R v Haringey LBC ex p Norton

Queen's Bench Division
Mr Henderson QC (sitting as a deputy judge)
15 July 1997

Although local authorities assessing needs must take into account earlier assessments both they and the court on review are entitled to have regard to evidence suggesting that an earlier care plan made more extensive provision than was actually considered necessary. It is especially difficult to establish that service provision decisions are irrational but an assessment which fails to distinguish between, and as a result also fails to assess comprehensively, both personal care needs and social, recreational and leisure needs would be unlawful.

Facts

The applicant was seriously disabled by multiple sclerosis. Since about April 1994, pursuant to Chronically Sick and Disabled Persons Act 1970 s2, the respondent authority had funded 24 hours per day live-in care supplied by a local charitable organisation, known as SHAD, in the person of local volunteers. There came to be a parting of the ways between SHAD and the applicant.

The respondent authority did not suggest that the applicant's condition had improved or that his care needs had decreased. On the 11 April 1997, however, the respondent authority assessed him as needing only five hours practical assistance per day together with domiciliary nursing care provided by the health authority, an emergency contact alarm and meals on wheels to satisfy what the respondent authority described as his 'personal care needs'. The respondent authority stated that its resources were not sufficient to provide the 24-hour care desired by the applicant. The respondent authority further stated that in relation to the applicant's 'social, recreational and leisure needs' the applicant would on request be provided with details of a local resource centre.

The respondent authority accepted part of the Laming Letter (guidance in the form of a letter from Mr Herbert Laming CBE, the chief inspector, Social Services Inspectorate, dated 14 December 1992) as correctly stating the law:

> *Authorities must satisfy themselves, before any reduction in service provision takes place that the user does not have a continuing need for it.*

The respondent authority's officer who prepared the care plan of 1994 swore an affidavit, however, stating that 24-hour live-in care had been provided from 1994 because it was desirable and available at reasonably modest cost to the respondent from SHAD and its volunteers, not because it was 'needed'. In reality, in the opinion of the respondent authority, the applicant's needs had not changed.

Held:

1 Although appropriate weight had to be given to the 1994 assessment: (a) the 1994 assessment could not give rise to an estoppel, or fetter the respondent authority's evaluation of the applicant's present needs in the context of its current resources; and (b) the respondent authority had to give the 1994 assessment the weight it truly deserved and that required it to take into account all relevant material including material demonstrating that 24-hour care had been provided not because it was considered necessary but because it was considered desirable and was available at reasonably modest cost. The court

when asked to review the lawfulness of the 1997 assessment was accordingly duty bound to admit such evidential material, although it might be doubted whether the Court would admit affidavit evidence from local authorities purporting to supplement, amend or impugn assessments directly under challenge: *R v Westminster CC ex p Ermakov* [1996] 2 All ER 302; *Re C and P* [1992] COD 29 distinguished.

2 In a case such as this where the relevant facts included qualitative judgments of an individual's needs and the availability of resources to meet those needs and the needs of others it is especially difficult to establish perversity. In the light of *R v Gloucestershire CC ex p Barry* (1997) 1 CCLR 40; [1997] 2 All ER 1; [1997] 2 WLR 459, HL, an applicant seeking to establish the irrationality or unreasonableness in law of decisions of this type must persuade the court to step into the arena and to conclude that it is sufficiently informed of all relevant information such that no reasonable authority could have come to the conclusion that was in fact reached.

3 The applicant put before the court a weight of good quality evidence from his general practitioner, carers, support workers from SHAD, his family and his friends all of which strongly suggested that an authority with unlimited resources or with the opportunity of taking advantage of a body such as SHAD would unhesitatingly provide the applicant with 24-hour live-in care. The court itself had grave misgivings as to whether five hours care per day plus nursing and meals on wheels could meet the applicant's needs consistently with the respondent authority's resources, particularly having regard to the 1994 assessment which expressly stated that the applicant required care through the night. On the admissible evidence, however, it was not possible to go so far as to say that the respondent authority must have taken leave of its senses in coming to the conclusion that it did.

4 Although there might be rare occasions in community care cases on which the court could be assisted by expert evidence, expert evidence on behalf of an applicant expressing the opinion that the respondent authority's decision was *Wednesbury* irrational was not admissible because it purported to answer the very question which it was for the court to answer. Such opinion was particularly objectionable in a case where, as here, an element of the decision involved the available resources of a local authority and competing needs, about which an expert could not claim to know as much as the local authority in question. Expert evidence – as well as judicial observations – are, however, relevant material which a local authority carrying out an assessment or re-assessment is required to take into account.

5 The respondent authority misdirected itself in law in the way that it differentiated in its 1997 assessment between the applicant's social, recreational and leisure needs for which it did not believe that it needed to provide and the applicant's personal care needs for which it recognised that it did need to make provision. Differentiation between such needs is not inherently objectionable but it was impermissible to carry out an assessment which put social, recreational and leisure needs to one side with an indication that details of a resource centre would be made available on request. The care package assessed ought to have been a multi-faceted package. In so stating, DSS guidance *The Care and Management Assessment: A Practitioners' Guide* (1991) para 16 reflects the true effect of the statutory scheme contained in Chronically Sick and Disabled Persons Act 1970 s2.

Cases referred to in judgment:

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223; [1947] 2 All ER 680; 45 LGR 635, CA.

R v Gloucestershire CC and Secretary of State for Health ex p Barry (1997) 1 CCLR 19; [1996] 4 All ER 421; [1996] COD 387; (1996) 93(33) LS Gaz 25; (1996) 140 SJLB 177; *Times*, 12 July; *Independent*, 10 July, CA.

R v Gloucestershire CC and Secretary of State for Health ex p Barry (1997) 1 CCLR 40; [1997] 2 All ER 1; [1997] 2 WLR 459, HL.

R v Hillingdon LBC ex p Puhlhofer [1986] AC 484; [1986] 2 WLR 259; (1986) 130 SJ 143; [1986] 1 All ER 467; (1986) 18 HLR 158; [1986] 1 FLR 22; (1986) 16 Fam Law 218; (1986) 136 NLJ 140; (1986) 83 LS Gaz 785, HL.

R v Islington LBC ex p Rixon (Jonathan) (1997) 1 CCLR 119; (1996) 32 BMLR 136; *Times*, 17 April, QBD.

R v Secretary of State for the Environment ex p Powis [1981] 1 WLR 584; (1980) 125 SJ 324; [1981] 1 All ER 788; (1980) 79 LGR 318; (1980) 258 EG 57; [1981] JPL 270; (1981) 42 P&CR 73, CA.

R v Westminster CC ex p Ermakov [1996] 2 All ER 302; (1996) 28 HLR 819; [1996] 2 FCR 208; (1996) 8 Admin LR 389; (1996) 160 JP Rep 814; [1996] COD 391; (1996) 140 SJLB 23; *Times*, 20 November, CA.

R v Governors of the Bishop Challoner Roman Catholic School ex p Choudhary; Same v Same ex p Purkayastha; sub nom *Re C and P* (1992) 90 LGR 103; [1992] 1 FLR 413; [1992] Fam Law 200; [1992] COD 199; [1992] LS Gaz, 8 January, 33; (1991) 135 SJLB 197; [1992] COD 29; (1991) *Times*, 7 November; *Independent*, 7 November; *Guardian*, 13 November, CA.

Short v Poole Corporation [1926] Ch 66.

Legislation/guidance referred to in judgment:

Chronically Sick and Disabled Persons Act 1970 s2 – Disabled Persons (Services, Consultation and Representation) Act 1986 ss4 and 16 – Local Authority Social Services Act 1970 s7 – National Assistance Act 1948 s29 – National Health Service and Community Care Act 1990 ss46 and 47 – *Care Management and Assessment: A Practitioners' Guide* (HMSO, 1991) (The Practice Guidance) – *Community Care in the Next Decade and Beyond* (LASSA guidance, November 1990) (The Policy Guidance) – *The Laming Letter* (CI(92)34; 14 December 1992).

This case also reported at:

Not elsewhere reported.

Representation

M Beloff QC and D Wolfe (instructed by David Levene & Co) appeared on behalf of the applicant.

A Underwood and J Presland (instructed by Borough Solicitors, Haringey Council) appeared on behalf of the respondent.

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Judgment

MR HENDERSON QC (SITTING AS A DEPUTY JUDGE): The Applicant suffers from and is seriously disabled by multiple sclerosis. The Respondent is his local authority. This case concerns the extent of the Respondent's duty to the Applicant and its reassessment of its responsibilities towards him.

When this matter first came before Popplewell J on 28th February 1997, the Applicant was seeking leave to impugn a decision or decisions of the Respondent taken in early 1997. By a letter of 24th January Mr Crowe, a care manager of the

Respondent, said that the Housing and Social Services Department would cease to provide care for the Applicant with effect from 24th January 1997. By a letter of 29th January 1997 the team manager of the department stated that the Respondent would meet the cost of the Applicant's care for one week to 2nd February 1997 but that thenceforth the Applicant would be responsible for organising his own care services and any costs incurred. By a letter of 5th February 1997 the Commissioning Manager of the same department extended the Respondent's funding until 14th February 1997. A letter of 13th February 1997 from the Applicant's solicitors reported that the Applicant was advised that in certain circumstances he would receive 3 hours per day of care (shortly afterwards extended to 3½ hours per day) arranged by the Respondent instead of the 24 hours per day that he had been receiving since about April 1994 through funding supplied by the Respondent to SHAD (Supported Housing and Disability, a local charitable organisation). It is not necessary or appropriate to consider the circumstances in which there came to be a parting of the ways between SHAD and the Applicant. Nor is it necessary to rule upon the lawfulness or otherwise of the Respondent's decisions which were then impugned, because that challenge has fallen away and been superseded in the following circumstances.

On 28th February 1997, the Applicant by his Counsel, undertook to provide to the Respondent such information as he wished to provide within 14 days. The Respondent undertook to carry out a full reassessment of the Applicant's care needs pursuant to its full assessment procedures as set out in its Community Charter with full involvement of the Applicant, his family and carers. It also agreed to pay the Applicant's care costs up to £75 per day until 7 days after the re-assessment, unless the Applicant indicated a wish to challenge the re-assessment, in which event the funding was to continue on terms. Upon those undertakings, Popplewell J adjourned the application for judicial review generally.

The challenge which is now before the Court is to that reassessment by the Respondent of the Applicant's needs imparted by a letter of 11th April 1997 from the Respondent to the Applicant. Because the reasonableness of that decision is now under challenge by leave of Popplewell J granted on 19th May 1997 I must set out the whole of that letter:

Dear Mr Norton,
I am writing to inform you of the outcome of this department's recent assessment of your personal care needs.

Assessed Need
The assessment concluded that you will require assistance with the following tasks:

(a) Personal care including getting into and out of bed, washing/bathing, dressing/undressing, cleaning teeth, washing hair and toileting.
(b) Preparation of meals, including making breakfast and light snacks, washing dishes/putting dishes away.
(c) Shopping, laundry and light cleaning, including food shopping (local), collection of benefits/pension, laundry/ironing/putting away, and light domestic cleaning (i.e. hoovering, general dusting, cleaning bath/shower/work surface).

Assessed Care Plan
In order to ensure that your personal care needs (as listed above) can be met adequately and safety (sic), this department has taken account of your regular daily routine, consulting with you and your present carer, as well as considering

A *several written statements/documents supplied by you. As a result of this process, I can confirm the following care plan.*

Monday–Sunday (7 days per week)

B **8 am–10 am** *Assistance with getting out of bed, toileting, washing/bathing/shower, cleaning teeth, dressing, preparation of breakfast and carrying out some domestic tasks (e.g. light cleaning, changing bed linen, or laundry etc).*

12 noon–1 pm *Assistance with toileting, preparation snack/evening meal, some domestic tasks as required.*

C *Meals-on-Wheels to be delivered daily.*

8 pm–10 pm *Assistance with getting undressed, toileting, washing, getting into bed.*

Daily Total 5 hrs + provision of Meals-on-Wheels.

D **Weekly Total 35 hrs**

N.B. *This care plan does not include any community nursing service (ie District Nurse). This department is therefore not responsible for the provision of domiciliary nursing care (e.g. bowel evacuations, administering of suppositories, injections etc).*

E *I understand that the above care plan has already been discussed with you during a meeting at your home on 27th March with Naveed Bokhari (Senior Practitioner) and Mark Crowe (Care Manager) and that you are not entirely happy with the proposals.*

F Indeed I am aware that you are insisting on the provision of a '24 hr' care package ~~or 'live-in' option, which would not only meet your personal care~~ needs, but also your social, recreational ~~and leisure needs.~~

Unfortunately, however, local authority departments are not always in a position to meet or address all the demands made of them, and are therefore, forced to make decisions based upon prioritising need and working within existing resources.

G The care plan outlined in this letter, provides for your basic personal care needs. ~~In relation to your social/recreational/leisure needs, identified by you~~ during the assessment process, I would be happy to ~~provide you with details of~~ the Winkfield Road Resource ~~Centre.~~

H *I would envisage implementing your care package within the next 14 days with the service being provided by one of our accredited care agencies. However if you do not wish to accept the care service or you want to propose an alternative arrangement for meeting your care needs within existing resource limitations (ie £240 p.w.), I would urge you to take the opportunity to discuss this further with Naveed and Mark, who will visit your (sic) again shortly.*

I *Yours sincerely,*
Anne Fraser
Team Manager – Physical Disabilities

(The underlining is mine for ease of reference.)

J In addition to the challenge to the rationality of the decision enshrined in that letter, the Applicant contends that the Respondent misdirected itself in law in drawing a distinction between 'personal care needs' and 'social, recreational and leisure needs'. A further issue which arose concerned the admissibility and probative quality of affidavit evidence. A little more background is necessary to permit an understanding of the latter issue. The supplementary background is also

K required for a proper consideration of the *Wednesbury* challenge.

By a letter of 19th February 1997 from the Respondent to the Applicant's solicitors the Applicant was provided, apparently for the first time, with what was described as a Care Plan of March 1994 which resulted from 'a comprehensive assessment during the early part of 1994'. The document is set out in 5 columns, the first of which is headed 'identified needs in priority order'. The second column is headed 'resources needed'; the third 'service provider if known'. The fourth is irrelevant to this case and the fifth column permitted costings to be identified.

The entries in the first column are not wholly apt to its title in that they conflate needs with the resources to meet those needs. Nor do the lines in the second column correlate with the lines in the first column. The latter provides:

> *Assistance with dressing, washing, cooking, shopping, laundry, housework, mobility inc personal care through night. Safe + sound. Discuss bath aids, transfers to/from car, contact system with volunteers etc.*

'Safe + sound' refers to an electrical alarm call by which the Applicant can summon help. It is plain that that entry and the subsequent entries in column 1 relate more to the means of meeting the Applicant's needs than the identification of those needs. Under the column 'resources needed' only 2 entries are to be found, namely '24 hour carer' and 'O/T' (i.e. occupational therapy). The service provider is identified as SHAD and an occupational therapist is also identified. The cost was put at £240 per week.

It is common ground that from early 1994 until late 1996 the Applicant was in receipt of 24-hour care and that this was provided by live-in volunteers provided by SHAD funded by £240 per week from the Respondent. It is also common ground 'that there is no suggestion that Mr Norton's condition had improved, or that his care needs have decreased since 1994' (per the first Affidavit of Mr Crowe sworn on 19th May 1997 paragraph 3).

The Applicant sets great store by that care plan. He prays it in aid in his challenge to the reasonableness of the latest reassessment. Simply stated, he contends that this was a valid assessment which properly recognised that the Applicant needed 24-hour care per day, that this was rightly set out in a document reflecting both national and local guidance and the Applicant's needs never having reduced, it could not now rationally be said that the Applicant could be cared for by a mere 5 hours per day. Particular attention is paid to the stated need for personal care through the night which obviously could not be covered by 5 hours per day care. Mr Beloff QC on behalf of the Applicant and Mr Underwood on behalf of the Respondent are agreed upon the proposition in the letter which has come to be known as the Laming letter (see *R -v- Gloucester County Council ex parte Barry* (1997) 1 CCLR 19; [1996] 4 All ER 421 at page 430 in the judgment of Hirst LJ) that:

> *Authorities must satisfy themselves, before any reduction in service provision takes place that the user does not have a continuing need for it.*

Undaunted by the acceptance of the legal position as stated by Mr Laming, Mr Underwood, in my judgment rightly, states that there is an implicit assumption that the existing provision flows from a pre-existing assessment of need and that where the provision was originally more than was necessary, it would not logically apply. He therefore seeks to rely upon evidence of Mr Lawrence who was directly involved in the 1994 assessment to show that the original assessed need did not call for 24-hour care and that the provision was made because it was fortuitously available, desirable and able to be afforded. To that, Mr Beloff QC rightly responds

that the Care Plan had and has a central and formal role enshrining and establishing the needs of persons such as the Applicant and the resources to meet those needs. He submits that the document is to be considered and construed objectively and is not susceptible to subsequent re-explanation by Mr Lawrence or by the Respondent. By analogy he relies upon *Re C & P* [1992] COD 29 and *R -v- Westminster City Council ex parte Ermakov* [1996] 2 All ER 302. He invites me to refuse to accept ex post facto explanation of the 1994 decision. Mr Underwood then seeks to rebut that stance and relies upon *R -v- The Secretary of State for the Environment ex parte Powis* [1981] 1 WLR 584 at 595G to the effect that the Court can receive evidence to show what material was before the person whose decision is impugned and that Mr Lawrence's evidence is admissible and probative in this respect. He says that the 1994 decision is not challenged and that the Respondent is entitled to adduce evidence as to the true effect of the 1994 assessment as a matter which was obviously relevant to the 1997 re-assessment.

The 1994 decision is not under challenge in these proceedings. While it is a necessary part of the background properly to be taken into account, its lawfulness or unlawfulness and its substance or lack of substance could not determine the 1997 reassessment. The 1997 reassessment had to be decided on its own merits and although it was necessary to give appropriate weight to the 1994 decision there could have been no estoppel or fetter upon the Respondent in coming in 1997 to what it considered to be the correct evaluation of the Applicant's present needs consistent with the resources required to meet those needs. Thus *Re C & P* and *R -v- Westminster City Council ex parte Ermakov* are both plainly distinguishable. Both cases were concerned with evidence going to the decision which was under challenge and in the latter case there was a statutory duty to give reasons. Furthermore Hutchison LJ emphasised in the latter case at page 316h, 'All I have said is with reference only to the provisions of Section 64 of the 1985 Act.' I am concerned with a materially different set of circumstances although I would accept wholeheartedly the general principle that in judicial review there is a need for very considerable caution before the admission of affidavit evidence which purports to supplement, amend or impugn a document enshrining a decision which on its face bears no mark of invalidity. I come later to a consideration of inadmissible evidence put before me in this case which would seek to transform the proceedings from judicial review to ordinary civil litigation and indeed to go beyond the bounds of permissible evidence even in that regard.

Mr Lawrence, in his affidavit of 2nd June 1997, deposes that he prepared the Care Plan of 1994 and says:

> *Having identified Mr Norton's needs in order of priority as set out in the first column, I made no attempt to itemise how those needs should be met. This was because I knew 24-hour live-in care was going to be available from SHAD. This is apparent from the second and third columns and from the service agreement at page 222 which makes no attempt to identify the allocation of time to tasks or the resources necessary to meet Mr Norton's specific needs . . . at no time did I ever determine that the Applicant here required 24-hour care. I do not think he did. SHAD provide volunteers who can be enormously flexible, and I was in no doubt they could meet his assessed needs.*

Is that evidence properly admissible? It is plainly probative in relation to the extent of the Applicant's needs in 1997 because it casts the 1994 Care Plan in a materially different light. In effect, it says that the 'resources needed' in 1994 were not for 24 hours per day care and occupational therapy but for some unspecified

lesser provision and that therefore the Care Plan should not be taken fully at face value. In turn, this must devalue the 1994 Care Plan as a compelling yardstick for the 1997 re-assessment. I do not need to decide whether Mr Lawrence's evidence would be admissible if the 1994 Plan were under challenge but it might plainly be arguable that because of the formality and importance of documents such as care plans the Respondent should not be able to resile from such a plan when it is under challenge by adducing contradictory evidence. On the other hand, when some 3 years later different people have to decide upon the needs of the Applicant and of the resources which should be provided to meet those needs lawful decision-making should require that they inform themselves of all relevant material, including, if it be the case, the fact that 24-hour care was provided because it was available and desirable at reasonably modest cost to the Respondent rather than because it was needed in and after 1994. It could not be right that an authority such as the Respondent should be bound to put such matters out of its mind or be bound to give undue weight to the 1994 decision. This would be flying in the face of the duty of the Respondent:

> *For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said and often is said, to be acting 'unreasonably' (per* Lord Greene MR in *Associated Provincial Picture Houses Limited -v- Wednesbury Corporation [1948] 1 KB 223 at page 229).*

The Respondent had to draw its attention to the 1994 evaluation and care plan and to give them the weight that they truly deserved. This Court, when asked to review the lawfulness of the 1997 decision and in particular to review its reasonableness, is duty bound to admit Mr Lawrence's evidence which both sets the context for the 1997 decision and makes a material contribution to the reliability or otherwise of the decision that a greatly reduced number of hours of care should meet the needs of this Applicant.

The reasonableness or rationality of a decision can only be judged in the context of the statutory framework and of the particular facts of the case. Before turning to the statutory framework it is necessary to emphasise that it is only in extreme circumstances that a Court will conclude that a decision is 'so unreasonable that no reasonable authority could ever have come to it'. (per Lord Greene MR at page 234). Warrington LJ in *Short -v- Poole Corporation* [1926] Ch 66 at 90/91 gave the example of the red-haired teacher dismissed because she had red hair. More apt to the present circumstances I have this week encountered a case in which a local authority applying its medical points system to housing need on a scale of 0–250 awarded 0 points to a lady with possibly recurrent cancer and gross breathing difficulty, of whom two consultants at London Teaching Hospitals said in categorical terms that were she to have to climb stairs this would endanger her life. In such circumstances a Court can properly but most exceptionally conclude that the authority must have taken leave of its senses. I am reminded of Lord Brightman's caution in *R -v- Hillingdon Borough Council ex parte Puhlhofer* [1986] AC 484 at page 518d, where he says:

> *Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the Court to leave the decision of that fact to the public body to whom Parliament has entrusted the*

A *decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.*

In a case such as this, where the relevant facts include qualitative judgments of an individual's needs and the availability of resources to meet those needs and the needs of others, it must be especially difficult to establish perversity.

B We can now see from the recent speeches of the House of Lords in *R -v- Gloucester County Council ex parte Barry* (1997) 1 CCLR 40; [1997] 2 WLR 459 that not only do the needs of particular applicants have to be considered under the statutory framework, but also a local authority's resources are to be taken into account when assessing or re-assessing the applicant's needs. The burden upon

C an applicant seeking to establish the irrationality or unreasonableness in law of a decision in that context is to persuade the Court to step into the arena and to conclude that it is sufficiently informed of all relevant information such that no reasonable authority could have come to the conclusion that was in fact reached. Despite Mr Beloff's formidable advocacy, I am not persuaded that he has

D surmounted those obstacles.

The Statutory Framework

Section 29(1) of the National Assistance Act 1948, as amended, provides that:

E *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 . . . substantially and permanently handicapped by illness . . .*

F It is common ground that the applicant who suffers from Multiple Sclerosis is a person to whom that Section applies.

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

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

G *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 for that person in obtaining,

H *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 *(g) the provision of meals for that person whether in his home or elsewhere;*

. . .

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

J *guidance of 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.*

Section 7(1) of the Local Authority Social Services Act 1970 provides that:

Local authorities shall, in the exercise of their social services functions, including

K *the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State.*

The Secretary of State has duly issued policy guidance to local authorities on care management including the assessment and meeting of individual needs of adults for community care services. That guidance states as respects assessment:

3.16 The individual service user and normally, with his or her agreement, any carers should be involved throughout the assessment and care management process. They should feel that the process is aimed at meeting their wishes. Where a user is unable to participate actively it is even more important that he or she should be helped to understand what is involved and the intended outcome.

. . .

3.18 . . . local authorities should publish readily accessible information about their care services. . . . It should include the authority's criteria for determining when services should be provided and the assessment procedures, showing how and where to apply for an assessment and giving information about how to make representations and complaints.

3.19 The assessment and care management process should take into account particular risk factors for service users, carers and the community generally; abilities and attitudes; health (especially remediable conditions or chronic conditions requiring continuing health care) and accommodation and social support needs . . . .

As respects care plans the guidance states:

3.24 Once needs have been assessed, the services to be provided or arranged and the objectives of any intervention shall be agreed in the form of a care plan. The objective of ensuring that service provision should, as far as possible, preserve or restore normal living implies the following order of preference in constructing care packages which may include health provision, both primary and specialist, housing provision and social services provision:

- *Support for the user in his or her own home including day and domiciliary care, respite care, provision of disability equipment and adaptations to accommodation as necessary;*

. . .

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

The mandatory requirement that local authorities should act under the general guidance of the Secretary of State requires them 'to follow the path charted by the Secretary of State's guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course,' per Sedley J in *R -v- London Borough of Islington ex parte Rixon* (1998) 1 CCLR 119. Although the letter from Mr Laming, the Chief Inspector of Social Services Inspectorate, to which I have already referred, does not fall within Section 7 of the Local Authority

Social Services Act 1970, it provides persuasive authority as to how the legislation should be carried into effect. It states:

> *The care plans of all users should be subject to regular review. For frail people in the community, frequent reviews and adjustments of their care plans are likely to be needed. Before any changes in services are made for existing users, they should be re-assessed. In those cases, where assessments have been undertaken, particularly under section 2(1) of the [Chronically Sick and Disabled Persons Act 1970] authorities must satisfy themselves, before any reduction in service provision takes place, that the user does not have a continuing need for it. So long as there is a continuing need, a service must be provided although, following review, it is possible that an assessed need might be met in a different way . . .*

However, insofar as that letter says that continuing needs must be met even if an authority's resources have changed for the worse, the decision of the House of Lords in *R -v- Gloucester County Council ex parte Barry* (1997) 1 CCLR 40; [1997] 2 WLR 459 must be recognised.

Section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986 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 16 of that Act provides that a 'disabled person' is 'in the case of a person aged 18 or over, a person to whom section 29 of the 1948 Act applies'. Section 46(3) of the National Health Service and Community Care Act 1990 provides that 'community care services' are:

> *. . . 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; . . .*

Section 29 of the 1948 Act is within Part III of the 1948 Act.

Finally, Section 47 of the National Health Service and Community Care Act 1990 provides that except in cases of urgency:

> *(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 the local authority that he is a disabled person, the authority –*
> *(a) shall proceed to make such a decision as to the service 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.

We have the benefit of the speeches in *R -v- Gloucester County Council ex parte Barry* (1997) 1 CCLR 40; [1997] 2 WLR 459 in understanding how the statutory framework is to operate. In substance, by a majority of 3 to 2, it was decided that in assessing a disabled Applicant's need for service and the degree of that Applicant's need but before discharging the duty to make arrangements to meet that need, a local authority has to balance needs, benefits, costs and resources applying standards set by its social services committee in the context of current standards of living. Resources must be borne in mind in assessing needs. The right to have the arrangements made inures to the individual Applicant's benefit when the local authority is satisfied that arrangements are necessary to meet his or her needs. Once it is recognised that criteria have to be devised for assessing the necessity required by the statutory provision and that those criteria include costs and resources, what is considered necessary to be met must be met. To that extent no unmet need will exist, albeit that in other areas with greater resources or fewer competing needs such needs might be met.

The decision letter of 11th April 1997 makes it plain beyond argument that the Respondent took costs and resources into account in reducing the amount of care to a weekly total of 35 hours, exclusive of domiciliary nursing care and meals on wheels:

Unfortunately, however, local authority departments are not always in a position to meet or address all the demands made of them, and are therefore, forced to make decisions based upon prioritising need and working within existing resources.

Mr Crowe's Affidavit at paragraphs 7 and 8 expands upon those words:

7. There has been of necessity a decision that his needs must be met in a different way to previously. I understand that the Applicant is not happy with that decision and would like us to provide around the clock live-in care. The authority's aim has to be to secure the most cost effective package of services that meets the service user's care needs, taking account of the user's and carer's own preferences. While his wishes are enormously important, the authority is rarely able to make a determination on the basis of a client's wishes alone. The proposed level of 5 hours daily objectively meets those aspects of the Applicant's personal care needs, which are the authority's responsibility. The authority also provides meals on wheels and an emergency contact alarm. He also has assistance from the Health Services.

8. Considering the Applicant's needs objectively in the light of my professional experience, and that of my department, and for the reasons set out in Ms Fraser's letter, I am confident that the assessment of his personal care needs is a proper one and that the 5 hours proposed will meet them. As a matter of course, the new care arrangements will be subject to continuing review. But to make unjustified additional arrangements would not be a responsible use of the authority's resources.

Against that evidence the Applicant invites me to conclude that the Respondent could not rationally have come to that conclusion primarily because of the weight of evidence which was produced to the Respondent, the quality of that evidence and its unanimity that 24 hour per day care was and is required to meet his needs.

I have reviewed the totality of that evidence, including those parts which I consider to be wholly inadmissible and therefore disregard, but I am not per-

A suaded that the decision is one which the Respondent could not properly have reached, save in one respect to which I come last. The cogent evidence provided to the Respondent before it came to its decision included letters from the Applicant's General Practitioner, his carers, support workers from SHAD, his family, his friends, including a friend going back to his University days at Oxford, and those
B concerned with other activities such as bridge and swimming. The picture which they present strongly suggests that an authority with unlimited resources or with the opportunity of taking advantage of a body such as SHAD would unhesitatingly provide the Applicant with the amount of care which he has previously enjoyed. To that evidence, the Applicant now seeks to add the evidence of Lesley
C Collins who is instructed on the Applicant's behalf in the following terms:

> *(1) To report on the assessment findings of an occupational therapist in order to detail Mr Norton's current level of function and his resulting care needs including the level of support he requires at this time.*
>
> D *(2) To give an opinion regarding Haringey Council's decision to provide 5 hours support per day and whether this decision is reasonable and within the spectrum of decisions of a Local Authority properly carrying out their Community Care Duties.*

E It is not permissible to adduce, either by way of expert evidence or at all, evidence which purports to answer the question which it is for the Court to answer. Whether or not the Respondent's decision was within the realms of reasonableness in point of law is for the Court and the Court alone to decide. True it is that the Court may in certain rare circumstances be assisted by knowing ex post facto
F how an expert in the field would have assessed the needs of a particular Applicant (eg a case where deficient enquiry led to ignorance of material facts or opinion and the evidence being proffered goes to the issue of what would have been discovered had due enquiry been made) but it can never be permissible for an expert either to express an opinion that a local authority's decision was or was not
G reasonable, nor to say whether such a decision fell within or outwith the spectrum of decisions of a local authority properly carrying out its community care duties. The opinion is the more objectionable in this case because an occupational therapist cannot claim to know as much as the Respondent about its available resources and competing needs, nor perhaps about Haringey's local standards. Furthermore, it is very doubtful whether, even if the opinion were
H appropriately limited so that it did not purport to usurp the Court's function, it would be admissible consistent with *R -v- The Secretary of State for Environment ex parte Powis.*

Before turning finally to the alleged misdirection in law, I must add that I have
I grave misgivings as to whether 5 hours per day of care plus meals on wheels and domiciliary nursing can meet the Applicant's needs consistent with the Respondent's resources. I would draw particular attention to the 1994 Care Plan which expressly stated that care through the night was identified as a need of the Applicant and there is much supporting evidence from people who have been involved
J with the care of the Applicant which points to a need for more than 5 hours per day of care. However, to go so far as to say that the Respondent must have taken leave of its senses in coming to the conclusion that it did is not justifiable on the admissible evidence. That evidence is limited in its ambit and this in turn makes the judgment more difficult.

K I consider that the Respondent misdirected itself in law. Reading the underlined sentences of the decision letter in context, the Respondent differentiated

between the Applicant's social, recreational and leisure needs for which it did not believe that it needed to provide from the Applicant's personal care needs for which it recognised that it did need to provide. While the differentiation itself was not objectionable in point of law, because the Act of 1970 itemises such matters separately, it was impermissible to carry out the reassessment by putting social, recreation and leisure needs on one side and saying that 'I would be happy to provide you with details of the Winkfield Road Resource Centre.' The care package which should have been assessed by the Respondent had to be a multi-faceted package. This Applicant has been able to overcome or at least to live with some of the most awful characteristics of his illness by the social intercourse achieved in recreational facilities such as the playing of bridge, swimming etc. A reassessed care package should have comprehended such matters and should not have discriminated in the manner that it did. Mr Underwood says that the discrimination is only between the arrangements for needs and not between the needs themselves. That is not how I read the letter, giving due weight to the whole of the letter and all the other evidence.

A Care Management and Assessment Practitioner's Guide promulgated by the Department of Health and Social Services Inspectorate states:

> *Need is a multi-faceted concept which, for the purpose of this guidance, is sub-divided into six broad categories, each of which should be covered in a comprehensive assessment of need:*
> - *Personal/social care*
> - *Health care*
> - *Accommodation*
> - *Finance*
> - *Education/employment/leisure*
> - *Transport/access.*

This publication does not appear to fall within Section 7 of the Local Authority Social Services Act 1970 and in any event is not proper material for construction of the critical provision (see the speech of Lord Clyde at page 476(h) in *R -v- Gloucestershire County Council ex parte Barry*) but it reflects what I consider to be the true effect of the statutory scheme. It is impermissible, upon a proper construction of section 2 of the Chronically Sick and Disabled Persons Act 1970, when assessing or reassessing a person such as the Applicant to fail to treat what Lord Justice Hirst helpfully called the 'service list' as a package. That is what the Respondent did and I therefore conclude that they must now reconsider the Applicant's needs according to law. In any such reassessment, they will have to take into account all the available material which now includes an expert's report and such limited observations as I have thought it necessary to make in the course of any Judgment.