

A **R v Powys CC ex p Hambidge (Jenny Diane)**

Queen's Bench Division
Popplewell J
7 October 1997

B *Health and Social Services and Social Security Adjudications Act 1983 s17 entitles local authorities to charge for services referred to in Chronically Sick and Disabled Persons Act 1970 s2 because such services are provided by way of arrangements made under, and in the exercise of functions under, National Assistance Act 1948 s29.*

C **Facts**

D The respondent authority provided the applicant with services under Chronically Sick and Disabled Persons Act 1970 (CSDPA) s2 at a charge of £10 per week. An issue arose as to whether the respondent authority was empowered to levy that charge by Health and Social Services and Social Security Adjudications Act 1983 (HASSASSAA) s17, which provides that:

- (1) . . . an authority providing a service to which this section applies may recover such charge (if any) for it as they consider reasonable.
- E (2) This section applies to services provided under the following enactments –
(a) section 29 of the National Assistance Act 1948 . . .

F It was pointed out by the applicant that HASSASSAA 1983 s17 did not expressly refer to CSDPA 1970 s2. The applicant further submitted that services under CSDPA 1970 s2 were separate from services provided under National Assistance Act 1948 (NAA) s29. In the absence of clear statutory authority the respondent authority had no power to charge for services provided under CSDPA 1970 s2.

Held:

G CSDPA 1970 s2 applies itself expressly to local authorities with functions under NAA 1948 s29 and expressly states that arrangements of the kind it refers to are 'arrangements in the exercise of . . . functions under the said section 29'. Accordingly, as a matter of comparatively simple construction of the relevant provisions, services under CSDPA 1970 s2 are provided by way of arrangements made under NAA 1948 s29 and in the exercise of functions under NAA 1948 s29. It follows that HASSASSAA 1983 s17 entitles a local authority to charge for services provided under NAA 1948 s29, including those services referred to in CSDPA 1970 s2.

Cases referred to in judgment:

- I *Attorney-General v Wilts United* (1921) 37 TLR 884.
R v Gloucestershire CC and Secretary of State for Health ex p Barry (1997) 1 CCLR 40; [1997] 2 All ER 1; [1997] 2 WLR 459, HL.
R v Gloucestershire CC ex p Mahfood (1997) 1 CCLR 7; (1996) 8 Admin LR 181; (1996) 160 LG Rev 321; (1996) 30 BMLR 20; [1996] COD 67; (1995) *Times*, 21 June; *Independent*, 20 June, QBD.
- J *R v Richmond-upon-Thames LBC ex p McCarthy and Stone (Developments)* [1992] 2 AC 48; [1991] 3 WLR 941; [1991] 4 All ER 897; (1991) 135 SJLB 206; 90 LGR 1; (1991) 63 P&CR 234; [1992] 1 PLR 131; [1992] JPL 467; [1991] EGCS 118; [1991] NPC 118; (1992) 4 Admin LR 223; [1992] LS Gaz 22 January, 33; (1991) 141 NLJ 1589; (1991) *Times*, 15 November; (1991) *Independent*, 15 November, HL.
- K

Legislation/guidance referred to in judgment:

Children Act 1989 ss17 and 108 and Sch 2 Part I para 3 and Sch 13 paras 11(2) and 27 – Chronically Sick and Disabled Persons Act 1970 s2 – Disabled Persons (Services, Consultation and Representation) Act 1986 s4 – Health and Social Services and Social Security Adjudications Act 1983 s17 – Local Authority Social Services Act 1970 s7 and Sch 1 – Mental Health Act 1983 s117 – National Assistance Act 1948 ss22, 29 and 34 – National Health Service Act 1977 – National Health Service and Community Care Act 1990 ss46 and 47 – LAC (93)10.

This case also reported at:

(1997) *Times*, 5 November, QBD.

Representation

R Gordon QC and S Cragg (instructed by Thorpes) appeared on behalf of the applicant.

S Davies for R Barratt QC and C Lewis (instructed by Legal Department, Powys County Council, Powys, Wales) appeared on behalf of Powys County Council.

J Richards for S Kovats (instructed by the Treasury Solicitors) appeared on behalf of the Secretary of State for Health.

Judgment

MR JUSTICE POPPLEWELL:

The Parties

The applicant is a lady for whom the County Council provide certain services under Section 2 of the Chronically Sick and Disabled Persons Act 1990. The Secretary of State for Health sought leave to be heard on a number of grounds. His application was not objected to and was granted.

The Issue

The issue before the Court is whether there is power in law for the Local Authority to charge the applicant £10 per week for community-care services provided by the respondent.

The Law

It is trite law that if a charge is to be made by a public body there must be clear statutory wording to that effect (see *Attorney General v Wilts United* (1921) 37 Times Law Report 884 and *R v Richmond LBC ex parte McCarthy and Stone* [1992] 2 AC 48). It is the contention of the Local Authority and the Secretary of State that the Council is empowered by Section 17 of the Health and Social Services and Social Security Adjudications Act 1983 (HSSSSA) to charge for the services provided.

Section 17 provides as follows:-

(1) *Subject to subsection (3) below, an authority providing a service to which this section applies may recover such charge (if any) for it as they consider reasonable.*

(2) *This section applies to services provided under the following enactments –*
(a) *Section 29 of the National Assistance Act 1948 (welfare arrangements for blind, deaf, dumb and crippled persons etc.) . . .*

(c) *Schedule 8 to the National Health Service 1977 (care of mothers and young children, prevention of illness and care and after-care and home help and laundry facilities). . .*

A Section 29 of the National Assistance Act 1948 now provides that:-

B *(1) A local authority may, with the approval of the Secretary of State, and to such extent as he may direct in relation to persons ordinarily resident in the area of the local authority shall make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons aged eighteen or over who are blind, deaf or dumb or who suffer from mental disorder of any description, and other persons aged eighteen or over who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other disabilities as may be prescribed by the Minister.*

C Subsection 6 of Section 29 reads:

*Nothing in the foregoing provisions of this section shall authorise or require . . .
(b) the provision of any accommodation or services required to be provided under the National Health Service Act 1977.*

D Section 2 of the Chronically Sick and Disabled Persons Act 1970 now provides:

E *(1) Where a local authority having functions under section 29 of the National Assistance Act 1948 are satisfied in the case of any person to whom that section applies who is ordinarily resident in their area that it is necessary in order to meet the needs of that person for that authority to make arrangements for all or any of the following matters, namely . . .*

There are then set out a number of practical measures which the authority may make, and the section goes on:

F *. . . then, subject to the provisions of section 7(1) of the Local Authority Social Services Act 1970 (which requires local authorities in the exercise of certain functions, including functions under the said section 29, to act under the general guidance of the Secretary of State) . . . it shall be the duty of that authority to make those arrangements in the exercise of their functions under the said section 29.*

G It is Mr Gordon's submission on behalf of the applicant that Section 17(1) and Section 17(2)(a) of HSSSSA has no application to Section 29 of the National Assistance Act 1948. There is nothing in Section 29, suggesting that it is subject to HSSSSA. Section 29 merely gives a power for instance to provide residential accommodation and if a charge were to be imposed it would require a separate charge. He points out that Section 29 is included in the list of Community Care Services in the NHS and Community Care Act 1990.

H One of the statutory provisions under which community care services are provided is Section 117 of the Mental Health Act 1983. There is nothing in that Section about it being subject to Section 29 and there is no power to charge for services under Section 117. He submits that Section 29 in its present form is a classic example of a general target observation and is not enforceable at the suit of any individual. Section 22 of the National Assistance Act makes specific reference to 'charges to be made for accommodation'.

I He drew my attention to the local authority circular LAC(93)10. Paragraphs 10
J and 11 read:

10. By virtue of Section 2(2) of the Chronically Sick and Disabled Persons Act 1970 the matters dealt with in Sub-section 1 of that Section do not need to be included in the arrangements contained in the appendix 2.

K *11. It is not necessary for the arrangements contained in this circular to cover the provision by local authorities of Sheltered Employment as this is provided*

under powers deriving from the Disabled Persons (Employment) Acts 1944 and 1958.

Appendix 2 contains the Secretary of State's approvals and directions under Section 29(1) of the National Assistance Act 1948. The matters there are all very general says Mr Gordon. Where the obligation is triggered it is either a general power if the Secretary of State gives approval or a duty if he gives a direction. But at no stage does it appear that Section 29 imposes an obligation to an individual.

Section 2 in its current form does however impose a free-standing duty to an individual of which there are three important features. Firstly it can only be exercised by an authority under Section 29, for which purpose the authority has to decide if there is a need under paragraphs (a) to (h). The local authority then have to be satisfied that it is necessary to make arrangements for the identified need. That is absent from Section 29 and finally in the context of the individual duty, it is necessary to make those arrangements under Section 29.

Mr Gordon drew my attention to the distinction between Section 29 as originally drafted and in its present form. In its present form there is both a power and a duty and reference to persons aged eighteen or over where under the old form there was the existence of a power which could be converted into a duty but would only be brought into effect by a scheme approved by the Minister under Section 34. He further observes that Section 2 of the Chronically Sick and Disabled Persons Act 1970 in its original form was free-standing from any scheme under Section 29.

The National Health Service and Community Care Act 1990 by Section 46(3) identified Community Care Services as:

... services which a local authority may provide or arrange to be provided under any of the following provisions –

- (a) Part III of the National Assistance Act 1948;*
- (b) section 45 of the Health Services and Public Health Act 1968;*
- (c) section 21 of and Schedule 8 to the National Health Service Act 1977;*
- (d) section 117 of the Mental Health Act 1983 . . .*

It is to be observed that under (a) there is a reference to Section 29 but there is no reference to Section 2.

By Section 47:

(1) Subject to subsections (5) and (6) below, where it appears to a local authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such services, the authority –

- (a) shall carry out an assessment of his needs for those services; and*
- (b) having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of any such services.*

(2) If at any time during the assessment of the needs of any person under subsection (1)(a) above it appears to a local authority that he is a disabled person, the authority –

- (a) shall proceed to make such a decision as to the services he requires as is mentioned in section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986 without his requesting them to do so under that section; and*
- (b) shall inform him they will be doing so and of his rights under that Act.*

A Section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986 reads:

Services under Section 2 of the 1970 Act; duty to consider needs of disabled persons.

B *When requested to do so. . . by a disabled person . . . a local authority shall decide whether the needs of the disabled person call for the provision by the authority of any services in accordance with section 2(1) of the 1970 Act (provision of welfare services).*

C Mr Gordon points out that under Section 47(1) there first of all has to be an assessment for need and then if there is a need there is a discretion to decide whether to provide that service, whereas under Section 2, once there has been an assessment the service must be provided.

D The respondents contend that Section 47 does not support the contention that services are provided under Section 29 or under Section 2. Reference in Section 47(2) of the 1990 Act to assessment under Section 4 does not have the consequence that services are provided under Section 2 of the 1970 Act. Section 47(2) does not say that services, once need has been assessed, are provided under Section 2. It simply provides that the question whether there is a duty under Section 2 has to be addressed. If the duty arises the service is still provided under section 29 of the 1948 Act. The object is to ensure the provisions of the 1986 Act are complied with thereby avoiding the possibility of matters being dealt with by the Secretary of State under both Acts or under neither Act.

F Both parties drew my attention to the decision of the House of Lords in *R v Gloucester County Council ex parte Barry* (1997) 1 CCLR 40; [1997] 2 WLR 459. Their Lordships were there concerned with the provision of Home Care under Section 2(1) of the Chronically Sick and Disabled Persons Act 1970. It was held by a majority that when assessing an applicant's needs for a service the degree of that need and the necessity to make arrangements to meet it, the local authority had to balance the severity of the applicant's disabling condition against the cost of those arrangements; the availability of resources which might accordingly be a proper consideration.

G At page 476D [(1997) 1 CCLR 40 at p56A–B] Lord Clyde said:

H *Counsel for the respondent founded on the separation of the first two subsections of section 47 to support his proposition that the regime for the provision of services for the disabled under section 2(1) of the 1970 Act was distinct from that regarding the provision of services for others so that while in the other cases to which subsection 47(1) applied resources were a relevant consideration, the duty to provide for the disabled arose after a judgment had been made on the matter of necessity and resources played no part in the forming of that judgment. But it is essentially by reference to its own terms in the context in which it was enacted that section 2(1) of the 1970 Act must be defined. So far as the two-fold provision in section 47(1) and (2) is concerned the obligation on the local authority introduced by section 47(1) was to carry out an assessment on its own initiative and the separate provision made in subsection (2) cannot have been intended merely to achieve that purpose. It seems to me there is sufficient reason for the making of a distinct provision in subsection (2) in the desire to recognise the distinct procedural situation relative to the disabled. But it does not follow that any distinction exists in the considerations which may or may not be taken into account in making an assessment in the case of the disabled as compared with any other case. What is significant is that section 2(1) is clearly embodied in the whole of*

the community care regime, distinct only in its particular procedure and the importing of an express duty of performance once the local authority has been satisfied regarding the necessity to make the arrangements.

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The respondents contend that Mr Gordon's argument has been specifically rejected by the House of Lords in that case. Mr Gordon retorts that they were not dealing with Section 47(1)(b) and that the House of Lords recognised the distinct regime under Section 2; without Section 47(1) and (2) there would be a collision between 47(1) and Section 2.

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The next point raised by Mr Gordon related to Authorities having functions under the Children Act 1989. By Section 28A of the Chronically Sick and Disabled Persons Act 1970:

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This Act applies in respect of disabled children in relation to whom a local authority have functions under Part III of the Children Act 1989 as it applies in relation to persons to whom Section 29 of the National Assistance Act 1948 applies.

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Schedule 2 Part 1 para 3 of the Children Act 1989 reads:

Where it appears to a local authority that a child within their area is in need, the authority may assess his needs for the purposes of this Act at the same time as any assessment of his needs is made under –

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(a) the Chronically Sick and Disabled Persons Act 1970 . . .

It is accepted that the Children Act 1989, by Section 108(5) and Schedule 13 paragraphs 11(2) and 27, took children out of the general provisions of Section 29. They are, however, still governed by Section 2. It is therefore argued by Mr Gordon that the exclusion of Section 29 means that Section 2 must be free-standing so far as children is concerned.

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Both parties relied on the decision of the Divisional Court in *R v Gloucester County Council ex parte Mahfood* (1997) 1 CCLR 7; (1996) 8 Admin LR 181. At [(1997) 1 CCLR 7 at p16]; (1996) 8 Admin LR 181 at page 193] Lord Justice McCowan said this at letter C:

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Before leaving the Gloucestershire case, however, I should make reference to a further point raised by Mr Eccles after he heard the argument of Mr McCarthy for the Borough of Islington. During his original argument Mr Eccles had said: 'I accept that we had to make a decision under section 2 and we did.' He now seeks to resile from that position.

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His argument was that it is a pre-condition of the duty under section 2 of the 1970 Act that the local authority have power to provide the service under section 29 of the 1948 Act. If there is no power under section 29 there can be no duty under section 2. But section 29(6) of the 1948 Act positively provides that there is no power to exercise certain functions, in particular those which involve services which have to be provided under the National Health Service Act 1977. There is a duty to provide home helps for the aged and handicapped, but it is a duty under the 1977 Act. Therefore, the power to provide the service is excluded and home help services could not lawfully have been provided to Mr Mahfood and Mr Barry under section 2 of the 1970 Act.

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The submission is an unattractive one because it would follow that if the local authority were satisfied, by reason of the fact that the general arrangements had not been made for home help under the 1977 Act, that arrangements should be made for home help, they would have no power and thus no duty to make these arrangements. The short answer to the point, however, is that section 29(6) of the

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- A 1948 Act merely states that 'nothing in the foregoing provisions of this section shall authorise or require'. What is authorising the local authority to make arrangements under section 2 is section 2. Thus the provisions which authorise the local authority to meet the needs of a disabled person if those needs are not being otherwise met are section 2 itself. Accordingly, I would reject Mr Eccles's
- B further point.

Thus said Mr Gordon it is clear that services under Section 2 are separate from services provided under the authority of Section 29. History shows that Section 2 is intended to operate apart from Section 29 and reference to other statutory provisions shows Section 2 exists on its own and not as part of Section 29. See for

C instance Part III of the Children Act and Schedule 1 to the Local Authority Social Services Act 1970. Finally says Mr Gordon there is a policy reason why Section 2 should not be charged for. There is a statutory *duty* as opposed to a *power* to provide a service which is not discretionary and given the general law about the necessity for an express statutory provision to enable a public authority to charge,

D it is clear in this case that the respondents had no right to charge the applicant.

The argument for the local authority is essentially simple. It is that Section 17 of HSSSA provides that a Council may charge for services provided under certain enactments including Section 29 of the 1948 Act. They are provided pursuant to arrangements made in the exercise of their functions under Section 29 and as

E such they are provided under Section 29. They are not provided under Section 2 of the 1970 Act. That section is distinct from the provision of services under the 1948 Act and while Section 2 imposes a duty on the Council to make arrangements for the provision of services those arrangements are made under the 1948 Act. Support for that proposition is to be found in Lord Clyde's speech in *Barry* (1997) 1

F CCLR 40.

Mr Barratt on behalf of the local authority submits that no services are provided under Section 2: the services are provided under the 1948 Act. Section 2 imposes a duty to make arrangements under the 1948 Act and accordingly charges may be made. So far as the judgment of Lord Justice McCowan is concerned it is submitted that he was not dealing with the construction of Section 17. All he was indicating was that the provision of services was triggered or authorised by Section 2; it was not suggested that the services themselves are provided under Section 2; indeed they could not be provided under Section 2 because there is no such

G power and the services were provided under Section 29 for the purposes of

H Section 17.

So far as the Children Act 1989 is concerned, services for children are provided under Section 17 of that Act and can be charged for under Section 17(7). The effect of Section 28A of the 1970 Act means that an authority can, if the criteria in Section 2 of the 1970 Act are met, be obliged to provide services under Section 17

I of the 1989 Act but it does not mean that in non-children cases services are provided under Section 2 as opposed to Section 29.

In answer to Mr Gordon's submission that Section 17 makes no reference to Section 2, whereas Schedule 1 to the Local Authority Social Services Act 1970 and Schedule 2 Part 1 to the Children Act 1989 and Section 4 of the Disabled Persons Act 1986 make specific mention of Section 2, he submits that Section 4 does not have the consequences that services are provided under Section 2 merely that the local authority shall decide whether his needs call for the provision of services in accordance with Section 2. None of these provisions assist in any way in interpreting the provisions of the 1970 Act and its relationship with Section 17.

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Essentially the case for the respondents is that whilst Section 17 does not

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refer expressly to Section 2 of the 1970 Act the services described in Section 2 are provided under Section 29 of the 1948 Act, and are therefore covered by Section 17(2). The phrase 'in exercise of their functions under the said section 29' [Chronically Sick and Disabled Persons Act 1970 s2(1)] means what it says. The opening words of Section 2 of the 1970 Act identify the persons to whom Section 2 applies. They are the same persons as those to whom Section 29 of the 1948 Act applies. The relevant words have a different function and this construction is supported by the reference in Section 2(1) to Section 29 in the context of Section 7 of the Local Authority Social Services Act 1970. It is submitted that looking at the history of the various provisions as originally enacted it is clear that their repeal and/or amendment had the effect of providing a system of the Secretary of State's approvals and directions and supported the view that local authorities' functions under Section 2 were part of their functions under Section 29.

So far as the argument about Schedule 1 to the Local Authority Social Services Act 1970 and its reference to Section 2, that was made *ex abundante cautela*. Nor does Section 28A of the Chronically Sick and Disabled Persons Act 1970 have any relevance to the present issue.

I have listened with care to the interesting and well developed arguments on both sides but in the end it seems to me a matter of comparatively simple construction. Section 17 entitles the local authority to charge for services provided under Section 29. When providing welfare services under Section 2 of the Chronically Sick and Disabled Persons Act 1970 the local authority are exercising their functions under Section 29. They are not providing services under Section 2; they are making arrangements under the 1948 Act for the provision of their services.

Such authority as there is, namely *Barry* in the House of Lords, tends to support this view; nothing in any of the other statutory provisions persuades me that a different interpretation should be imposed.

Accordingly I take the view that the local authority were entitled to charge and accordingly this application must be dismissed.