

# R v LB Islington ex p McMillan; R v Gloucestershire CC ex p Mahfood, Barry, Grinham and Dartnell

Queen's Bench Division  
McCowan LJ and Waller J  
16 June 1995

*In assessing under Chronically Sick and Disabled Persons Act 1970 s2 whether:*

- a) *an individual has a need; and*
- b) *if so, what arrangements ought to be made to meet that need;*

*a local authority is entitled to balance the needs of the individual against the needs of other individuals in the context of the amount of resources available. A local authority is not, however, entitled to withdraw or reduce the provision of services without first reassessing the individual's current needs in such context.*

## Facts

The applicants were all elderly persons, physically disabled, of modest means or in receipt of state benefits. The respondent had been providing three of them with home care services (one to two hours help each week with bed-making, ironing, laundry, shopping, cleaning, etc; one of them with respite care for two weeks every six weeks; one had been assessed as needing a hoist installed in her home so that she could return home from hospital).

These services were all provided or to be provided under Chronically Sick and Disabled Persons Act 1970 (CSDPA) s2, which states that, once the local authority:

*... are satisfied ... that it is necessary in order to meet the needs of that person for that authority to make arrangements for ...*

*(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 ...*

The respondent wrote to each of the applicants informing them that it was either ceasing service provision altogether, substantially reducing it or (in the case of the hoist) that it had decided not to make provision earlier agreed. The reason was that the government had unexpectedly withdrawn £3m of the grant on which the respondent's plans had been based, leaving the respondent with insufficient funds to provide services to meet the needs of persons more seriously disabled than the applicants.

The applicants submitted that once a person had been assessed as having a need the local authority had an absolute duty to make arrangements to meet it: sufficiency of resources was not relevant. The respondent submitted that the duty under CSDPA 1970 s2 was merely a target duty and that as resources diminish services have to be withdrawn or reduced. The Secretary of State for Health submitted that when assessing need a local authority has to take into account all relevant factors including resources; that a local authority may from time to time reassess the needs of individuals taking into account his/her current needs and all other relevant factors including resources; it is only after the local authority has satisfied itself, as the result of such reassessment, that it is necessary to make arrangements under CSDPA 1970 s2 that the duty to make arrangements arises, which duty must be performed irrespective of shortage of funds.

**A Held:**

- 1 Assessing need involves weighing the needs of one individual against the needs of others in the context of the amount of resources available.
- 2 Local authorities are entitled to reassess individual applicants as individuals, weighing their current needs against the needs of others in the context of the amount of resources currently available. Local authorities are not entitled simply to cut services without prior reassessment because their resources have in turn been cut. That amounts to treating the cut in resources as the sole relevant factor.
- 3 Once a local authority has decided that it is necessary to make arrangements under CSDPA 1970 s2 it is under an absolute duty to make them. The duty is owed to the individual and is not a target duty.
- 4 Shortage of resources could not reasonably justify failure to make some service provision where otherwise an individual would be at severe physical risk.

**Cases referred to in judgment:**

- D** *R v Inner London Education Authority ex p Ali* (1990) 2 Admin LR 822; [1990] COD 317; (1990) 154 LG Rev 852, DC.

**Legislation/guidance referred to in judgment:**

National Assistance Act 1948 s29 – Chronically Sick and Disabled Persons Act 1970 s2 – National Health Service Act 1977 s21 and Sch 8 – Disabled Persons (Services, Consultation and Representation) Act 1986 s4 – National Health Service and Community Care Act 1990 ss46 and 47 – Local Authority Social Services Act 1970 s7 – Community Care in the Next Decade and Beyond (*LASSA Guidance, November 1990*).

**This case also reported at:**

(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.

**G Representation**

Richard Gordon QC and Alan Maclean (instructed by Percy Short & Co) appeared on behalf of the applicant McMillan.

Richard Gordon QC and Alan Maclean (instructed by the Public Law Project) appeared on behalf of the applicants Mahfood, Barry, Grinham and Dartnell.

M Lazerous (instructed by the London Borough of Islington) appeared for the London Borough of Islington.

Patrick Eccles QC and Christopher Frazer (instructed by Gloucestershire County Council Legal Department) appeared on behalf of Gloucestershire County Council.

Nigel Pleming QC and Stephen Kovats (instructed by the Treasury solicitors) appeared on behalf of the Secretary of State for Health.

**Judgment**

**J LORD JUSTICE McCOWAN:** There are before the Court five applications for judicial review brought against the Gloucestershire County Council with leave. The applicants sought orders of:

- (1) **Certiorari** to quash various decisions of the Council whereby it withdrew and/or curtailed and/or failed to provide community care services

previously provided to the various applicants on the grounds that the Council could no longer finance those services, and

- (2) **Mandamus** to require the Council to resume the provision of the said services on a permanent basis (the Council having undertaken to continue the said services pending the outcome of these proceedings).

Additionally, there is before the Court an application for judicial review brought against the London Borough of Islington with leave. The orders sought against the Borough were:

- (1) **Certiorari** to quash decisions of the Borough to withdraw community care services previously provided to the applicant on the ground that the Borough could no longer finance these services; and
- (2) **Mandamus** to require the Borough to resume the provision of the said services on a permanent basis.

In the case of each application, however, Mr Gordon made plain at the outset of the hearing that he would be content with declaratory relief.

At the root of all the cases lie the following points:

- (1) Are local authorities entitled, when making an assessment of a disabled person's needs and of the arrangements required to meet them, to take account of the resources available in both human and financial terms?
- (2) If an assessment has been made and a local authority has satisfied itself that the arrangements should be made, is the duty to make those arrangements subject to the authority having the resources to provide them?
- (3) If authorities are entitled to take into account resources when making the original assessment, to what extent can they reassess if the resource position alters, what factors should they then take into account, and how should that reassessment be carried out?

The situation of the applicants is in summary form as follows, beginning with the Gloucestershire five.

Mr Mahfood is 71 years old and lives alone. He suffers from decreased mobility, pain and stiffness resulting from a back injury, and in November 1992 he suffered a stroke. He is in receipt of attendance allowance and income support. In February 1993, he was assessed as requiring assistance with bed making, ironing and cleaning. He applied for a home care assistant service from the Council and was granted 1½ hours a week. The assessment was confirmed in May 1994 but on 29 September the Council wrote to him saying:

*... The demand for Community Care in Gloucestershire is far greater than the Government estimated it would be ... In order to try to continue to offer some help to people at greatest risk, we are therefore having to reduce or stop altogether the services we have been providing to some people. I very much regret that the service we have been providing you is affected. Until further notice we will no longer be able to provide you with Housework ...*

Mr Barry is 79 years old. He has in the past suffered several heart attacks. He previously fractured the neck of his femur; he has had a hip replacement and is able to walk only short distances with the aid of a stick. He is partially sighted. He is in receipt of income support, and prior to September 1994 he was in receipt of home care services, providing him with cleaning, laundry, shopping and community meals. By letter of 29 September 1994 (in similar terms to that received by Mr Mahfood) the Council withdrew his cleaning services and reduced his laundry provision.

- A Mr Dartnell is 76 years old and his wife 71. He has had both legs amputated below the knee and is wheelchair bound. He suffers from prostate cancer. Mrs Dartnell has arthritis, high blood pressure and a heart condition. Mr Dartnell (who was cared for by his wife) was assessed by the Council as requiring respite care every six weeks for two weeks, this providing short breaks for his wife. In addition, both were assessed as requiring practical assistance in their home. The respite care was cancelled by the Council on 23 September 1994 'due to current financial restrictions'. By letter of 6 October 1994 to Mr and Mrs Dartnell the Council told them:

- C *I am sorry to have to tell you that we are unable to continue to offer you a service on Wednesday evenings and your afternoon visits will be reduced to half an hour between 2.30–3.00 p.m. For toileting. We very much regret having to take this action, but we have to ensure that the limited resources at our disposal are targeted at those who are most at risk.*

- D Mrs Grinham is aged 79. She suffers from severely disabling rheumatoid arthritis and is unlikely to walk again. She was assessed by the Council as requiring a hoist for her home, but after the Council ran into budgetary difficulties they rescinded the decision to provide her with a hoist, as a result of which she has been unable to fulfil her wish to leave hospital and return home.

- E Mr McMillan is aged 53 and suffers from osteoporosis and Parkinson's Disease. On 9 April 1992 he was informed by the Borough of Islington that he had been assessed for home service and would be provided with practical assistance in his home involving 'one hour on a Monday to do your laundry and any heavy ironing and on a Tuesday ... Cleaning tasks within your home ...' Mr McMillan's complaint is that his receipt of these services has often been interrupted by the absence of his carer through days off or illness.

The relevant statutory provisions, in chronological order, are as follows. First of all I have regard to section 29 of the National Assistance Act 1948. Sub-section (1) reads:

- G *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.*

Sub-section 6 reads:

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

- J A very important provision for the purposes of this case is section 2(1) of the Chronically Sick and Disabled Persons Act 1970, which reads:

## **2 Provision of welfare services**

- K *(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 –* A

- (a) the provision of practical assistance for that person in his home;*
- (b) the provision for that person of, or assistance to that person in obtaining, wireless, television, library or similar recreational facilities;*
- (c) the provision for that person of lectures, games, outings or other recreational facilities outside his home or assistance to that person in taking advantage of educational facilities available to him;* B
- (d) the provision for that person of facilities for, or assistance in, travelling to and from his home for the purpose of participating in any services provided under arrangements made by the authority under the said section 29 or, with the approval of the authority, in any services provided otherwise than as aforesaid which are similar to services which could be provided under such arrangements;* C
- (e) the provision of assistance for that person in arranging for the carrying out of any works of adaptation in his home or the provision of any additional facilities designed to secure his greater safety, comfort or convenience;* D
- (f) facilitating the taking of holidays by that person, whether at holiday homes or otherwise and whether provided under arrangements made by the authority or otherwise;*
- (g) the provision of meals for that person whether in his home or elsewhere;* E
- (h) the provision for that person of, or assistance to that person in obtaining, a telephone and any special equipment necessary to enable him to use a telephone,*

*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)] [and to the provisions of section 7A of that Act (which requires local authorities to exercise their social services functions in accordance with directions given by the Secretary of State)], it shall be the duty of that authority to make those arrangements in exercise of their functions under the said section 29.* F G

By section 21(1) of the National Health Service Act 1977 it is provided that:

*Subject to paragraphs (d) and (e) of section 3(1) above, the services described in Schedule 8 to this Act in relation to –* H

- (a) . . .*
- (b) . . .*
- (c) home help and laundry facilities, are functions exercisable by local social services authorities, and that Schedule has effect accordingly.* I

Paragraph 3(1) of Schedule 8 to that Act further provides:

*It is the duty of every local social services authority to provide on such a scale as is adequate for the needs of their area, or to arrange for the provision on such a scale as is so adequate, of home help for households where such help is required owing to the presence of –* J

- (a) a person who is aged, handicapped as a result of having suffered from illness or by congenital deformity, or*
- (b) . . .*

*And every such authority has power to provide or arrange for the provision of laundry facilities for households for which home help is being, or can be, provided under this sub-paragraph.* K

- A Next I read section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986.

*When requested to do so by –*

- (a) *a disabled person,*  
B (b) *his authorised representative, or*  
(c) *any person who provides care for him in the circumstances mentioned in section 8,*  
*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 By section 16 of that Act ‘disabled person’ is stated to mean:

(i) *in the case of a person aged eighteen or over, a person to whom section 29 of the 1948 Act applies.*

- D By section 46(3) of the National Health Service and Community Care Act 1990 ‘community care services’ are stated to mean:

*... 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;*  
E (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; and*  
(d) *section 117 of the Mental Health Act 1983; ...*

Finally I must look at section 47 of that Act.

- F (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*  
G (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*  
H (b) *shall inform him that they will be doing so and of his rights under that Act.*

- I By section 47(1), where it appears that anyone for whom the local authority may arrange community care may be in need of it, the authority are under a duty to carry out an assessment of that person’s needs for those services. If during that assessment it appears that a person is a disabled person (and there is no dispute that all the applicants fall into that category), sub-section (2) is triggered. The local  
J authority must then make a decision as to the services he requires and also inform him that they will be doing so and of his rights under the 1986 Act. Whereas under section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986 a local authority has to decide whether the needs of the disabled person call for the provision by the authority of any services ‘when requested to do so’ by the  
K disabled person, under section 47(2) of the 1990 Act the local authority has to make a decision as to the services required without a request from the disabled person.

From section 4 of the 1986 Act one is taken back to section 2 of the Chronically Sick and Disabled Persons Act 1970. Under that section the local authority has to be satisfied 'that it is necessary in order to meet the needs of that person for that authority to make arrangements'. If the local authority is satisfied both as to the needs and that to meet them it is necessary for the local authority to make the arrangements for them, then 'it shall be the duty of that authority to make those arrangements'.

Mr Gordon QC has appeared for all the applicants. His position is a simple one. He says that individual need is the only criterion. Sufficiency of resources in the provider or the number of disabled persons in the area who are also in need are irrelevant. His argument was illuminated by homely examples. First there were the six tired advocates who had only five chairs. There was clearly a need of a sixth chair and that need existed none the less because there was no money available to buy it. Again, there was the chairless museum attendant. He either needs a chair or he does not. The cost of the chair to the administrator of the museum does not come into it. Moreover, once it has been determined that the attendant does need a chair, his need does not become less because the museum has decided to employ more attendants who will also need chairs.

The word used in the relevant sections, says Mr Gordon, is 'need', and once that is assessed arrangements have to be made to meet it. It is not qualified by any expression such as 'to the best of their ability' or 'provided it is reasonably practicable for the local authority to meet the need'. The duty, in his submission, is an absolute and specific one aimed at the satisfaction of individual need and not a target duty, as explained by Woolf LJ as he then was in *R v Inner London Education Authority ex p Ali* (1990) 2 Admin LR 822.

What then if the County Council simply do not have the resources to meet all the 'needs' in their area, not only those of the five applicants but, according to Mr Eccles QC appearing for the County Council, perhaps as many as 1,500 persons in a similar position? In answer to that, Mr Gordon reminded us that he no longer presses his claim for **mandamus**. He asks only for declaratory relief, which he says would signal the illegality on the part of the Council.

For the Council, Mr Eccles says that its Social Services Department has a strong professional commitment. The problem has arisen from an unexpected decision of the Government in December 1993 which had the immediate effect of withdrawing £3m of the grant upon which the Council's plans had been based, a change whose consequences the Government has not been prepared to assist the Council to cope with. In the result the Council had insufficient funds to keep up their commitments to the applicants and others like them and decided to give greater priority to the more seriously disabled.

It is not for us to decide whether Gloucestershire's explanation of why they acted as they did is accurate or acceptable. The question is whether they have acted unlawfully. Mr Eccles says they have not, because at each stage at which they have made a decision in these matters, resources have been, and properly have been within the statutes, the dominant factor. Any duty cast upon them was no more than a target duty. If resources diminish, as they have done in Gloucestershire's case, then the services have to be withdrawn or reduced.

Mr Eccles further submitted that if he is wrong in his primary argument on interpretation, he would further argue (boldly, as he admitted) that in every statute which appears to place an absolute duty there should be a term implied that, unless the contrary is stated, a local authority is obliged to comply with a statutory duty only if it has the revenue to do so.

Mr Eccles accepted that the Council had not done a reassessment of the

A applicants' needs in the light of the cut in the Council's resources. The reason was that the decisions made were not related to the applicants' individual situations. There was no need to do more than send out a standard form of letter telling them of the removal or reduction of the benefits; and indeed nothing that the applicants could have said would have made any difference.

B Finally Mr Eccles submitted that even if there has been any breach by the Council it has come about as a result of circumstances over which they have no control and they have done all they could honestly and honourably do to meet their obligations. Hence, he contended, the Court should not grant even declaratory relief, since such a declaration would be considered by the Council a serious matter to which they must respond.

C The case advanced by Mr Fleming QC for the Secretary of State for Health differed materially from that of both Mr Gordon and Mr Eccles. Mr Fleming submitted that when assessing need the local authority must take into account all relevant factors, one of them being resources. Then, when considering whether it is 'necessary in order to meet the needs of that person for that authority to make arrangements', the local authority will have to take into account whether other persons or organisations could more appropriately meet the needs identified, but it will also have to take into account the resources available to the authority. If, however, the authority have satisfied themselves that it is necessary for them to make the arrangements for any of the matters listed in section 2(1) of the 1970 Act, it is not permissible for them to decline or cease to make those arrangements because of shortage of funds. There is no reason, however, why a local authority should not from time to time re-assess the needs of an individual, taking account of the current needs of the individual and all other relevant factors, including resources. In fact, he submitted, it is good practice so to do, recommended to local authorities in a Practitioners' Guide to 'Care Management and Assessment' issued by the Department of Health.

F Mr Fleming drew the Court's attention to the words at the end of section 2(1): 'subject to the provisions of section 7(1) of the Local Authority Social Services Act 1970 . . . it shall be the duty of that authority to make those arrangements in exercise of their functions under the said section 29'. He told the Court that the only guidance issued by the Secretary of State under section 7 of the 1970 Act is entitled 'Community Care In The Next Decade And Beyond', dated November 1990. The following passages from Chapter 3 were referred to by Mr Fleming.

H *3.15 Although assessment is a service in its own right it can be distinguished from the services that are arranged as a consequence. The needs-led approach pre-supposes a progressive separation of assessment from service provision. Assessment does not take place in a vacuum: account needs to be taken of the local authority's criteria for determining when services should be provided, the types of service they have decided to make available and the overall range of services provided by other agencies, including health authorities.*

J *3.25 The aim should be to secure the most cost-effective package of services that meets the user's care needs taking account of the user's and carers' own preferences. Where supporting the user in a home of their own would provide a better quality of life, this is to be preferred to admission to residential or nursing home care. However, local authorities also have a responsibility to meet needs within the resources available and this will sometimes involve difficult decisions where it will be necessary to strike a balance between meeting the needs identified within available resources and meeting the care preferences of the individual. Where agreement between all the parties is not possible, the points of*



*difference should be recorded. Failure to satisfy particular needs can result in even greater burdens on particular services, for example where a person becomes homeless as a result of leaving inappropriate accommodation which has been provided following discharge from hospital.*

*3.30 In accordance with Section 47(2) of the Act, if, at any time during their assessment, an individual is found to be a person to whom Section 29 of the National Assistance Act 1948 applies, the authority must so inform them, advise them of their rights and make a decision as to their need for services, as required by Section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986. Once an individual's need for welfare services, specified in Section 2 of the Chronically Sick and Disabled Persons Act 1970, has been established, the authority must make necessary arrangements to meet it.*

*3.51 Care needs, for which services are being provided, should be reviewed at regular intervals. This review, especially where it relates to complex needs, should wherever possible, be undertaken by someone, such as a care manager, not involved in direct service provision, to preserve the needs-led approach. The projected timing of the first review should be stated in the original care plan. However, reviews may take place earlier if it is clear that community care needs have changed. Reviews may also be needed of services already being provided before the introduction of the new arrangements.*

*3.52 The purpose of the review is to establish whether the objectives, set in the original care plan, are being or have been met and to increase, revise or withdraw services accordingly. Reviews should also take account of any changes in needs or service delivery policies. The other purposes of reviews are to monitor the quality of services provided and, in particular, to note the views of service users and carers and any changes in their wishes or preferences. These views should be fed back into service planning together with any identified shortfalls in provisions.*

*3.53 The type of review will vary according to need but all those involved in the original care planning should be consulted. Large scale review meetings should rarely be necessary. All relevant agencies, service users and carers should be notified of the results of the review, subject to the same constraints of confidentiality as the care plan.*

Interesting though those passages are, it must be borne in mind that under section 2(1) of the 1970 Act it is only at the stage in the sub-section where the duty is placed upon the authority to make the arrangements that that duty is stated to be subject to the guidance given by the Secretary of State. Neither the guidance nor Mr Fleming say that once that stage is reached shortage of resources can be taken into account.

At first sight there appears much force in Mr Gordon's basic contention. A person's need is none the less a need because there is a shortage of resources to meet it and competing needs of other persons; and once a need has been established it cannot be reduced or eliminated by virtue of a reduction in the resources available to meet it. On further reflection, however, I have been driven to the view that such an interpretation would be impractical and unrealistic and hence one to be avoided if at all possible. In assessing need, those doing so will inevitably compare the extent of the disabilities of the persons concerned in order to arrive at a view as to who needs help more. That comparative exercise is obviously related to resources. Indeed, it seems to me that a local authority face

A an impossible task unless they can have regard to the size of the cake so that in turn they know how fairest and best to cut it.

I am strengthened in that view by the following factors:

- (1) The broad nature of the factors under (a) to (h) seems to demonstrate the very broad spectrum covered by the word 'needs'.
- B (2) The expression 'necessary in order to meet the needs' again suggests to my mind that resources are a relevant factor.
- (3) The demand for resources and the resources themselves are bound to fluctuate. Hence inevitably resources will be a relevant factor.
- C (4) Under section 2(1) the local authority are to make the arrangements in exercise of their functions under section 29 of the 1948 Act. Those functions are to make welfare arrangements for persons who are substantially and permanently handicapped by among other things disabilities. This points, in my view, in the direction of having to take account of other needs of other disabled persons when looking at the needs of a particular disabled person.
- D

For these reasons I for my part have concluded that a local authority are right to take account of resources both when assessing needs and when deciding whether it is necessary to make arrangements to meet those needs. I should stress, however, that there will, in my judgment, be situations where a reasonable authority could only conclude that some arrangements were necessary to meet the needs of a particular disabled person and in which they could not reasonably conclude that a lack of resources provided an answer. Certain persons would be at severe physical risk if they were unable to have some practical assistance in their homes. In those situations, I cannot conceive that an authority would be held to have acted reasonably if they used shortage of resources as a reason for not being satisfied that some arrangement should be made to meet those persons' needs.

On any view section 2(1) is needs-led by reference to the particular needs of a particular disabled person. A balancing exercise must be carried out assessing the particular needs of that person in the context of the needs of others and the resources available, but if no reasonable authority could conclude other than that *some* practical help was necessary, that would have to be their decision.

Furthermore, once they have decided that it is necessary to make the arrangements, they are under an absolute duty to make them. It is a duty owed to a specific individual and not a target duty. No term is to be implied that the local authority are obliged to comply with the duty only if they have the revenue to do so. In fact, once under that duty, resources do not come into it.

It would certainly have been open to the Gloucestershire County Council to re-assess the individual applicants as individuals, judging their current needs and taking into account all relevant factors including the resources now available and the competing needs of other disabled persons. What they were not entitled to do, but what in my judgment they in fact did, was not to re-assess at all but simply to cut the services they were providing because their resources in turn had been cut. This amounted to treating the cut in resources as the sole factor to be taken into account, and that was, in my judgment, unlawful. Moreover, I see no reason to deny the applicants a declaration to that effect.

Before leaving the Gloucestershire case, however, I should make reference to a further point raised by Mr Eccles after he had 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.

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.

The submission is an unattractive one because it would follow that if the local authority were satisfied, by reason of the fact that general arrangements had not been made for home help under the 1977 Act, that arrangements should be made for home help, it 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 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 further point.

That leaves the application of Mr McMillan against the London Borough of Islington which raises a much shorter point. It turns on two letters written to the applicant by Mr Ronald Giddens, Neighbourhood Officer (Social Services) with the Borough. The first is dated 3 October 1991 and reads:

*Following our meeting on 10th September 1991 and subsequent telephone conversation on 1st October 1991, it is important I clarify in writing the situation regarding the home care service we are providing you in order to avoid any further mis-understanding.*

*As I informed you on 10/9/91 it is not possible to guarantee providing cover when home carers are either sick or on leave. This will be the situation even when, as in your case, the home carer gives plenty of notice of being on leave. Whenever a home carer is absent decisions have to be made about which users of the service must be covered (ie those that are a priority) and those which can manage without. Users, like yourself, who have a homecarer for cleaning tasks only are not considered a priority and it is unlikely that such absences will be covered. Where it is possible to provide cover we will do so but we will not know until the day, which home carer may be available to cover or at what time they could call. As I'm sure you will appreciate, when a home carer telephones in sick there is very little notice and time in which to sort out cover for the priority users of the service. It is for this reason that cover cannot be sorted out in advance for covering non priority users as yourself. The only way we can ensure covering priority users at short notice is by not committing home carers to covering additional cleaning tasks.*

*I do appreciate that not knowing whether a home carer is coming or not is inconvenient particularly if you have plans to go out although with the majority of our users who are housebound this is not such a problem. In order to avoid this problem however it will be clearer to agree that we will not provide you with cover when your home carer is absent. This will mean you are not then inconvenienced in this way.*

*I hope the contents of this letter are clear and there will be no further mis-understanding on what happens when your home carer is absent.*

- A The second letter is dated 9 April 1992, and in this instance I need read only the first two paragraphs.

*Following the visits by myself and Joan Hutchinson to your home on 30/3/92 and 3/4/92, I am writing to confirm the details of the home care service we are able to offer you.*

- B *Starting on 13/4/92 your home carer will visit you for one hour on a Monday to do your laundry and any heavy ironing and on a Tuesday will visit you to undertake cleaning tasks within your home. As discussed, your home carer is able to undertake a range of cleaning duties including the occasional cleaning of high level shelves, curtains and similar items. You will need to discuss with your home carer the specific items which need to be cleaned on the day. The situation regarding cover for when your Home Carer is sick or on leave remains the same as outlined in my letter of 3-10-91. That is, we cannot guarantee providing such cover, but you will be informed by either your home carer, or by staff from this office when your home carer is going to be on leave or is unavailable for any other reason.*
- C
- D

- E As had been forecast in those letters, Mr McMillan did not get a continuous service. There were interruptions by illness or days off on the part of his carers. Mr Gordon's point is a simple one. He says that having determined what the applicant's needs were, the Borough were required to meet those needs continuously and acted illegally in not drafting in replacement staff to deal with the situation when his regular carer was for any reason unavailable. He seeks a declaration to that effect.

- F The Borough on the other hand say that the two letters made it clear to him that they were not undertaking to provide him with a continuous service. He was clearly informed that there would have to be time off for staff and that, when that happened, his case was not so bad that the local authority thought it necessary for him to have a temporary replacement.

In deciding this question the following factors to my mind prevail.

- G (1) The Borough did a proper balancing exercise under the section, taking into account resources and the comparative needs of the disabled in their area.
- (2) They gave the applicant clear notice that there would be interruptions to the service.
- (3) They have provided exactly what they undertook.
- H (4) They have at no time withdrawn service.
- (5) The service provided is what the Borough were satisfied he needed.
- (6) The condition of some disabled persons would be so bad that even missing a day's service would be intolerable. They clearly have to have a 100% guaranteed service. That was not true of the applicant.
- I (7) Although the missing of a day's meals would not be acceptable, the missing of a day's cleaning would be.

- J Taking all those factors into account I am not persuaded that a breach of the duty owed by the local authority to this applicant has been made out. In any event, I would not consider it an appropriate case in which to grant relief.

**MR JUSTICE WALLER:** I agree.