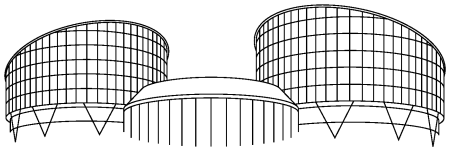

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF McDONALD v. THE UNITED KINGDOM

(Application no. 4241/12)

JUDGMENT

STRASBOURG

20 May 2014

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of McDonald v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Ineta Ziemele, *President,*
Päivi Hirvelä,
Ledi Bianku,
Nona Tsotsoria,
Paul Mahoney,
Krzysztof Wojtyczek,
Faris Vehabović, *judges,*
and Françoise Elens-Passos, *Section Registrar,*

Having deliberated in private on 15 April 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 4241/12) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Ms Elaine McDonald ("the applicant"), on 5 January 2012.

2. The applicant was represented by Mr D. Joy and Ms C. Hauser of Disability Law Service, a non-governmental organisation based in London. The United Kingdom Government ("the Government") were represented by their Agent, Ms A. Sornarajah of the Foreign & Commonwealth Office.

3. On 17 April 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1943 and lives in London.

5. The applicant suffered an incapacitating stroke in September 1999 which left her with severely limited mobility. In April 2006 she fell heavily, breaking her hip in several places. She then suffered two further falls, both of which resulted in further hospitalisation.

6. The applicant has a small and neurogenic bladder. As a result, she usually has to urinate some two to three times a night. On account of her

mobility problems she is unable safely to access a toilet or commode unaided.

7. In March 2007, after the applicant's third fall, she applied to the Independent Living Fund ("ILF") for full day and night support. While the application was pending she was provided with a care package by the local authority (the Royal Borough of Kensington and Chelsea) which included seventy hours per week of night-time care. The application to the ILF was ultimately unsuccessful as the applicant ceased to be eligible for funding when she turned sixty-five in 2008.

8. A local authority care plan dated 27 April 2007 indicated that the applicant needed "assistance with toileting, when it's required during the night". Likewise, the FACE (Functional Analysis of Care Environments) Overview assessment which followed on 8 January 2008 noted that "Miss McDonald needs assistance to manage continence at night. Substantial need."

9. However, the FACE Overview Assessment was subsequently amended to read "Miss McDonald needs assistance at night to use the commode. Moderate need."

10. A further Needs Assessment was started on 19 February 2008 and signed off on 29 February 2008. It noted:

> "Ms McDonald wanted to emphasise that she requires assistance with all transfers and when she mobilises. Ms McDonald requested night care in order [for] someone to assist her using commode during the night. This is because Ms McDonald does not wish to use incontinence pads and sheets...
>
> Summary of Needs Assessment
>
> Ms McDonald needs assistance to use the commode at night. Substantial need."

11. A further Needs Assessment signed off on 28 October 2008 concluded that "Miss McDonald needs assistance to use the commode at night. Substantial need." This assessment was subsequently described by Lord Dyson as "a concession" granted on a "temporary basis" (see paragraph 53 of the opinion of the Supreme Court).

12. On 17 October 2008 a formal decision was taken to reduce the amount allocated for the applicant's weekly care from GBP 703 to GBP 450. This figure appears to have been assessed on the basis that the applicant would be provided with incontinence pads in lieu of night-time care. This decision was taken at a meeting between the local authority and the applicant at the applicant's home. She was formally notified of the decision by letter dated 21 November 2008. It noted that:

> "As stated at the meeting, the rationale behind the planned reduction is that we consider the current provision to be in excess of that required to meet your eligible needs under the council's Fair Access to Care Services criteria. The council has a duty to provide care, but we must do so in a way that shows regard for use of public resources."

13. On 22 December 2008 the applicant sought permission to apply for judicial review on the ground that the local authority was unreasonably and unlawfully failing to meet her assessed and eligible needs. She further submitted that the local authorities' actions would cause her to suffer indignity which would amount to an interference with her right to respect for her private life in breach of Article 8 of the Convention.

14. Pending judicial consideration of the applicant's complaints, a "holding compromise" was reached: from November 2008 to December 2008 she continued to receive night-time care five days a week and between December 2008 and September 2011 she received night-time care four nights a week. During this period the applicant's partner stayed with her when night-time care wasn't provided in order to assist her. In September 2011 all night-time care was withdrawn.

15. On 5 March 2009 the application was refused by a Deputy High Court Judge. Although the judge accepted that the local authority was obliged to meet the applicant's assessed need, she found that the assessed need was not "assistance to use the commode at night" but rather ensuring the applicant's safety. The judge considered there to be two ways to meet that need: the provision of a night-time carer or the provision of incontinence pads. The statutory scheme requiring that the applicant's needs be met allowed the local authority some flexibility about how that was to be done and the local authority was therefore quite entitled to meet the need in the most economic manner. The judge further considered the applicant's complaints under Article 8 of the Convention to be "parasitic" upon the first ground being established and did not, therefore, consider that they raised any issues which needed to be gone into.

16. Following that decision, the local authority carried out a Care Plan Review. The review, which was dated 4 November 2009, concluded that

> "It remains Social Service's view that the use of incontinence pads is a practical and appropriate solution to Ms McDonald's night-time toileting needs. There does not seem to be any reason why this planned reduction to provide care should not go ahead..."

17. After a visit to the applicant's home on 15 April 2010, a further Care Plan Review was conducted. It was noted that "Ms McDonald did not want to discuss the option of using incontinence pads or Kylie sheets (absorbent sheets) as a way of meeting her toileting needs". The Review concluded:

> "I remain of the opinion that Ms McDonald's need to be kept safe from falling and injuring herself can be met by the provision of equipment (pads and/or absorbent sheets). She has however consistently refused this option. I am aware that she considers pads and/or sheets to be an affront to her dignity. Other service users have held similar views when such measures were initially suggested but once they have tried them, and been provided with support in using them, they have realised that the pads/sheets improve the quality of life by protecting them from harm and allowing a degree of privacy and independence in circumstances which, as the result of health problems, are less than ideal. The practicalities can be managed within the existing

> care package to accommodate Ms McDonald's preferred bedtime and to allow her to be bathed in the morning and/or have sheets changed. If Ms McDonald were willing to try this option, she might similarly alter her views.
>
> ... ...
>
> In light of her entrenched position on this, and despite the council's view that pads and/or sheets are the best way to ensure Ms McDonald's safety, consideration has been given to Extra Care Sheltered Housing as a means by which Ms McDonald could continue to receive support throughout the day and night. This would be consistent with her wish to receive personal care and also remain living independently in the community. It is not the recommended option because being assisted to access the toilet at night carries a risk of falls, but has been explored because of the impasse as regards the use of pads. Such accommodation will make support available 24 hours a day and reduce any longer term need to provide residential care to Ms McDonald should her needs increase in future. Ms McDonald refused this option when it was discussed with her."

18. The applicant applied to the Court of Appeal for permission to appeal against the refusal of permission to apply for judicial review on the grounds first, that the reduction in funding was inconsistent with the assessment of her night-time needs; secondly, that the reduction in funding violated her rights under Article 8 of the Convention; and thirdly, that in reducing her funding the local authority had failed to comply with its obligations under the Disability Discrimination Act 1995. In particular, she argued that if forced to use incontinence pads she would "lose all sense of dignity" and, as a consequence, she would suffer considerable distress. The local authority submitted that the provision of a night-time carer would cost GBP 22,270 per year, which would have to be paid out of the adult social care budget from which all other community care services for adults in the applicant's borough were funded. The local authority also argued that the use of pads would ensure the applicant's safety and provide her with greater privacy and independence in her own home. Finally, the local authority submitted that the weekly funding of GBP 450 could be used according to the applicant's preferences. She could therefore pay for a bedtime visit for the purpose of fitting the pads, and even a subsequent visit if necessary.

19. Upon the applicant's application for permission to appeal, a single Lord Justice granted permission and directed that the claim for judicial review should be heard by the Court of Appeal. In a decision dated 13 October 2010 the Court of Appeal departed from the judgment of the Administrative Court insofar as it did not consider that it was appropriate for the courts to re-categorise the applicant's needs as assessed by the local authority. It therefore found that between 21 November 2008 (the date of the disputed decision letter) and 4 November 2009 (the date of its first care plan review) the applicant's assessed need had been for assistance to use a commode. In failing to provide such assistance, the local authority had been in breach of its statutory duty. However, it had mitigated the breach by entering into an arrangement with the applicant's partner. Moreover, the

21 November 2008 decision had not been put into operation and applicant's need had been reassessed in the Care Plan Reviews of November 2009 and April 2010. As a consequence, the court found that the applicant had no substantive complaint under this head.

20. With regard to the complaint under Article 8 of the Convention, the Court of Appeal found that the conditions for finding a breach had not been established. Even though the local authority had failed in its duty at the time of its November 2008 decision, the error was not born of any lack of respect for the applicant's dignity but of a concern to perform the difficult task of balancing its desire to assist the applicant with its responsibilities to all its clients within the limited resources available to it.

21. Finally, the court held that there had been no failure to comply with any obligations under the Disability Discrimination Act 1995.

22. The applicant was granted permission to appeal to the Supreme Court. She argued that: the Court of Appeal had been wrong to hold that the 2009 and 2010 Care Plan Reviews were to be read as including a reassessment of her needs; the decision to provide her with incontinence pads instead of a night-time carer had unjustifiably interfered with her rights under Article 8; and there had been a failure to comply with the Disability Discrimination Act 1995.

23. By a majority, the Supreme Court agreed with the Court of Appeal that the applicant's needs had been reassessed on 4 November 2009, as the local authority had been entitled to do; that, from that date onwards, there had been no interference with the applicant's rights under Article 8 of the Convention; and that there had been no failure to comply with the Disability Discrimination Act 1995.

24. With regard to the complaint under Article 8, Lord Brown observed that even if a direct link existed between the measures sought by the applicant and her private life, the clear and consistent jurisprudence of this Court established that States enjoyed a wide margin of appreciation in striking a fair balance between the competing interests of the individual and of the community as a whole. He went on to state that:

> "There is, of course, a positive obligation under Article 8 to respect a person's private life. But it cannot possibly be argued that such respect was not afforded here. As already indicated, the respondents went to great lengths both to consult the appellant and [her partner] about the appellant's needs and the possible ways of meeting them and to try to reach agreement with her upon them. In doing so they sought to respect as far as possible her personal feelings and desires, at the same time taking account of her safety, her independence and their own responsibilities towards all their other clients. They respected the appellant's human dignity and autonomy, allowing her to choose the details of her care package within their overall assessment of her needs: for example, the particular hours of care attendance, whether to receive direct payments in order to employ her own care assistant, and the possibility of other options like extra care sheltered housing. These matters are all fully covered in paras 5, 42 and 66 of Rix LJ's judgment below. Like him, I too have the greatest sympathy for the appellant's misfortunes and a real understanding of her deepest antipathy

> towards using incontinence pads. But I also share Rix LJ's view that the appellant cannot establish an interference here by the respondents with her Article 8 rights. I add only that, even if such an interference were established, it would be clearly justified under Article 8(2) – save, of course, for the period prior to the 2009 review when the respondent's proposed care provision was not 'in accordance with the law' – on the grounds that it is necessary for the economic well-being of the respondents and the interests of their other service-users and is a proportionate response to the appellant's needs because it affords her the maximum protection from injury, greater privacy and independence, and results in a substantial costs saving."

25. In her dissenting opinion, Lady Hale considered that the need for help to get to the lavatory or commode was so different from the need for protection from uncontrollable bodily functions that it was irrational to confuse the two and to meet the need for one in a manner appropriate for the other. She would therefore have allowed the appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

26. Section 47 of the National Health Service and Community Care Act 1990 ("the 1990 Act") provides that:

> "(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.
>
> ... ...
>
> (4)The Secretary of State may give directions as to the manner in which an assessment under this section is to be carried out or the form it is to take but, subject to any such directions and to subsection (7) below, it shall be carried out in such manner and take such form as the local authority consider appropriate."

27. Disabled persons also have an individual right to certain services under section 2(1) of the Chronically Sick and Disabled Persons Act 1970 ("the 1970 Act"), which reads as follows:

> "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—
>
> (a) the provision of practical assistance for that person in his home;
>
> ... ...
>
> then, ... it shall be the duty of that authority to make those arrangements in exercise of their functions under the said section 29."

28. It was decided by the House of Lords in *R v Gloucestershire County Council Ex p Barry* [1997] AC 584 (by a majority of three to two) that "need" was a relative concept and that needs for services could not sensibly be assessed without having some regard to the cost of providing them. A person's need for a particular type or level of service could not be decided in a vacuum from which all other considerations of cost had been expelled. Consequently, the position subsequently established was that the local authority was under a duty to make an assessment of needs under section 47(1)(a) of the 1990 Act and in doing so might take account of its resources. If the need fell into one of the four bands described in the Fair Access to Care Services ("FACS") Guidance (critical, substantial, moderate or low) – which, having regard to its resources, the local authority had indicated it would meet – then it had to meet that need. In deciding how to meet the need, the local authority was entitled to take account of its resources.

29. The FACS Guidance issued on 1 January 2003 (which remained in force until new guidance was issued in February 2010) provided, as relevant, that: councils should ensure that individuals in similar circumstances receive services capable of achieving broadly similar outcomes; reviews should be undertaken at regular intervals to ensure that the care provided to individuals is still required and is achieving the agreed outcomes; and that reviews should establish how far the services provided have achieved the outcomes set out in the care plan, reassess the needs and circumstances of individual service users, help determine individuals' continued eligibility for support, and confirm or amend the current care plan.

III. RELEVANT INTERNATIONAL LAW

A. The United Nations Convention on the Rights of Persons with Disabilities

30. Article 3 provides, as relevant, that:

> "The principles of the present Convention shall be:
>
> a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
>
> ... ..."

31. Article 17 provides that:

> "Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others."

32. Finally, Article 19 provides that:

"States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

a. Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

b. Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

c. Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs."

B. The European Union Charter of Fundamental Rights

33. Article 1 provides that "[h]uman dignity is inviolable. It must be respected and protected."

34. The United Kingdom has signed a protocol to the Charter which precludes, *inter alia*, the domestic courts and the EU's courts from finding that its "laws, regulations or administrative provisions, practices or action" are inconsistent with the Charter. However, there is considerable debate concerning the legal effect of the protocol.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

35. The applicant complained under Article 8 of the Convention that the withdrawal of night-time care disproportionately interfered with her right to respect for her private life. In the alternative, she complained that by withdrawing the service the respondent State was in breach of its positive obligation to provide her with a service which enabled her to live with dignity. Article 8 of the Convention reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

36. The Government contested that argument.

A. Admissibility

37. The Government submitted that the Court should declare the Article 8 complaint inadmissible because it was manifestly ill-founded. The Court considers that the issue of whether or not the applicant's complaint is manifestly ill-founded is closely linked to the merits. It therefore considers it necessary to join the Government's objection to the merits of the applicant's complaint.

B. Merits

1. The applicant's submissions

38. The applicant submitted that the decision to withdraw night-time care from her and require her to use incontinence pads, even though she was not incontinent, constituted an unjustified interference with her right to respect for her private life. In particular, she argued that it was difficult to conceive of a factual situation which established more of a "direct and immediate link" to the rights protected under Article 8 than a disabled person's need or assistance to reach a toilet or commode where they could urinate and defecate in dignity. The aspects of Article 8 of the Convention relating to personal and psychological integrity were all in play, and the interference affected the applicant's ability to maintain an independent life at home and negatively impacted on her family life with her partner. Moreover, it exposed her to considerable indignity and placed significant caring responsibilities on her partner, who had made it clear that he was unable to act as her carer.

39. In any case, the applicant submitted that up until 4 November 2009 the interference with her private life had not been in accordance with the law.

40. In the alternative, the applicant submitted that the respondent State had been under a positive obligation to provide night-time care given the special link between the provision of this care and her psychological integrity. The applicant's local authority (the Royal Borough of Kensington and Chelsea) was one of the wealthiest in the United Kingdom and there would therefore have been no overwhelming cost barrier to the provision of such care.

41. The applicant further submitted that both the UN Convention on the Rights of Persons with Disabilities (see paragraphs 30 - 32 above) and the EU Charter of Fundamental Rights (see paragraphs 33 and 34 above) made it clear that a person's inherent dignity and individual autonomy should be at the heart of the Article 8 right to private life. In particular, Article 19 of the Disability Convention required State parties to provide the personal assistance necessary to support living and inclusion in the community.

According to the applicant, the only way that she could live a dignified life was through the continued provision of a night-time carer.

42. Finally, the applicant argued that the Supreme Court in the present case had wrongly applied the doctrine of the margin of appreciation to give such a margin to the executive (see paragraph 24 above). As a consequence, no proper consideration was given by the domestic courts to the proportionality and/or fairness of the decision in the applicant's case and, if the Court were also to afford the same margin of appreciation to the State, there would have been no real proportionality assessment by any court.

2. The Government's submissions

43. The Government submitted that there had been no interference with the applicant's rights under Article 8 of the Convention. While they accepted that matters such as dignity and personal autonomy fell within the ambit of Article 8, they argued that the care provided to the applicant during the relevant period had respected her dignity and private life even if it was not the care package that she had wanted. However, the Government accepted that if the Court were to find that there had been an interference with the applicant's rights as defined in paragraph 1 of Article 8, that interference would have constituted a violation from 21 November 2008 to 4 November 2009 because it was not "in accordance with the law" as required by the second paragraph of that Article.

44. From 4 November 2009 onwards, any interference was in accordance with the law and was necessary and proportionate in the interests of other care-users and the economic well-being of the State given the substantial demand for adult care services. In this regard, the Government noted that the Court has repeatedly held that while States enjoy a wide margin of appreciation in striking a fair balance between the competing interests of the individual and of the community as a whole, this margin is even wider where the issues involve an assessment of priorities in the context of the allocation of limited State resources (see, for example, *Sentges v. the Netherlands* (dec.), no. 27677/02, 8 July 2003, *Pentiacova and Others v. Moldova* (dec.), no. 14462/03, ECHR 2005-I, *Molka v. Poland* (dec.), no. 56550/00, 11 April 2006). The Government therefore submitted that the decision to withdraw night-time care was proportionate and fell within its margin of appreciation.

45. The Government accepted that the applicant had been entitled to support at night in accordance with her right to respect for her private life, including her dignity and personal autonomy; however, in determining what measures should be adopted to fulfil her need, the State was entitled to have regard to the interests of other care users and the limited resources available to meet the substantial demand for adult care services. The Government therefore argued that it was not under any positive obligation to provide the applicant with the requisite support in the form of night-time care. To the

extent that it was under a duty by virtue of Article 8 to provide her with a service which enabled her to live with dignity, that obligation had been met by the care package provided by the local authority.

3. The Court's assessment

(a) The scope of Article 8

46. The first question which arises is whether the facts of the case fall within the scope of the concept of "respect" for "private life" set forth in Article 8 of the Convention. In this regard, the Court has previously held that the notion of "private life" within the meaning of Article 8 is a broad concept which encompasses, *inter alia*, a person's physical and psychological integrity (see *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251‑B and *Botta v. Italy*, 24 February 1998, § 32, *Reports of Judgments and Decisions* 1998-I); the right to "personal development" (see *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001‑I); and the notion of personal autonomy (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002‑III). In a number of cases the Court has held that Article 8 was relevant to complaints about public funding to facilitate the mobility and quality of life of disabled applicants (see, for example, *Zehnalová and Zehnal v. the Czech Republic* (dec.), no. 38621/97, ECHR 2002-V and *Sentges v. the Netherlands* (dec.), no. 27677/02, 8 July 2003).

47. In *Pretty* the Court held that the very essence of the Convention was respect for human dignity and human freedom; indeed, it was under Article 8 that notions of the quality of life took on significance because, in an era of growing medical sophistication combined with longer life expectancies, many people were concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflicted with their strongly held ideas of self and personal identity (*Pretty v. the United Kingdom*, cited above, § 65). Although the facts of the present case differ significantly from those of *Pretty*, insofar as the present applicant believed that the level of care offered by the local authority would have undignified and distressing consequences, she too was faced with the possibility of living in a manner which "conflicted with [her] strongly held ideas of self and personal identity". In the Supreme Court, Baroness Hale, in her dissenting opinion, appeared to accept that considerations of human dignity were engaged when someone who could control her bodily functions was obliged to behave as if she could not (see paragraph 25 above). The Court agrees with this general assessment of the applicant's situation and it does not exclude that the particular measure complained of by the applicant in the present case was capable of having an impact on her enjoyment of her right to respect for private life as guaranteed under

Article 8 § 1 of the Convention. It therefore finds that the contested measure reducing the level of her healthcare falls within the scope of Article 8.

(b) Positive obligation or interference with a right?

48. The Court has previously considered a number of earlier cases concerning funding for care and medical treatment as falling within the sphere of possible positive obligations because the applicants complained in substance not of action but of a lack of action by the respondent States (see, for example, *Sentges v. the Netherlands* and *Pentiacova v. Moldova*, both cited above). Those cases concerned the refusal by the State to provide funding for medical equipment and/or treatment. In the present case, however, the local authority had initially provided the applicant with a night-time carer, albeit, in the description of the Supreme Court, as a "concession" granted on a "temporary basis" (see paragraph 11 above). The applicant is therefore complaining not of a lack of action but rather of the decision of the local authority to reduce the care package that it had hitherto been making available to her. As such, a more appropriate comparator would be the case of *Watts v. The United Kingdom* (dec.), no. 53586/09 of 4 May 2010, in which the Court was content to proceed on the basis that a decision to close the care home where the elderly applicant was resident and to transfer her to another home constituted an interference with her rights under Article 8.

49. The Court is likewise prepared to approach the present case as one involving an interference with the applicant's right to respect for her private life, without entering into the question whether or not Article 8 § 1 imposes a positive obligation on the Contracting States to put in place a level of entitlement to care equivalent to that claimed by the applicant.

(c) Compliance with Article 8 § 2

50. Such an interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", pursuing one or more of the legitimate aims listed therein, and being "necessary in a democratic society" in order to achieve the aim or aims concerned.

(i) The period from 21 November 2008 to 4 November 2009

51. The Supreme Court (see paragraph 24 above), upholding the Court of Appeal (see paragraph 19 above), held that the local authority had been in breach of its statutory duty to provide care to the applicant in accordance with its own assessment of her need for care (namely a need for assistance to use a commode during the night) between 21 November 2008 (the date of the letter from the local authority withdrawing night-time care – see paragraph 12 above) and 4 November 2009 (the date of the authority's first care plan review – see paragraph 16 above). In light of this finding, the

Government have accepted (see paragraph 43 above) that during this period any interference with the applicant's right to respect for her private life was not "in accordance with the law" as required by paragraph 2 of Article 8.

52. The Court cannot but find that from 21 November 2008 to 4 November 2009 the interference with the applicant's right to respect for her private life was in breach of Article 8 of the Convention on this ground.

(ii) From 4 November 2009 onwards

53. From 4 November 2009 onward, there is no doubt that the interference was "in accordance with the law". The Court also accepts that the interference pursued a legitimate aim, namely the economic well-being of the State and the interests of the other care-users. It therefore falls to the Court to consider whether the decision not to provide the applicant with a night-time carer to help her to access a commode was "necessary in a democratic society" for the purposes of paragraph 2 of Article 8 and, in particular, in that connection, was proportionate to the legitimate aim pursued.

54. In conducting the balancing act required by Article 8 § 2 the Court has to have regard to the wide margin of appreciation afforded to States in issues of general policy, including social, economic and health-care policies (see *James and Others v. the United Kingdom*, 21 February 1986, § 46, Series A no. 98; *Shelley v. the United Kingdom* (dec.), no. 23800/06, 4 January 2008); and *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003‑VIII). The margin is particularly wide when, as in the present case, the issues involve an assessment of priorities in the context of the allocation of limited State resources (see, *mutatis mutandis*, *Osman v. the United Kingdom*, judgment of 28 October 1998, Reports 1998-VIII, p. 3159, § 116, *O'Reilly and Others v. Ireland* (dec.), no. 54725/00, 28 February 2002, unreported). In view of their familiarity with the demands made on the health care system as well as with the funds available to meet those demands, the national authorities are in a better position to carry out this assessment than an international court.

55. In the present case the Supreme Court primarily considered the applicant's Article 8 complaint within the sphere of positive obligations. It therefore had to consider whether or not a fair balance had been struck between the interests of the applicant and those of the wider community and it would have been impossible to do so without addressing one of the fundamental principles underpinning the Court's jurisprudence in such cases: namely, that States are afforded a wide margin of appreciation in issues of general policy, and that margin is particularly wide when the issues involve an assessment of the priorities in the context of the allocation of limited State resources (see paragraph 54 above).

56. In any case, the Court observes that the proportionality of the decision to reduce the applicant's care package was fully considered, first

by the local authority in the course of its regular Care Plan Reviews and, secondly, by the domestic courts (including the Court of Appeal and the Supreme Court). In particular, in concluding that there had been no interference with the applicant's rights under Article 8, Lord Brown considered the great lengths to which the local authority had gone to consult – and, in fact, to reach an agreement with – the applicant and her partner. He further noted that the applicant's personal feelings and desires had properly been balanced against the local authority's concern for her safety, independence and respect for other care-users. Finally, he concluded that even if there had been an interference with her right to respect for her private life, save for the period prior to 4 November 2009 review when the proposed care provision was not "in accordance with the law", the interference would have been necessary for the economic well-being of the respondents (that is, the local authority) and the interests of their other care-users and would therefore have been a proportionate response to her needs because it would have afforded her the maximum protection from injury, greater privacy and independence, and would have resulted in a substantial costs saving (see paragraph 24 above).

57. The Court is satisfied that the national courts adequately balanced the applicant's personal interests against the more general interest of the competent public authority in carrying out its social responsibility of provision of care to the community at large. It cannot, therefore, agree with the applicant that there has been no proper proportionality assessment at domestic level and that any reliance by it on the margin of appreciation would deprive her of such an assessment at any level of jurisdiction. In such cases, it is not for this Court to substitute its own assessment of the merits of the contested measure (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities (notably the courts) unless there are shown to be compelling reasons for doing so (see, for example, *X v. Latvia* [GC], no. 27853/09, § 102, ECHR 2013). The present applicant has not adduced any such compelling reasons in her pleadings before this Court.

58. The foregoing considerations are sufficient to enable the Court to conclude that from 4 November 2009 onwards the interference with the applicant's right to respect for her private life was both proportionate and justified in terms of the requirement of "necessity in a democratic society" under Article 8 § 2. The Court by no means wishes to underestimate the difficulties encountered by the applicant and it appreciates the very distressing situation she is facing. Nevertheless, the Court is of the opinion that in reducing her care-package it cannot be said that the competent authorities of the respondent State exceeded the margin of appreciation afforded to them, notably in relation to the allocation of scarce resources. It follows that in respect of this period the complaint is manifestly ill-founded

and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

(iii) Conclusion

59. There has accordingly been a violation of Article 8 of the Convention in respect of the period from 21 November 2008 to 4 November 2009. The remainder of the applicant's complaint is inadmissible.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

61. The applicant claimed ten thousand euros (EUR 10,000) in respect of non-pecuniary damage.

62. The Government submitted that a finding of a violation was itself sufficient to provide just satisfaction. No award of damages was therefore appropriate.

63. The Court awards the applicant EUR 1,000 in respect of non-pecuniary damage. In arriving at this figure, it has taken account of the fact that the applicant continued to receive night-time care seven days a week up to November 2008; that from November 2008 to December 2008 she continued to receive night-time care five days a week; and between December 2008 and 4 November 2009 (representing the end of the period in respect of which the Court has found a violation of Article 8) she received night-time care four nights a week. Moreover, on the nights when she did not receive night-time care, her partner was on hand to assist her with her nightly toileting needs.

B. Costs and expenses

64. The applicant also claimed GBP 9,822 for the costs and expenses incurred before the Court.

65. The Government submitted that this figure was excessive.

66. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its

possession and the above criteria, the Court considers it reasonable to award the sum of GBP 9,500 covering costs under all heads.

C. Default interest

67. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 8 in respect of the period from 21 November 2008 to 4 November 2009 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 8 of the Convention in respect of that period;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted, where appropriate, into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) GBP 9,500 (nine thousand five hundred pounds), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 May 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Registrar

Ineta Ziemele
President