R v Gloucestershire CC and Secretary of State for Health ex p Barry

House of Lords
Lord Lloyd of Berwick, Lord Nicholls of Birkenhead, Lord Steyn, Lord Hoffman and Lord Clyde
20 March 1997

In assessing whether services under Chronically Sick and Disabled Persons Act 1970 s2 are 'necessary to meet the needs of' a disabled person local authorities are entitled, indeed obliged, to have regard to the resources available to them.

Facts

Mr Barry was a disabled 79-year-old man whom the respondent had assessed as needing home care assistance including cleaning and laundry services. The respondent then withdrew these services owing to a shortage of financial resources.

Held (Lord Nicholls of Birkenhead, Lord Clyde and Lord Hoffman)**:**

1 The words 'needs' and 'necessary' are both relative expressions. Distinctions between what is 'necessary' and what is 'desirable' depend in part on the extent to which resources are available. A need for services can not be assessed sensibly without having some regard to the cost of providing the services.

2 In assessing need local authorities are entitled and obliged to have regard to current standards of living, the nature and extent of the disability, the extent and manner to which quality of life would be improved by the provision of this or that assistance or service and the cost of providing this or that service at this or that level in the context of the resources available to the local authority. The relative cost of services is to be weighed against the relative benefit and the relative need for that benefit.

Held (Lord Lloyd of Berwick and Lord Steyn)**:**

1 Need is the lack of what is essential for the ordinary business of living. Decisions as to what disabled persons need are readily made by social workers applying the standards of our civilised society, as set by social services committees under Local Authority Social Services Act 1970 s2.

2 In assessing need a local authority is to take into account all circumstances relevant to the individual but not circumstances extraneous to the individual, eg, the local authority's resources.

Cases referred to in judgment:

R v Hammersmith and Fulham LBC ex p M (1997) *Times*, 19 February; *sub nom R v Westminster CC and Others ex p M, P, A and X* (1997) 1 CCLR 85, CA.

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 ss2 and 7.

This case also reported at:

[1997] 2 All ER 1; [1997] 2 WLR 459, HL.

Representation

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

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

Richard Gordon QC, Alan Maclean and Stephen Cragg (instructed by the Public Law Project) appeared on behalf of the applicant.

Judgment

LORD LLOYD OF BERWICK: Under section 29 of the National Assistance Act 1948 as originally enacted local authorities had the *power* to make arrangements for promoting the welfare of disabled persons. Under section 1 of the Chronically Sick and Disabled Persons Act 1970 local authorities were, for the first time, placed under a *duty* to inform themselves of the need for making arrangements for disabled persons within their area. Section 2 of the Act of 1970, on which the present appeal turns, provides that where a local authority are satisfied in the case of a disabled person within their area that it is necessary to make arrangements in order to meet the needs of that person, then the local authority are under a further *duty* to make those arrangements. It was common ground that the duty imposed on the local authority under section 2 of the Act of 1970 is a duty owed to the disabled person individually. In that respect section 2 is almost unique in the field of community care, the only other example of such a duty (so it was said) being section 117 of the Mental Health Act 1983.

Mr Michael Barry lives in Gloucestershire. He was born in 1915, so he is coming up for his 82nd birthday. In the summer of 1992 he spent a short spell in Gloucestershire Royal Hospital suffering from dizzy spells and nausea. He was told that he had suffered a slight stroke. He has also had several heart attacks, and cannot see well. After discharge from hospital, he returned home, where he lives alone. He gets around by using a zimmer frame, as a result of having fractured his hip several years ago. He has no contact with any of his family. But two friends call from time to time to do things for him. On 8 September 1992 he was referred to the Social Services Department of Gloucestershire County Council ('the Council'). On 15 September his needs were assessed as follows:

> *Home care to call twice a week for shopping, pension, laundry, cleaning. Meals-on-wheels four days a week.*

The Council arranged to provide these services. Nearly a year later, on 3 August 1993 Mr Barry received a routine visit from the Social Services Department. His needs were assessed as being the same.

Then on 29 September 1994 Mr Barry received a letter from the Council regretting that they would no longer be able to provide Mr Barry with his full needs as assessed. Cleaning and laundry services would be withdrawn. The reason given was that the money allocated to the Council by central Government had been reduced by £2.5 million and there was 'nowhere near enough to meet demand.' It is only fair to add that the letter was sympathetic in tone.

Mr Barry, and other residents, commenced proceedings for judicial review. His case is that his needs are the same as they always were. Parliament has imposed a duty on the Council to do what is necessary to meet those needs, and it is no answer that they are short of money, as no doubt they are. The Council's case is that in assessing Mr Barry's *needs* they are entitled to have regard to their overall financial resources.

The case came before the Divisional Court on 6 June 1994. In the meantime the Council had, very properly, continued to provide Mr Barry with the same services as before, pending the outcome of the proceedings. Mr Gordon QC, who appeared for Mr Barry, did not press his claim for an order of mandamus to compel the Council to perform their statutory duty. But he was granted a declaration in the following terms:

> *That the respondent has acted unlawfully in that it has, on the sole basis of having exhausted available resources, withdrawn services previously provided or offered to the applicant pursuant to section 2 of the Chronically Sick and Disabled Persons Act 1970, without a lawful reassessment of the applicant.*

On the broader question of whether the Council are entitled to take resources into account in assessing an individual's needs, McCowan LJ said that a local authority would face an impossible task unless they could have regard to the size of the cake before deciding how to cut it.

> *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.*

The test proposed by the Divisional Court was as follows:

> *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.*

This seems to reduce the minimum obligation under section 2 of the Act of 1970 to the level of *Wednesbury* unreasonableness.

Following the decision of the Divisional Court on the narrow question, the Council reassessed some 1,500 people in receipt of services under section 2 of the Act of 1970. As a result of the reassessment the number was reduced to 1,060. But meanwhile Mr Barry had launched an appeal on the broader question. On 27 June 1996 the Court of Appeal ([1996] 4 All ER 421; (1997) 1 CCLR 19) allowed his appeal by a majority, with Hirst LJ dissenting. The Court of Appeal granted declarations as follows:

> *(1) By withdrawing the said services without the Council being satisfied that the applicant's previously assessed needs had diminished, the respondent is in breach of their continuing duty under section 2 of the Chronically Sick and Disabled Persons Act 1970;*
>
> *(2) That in assessing or re-assessing whether it is necessary to make arrangements to meet them, a local authority are not entitled to take account of the resources available to such local authority.*

The first of these declarations is no longer of practical effect, since the reassessment has been carried out, and the services reduced as a consequence. But if the second of the declarations is correct, the Council would be obliged to revert to their former practice, and if necessary carry out a further reassessment *without* taking their resources into account. The Council now appeals to the House. The Secretary of State for Health is joined in the appeal. It is as well that he should be for it is the failure of central Government to supply the funds necessary to enable the Council to carry out what I regard as their statutory duty which, departing from the fine words contained in the Government White Paper *'Caring for People: Community Care in the Next Decade and Beyond'* (1989) (Cm 849), has put the

Council into what the Divisional Court called an impossible position; truly impossible, because even if the Council wished to raise the money themselves to meet the need by increasing council tax, they would be unable to do so by reason of the government-imposed rate capping.

The construction of section 2 of the Act of 1970 does not seem to me to present any real problems. I set out the relevant part of the section verbatim:

> ***Provision of welfare services***
>
> *(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) . . . (h) . . .*
>
> *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.*

The section contemplates three separate stages. The Council must first assess the individual needs of each person to whom section 29 of the Act of 1948 applies. Having identified those needs, the Council must then decide whether it is necessary to make arrangements to meet those needs. There might be any number of reasons why, in the circumstances of a particular case, it might not be necessary for the local authority to make arrangements, for example, if the person's needs were being adequately met by a friend or relation. Or he might be wealthy enough to meet his needs out of his own pocket. But if there is no other way of meeting the individual's needs, as assessed, and the Council are therefore satisfied that it is necessary for them to make arrangements to meet those needs, then the Council are under a duty to make those arrangements. It is essential to a proper understanding of section 2 of the Act of 1970 to keep the three stages separate. Confusion arises if the stages are telescoped.

There is not much dispute about the second and third stages. Mr Pleming on behalf of the Secretary of State conceded that at the third stage the duty is absolute. In other words, the Council cannot escape their duty to make arrangements to meet the need by saying that they do not have the money. Mr Gordon, for his part, accepts that the Council must obviously be allowed a good deal of flexibility as to the arrangements which they make, provided always that the need is met. So the second and third stages do not require elaboration. It is over the first stage that the battle was joined.

It was as I have said common ground that the duty under section 2 is owed to the disabled person individually. It is not surprising, therefore, that the starting-point of the whole exercise is the assessment of his individual needs. The assessment is, to adopt the departmental jargon, 'needs-led.' The word 'need' like most English words has different shades of meaning. You can say to an overworked QC at the end of a busy term 'You look as though you need a holiday.' The word 'need' in section 2 is not used in that sense; which is not to say that there may not be disabled people living in very restricted circumstances who may not *need* a holiday in the sense which Parliament intended. To need is not the same

as to want. 'Need' is the lack of what is essential for the ordinary business of living.

Who then is to decide what it is that the disabled person needs, and by what yardstick does he make his decision? I do not find the answer difficult. In the simplest case it is the individual social worker who decides. In more complicated cases there may have to be what is called a comprehensive assessment. But in every case, simple or complex, the need of the individual will be assessed against the standards of civilised society as we know them in the United Kingdom, or, in the more homely phraseology of the law, by the standards of the man on the Clapham omnibus. Those standards may vary over time. What was acceptable in Victorian England might not be acceptable today. Expectations have risen. But this does not pose any difficulty. The assessment of the needs of the disabled individual against contempoary standards is left to the professional judgment of the social worker concerned, just as the need for a by-pass operation is left to the professional judgment of the heart specialist.

Who then decides what are the contemporary standards against which the social worker assesses the individual's needs? Again the answer seems straightforward. The standard is that set by the social services committee of the local authority in question. No doubt this was one of the reasons why social services committees were set up in the first place by section 2 of the Local Authority Social Services Act 1970, so as to represent the views of ordinary members of the public. Standards may vary from one local authority to another. But since the United Kingdom is relatively homogeneous, the standards may be expected to approximate to each other over time.

It is said that the standards of civilised society as interpreted by the social services committee of a particular local authority is too imprecise a concept to be of any practical value. I do not agree. But even if it were so, I do not see how it becomes less imprecise by bringing into consideration the availability of resources. Resources can, of course, operate to impose a cash limit on what is provided. But how can resources help to measure the need? This, as it seems to me, is the fallacy which lies at the heart of the Council's argument.

The point can be illustrated by a simple example. Suppose there are two people with identical disabilities, living in identical circumstances, but in different parts of the country. Local authority A provides for his needs by arranging for meals on wheels four days a week. Local authority B might also be expected to provide meals on wheels four days a week, or its equivalent. It cannot, however, have been Parliament's intention that local authority B should be able to say 'because we do not have enough resources, we are going to reduce your needs.' His needs remain exactly the same. They cannot be affected by the local authority's inability to meet those needs. Every child needs a new pair of shoes from time to time. The need is not the less because his parents cannot afford them.

There was much discussion in the course of the hearing of the appeal about 'eligibility criteria.' This is the departmental way of describing the standard against which an individual's needs are judged. Local authorities are encouraged to publish their own eligibility criteria. The Council have not fallen behind in this respect. There are elaborate tables included among our papers in which different degrees of disability are set against varying degrees of isolation from the community and other relevant factors. There are recommendations about the level of services which are appropriate for different combinations of disability and individual circumstances. Thus for a given degree of disability and a given degree of isolation (to take two of the relevant factors) the recommended home care might be for meals on wheels three times a week (or equivalent),

cleaning twice a week and laundry once a fortnight. What is interesting about all this for present purposes is that nowhere in the tables is there any reference to resources. Nor is there any reason why there should be. The eligibility criteria can work perfectly well without taking resources into account, as Mr Pleming was prepared to concede. With respect to those who take a different view, I can see no necessity on grounds of logic, and no advantage on grounds of practical convenience, in bringing resources into account as a relevant factor when assessing needs.

It is then open to a local authority to raise the threshold artificially if it does not have sufficient resources to meet the previously assessed need? This is just what Parliament did *not* intend when enacting section 2 of the Chronically Sick and Disabled Persons Act of 1970. If a local authority could arbitrarily reduce the assessed need by raising the eligibility criteria, the duty imposed by Parliament would, in Mr Gordon's graphic phrase, be collapsed into a power. The language of section 2 admits of no half-way house.

In the course of the argument it was suggested that 'needs' in section 2 might mean 'reasonable needs.' Mr Eccles, on behalf of the Council, did not accept this suggestion. But I have no difficulty in reading 'needs' as meaning reasonable needs, in the sense that the social worker, in the exercise of his or her judgment, must act reasonably. In any event, if the needs are not reasonable it would not be necessary to make arrangements to meet the needs under the second of the three stages of the exercise. What I cannot accept is that the reasonable needs of the individual require consideration of the local authority's ability to meet those needs.

Mr Pleming put the same point a different way. He argued that all the relevant circumstances have to be taken into account in assessing an individual's needs, and that among the relevant circumstances are the resources of the local authority. I agree that all the circumstances relating to the individual are to be taken into account. But the local authority's resources are external to the individual. There is nothing in the language of the section which permits, let alone suggests, that external resources are to be taken into account when assessing the individual's needs.

Then it is said that section 2 must be construed in the light of section 29 of the National Assistance Act 1948, to which it refers. I agree. But a consideration of section 29, and the other provisions of Part III of the Act of 1948, which have been analysed in the very recent decision of the Court of Appeal in *R v Hammersmith and Fulham London Borough Council, ex parte M* [see (1997) 1 CCLR 85; *Times*, 19 February] leads me in the exact opposite direction to that in which Mr Eccles would have me go.

Sections 21 to 28 of Part III as originally enacted cover the provision of accommodation. Under section 21 it was the *duty* of every local authority to provide residential accommodation for those in need of care and attention not otherwise available to them by reason of age, infirmity or any other circumstances. Sections 29 to 31 are concerned with welfare services. They conferred a *power* on local authorities to promote the welfare of the blind, deaf or dumb and other persons who are substantially and permanently handicapped by illness, injury, congenital deformities or other disabilities. By section 195(6) of and Schedule 23 to the Local Government Act 1972 section 21(1) of the Act of 1948 was amended. It now provides that the local authorities *may* provide residential accommodation and *shall* do so if directed by the Secretary of State. The Act of 1972 also made a similar amendment to section 29(1) of the Act of 1948. Thus there are now the same powers under both sections and the same duties if directed by the Secretary of

State. But in the meantime Parliament had passed the Act of 1970. Like section 29 of the Act of 1948 sections 1 and 2 of the Act of 1970 are concerned with welfare services. It seems plain enough that the legislative purpose behind sections 1 and 2 was to impose a duty towards the disabled where hitherto there had been no more than a power. That duty was *not* made dependent on directions having been given by the Secretary of State. So far, therefore, from the inference being that the availability of resources was to remain a proper consideration, the inference is the other way.

It was pointed out that the Act of 1970 started life as a Private Member's Bill. So indeed it did. But it received strong all-party support. In any event the fact that the Act of 1970 owed its origin to the initiative of a private Member – Mr Alf Morris – hardly throws light on its interpretation.

Simply looking at the language of section 2 of the Act of 1970, against the background of Part III of the Act of 1948, it is clear enough that Parliament did not intend that provision for the needs of the disabled should depend on the availability of resources. The intention was to treat disability as a special case. That is why the Act of 1970 has always been regarded as such an important landmark in the care of the disabled.

The point becomes all the clearer when one looks at the subsequent legislation, following on the Griffiths Report and the Government White Paper '*Caring for People*' published in November 1989 (Cm 849). The disabled might at that stage have been brought back into line with others in need of community care services. But that was not the course which Parliament took when enacting the National Health Service and Community Care Act 1990. Section 47 provides:

> ***Assessment of needs for community care services***
>
> *(1) Subject to subsections (5) and (6) below, where it appears to a local authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such services, the authority –*
>
> *(a) shall carry out an assessment of his needs for those services; and*
>
> *(b) having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of any such services.*
>
> *(2) If at any time during the assessment of the needs of any person under subsection (1)(a) above it appears to a local authority that he is a disabled person, the authority:*
>
> *(a) shall proceed to make such a decision as to the services he requires as is mentioned in section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986 without his requesting them to do so under that section; and*
>
> *(b) shall inform him that they will be doing so and of his rights under that Act.*

It was common ground, as is indeed obvious from the language of section 47(1)(*b*), that a local authority have a discretion whether to meet a person's needs under section 47(1). In exercising that discretion the local authority are entitled to take their available resources into account. But in sharp distinction, section 47(2) gives the local authority no such discretion. Once it appears that the person in question is disabled, the local authority are bound to decide whether his needs call for the provision of services under section 2 of the Act of 1970. By preserving and reinforcing the beneficial provisions of the Act of 1970, Parliament has underlined its intention to treat the needs of the disabled as a special case in the consideration of which resources play no part. Otherwise, why was it thought necessary to make separate provision for the disabled under section 47(2)?

There is another point. Section 47(1) contemplates a two-stage process. There

is to be an assessment of needs followed by a decision whether to meet those needs. Since resources come in at the second stage, it is difficult to see why resources should also come in when assessing needs at the first stage. But if resources do not come in when assessing needs under section 47(1), how can it be argued that they come in when assessing the needs of the disabled under section 47(2)?

I return to section 2 to consider a further argument to which Hirst LJ in his dissenting judgment attached importance. It is necessary to refer in this connection to the list of services set out in section 2(1) which are as follows:

> *2(1) . . .*
> *(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;*
> *(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;*
> *(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;*
> *(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;*
> *(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 . . .*

It is argued that the very width of these services indicates that resources must be a relevant consideration. Hirst LJ ([1996] 4 All ER 421, 433; (1997) 1 CCLR 19 at p29J–30A) put the point as follows:

> *Nor do I consider that the safety-net concept fits several of the individual items in the service list, in particular items (*b*) to (*f*) [inclusive], which hardly rate as basic requirements, and whose selection would seem to involve choices in which cost would be an inevitable consideration. Despite Mr Gordon's plea to the contrary, I do not think it proper to ignore the service list when construing the opening words of the section . . .*

I agree with Hirst LJ that it would not be right to exclude the service list from consideration when construing the opening words of the section. But I do not myself find that they throw much light on the meaning of 'need' or on the question whether resources are to be taken into account in assessing an individual's needs. Disabled persons may not need recreational facilities, or a holiday, as often as they will need practical assistance in the home, or the provision of meals. But this does not lead to the conclusion that the assessment of need is dependent on sufficient resources being available. It is not what the section says.

Like my Lords, I do not find it necessary to refer to the non-statutory guidance

A issued by the Department. It is conveniently set out in Hirst LJ's judgment, at pp427–430 [(1997) 1 CCLR 19, at pp24–27]. I note only that the guidance relates to the provision of community services generally, where resources are admittedly relevant. Where there is specific reference to section 2 of the Act of 1970, the guidance is, from the Council's point of view, at best ambivalent as to whether B resources are to be taken into account or not.

For the above reasons I find myself in full agreement with the judgment of Swinton Thomas LJ. I also agree with the judgment of Sir John Balcombe. His reasoning is criticised in the Council's printed case, because of his acceptance that need is a relative concept, which may vary according to outside C circumstances. It would follow that on this view (so it is argued) *all* outside circumstances should be taken into account, including the local authority's available resources. But when Sir John Balcombe refers, at p441 [(1997) 1 CCLR 19, at p37H], to 'outside circumstances' and to need being 'a relative concept,' it is plain from the very next sentence what he had in mind:

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> *. . . thus the needs of a disabled person may be assessed differently now than they would have been in years gone by, because standards rise and expectations change.*

I agree. But it does not follow that needs *today* should be assessed differently in E different parts of the United Kingdom; and still less does it follow that needs may be assessed differently on the ground that some local authorities (including Gloucestershire) have suffered more than others as a result of central Government's abrupt decision to distribute a special transitional grant for 1994–95 on the basis of standard spending assessments alone, instead of partly on that basis F and partly on the basis of historic spending on income support.

The error in the Council's criticism of Sir John Balcombe's judgment can be illustrated by a single quotation from paragraph 24 of their case:

> *If increased national wealth is relevant in raising standards and expectations, so too should pressure on local resources be admissible in determining whether it is* G *necessary to meet expectations.*

The *non sequitur* is evident. Parliament cannot have intended that the standards and expectations for measuring the needs of the disabled in Bermondsey should differ from those in Belgrave Square.

H This brings me, last of all, to the wretched position in which the Council now find themselves, through no fault of their own. I have read the affidavits of Mr Deryk Mead, the Director of Social Services, and Mr Honey, Chief Executive, with something approaching despair. Equally depressing is the evidence of Margaret Newland, Chair of Age Concern, Gloucestershire, and the numerous letters writ- I ten by the Council to the Secretary of State. Most depressing of all are the minutes of the Community Care Sub-Committee of the Social Services Committee, especially the meeting held on 14 October 1994, in which members expressed their abhorrence at the choices which the Social Services Department was being required to make. The Chairman commented:

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> *It was deplorable that there was no other way forward apart from the exclusion of certain people from access to community care through the device of rationing services.*

By your Lordships' decision today the Council have escaped from the impos- K sible position in which they, and other local authorities have been placed. Nevertheless, I cannot help wondering whether they will not be regretting today's

decision as much as Mr Barry. The solution lies with the government. The passing of the Chronically Sick and Disabled Persons Act 1970 was a noble aspiration. Having willed the end, Parliament must be asked to provide the means.

I would dismiss the appeal.

LORD NICHOLLS OF BIRKENHEAD: This appeal raises an important point of interpretation of section 2(1) of the Chronically Sick and Disabled Persons Act 1970. Can a local authority properly take into account its own financial resources when assessing the needs of a disabled person under section 2(1)? The appellants, the Gloucestershire County Council and the Secretary of State for Health say yes, the respondent Mr Barry says no. The question has given rise to a considerable difference of judicial opinion, so I shall give my conclusion in my own words.

At first sight the contentions advanced on behalf of Mr Barry are compelling. A person's needs, it was submitted, depend upon the nature and extent of his disability. They cannot be affected by, or depend upon, the local authority's ability to meet them. They cannot vary according to whether the authority has more or less money currently available. Take the case of an authority which assesses a person's needs as twice weekly help at home with laundry and cleaning. In the following year nothing changes except that the authority has less money available. If the authority's financial resources can be properly taken into account, it would be open to the authority to reassess that person's needs in the later year as nil. That cannot be right: the person's needs have not changed.

This is an alluring argument but I am unable to accept it. It is flawed by a failure to recognise that needs for services cannot 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 cannot be decided in a vacuum from which all considerations of cost have been expelled.

I turn to the statute. Under section 2(1) 'needs' are to be assessed in the context of, and by reference to, the provision of certain types of assistance for promoting the welfare of disabled persons: home help, meals on wheels, holidays, home adaptation, and so forth. In deciding whether the disability of a particular person dictates a need for assistance and, if so, at what level, a social worker or anyone else must use some criteria. This is inevitably so. He will judge the needs for assistance against some standard, some criteria, whether spoken or unspoken. One important factor he will take into account will be what constitutes an acceptable standard of living today.

Standards of living, however, vary widely. So do different people's ideas on the requirements of an acceptable standard of living. Thus something more concrete, capable of being applied uniformly, is called for when assessing the needs of a given disabled person under the statute. Some more precisely defined standard is required, a more readily identifiable yardstick, than individual notions of current standards of living.

Who is to set the standard? To this there can be only one answer: the relevant local authority, acting by its social services committee. The local authority sets the standards to be applied within its area. In setting the standards, or 'eligibility criteria' as they have been called, the local authority must take into account current standards of living, with all the latitude inherent in this concept. The authority must also take into account the nature and extent of the disability. The authority will further take into account the manner in which, and the extent to which, quality of life would be improved by the provision of this or that service or assistance, at this or that level: for example, by home care, once a week or more frequently. The authority should also have regard to the cost of providing this or

A that service, at this or that level. The cost of daily home care, or of installing a ground floor lavatory for a disabled person in his home and widening the doors to take a wheelchair, may be substantial. The relative cost will be balanced against the relative benefit and the relative need for that benefit.

Thus far the position is straightforward. The next step is the crucial step. In the B same way as the importance to be attached to cost varies according to the benefit to be derived from the suggested expenditure, so also must the importance of cost vary according to the means of the person called upon to pay. An amount of money may be a large sum to one person, or to one person at a particular time, but of less consequence to another person, or to the same person at a different C time. Once it is accepted, as surely must be right, that cost is a relevant factor in assessing a person's needs for the services listed in section 2(1), then in deciding how much weight is to be attached to cost some evaluation or assumption has to be made about the impact which the cost will have upon the authority. Cost is of more or less significance depending upon whether the authority currently has D more or less money. Thus, depending upon the authority's financial position, so the eligibility criteria, setting out the degree of disability which must exist before help will be provided with laundry or cleaning or whatever, may properly be more or less stringent.

I have considered whether, instead of taking into account the actual resources E of the paying authority, the significance of cost could be evaluated by some more general criterion, for instance, that there should be attached to cost the weight which would be attributed to the amount in question by any reasonable authority. This could not work. This would be meaningless as a yardstick. What are the resources to be attributed to the hypothetical reasonable authority at any particu- F lar time?

In the course of the argument some emphasis was placed upon a submission that if a local authority may properly take its resources into account in the way I have described, the section 2(1) duty would in effect be limited to making arrangements to the extent only that the authority should decide to allocate G money for this purpose. The duty, it was said, would collapse into a power. I do not agree. A local authority must carry out its functions under section 2(1) in a responsible fashion. In the event of a local authority acting with *Wednesbury* unreasonableness, a disabled person would have a remedy.

This interpretation does not emasculate section 2(1). The section was intended H to confer rights upon disabled persons. It does so by giving them a valuable personal right to see that the authority acts reasonably in assessing their needs for certain types of assistance, and a right to have their assessed needs met so far as it is necessary for the authority (as distinct from others) to do so. I can see no basis for reading into the section an implication that in assessing the needs of disabled I persons for the prescribed services, cost is to be ignored. I do not believe Parliament intended that to be the position.

For these reasons, which are substantially to the same effect as those of my noble and learned friend Lord Clyde, I would allow this appeal and declare that when assessing needs under section 2(1) a local authority may take its resources J into account.

LORD STEYN: I have had the advantage of reading in draft the speech of my noble and learned friend Lord Lloyd of Berwick. For the reasons he has given I too would dismiss the appeal.

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LORD HOFFMAN: I have had the advantage of reading in draft the speeches of

my noble and learned friends Lord Nicholls of Birkenhead and Lord Clyde. For the reasons which they give I would allow this appeal.

LORD CLYDE: Following on the passing of the National Health Service and Community Care Act 1990 an increased financial responsibility was imposed on local authorities. The sick and disabled who had been previously cared for in residential and nursing homes, supported where necessary through the Benefits system, were now to be cared for in their own homes by the local authority. To assist in meeting the new financial burden central government provided funds in the form of a Special Transitional Grant which could only be used for community care. For the year 1994–95 an alteration was made in the basis of allocation of the grant among local authorities. As a result of that the grant in Gloucestershire was less than it would have been under the previous basis of allocation and the Gloucestershire County Council found itself faced with severe restrictions on the resources available to it for meeting its responsibility for community care services.

In anticipation of the introduction of the Community Care System the Council had instructed research into the likely level of assessed need. Criteria were then set for meeting the needs which had been assessed. In light of the reduction in the resources available to it the Council felt that it had no alternative but to tighten the criteria for the provision of welfare services. It also decided that it should apply the new criteria to existing as well as to new cases.

Michael Barry was discharged from Gloucestershire Royal Hospital in September 1992 and returned to live on his own in a local authority flat. He is elderly and disabled. He was provided with help for cleaning, laundry, shopping and community meals. These services were provided to him pursuant to section 2(1) of the Chronically Sick and Disabled Persons Act 1970. On 29 September 1994 the County Council wrote to him explaining that the money allocated by the Government was inadequate to meet demand and that services had to be reduced. It stated that 'Until further notice we will no longer be able to provide you with cleaning and laundry.' Mr Barry then sought judicial review of the decision to withdraw the services which he had been receiving. In the Divisional Court he won a declaration that the Council had acted unlawfully in that it had, on the sole basis of having exhausted available resources, withdrawn services without having made a reassessment of his needs. The Court however also held that the local authority could take its resources into account both when assessing need and when deciding what services to provide. Mr Barry then appealed successfully to the Court of Appeal where, on that latter point, it was held by a majority of the Court that a local authority was not entitled to take account of the resources available to it in assessing or reassessing whether it is necessary to make arrangements to meet the applicant's needs under section 2(1) of the Act. It is that issue which the County Council and the Secretary of State have appealed to this House.

In the course of the very able arguments which were presented before us we were taken through the history of the relevant legislation to the present day. But while it is appropriate to make some reference to later legislation the question raised in the appeal is properly one of the construction of section 2(1) of the Chronically Sick and Disabled Persons Act 1970 and it is appropriate to turn to the provisions of that section in the first instance.

Section 2(1) of that Act as originally enacted is in the following terms:

2(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) 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;

(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 aforesaid which are similar to services which could be provided under such arrangements;

(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;

(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;

(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, notwithstanding anything in any scheme made by the authority under the said section 29, but subject to the provisions of section 35(2) of that Act (which requires local authorities to exercise their functions under Part III of that Act under the general guidance of the Secretary of State and in accordance with the provisions of any regulations made for that purpose), it shall be the duty of that authority to make those arrangements in exercise of their functions under the said section 29.

It is immediately clear that the context in which the section has been placed is that of section 29 of the National Assistance Act 1948. Reference is made to that section in order to define the local authority as one having functions under section 29 and the persons affected by section 2(1) as persons to whom section 29 applies. Reference is also made to arrangements and to any scheme made under section 29. Moreover at the end of the section the duty imposed on the local authority by section 2(1) is expressly stated to be a duty in exercise of their functions under the said section 29. So it is appropriate also to look at that section. As originally enacted section 29(1) provided:

29(1) A local authority shall have power to make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons who are blind, deaf or dumb, and other persons who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other disabilities as may be prescribed by the Minister.

The class of beneficiaries under section 29(1) was widened by the Mental Health (Scotland) Act 1960 (sections 113(1) and 114, and Schedule 4) and further amendments were made by the Local Government Act 1972 and the Children Act

1989. The reference in section 2(1) of the Chronically Sick and Disabled Persons Act 1970 to a scheme made by the authority under section 29 was a reference to section 29(3) which required that arrangements made under the section should be carried into effect in accordance with a scheme made thereunder. Subsection (2) of section 29 provided that the authority should, 'to such extent as the Minister may direct, be under a duty to exercise their powers under this section.' Both that subsection and subsection (3) of section 29 were repealed by the Local Government Act 1972, which also deleted the reference in section 2(1) to such a scheme. The overall guidance of central government has however remained. Under section 35(2) of the 1948 Act, which was later repealed by the National Health Service and Community Care Act 1990, local authorities were required to act under the general guidance of the Minister. By section 2 of and Schedule 1 to the Local Authority Social Services Act 1970 there were referred to the social services committees, which were established by that Act, among other things the statutory functions under section 29 of the 1948 Act. That included the functions contained in section 2(1) of the Chronically Sick and Disabled Persons Act 1970. Section 7 of the Local Authority Social Services Act 1970 required local authorities in the exercise of their social security functions to act under the general guidance of the Secretary of State. Section 7A of that Act, which was introduced by the National Health Service and Community Care Act 1990, required local authorities to exercise their social services functions in accordance with directions given by the Secretary of State. By amendments made by each of these two Acts to section 2(1) of the Chronically Sick and Disabled Persons Act 1970 the duty thereby provided was expressly made subject to the provisions of section 7(1) and 7A of the Local Authority Social Services Act 1970. In all of this section 2(1) of the 1970 Act is not marked out as anything special or unique in the general regime of social welfare.

Section 29(4) of the National Assistance Act 1948 provided as follows:

29(4) Without prejudice to the generality of the provisions of subsection (1) of this section, arrangements may be made thereunder –

(a) for informing persons to whom arrangements under that subsection relate of the services available to them thereunder;

(b) for giving such persons instruction in their own homes or elsewhere in methods of overcoming the effects of their disabilities;

(c) for providing workshops where such persons may be engaged (whether under a contract of service or otherwise) in suitable work, and hostels where persons engaged in the workshops, and other persons to whom arrangements under subsection (1) of this section relate and for whom work or training is being provided in pursuance of the Disabled Persons (Employment) Act 1944, may live;

(d) for providing persons to whom arrangements under subsection (1) of this section relate with suitable work (whether under a contract of service or otherwise) in their own homes or elsewhere;

(e) for helping such persons in disposing of the produce of their work;

(f) for providing such persons with recreational facilities in their own homes or elsewhere;

(g) for compiling and maintaining classified registers of the persons to whom arrangements under subsection (1) of this section relate.

An addition was made to subsection (4)(c) by the Employment and Training Act 1973, but that is not material to the present case.

It will be seen that the list set out in subsection (4) is in several respects a

forerunner of what has for convenience been referred to as the 'service list' incorporated in section 2(1) of the Chronically Sick and Disabled Persons Act 1970.

Now there is no doubt that in the exercise of its powers under section 29 of the National Assistance Act 1948 it was proper for a local authority to take into account the extent of the resources which were available to it. So in approaching section 2(1) of the Chronically Sick and Disabled Persons Act 1970, set as it is in the context of section 29, one would expect that the extent of available resources would remain a proper consideration, or at least that if for some reason at any stage of the operation of the provisions of section 2(1) no regard was to be paid to considerations of available resources that would be made very clear in the terms of the section. But the section is silent on the matter.

The Chronically Sick and Disabled Persons Act 1970 came in as a Private Member's Bill. Section 2(1) was in its day an important innovation. While section 29(1) of the National Assistance Act 1948 gave the local authority a power to make welfare arrangements for the persons there described, a power which it might have a duty to perform by virtue of an appropriate direction under section 29(2), section 2(1) imposed a duty on the local authority to make welfare arrangements for an individual where it was satisfied that in the case of that individual it was necessary in order to meet his needs to make the arrangements. This was not a general but a particular duty and it gave a correlative right to the individual which he could enforce in the event of a failure in its performance. Such a provision in this area of the legislation is not common. We were referred only to one other example of it, in section 117 of the Mental Health Act 1983.

The right given to the person by section 2(1) of the Chronically Sick and Disabled Persons Act 1970 was a right to have the arrangements made which the local authority was satisfied were necessary to meet his needs. The duty only arises if or when the local authority is so satisfied. But when it does arise then it is clear that a shortage of resources will not excuse a failure in the performance of the duty. However neither the fact that the section imposes the duty towards the individual, with the corresponding right in the individual to the enforcement of the duty, nor the fact that consideration of resources is not relevant to the question whether the duty is to be performed or not, means that a consideration of resources may not be relevant to the earlier stages of the implementation of the section which lead up to the stage when the satisfaction is achieved. The earlier stages envisaged by the section require to be distinguished from the emergence of the duty. And if that distinction is kept in mind, the risk of which counsel for the respondent warned, namely the risk of the duty becoming devalued into a power, should not arise.

The words 'necessary,' and 'needs' are both relative expressions, admitting in each case a considerable range of meaning. They are not defined in the Act and reference to dictionary definitions does not seem to me to advance the construction of the subsection. In deciding whether there is a necessity to meet the needs of the individual some criteria have to be provided. Such criteria are required both to determine whether there is a necessity at all or only, for example, a desirability, and also to assess the degree of necessity. Counsel for the respondent suggested that a criterion could be found in the values of a civilised society. But I am not persuaded that that is sufficiently precise to be of any real assistance. It is possible to draw up categories of disabilities, reflecting the variations in the gravity of such disabilities which could be experienced. Such a classification might enable comparisons to be made between persons with differing kinds and degrees of disability. But in determining the question whether in a given case the

making of particular arrangements is necessary in order to meet the needs of a given individual it seems to me that a mere list of disabling conditions graded in order of severity will still leave unanswered the question at what level of disability is the stage of necessity reached. The determination of eligibility for the purposes of the statutory provision requires guidance not only on the assessment of the severity of the condition or the seriousness of the need but also on the level at which there is to be satisfaction of the necessity to make arrangements. In the framing of the criteria to be applied it seems to me that the severity of a condition may have to be to be matched against the availability of resources. Such an exercise indeed accords with everyday domestic experience in relation to things which we do not have. If my resources are limited I have to need the thing very much before I am satisfied that it is necessary to purchase it. It may also be observed that the range of the facilities which are listed as being the subject of possible arrangements, 'the service list', is so extensive as to make it unlikely that Parliament intended that they might all be provided regardless of the cost involved. It is not necessary to hold that cost and resources are always an element in determining the necessity. It is enough for the purposes of the present case to recognise that they may be a proper consideration. I have not been persuaded that they must always and necessarily be excluded from consideration. Counsel for the respondent founded part of his submission on the claim that on the appellants' approach there would be an unmet need, but once it is recognised that criteria have to be devised for assessing the necessity required by the statutory provision it will be possible to allege that in one sense there will be an unmet need. But such an unmet need will be lawfully within what is contemplated by the statute. On a more exact analysis, whereby the necessity is measured by the appropriate criteria, what is necessary to be met will in fact be met and in the strict sense of the words no unmet need will exist.

Section 2(1) has now to be implemented in the context of section 47 of the National Health Service and Community Care Act 1990. The first two subsections of that section provide as follows:

47(1) . . . where it appears to a local authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such services, the authority –

(a) shall carry out an assessment of his needs for those services, and

(b) having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of any such services.

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

(a) shall proceed to make such a decision as to the services he requires as is mentioned in section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986 without his requesting them to do so under that section; and

(b) shall inform him that they will be doing so and of his rights under that Act.

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

4 When requested to do so by –

(a) a disabled person . . .

a local authority shall decide whether the needs of the disabled person call for the

A *provision by the authority of any services in accordance with section 2(1) of the 1970 Act (provision of welfare services).*

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

We were referred to a number of publications which have emanated from central government sources containing views and guidance on the implementation F of the Act of 1970 and, more recently, on the operation of the whole area of community care. I do not regard these as proper material for the construction of the critical provision but it is at least satisfactory that the view which I have formed of the section accords with what seems from these documents to have been a recognised opinion over the past years. It is also satisfactory that the view G which I have taken avoids the considerable practical difficulties which the County Council would otherwise face in the provision of a coherent scheme of community care in its area.

I move your Lordships to allow the appeal and restore the order of the Divisional Court. H