OUTER HOUSE, COURT OF SESSION

[2024] CSOH 103

P417/24

OPINION OF LADY HALDANE

In the petition

CM attorney to AM, conform to a Power of Attorney dated 27 October 2014 and registered with the Office of the Public Guardian on 18 December 2014

Petitioner

for

Judicial Review of a decision by the Western Isles Council of 28 February 2024 to refuse providing residential care for AM

Petitioner: Hay KC; Campbell Smith LLP
Respondent: McClelland KC; Morton Fraser MacRoberts LLP

15 November 2024

Introduction

[1] The petitioner is CA. He is the financial and welfare attorney for his uncle, AM, who lives in the Western Isles. The respondent is Western Isles Council, the local authority with a duty to provide community care services to those in need of such services in terms of the Social Work (Scotland) Act 1968 (as amended). Throughout this opinion, I have used only the initials of those with the closest involvement in this matter. AM has been assessed by the respondent as a person in need of such services. Acting through its employee, DH, the respondent made an assessment of AM's needs on around 28 February 2024. She prepared a

report dated 7 March 2024. AM's needs were assessed as "critical". Pursuant to that assessment, a care package provided to AM at home was implemented. That assessment was reviewed during April and May 2024 and a review report issued dated 21 May 2024. His needs were downgraded to 'substantial" and a care package remained in place.

[2] The petitioner challenges both those assessments. He argues that the decisions are irrational. He seeks as a primary remedy reduction of the decision to delay in providing, or perhaps more accurately not to provide, a residential care place to AM having regard to the terms of the two assessment reports; a declarator that AM's needs call for the provision of residential care; and an order requiring the respondent to provide such a place at one of three named establishments. In the alternative, the petitioner seeks a declarator that the decisions in the two reports are inadequately reasoned; and an order requiring the respondent to undertake an assessment of AM's needs of new, with the current support plan remaining in place until that is done.

[3] The issues identified as requiring determination in the context of this petition are expressed slightly differently by the parties in their respective statements of issues, but are materially the same and are four in number:

- Is the respondent under a duty to provide reasons for its decisions reached in determining the needs of AM, and if so the basis and nature of that duty;
- Whether its decision in this case was irrational;
- Whether, in the alternative, its decisions were inadequately reasoned; and
- Does the potential for review of the decision by the Scottish Public Services Ombudsman amount to an effective alternative remedy such that this Court should decline to provide a remedy.

Background

[4] AM is 89 years old. He has lived in his home for around 40 years. He has no spouse and no children. Until December 2023 he lived with his brother CM. CM moved at that point to a nursing home in the Western Isles. He has recently sadly passed away. AM has lived alone since his brother moved into the nursing home. His home has two floors and has a Rayburn coal stove in the kitchen, which is the only source of heat in the home. This stove can heat two radiators in the living room and there are, in addition, a number of electric and oil fired radiators in the house. The bathroom has a bath with an over bath shower. There is no walk in shower in the property. AM suffers from a number of symptoms of advanced old age including restricted mobility, unsteadiness on his feet, a tendency to fall, and he walks with the aid of a walking stick. He has oedema (swelling) in his legs, ankles and feet. His hearing is impaired but he finds wearing hearing aids uncomfortable. Since his brother moved out, AM has become depressed and anxious. He does not leave his home other than to attend medical appointments. He has recently been diagnosed with a build-up of fluid in his lungs which is suspected to be cancer. He is not considered fit for further exploratory examination or treatment due to his age, frailty and the distress this would cause him.

[5] As a consequence of the foregoing circumstances AM has difficulty in attending to his personal needs. In the period prior to the respondent's first assessment he was unable to step into the bath or shower or stand to wash. He was unable to prepare meals and hot drinks safely or collect his medication. He has suffered from incontinence and has increased laundry needs as a result. He was and is heavily reliant on neighbours, in particular a Mr and Mrs C, and other friends and family for support with his care needs. Mr and Mrs C both work and have an adult son with learning difficulties and his own care needs. The

petitioner visits his uncle as often as he can, approximately every six weeks, from his home in the South of England. AM's cousin, IM, arranges for coal to be delivered and provides further assistance and maintenance services.

[6] Against that background the petitioner made a referral to the respondent on 12 February 2024 and an assessment was carried out on 28 February. AM's health and living arrangements were noted as set out above. The following risks were identified:

- Loss of dignity through incontinence.
- Loss of dignity through neglect in terms of personal hygiene.
- Not managing meals as a result of lack of motivation due to feelings of isolation, anxiety and depression.
- Risk of falls over cables for electric and oil fired electric radiators.
- Risk of falls due to poor mobility due to swollen legs.
- Risk to mental health due to feelings of isolation and feelings that he has lost his brother.
- A (full name used in the document) requires constant reassurance and supervision to tend to simple tasks.
- A's neighbours feel that they are no longer able to support A with his needs.
- A is not able to call for help should he require. He will wait for long periods of time until someone visits him.

Under a pro forma heading "What outcomes does the client want to achieve?" it is noted:

> "A outcomes (*sic*) is that he would like to be in a residential care home setting where he does not need to worry about how he is going to manage on his own"

[7] AM's Eligibility criteria was assessed as "critical", with the outcome of the assessment stated to be "Support plan required." A package of care was instituted from

around 12 March 2024. The respondent carried out a review of the support plan on 23 April 2024. In that document it is noted in the first paragraph under "Review" that:

> "A is grateful for the carers that visit him, but he feels the times in between the visits long and he worries that he will not manage his toileting himself.
>
> A feels himself that he would like to move into a residential care setting.
>
> This is due to loneliness and anxieties around toileting."

Under the heading of "Health" the medical opinion of Dr NM (GP) that AM is suspected to suffer from cancer is noted, as well as the following: "Dr N's (*sic*) view was that given A's likely downward health trajectory that a care home placement would be best."

[8] The review went on to note improvements in AM's mental health presentation since the first assessment was carried out. He was observed tending to tasks independently such as going to the toilet and washing his hands when the carer came in. A review of AM's medication had resulted in improvements to his continence and significant improvements in toileting since the care package had been put in place were also noted. AM continued to receive support with medication from his neighbour Mrs C. He had gained weight but continued to be supported with shopping by Mr and Mrs C. It is recorded that they are finding this responsibility difficult. AM was still anxious about managing his solid fuel stove and heating. He is recorded as requiring support with his laundry and household duties; that his cousin IM had asked if the care service could assist with this but that this was not possible; and that Mrs C had been doing laundry for AM but felt this was a lot for her to take on with her own work and family commitments.

[9] Under the heading "A's views" it is recorded:

> "A wants to change to a different home. A feels that at his age he should not be expected to live alone and to manage his own toileting and other care needs. A is appreciative of the support and company that his care package provides."

Below that paragraph, the concerns of the petitioner and the neighbour DC are summarised as:

> "C has raised continued concerns that A's needs are not being met with the current care package and that A requires to be added to care home placement waiting list. During several discussions and email correspondence with C and D they have advised that A requires more support in terms of shopping, household duties, medication, toileting and changing of soiled or saturated clothing in between care visits and isolation and social contact. Neighbours have also been putting A to bed every night.
>
> Also it was considered by C that due to A's recent diagnosis which is likely to affect A's future health, that he requires care home placement."

[10] Thereafter, under "Plan details" AM's eligibility criteria is stated to be "Substantial". As with the original assessment, there follows a pro forma heading entitled "What do I want to achieve" which is answered in the following terms: "A wants to be supported with all his personal care needs A would like to live in a residential care setting with his brother as he often feels lonely". The following pro forma heading is "How will we achieve this:" which is answered as follows:

> "A will continue to have his personal care needs by a care at home support package. A has been referred to Crossroads for support with loneliness".

[11] The petitioner has corresponded with the respondent since he referred AM in an effort to secure a residential care home placement for his uncle. He submitted a formal complaint dated 13 March 2024 which was responded to by letter dated 19 April 2024. In that letter the respondent explained the meaning of a "critical" assessment, and also upheld the petitioner's complaint that the social workers had not been informed by social care that neighbours were putting AM to bed at night, and giving him his medication when care staff were supposed to be carrying out that task. His complaint that having regard to AM's inability to wash his clothes and bedding, his periodic incontinence and the reliance upon

help from neighbours, only a residential care placement would meet AM's needs was not upheld.

The applicable law and guidance

[12] There was no dispute between the parties that the relevant legislation is the Social Work (Scotland) Act 1968 (as amended). Section 12 of the Act is in the following terms:

> "**12.— General social welfare services of local authorities**.
>
> (1) It shall be the duty of every local authority to promote social welfare by making available advice, guidance and assistance on such a scale as may be appropriate for their area, and in that behalf (*sic*) to make arrangements and to provide or secure the provision of such facilities (including the provision or arranging for the provision of residential and other establishments) as they may consider suitable and adequate, and such assistance may, subject to subsections (3) to (5) of this section, be given in kind or in cash to, or in respect of, any relevant person.
>
> (2) A person is a relevant person for the purposes of this section if, not being less than eighteen years of age, he is in need requiring assistance in kind or, in exceptional circumstances constituting an emergency, in cash, where the giving of assistance in either form would avoid the local authority being caused greater expense in the giving of assistance in another form, or where probable aggravation of the person's need would cause greater expense to the local authority on a later occasion."

There is no dispute that AM is a relevant person for the purposes of section 12.

[13] Section 12A(1) of the 1968 Act provides:

> "**12A – Duty of local authority to assess needs**
>
> (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 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.

(1A) In subsection (1)(b)(i) and (ia), the reference to the care provided by a carer means—

(a) in the case of an adult carer who has an adult carer support plan, the information about that care set out in that plan,

(b) in the case of a young carer who has a young carer statement, the information about that care set out in that statement.

(1B) In—

(a) assessing the needs of a person for services under subsection (1)(a),

(b deciding under subsection (1)(b) whether those needs call for the provision of any services, and

(c) deciding how any such services are to be provided, a local authority must take account of the views of the carer, in so far as it is reasonable and practicable to do so.

(2) Before deciding, under subsection (1)(b) of this section, that the needs of any person call for the provision of nursing care, a local authority shall consult a medical practitioner.

[14] The risk categories of "Critical" and "Substantial" are defined by the Scottish Government guidance "National Standard Eligibility Criteria and Waiting Times for the Personal and Nursing Care of Older People" ("the Guidance"). Under the Guidance, a "Critical" categorisation "indicates that there are major risks to an individual's independent living or health and well-being likely to call for the immediate or imminent provision of

social care services". A "Substantial" categorisation is similar, except that the risks are assessed as "significant" rather than "major".

The petitioner's submissions

[15] Mr Hay adopted his note of argument and invited me to sustain his first three pleas-in-law, bearing on the irrationality challenge, or in the alternative to sustain pleas four and five, directed to the inadequacy of reasons. He approached the question of adequacy of reasons first, in what he described as an "incremental" approach. That approach began by first considering whether the respondent was under a duty to provide reasons at all, and had three aspects to it –

1. The nature of duty under 1968 Act
2. The relevant legal propositions for the imposition of a duty to give reasons at common law
3. The application of those relevant legal principles to the duty under section 12A of the Act – all of which analysis, Mr Hay contended, leads to conclusion that there is a duty on the respondent to provide reasons when undertaking such an assessment.

The nature of the duty

[16] Looking firstly at the nature of the duty, Mr Hay submitted that once a local authority had identified a person to whom it was under a duty to assess needs, the process thereafter was a two stage one: First to assess the needs of the person, then, that having been done, the second element of the assessment is to decide whether the needs of the

person assessed call for the provision of community care services. The first element of assessment feeds into the second, the decision.

[17] The statutory duty under section 12A contains two other specific matters to be taken into account - first is care provided by an adult or child carer – elaborated in subsection (1A). This was not applicable in this case as there was no "adult carer" as defined in the Act. Friends or neighbours "mucking in" is not what is envisaged by section 12A(1A) so that aspect does not arise here. Secondly, in deciding what services might be called for the local authority has a duty to take account of the views of the person being assessed in terms of section 12A(1)(b)(ii). This duty itself has two elements, being in the first place where a wish is expressed by person who has capacity to do so, and the second qualification is that those views must be taken into account "in so far as is reasonable and practicable to do so".

The relevant legal propositions

[18] Mr Hay accepted that fulfilling its statutory duty will involve an exercise of judgment on the part of the local authority but what emerges from consideration of the wording of the statute is a mandatory requirement to assess the person in need, two clear and linked elements of determination once such an assessment has been undertaken, and also a statutory requirement to take into account, as part of that process, where it is reasonable and practicable to do so, the wishes of the person in need. This was the proper approach to the task as confirmed by the Inner House in *Q* v *Glasgow City Council* 2018 SLT 151 at paragraphs 1, 6 and 20.

[19] Mr Hay acknowledged that the Act did not contain an explicit duty to give reasons for the local authority's decision, but submitted that this duty arose at common law. Under this second branch of his argument, Mr Hay placed reliance upon *Stefan* v *General Medical*

Council [1999] 1 WLR 1293 a decision of the Privy Council in the context of a challenge to the General Medical Council suspending the registration of Ms Stefan. Lord Clyde, in delivering the opinion of the court, held that an obligation to give reasons can arise in four different situations, as he explained at page 1297:

> "There is no express statutory duty on the Health Committee to state reasons for its decisions … But neither in the Act of 1983 nor in the Rules is any such express obligation to be found. In such a situation an obligation to give reasons may nevertheless be found to exist. This may arise through construction of the statutory provisions as a matter of implied intention. Alternatively it may be held to exist by operation of the common law as a matter of fairness. In the latter case account may require to be taken of the statutory provisions so that some overlapping of the material may occur in the pursuit of these two approaches. Furthermore, particularly in connection with the approach at common law the question arises whether, if there is an obligation to give reasons, it is one which arises in the special circumstances of the particular case or whether it is of application to all decisions made by the body in question, that is, in the present case, the Health Committee."

[20] Applying those principles to the circumstances of the present case, Mr Hay submitted that the duty to give reasons arose principally from a combination of the construction of the statutory provisions and as a matter of fairness. The duty arises in all decisions of this type, but even if he were wrong about that, Mr Hay contended that the specific circumstances of AM and his expressed wishes so far as residential accommodation was concerned amounted to the sort of "special circumstances" envisaged by Lord Clyde in *Stefan*.

[21] That there were clear benefits to the imposition of a duty to give reasons was recognised by Lord Clyde in *Stefan* at 1299 B/C

> "In *Reg* v *Secretary of State for the Home Department, Ex parte Doody* [1994] 1 AC 531, 565, Lord Mustill regarded it as necessary for reasons to be disclosed where it was important for there to be an effective means of detecting the kind of error which would enable the court to intervene by way of judicial review. On the other hand the existence of a right of appeal has also been taken as a factor pointing towards a requirement for the giving of reasons."

And further on, at 1300D to 1301B:

"Their Lordships now turn to the alternative approach, that of the common law. In its most general form the argument proposes that there should be a general obligation on all decision-makers to give reasons for their decisions. The advantages of the provision of reasons have been often rehearsed. They relate to the decision-making process, in strengthening that process itself, in increasing the public confidence in it, and in the desirability of the disclosure of error where error exists. They relate also to the parties immediately affected by the decision, in enabling them to know the strengths and weaknesses of their respective cases, and to facilitate appeal where that course is appropriate. But there are also dangers and disadvantages in a universal requirement for reasons. It may impose an undesirable legalism into areas where a high degree of informality is appropriate and add to delay and expense. The arguments for and against the giving of reasons were explored in the Justice-All Souls Report 'Administrative Justice: Some Necessary Reforms' (1988). Another summary can be found in *Reg* v *Higher Education Funding Council, Ex parte Institute of Dental Surgery* [1994] 1 WLR 242, 256.

The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with current developments towards an increased openness in matters of government and administration. But the trend is proceeding on a case by case basis {*Reg* v *Kensington and Chelsea Royal London Borough Council, Ex parte Grillo* (1995) 94 LGR 144), and has not lost sight of the established position of the common law that there is no general duty, universally imposed on all decision-makers. It was reaffirmed in *Reg* v *Secretary of State for the Home Department, Ex parte Doody* [1994] 1 AC 531, 564, that the law does not at present recognise a general duty to give reasons for administrative decisions. But it is well established that there are exceptions where the giving of reasons will be required as a matter of fairness and openness. These may occur through the particular circumstances of a particular case. Or, as was recognised in *Reg* v *Higher Education Funding Council, Ex parte Institute of Dental Surgery* [1994] 1 WLR 242, 263, there may be classes of cases where the duty to give reasons may exist in all cases of that class. Those classes may be defined by factors relating to the particular character or quality of the decisions, as where they appear aberrant, or to factors relating to the particular character or particular jurisdiction of a decision-making body, as where it is concerned with matters of special importance, such as personal liberty.

There is certainly a strong argument for the view that what were once seen as exceptions to a rule may now be becoming examples of the norm, and the cases where reasons are not required may be taking on the appearance of exceptions. But the general rule has not been departed from and their Lordships do not consider that the present case provides an appropriate opportunity to explore the possibility of such a departure."

[22] Drawing these propositions together, Mr Hay submitted that what can be seen from *Stefan* is a clear development of approach, and a "direction of travel" that there is now an

increasing expectation of openness in government and administration, and that the law will expect and require reasons to be given in an increasing number of decisions which authorities make. It was also of note, Mr Hay observed, that in *Stefan* the fact that the matter or decision might be considered to be one delivered in the exercise of an administrative rather than judicial function did not exclude the possibility that reasons might require to be given. A requirement for reasons need not be overly onerous on decision makers. Reasons can be set out in a matter of sentences, and did not need to be an elaborate piece of draftsmanship.

The application of the principles to the duties under section 12A

[23] Mr Hay then moved to the third aspect under this chapter of his submissions, the application of these legal principles to the statutory duties under section 12A of the Act. The duty to give reasons arose, he argued, from a combination of matters of special importance and the construction of section 12A as well as common law fairness, which lead to the conclusion that the local authority is under a duty to give reasons for its decision. The issue of fairness is interwoven with interpretation of the statute and the question of "special importance" as discussed in *Stefan.*

[24] Turning to construction of statute Mr Hay suggested three aspects pointed to the requirement to give reasons:

- The mandatory requirement to assess the individual in need;
- The mandatory requirement to determine what services called for; and
- The mandatory requirement to consider so far as reasonable and practicable the express views of the person being assessed.

[25] On third point, if the local authority reaches a conclusion on what services are called for which does not go as far as, or is contrary to the express views of person being assessed, that person will inevitably be disappointed and would invariably wish to know why a decision contrary to their expressed views has been reached.

[26] So far as the "special importance" test was concerned, this too had three aspects to it:

- Section 12A assessments concern the determination of needs of persons in need who are by definition vulnerable people;
- These are vulnerable people to whom local authority can owe duties to secure or provide assistance where it is needed;
- Finally, that aspects of the determination of need routinely if not inevitably concern fundamental matters of a person's ability to function in day to day life.

Once again the question of fairness is interwoven through these three points – fairness demanded that reasons are given when a conclusion is reached on what services are ultimately required.

[27] These propositions, it was submitted, mirrored closely, and were supported by, the conclusions reached in *Q* v *Glasgow City Council* 2018 SLT 151 where the Inner House held, at paragraph [29], in relation to the question of whether the local authority had a duty to explain how it calculated the cost of community care services:

> "We have no difficulty with the proposition that where a local authority has a duty to make a reasonable estimate of the amount of money which is intended for the provision of community care services, the estimate requires to be made on a rational basis which should be amenable to explanation and, further, that this explanation should be provided to the supported person. The reclaimer relied on what was said by Maurice Kay LJ, with whom Longmore and Patten LJJ agreed, in *R (on the application of Savva)* v *Kensington and Chelsea Royal London Borough*, at [2011] PTSR pp 768–769, para 20: 'In the present case, the Deputy Judge concluded that fairness required the provision of reasons. He emphasised the consistent theme in the

> guidance emanating from the Department of Health and the Association of Directors of Social Services - the need for transparency in the decision-making process.' In my judgment, he was right to do so. When a local authority converts an established right - the provision of services to meet an assessed eligible need - into a sum of money, the recipient is entitled to be told how the sum has been calculated."

It would be remarkable, suggested Mr Hay, for there to be a duty at common law upon the local authority to have to explain its quantification of the value of services provided under 12A and yet for it not to be under a duty to give reasons for determining the underlying services that are called for. For all those reasons Mr Hay submitted that any determination by the local authority of what services are called for as result of a needs assessment triggers a duty to give reasons for that decision. If that argument did not find favour then Mr Hay submitted that in a more focussed category of cases where a decision is reached on what services are called for which is contrary to or goes against the stated views of person assessed then it certainly arises in that more focussed category, which is the category in which AM finds himself.

[28] On the hypothesis that a duty to give reasons arose on one or more of the bases contended for, then Mr Hay submitted that the reasoning in both of the decisions under scrutiny in the present case was inadequate, arguably to the extent of being irrational. The touchstone for the adequacy of reasons was well understood and found in the decision of the Inner House in *Wordie Property Co Ltd* v *the Secretary of State for Scotland* 1984 SLT 345, in short that the decision must leave the informed reader in no real and substantial doubt as to the reasons for the decision and the material considerations which were taken into account in reaching it. By that yardstick, the reasoning in the decisions in the present case was inadequate. This was because whilst it was possible to discern a considerable amount of detail in the assessment of his personal circumstances, and the reasoning underlying the

conclusions flowing from that aspect of matters, there was no reasoning at all underpinning the conclusions as to what support was called for following that assessment of need.

[29] Mr Hay set out in his note of argument a list of areas in which he contended the reasoning in the original assessment report was deficient or non-existent, but placed particular emphasis on the fact that despite recording AM's views, no reasoning was provided in relation to what view was taken of that expression of wishes, and whether or not it was reasonable to take his views into account. Put another way, his views were recorded but the question is what weight if any was given to those and whether it was reasonable or practicable to give effect to them. These, according to Mr Hay, were important and substantial deficiencies with the consequence that the petitioner (and AM) were in the dark as to why there was considered to be a need for certain services but not residential accommodation. The petitioner and AM were entitled to understand why the decision had been reached.

[30] Turning to the review report, that too was devoid of adequate reasoning. The review made findings in relation to issues around AM's nutrition, concerns about his home environment and the heating arrangements, his lack of social support and the concerns expressed by the petitioner and neighbours, as well as his pessimistic health prognosis. The continuing concerns expressed by neighbours in relation to issues such as food shopping and laundry were also noted. AM's wishes were recorded under the heading "What do I want to achieve" and were in the same terms as recorded in the initial assessment, namely that he wished to move to a residential care setting. The pro forma response to that expression of wish, under the heading "How we will achieve this" was short: "A will continue to have his personal care needs by a care at home support package. A has been referred to Crossroads for support with loneliness". There was thus nothing in this

document in the conclusions or the reasoning that cast light on the deficiencies in the report in respect of the identification of the services called for. There was no explanation as to what conclusions, if any, had been reached by the respondent, beyond recording that a further review was required, or the basis upon which it had determined to preserve the status quo. The review was silent in respect of addressing the concerns identified therein and there was nothing to cast light on why the respondent considered that a care plan was suitable to address the needs identified whilst the stated wishes of AM and the petitioner, namely a move to residential accommodation, were not. Thus taken together, the two decisions were inadequately reasoned in a context where the respondent had a duty to provide reasons.

[31] Mr Hay conceded that it would be appropriate to consider whether any deficiencies within the four corners of the reports might be cured by looking at the surrounding context but submitted that the context in this case did not assist. Specifically, requests from the petitioner for further information had not been addressed; the care services provided by the respondent following its determination did not meet all of the needs identified in the assessment (such as shopping, laundry, bathing and cleaning); that AM's condition is unlikely to improve; that the support provided by family and neighbours is not sustainable; and that therefore AM's needs are accordingly not being met by the care services currently provided. Consideration of the affidavit of DH, who had carried out the assessment and review, did not elucidate matters further so far as reasoning was concerned. Therefore nothing in the surrounding context rescued the deficiencies in reasoning of the decisions themselves. The identified deficiencies of reasoning rendered the decisions unlawful.

[32] Mr Hay then addressed the question of irrationality. He rightly recognised the high bar applicable to a finding of that nature, but submitted that if the court was of the view that the criticisms advanced not only impugned the adequacy of reasons, but pointed to there

being only one conclusion that the respondent could have arrived at, then the court would be entitled to conclude that the high threshold of irrationality had been reached (*R* v *Secretary of State for Trade and Industry ex parte Lonrho* [1989] 1 WLR 525 at 539H - 540A). In the present case that one conclusion was that having regard to the whole picture so far as AM was concerned, the circumstances pointed overwhelmingly to a need for care services of at least supported residential accommodation. Mr Hay recognised that this submission might be met by a retort to the effect that if the reasoning was asserted to be unsatisfactory, how could it be said that the decision was irrational as opposed to being capable of rational explanation? His response to that hypothetical retort was that an absence of reasoning might well suggest that there is no reasonable conclusion that can be reached. In the result, Mr Hay contended that the decision was therefore one which no reasonable authority, acting reasonably, could have reached (*Associated Provincial Picture Houses Limited* v *Wednesbury Corporation* [1948] 1 KB 223; *Q* v *Glasgow City Council* at paras [13] and [14]).

[33] So far as disposal was concerned, Mr Hay invited me, if satisfied that the decisions were irrational and unlawful, to sustain his first to third pleas-in-law, and reduce the decisions; secondly to declare that in terms of section 12A of the Act, AM's needs call for the provision of residential accommodation; and to pronounce an order to that effect. If, on the other hand, the court was of the view that the decisions complained of were not *Wednesbury* irrational, but did take the view that they were inadequately reasoned, then a further reasoned assessment should be undertaken by the respondent (*Chief Constable Lothian & Borders* v *Lothian & Borders Police Board* 2005 SLT 315 at paras [42] and [46]). In that second scenario, the petitioner consciously did not seek reduction of the decisions in question, as to do so would mean that the care package presently in place would no longer have a basis and

would fall. Thus the better approach would be to declare that the two reports are inadequately reasoned and thereafter ordain the respondent to carry out a fresh assessment.

[34] During the course of his submissions, Mr Hay also proffered a response in anticipation of the issue focussed by the respondent as to whether a review by the Scottish Public Services Ombudsman ("SPSO") amounted to an alternative remedy such that this court should decline a remedy. He properly accepted that if such a review did constitute an alternative remedy then that would preclude the petitioner from seeking the exercise of the supervisory jurisdiction of the Court of Session, under reference to Rule of Court 58.3. However, Mr Hay contended that when one considered the nature of the SPSO powers and process, and in particular the available remedies, these fell short of being considered as true alternative remedies. For example, the petitioner does not have a right to have the ombudsman investigate a complaint, investigation of complaints being at the ombudsman's discretion (section 2(3) Scottish Public Services Ombudsman Act 2002). The SPSO has no power to reduce decisions or pronounce equivalent orders to those of this court. It is not an effective alternative remedy that would preclude the petitioner from accessing this court's supervisory jurisdiction (see *Smart's Guardian* v *Fife Council* 2016 SLT 384 at paras [15]-[18]). In any event, the effect of section 7(8)(c) of the 2002 Act was to act as an ouster clause in respect of proceedings such as the present petition, at least insofar as relates to any complaint which asks the SPSO to address the same matter as addressed in the judicial review. That view had been confirmed by the Inner House in *McCue* v *Glasgow City Council* 2021 SC 107, at paragraph 41. In other words, the complainant could elect for one procedure or the other.

[35] Further and in any event the provisions of the 2002 Act relating to the submission of a report to the Scottish Ministers (sections 15 and 16) were not accompanied by any

provision stating what action might follow upon the preparation of such a report. No positive remedies were provided for. The question of the availability or otherwise of remedies had been held to be of significance in *Smart* as well as in *McCue* v *Glasgow City Council* 2014 SLT 891 (a precursor to the case of *McCue* referred to above, hereinafter *McCue* 2014) where the court held, at paragraph 71, the availability of the SPSO procedure did not amount to an alternative remedy barring resort to judicial review. In any event, the court held in *McCue* 2014 that there was an alternative statutory remedy which had not been exhausted, namely the council's own complaints procedure and it dismissed the petition as incompetent on that basis. It was noteworthy in *McCue* 2014 that the complaints procedure in question included remedies such as re-assessment of the client's circumstances, and financial recompense. No such remedies were available in the SPSO procedure. For all those reasons the petitioner was not precluded from seeking recourse to the supervisory jurisdiction of the court.

The respondent's submissions

[36] Mr McClelland invited me to sustain the respondent's second, third and fourth pleas-in-law and to refuse the orders sought by the petitioner. He submitted that there was no illegality in the respondent's decisions; that they were not irrational and nor was there any unlawful deficiency of reasons. Put simply, the petitioner disagreed with the decision taken but that was not a sufficient basis for the exercise of the supervisory jurisdiction of the court. Further and in any event, the petitioner had an alternative remedy adequate to address his complaint by way of an application to the SPSO.

[37] In adopting his note of argument, Mr McClelland looked firstly at what he described as the "handling of the facts". He submitted that there was no suggestion that the

respondent had proceeded in an incorrect factual basis and that therefore the court could and should proceed on the basis that the two reports in question set out the pertinent facts relevant to its decision. The second point was that it was important to remember that the documents had been drafted by social workers and should be construed accordingly; that they must be read in a practical way in their context.

[38] With that introduction Mr McClelland turned to the duties imposed by the 1968 Act. He made a number of broad points under this chapter of his submissions. In the first place it was of note, he said, that the Act imposed duties on a local authority so far as the provision of care was concerned but left to the particular local authority a broad discretion about how to implement those duties. That discretion existed at a general and a particular level. In terms of section 12A certain things required to be taken into account, one example being the views of the relevant person, but otherwise there was a broad discretion afforded to the local authority to determine which services should be provided to meet the identified need. Parliament has entrusted decisions about social care services to the judgment and experience of the local authority, they in turn employ social workers for that purpose who know how the services work and what is most likely to meet an individual's need. Any scrutiny by the court must respect that statutory settlement. Mr McClelland accepted that decisions about social care were often difficult and sensitive, and that there was often room for disagreement, but that it was for the local authority to weigh all that in the balance. The court was concerned only with the legality of the decision-making and not its merits. It was not for the court to substitute its own view on the merits, but only to address the legality of the decision making (*Q* v *Glasgow City Council* 2018 SLT 151).

[39] Mr McClelland developed this submission by contending, secondly, that the Act does not oblige the local authority to provide all of the care that a person needs, and that in

particular there was no obligation on the local authority to take away the care burden borne by family and friends – the local authority was entitled to take into account the care provided by others. That formed part of the assessment the authority was making. It assessed needs and then decided what services are required to meet those needs. In that context support from the community and family is a relevant consideration. Mr McClelland did not demur from the submission already made that there was not an adult carer (as that term is defined in the Act) in place, but he contended that did not mean that the authority was not entitled to take care that was being provided into account in a more general sense. It was open to the authority to take on the burden of care provided by family and it was equally open to it to leave it out of account. It was all a matter of judgment for the authority.

[40] Thirdly, Mr McClelland submitted that when it came to individuals in need, the duty imposed upon the local authority was ongoing, not "one and done" as he put it, so that if services being provided by the authority for whatever reason no longer met the needs of the individual then there was a duty on the authority to assess those needs, and meet them. So where, for example a neighbour no longer wanted to provide services, that is a factor to be taken into account but ultimately a matter for the authority to weigh in the balance in the exercise of its judgment. In the present case the care package currently being delivered involved carers attending four times a day so if there was a change in circumstances giving rise to unaddressed needs there are four points a day when that would come to the attention of the local authority.

[41] Mr McClellands' fourth proposition drawn from the 1968 Act was that the Act was not concerned narrowly with residential care, rather it was concerned with the full range of community care services. That was important because the focus of the petitioner was on securing a place in a residential care facility, and that focus gave rise to a misapprehension

about what the duty of the local authority was – it was not a duty to consider applications for care home places, rather a duty to assess needs and provide services to meet those needs. That was a broader concept than just whether a place in a care home was available. This, Mr McClelland contended, was of particular importance when considering whether there was a duty to provide reasons.

[42] The fifth and final broad point drawn from the Act was that the Act did not impose any duties that reasons be given. Therefore the question of the existence and extent of any such duty was a matter for common law.

[43] Turning then to the legal considerations applicable to the grounds of challenge, Mr McClelland was at one with Mr Hay in relation to the high bar applicable to an irrationality challenge as derived from *Wednesbury* – described by Lord Brodie in *Q* as amounting to "perversity".

[44] In that context, Mr McClelland contended that what was involved here was a discretionary judgment, therefore it was for petitioner to demonstrate prejudice arising from a lack of reasons (*South Bucks District Council* v *Porter* [2004] 1 WLR 1953). Mr McClelland also placed reliance upon *Lawrie* v *Commission for Local Authority Accounts in Scotland* 1994 SLT 1185 in support of the proposition that there was no general principle at common law, and no principle of natural justice, to the effect that a public authority always or even usually was under an obligation to give reasons for its decisions. Drawing these strands together, and under reference also to *R* v *Secretary of State for Trade and Industry, ex parte Lonrho plc* [1989] 1 WLR pages 539-540, Mr McClelland submitted that whilst reasons may be needed to explain a decision which is prima facie irrational, the absence of reasons does not of itself render a decision irrational. When asked whether he accepted that the law in this area had perhaps moved on to some extent since the date of the decision in *Lawrie* in

particular, Mr McClelland conceded that this was so, but that the point he sought to make was that in the present case, the explanation offered for the decision was perfectly adequate, although he accepted as a generality the following propositions: that reasons may be needed to satisfy fairness and natural justice; that the decision has to be comprehensible; and that those affected need to know what factors have been taken into account. In the present case the respondent had gone to some lengths to set out the factual circumstances against which it had made its decision. It had assessed AM's needs and determined that these needs were best met by a care package in his own home, rather than by way of residential care. That was a perfectly adequate conclusion in the circumstances of the present case.

[45] Mr McClelland then turned in more detail to the case of *Lawrie* v *Commission for Local Authority Accounts in Scotland* 1994 SLT 1185 at 1192B/E in support of his submissions that any further reasons were not required as there was no real uncertainty about the issues to which the respondent was turning its mind. These were set out at length in the report and review report. He also placed reliance upon the passage at page 1192H where Lord Prosser cautioned against what he described as a "regress", which concept he explained as follows:

> "I would only add that when talking of 'a duty to provide reasons', one may perhaps too easily forget to ask oneself 'reasons for what?'. One is concerned, in my view, with the reasons for an actual decision. There may be a duty to provide these, or they may be apparent or inferred, whether good or bad. But I think that one must avoid a regress, in terms of which one goes on asking the reasons for those reasons, and the reasons for the reasons for those reasons …"

In the present case it was clear that the respondent had exercised its judgment by deciding its services are sufficient to meet the needs of the individual.

[46] Mr McClelland touched lightly on the case of *Stefan*, to emphasise the proposition that in the present case there was no express or implied duty to give reasons in the

underlying legislation; that the court had considered that the Judicial character of the decision under scrutiny and the existence of a right of appeal was of significance; and that the extent and substance of the reasons required varies according to the circumstances of the case.

[47] Addressing the criticisms made by the petitioner of the multiple areas of need he suggested had not been addressed, Mr McClelland argued that if those submissions were well founded then that would significantly increase the burden on social workers when making a decision about care. The case for any further reasons was in any event weak, because the decision was of an administrative rather than judicial character: there was no provision for an appeal; that it was for the respondent to weigh up the competing considerations with no review available on the merits; and that the decision was made by social workers, not lawyers, in circumstances of urgency. Here, it was possible to discern the factors taken into account. AM knows which services are being supplied as he receives them, thus it was not hard to know what the decision is or why it had been taken – the decision was not an "abhorrent" one.

[48] In any event it was hard to envisage what more could be said, the assessment was not an application for a care home, it was an assessment of needs. The respondent having decided that a domestic care package was sufficient to meet AM's needs was in itself the "reason" – if the question was, why give him a care package in his own home, then the answer was, that it meets his needs. It was difficult to say much more than that. There are some judgments that defy meaningful articulation of further reasons, and this is one of them. The people making these decisions are professional social workers and deciding which services meet particular needs is simply an exercise of judgment.

[49] Returning to the substance of the irrationality challenge, Mr McClelland reiterated that there was a high bar to overcome. It was not enough to identify reasons why a different decision could have been made, rather the petitioner had to show that no reasonable authority could or would meet the needs of AM by supplying carers four times a day. It was noteworthy that AM's position had improved once the care package was in place, particularly in areas such as the management of his incontinence. Mr McClelland invited the court to reject the submissions for the petitioner that the decision was irrational. In effect, the petitioner's argument was that the care package did not meet AM's needs and that the support from friends and family was not sustainable. Neither of these facts demonstrated any irrationality in the decision under challenge.

[50] Developing his response to the point made that support from family and neighbours was not sustainable, Mr McClelland suggested that this may or may not be right, as a matter of fact, but that the respondent was still entitled to take it into account, and was entitled to take the view that it was sufficient for the time being. The respondent had in any event made suggestions to alleviate the burden of shopping and taken steps to address other issues identified. Acting in that way was not irrational. It was within the range of reasonable responses open to the respondent. So far as AM's own views were concerned, the respondent had discharged its statutory duty to take those into account by recording his preference, therefore those views had been taken into account.

[51] Mr McClelland then addressed the respondent's own argument that an alternative remedy existed such that the court should decline to provide a remedy. His core submission was that there existed a statutory procedure which was well suited to addressing the petitioner's complaint as provided for in the Scottish Public Services Ombudsman Act 2002, which provided to the SPSO a broad authority to investigate complaints. The respondent

was a local authority subject to investigation by the SPSO in terms of section 3 of the 2002 Act; and the substance of the petitioner's complaint was covered by section 5 (matters which may be investigated). Mr McClelland suggested the circumstances of the present case would fall within the definition of "service failure" as provided for in section 5(1)(c). The broad power of investigation under section 2 included a power in subsection (5) to take action with a view to resolving the complaint, and further provision was made in section 16 for the SPSO to make a special report to be laid before Parliament where it found that the person aggrieved had sustained injustice or hardship. The petitioner argued that a referral to the SPSO did not constitute an alternative remedy because there was no power to reduce decisions or pronounce other orders – whilst this was true, that did not take away from the broad powers that the SPSO did have in terms of the legislation. These powers were just as or more effective in the context of social work complaints, whereas the court's power is a limited one because there are only certain remedies the court can provide. The power of the SPSO to engage with a local authority to address concerns raised is a soft power which, whilst not giving a right to insist on a particular outcome, can lead in cases of failure to engage, to a special report being laid before Parliament in terms of section 16.

[52] Reliance upon *Smart's* guardian was misconceived. That case could be distinguished on the basis that the alternative remedy in this case was by way of a statutory procedure, rather than an internal complaints procedure as was the position in *Smart*. The statutory scheme provided substantive remedies unlike the procedure which was held in *Smart* not to provide any effective alternative remedy. In *McCue* 2014 the court held that the more detailed local authority procedure was capable of curing any injustice and so the judicial review was accordingly dismissed, but the particular issue the court was grappling with in that case did not arise here. There were a number of principles that could be drawn from

that case however, in particular that judicial review is a remedy of last resort; that it was not available where there was an alternative remedy; but that there may be exceptions to that generality where it was necessary to avoid injustice (see *McCue* 2014 at paragraphs 47, 51, and 60). In 2021 a second litigation at the instance of Mrs McCue came before the court (*McCue* v *Glasgow City Council* 2021 SC 107, hereinafter *McCue* 2021) in which the SPSO was an intervener. This case had, amongst other matters, looked at the "ouster" provisions in section 7(8) of the 2002 Act. The Inner House concluded that a complaint in relation to social work provision was one that the SPSO could entertain, and that the particular complaint made by Mrs McCue was not amenable to judicial review. The analysis in *McCue* 2021 (see for example paragraph 53) supported the submission that a review by the SPSO was an adequate and effective remedy and in that event, the court should refuse relief by way of Judicial review.

[53] Finally, Mr McClelland submitted that even if the court were not with him in his submissions, it ought not in any event grant an order *ad factum praestandum* (an order for the performance of a specific act) ordering that a place be made available in a residential care home. That course would inevitably necessitate a finding that the only appropriate decision was to place AM in a residential home. The decisions under scrutiny were now in any event historic so even if they were thought irrational it did not follow that the order sought should be made. Rather any fresh decision should reflect the up to date circumstances. Therefore the appropriate disposal, if the court were against the respondent, would be to order that the decision be taken of new.

[54] In a brief reply, Mr Hay observed that a recurring theme in the respondent's submissions had been that the decisions in question involved the exercise of professional judgment in a sensitive and complex area and thus what was stated by way of reasons was

sufficient. Whilst accepting that the decisions did indeed involve matters of professional expertise and were complex and sensitive, understanding those decisions was not beyond the wit of ordinary people and therefore the fact that the decisions involved the exercise of professional judgment did not dispense with the need for reasons as to why the decisions had been reached. Although section 12A afforded a broad discretion, reasons were needed to explain and understand the basis of the exercise of that broad discretion.

[55] So far as the reliance upon the observations of Lord Brown in the *South Bucks* case was concerned, and the requirement for prejudice to be established, it was clear that this dictum was focussed on matters of planning – that much was clear from paragraph 35, however even if there was a need to show prejudice that was demonstrated in the context of this case having regard to the decisions made which were contrary to the stated wishes of the person claiming an interest in the decision. Put another way, AM could point to prejudice arising from the absence of reasons.

[56] Turning to the case of *Lawrie*, Mr Hay suggested that the decision in that case had been arrived at by the application of a "conservative" lens to the question of the duty to give reasons extending beyond a duty in the context of decisions akin to those of a judicial body. The later case of *Stefan* cast doubt on that approach. *Lawrie* was of limited assistance when determining whether there was a duty to give reasons arising in terms of section 12A.

[57] Replying to the submissions made in support of there being an alternative remedy, Mr Hay accepted that the SPSO had broad powers to take action but that from the perspective of remedies the powers available to the court had more "teeth" by way of enforcement and compulsion that that was an important distinction to draw. He submitted further that *McCue* 2021, properly understood, was authority for the proposition that where a judicial review was proceeding properly before the court the ouster clause in the 2002 Act

was engaged. The question of whether to proceed by way of judicial review or a referral to the ombudsman was one of election for the complainant to make, and there could be advantages of one procedure over the other in any particular case. In paragraph 53 of the decision the Inner House were simply making clear that in the event that proceedings were raised in court and thereafter dismissed, that did not preclude the SPSO from taking the matter on. Otherwise, Mr Hay adhered to his earlier submissions and renewed the motions previously made.

Analysis and decision

[58] I propose to address matters in the order set out in paragraph 3 above. Therefore the first issue to address is the following:

Is the respondent under a duty to provide reasons for its decisions reached in determining the needs of AM, and if so the basis and nature of that duty?

There was no dispute that there is no statutory duty to give reasons for decisions made under section 12A of the 1968 Act. Nor, in effect, was there any real dispute between the parties that the lack of a statutory duty to give reasons does not, in and of itself, preclude the conclusion that a duty to give reasons nevertheless exists. The respondent's position however is that the basis for its decision is clear and comprehensible from the face of the documents themselves and that the respondent has, more generally, fulfilled its obligations in terms of the Act. No further reasoning is required. The petitioner's challenge amounts to no more than a disagreement with the outcome.

[59] The duty to give reasons, particularly in a non-judicial context, where no statutory obligation to do so exists, has developed incrementally over a number of years. It is commonly accepted now that many sorts of administrative decisions engage a duty to give

reasons at common law, as was explained by Lord Clyde in *Stefan* v *General Medical Council* at 1297B-E

> "This may arise through construction of the statutory provisions as a matter of implied intention. Alternatively it may be held to exist by operation of the common law as a matter of fairness. In the latter case account may require to be taken of the statutory provisions so that some overlapping of the material may occur in the pursuit of these two approaches. Furthermore, particularly in connection with the approach at common law the question arises whether, if there is an obligation to give reasons, it is one which arises in the special circumstances of the particular case …"

[60] In the present case, at least so far as section 12A of the 1968 Act is concerned, there are indicators in the language used that give rise to the permissible inference that a duty to give reasons, at least in certain circumstances, arises. I refer specifically to the statutory obligation to take account of the views of the individual being assessed set out in section 12A(1)(b)(ii) as follows:

> "(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),"

If there is an obligation to take account of the individual's views, then if that person's views have been expressed and there is no question over their capacity to do so, they are entitled to understand what view the local authority hold in relation to those wishes. That obligation arises as a matter of common law fairness and is consistent with the considerations enunciated by Lord Clyde in *Stefan*. Of course, where the individual has expressed a wish, say, to remain in their own home with carers visiting, and that coincides with the local authority assessment of needs, then self-evidently very little need be said to comply with the duty to give reasons. However, where, as here, the wishes of the individual are entirely at odds with the assessment of needs by the local authority, then the language of the statute gives rise to a duty at common law to explain the basis upon which those views have been taken into account, but are not being acceded to. Such a duty does

not in any way cut across the entitlement of the local authority, acting through its professional social workers, and in exercise of the broad discretion afforded to it, to reach a judgment on the needs of the individual which may not coincide with the views of that individual. There is no statutory obligation to give effect to expressed wishes in every case. But the statutory obligation to take account of those views goes beyond merely noting what those views are, as Mr McClelland suggested. Taking them into account, as a matter of plan English, implies weighing those views in the balance, along with all the other available information, and then exercising a judgment as to how the individual's assessed needs are best met. If, having carried out their assessment, the views of the individual are, perhaps for good and proper reasons, not being acceded to, then they are entitled, given their close and obvious interest in the outcome of the assessment, to know why. In the circumstances of the present case, that close and obvious interest in the outcome, and an expression of wishes directly contradictory to the view expressed by the respondents, amounts in any event to a "special circumstance" entitling the person concerned, AM, as well as the petitioner, to an explanation. The explanation does not require to be lengthy, or expressed in overly technical or legal language, but it does require to leave the informed reader in no real and substantial doubt as to the reasons for the decision and the material considerations which were taken into account in reaching it (*Wordie Property Co* v *Secretary of State*). Providing that sort of explanation would not impose an unreasonable burden upon the decision maker.

[61] I am fortified in that conclusion in the present case having regard to the language employed in the respondent's own documentation. In the review report completed on 21 May 2024 on the second last page, there is a pro forma box headed "What do I want to achieve". There AM's views that he wishes to live in residential accommodation are noted. There follows a pro forma heading "How we will achieve <u>this</u>" (emphasis added). Under

that heading is the decision "A will continue to have his personal care needs by a care at home support package." Whilst, for the reasons already given, the obligation to take account of the individual's wishes does not expressly include an obligation to accede to those wishes, the language of the respondent's own documentation implies that the individual's wishes are of significance and that those will, perhaps as a generality, be given effect to where possible. Where that does not or cannot happen, then it is implicit in the respondent's own documentation that reasons will be given for that decision, otherwise the language of the pro forma report quite simply does not make sense.

[62] The obligation to give reasons does not necessarily end there, however. The statutory duty incumbent upon the respondent, or indeed any local authority in terms of section 12A is to carry out an assessment of needs and then decide whether the needs of the person call for the provision of community care services. Where a particular need is assessed, but a decision taken that such a need does not call for the provision of community care services to meet that identified need then it may be that as a matter of fairness to the individual affected, a reason or reasons for that decision should be conveyed. Whilst it would be going too far to suggest that such an obligation arises as a matter of course in every case, there is no reason in principle why a duty to give reasons for declining to provide a service to meet an identified need might not arise depending on the facts of the particular case.

[63] Therefore, adopting respectfully the language of Lord Clyde in *Stefan*, taking account of the language of the statute gives rise to an obligation to give reasons as a matter of common law fairness, at least insofar as the statutory obligation to take account of the wishes of the individual is concerned. That duty may extend to a decision not to provide

community care services to meet an identified need, depending on the particular facts of the case.

Is the respondents' decision irrational?

[64] Mr McClelland submitted that the threshold for a finding of irrationality in decision making is a high one when challenging the legality of administrative decisions particularly where, as here, those decisions involve the exercise of a discretion. Mr Hay did not demur from that proposition. It is well accepted, if not trite, that the court will only intervene on grounds of irrationality if the decision is one which is so unreasonable that no reasonable authority would have made it (*Associated Provincial Picture Houses Limited* v *Wednesbury Corporation* [1948] 1 KB 223). As Mr Hay recognised, there was a circularity in his argument that the reasoning in the present case was inadequate such that the decision should be declared to be irrational – if the reasoning is lacking, how is it possible to discern whether the decision is so unreasonable that no reasonable authority would have made it? Ultimately Mr Hay submitted that the findings made on assessment pointed so overwhelmingly towards one conclusion (that only residential care would meet the needs of AM) that the court could permissibly conclude that there was no rational basis for the decision actually made.

[65] The requisite level of unreasonableness is not demonstrated in this case. The respondent was operating within a statutory regime that confers a broad discretion upon local authorities to assess, and provide services to meet, the needs of identified individuals. There may be more than one way to meet that identified need or needs. A decision to take one approach as opposed to another, is not in and of itself irrational in the context of decisions taken in terms of section 12A of the 1968 Act. True it is that certain needs were

identified in the assessment and review that have not been met by the respondent. That fact however does not vitiate the decision in its entirety on the ground of irrationality. This challenge does not therefore succeed.

In the alternative, are the respondent's decisions inadequately reasoned?

[66] For the reasons set out above, the language of the statute gives rise to a common law duty to give reasons where the views of the individual have been taken into account but are not being acceded to, as is the case here. Mr McClelland contends that the basis of the decision are evident from the face of the documents, and that, in any event, some decisions defy any form of detailed reasoning. He suggests that this is one such case. I disagree. As explained above, not only does the language of the statute support the requirement for reasons as a matter of fairness, but the language of the respondent's own documentation points in that direction as well. Here, having noted AM's views, stating that these will be achieved by providing a care package in his home does not, in isolation, make sense. Given the consistent views expressed by AM, a perhaps entirely justifiable and comprehensible decision to meet his needs in another way merits explanation so that he, and the petitioner, can understand the basis for that decision. Here there is an absence of anything by way of such an explanation.

[67] The absence of reasoning goes further than just the ultimate decision being contrary to the wishes of AM. The local authority is entitled, in the process of assessing needs, to take account of any services provided by an adult carer or a young carer (as defined). There is no statutory entitlement to take account of gratuitous care provided by friends or neighbours in assessing what services might be required, although Mr McClelland submitted that a local authority was entitled to take that sort of care into account. It would be no doubt reasonable

in the exercise of its judgment and discretion for a local authority such as the respondent to, for example, take account of gratuitous care provided by a friend or relative who wishes to be involved in the care of the individual in question. The position where care or services are provided less willingly, or where the informal carer is unable or unwilling to carry on, is less clear. No authority was cited to me that dealt with the latter situation.

[68] Here, the respondent assessed, amongst other matters, that AM "requires" support with changing bedding and laundry. It is also noted that "A's neighbours feel that they are no longer able to support A with his needs." The review report noted improvements in a number of aspects of AM's nutrition and toileting, but also noted that he still required support with shopping from his neighbours and that they were finding this difficult. It is also recorded that

> "A requires support with his laundry and household duties (emphasis added). IM has asked if this is a task that Care at Home are able to take on and I have confirmed that Care at Home are not able to facilitate this support. Currently N (NC, neighbour) has been supporting A with this but it is a lot for her to take on due to her own work and family commitments."(Emphasis and brackets added)

[69] There is thus a lacuna in reasoning as to why, in a situation where certain needs have been identified as being required, family and neighbours being noted as unwilling to carry on addressing those needs, and the agency tasked with providing care being unable to facilitate the required services, those identified needs are not being met or perhaps cannot be met through community care services. If, in exercise of its statutory duty, a need has been identified but the local authority does not propose to meet that need, or cannot meet that need, then once again, as a matter of common law fairness the individual directly impacted ought to understand why that is so. Such a conclusion is consistent with the terms of section 12A and with principles expressed in other cases such as *Q* v *Glasgow City*

Council 2018 SLT 151 at paragraph 13 where, adopting and endorsing the reasoning of the Lord Ordinary, the Extra Division held:

> "We respectfully agree with and would adopt the way in which the Lord Ordinary articulated these principles:
>
> > '[16] … First it is not for the court to take a decision which Parliament has empowered to a local authority. It is only if the local authority has acted outwith its powers, failed to take into account a relevant matter, omitted to take into account a relevant matter or the decision was *Wednesbury* unreasonable that the court can intervene. Even if there has been an error in law it will be for the local authority to remake the decision, possibly under the guidance of the court, not for the court to remake it.
> >
> > [17] Secondly local authorities have finite resources and the court has to recognise that it is for the local authority to determine where resources should be spent and in what manner. In *R(G)* v *Barnet LBC* 2004 2 AC 208 Lord Nicholls of Birkenhead drew a distinction between a local authority exercising a power and one exercising a duty. A local authority is obliged to comply with a statutory duty regardless of whether, left to itself, it would prefer to spend its money on some other purpose. A power need not be exercised but a duty must be discharged (para 12). The extent to which a duty precludes a local authority from ordering expenditure priorities for itself varies from one duty to the other. This is especially so in the field of social welfare. 'As a general proposition the more specific and precise the duty the more readily the statute may be interpreted as imposing an obligation of an absolute character. Conversely, the broader and more general the terms of the duty, the more readily the statute may be construed as affording scope for a local authority to take into account matters such as cost when deciding how best to perform the duty in its own area.' (para 13) …"

[70] Drawing all of these strands together, the respondent has a statutory duty to assess needs, and to decide what services to provide to meet those needs. The respondent is afforded a discretion in the discharge of that duty, but where a need has been identified in respect of which a community care service is not to be provided, then the individual affected is entitled to know why that is so. In the present case, such an explanation is absent. Accordingly the submission that the reasoning for the decisions reached in each of the assessment and review documents is inadequate, is well founded. I turn now to the final issue for determination.

Does the potential for review of the decision by the Scottish Public Services Ombudsman amount to an effective alternative remedy such that this court should decline to provide a remedy?

[71] There was little dispute between the parties that the general rule is that judicial review is a remedy of last resort, and that it will be inappropriate where an alternative remedy is available to the aggrieved party and they have not used or exhausted it (*McCue* 2014, at [51], [60]). Here the respondent contended that a review by the ombudsman was the appropriate course for a fact specific case such as the present one. The "ouster" clause in section 7(8) of the 2002 Act which was engaged where judicial review proceedings were raised did not prevent the court dismissing a petition on the basis that review by the ombudsman was more appropriate. Authority for this last proposition according to the respondent, came from the later case of *McCue* 2021. The petitioner disputed that interpretation of *McCue* 2021, contending that, properly understood, the Inner House had concluded that the subject matter of the complaint in that case was not one that engaged the supervisory jurisdiction, relating as it did to questions of disability discrimination in the context of the Equality Act. The question then became whether the decision to proceed by way of judicial review, and the consequent engagement of the ouster clause, meant that the ombudsman was precluded from considering the case at all. The Inner House concluded that this was not so.

[72] The "ouster" clause contained in section 7(8) of the 2002 Act is in the following terms:

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

> (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 Inner House in the *McCue* 2021 case authoritatively determined (a) that "a remedy by way of proceedings in any court of law" was clearly apt to cover judicial review, and (b) that such proceedings ousted the jurisdiction of the ombudsman, at least in so far as it related to any complaint that addressed the same matter as any judicial review. There was no suggestion that there would be any difference in the complaint raised in these proceedings and any complaint that might be taken to the ombudsman, rather the contention was that it was open to this court, on the basis of *McCue* 2021, to dismiss the petition if it considered that the matter was one more properly directed to the ombudsman. Read fairly, that was not the conclusion of the Inner House in *McCue* 2021. Rather, in response to an intervention by the ombudsman the Inner House clarified that the statutory ouster clause did not prevent the ombudsman accepting a complaint for investigation where judicial review proceedings had been dismissed on the basis that the complaint raised was not amenable to the supervisory jurisdiction. In the present case, unlike *McCue* 2021, there was no suggestion that judicial review was incompetent as such, rather that a review by the ombudsman was a suitable alternative remedy which ought to be pursued.

[73] This case can be distinguished from *McCue* 2021 on the basis that there is no suggestion here, unlike *McCue* 2021, that the subject matter of this complaint is not amenable to judicial review, simply that it should be viewed as an avenue of last resort which should not be entertained until the alternative remedy is exhausted. Nor does the present case share any of the same features as the first *McCue* 2014 case, where the internal complaints procedure was held to constitute an effective alternative remedy. Therefore the question is

whether the petitioner is under some obligation to invoke the procedures under the 2002 Act prior to seeking judicial review. I can discern no such obligation on the face of the statute, or from the authorities cited to me. The existence of a statutory ouster clause points against such an inference being drawn. Therefore I prefer the analysis of the petitioner that in a case such as the present, the question of which route to adopt is one for the complainant to choose, but that if they choose to pursue judicial review, they may not also seek a review by the ombudsman in respect of the same basis of complaint as is focussed in the court proceedings.

[74] That being so, the statutory ouster clause is properly engaged in this case, and thus any exercise of weighing up competing remedies available to the court and to the ombudsman, or making any form of "election" as to which process is more suitable to address the complaints set out in this petition, is not only unnecessary, but would run counter to the express terms of the statutory provision, and binding authority on the nature and effect of that provision.

Conclusion and disposal

[75] In light of the analysis above, it follows that I will repel the first three pleas-in-law for the petitioner, sustain his fourth and fifth pleas, and repel all four pleas-in-law for the respondent. In so doing, I would observe that even had I been of the view that the decisions met the threshold of irrationality, having regard to the fact that that the statutory obligation in question is to make an assessment of needs and decide what "community care services" may be required to meet those needs, the order sought, being an order that AM be placed in a residential care home by the respondent, may have been of doubtful competency, having regard to the statutory definition of community care services. Mr McClelland's observations

and submissions on the nature and limitations of the duties incumbent upon (and powers available to) the respondent in that regard had some force.

[76] In the event, that issue does not require to be addressed. In light of my decision, I will grant declarator as craved in the fourth plea-in-law for the petitioner, to the extent that the decisions complained of are inadequately reasoned, and pronounce an order requiring the respondent to undertake a reasoned assessment of AM's needs of new in terms of the fifth plea-in-law.

[77] I will reserve all questions of expenses meantime.