Community Care:
Practising public law in a recession

Decision-making about the provision of social care and health services is (of course) not a matter of applying a closely prescribed set of criteria which generate a positive or negative decision depending on how many boxes are ticked. It is about public authorities exercising the statutory powers conferred on them. Those powers may be in the form of what appear to be very broad discretions or, even where they impose individual duties, may require the exercise of some kind of judgment (professional or otherwise) to trigger that duty.

But this does not mean that the public authorities involved can exercise those powers unconstrained. They must apply the relevant law correctly, make rational decisions and do so having followed a fair process. This has implications for practitioners advising both public authorities and citizens – it is not enough to 'know' the relevant statutes and be familiar with the relevant guidance. What is required is a public law analysis which informs a sustainable view on the lawfulness of the decision (act or failure to act) in public law terms.

The need for these skills will become of increasing importance in the current economic climate. The most common underlying issue in public law disputes in the social welfare field is access to resources, and those disputes will be 'played out' in various ways time and time again against the backdrop of deficit reduction over the next few years. What follows are a few examples of the kinds of issues that are already being thrown up.

Resource Allocation Schemes

A Resource Allocation Scheme (RAS) does what it says on the tin. It allocates the money in the local authority's adult social care budget to individuals making demands on that budget. The allocation is made in the form of an Individual Budget (IB) - the amount of money available to be spent (either by the local authority or paid over to the individual as a Direct Payment) on community care services for that individual. The idea is that, by knowing their own IB, the individual can have more control over how that money is spent to meet their needs.

There has been no change made to the legislative framework in the community care field for the purpose of introducing IBs; this is a policy initiative now supported by the Department of Health. Local authorities throughout England are currently at various stages in the development of their own RASs. If it is right that the majority of disputes in the community care field have their roots in the allocation of resources, then it will be absolutely vital for community care practitioners to understand how the relevant RAS works. The common elements are:

- A "self assessment questionnaire" which consists of questions, each with a set of answers from which a selection is made;
- Each answer attracts a number of points;
- Each point has a monetary value e.g. £7.50 per point.

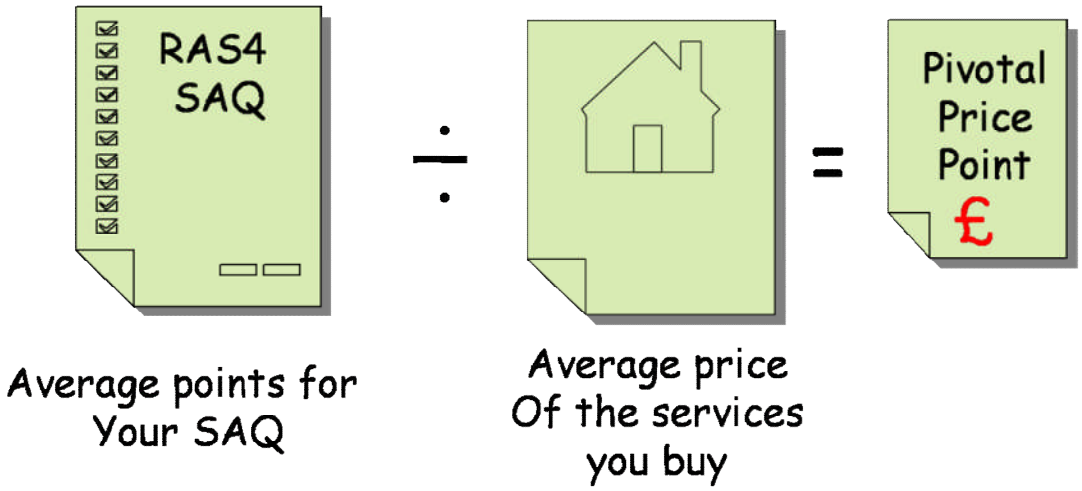
It is a matter for a particular local authority how it goes about setting up its RAS, but there are a number of commonly used models. One - the RAS4 - has been developed by InControl (a social enterprise which champions 'self-directed support')[1]. This advises the local authority to develop a self assessment questionnaire with points attached to answers, identify a sample test group of

[1] www.in-control.org.uk

existing service users, apply the questionnaire to them and calculate the costs of their current service packages[2]. The next step is explained in the following terms:

"*Converting Needs to Funding Allocation*

The RAS4 spreadsheet calculates a price point based upon the average cost of care packages entered and the average points from the SAQ's. This links the RAS to local pricing information and needs.



The Price Point is used to calculate an indicative funding allocation for each individual.

The spreadsheet is set to do this by multiplying the number of points a person receives in the SAQ by the price point, and allocating 75% of this figure.

The explanation of the process includes a section called "fine tuning" which includes the possibility of "*increasing or decreasing the overall spend*" by, for example, changing the percentage multiple used which is set at 75% in their version. In short, the process for establishing the value of a point, for the purpose of calculating the IB

[2] Creating A Resource Allocation System http://www.in-control.org.uk/site/INCO/Templates/SearchResults.aspx?pageid=19&search=RAS4&cc=GB

allocated to a particular individual, may already have built into it an average reduction on current allocated resources of 25% or even more.

In the case of R(Savva) v Royal Borough of Kensington and Chelsea[3], the court held that the decision allocating the claimant an IB was unlawful because the Council had failed to give adequate reasons for its decision. The judge said:

"*.. without being able to properly understand the use made of the RAS, the service user and anyone acting on her behalf, is left totally in the dark as to whether the monetary value of £170.45 is adequate to meet the assessed need of a 28 point score."* (para 48)

However, the judge rejected the argument that the system failed to discharge the authority's statutory duty to meet assessed needs because it imposed an unlawful cap on the budget. He accepted that the process of what is known as "moderation" rescues the system from falling into this trap. A moderation process allows the local authority to increase the "indicative" IB which is generated by the above calculation if that indicative budget does not meet assessed need. The case is under appeal

Ultimately, to be lawful, the application of the scheme must enable the local authority to comply with its statutory obligations and be consistent with the statutory guidance[4] applicable in the field. It is unlikely that Savva will resolve all of the issues thrown up by this approach – they are many and various e.g.:

- Any particular RAS may contain some kind of systemic flaw (e.g. the sampling process may fail to take into account a particular category of need or service provision). Is it sufficient to have a moderation process which offers the opportunity to 'correct' the flaw on a case by case basis?

- Is the number of points awarded to any specific answer allocated on anything other than a purely arbitrary basis?

[3] (2010) 13 CCLR 233

[4] See in particular the FACS replacement guidance: Prioritising need in the context of Putting People First

- Does the specific SAQ adopted by the local authority properly apply the requirements of the statutory guidance e.g. does it collect information on the consequences of non-provision of a service and award points where those consequences fall within an eligibility category?

- What are the necessary constituents of a moderation process if it is to 'save' a RAS from operating unlawfully e.g. does the system allow for eligible needs to be identified so that a professional judgment on whether the IB is sufficient to meet those needs can be made, or is moderation in effect triggered by the service user's dissatisfaction?

Arguably, if the current legislative requirements, directions and guidance were properly and lawfully applied in each and every case, everyone accessing the adult social care system would have the kind of choice and control that IBs are supposed to offer. One cannot help thinking that, particularly at a time of unprecedented cuts in local authority expenditure, the more significant characteristic of the regime is the fact that the underlying RAS is capable of operating as a (far from transparent) mechanism for restricting access to resources, and that those most likely to suffer the consequences are those least able to negotiate the moderating process.

Budget setting

The decision on how much money to allocate to adult social care is, of course, a political decision and not, on the face of it, one for the courts. But this risks oversimplifying the issue, as became clear in the recent case of R (Domb and others) v Hammersmith & Fulham LBC.[5] The Court of Appeal considered a challenge to the local authority's decision to introduce charges for its domiciliary care services. The local authority, having already decided to reduce Council Tax by 3% some months before, was faced with a choice between raising eligibility criteria, or introducing charges. As part of its impact assessment required by the statutory equality duties, the local authority consulted on the proposal to introduce charges. The claimants complained that the local authority had failed to have due regard to

[5] [2009] EWCA Civ 941

those duties and that the impact assessment - which had concluded that there would be positive benefits to maintaining eligibility criteria - was perverse, as it was based on the false premise that the only two choices were to raise eligibility criteria or introduce charges. The court held that there was no evidence that the local authority had failed to consider its equality duties in relation to the decision it was then making. Sedley LJ articulated the court's unease in reaching that decision:

"*The object of this exercise was the sacrifice of free home care on the altar of a council tax reduction for which there was no legal requirement. The only real issue was how it was to be accomplished. ….there is at the back of this a major question of public law: can a local authority, by tying its own fiscal hands for electoral ends, rely on the consequent budgetary deficit to modify its performance of its statutory duties? But it is not the issue before this court".* (Para 80)

The answer to this question (arguably) depends on the nature of the statutory duty.

Individual statutory duties

Public authorities cannot use the allocation of a fixed level of resources as an excuse for failing to meet a specific duty owed to an individual, such as the provision of a services under section 2 of the Chronically Sick and Disabled Persons Act 1970, where the individual has been assessed as being in need of such a service.[6]

The question of whether social welfare provision is made pursuant to such a duty (or in the exercise of a power or a general target duty) is therefore of critical importance, not only for the individual (and the public authority) at the level of individual decision-making, but at the strategic and political level of overall budget setting. The importance of the nature of the legislative framework governing a public authority's responsibilities increases, of course, when competition for access to reduced resources is particularly fierce, as will be the case for some years.

The purpose of the Law Commission's current review of community care law is to consolidate, simplify and modernise, not to change. It has proposed that the two key

[6] R v Gloucestershire CC Ex p Barry (1997) AC 584 HL

individual duties to be found in section 21 of the National Assistance Act 1948 (residential care) and section 2 of Chronically Sick and Disabled Persons Act 1970 (domiciliary care) be removed, but not (it would appear) with the intention of watering down an individuals' rights. The consultation paper[7] proposes:

" *The current legal structure is a product of the piecemeal and inconsistent way that adult social care law has developed over the past 60 years. In our provisional view, it would be counterproductive to reproduce such confusion in our proposed adult social care statute. Instead, we consider that it would be clearer, less complex and more effective to adopt the lead of FACS and UFSAMC and make an assessment of a person's social care needs and the application of the eligibility criteria, set by the local authority in accordance with FACS and UFSAMC, the sole means by which a person's eligibility for community care services is determined. This could take the form of two duties on local authorities following an assessment:*

(1) A duty to decide whether a person's social care needs are eligible needs, using eligibility criteria; and
(2) A duty to meet all eligible needs with the provision of services, which is owed to and ***can be enforced by the individual concerned****."* (See page 56 – emphasis added)

But law reform of this kind opens up the opportunity for more radical legislative change. The government has flagged up its intentions in its response to the Law Commission's consultation paper:

"Through the Coalition Programme, the Government is committed to promoting decentralisation; and one of the key strands of this work will be removing barriers. This also means supporting local authorities to deliver vital front line services in a way that suits their local needs by seeking to impose fewer duties on them."

It is unclear what this will mean in practice, although there is some evidence that there is no current intention to weaken rights. For example, in their response to the

[7] Law Commission Adult Social Care Consultation Paper No 192

Law Commission's consultation, the Department of Health has said in the context of considering the proposed repeal of section 21:

"*We agree in principle but we are concerned, like the Commission, that the existing rights of those in need of care and support should not be weakened."* (see para 28)[8]

However, it must be said that there is no express commitment, in this context, to maintaining the enforceable nature of the duty to provide services. It is important that any change that may (intentionally or inadvertently) amount to a loss of enforceable rights, and, indirectly, to a vulnerability to cuts in allocated resources, is identified and properly debated in the reform programme. This will minimise the risk of a subsequent (mis)-interpretation of new legislation by the courts to the effect that any new duty is a target duty.

The public law equality duties

In its judicial review challenge to the new administration's first budget, the Fawcett Society is arguing that the government failed to comply with its equality duty under section 76A of the Sex Discrimination Act 1975 (as amended by the Equality Act 2006):

"*(1) A public authority shall in carrying out its functions have due regard to the need –*

(a) to eliminate unlawful discrimination and harassment;

(b) to promote equality of opportunity between men and women"

The government, the Fawcett Society argues, should have assessed whether its budget proposals would increase or reduce inequality between women and men. On their website they say:

"*Independent analysis of the budget has shown that it is women who will bear the brunt of the cuts unveiled so far. Research by the House of Commons Library found that 72 per cent of the savings identified in the budget will come from women's*

[8] The Government response to Law Commission consultation paper 192 August 2010.

pockets. This is because many of the benefits to be cut or frozen - including the Health in Pregnancy Grant, the Sure Start Maternity Grant and Child Benefit - are benefits that more women than men rely on. Further, this analysis doesn't take into account the impact of the public sector pay freeze which will also hit women disproportionately as 65 per cent of public sector workers are women. "[9]

In short, the Fawcett Society appears to have learned the lesson from the Domb case and tackled the (alleged) mischief at its root source. The problem with this is that the individuals who are most likely be affected by defects in the budget setting process are unlikely to be aware of the issue or its potential until they feel that impact in practice. Whether or not any defects are challenged may well depend on how well-developed the NGO sector is in that particular locality or area of interest. However, it is perhaps arguable that, although Domb was unable to tackle the "major question of public law" that it raised, it has left open the possibility of addressing that issue at point of impact. The problem in Domb was, as Lord Justice Rix put it:

"*We just do not know the ramifications of the budgetary meetings and decision making; those decisions have not been challenged and no evidence about them has been formulated. They simply lie in the past, as data. For all we know, the budget had to be balanced; and each department tor spending area had to be capable of living within its own budget. However, we simply do not know these matters, for they have never had to be investigated."* (See para 60.)

If a local authority does not properly perform its statutory public equality duties at the point that it sets its budget, and, in consequence, does not consider and make transparent the potential impact on, for example, people with disabilities, is it arguable that, at a later date, it will not be able to rely on the resulting budget deficit to constrain its approach to deciding issues which have a direct impact (and as a result then become transparent to those affected).

Commissioning and de-commissioning

[9] http://www.fawcettsociety.org.uk/index.asp?PageID=1171

As the money dries up there will be increasing pressures on commissioning bodies (both local authorities and Primary Care Trusts or any replacement commissioning body following the proposed NHS restructuring) to find ways of providing services more cheaply (or at least more cheaply for the relevant care budget).

Service closures/reconfigurations – adult social care

For many years, the received wisdom has been that community care services are provided more "efficiently" by the private and third sectors, and social services authorities have increasingly commissioned by contracting out. In consequence, a substantial proportion of such services are provided by those sectors. This has significant implications in public law terms when services close or remodel themselves. If the service is provided directly by the local authority the service user may be able to assert a right to be consulted, or a substantive right to continue to be provided with the service on the ground of some kind of legitimate expectation. The public authority may have to comply with the various equality duties or even maintain the service if no other means of meeting assessed eligible needs is available.

But what if the service closure decision is taken by a private sector provider? To the extent that the local authority's decision-making (perhaps at a policy level) is a clear contributory factor to the service closure/ reconfiguration, then of course public law principles apply. For example, the local authority may have adopted a commissioning policy (such as supported living in place of residential care for people with learning disabilities) that requires the service to be provided in a different (cheaper way) which makes it difficult for the provider to continue to function in the same way or at all. However, even if the local authority's decision is arguably unlawful, it may of course be more difficult to secure a remedy for the service user if the provider decides that it will implement the change/close the service in any event. Has the service user any public law rights as against the service provider?

- Is a private sector provider subject to the requirements of the Human Rights Act 1998 (HRA)?

This is of course a developing area. Although the House of Lords found that a care home providing a service under contract with the local authority (in fulfilling

its statutory functions under section 21 of the National Assistance Act 1948) was not a public authority for the purpose of the HRA[10], the government disagreed and introduced legislative reform. Section 145 of the Health and Social Care Act 2008, which came into force on 1 December 2008, provides:

"*145 Human Rights Act 1998: provision of certain social care to be public function*

(1) A person ("P") who provides accommodation, together with nursing or personal care, in a care home for an individual under arrangements made with P under the relevant statutory provisions is to be taken for the purposes of subsection (3)(b) of section 6 of the Human Rights Act 1998 (c 42) (acts of public authorities) to be exercising a function of a public nature in doing so.

(2) The "relevant statutory provisions" are—

(a) in relation to England and Wales, sections 21(1)(a) and 26 of the National Assistance Act 1948 (c 29)....

.....

(5) Subsection (1) does not apply to acts (within the meaning of section 6 of the Human Rights Act 1998 (c 42)) taking place before the coming into force of this section."

This may prevent a provider from closing a care home if to do so would breach a resident's Article 8 rights to respect for their home, private and/or family life, or at least import a right to be consulted. In Blecic v Croatia the European Court of Human Rights said[11]:

"*.. whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8. The Court must therefore determine whether, having regard to the circumstances of the case and notably the importance of the decisions to be taken, the applicant*

[10] YL v Birmingham City Council and others [2007]UKHL 27

[11] App. No 59532/00 29 July 2004

has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her with the requisite protection of her interests."

- Is a private sector provider subject to the public law equality duty?

The public law equality duty in section 49A of the Disability Discrimination Act 1995 applies to public authorities. Section 49B defines a public authority as including "*any person certain of his functions are functions of a public nature"* Section 49B(2) provides that:

"In relation to a particular act, a person is not a public authority by virtue only of subsection (1)(a) if the nature of the act is private."

The YL case would suggest that a private sector provider of a section 21 service may well be found not to be a public body for this purpose (given the similarity on the wording of the definitional provision to that found in the HRA). But it is not possible to be absolutely sure – the various factors and public policy issues may well be different in this context, where private sector providers of services are, in any event, subject to various statutory anti-discrimination provisions.[12]

One growth area in which this may become an increasingly important issue is care homes who are seeking to move to the "supported living" model of provision under which service residents of the care home become tenants and for whom care services are provided not as residential services, but domiciliary services to their own homes. This is often seen as a cheaper option for the adult social care budgets because accommodation costs can be met by the housing benefit.

Commissioning in the NHS

In the field of adult social care services, inadequacies in commissioning at a strategic level can – in a sense and to some extent - be remedied at the stage of individual service provision, because the local authority is under a duty to provide services to

[12] The current statutory equality duties will be replaced by the new provisions in the Equality Act 2010 when the relevant section (section 149) is brought into force. This takes a different approach to defining public authorities, listing specific bodies in Schedule 19. The Secretary of State is empowered to amend the list, but this power only applies where the extension relates to a person by whom a public function is exercisable. Section 150(5) defines a public function as being one which is of a public nature for the purpose of the HRA.

meet the assessed eligible needs of that individual. The authority cannot say, at that stage, that it is short of resources. This is, of course, more problematic in the NHS where services are provided pursuant to a general target duty (save where – in the exceptional case - it may be possible to rely on a breach of Convention right if a service were not to be provided).

The new administration has made a number of proposals in its recent White Paper[13] for restructuring the NHS in order to save money:

"*The NHS will need to achieve unprecedented efficiency gains with savings reinvested in front-line services to meet the current financial challenge and the future costs of demographic and technological change:*
v. The NHS will release up to £20 billion of efficiency savings by 2014 which will be reinvested to support improvements in quality and outcomes.
w. The Government will reduce NHS management costs by more than 45% over the next four years, freeing up further resources for front-line care.
x. We will radically delayer and simplify the number of NHS bodies, and radically reduce the Department of Health's own NHS functions. We will abolish quangos that no not need to exist and streamline the functions of those that do." (See para 7)

Some of those proposals may impact on the fairness of the decision-making process.

- GP commissioning

  The most significant proposed structural reform is the abolition of PCTs and the transfer of many of their commissioning functions to GP consortia. The idea is that each GP practice will be required to belong to a consortium. The consortium will be allocated a commissioning budget by the NHS Commissioning Board and will be responsible for commissioning all services for their patients except GP services; other family health services – dentistry, community pharmacy and primary ophthalmic services; national and regional specialised services; maternity services. (Commissioning responsibility for the latter will be retained

[13] Equity and excellence: Liberating the NHS July 2010

centrally to be undertaken by the NHS Commissioning Board.) GPs as self employed contractors will not only make clinical judgments about the need for referrals for secondary care, but also be responsible for balancing the NHS books. In the absence of an independent mechanism for allocating additional resources in an individual case, does this risk introducing an inherent bias (in public law terms) into the process?

- The role of local authorities

Local authorities will be given new functions which it is suggested will place them much more at the centre of commissioning planning, thus (it is said) increasing local accountability. The Government is currently consulting on what this may mean in practice[14]. Proposals include establishing a statutory partnership board (to be known as a "*health and well being board*") within the local authority, to be the "*vehicle and focal point*" for joint working. The current statutory functions of local authority Overview and Scrutiny Committees - to scrutinise and be consulted on proposals for major changes to local health services - would, it is proposed, transfer to these new boards. Although 'convened' by local authorities, the boards will, it seems, be made up of representation from all stakeholders. What is currently the sole function of the local authority (to scrutinise proposals by an NHS body for changes to health services for local people) will fall within the remit of a 'partnership' board whose membership will consist not solely of local councillors but will include representation from NHS commissioners. On the face of it, this would appear to be a loss of local accountability. Careful consideration may need to be given to the precise terms in which the new statutory scrutiny functions are put, and the way that the boards operate, in order to ensure that there is proper compliance with the new obligations.

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[14] DoH consultation paper: Liberating the NHS: Local democratic legitimacy in health