

R v Berkshire CC ex p P

A

Queen’s Bench Division  
Laws J  
9 July 1996

*A local authority is required by National Health Service and Community Care Act 1990 s47(1) to assess persons in apparent need, for all community care services which the local authority has power to provide, whether or not in practice it provides services of a kind the person in question is likely to need. A local authority has power to make arrangements of the kind referred to in National Assistance Act 1948 s29 irrespective of the service user’s ordinary residence, provided the Secretary of State for Social Security has given his/her approval.*

B

C

Facts

P was seriously disabled. He lived at the British Home and Hospital for Incurables (BHHL) in Streatham, London. His placement was funded partly by the respondent local authority and partly by the Department of Social Security. P’s mother was concerned about the level of care and services which P was receiving at the BHHL and asked the respondent local authority to carry out an assessment under National Health Service and Community Care Act 1990 (NHSCCA) s47(1), the National Assistance Act 1948 (NAA) and Chronically Sick and Disabled Persons Act 1970 s2. There was a dispute about whether P was ‘ordinarily resident’ in Berkshire or elsewhere and whether the respondent local authority could, therefore, have any obligation to provide him with community care services under NAA 1948. It was, however, common ground that the correct forum for the resolution of that dispute was an application to the Secretary of State for Social Security under NAA 1948 s32(3). The issue was whether, irrespective of P’s ordinary residence and irrespective of whether the respondent local authority did in practice provide community care services for the benefit of persons who were not ordinarily resident in its area, the respondent was still obliged by law to assess P’s need for community care services.

D

E

F

G

Held:

- 1 The duty to assess apparent needs for community care services under NHSCCA 1990 s47(1) arises whenever the local authority possesses the legal power to provide or arrange for the provision of community care services to an individual appearing to be in need of such services. This is not conditional on:  
(a) whether the service user is ordinarily resident in the local authority’s area; or  
(b) whether the local authority has in place arrangements to provide services of a kind which, in the light of the assessment, the service user was likely to need; or  
(c) whether the local authority makes such services physically available to service users of the relevant kind.
- 2 NAA 1948 s29(1) provides that:

H

I

*A local authority may, with the approval of the Secretary of State, and to such extent as he may direct in relation to persons ordinarily resident in the area of the local authority shall make arrangements for . . . [various matters].*

J

The duty to make arrangements is confined to cases where the Secretary of State for Social Security has given a direction relating to persons ordinarily resident in the local authority’s area. The power to make arrangements is not so confined; it arises where the Secretary of State for Social Security has given

K

- A approval to arrangements being made and the Secretary of State's approval may be given (and has been given) without regard to the place of residence of any potential beneficiary.
- 3 By virtue of NAA 1948 s29 and Local Authority Circular LAC(93)10 App 2 para 2(1) (the Secretary of State's Approvals and Directions under s29(1) of the National Assistance Act 1948) the respondent local authority had the power in law to make arrangements for the benefit of all disabled persons falling within NAA 1948 s29 irrespective of their ordinary residence. It followed that the respondent local authority had a duty to assess P's apparent needs.

C **Cases referred to in judgment:**  
None.

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

- Chronically Sick and Disabled Persons Act 1970 s2 – National Assistance Act 1948 ss21, 24, 29 and 32 – National Health Service and Community Care Act 1990 ss46 and 47 – Local Authority Circular LAC(93)7 *Ordinary Residence* – Secretary of State's Approvals and Directions under s29(1) of the National Assistance Act 1948 at Appendix 2 to LAC(93)10.
- E **This case also reported at:**  
(1996) *Times*, 15 August, QBD.

**Representation**

- J Richards (instructed by Leigh Day & Co) appeared on behalf of the appellant.
- F R McCarthy QC (instructed by the County Solicitor, Berkshire County Council) appeared on behalf of the respondent.

.....  
**Judgment**

- MR JUSTICE LAWS:** In this motion for judicial review, the applicant asserts that the respondent local authority is in the events which have happened under a present obligation to carry out an assessment of his needs pursuant to s.47(1) of the National Health Service and Community Care Act 1990 ('NHSCCA').
- The primary facts are not in dispute. The applicant, who was born on 23rd February 1968, is seriously disabled. He suffers from viral brain damage and epilepsy. Until he was 20 he lived at home with his mother in Berkshire. Between December 1988 and February 1991 he lived in the Holy Cross Hospital in Haslemere. Since December 1991 he has been at a private home, the British Home and Hospital for Incurables ('BHHI') in Streatham. His placement there is funded partly by Berkshire Health Authority and partly by the Department of Social Security. Most of the day he sits in his wheelchair in the dining room at the Home. He shares a bedroom with 3 others. He has some awareness of his environment but only a limited ability to communicate. He receives no physiotherapy, occupational therapy, or assistance in communication. No recreational or social facilities, such as art or outings, are available to him. He has in effect nothing to do except listen to music, the radio, or television. In fairness I should indicate that there is no complaint as to the medical attention received by the applicant, and this application involves no criticism of BHHI; it is said rather that he needs a different level and type of care than is available there, though as will appear it is no part of my function to decide as a matter of fact what services should be provided for him.

The applicant's mother, who lives in Hammersmith and Fulham and acts as his

next friend in this litigation, is very worried about him. By October 1995 she had become so concerned about the level of care and services which he was receiving at BHHI that she instructed solicitors who wrote to the respondent's Social Services Department on 12th October to request assessment of his needs under s.47(1) of NHSCCA. In consequence the respondent produced a document dated 30th November 1995 which was said to be an assessment under s.47(1). Mrs Parker says that this was not a lawful assessment under the subsection because, as it is put in Miss Richards' skeleton argument, it does not identify his needs but merely describes the services which the applicant currently receives. The applicant's Grounds focus on the alleged inadequacies of the November document, but in the event it is unnecessary for me to canvass them because the respondent accepts that it was not drawn up in accordance with 'good practice' (though would no doubt assert on the particular facts that this is not a ground for criticism); more important, the respondent also accepts that if I hold that it presently owes a duty to the applicant to assess his needs under s.47(1) a further assessment will be carried out, and there is no reason to suppose that that would be anything other than a proper assessment under the subsection, whatever the rights and wrongs of the old one. The question I must decide is whether, leaving aside the November document, there is a present duty upon the respondent to assess the applicant under s.47(1).

In order to understand the nature of the parties' arguments on this issue, it is convenient to set out the relevant legislation and in part the contents of certain Ministerial circulars.

Section 47(1) of NHSCCA provides:

*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.*

Section 46(3) defines 'community care services' in part as follows:

*... services which a local authority may provide or arrange to be provided under any of the following provisions –*  
 (a) *Part III of the National Assistance Act 1948 ...*

Part III of the Act of 1948 ('NAA') includes s.21(1):

*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 ...*

Section 24(1) :

*The local authority empowered under this Part of this Act to provide residential accommodation for any person shall subject to the following provisions of this Part of this Act be the authority in whose area the person is ordinarily resident.*

Section 24(3) :

*Where a person in the area of the local authority –*

- A *(a) is a person with no settled residence, or  
(b) not being ordinarily resident in the area of the local authority, is in urgent need of residential accommodation under this Part of this Act, the authority shall have the like power to provide residential accommodation for him as if he were ordinarily resident in their area.*

B Section 24(4) :

- C *Subject to and in accordance with the arrangements under section 21 of this Act, a local authority shall have power, as respects a person ordinarily resident in the area of another local authority, with the consent of that other authority to provide residential accommodation for him in any case where the authority would have a duty to provide such accommodation if he were ordinarily resident in their area.*

Section 29(1) :

- D *A local authority may, with the approval of the Secretary of State, and to such extent as he may direct in relation to persons ordinarily resident in the area of the local authority shall make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons aged 18 or over who are blind, deaf or dumb or who suffer from mental disorder of any description, and other persons aged 18 or over who are substantially and permanently handicapped by illness, injury or congenital deformity or such other disabilities as may be prescribed by the Minister.*

Section 32(3) :

- F *Any question arising under this Part of this Act as to the ordinary residence of a person shall be determined by the Minister.*

Section 2(1) of the Chronically Sick and Disabled Persons Act 1970 provides:

- G *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 –*

...

- H *(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;*

I ...

- J *(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;  
then ... it shall be the duty of that authority to make those arrangements in exercise of their functions under the said section 29.*

The Secretary of State gave approvals and directions under s.29(1) of NAA in Appendix 2 to Circular LAC(93)10. Paragraph 2(1) reads in part:

- K *The Secretary of State hereby approves the making by local authorities of arrangements under section 29(1) of the Act for all persons to whom that subsection applies and directs local authorities to make arrangements under section*

29(1) of the Act in relation to persons who are ordinarily resident in their area for all or any of the following purposes –

- (a) to provide a social work service . . . ;
- (b) to provide, whether at centres or elsewhere, facilities for social rehabilitation and adjustment to disability including assistance in overcoming limitations of mobility or communication;
- (c) to provide, whether at centres or elsewhere, facilities for occupational, social, cultural and recreational activities . . .

Paragraph 2(3) states:

*The Secretary of State hereby approves the making by local authorities of arrangements under section 29(1) of the Act for all persons to whom that subsection applies for the following purposes . . .*

Then by paragraph 2(3) various other forms of provision are approved, such as holiday homes, free or subsidised travel, and assistance in finding accommodation.

By paragraph 2(4) the Secretary of State approves the making by local authorities of arrangements referred to in s.29(4), which I have not set out but which deals with such matters as the provision of suitable work, instruction, and recreational facilities for disabled people in their own homes.

Circular 93(10) paragraph 5 reads in part as follows:

*. . . once it has been established that a person comes within the scope of section 29 . . . or the material question in determining that eligibility is whether, for the purposes of section 29, the person is to be regarded as having a hearing, vision or speech impairment or is substantially and permanently handicapped by illness, injury or general deformity.*

Circular LAC(93)7, issued by the Secretary of State, is headed 'Ordinary Residence'. Paragraph 1 states:

*Under sections 21 and 29 of the National Assistance Act 1948 . . . each local authority has a power, and so far as directed by the Secretary of State a duty, to provide residential accommodation and certain other welfare services for people who are 'ordinarily resident' in the authority's area . . .*

There is a substantial dispute between the parties as to where is the applicant's 'ordinary residence', a term which, as appears from the citations I have given, figures in the relevant legal materials and in particular in NAA s.29 (1). Much of the respective skeleton arguments, and a certain amount of the affidavit evidence, concern that question. However when the case was opened I was told that the parties are agreed that it is not a question for me to determine; application will be made to the Secretary of State to decide it, as is required by NAA s.32(3). I have no doubt that the parties were right so to agree. But Miss Richards submits that on the true construction of the relevant legislation the respondent is obliged to assess the applicant's needs under NHSCCA s.47(1)(a) now, before any determination by the Secretary of State is made. Mr McCarthy QC for the respondent submits that the duty to assess only arises once it is established that the applicant is ordinarily resident in the respondent's area.

This issue falls to be determined according to the correct construction of NHSCCA s.47(1) and NAA s.29(1). No authority has been cited to me as to the interpretation of either subsection, and I assume none exists. The issue is of some general significance. Miss Richards submits that on the facts here no local

- A authority has assumed responsibility for the applicant as being ordinarily resident within its area (I do not travel into the evidence about it, because as I have said the Secretary of State will decide where in truth he is ordinarily resident). In such circumstances, she says, any severely disabled person in the applicant's position is left in limbo if the respondent's approach is right. If there is an open question where he is ordinarily resident, he will have no rights under s.47(1) until that question is decided by the Secretary of State. Depending no doubt upon the particular conditions in which he is presently living, that may have very deleterious consequences.

- C I turn to the competing arguments as to the correct construction of the relevant statutory provisions. As regards s.47(1), Miss Richards for the applicant submits that the duty to assess is triggered by the existence of a legal power in the local authority to provide or arrange for the provision of community care services for any person appearing to be in need of such services; this is no more nor less than what the statutory words in the subsection say. If that is right, the duty to assess exists if (on the facts of this case) the respondent is empowered under NAA s.29(1) to provide services to the applicant. That being her approach Miss Richards concentrated her argument upon the interpretation of s.29(1), and I will come to that. Mr McCarthy for his part submits that the phrase in s.47(1) '... any person for whom they may provide or arrange for the provision of community care services ...' imports two conditions which must be fulfilled before the s.47(1) duty arises. First, the existence of what he called a 'basic vires' to make such provision, and secondly the existence as regards the particular local authority of an actual, practical, ability to provide specific services (of a kind, I assume, which the person under consideration might need).

- F It seems to me that looked at purely as a matter of strict construction. Mr McCarthy's position on s.47(1) is distinctly unpromising. It would require me to hold that the word 'may' in the phrase I have just set out carries out two quite different meanings at the same time: first, a requirement of 'basic vires' – the authority legally 'may' make the relevant provision, and secondly a requirement of factual capacity – the authority 'can' make the provision. I do not think this can be right. If Parliament had intended the s.47(1) duty to be subject to a factual capacity in the authority itself to make provision within its existing arrangements, it could readily have so provided. Miss Richards in my judgment correctly relied on the fact that s.47(1) contemplates not only provision of community care services, but also arrangement by the authority for such provision; and in addition the terms of s.47(1)(b) show that once an assessment is made by the authority it is to decide whether the person's needs 'call for the provision *by them* of any such services' (my emphasis). Services may be provided by means other than the established procedures or institutions of the particular local authority. In my judgment the s.47(1) duty to assess is not conditional upon its being shown that the local authority in question has in place existing arrangements to provide services of a kind which, in light of the assessment, the disabled person might need.

- J However Mr McCarthy supported his position on s.47(1) by means of a specific argument directed to the correct sense to be attributed to paragraph 2(1) of Appendix 2 to Circular 93(10). The primary relevance of this measure is to the correct construction of NAA s.29(1) to which I will come; but I deal now with Mr McCarthy's submission about it so far as it relates to s.47(1). He says that the words 'in relation to persons who are ordinarily resident in their area' apply only to the Secretary of State's direction, not his approval. He asserts therefore that in paragraph 2(1) of the Circular the Secretary of State has given no more than a

general 'approval' to the making of arrangements under s.29(1) so far as they might relate to persons not ordinarily resident in an authority's area, but has by contrast made specific directions for named purposes in relation to persons who are ordinarily resident in the local authority's area. His purpose in so submitting was, as I understood it, to support the proposition that no specific forms of provision under s.29(1) are in place pursuant to an approval by the Secretary of State of which persons not ordinarily resident in an authority's area might take advantage; and so, I think he would say, there is nothing on which the power referred to in s.47(1) can bite as regards any person not so ordinarily resident, with the consequences that the s.47(1) duty cannot arise in relation to any such person.

With respect to Mr McCarthy, I see no force in this argument. First, it rests on what seems to me plainly an incorrect interpretation of paragraph 2(1). As a matter of language the paragraph both approves (as regards all persons to whom s.29(1) applies) and directs (as regards persons ordinarily resident in the authority's area) the specific provision identified at (a)–(c). Secondly, as Miss Richards submits, paragraphs 2(3) and (4) would be otiose if Mr McCarthy is right. Thirdly, Mr McCarthy's reliance on paragraph 2(1) reveals something of a slippage in his argument. If the proposition is that the s.47(1) duty only arises where the authority already has in place existing arrangements of which non-ordinarily resident persons may take advantage, that is one thing; but if the argument is that the duty to assess only arises where the Secretary of State has authorised arrangements to be made (which, so far as it goes, is clearly right) then on his own argument the Secretary of State has authorised any and all arrangements; and Mr McCarthy, to use the tired phrase, is hoist by his own petard. Paragraph 2(1) cannot assist him.

For all these reasons I reject the respondent's submission that s.47(1) imports a condition requiring the physical availability of services to a person before the duty of assessment arises in relation to that person. The word 'may' in the subordinate clause in question means, in the context of the subsection as a whole, that the duty to assess arises where the local authority possesses the legal power to provide or arrange for the provision of community care services to the individual in question.

This brings me to NAA s.29(1), since that is the provision in which Miss Richards says the relevant power is to be found. The principal issue here is whether the words 'in relation to persons ordinarily resident in the area of the local authority' qualify both the *discretion* ['may . . . make arrangements for promoting the welfare of persons . . .'] and the *duty* to do so ['shall'], or only the latter. Miss Richards contends for the second construction; Mr McCarthy for the first. Miss Richards prays in aid the terms of paragraph 2(1) of Appendix 2 to Circular LAC(93)10, which I have already discussed in the context of Mr McCarthy's argument on s.47(1) but repeat in part for convenience:

*The Secretary of State hereby approves the making by local authorities of arrangements under section 29(1) of the Act for all persons to whom that subsection applies and directs local authorities to make arrangements under section 29(1) of the Act in relation to persons who are ordinarily resident in their area for all or any of the following purposes . . .*

Miss Richards submits that this paragraph plainly reflects the construction of s.29(1) for which she contends. The Secretary of State makes a clear distinction between approval and direction. Only the latter is limited so as to refer to persons ordinarily resident in the local authority area. I have already indicated that in my view this is a correct approach to the Circular, and to that extent it assists Miss

A Richards. For his part Mr McCarthy relies on paragraph 1 of Circular LAC(93)7:

*Under sections 21 and 29 of the National Assistance Act 1948 . . . each local authority has a power, and so far as directed by the Secretary of State a duty, to provide residential accommodation and certain other welfare services for people who are 'ordinarily resident' in the authority's area . . .*

B

He submits that this paragraph plainly reflects the construction for which he contends. So far as it goes, so it does. Miss Richards says that this Circular (as its title indicates) is dealing specifically with questions of ordinary residence as they arise under the legislation, and there is no focus on the distinction between

C approval and direction in NAA s.29(1).

While I have discussed paragraph 2(1) of Appendix 2 to Circular LAC(93)10 at some length out of respect for Mr McCarthy's argument on s.47(1), I should indicate at this stage a degree of judicial unease that two ministerial circulars should be advanced before me as competing interpretations of an Act of Parliament, to

D

which I should pay attention in deciding the Act's true meaning. In the course of argument I raised the question how far such materials are by law a legitimate aid to construction; neither counsel was armed with any authority to deal with such a question, and both seemed to accept that I could take the Circulars into account so far as I thought it helpful. I have some doubt whether that is right. I

E

may, as I understand it, look at subordinate legislation to assist in the construction of main legislation where the subordinate measure forms part of a code with the statute; and Miss Richards would no doubt say that paragraph 2(1) of Appendix 2 to LAC(93)10, though not a statutory instrument as such, falls into that category since it constitutes the Secretary of State's decision expressly con-

F

templated by s.29(1) without which the subsection would lack all application. I think there is some force in that, and I should pay more attention to paragraph 2(1) than to paragraph 1 of LAC(93)7; but it would be wrong to treat either as a driving force in my determination of the true construction of s.29(1).

In my judgment s.29(1) confers two distinct functions on local authorities; one permissive, the other mandatory. Within it the *duty* to make arrangements is confined to cases where the Secretary of State has given a direction relating to persons ordinarily resident in the authority's area. The *power* to make arrangements is not so confined; it arises where the Secretary of State has given his approval to arrangements being made, and his approval may be given without

H

regard to the place of residence of any potential beneficiary. This is the natural meaning of the subsection. Mr McCarthy advanced a submission to the effect that if that construction were right, the draftsman would have placed a comma after the word 'shall'. In these days when too many people believe that language means only what its user wants it to mean it is refreshing to entertain so refined

I

an argument; but I think the point is badly taken. It would mean that there is no distinction in the provision between the scope of the Secretary of State's power of approval and his power of direction. I consider that the statute plainly differentiates between the two, confining the latter to arrangements for the benefit of persons ordinarily resident in the authority's area. It is perhaps worth noting that

J

the words which provide for the antithesis between approval and direction were added by the Local Government Act 1972 in which the significance of Mr McCarthy's putative comma may have been lost.

Mr McCarthy had a further argument, based on an alleged absurdity. He said that if Miss Richards were right, persons up and down the land may seek assessments under s.47(1) from authorities with which they had no practical connection. Theoretically, this is right; but as Miss Richards submitted an authority in

K

such a case, though obliged to make an assessment, would be entitled under s.47(1)(b) to have regard to another authority's potential or actual responsibilities in deciding whether any action is required. She submitted further that if Mr McCarthy were right, a disabled person such as her client would have no protection under the legislation (save I suppose as regards the residence provisions in NAA s.24(3) and (4), which fall within Part III of the Act as does s.29(1) in a case where no authority accepted responsibility for him short of a decision by the Secretary of State as to the location of his ordinary residence). In my judgment the construction which I prefer is assisted also by the terms of s.2(1) of the Chronically Sick and Disabled Persons Act 1970 which I have set out.

In the result, the construction of s.29(1) which I prefer cannot in my judgment be refuted on absurdity grounds or any other. It follows that the respondent is obliged to conduct a proper assessment of the applicant's needs, and I will so declare.