6 July 2011

PRESS SUMMARY

R (on the application of McDonald) (Appellant) v Royal Borough of Kensington and Chelsea (Respondents) [2011] UKSC 33
On appeal from the Court of Appeal [2010] EWCA Civ 1109

JUSTICES: Lord Walker, Lady Hale, Lord Brown, Lord Kerr and Lord Dyson

BACKGROUND TO THE APPEAL

This appeal concerns the question of whether the Respondent Royal Borough acted unlawfully in seeking to amend the Appellant's care package by substituting her night-time carer with provision of incontinence pads or absorbent sheets (hereafter "pads") when the Appellant is not in fact incontinent.

In September 1999, the Appellant, Ms McDonald, suffered a stroke leaving her with severely limited mobility. She also suffers from a small and neurogenic bladder which makes her have to urinate some two to three times a night. Up to now she has dealt with this by accessing a commode with the help of a carer provided by the Respondent Royal Borough as part of her care package. In November 2008, however, the Respondent proposed instead that the appellant should use pads, avoiding the need for a night-time carer and thereby providing her with greater safety (preventing the risk of injury whilst she as assisted to the commode), independence and privacy and in addition reducing the cost of her care by some £22,000 per annum. It is this decision the Appellant is seeking to challenge, maintaining that the thought of being treated as incontinent (which she is not) and having to use pads is an intolerable affront to her dignity.

In the High Court, the deputy judge dismissed Ms McDonald's arguments and held that it was open to the Respondent to meet Ms McDonald's need, identified in the Needs Assessment dated 2 July 2008 as "assistance to use the commode at night", in a more economical manner by provision of pads. The Court of Appeal disagreed holding that the clear language of the Needs Assessment could not be extended in a way proposed by the deputy judge and that at the time when proceedings were commenced the Respondents were in breach of their statutory duty. However, since the Respondent's decision to amend the care package was not in fact put into operation, and since the need had been reassessed in the Care Plan Reviews of November 2009 and April 2010 as the appellant's "night-time toileting need", the Appellant had no substantial complaint.

In the Supreme Court, the Appellant put her argument against the Respondent's decision on four separate basis: (i) the 2009/2010 Care Plan Reviews did not in fact contain a reassessment of her needs; (ii) the decision breached Ms McDonald's rights under article 8 of the European Convention on Human Rights ("article 8"); (iii) the decision was taken

in breach of section 21 of the Disability Discrimination Act 1995 ("DDA"); and (iv) the Respondents failed to have due regard to the need to promote equality of opportunity of disabled persons under section 49A of the DDA (now superseded by comparable provisions in the Equality Act 2010).

JUDGMENT

The Supreme Court, by a majority of 4-1, dismissed the appeal. The lead judgment was given by Lord Brown. Lord Dyson gave a separate concurring judgment. Lord Walker agreed with Lord Brown and Lord Dyson, delivering a short opinion on the point raised by Lady Hale in her dissenting opinion. Lord Kerr agreed with the majority's conclusion but for different reasons on issue 1. Lady Hale gave a dissenting judgment for the Appellant on a point that, although not taken by the Appellant, was raised in Age UK's intervention.

REASONS FOR THE JUDGMENT

Issue 1 – the 2009/2010 Care Plan Reviews

The court agreed with Rix LJ's conclusion in the Court of Appeal. In accordance with the Fair Access to Care Services (FACS) Guidance issued by the Secretary of State, the Care Review Plans could and in fact did incorporate a review of Ms McDonald's needs: **[12]**, **[52]**. Care plan reviews are usually drafted by social workers rather than lawyers and thus should be construed in a practical way: **[53]**. Given the history of consultation in this case, the Respondent complied with the relevant FACS Guidance: **[13]**, **[55]**.

Lord Kerr agreed with the majority but on a narrower basis. Although the Respondent did not intend to carry out a re-assessment of the Appellant's needs in the 2009/2010 Care Plan Reviews, in fact the exercise then conducted yielded sufficient information to allow the court to conclude that the Appellant's needs could be properly re-cast: **[38]**. In this context, the definition of "needs" includes the means by which those needs are to be met: **[40]**.

Issue 2 – Article 8

The Appellant could not establish interference with her article 8 rights. The Respondent respected Ms McDonald's dignity and autonomy, allowing her to choose the details of her care package. Even if article 8 interference were established, it would be justified under article 8(2) on the ground that it is (a) necessary for the economic well-being of the Respondent Royal Borough and the interests of its other service-users and (b) a proportionate response to the Appellant's needs by affording her greater privacy and protection from injury: **[19]**.

Issue 3 – section 21 of the DDA

Under section 21 of the DDA, the Respondent may not operate any "practice, policy or procedure" which makes it impossible or unreasonably difficult for disabled persons to receive any benefit conferred on them. The Appellant failed to show that the Respondent's decision could properly be characterised as a "practice, policy or procedure" and thus the Respondent did not breach its section 21 duty. Even if that were not so, the Respondent's acts would have been justified as constituting "a

proportionate means of achieving a legitimate aim" within the meaning of section 21D(5): **[22]**.

Issue 4 – section 49A of the DDA

Where the public authority is discharging its functions under statutes which expressly direct its attention to the needs of the disabled persons, it may be entirely superfluous to make express reference to section 49A of the DDA. It would be absurd on the facts of the present case to infer a breach of section 49A of the DDA from an omission to refer to that section in any of the Respondent's documentation: **[24]**.

Issue 5 – section 2(1) of the Chronically Sick and Disabled Persons Act 1970 ("CSDPA")

Lady Hale would have allowed Ms McDonald's appeal on a different basis outlined by Age UK in its intervention, namely that it was *Wednesbury* irrational for the Respondent Royal Borough to characterise the Appellant as having a need different from the one she in fact has: **[78]**. Under section 2(1) of the CSDPA disabled people have a right to practical assistance from their local authority to meet their needs. In complying with section 2(1) the local authority has to answer rationally the following two questions: (i) what are the needs of the disabled person and (ii) what is necessary to meet those needs: **[69]**. It is clear that the need for help to get to the commode is so different from the need for protection from uncontrollable bodily functions that it is irrational to confuse the two, and meet the one need in the way that is appropriate to the other: **[75]**.

References in square brackets are to paragraph numbers in the judgment.