R v Sefton BC ex p Help the Aged

Queen's Bench Division
Jowitt J
26 March 1997

Local authorities are entitled to take into account their own financial resources and the resources including financial resources of applicants seeking residential accommodation under National Assistance Act 1948 s21 in deciding whether such applicants require 'care and attention' which is not 'otherwise available'. Consequently, they are entitled to refuse to provide residential accommodation to persons whose capital exceeds a threshold fixed by the local authority, even when that threshold is substantially lower than the threshold fixed by regulations made under National Assistance Act 1948 s22 for the purpose of means-testing persons already resident in residential accommodation.

National Assistance Act 1948 ss21, 22 and 26 – National Health Service and Community Care Act 1990 ss46(3) and 47 – Local Authority Social Services Act 1970 ss2 and 7 and Sch 2 – Disabled Persons (Services, Consultation and Representation) Act 1986 s4 – Chronically Sick and Disabled Persons Act 1970 s2 – Secretary of State's Approvals and Directions under s21 of the National Assistance Act 1948 at Appendix 1 to LAC(93)10 – National Assistance (Assessment of Resources) Regulations 1992 SI No 2977 – National Assistance (Assessment of Resources) (Amendment) (No 7) Regulations 1996 SI No 602.

Facts

A local authority which provides residential accommodation under National Assistance Act 1948 (NAA) Part III is required to charge residents the full cost to the local authority of providing such accommodation. There is an exception for residents who have capital of £16,000 or less. The local authority can only require such residents to pay a contribution, based on their actual income plus their notional income on the excess of their capital over £16,000, calculated in accordance with the 1992 Regulations. The balance of the total cost of providing the accommodation is borne by the local authority. There was high demand in the area of the respondent authority for residential accommodation from persons whose capital was £16,000 or less. The respondent authority considered that the marginal cost of providing residential accommodation to such persons exceeded the financial resources available to it. The respondent accordingly adopted a comprehensive money saving policy, two aspects of which were subject to challenge in this case. First, the respondent authority determined, as a general but not inflexible rule, not to provide residential accommodation to any person already in a residential or nursing home pursuant to private arrangements until such person's capital fell to below £1,500. Second, the respondent authority considered the position of persons, already in residential accommodation provided by a third party pursuant to arrangements made by the respondent authority under NAA 1948 ss21 and 26, who receive an addition to their capital which takes it over £16,000. The respondent authority determined, as a general but not inflexible rule, to treat such persons as ceasing to occupy their accommodation on the basis that it was provided under NAA 1948 Part III and as becoming liable to pay the home-owner privately until their capital falls to below £1,500.

Decision

1 NAA 1948 s21 creates a duty to provide accommodation to those who come within the scope of the section. But in considering whether 'care and attention' is 'otherwise available' to an applicant the local authority is entitled to consider the resources available to him/her, including financial resources, which can enable him/her to make private arrangements to obtain any necessary 'care and attention'. There will be cases, however, where despite adequate financial means a person will not be able to obtain 'care and attention' because s/he is unable to make sensible decisions for him/herself or obtain disinterested, prudent advice and timely assistance from others.

2 NAA 1948 s22 and the National Assistance (Assessment of Resources) Regulations 1992 do not apply unless and until a person is in occupation of accommodation under NAA 1948 s21. They are not relevant to the proper construction of s21 in so far as that section defines the type of people entitled to residential accommodation.

3 Applying *R v Gloucestershire CC and Secretary of State for Health ex p Barry* (1997) 1 CCLR 000, HL, the respondent was entitled to take into account its own resources when considering the needs of applicants who seek to be provided with accommodation under NAA 1948 s21 and when deciding whether the need which triggers the duty to provide such accommodation has been established.

4 NAA 1948 s21(2) does not permit the local authority to take into account any shortage it might have of non-financial resources in deciding whether it owes a duty in a particular case.

5 In a case where the local authority had said or done nothing to make it clear to a resident, in accommodation provided under NAA 1948 ss21 and 26, that his/her status had changed to that of a privately paying resident, the resident's status could not have changed. His/her position remained governed by ss21 and 26 and the National Assistance (Assessment of Resources) Regulations 1992.

6 The charity, Help the Aged, had *locus standi* to seek judicial review of the respondent's policies.

7 Guidance under Local Authority Social Services Act 1970 s7 cannot create a duty under NAA 1948 s21 which that section itself has not created.

Cases also referred to in judgment:

R v Gloucestershire CC and Secretary of State for Health ex p Barry (1997) 1 CCLR 000; [1997] 2 WLR 459, HL.

This case also reported at:

(1997) 149 NLJ 490, QBD.

Representation

Genevra Caws QC and Ms Mount (instructed by the Public Law Project) appeared on behalf of Help the Aged.

Mr Gilbart QC and J Barrett (instructed by the Legal Department, Sefton Borough Council) appeared on behalf of Sefton Borough Council.

.....

Judgment

MR JUSTICE JOWITT:

THE FACTS

Local Authorities (LAs) have a statutory duty to provide residential accommodation to meet the needs of certain people aged 18 or over. It is known as part III

accommodation because the statutory duty is imposed by section 21(1) of the National Assistance Act 1948 (NAA) which is to be found in part III of that Act. Part 111 accommodation may be accommodation managed and provided by the LA itself or, under the statute, it may provide it through arrangements made with third parties. Under the statute the LA is required, when it provides part III accommodation, to charge the full cost to the resident, save in so far as that requirement is mitigated by regulations made under the statute. The present regulations are the National Assistance (Assessment of Resources) Regulations 1992 as amended by the National Assistance (Assessment of Resources) (Amendment) Regulations 1996. The regulations provide no reduction in the amount payable for someone whose capital, calculated in accordance with the regulations, exceeds £16,000. A resident with capital of £16,000 or less has to make a contribution based on his income and the notional income, calculated in accordance with the regulations, derived from the excess of his capital over £10,000, so that capital of £10,000 or less is ignored for the purpose of calculating the contribution.

Living within the area for which the respondent, Sefton Metropolitan Borough Council, has statutory responsibility under the Act is a larger than average number of old and elderly people who claim to be entitled to part III accommodation. This is because Southport and its locality are within the borough and are attractive to many retired people from nearby populous areas who choose to settle there in retirement. The cost of meeting the demands made on the respondent for part III accommodation has exceeded the financial resources available to its social services department which, by statue, is charged with performing the duty under section 21.

The respondent recognises that as long as someone is resident in part III accommodation the regulations bite, so that its charge for such accommodation has to be made in accordance with the regulations. However, to try to match demands to its resources or, at least, to reduce the shortfall between resources and demands the respondent has adopted a policy by which to decide whether or not to accede to applications made to it for part III accommodation. The policy has regard both to these resources and to the resources of the applicant and has two limbs.

The respondent has fixed its own capital threshold which is substantially lower than the lower of the two thresholds provided by the regulations. If an application is received from someone whose capital is in excess of the respondent's threshold there will be no immediate provision of accommodation. The practice is to defer making an immediate decision on the application and to consider it, along with other outstanding applications, at weekly intervals. At these weekly considerations an order of priority as between individual applicants is determined in accordance with their respective resources and the respondent's current resources, which may be in deficit, are taken into account. Once an applicant's resources fall below the threshold fixed by the respondent part III accommodation is provided to him (assuming, of course, he would qualify apart from any question of his resources). Once he is provided with part III accommodation then the payment required of him is determined in accordance with the regulations. However, until his resources fall to the level of the respondent's own threshold it is unlikely under its policy, having regard to it own chronic lack of resources from which it provides part III accommodation, that any provision will be made to the applicant. This is the first limb of the policy.

The second limb of the respondent's policy applies the first limb to a resident who has been admitted to part III accommodation provided by a third party

(pursuant to arrangements made between the third party and the respondent) and who subsequently receives some addition to his capital which takes him above the upper capital threshold provided by the regulations of £16,000 so as to make him liable to pay the full cost of his accommodation. Were such a person to remain a beneficiary of part III accommodation then, at such time as his resources fell below that upper threshold, he would once again enjoy the benefit of the regulations. The respondent treats such a person, even though he remains in what is physically the same accommodation, enjoying the same facilities and services as before, as ceasing to occupy accommodation provided under section 21 when this increase in his capital occurs. His occupation of the accommodation provided by the third party is then regarded as being pursuant solely to a private arrangement between him and the third party. Accordingly, if his capital falls to £16,000 he does not thereupon enjoy once more the benefit of the regulations. Instead his case is considered in accordance with the first limb of the respondent's policy.

The applicants challenge the respondent's policy by way of judicial review. The first applicant, Help The Aged, is a charity founded, as its name implies, to help the aged and has, on behalf of the aged it seeks to serve, and is rightly accepted by the respondent to have, the necessary standing to make this application.

The second and third applicants are directly affected by the respondent's policy.

The second applicant, Mr Pinch, was admitted by the respondent to part III accommodation. There followed an increase in his capital which took him outside the benefit of the regulations and at that stage the respondent applied to him the second limb of its policy so as then to apply also the first limb. I am told there are other cases similar to his which will be affected by the question arising in his case, which is whether he has ever ceased to occupy accommodation provided to him under section 21 by the respondent.

Mrs Blanchard, the third applicant, is a resident in a home pursuant to a private arrangement made between her and the managers of that home in which the respondent is not involved and she has never been the beneficiary of part III accommodation. Hers is a case to which the respondent has applied the first limb of its policy.

It is accepted by the respondent that, leaving aside any question of resources, the respondent's and theirs, both Mr Pinch and Mrs Blanchard would be owed a duty of provision under section 21 and that were they to be beneficiaries of part III accommodation they would enjoy the benefit of the regulations. Although I have spoken of benefit I should make it clear that a resident's income, whether he has capital or no, may be such that no reduction is to be made in the amount payable by him.

THE CONTENTIONS AND ISSUES.

The applicants contend that the respondent's policy is unlawful in that it is not entitled to take into account its own resources in deciding whether it has a duty to or is required to discharge its duty to a person making application to it for part III accommodation. They further contend that although an LA is entitled to regard the financial resources of the person applying as one of the factors which are relevant in deciding whether the need has been established which triggers the performance of the duty under section 21(1) of NAA it is unlawful for it to have regard to them if the result would be to place the applicant at a financial disadvantage in comparison with his position were he to be provided with part III accommodation and have the benefit of the regulations.

The respondent contends it is entitled to take into account its own resources, both financial and non-financial, and is not required on the true construction of section 21(1) to have regard to the content of the regulations as in some way restricting the regard it is entitled to have to the applicant's own resources.

Mr Gilbart, QC for the respondent accepts that since a consideration of its own resources plays a significant role in its policy and its implementation the policy cannot stand unless the respondent is entitled to take them into account, whether or not it is required to take account of the content of the regulations in the way suggested by the applicants. For the applicants Miss Caws, QC accepts that if the respondent is entitled to take account of its own resources and does not have to take account of the regulations, as she contends, no question of *Wednesbury* unreasonableness arises.

The helpful result of counsels' submissions has been to crystalize and narrow the issues and both are agreed that the issues in relation to the respondent's policy turn on:

(1) the construction of section 21(1) and (2) of NAA and the effect of subsection (2) on the scope of the duty owed under subsection (1);
(2) whether sections 22 and 26(3), (3A) and (4) of NAA and the regulations made under section 22(5) are relevant to the construction of section 21(1);
(3) the construction of section 47(1) (b) of the National Health Service & Community Care Act 1990 (NHSCCA) and whether it permits an LA to have regard to its own resources in the discharge of its duty under section 21(1) of NAA.

In the light of the decision of the House of Lords in *R v. Gloucestershire County Council ex parte Barry* given on 20/3/97, after counsel had made their submissions to me, the first issue has to be considered in the light of their lordships' speeches on the question whether an LA may take into account its own resources in assessing need.

So far as Mr Pinch is concerned a separate challenge is raised independently of the challenge to the policy. It is contended on his behalf that having been provided with part III accommodation he never lost his status as a resident pursuant to section 21. Mr Gilbart accepts that if that is the position Mr Pinch has been treated unlawfully in that, whatever be the lawfulness of the respondent's policy, he never came within its second limb or, consequently, its first limb.

SECTION 21 NAA.

Section 21(1)(a) provides, as amended:

> *Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing –*
> *(a) residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them; . . .*

It is accepted that the effect of ministerial direction is to require the operative words of this provision as though they read, 'a local authority shall make arrangements for providing –' (See paragraph 2(1) of appendix 1 to D of H Circular No LAC(93)10.)

The words 'make arrangements for providing' might on a first reading suggest the duty under the section is to have accommodation available for those to whom a duty to provide accommodation is owed under some other statutory provision, for example section 47(1)(b) of NHSCCA. It is accepted, though, that section 21(1)

(a) creates a duty to provide accommodation to those who come within the scope of the section. The reason why the words, 'shall make arrangements to provide,' are used rather than simply, 'shall provide,' becomes apparent when one turns to subsection (4) and to section 26 which enable an LA to perform its statutory duty by providing accommodation through other LAs and through third parties as a result of arrangements it makes with them enabling it to call on suitable accommodation which they have available.

In deciding whether a duty is owed under section 21(1)(a) to a particular individual an LA has to consider:

(i) whether he has needs which fall within the scope of paragraph (a) and, if so,
(ii) whether the requisite care and attention will not be met unless he can receive it in part III accommodation.

In considering (ii) the LA is entitled to consider the resource available to him. Resources should be understood in a broad sense to include not only financial resources but non-financial resources including the applicant's own physical and mental resources and, for example, if he lacks the ability to make sensible decisions for himself, whether he is able to call on others for disinterested and prudent advice and timely action. In many cases a sufficiency of means to make private arrangements to receive the needed care and attention is likely to be decisive of whether a duty is owed under section 21(1)(a). However, there will obviously be cases in which, despite the adequacy of his means, someone is unable to call on the kind of advice and assistance of which he stands in need. Circumstances can vary so much from person to person that it would be unprofitable to attempt to define them or to enumerate all the factors which an LA may or should in appropriate cases take into account. In practice it should not generally be a difficult task to recognise whether a particular case does or does not call for the provision of part III accommodation. An LA must also have regard to the duty placed on it under section 7(1) of the Local Authorities Social Services Act 1970 (LASSA), 'in the exercise of [its] social services functions . . . [to] act under the general guidance of the Secretary of State'. The duty under section 21 is a social services function (whose performance is delegated to an LA's social services committee): see section 2(1) and schedule 1 of LASSA.

In his submissions Mr Gilbart made the concession that there was nothing in section 21(1)(a), considered on its own, which would enable an LA to take into account its own resources, financial or otherwise, in deciding whether in any particular case it is under a duty to provide part III accommodation.

It is necessary to consider whether in light of the decision of the House of Lords in *ex parte Barry* this concession in fact represents the law. The Court of Appeal in that case, [1996] 4ALLER 421, considered 47(1) and (2) of NHSCCA which provide as follows:

> *(1) Subject to sub-sections (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; . . .

Section 4 of the 1986 Act provides:

When requested to do so by – (a) a disabled person, (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).

Section 2(1) of the Chronically Sick and Disabled Persons Act 1970 (the section referred to in section 4 of the 1986 Act) provides:

Where a local authority having functions under section 29 of the National Assistance Act 1948 was 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 – [and there follows a list of community care services of varying kinds] it shall be the duty of that authority to make those arrangements in the exercise of their functions under the said section 29 . . .

It was held by the majority in the Court of Appeal that on the true construction of this provision the resources of the LA were irrelevant to the assessment of the needs of a disabled person and could not be taken into account in deciding whether to make provision to meet his needs. It is to be observed that although the wording of section 2(1) of the 1970 Act and section 21(1)(a) of NAA are not identical the two sub-sections speak with the same peremptory voice. Under section 2(1) the LA must make those arrangements which are necessary to meet the needs of the disabled person. Under section 21(1)(a) it must arrange by the provision of part III accommodation to meet a person's need of care and attention if that care and attention will not otherwise be available. Unless there is some statutory provision which provides otherwise common sense suggests that the question whether an LA is entitled to take into account its own resources in assessing needs should receive the same answer whichever of these two statutory provisions is being considered. Assuming section 47(1)(b) of NHSCCA applies to a case arising under section 21(1)(a) but not to one arising under section 2(1) this cannot help the first or second applicants for reasons which will be apparent when I come to the third issue.

The majority in the House of Lords in *ex parte Barry*, Lord Nicholls of Birkenhead and Lord Clyde, and Lord Hoffmann, who agreed with their speeches, held, in reversing the decision of the Court of Appeal, that an LA is entitled in assessing the needs of a disabled person under section 2(1) to take into accounts its own resources on the ground that need is not an absolute concept and has to be considered in the context of all relevant factors of which the LA's own resources is one. Lord Nicholls of Birkenhead said at page 14 that his reasons for deciding as he did were substantially to the same effect as those of Lord Clyde who, in a passage in his speech at page 22, dealt with the attempt which had been made to distinguish the cases of the disabled from those of others seeking community care services in the following words:

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

A *that regarding the provision of services for others so that while in the other cases to which section 47(1) applied resources were a relevant consideration, the duty to provide for the disabled arose after a judgement had been made on the matter of necessity and resources played no part in the forming of that judgement. But it is essentially by reference to its own terms in the context in which it was enacted*
B *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 sub-section (2) cannot have been intended merely to achieve that purpose. It seems to me that there is sufficient reason for the*
C *making of a distinct provision in sub-section (2) in the desire to recognise the distinct procedural situation relative to the disabled. But it does not follow that any distinction exists in the considerations which may or may not be taken into account in making an assessment in the case of the disabled as compared with any other case. What is significant is that section 2(1) is clearly embodied in the*
D *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.*

In my judgement this passage provides a clear, decisive and affirmative answer
E to the question: is an LA entitled to take account of its own resources when considering the need of an applicant who seeks to be provided with part III accommodation under section 21(1)(a) and when deciding whether the need which triggers the duty to provide such accommodation has been established?

Miss Caws realistically conceded that if the respondent was entitled to take into
F account its own resources in deciding whether a duty under section 21(1)(a) had been triggered she could not argue that it has behaved with *Wednesbury* unreasonableness in formulating the policy it has adopted and applying it.

I should point out that once an LA concludes in a particular case that the need which triggers its duty under section 21(1)(a) exists it must provide part III
G accommodation of a kind which will meet the need for care and attention which arises in that case. It cannot at that stage pray in aid its own lack of resources as an excuse for failing to make the necessary provision though, of course, it is entitled to take that factor into account in deciding how it meets the need by the provision of part III accommodation provided it meets that need.

H It is, of course, trite law to say that a policy which is pursued inflexibly without regard to what may be special circumstances in a particular case which may call for an exception may be open to challenge on *Wednesbury* principles. However, there is no case of this kind before the court. Nor do I understand Mr Gilbart to be submitting that the respondent is entitled to be indifferent to any inequality of
I treatment which its own proposed financial criteria would create between those admitted to part III accommodation and those who, because of such criteria, would be excluded from eligibility in the sense of not taking this into consideration along with other relevant factors in formulating and maintaining its policy. Equally he does not suggest that in formulating and maintaining its policy the
J respondent is entitled to leave out of account and ignore guidance given by the Secretary of State pursuant to section 7(1) of LASSA. He correctly submits, though, that such guidance cannot create a statutory duty under section 21(1)(a) which the section itself has not created. Neither, I should add, does this guidance provide an aid to the proper construction of the relevant statutory material. See Lord Clyde at page 22.

K My conclusion as to the effect of the decision of the House of Lords in *ex parte*

Barry is really sufficient to dispose of the applications for judicial review by the first and third applicants but I think it's right to deal with other submissions which have been made and to go on to consider briefly the second and third issues.

Having made the concession which I have concluded involves a mis-statement of the law Mr Gilbart contended that when subsection (2) of section 21 is read together with sub-section (1)(a) it becomes clear that an LA is entitled to take into account its non-financial resources in deciding whether it owes a duty in a particular case. Sub-section (2) provides:

> *In making any such arrangements a local authority shall have regard to the welfare of all persons for whom accommodation is provided, and in particular to the need for providing accommodation of different descriptions suited to different descriptions of such persons as are mentioned in the last foregoing sub-section.*

Mr Gilbart submitted that this sub-section relates to the arrangements an LA must make in order to have available to it a stock of part III accommodation so as to enable it to discharge its duty under sub-section (1)(a). He argues that the available stock may not always be sufficient to meet the demands made upon an LA and that in deciding whether it is under a duty in a particular case to provide part III accommodation it is entitled to have regard to the stock available to it, so that a lack of suitable stock may mean that as long as that state of affairs continues no duty arises. I do not read sub-section (2) in this way. In my judgement its role is further to define the ambit of the needs for which under sub-section (1)(a) there is a duty to make provision. That paid, the resources to which an LA is entitled to have regard under sub-section (1) are not restricted to financial resources.

Miss Caws submitted that since section 21(1)(a) imposes a duty, rather than conferring a discretion, an LA has no power to provide part III accommodation to someone unless it owes him a duty of provision. The power and the duty therefore go hand in hand. So, proceeds her argument, if the respondent is right in its view that possession of capital in excess of the threshold it has fixed means there is no duty to provide accommodation the corollary to this is that neither is there any power to provide it. There is, therefore, no power or duty to provide it in the case of the person possessed of capital in excess of £16,000 in whose case the regulations require payment of the whole cost of providing part III accommodation. But, she argues, this is inconsistent with section 22 which deals with the charge to be made for such accommodation and by sub-section (5) applies the regulations to the calculation of the charge to be made. Therefore, Miss Caws submits, the position the respondent has adopted by which it recognises no duty to provide part III accommodation to those with capital in excess of its own threshold is unlawful as being contrary to section 22 and the regulations.

In my judgement the answer to this argument is that section 21(1)(a) involves a two stage process. The first stage involves assessing whether any care and attention within the ambit of paragraph (a) is needed by a person who applies for part III accommodation which will not be met if the accommodation is not provided and, if so, what that need is. The second stage requires the LA to decide whether that need will be met if part III accommodation is not provided. If the answer is yes there is no duty. If the answer is no, then there is. In answering this question the LA has to take into account the person's resources (in the wide sense to which I have referred) and, as I have pointed out, the extent of a person's financial resources will not necessarily in all cases determine the answer to the question.

SECTIONS 22 & 26 OF NAA AND THE REGULATIONS.

Section 22 and the regulations made under sub-section (5) and sub-sections (3), (3A) and (4) of section 26 all deal with the charges to be made to those provided with part III accommodation. Mr Gilbart rightly contends that these provisions do not begin to apply unless and until a person is in occupation of such accommodation. He submits they have no relevance beyond what they say about the charges to be levied upon those in occupation of part III accommodation and provide no assistance to the proper construction of section 21(1)(a).

Mindful of the inequality of treatment which the respondent's approach creates between some of those who have been placed in part III accommodation and some of those who apply for it I suggested to Miss Caws that it might be possible to pray in aid particularly the regulations as an aid to the construction of section 21(1)(a). I suggested their effect might be to impose the same limit on the extent to which an applicant's resources may be taken into account in deciding whether a duty is owed to him to provide part III accommodation as would be the case were he to be admitted to such accommodation.

Miss Caws adopted my suggestion but if the point was a bad one the responsibility for it is mine and not hers. Having reflected upon it I consider it to be a bad one. I am persuaded by Mr Gilbart's submission and I reject it. There is no warrant for construing section 21(1)(a) in a way which requires an LA to proceed as though, as a matter of law, the regulations already apply to someone at the stage when he is applying for and is not yet resident in part III accommodation. This would give them an effect beyond that which they are given by section 22(5). In my view my rejection of the suggestion which I made is reinforced by the decision of the House of Lords in *ex parte Barry*.

SECTION 47 (1)NHSCCA.

I found the relationship between section 47(1) and (b) and section 21(1)(a) a cause of difficultly in coming to a conclusion until it was removed for me by the decision of the majority in the House of Lords in *ex parte Barry*. Section 47(1) refers to community care services and these are defined by section 46(3) as services which an LA may provide or arrange to be provided under the statutory provisions set out in the sub-section. If one turns to those provisions some confer powers and some impose duties on LAs. In the light of Mr Gilbart's concession that section 21(1)(a) did not allow an LA to take into account its own financial resources and his submission that provision for this was to be found in section 47(b) it seemed to be me strange that LAs should have gone from 1948 to 1993 (when section 47 came into force) without being able to take account of their own financial resources in duty cases and Mr Gilbart was reluctant to suggest that the later provision had amended the earlier one. Moreover, section 47(1)(b) applies alike to both duties and powers though the conferring of a power, in the absence of words to the contrary, carries with it a discretion to have regard to resources. On the other hand, all three members of the Court of Appeal endorsed the acceptance on Mr Barry's behalf that 47(1)(b) did confer a discretion. (It was submitted on his behalf that section 47(2) bypassed in his case, as a disabled person, the provisions of section 47(1)(b).) However, once it is established that in assessing need pursuant to section 21(1)(a) an LA is entitled to take into account its own resources and that this entitlement is to be derived from that section it seems to me permissible to regard section 47(1)(b) simply as recognising and not taking away a discretion which already existed, both in the case of duties and powers; nor indeed does it seem to me to matter whether this provision is regarded as conferring or merely recognising the prior existence of a discretion.

For these reasons the challenges by Help the Aged and by Miss Blanchard must be rejected and their applications dismissed.

MR PINCH.

Mr Pinch was provided by the respondent with part III accommodation in a home in the private sector as a result of arrangements made by the respondent with the managers of that home. There was a pre-existing contract between the respondent and the managers to provide part III accommodation at rates fixed by the contract when called on by the respondent to do so.

Mr Pinch paid a contribution, calculated in accordance with the regulations, direct to the managers. Provision is made for direct payment by an amendment to section 26 of NAA by the addition of a new sub-section, (3A). This requires the agreement of the LA, the managers and the resident but the sub-section preserves the LA's liability to make good to the managers any difference between the payments made by the resident and the full cost of the accommodation he occupies. When Mr Pinch's capital increased above £16,000 so that he became liable under the regulation to meet the whole cost of his part III accommodation he simply increased his payments to the management accordingly. This revised arrangement was made informally and there is no exchange of correspondence and no memorandum passing between any of the three parties to record the change.

The time came when Mr Pinch's capital fell below £16,000, though it remained above the threshold fixed by the respondent. The respondent at that stage declined to make any calculation of the contribution due from him under the regulations, asserting that when his capital had risen above £16,000 his residence at the home where he was and remained had ceased to be as a resident provided with part III accommodation. In fact nothing had been said or done to give effect to any change in the status of Mr Pinch's residence in the home. When his capital fell below £16,000 nothing was said or done to make clear to him or to the managers that sub-section (3A) had ceased to apply to his case and that in the event of there being any shortfall in the payments he made the respondent would be under no liability to the managers to make that good. Faced, though, with the stand taken by the respondent Mr Pinch felt he was left with no alternative but to continue to pay the full cost of his accommodation to the managers pending the resolution by legal proceedings of his dispute with the respondent.

While not conceding the point, Mr Gilbart has pursued his opposition to Mr Pinch's challenge without enthusiasm, candidly accepting there is a paucity of evidence to support his case and that there is not a single document on which he can rely. There is in my judgement simply no evidence upon which the respondent could conclude that Mr Pinch had ever ceased to live at the home as someone living in accommodation provided to him under section 21(1)(a) of NAA. It follows that the respondent's refusal to accept his continuing status as someone enjoying part III accommodation and to act accordingly was unlawful and that Mr Pinch's application must succeed.

MR JUSTICE JOWITT: Miss Caws, Mr Barrett, you will see from the judgment that has been provided and which I have handed down now that Mr Pinch succeeds and the other applicants fail. May I say that I had prepared the judgment before the House of Lords' decision was received. It was adverse to you, but I thought it appropriate to wait until the House of Lords in those circumstances had given its decision, and, as you can see, I have revised my judgment in the light of that. It merely reinforces the conclusion I had come to. I imagine you have

A already considered the form of order I should make in the case of Mr Pinch, have you?

MISS CAWS: Yes, my Lord. I am happy to tell your Lordships that Mr Barrett and I are agreed in fact in relation to all the orders your Lordships should make,
B although I have an application in addition. In relation to Mr Pinch, Mr Barrett has agreed that the appropriate order is **certiorari** to quash the decision in his case. The relief we sought, if I can just remind your Lordship, distinguished between relief in relation to quashing the policy and relief in relation to quashing the decision, and all we ask is **certiorari** to quash the decision. In relation to costs, if I
C can deal with costs across the boards, the position is that Mrs Blanchard and Mr Pinch are both legally aided. Mr Pinch has succeeded, and Mr Barrett has agreed in those circumstances that a proportion of the costs attributable to Mr Pinch should be ours.

D MR JUSTICE JOWITT: Have you agreed on the proportion?

MISS CAWS: We have not, I am afraid. That has been left at large. It may be it can be the subject of agreement.

E MR JUSTICE JOWITT: So the order will simply be that Mr Pinch's costs be paid by the respondent.

MISS CAWS: Indeed, my Lord, and the remainder of costs we are agreed there should be so ordered on the basis that Help the Aged has partially succeeded
F and partially failed, and Mrs Blanchard, who has failed, is legally aided and my learned friend is not pressing for costs in the circumstances.

MR JUSTICE JOWITT: You are asking for legal aid taxation?

G MISS CAWS: Yes, I need legal aid taxation.

MR JUSTICE JOWITT: Yes.