SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 51
P422/19

Lord Justice Clerk
Lord Glennie
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Reclaiming Motion

by

TERRI McCUE as guardian of ANDREW McCUE

Petitioner and Reclaimer

for

JUDICIAL REVIEW AGAINST A DECISION OF GLASGOW CITY COUNCIL

Respondent

_____

Petitioner and Reclaimer :Dailly, Sol Adv; Drummond Miller LLP
Respondent: Byrne; Morton Fraser LLP

21 August 2020

Introduction

[1] The reclaimer is the mother, carer and Guardian of Andrew McCue. Andrew is 25 years of age, has Down's Syndrome and lives with his parents. He is disabled within the meaning of section 6 of the Equality Act 2010 ("the 2010 Act"). Accordingly he is entitled in law to community care services from the respondent in terms of section 12A of the Social Work (Scotland) Act 1968 ("the 1968 Act") and section 5 of the Social Care (Self-directed

Support) (Scotland) Act 2013. The respondent has in place a "Support Plan" which provides Andrew with non-personal care between 9am and 3pm during weekdays at certain locations. The reclaimer does not challenge the Support Plan, which it is accepted adequately meets Andrew's needs as a disabled person which the respondent is under a duty to meet. Given the nature of the issues in the case, the Scottish Public Services Ombudsman ("SPSO") was given permission to intervene and to lodge a written submission.

[2] Sections 87(1) and (1A) of the 1968 Act provide local authorities with a power to levy a charge for services they provide, so long as the charge is reasonable and the service user has the means to pay. The respondent does so in terms of a charging policy, under which an individual will only require to make any payment where his income is in excess of the "minimum income threshold", a sum set by reference to COSLA guidance and linked to rates set by the UK Government Department for Work and Pensions. Income relating to the applicant's disability, such as Disability Living Allowance, is left out of account. Andrew's income is above the threshold, hence he is asked to pay a contribution to the costs of services provided. These rates are used to assess the initial contribution level. The respondent may then apply certain deductions to reduce the contribution, such as deductions for disability related expenditure ("DRE"). The respondent's decision to allow only certain deductions is, together with the validity of the charging policy, at the heart of this case.

[3] Para 12.2 of the charging policy sets out certain principles which will be applied in the calculation of the relevant charges. These include that:

> "Consideration will be given to representations to take into account other specific costs of living e.g. in relation to disability related expenditure."

On a number of occasions and over the course of a number of years the reclaimer (the petitioner) has challenged the decisions of the respondent regarding the amounts which Andrew had been requested to pay.

[4] In 2015, the petitioner sought a decision from the respondent that certain items of regular expenditure should be classed as DRE and thus subject to deduction from the assessed contribution. That request was rejected on 6 March 2015. After a request for reconsideration, on 1 May 2015 the respondent accepted that costs associated with alterations to clothing and additional footwear were properly characterised as DRE which should be subject to a deduction of £6.25 per week. The respondent considered that further items claimed were: (i) not disability related expenditure; (ii) only indirectly linked to the disability; or (iii) not necessary expenditure resulting from the disability. The petitioner lodged a complaint about this decision which was rejected by letter dated 10 July 2017, which advised the petitioner that she could make a complaint to the SPSO. No such complaint was made. The petitioner refused to pay the assessed contribution. A re-assessment took place in June 2018, and resulted in inclusion or rejection of essentially the same items as previously. The respondent wrote to the petitioner on 14 August 2018 intimating this decision and stating that since the care plan in place for Andrew promoted meaningful day opportunities, community engagement and short breaks for carers, any additional activities were discretionary choices.

[5] The petitioner's agents wrote to the respondent on 25 September 2018 asserting that the failure to include the disputed items was "unlawful and unreasonable" since the respondent failed to give reasons for the rejection of bedding and ironing costs; and that the rejection of costs relating to attendance at social clubs proceeded on the basis of an unduly restricted definition of DRE. It was asserted that the charging policy was unlawful and

discriminatory in terms of the 2010 Act. The letter was couched in terms of a "complaint" and did not, at least directly, ask for reconsideration. Following reminders the respondent indicated by letter dated 4 March 2019 that a reply would be sent within 10 days, but no further correspondence has followed.

[6] The petitioner raised judicial review proceedings in May 2019 claiming that the respondent's charging policy was unlawful as it discriminated against disabled persons contrary to sections 15, 20 and 21 of the 2010 Act. The petition also sought declarator that "the Respondent's failure to act in relation to the Petitioner's complaint is irrational, unlawful et separatim unreasonable"; reduction of the decision of 14 August 2018; and an order for specific performance. The latter order was not insisted on in the reclaiming motion.

[7] This reclaiming motion challenges the decision of the Lord Ordinary holding that the reclaimer had an available alternative remedy for all of her grounds of challenge in the form of a complaint to the SPSO and dismissing the petition for want of jurisdiction. The Lord Ordinary's conclusions as to the merits of the petition are also challenged in this appeal.

The Statutory Provisions

[8] ***1968 Act***

Section 12A:

> "(1) Subject to the provisions of this section, where it appears to a local authority that any person for whom they are under a duty or have a power to provide, or to secure the provision of, community care services may be in need of any such services, the authority—
>
> (a) shall make an assessment of the needs of that person for those services; and

(b) shall then decide, having regard to the results of that assessment, and taking account—

(i) if an adult carer provides, or intends to provide, care for that person, of the care provided by that carer,

(ia) if a young carer provides, or intends to provide, care for that person, of the care provided by that carer, and

(ii) in so far as it is reasonable and practicable to do so, of the views of the person whose needs are being assessed (provided that there is a wish, or as the case may be a capacity, to express a view),

whether the needs of the person being assessed call for the provision of any such services.

…."

Section 87:

"Charges that may be made for services and accommodation.
(1) Subject to sections 78 and 78A of this Act …and to the following provisions of this section, a local authority providing a service under this Act, [or certain other specified statutes] may recover such charge (if any) for it as they consider reasonable.

(1A) If a person—

(a) avails himself of a service provided under this Act [or certain other specified statutes] and

(b) satisfies the authority providing the service that his means are insufficient for it to be reasonably practicable for him to pay for the service the amount which he would otherwise be obliged to pay for it, the authority shall not require him to pay more for it than it appears to them that it is practicable for him to pay ……"

[9] ***The Scottish Public Services Ombudsman Act 2002 (the "2002 Act")***

Section 2:

"Power of investigation

(1) The Ombudsman may investigate any matter, whenever arising, if—

(a) the matter consists of action taken by or on behalf of a person liable to investigation under this Act,

(b) the matter is one which the Ombudsman is entitled to investigate, and

(c) a complaint in respect of the matter has been duly made to the Ombudsman.

…"

A "person liable to investigation" includes a local authority.

[10] Sections 5 to 8 make provision as to the range of matters which the Ombudsman is entitled to investigate.

Section 5:

"(1) The matters which the Ombudsman is entitled to investigate are—

(a) in relation to a listed authority other than one to whom paragraph (b), (d) or (e) applies, any action taken by or on behalf of the authority (other than action consisting of a service failure) in the exercise of administrative functions of the authority,
…

(c) in relation to a listed authority other than one to whom paragraph (d) or (e) applies, any service failure,

…

(2) In subsection (1), "service failure", in relation to a listed authority, means—

(a) any failure in a service provided by the authority,

(b) any failure of the authority to provide a service which it was a function of the authority to provide.

(3) The Ombudsman may investigate a matter falling within subsection (1) pursuant to a complaint only if a member of the public claims to have sustained injustice or hardship in consequence of—

(a) where the matter is such action as is mentioned in paragraph (a), (b) or (e) of that subsection, maladministration in connection with the action in question,

(b) where the matter is such failure or other action as is mentioned in paragraph (c) or (d), the failure or other action in question.

…

(7) This section is subject to sections 6 to 8."

Section 7:

"Matters which may be investigated: restrictions

(1) The Ombudsman is not entitled to question the merits of a decision taken without maladministration by or on behalf of a listed authority in the exercise of a discretion vested in that authority.

…

(2C) Subsection (1) does not apply to the merits of a decision taken by or on behalf of a person mentioned in subsection (2D) in pursuance of a social work function to the extent that the decision was taken in consequence of the exercise of the professional judgment of the social worker or other person discharging the function.

(2D) The persons are—

(a) a local authority, or

(b) the holder of an office established by or under any enactment to which appointments are made by a local authority.

(2E) In subsection (2C), "social work function" means a function conferred by or under—

(a) the Social Work (Scotland) Act 1968,

(b) an enactment mentioned in section 5(1B) of that Act, or

(c) an enactment listed in the schedule to the Public Bodies (Joint Working) (Scotland) Act 2014.

….

(8) The Ombudsman must not investigate any matter in respect of which the person aggrieved has or had—

(a) a right of appeal to a Minister of the Crown or the Scottish Ministers,

(b) a right of appeal, reference or review to or before any tribunal constituted by or under any enactment or by virtue of Her Majesty's prerogative, or

(c) a remedy by way of proceedings in any court of law,

unless the Ombudsman is satisfied that, in the particular circumstances, it is not reasonable to expect the person aggrieved to resort or have resorted to the right or remedy.

(9) Subsection (10) applies where a matter in respect of which a complaint is made under this Act—

(a) is a matter in respect of which a complaint can be made, or a review can be requested, by the person aggrieved under a procedure operated by any listed authority (whether or not the listed authority in relation to whom the complaint under this Act is made), and

(b) is not a matter of the kind mentioned in subsection (8) or paragraph 12 of schedule 4.

(10) In such a case, the Ombudsman must not investigate the matter unless the Ombudsman is satisfied that—

(a) the other procedure has been invoked and exhausted, or

(b) in the particular circumstances it is not reasonable to expect the procedure to be invoked or, as the case may be, exhausted."

Section 8

"Excluded matters

(1) The Ombudsman must not investigate any matter specified in schedule 4.

…….

(3) Nothing in section 7 or schedule 4 prevents the Ombudsman conducting an investigation in respect of action taken by a listed authority in operating a procedure established to examine complaints or review decisions."

Schedule 4:

"MATTERS WHICH THE OMBUDSMAN MUST NOT INVESTIGATE

…

2. (1) The commencement or conduct of—

(a) civil or criminal proceedings before any court of law, or

(b) proceedings before any international court or tribunal.

…"

The Equality Act 2010

[11] It is accepted that Andrew is a disabled person in terms of the 2010 Act. It is sufficient for the purposes of the arguments to record the summary from the reclaimer's written submissions, that in terms of section 15 of the 2010 Act a person unlawfully discriminates against a disabled person if they treat that disabled person unfavourably because of something arising in consequence of his or her disability, and that, in terms of section 20, where a disabled person was at a substantial disadvantage in comparison with persons who are not disabled, the respondent was under a legal duty "to take such steps as it is reasonable to have to take to avoid the disadvantage".

The Lord Ordinary's decision

Alternative remedy

[12] The Lord Ordinary considered that the reclaimer had an available alternative remedy in the form of a complaint or application to the Ombudsman for all of the grounds of challenge contained within her petition. She rejected the submission that section 7(8) prevented consideration by the SPSO of any matter in which the aggrieved person may be able to bring proceedings for judicial review. Were the jurisdiction of the SPSO ousted in this way, it would be difficult to identify what sorts of complaints the SPSO would have jurisdiction to consider.

[13] Section 7(2C) of the 2002 Act would give the SPSO jurisdiction to entertain a complaint requiring a determination whether items of claimed expenditure did or did not properly fall within DRE for the purpose of the calculation taken under section 87 of the 1968 Act.

[14] The asserted failure to respond to the reclaimer's letter potentially fell within the category of a "service failure" (section 5(1)(c)) and thus also within the jurisdiction of the SPSO. The failure to exhaust the alternative remedy was not excusable. This decision meant the petition was dismissed in terms of the respondent's first plea in law. Nevertheless, the Lord Ordinary proceeded to address the remaining arguments on an *esto* basis.

Whether the disputed items came within the concept of DRE

[15] The Lord Ordinary rejected the argument that DRE meant all additional expenditure incurred as a consequence of Andrew's disability whether that expenditure was to meet an assessed need or for other discretionary spending intended to take advantage of more fulfilling opportunities outwith his home, particularly in the evening hours. She concluded that

> "In this specific context, DRE means the additional expenditure incurred as a consequence of disability and used to meet the assessed needs of the individual in receipt of social care ... "

The petitioner's argument ignored the statutory context in which allowance for DRE was made, which did not encompass discretionary spending, whether in respect of a disabled person or not.

Challenge to the vires of the policy

[16] The essence of the argument was that a policy which provided that "consideration would be given" to other costs, for example in relation to DRE, did not accord with the positive obligations imposed under the 2010 Act. Under the policy, accommodation of the disabilities of a person in receipt of social care services was achieved by identifying whether there was additional expenditure in meeting those needs incurred by reason of the person's

disability, namely the element of DRE. If so, it would be met. This was consistent with the 2010 Act.

Failure to decide

[17] The respondent candidly accepted that it had not responded meaningfully to the complaint letter of 4 September 2018 against the decision of 14 August 2018. However, there had been a history of correspondence and the Lord Ordinary concluded that the reclaimer could have been in no doubt as to the respondent's full reasons for rejecting the claim. It could not be said that the failure to reply to the letter of 4 September had any impact or was a necessary precursor to further action. There was no purpose to the declarator sought.

Individual items claimed

[18] The submission here was predicated on the argument as to the scope of DRE and, that argument having failed, the matter was concluded.

Submissions

Submissions before this court

[19] Very detailed notes of argument were lodged by both parties and were further supplemented by oral argument. A helpful written submission was also lodged on behalf of the SPSO. What follows is a summary of the main points.

Submissions for the reclaimer

[20] For the purposes of the hearing the reclaimer grouped the 8 grounds of appeal under four headings. The four headings being that the Lord Ordinary:

(1) erred in holding that there was an alternative remedy available (grounds (i) to (iv));

(2) adopted a definition of DRE not justified by the statutory context (ground (v));

(3) erred in failing to hold that the charging policy was unlawful and discriminatory by failing to make reasonable adjustments (grounds (vi) and (vii));

(4) erred in failing to hold that the respondent had acted irrationally and unreasonably in failing to respond to the final complaint- ground (viii).

Group 1: no alternative remedy

[21] The Lord Ordinary's reasoning failed to accord with a plain and ordinary reading of the words in section 7(8), which was the well-established starting point for statutory interpretation and had failed to provide any reasonable explanation or cogent justification from departing from a plain and ordinary reading of the provision. The Lord Ordinary had read into the section words which did not appear there, namely, "an appeal, or right of review". These words would encompass a petition for judicial review which constitutes civil proceedings: *McKenzie v The Scottish Ministers* 2004 SLT 1236, para 20.

[22] The SPSO did not oust the court's supervisory jurisdiction for judicial review. It was submitted that the proper approach to the SPSO was that it represented a separate and independent jurisdiction to the court, as explained in *O'Neill* v *The Scottish Ministers* [2020] CSOH 28, para 23. Section 7(8) made clear the separate and distinctive roles of the Ombudsman on one hand and the courts on another. Requiring the Ombudsman to be a necessary final stage before a petition for judicial review may result in considerable delay in the resolution of disputes and unintended consequences.

Group 2: interpretation and definition of DRE

[23] A narrow and restricted definition of DRE was an error of law for a number of reasons:

(1) In terms of section 15 of the 2010 Act a person unlawfully discriminated against a disabled person if they treated that disabled person unfavourably because of something arising in consequence of his or her disability. In terms of section 20 where a disabled person was at a substantial disadvantage in comparison with persons who were not disabled, the respondent was under a legal duty "to take such steps as it is reasonable to have to take to avoid the disadvantage".

(2) DRE was concerned with extra living costs by reason of disability generally. Since Andrew was a disabled person in terms of section 6 of the 2010 Act, the respondent required to undertake its charging calculation under section 87 of the 1968 Act in accordance with sections 15, 20 and 21 of the 2010 Act. The reclaimer incurred extra living costs because of Andrew's disability. It is more expensive for him to go about his day to day life than someone who was not disabled as he needed a carer to accompany him. Sections 15, 20 and 21 required the payments to be made as "reasonable adjustments" in the circumstances.

[24] There was no statutory basis to qualify DRE in the way the Lord Ordinary had done, far less was there a basis for the respondent's assertion that DRE had to be "necessary" or "essential disability expenditure".

Group 3: Charging Policy not compliant with the 2010 Act

[25] The Lord Ordinary erred in law in failing to hold that the respondent's charging policy was discriminatory or unlawful in relation to the reclaimer. In failing to make a proper allowance or adjustments for DRE, the policy was not compliant with the 2010 Act. The policy merely provided that "*Consideration will be given to representations to take into account other specific costs of living e.g. in relation to disability living expenditure*". This did not amount to making reasonable adjustment and was not enough to meet the requirements of

the 2010 Act. To ensure that an individual was not disadvantaged by reason of their disability, the respondent required to make allowance for all DRE. The policy was discriminatory: see *R (on the application of Hardy)* v *Sandwell MBC* [2015] EWHC 890 where a policy of treating disability-related income in exactly the same way as it treated non-disability related incomes of others was held to be discriminatory.

Group 4: respondent acting irrationally and unreasonably

[26] The respondent provided no rational or reasonable explanation for not providing a stage 2 decision, which it ought to have done in accordance with its own complaints policy. In any event, the respondent adopted the reasoning from its letter of 10 July 2017 for refusal of DRE in August 2018, yet the vouching of DRE had only been provided in June 2018. This demonstrated that DRE had wrongly been excluded and showed an irrational and unreasonable approach.

Submissions for the respondent

Group 1: Alternative remedy

[27] It was submitted that the reclaimer failed to utilise an available, adequate and alternative statutory remedy. No exceptional or special circumstances why the remedy ought not to have been used had been presented or averred by the reclaimer. Accordingly, the Lord Ordinary correctly refused the petition. Four propositions were advanced in the development of this argument.

(1) Judicial Review was an equitable remedy whose origin resided in the Privy Council's role, separate from the ordinary court, to provide remedies where the law provided none: *West* v *Secretary of State for Scotland* 1992 SC 385, at page 393. Submissions (at great, not to

say inordinate, length) were made as to the conceptual, practical and historical context of Judicial Review.

(2) An application to the supervisory jurisdiction was not available, and was incompetent, where the issue could be raised by "an appeal or review" under any enactment, unless special or exceptional circumstances were averred, which was a high test to overcome: Rule of Court 58.3.1. *Tarmac Econowaste Ltd* v *Assessor for Lothian Region* 1991 SLT 77 at 78L; *McCue* [2014] CSOH 124, paras 6, 35 and 61; *McKenzie* v *Scottish Ministers* 2004 SLT 1236 para 18; *BBC, Petitioners* 2020 SLT 345 para 36. There were two remedies available to the reclaimer. They were (i) an internal complaint to the respondent under section 5B of the 1968 Act; and (ii) review by the Ombudsman under section 7. Both were statutory, constituted a "review" and therefore fell foul of rule of court 58.3.1.

(3) The court's remedies in judicial review were discretionary: *King* v *East Ayrshire Council* 1998 SC 182 at page 1941.

(4) Where a judicial review contended for no practical purpose, the court should refuse to offer a discretionary remedy: *JCM, petitioner* [2011] CSOH 174 at [18]; *Penman, petitioner* 2015 SLT 597, at [29]-[32].

Nature of the remedy

[28] The scope of the matters which the SPSO could investigate was broad, and when a decision was the product of a social work function of a Local Authority extended to considering the merits of the decision. The decision not to deduct certain items of expenditure when calculating social care charges constituted a social work function in terms of section 7(2E).

[29] The SPSO had far reaching powers of investigation and these were powers equivalent in a number of respects of those available to this court, for example to compel witnesses or order production of documents. The fact that under section 15 the SPSO may 'only' make a report with recommendations is not a barrier to it constituting a remedy, since in practice the SPSO's recommendations were followed. Having regard to the ability of the SPSO in the current complaint to go into the merits of the decision (section7(2C)) and to a number of English authorities on the scope and adequacy of the Ombudsman route as a remedy (including *Gifford* v *Governor of Bure Prison* 2014 EWHC 911 (admin) paras 36-7; *Anufrijeva* v *London Borough of Southwalk* 2004 QB 1124; *R on the application of Umo* v *Commissioner for local administration England* (2003) EWHC 3202 (Admin), at [17]; and *R* v *Lambeth London Borough Council ex parte Crookes*, 28 HLR 1997) it was difficult to see how it could be said that the SPSO could provide an inferior remedy than this Court in the general run of complaints. Simply because a complaint could be expressed in or as a ground of legal review did not mean the reclaimer could ignore a remedy by another route. That was the ratio of *JCM, petitioner* [2011] CSOH 174 at 18; and it accorded with a principled approach to the purpose and therefore scope of judicial review.

[30] The reclaimer's construction would unpick the SPSO's jurisdiction in almost every conceivable case.

Group 2- the meaning of DRE

[31] This ground of appeal was misconceived. In accordance with section 87(1A) of the 1968 Act the respondent must assess what was 'practicable' for the individual to pay when determining what charges may be made. In doing so, in the case of a disabled person such as the reclaimer, the respondent excluded from its calculation disability related expenditure, i.e. expenditure for a disability related need which was not otherwise being met. The

respondent had adopted a rational and transparent methodology contained within the policy under which charges were calculated in accordance with guidance issued by COSLA.

[32] Section 87(1A) provides that it is for the local authority to determine what it is practicable for an individual to pay towards the costs of social care services. Where Parliament had empowered a local authority to make a decision, it was not for the Court to remake that decision unless it was *Wednesbury* unreasonable or otherwise amenable to review; the SPSO on the other hand could question the merits of the local authority's decision.

Ground 3 - Charging Policy not compliant with the 2010 Act

[33] The Lord Ordinary was correct to conclude that discretionary spending was excluded from the section 87(1A) calculation in respect of disabled and non-disabled persons alike. The policy made it clear that the respondent would consider representations to take into account other specific costs of living. The purpose of allowing deduction of disability related expenditure was to enable the individual to meet any assessed needs which were not being met by the respondent. It was inherent in the charging policy that disability related expenditure was excluded, making it compliant with the Equality Act 2010.

Ground 4

[34] The Lord Ordinary was entitled in her discretion to conclude that there would have been no practical purpose in granting the petitioner's order for declarator. The court was entitled to provide no remedy, the failure being one of form, not substance, and in all the circumstances immaterial. Had the letter been responded to it would have made no difference. The respondent's position remained the same; the reclaimer could be in no

doubt about the respondent's position in this respect. Declarator would have no practical purpose.

Submissions for the Intervener

[35] It was submitted that the outcome of the proceedings could result in the SPSO being seen as the final stage in a complaints process before access to the court was permitted, rather than something wholly distinct from and separate to the courts. Such an outcome would erode the element of choice which the public currently enjoyed in deciding how to challenge a decision of a public authority, when the decision itself was in principle amenable to judicial review, and it would not be in keeping with the Venice Principles (The Principles on the Protection and Promotion of the Ombudsman Institution, adopted by the Venice Commission of the Council of Europe 15 March 2019).

[36] It was submitted that there was no need to subject the 2002 Act to any elaborate analysis, or to allow the well-known authorities on alternative remedy in the judicial review context to complicate what was, essentially, a simple matter of statutory interpretation.

[37] When it came to considering whether a complaint to the SPSO was an alternative remedy to judicial review such as to bar judicial review until that remedy was exhausted, the starting point was not the common law of alternative remedies but consideration of section 7(8) of the 2002 Act, which, as the heading to it made clear, restricted the matters which the SPSO was entitled to investigate. It created a statutory presumption that the SPSO would not investigate a complaint which might be resolved in certain other *fora* unless the SPSO was satisfied that it would not be reasonable to expect the complainant to resort or have resorted to that remedy.

[38] The SPSO was not barred from considering such a complaint; rather, whether to accept such a complaint for investigation was a matter for the SPSO's discretion in the particular circumstances. Whether to exercise it would vary on a case by case basis, and would depend on a consideration, *inter alia*, of what remedy was being sought; whether there was a clear statutory appeal route; and whether the issue was one which required a question of law to be determined by a court.

[39] It was submitted that "a remedy by way of proceedings in any court of law" within the subsection encompassed a petition for judicial review. The subsection was not qualified in the way the Lord Ordinary suggested. That qualification related to tribunals only. Section 7(8) of the 2002 Act was in plain terms: if a complainant has (or had) a remedy in a court, which would include judicial review, the presumption was that that was the remedy to be pursued. An individual should not be required to complain to the SPSO first before being permitted to invite the Court to exercise its supervisory jurisdiction over a patently judicially reviewable matter.

[40] It was also important for the court to consider the consequences of the SPSO being held to be a necessary final stage before a judicial review could be mounted, particularly given the 3 month time limit imposed by section 27A of the Court of Session Act 1988. It was one thing to require an internal complaints procedure to be exhausted, but it was quite another to compel those contemplating a judicial review to complain to the SPSO first, which may result in a considerable delay to the resolution of the dispute, and which may, in any event, require the aggrieved party either: (1) to petition the court and sist the petition pending the complaint to the SPSO; or (2) wait until the conclusion of the SPSO's investigation and thereafter invite the court to exercise its discretion to allow the petition to proceed late. Seen in the context that judicial review was a "process designed to give speedy

consideration to problems which arise and where time is of materiality", the SPSO could not conceive that it was the intention of Parliament to make recourse to the SPSO a necessary pre-requisite to a judicial review.

[41] The Intervener acknowledged that it was not the case that the Court of Session ought never to dismiss a judicial review on the basis that the complaint was one for the SPSO. That would be an appropriate disposal if the complaint in question, properly analysed, was not amenable to judicial review at all – even if it was dressed up as such - rather than because the petitioner had not availed himself of a complaint to the SPSO first. Determining whether the subject matter of a complaint was one which was amenable to judicial review, or whether, properly analysed, it was one which should be made to the SPSO was not a simple task, and each complaint would require to be considered on its merits.

Analysis and decision

Section 7(8) of the 2002 Act

[42] Section 7(8) provides that the Ombudsman may not investigate where the aggrieved person has or had

> "(a) a right of appeal to a Minister of the Crown or the Scottish Ministers,
>
> (b) a right of appeal, reference or review to or before any tribunal constituted by or under any enactment or by virtue of Her Majesty's prerogative, or
> (c) a remedy by way of proceedings in any court of law
>
> unless the Ombudsman is satisfied that, in the particular circumstances, it is not reasonable to expect the person aggrieved to resort or have resorted to the right or remedy".

The question which arose in this case was whether para (c) of this subsection included a remedy by way of judicial review, and whether, in consequence, resort to the Ombudsman would be excluded by the availability of recourse to judicial review.

[43] The way in which the Lord Ordinary expressed her conclusion was to say that the provisions:

> "mean what they say: that the Ombudsman does not have jurisdiction to hear a complaint where parliament has provided for:
>
> (i) An appeal to a Minister of the Crown, or the Scottish Ministers; or
>
> (ii) An appeal to a Tribunal; or
>
> (iii) An appeal, or right of review, before the courts".

[44] The problem is, that is not what the provision says. The provision refers in general terms to "a remedy by way of proceedings in any court of law" which is much wider than the more limited concept referred to by the Lord Ordinary. On its own terms it is clearly apt to cover judicial review. Where proceedings for judicial review have been presented, and there remains the possibility of a successful remedy thereby, the jurisdiction of the SPSO will be ousted, at least insofar as relates to any complaint which asks the SPSO to address the same matter as addressed in the judicial review. However, where a complainer has elected not to pursue judicial review proceedings, the SPSO will have a discretion to determine whether to accept the complaint. In such circumstances her decision will no doubt depend on a consideration, inter alia, of what remedy is being sought; whether there is a clear statutory appeal route or an obvious legality point more suitable for resolution by judicial review or other court proceedings, and generally whether the issue is one which requires a question of law to be determined by a court.

[45] This does not mean that the court may never decide to dismiss a petition for judicial review on the basis that it is a matter more appropriate for the SPSO. Clearly it may do so, either at the permission stage when it is clear that the matter is not one amenable to the

supervisory jurisdiction, or at a later stage when consideration of the merits of the petition reveals that this is so.

[46] It follows that the Lord Ordinary erred in upholding the plea of no jurisdiction.

Does the reclaimer have a remedy under the petition?

[47] That is not an end of the matter however, because the question remains whether the reclaimer has a remedy available to her in the present petition, in other words are the issues raised by her amenable to judicial review? If not she does not bring herself within the comfort of section 7(8)(c) and her complaint should nevertheless be directed towards SPSO.

[48] The reclaimer sought to advance the argument that the charging policy was unlawful because it was not in accordance with the 2010 Act. Identifying the logical and legal basis for this was not easy; in fact it seemed that the contention was not that the policy was inconsistent with the Act, but simply that the petitioner disagreed with the council on the way in which the policy had been applied, which would not be a matter for the judicial review jurisdiction of the court (although clearly within the scope of the SPSO's jurisdiction). However, we will deal with the legality argument as it was presented.

[49] The argument for the reclaimer was that her case, founded on the alleged illegality of a policy, was "classic judicial review territory" and that on examination of the merits of the claim the court should find that the policy was unlawful and discriminatory. We are unable to accept that argument. In essence the reclaimer is seeking to rely on the 2010 Act to justify payment of DRE independently of the statutory obligations of the respondent. In reality it amounts to saying that regardless of the nature of the obligation which the respondent is called upon to discharge, the respondent is in any event bound to give relief for all the sums claimed by the reclaimer as DRE.

[50] This is an approach which seeks to divorce the power to recover payment in section 87, and the policy to make allowance for DRE in doing so, from their proper context of the obligations of the respondent to which these issues relate. The power to recover charges given to the local authority under section 87(1) is a power to charge in respect of the services provided under the specific statutory provisions referred to therein. In the present case the relevant services are provided under the 1968 Act. The authority is entitled to recover a reasonable sum for those services. Section 87(1A) which makes provision for the recovery to be no more than it appears practicable for an individual to pay, is similarly tied to the services provided under the 1968 Act because it applies only where someone has availed himself "of those services" and moreover where he satisfies the authority that his means are insufficient for it to be reasonably practicable for him to pay for the service the amount which he would otherwise be obliged to pay. The two subsections are inextricably linked and are in turn inextricably linked to the services provided under the relevant statute. The services provided to Andrew under the 1968 Act are those which flow from section 12A of the 1968 Act, which are essentially, where someone may be in need of community care services, to assess the need for those services and thereafter supply services to meet those needs.

[51] The charging policy is simply the stated mechanism by which the local authority manages the combined effect of sections 87(1) and 87(1A), the latter of which is solely concerned with practicability. It seems to us, indeed, that the whole purpose of para 12.2 of the charging policy is to enable the authority to discharge the obligations imposed by the 2010 Act in respect of those requiring community care who come within the scope of that Act. Although there are also other means by which they do so (leaving out of account disability related income such as DLA, applying a 25% buffer to the assessment of

disposable income, and using a taper of up to 50% in respect of the charges to be recovered), para 12.2 is another method by which the council seeks to ensure that a disabled person is not disadvantaged by the charging policy and that reasonable adjustments are made. It does so by recognising that notwithstanding that there has been an assessment of his needs (and in this case one which is accepted as being sufficient for Andrew's needs), there may be some essential disability related expenditure associated with those needs which may have been overlooked or otherwise slipped through the net. The effect of the 2010 Act is not to create some entirely different obligation on the authority to pay for disability related expenditure which does not relate to the services provided by them the under the 1968 Act.

[52] In our view the suggestion that the policy is discriminatory is ill-founded, and must fail. The reclaimer would not therefore be entitled to declarator as sought in stat IV (i) of the petition. The crave for reduction of the decision of 14 August 2018 must also fail, since the only basis upon which the jurisdiction of this court could address that matter would be if the policy had been held to be unlawful. As to declarator that the respondent's failure to respond to the letter of complaint was unlawful, it too hinges on the alleged unlawfulness of the policy; without that all that would be left was a failure to address a discretionary matter. The final crave, for specific performance, was not insisted in. In any event, it is impossible to see how this court could have granted such an order in the circumstances of the case.

[53] The final part of the submissions for the intervener recognised that there must be cases where determining whether the subject matter of a complaint was one which was amenable to judicial review, or whether, properly analysed, it was one which should be made to the SPSO was not a simple task, and each complaint would require to be considered on its merits. We accept that. An example may be where it is suggested that an authority had not acted in accordance with its own policy. In circumstances where it is suggested to

be a fact specific, one off issue, this would clearly be for the SPSO; where what was being suggested was a systemic failure across the board, essentially amounting to a negation of a policy, that might be considered a matter for the supervisory jurisdiction.

[54] We do not consider this to be a difficult case in this respect, and have explained our reasons for concluding that the circumstances are not amenable to judicial review. On the other hand, we do consider that it is a matter amenable to the jurisdiction of the SPSO, the matter to which we now turn.

Is the ombudsman entitled to investigate the present complaint?

[55] The combined effect of sections 2 and 5 of the 2002 Act are that the SPSO may investigate any action taken by or on behalf of the authority including any service failure, but only, so far as the former, where there has been maladministration, and in respect of both, only where there is alleged injustice or hardship as a consequence of the maladministration or service failure.

[56] Section 7 however sets out what are referred to (somewhat misleadingly in certain cases, as the Lord Ordinary has pointed out) as "restrictions" on matters which may be investigated. The first, significant, restriction is that the Ombudsman may not investigate the merits of a decision taken without maladministration. However, that provision does not apply in certain specified cases of which subsections (2C)-(2E) are the important ones for present purposes. These provide that the prohibition on examining the merits of a decision taken without maladministration does not apply to the merits of a decision taken in pursuance of a social work function, to the extent that the decision was taken in consequence of the exercise of the professional judgment of the social worker or other person discharging that function. "Social work function" includes a function conferred by or under the 1968

Act. The effect of the legislation, in our view, is that it is open to the SPSO to consider in a complaint the merits of any decision made in respect of the care provision for Andrew, or the management of it, notwithstanding that the decision involved a degree of professional judgment. So, for example, the decision in general terms, whether the appropriate sums for DRE had been deducted from the section 87(1A) charge, could come within the jurisdiction of the SPSO. In our view also the alleged failure to respond to a complaint would clearly come within the scope of matters which it would be open to the Ombudsman to investigate.

[57] In the circumstances therefore the reclaiming motion must fail. However it will be necessary to recall the Lord Ordinary's interlocutor insofar as she upheld the respondent's first plea-in-law. Instead we shall uphold the fourth plea-in-law which is to the effect that the respondent having complied with any relevant statutory duty the petition should be refused.