placement the applicant claims to deserve.
- (d) The Trust is duty bound by reason of the Departmental Guidance to ensure that "direct payments must be at least as cost effective as the services it would otherwise provide". The Trust further goes on to claim "it cannot be held to ransom by a private company which seeks an amount in excess of other providers who can offer comparable opportunities".
- (e) The importance of the Bamford "Equal Lives" Review of Policy and Services for People with a Learning Disability in Northern Ireland 2005 on its policies. They have been designed "to ensure the continuing development of vocational training, social enterprise and supported employment programmes for adults with learning disabilities" so as to provide them with more diversity and opportunity. This has resulted in a range of day opportunities which it is claimed are able to cater for the applicant's needs in addition to those available at the Bridge.

[8] Those brief summaries are not intended to be comprehensive. They do not do justice to the carefully constructed and nuanced arguments put forward on behalf of the parties.

Relevant Legislation

[9] Counsel for the Applicant and the Respondent agreed that the relevant statutory framework is as set out below. Further they confirmed my view that it was the same as the regime which operates in England and Wales, although obviously different legislation is involved. The first relevant provision is article 15(1) of the Health and Personal Social Services (Northern Ireland) Order 1972, which imposes a general duty on the Department of Health, Social Services and Public Safety ('the Department') and to provide general social welfare in the following terms:

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

[10] This duty is generally discharged through the various health trusts. Article 15A(1) of the 1972 Order makes provision for direct payments in relation to the provision of social care, in the following terms:

"Where -

- (a) the Department has decided that the needs of a person aged 18 years or over call for the provision of any service which is a personal social service; and
- (b) the person is of a description prescribed for the purposes of this paragraph,

the Department may, if the person consents, make to him, in respect of his securing the provision of the service, a payment of such amount as it thinks fit." [underlined emphasis added]

[11] Section 2 of the Chronically Sick and Disabled Persons (Northern Ireland) Act 1978 also provides:

“Where the [Department of Health, Social Services and Public Safety] for Northern Ireland is satisfied in the case of any person to whom section 1 above applies that it is necessary in order to meet the needs of that person for that Department to make arrangements under section 2(1)(b) of the Health and Social Services (Reform) Act (Northern Ireland) 2009 and Article 15 of the Health and Personal Social Services (Northern Ireland) Order 1972 for all or any of the following matters namely -

...

(c) the provision for that person of lectures, games, outings or other recreational facilities, outside his home or assistance to that person in taking advantage of educational facilities available to him;

...

then, that Department shall make those arrangements.”

Further, more detailed, provision in relation to direct payments is made in the Carers and Direct Payments Act (Northern Ireland) 2002 (‘the 2002 Act’). Section 8 of the Act provides:

- “(1) Regulations may make provision for and in connection with requiring or authorising an authority in the case of a person of a prescribed description who falls within subsection (2) to make, with that person’s consent, such payments to him as the authority may determine in accordance with the regulations in respect of his securing the provision of the service mentioned in paragraph (a) or (b) of that subsection.
- (2) A person falls within this subsection if the authority has decided -
 - (a) under the 1972 Order that his needs call for the provision by it of a particular personal social service; or
 - (b) under section 2(1) to provide him with a particular service under that section.
- (3) Regulations under this section may, in particular, make provision -

...

- (b) for any payments required or authorised by the regulations to be made to a person by the authority (“direct payments”) to be made to that person (“the payee”) as gross payments or alternatively as net payments;
- (c) for the authority to make for the purposes of subsection (4) or (5) such determinations as to –
 - (i) the payee’s means; and
 - (ii) the amount (if any) which it would be reasonably practicable for him to pay to the authority by way of reimbursement or contribution,
as may be prescribed;

...

- (4) For the purposes of subsection (3)(b) “gross payments” means payments –
 - (a) which are made at such rate as the authority estimates to be equivalent to the reasonable cost of securing the provision of the service concerned; but
 - (b) which may be made subject to the condition that the payee pays to the authority, by way of reimbursement, an amount or amounts determined under the regulations.
- (5) For the purposes of subsection (3)(b) “net payments” means payments –
 - (a) which are made on the basis that the payee will himself pay an amount or amounts determined under the regulations by way of contribution towards the cost of securing the provision of the service concerned; and
 - (b) which are accordingly made at such a rate below that mentioned in subsection (4)(a) as reflects any such contribution by the payee...” [underlined emphasis added]

[12] Regulations were then made under section 8(1) of the 2002 Act in the form of the Personal Social Services and Children's Services (Direct Payment) Regulations (Northern Ireland) 2004 ('the 2004 Regulations'). Regulations 2 and 3 set out further detail of the duty to make direct payments. Regulation 2 provides:

- "(1) If the conditions in paragraph (3) are satisfied, an authority must make in the case of a prescribed person who falls within section 8(2) of the Act... with that person's consent, such payments to him (direct payments) as the authority may determine in accordance with regulation 5 in respect of his securing the provision of a relevant service.
- (2) In this regulation a relevant service means -
 - (a) a particular personal social service under the 1972 Order; or
 - (b) a particular service under section 2 of the Act; ...
- (3) The conditions referred to in paragraph (1) are that -
 - (a) the authority is satisfied that the person's needs for the relevant service can be met by securing the provision of it by means of a direct payment; ...
[underlined emphasis added]

[13] The amount of direct payments is governed by regulation 5, which provides simply as follows:

- "(1) Subject to paragraph (2) a direct payment shall be made as a gross payment unless the authority decides it shall be made as a net payment.
- (2) For the purpose of making the payment referred to in paragraph (1), the authority shall determine, having regard to the prescribed person's means, what amount (if any) it is reasonably practical for him to pay towards securing the provision of the relevant service (whether by way of reimbursement as mentioned in section 8(4) of the Act or by way of contribution as mentioned in section 8(5) of the Act)."

[14] Girvan LJ noted in PF and JF's Application (2011) NIQB 20 at paragraph 34 that these provisions together with other legislation dealing with the rights of disabled persons represent the UK's attempt to fulfil the obligations undertaken by

the UK under the United Nations Convention (on the Rights of Persons under Disabilities).

[15] My attention was also drawn by the parties to the Guidance for Boards and Trusts in respect of direct payments produced by the Department of Health and Social Services and Public Safety in April 2004. Each party relied on passages which each claim supported the stance that that particular party had taken. I remind myself that the Guidance is just that and that if there is any conflict with or contradiction to the primary legislation, then the statutory provisions should prevail. The head note at Section 1 states:

“Trust Guidance on Needs (sic) assessment should be the same whether the person being assessed is likely to receive services or direct payments. Direct payments can only be offered to someone who has been assessed as needing personal social services and for whom a Trust has decided to provide those services.”

There is nothing controversial in this.

[16] Section 9.1 states:

“Assessment is a crucial process. Direct payments can only be offered to someone who has been assessed as needing personal social services and for whom the Trust has decided to provide those services. Trust guidance on needs (sic) assessment should be the same whether the person being assessed is likely to receive services or direct payments. There is no difference in the assessment of needs between services and direct payments, and Trusts should ensure that information makes this clear. In particular, it is important that the needs-led focus of the assessment is retained and that the person being assessed should be involved throughout the assessment process. The assessment of needs in decisions about how these needs should be met should be seen as part of one process.”

Quite properly this stresses just how important assessment is in the whole process.

Section 11.1 states:

“A Trust should not make direct payments unless they are at least as cost-effective as the services that it would

otherwise arrange. Any consideration of cost-effectiveness should consider long-term best value.”

Again there should be nothing controversial in this.

Finally 11.3 states:

“However, the particular costs involved will depend on the way in which the direct payment recipient secures the service, and a Trust is not obliged to fund the particular costs associated with the direct payment recipient’s preferred method of securing the service if the service can in fact be secured most cheaply in another way (but still to a quality which the Trust considers is acceptable)”.

Again this should not be contentious. An applicant cannot seek to ask the Trust to fund a top of the range service when a much more modest and cheaper one satisfies the needs of that particular person. However, the preferred service of the Trust as well as being cheaper **must satisfy the assessed needs** (my emphasis) of that particular person.

Legal Discussion

[17] The courts here have in LW’s Application [2010] NIQB 62 and PF and JF’s Application [2011] NIQB 20 had cause to consider the above statutory scheme albeit in a somewhat different context. It was also considered by the House of Lords in R v Gloucestershire County Council ex parte Barry [1997] 2 All ER 1. Most importantly the Supreme Court returned to the English equivalent legislation in R (on the application of KM) v Cambridgeshire County Council [2012] UKSC 23 when it was asked to consider the issue which arises in this particular case, namely whether or not the amount of the annual sum assessed to be payable to the applicant was irrational. It had been thought that KM was going to challenge the earlier decision of Barry. In the Barry case the House of Lords had concluded that the local authority’s resources were relevant when determining what provision it was necessary to make to a disabled person under Section 2 of the Chronically Sick and Disabled Persons Act 1970. In the end the Supreme Court did not have to decide whether Barry had been rightly or wrongly decided. As Baroness Hale said at paragraph 43:

“Resources in KM did not come into the local authority’s decision”.

[18] In KM the challenges were to the local authority's decision to make payments of £85,000 per annum to KM who was profoundly disabled. This payment had been calculated by the council applying its "Resource Allocation System" ("RAS") along with its "Upper Banding Calculator", which it used to calculate additional amounts in severe cases. Lord Wilson with whom the rest of the Court agreed, gave the leading speech. At paragraph 15 of the judgment he broke down the analysis required of the local authority under Section 2 by asking the following three questions:

- "(i) What are the needs of the disabled person?
- (ii) In order to meet these needs is it necessary for the authority to make arrangements for the provision of any of the listed services?
- (iii) If so, what are the nature and extent of the services for which it is necessary for the local authority to make arrangements?"

He held that with direct payments there was a fourth question which had to be asked and that was:

- "(iv) What is the reasonable cost of securing provision of the services for which it is necessary for the authority to make arrangements?"

[19] At paragraph 5 of his judgment Lord Wilson held that constraints on the local authority's resources were "undoubtedly" relevant to the second question he identified at paragraph 15 of his speech. He went on to say that in so far as Barry suggested that resources were also relevant to the first stage of the inquiry he identified that were "arguable" grounds for finding that the Law Lords had fallen into error in Barry. He cited in support of that view the concerns expressed by Baroness Hale in R (McDonald) v Kensington & Chelsea Royal London Borough [2011] UKSC 333 para 69-73.

[20] In her judgment Baroness Hale suggested that Barry had not decided the local authority's resources were relevant to an assessment of the claimant's needs, that is the first question identified by Lord Wilson. She offered the analysis that instead all the House of Lords had decided in Barry was that resources were relevant to the second stage of the inquiry that fell to be made, as per Lord Wilson.

Findings

[21] The applicant claimed that his needs had not been adequately assessed. The Trust claimed that his needs had been assessed and that if they had not been adequately assessed, then he had only himself to blame. The Trust alleges that the refusal to permit an assessment of his needs was part of a group strategy to force the Trust to purchase services from the Bridge. It does seem that the Trust's position is somewhat inconsistent in that either the applicant was properly assessed or he was not. What is required in such an assessment is set out in the letter from Ms Beggs of the Trust's solicitors in a letter of 13 May 2011. She says at paragraph 1:

"The normal practice is for the Social Work assessment to identify which service is suitable to meet the individual's assessed needs ie respite, domiciliary or day services. The assessment would be forwarded to the team involved, in the case of your clients to the Day Opportunity Team, to identify in conjunction with the individual, and their family what services/activities are available for the individual eg Base, FE College, volunteering etc. Each case is discussed at a multidisciplinary day services panel then a referral is made to the day opportunity service. A member of the day opportunity service is then appointed to the client in order to develop and implement the day activity plan which is tailored to meet individual needs. This is done in consultation with the individual and their (sic) family. It is important to understand that people assessed as suitable for the day opportunity service are capable of having their needs met in a range of ways by a range of services."

No up-to-date report of any multidisciplinary day services panel was made available at the hearing nor do I believe the court had the chance to consider a day activity plan tailored for the applicant's individual needs. During the course of the hearing assessments by Joe Crilly, Community Nurse, dated 28 April 2011 and by Teresita Dorman dated 4 May 2010 were produced. As far as I am able to determine, no further assessments have been carried out and as I have said I was not directed to any up-to-date bespoke day activity plan for the applicant.

[22] There is a suggestion the applicant either on his own or as part of a group action prevented an assessment of his needs taking place. This allegation has not been made good. For example I have not seen or been referred to any document suggesting the applicant was ever asked to attend for appointment to allow an

objective assessment of his needs to take place and he has refused to attend. Mr Strattan says that the applicant has declined to meet staff "to discuss options" and that he has maintained his desire to remain in the Bridge. But that, if true and there does not appear to be any corroborating documents for this claim, is a far cry from refusing to be assessed.

[23] The Trust seems to divide those in need of social care into two categories, namely those who require care in Adult Centres and those who can benefit from the Day Opportunities' Programme. The applicant seems to fall between the two categories as described, having a mild learning disability but significant health problems and personal care issues. This dichotomy is set out in paragraph 9 of Mr Strattan's affidavit sworn on 3 May 2012.

[24] Further, it is suggested that other facilities run by the Trust would provide adequately for the applicant's needs. Only one such facility was tested. The Base was selected by the Trust as being suitable to cater for the applicant's needs at a rate much reduced to the £47 per day being looked for by the Bridge. The uncontradicted sworn evidence of Ms McCollum in her affidavit of 23 February 2012 establishes that the Base was manifestly unsuitable. She describes in some little detail the applicant's humiliation and she goes on to say without ever being contradicted:

"David was picked up on his hygiene on a number of occasions in front of others and felt humiliated, particularly when Base was not giving him the assistance he needed to deal with these issues. It has had a serious effect on his confidence. Having been told he was no longer welcome at Base he returned to Bridge where he has always been, and is, much happier."

[25] The obvious conclusion is that this mis-match between the needs of the applicant and the services being offered by the Base occurred as a direct consequence of the Trust's failure to match up the requirements of the applicant with the facilities that the Base could offer. It is also suggested on behalf of the Trust that the applicant was given the opportunity to engage in other activities and to study at a local college but that he declined to avail of these opportunities. Again, I would have expected to see some documentary evidence for these claims. But if the applicant was reluctant to take up these offers, and I make no finding on this issue, it is no wonder given what happened at the Base. I can well understand that following his humiliation there he would require considerable assurance that all his needs including those of personal care were capable of being looked after before he would agree to attend. I see no hint of this in the papers.

[26] The applicant says that it is too much of a coincidence that the contribution offered by the Trust of £21 per day payment is exactly the same as the one third contribution the Trust paid towards the total hourly rate to the Bridge namely £63 per diem. The Trust's answer is that it is a coincidence. While it is the same amount the Trust says it is at the top end of the current cost of other "day opportunity" providers who cater for other persons suffering from similar disabilities to the applicant. However, what the Trust has not done is:

- (i) assess the needs of the applicant (see above);
- (ii) assess the costs of satisfying those needs and/or;
- (iii) audit the charge of £47 per day requested by the Bridge to see whether it is reasonable or not.

Mr Lockhart QC on behalf of the Trust quite frankly said in answer to my question whether an assessment of the Bridge's rate had been carried out that the Trust did not want to assume the task of assessing such charges and preferred to leave this to ESF and/or DEL who were better resourced to carry out such a task.

Conclusion

[27] This is not an easy case. Both sides presented well marshalled arguments. However, it is clear that the Trust failed to follow the approach set out by Lord Wilson in KM. Firstly, at the outset it did not ask the question what are the needs of the applicant and carry out a detailed up to date assessment necessary to determine those needs. Secondly, it seems to have rolled up questions 2 and 3 (and perhaps question 1 as well) and considered them together taking into account its resources in deciding whether to provide services which it had previously considered necessary for the applicant and his needs. Thirdly, I find that the true motivation of the Trust in paying £21 per day is to be found in Mr Strattan's second affidavit at paragraph 27. In this he refers to the cost of financing the day opportunity scheme if the Trust were to pay £47 per day. "If 53,404 days were provided at a cost of £47 per day then this would cost the Trust £2,510m or an increase of £1,662m." Finally, the Trust did not ask the fourth question and thus did not make any assessment of the costs which Bridge proposed to charge. Instead the Trust has looked at other charges made by different Institutions over which it has control. These Institutions provide services very different to the Bridge and on the evidence available (albeit such evidence is limited) are not suited to the requirements of the applicant. The Trust has then sought to make some form of comparison. In truth, the Trust has fallen into an error of not comparing like with like. They were not on the evidence adduced to this court as the Trust contended "comparable opportunities" for the applicant.

[28] I will hear counsel on what is the appropriate relief in the light of my conclusion that the Trust has erred in its approach to the issue of what direct payment it should make to the applicant and, on the basis of the present information, has acted unreasonably in refusing to discharge in the future the cost of the applicant attending the Bridge at £47 per day.

Further Thoughts

[29] It is deeply disappointing that the applicant has become involved in the dispute between the Trust and the Bridge. However, it would be quite wrong for the Bridge to see this decision as a vindication of its decision to charge £47 per day. I make no comment on what the answers will be if the Trust asks the questions which Lord Wilson said it should ask. I must however point out that the Supreme Court specifically endorsed the general use of RASs as a lawful tool to provide a “ball park figure” subject to adjustment. These work by allocating points to eligible needs and thus ascribing a cost to each point. Once an indicative sum has been identified Lord Wilson said it “is crucial that the requisite services in a particular case should be costed in a reasonable degree of detail so that a judgement can be made where the indicative sum was too high, too low or about right”. This exercise is usually labelled the “Support Plan”. RSAs have been criticised for not being transparent. They rely on algorithms which are not revealed to service users. They translate the needs of a particular individual into a budget without identifying the costs of the particular services required to meet those needs.

[30] In the present case it is not at all clear what the result will be if the Trust carry out the exercise that they are duty bound to carry out under the present statutory framework. Indeed, the ultimate conclusion may be deeply unsatisfactory to the Bridge. That is why it is particularly disappointing that this dispute involving as it does, someone such as the applicant, has not been resolved long ago. The applicant has every right to feel that he has been let down by both the Bridge and the Trust. I would urge both the Trust and the Bridge to try once more and see whether they can find some mutual accommodation, so as to ensure the applicant continues to have his requirements for social care satisfied.