R v Sutton LBC ex p Tucker

Queen's Bench Division
Hidden J
29 October 1996

It was unlawful for the local authority to make a series of short-term provision decisions while the disabled person remained in hospital for two years after she was ready to be discharged, when at the same time the local authority had not prepared a care plan in respect of its long-term obligations, including a service provision decision to enable the disabled person's discharge.

Facts

The applicant's daughter was severely disabled and experienced substantial communication difficulties. The respondent authority completed an assessment of her care needs on 13 April 1994, while she was in NHS trust premises. The assessment included an assessment by SENSE, the view of which was that the daughter needed local, non-institutional accommodation shared with other similarly disabled persons with support provided by SENSE. She was fit to be discharged from the NHS premises by July 1994, but was not discharged. Although the respondent authority had initially agreed with the SENSE proposals, by February 1996 it had rejected them and had started to investigate using one of two non-specialist care homes, or SENSE-type accommodation that had already been established in other parts of the country. Both SENSE and a number of medical practitioners emphasised that the daughter needed local, non-institutional accommodation shared with other similarly disabled persons, supported by SENSE, and that although such accommodation did not exist in the respondent authority's area, it could be created with little difficulty. The respondent authority's view was that there were no other clients with similar needs and funding agreed in its area and that the SENSE proposals entailed unacceptable practical difficulties and cost, given that there was not as yet any SENSE-type accommodation in its area. The respondent authority and the applicant were unable to reach agreement over long-term service provision for the applicant's daughter. The respondent authority accordingly made a series of decisions relating to short-term service provision to enable the applicant and SENSE, on the one hand, and the respondent, on the other, to put forward proposals for agreement, while the daughter remained in NHS premises.

Held:

1 The respondent authority had acted unlawfully in breach of National Health Service and Community Care Act 1990 (NHSCCA) s47(1)(b) in having no effective option available for the applicant's daughter's discharge from hospital more than two years after she was fit to leave. It was not the case that there were no effective options available, but rather that the respondent authority had provisionally excluded such options (ie, local SENSE-type accommodation) from consideration. That involved a clear failure to follow the Policy Guidance paras 3.24 and 3.41, which stressed the importance of arranging for the discharge from hospital of persons whose care could be more appropriately provided elsewhere, and the desirability of restoring normal living. It was not lawful to use an undoubted discretion to make short-term and interim decisions in relation to the care of the daughter to replace the duty to make a service provision decision as to her long-term future.

2 The respondent authority had acted unlawfully in failing to provide a care plan in accordance with the Policy Guidance para 3.25, stating overall objectives in terms of long-term obligations (both carer's obligations and service provider's obligations); showing the criteria for the measurement of such objectives, costings, long-term options, residential care options and points of disagreement between the applicant and the respondent; identifying unmet need and containing a further review date*: R v Islington LBC ex p Rixon* (1998) 1 CCLR 119, QBD, applied.

3 Relief would not be refused on the ground that the applicant had an alternative remedy of complaint under Local Authority Social Services Act 1970 (LASSA) s7B or the Secretary of State's default powers under LASSA 1970 s7D. The reason was that there was a discrete point of law to be decided as to whether or not the respondent authority had acted unlawfully in failing to make a service provision decision under NHSCCA 1990 s47(1)(b) in accordance with statutory guidance issued under LASSA 1970 s7 and non-statutory guidance. Further, if the complaints procedure had been adopted, the applicant as a non-legally aided person would have been forced to argue points of law before a non-qualified body, which would not have been convenient, expeditious or effective.

4 The refusal of the applicant to agree to proposals put forward by the respondent authority for her daughter's long-term care was not unreasonable in that it was consistent with almost all of the medical evidence, which was that the proposals did not sufficiently meet her daughter's needs, and which in the opinion of the court was correct. Had it been necessary, the court would have been prepared to find that the respondent authority's actions had been *Wednesbury* unreasonable.

Cases referred to in judgment:

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

R v Barnet LBC ex p B [1994] ELR 357; [1994] 1 FLR 592; [1994] 2 FCR 781; [1994] Fam Law 185; (1993) *Independent*, 17 November, QBD.

R v Brent LBC ex p Sawyers; sub nom *R v Brent LBC ex p S* [1994] 1 FLR 203; [1994] 2 FCR 996; [1994] Fam Law 249, CA.

R v Devon CC ex p Baker and Johns; R v Durham CC ex p Curtis and Broxon [1995] 1 All ER 73; (1994) 6 Admin LR 113; 91 LGR 479; [1993] COD 253; (1993) *Times*, 21 January; (1993) *Independent*, 22 February, CA.

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

R v Islington LBC ex p Rixon (1998) CCLR 119; [1997] ELR 66; (1996) 32 BMLR 136; (1996) *Times*, 17 April, QBD.

R v Kingston-upon-Thames Royal LBC ex p T; sub nom *R v Kingston-upon-Thames Royal LBC ex p X* [1994] 1 FLR 798; [1994] 1 FCR 232; [1994] Fam Law 375; [1993] COD 470, Fam Div.

Legislation/guidance referred to in judgment:

Chronically Sick and Disabled Persons Act 1970 s2 – Disabled Persons (Services, Consultation and Representation) Act 1986 s4 – Local Authority Social Services Act 1970 ss7 to 7D – National Assistance Act 1948 Part III and ss21, 26, 29 and 36 – National Health Service and Community Care Act 1990 ss46 and 47 – Complaints Procedure Directions 1990 – Secretary of State's Approvals and Directions under

s21(1) of the National Assistance Act 1948 at Appendix 1 to LAC(93)10 – *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).

This case also reported at:
Not elsewhere reported.

Representation
R Gordon QC (instructed by Scott-Moncrieff, Harbour & Sinclair) appeared on behalf of the applicant.
P Eccles QC (instructed by Sutton Legal Services, Surrey) appeared on behalf of the respondent.

Judgment
MR JUSTICE HIDDEN: This is an application on behalf of Therese Blackmore, who is the 32 year old daughter of her next friend Sylvia Tucker, who makes this application for judicial review. She is described by Dr Bird, a consultant psychiatrist, as having 'a learning disability, sensory impairments and consequent social and communication difficulties and a mixture of physical and mental health needs'. She has, in particular, profound bilateral deafness and fine congenital nystagmus and myopia. She communicates using a mixture of Makaton signing, idiosyncratic gesture and speech which has characteristics of those with profound deafness and may be intelligible to strangers. She also has a number of physical health problems.

She seeks various orders of Mandamus, in particular to compel the respondent London Borough of Sutton to make a service provision decision in respect of her and to provide a Care Plan according to law. She also seeks a declaration that the respondent Borough has acted and continues to act unlawfully in a number of ways and in particular by failing to make a service provision decision and/or Care Plan in respect of her.

On 24th November 1993 she was placed for assessment at 8 Farm Lane, Orchard Hill, premises operated by a National Health Service Trust. That assessment was completed by 13th April 1994. On 13th November 1995 she was transferred to 1A Farm Lane, again National Health Service premises. In early 1996 plans to change the nature of 1A Farm Lane into an emergency/respite unit were put into effect and on 18th March 1996 it received its first such patient. The only other date which needs to be referred to at this stage is July 1994, by which time it is accepted on all sides that the applicant was fit for discharge from her National Health Service environment.

It will be at once apparent that this application was heard at a time which was two years and three months later than the time when the applicant became fit for discharge from National Health Service care to community care, but that she has even now not yet been so discharged. That was, of course, the underlying thrust of complaint behind the grounds upon which this application is based.

The journey through the relevant legislation starts with sections 46 and 47 of the National Health Service and Community Care Act 1990 (NHSCCA). Section 46(3) defines 'Community Care Services' as 'services which a local authority may provide or arrange to be provided under any of the following provisions' and those provisions include Part III of the National Assistance Act 1948.

Section 47, which deals with assessment of needs of the community care services, provides that:

A *(1) Subject to subsections (5) and (6) below, where it appears to a local authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such services, the authority –*

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

B *(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.*

That is a key provision in this application. There is provision in section 47(3) for the intervention of the District Health Authority. Subsection (3) reads:

C *If at any time during the assessment of the needs of any person under subsection (1)(a) above, it appears to a local authority –*

(a) that there may be a need for the provision to that person by such District Health Authority as may be determined in accordance with regulations of any services under the National Health Service Act 1977, or . . .

D *[I need not read (b)]*

the local authority shall notify that District Health Authority or local housing authority and invite them to assist, to such extent as is reasonable in the circumstances, in the making of the assessment; and, in making their decision as to the provision of services needed for the person in question, the local authority shall

E *take into account any services which are likely to be made available for him by that District Health Authority or local housing authority.*

The relevant health authority in this case did take part in the assessment of the applicant.

F It will be seen at once from looking at section 47(1) that there is a twofold duty on the Local Authority first to carry out an assessment of needs and then to make a decision as to whether those needs call for the making of a service provision decision.

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

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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

H *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).

I This is clearly a reference to an additional assessment under the Chronically Sick and Disabled Persons Act 1970. Section 2 of this Act provides that where a Local Authority is satisfied that it is necessary in order to meet the needs of a person ordinarily resident in their area to make arrangements for those welfare services '. . . it shall be the duty of that authority to make those arrangements in exercise of their functions under the said section 29.' That is a reference to section

J 29 of the National Assistance Act 1948 which provides for welfare arrangements for, amongst others, the blind, deaf, dumb and crippled.

In addition to making welfare arrangements under the National Assistance Act 1948, section 21 of that Act places upon the Local Authority a duty to provide accommodation under section 21(1)(a), which reads:

K

[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 eighteen 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;. . .

(2) 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 subsection.

There is a further rather important duty placed on local authorities by section 7 of the Local Authority Social Services Act 1970 (LASSA) which enacts that:

(1) Local authorities shall, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State.

There is also a similar provision in relation to directions of the Secretary of State under section 7A and a complaints procedure under section 7B of the same Act.

Policy guidance issued under LASSA has been given in the form of a book entitled Community Care in the Next Decade and Beyond, and is clearly binding on local authorities. Paragraph 3.41 gives guidance which concludes with the sentence:

It is most undesirable that anyone should be admitted to or remain in hospital when their care could be more appropriately provided elsewhere.

That piece of guidance is of clear importance in this case, as is the guidance at para 3.24 which begins:

Once means 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 . . .

That order of preference is then given and it begins, most importantly, with support in the home and, only after a further four descending priorities, ends with the last item in the order of preference as 'long stay care in hospital'.

Mr Gordon for the applicant submits that by failing to make the service provision decision which should have followed the completion of their assessment in April 1994, the London Borough of Sutton has, contrary to the guidance binding on them, effectively consigned the applicant to long stay care in hospital contrary to the guidance given in paras 3.24 and 3.41.

By letter dated 9th June 1995, page 155, the respondent acknowledged that the applicant had been identified by the Secretary of State as a person for whom the Secretary of State may provide or arrange for the provision of services under the National Health Service and Community Care Act 1990. The letter acknowledged that:

Social Services have undertaken a comprehensive assessment of need completed on 13th April 1994.

The comprehensive assessment included an assessment carried out by SENSE Training and Advice Consultant. At page 157 the conclusion was set out:

A *As far as the residential placement is concerned Miss Blackmore's assessed needs indicate that she should remain local to her family and that the Resource needs to be a SENSE type placement.*

SENSE is the short name for the National Deaf, Blind and Rubella Association – an organisation clearly predominant in this field. By their letter of 25th May 1994 SENSE concluded that in line with Therese's preference and community care values they felt it would be detrimental to move her away from the Borough. The conclusion was that:

. . . after discussion with yourselves, meeting Therese and considering recent assessments we felt very strongly that it would not be in her best interest to move to a residential placement away from her community. I would therefore not be offering Therese a placement at SENSE Midlands.

This was a site that had been contemplated earlier but was, of course, too far away from the applicant's home environment.

In a document dated 21st August 1995 at page 179 which is entitled 'Assessing the needs of Therese Blackmore against the options that can meet those needs' Mr Pringle, the respondent's Senior Care Manager, set out to identify the care needs of Therese and to evaluate how the needs could be met by matching resources available in the community to meet those needs. He recommended that her 'continuing care needs are best met by a placement at 1A Farm Lane, this placement being a secure placement, whilst alternative resources continue to be investigated and evaluated'. It will be seen from this document that there was still no decision as to Therese's long term placement.

By the letter of 5th October 1995 at page 141 the respondent stated:

We consider that 1A Farm Lane is a medium term option which should be utilised while all other options are considered for their suitability and viability. The duration of this placement is governed by two factors:

1. *The placement continuing to meet the needs of Therese*
2. *The availability of a suitable alternative placement.*

Mr Gordon submits that three factors can be spelt out from the situation as at August 1995 and they are that:

(i) The SENSE two bedroom proposal would have met all the applicant's needs,

(ii) Local placement could always have been created by finding suitable housing stock, and

(iii) No residual placement could be made unless Mrs Tucker's consent was obtained.

In an affidavit dated 20th September 1996 Francis McCabe, the respondent's assistant director of housing social services, identified a small home in Sutton, Clifton Manor, as 'the best option for Therese', but accepted that it was against the wishes of Mrs Tucker. She said that the respondent was faced with three options:

The first option is to try to engage Mrs Tucker and progress this placement with Mrs Tucker's participation and support.

The second is to continue with this proposal without the participation of Mrs Tucker's, which we believe would lead the placement to break down, resulting in another change for Therese, which would not be in her best interests.

The third option is that Therese remains at 1a Farm Lane until another suit-

able placement is found. There is no evidence of any potentially appropriate placement opening in the area until York Road in 1998.

The respondent refers to this as 'the most realistic and appropriate option that has arisen in over two years'.

Mr Gordon submitted that it was common ground that a service provision decision had not been made for the applicant's accommodation despite the fact that Therese was still living in National Health Service managed accommodation which had now become an emergency respite care centre and which was never, even in its previous role, intended as more than an interim measure. Further, the respondent had rejected a number of SENSE proposals which would have met Therese's identified needs. He submitted that the case was therefore not one about the general discretion of a Local Authority to determine service provision, but was rather a case raising important issues relating to an authority's obligations in respect of a patient who has not yet been and cannot be discharged from National Health Service provision, solely because of the social services' refusal to meet identified needs by a mechanism itself identified as being appropriate to meet those needs. He submitted that the law requires the respondent to come to a service provision decision which will have the effect of enabling Therese to be discharged from hospital. The respondent's continuing failure to do so was *Wednesbury* irrational in that it was a breach of mandatory policy guidance and contrary to the philosophy underpinning community care. It was also *Wednesbury* irrelevant in that it ignored the SENSE proposals.

He submitted that in any service provision, priority must be given to enabling the service user to live in his own home. There was a requirement that nobody remain in hospital where his or her care could more appropriately be provided elsewhere. However, before her discharge could occur there must be a provision of essential community care services which must be agreed with the service user and carer under paragraph 3.44 of the Policy Guidance. This paragraph says that 'subject always to consumer choice patients should not leave hospital until the supply of at least essential community care services has been agreed with them, their carers and all authorities concerned'.

Mr Gordon's legal submissions were that section 47(1) of the NHSCCA 1990 provided for a two stage approach to the assessment of needs for community care services in that there had to be an assessment and then a decision as to provision. He said that section 21 of the National Assistance Act 1948 laid on the Local Authority the duty to provide accommodation. The directions under section 21(1) [Appendix 1 to LAC(93)10], direction 2, in relation to residential accommodation for persons in need of care and attention, read as follows:

2. – (1) The Secretary of State hereby –

(a) approves the making by local authorities of arrangements under section 21(1)(a) of the Act in relation to persons with no settled residence and, to such extent as the authority may consider desirable, in relation to persons who are ordinarily resident in the area of another local authority, with the consent of that other authority; and

(b) directs local authorities to make arrangements under section 21(1)(a) of the Act in relation to persons who are ordinarily resident in their area and other persons who are in urgent need thereof,

to provide residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstance are in need of care and attention not otherwise available to them.

A Mr Gordon relied on an unreported judgment in the case of *R v London Borough of Islington ex parte Rixon*, a decision of Sedley J of 15th March 1996 [now reported at (1998) 1 CCLR 119]. He took me to page 12 [(1998) 1 CCLR 119 at p125K–126A] of the judgment where it was said that:

B *A second source of considerations which manifestly must be taken into account in coming to a decision is the practice guidance issued by the Department of Health.*

He then took me to page 19 [(1998) 1 CCLR 119 at p129B–D] where the learned judge said:

C *The practice guidance to which I have referred counsels against trimming the assessment of need to fit the available provision. For reasons I have given, this properly reflects the law. The guidance then counsels the inclusion of specific objectives for each relevant service provider and an agreement with each service provider as to how each service is to be delivered and measured. It also counsels:*

D *'Having completed the care plan, the practitioner shall identify any assessed need which it has not been possible to address and for what reason. This information should be fed back for service planning and quality assurance. It needs to be recorded and collated in a systematic way.'*

E The learned judge goes on [(1998) 1 CCLR 119 at p129D–G]:

Its model outline of a care plan proposes the following headings:
The overall objectives
The specific objectives of
– *users*
F – *carers*
– *service providers*
The criteria for measuring the achievement of these objectives
The services to be provided by which personnel/agency
The cost to the user and the contributing agencies
G *The other options considered*
Any point of difference between the user, carer, care planning practitioner or other agency
Any unmet needs with reasons – to be separately notified to the service planning system
H *The named person(s) responsible for implementing, monitoring and reviewing the care plan*
The date of the first planned review.

The learned judge then goes on to consider what counsel has submitted is the deficiency in the present care plan under various headings.
I At page 23 [(1998) 1 CCLR 119 at p130K] Sedley J goes on to say:

In the absence of any such considered decision, the deviation from the statutory guidance is in my judgment a breach of the law . . .

J Finally at page 24 [(1998) 1 CCLR 119 at p131D–E] Mr Gordon took me to the judge's words when he said:

The care plan also fails at a number of points to comply with the practice guidance on, for example, the contents of a care plan, the specification of its objectives, the achievement of agreement on implementation on all those involved,
K *leeway for contingencies and the identification and feeding back of assessed but still unmet need. While such guidance lacks the status accorded by section 7 of*

[Local Authority Social Services Act 1970], it is, as I have said, something to which regard must be had in carrying out the statutory functions. While the occasional lacuna would not furnish evidence of such a disregard, the series of lacunae which I have mentioned does, in my view, suggest that the statutory guidance has been overlooked.

Mr Gordon submits that the position in *ex parte Rixon* as to the care plan is the identical position in the instant case.

As to the complaints procedure, which is set out in section 7B of LASSA, Mr Gordon submits that there is no true alternative remedy here. He submits that provided there is a discrete point of law the courts have asserted jurisdiction to grant judicial review. He refers me to *R v Devon County Council ex parte Baker* [1995] 1 All ER 73 at page 87 where Dillon LJ dealt with the question of alternative remedies and said:

The duty of fairness, of which the duty to consult is an aspect, arises under the general law, but it arises in the present case in connection with the closure of a residential home for the elderly. The closure of such a home is part of the social services functions of the Durham County Council. But it is not clear to me whether the duty to consult is itself a social services function for the purposes of section 7D of the 1970 Act. In view of this, and as the issue is entirely one in law in a developing field which is peculiarly appropriate for decision by the courts rather than by the Secretary of State, I would hold that the applicants in the Durham case were not precluded from making their application for judicial review by the availability of another remedy; the case is one which it is proper for this court to entertain, differing in this respect from the judge.

At page 92 Simon Brown LJ said this:

Which of two available remedies, or perhaps more accurately, avenues of redress, is to be preferred will depend ultimately upon which is the more convenient, expeditious and effective. Where ministers have default powers, application to them will generally be the better remedy, particularly where, as so often, the central complaint is in reality about the substantive merits of the decision. The minister brings his department's expertise to bear upon the problem. He has the means to conduct an appropriate factual enquiry. Unlike the court, moreover, he can direct a solution rather than merely leave the authority to redetermine the question. Where, on the other hand, as here, what is required is the authoritative resolution of a legal issue, issue no 1, then, in common with Dillon LJ, I would regard judicial review as the more convenient alternate remedy.

I turn now to Mr Gordon's submissions on the detailed facts. By April 1994 he contended that the respondent had concluded that the way forward was by way of a SENSE-type accommodation. There were three proposals in February, March and June of 1995. The first proposal is in a document dated 20th February 1995 at page 85 and provided for accommodation in Therese's own home. The second proposal for 'a home of her own supported by SENSE staff' is at page 89 and contemplated a three bedroomed house with, over the next two to three years, two other people with sensory impairments moving into that house as well. The third proposal is in a letter from the respondent dated 9th June 1995 which accepts the comprehensive assessment was completed on 13th April 1994 and accepts the duty to provide an assessment for T under section 47 of the 1990 Act and to provide services. Details are given which say that the provision should remain local to the family and should be a SENSE-type placement.

A This was followed on 21st August 1995 by Mr Pringle's document 'Assessing the Needs'.

The respondent's letter of 5th October 1995 identifies 1A Farm Lane as a medium term option and anticipates Therese will be settled at 1A Farm Lane for a minimum of six to nine months. It acknowledges that no second person for the B SENSE option has yet been identified thereby making it clear that the possibility of a total of three residents has been reduced to two. The letter of 12th October 1995 at page 140 identifies a property in Alexandra Gardens as 'potential'. The attendance note of 14th February 1996 at page 187 shows a further change of attitude in that the limitations to 1A Farm Lane are acknowledged and conceded C but, notwithstanding that, the SENSE provision is abandoned.

The attendance note is a material document and I will read the relevant part from pages 188 to 190. It reads:

D *In the letter dated the 12th February 1996 from Maria Lucas Legal Department the following sentence appears 'the Local Authority has made representations but this does not meet Therese's needs'. It was agreed at the meeting that the placement at 1A Farm Lane would be much less appropriate for Therese when this change of use is implemented and that the local authority is now making representations to the trust for their proposals to be able to meet Therese's needs in this provision.*

E *It is however agreed as common ground between all those at this meeting that this was never proposed to be a permanent placement for Therese and reference to previous correspondence with the trust and with the local authority was referred to in support of this.*

F *2. Progress in identifying a further placement for Therese Blackmore. I asked for the details of work completed since the 9th June 1995 which is the date of the letter from London Borough of Sutton setting out the comprehensive assessment of needs completed by 13th April 1994 and added to with further documentation referred to in their letter.*

G *We discussed the further letter which sets out the proposals for Therese and contained in the valuation attached to the letter from the London Borough of Sutton of the 5th October 1995. This sets out six possibilities for Therese Blackmore and it was agreed that these six possibilities have been looked at by the London Borough of Sutton and not pursued with. One of these proposals is there*

H *be a provision made available in conjunction with SENSE and that the work to be done was to identify property and finance for this proposal. The London Borough of Sutton now takes the view that this proposal will not be proceeded with and this is because it is 'too risky' for Therese. Ann Goldsmith stated that the proposal presented a concern that finding one as a resident with the same or*

I *similar needs as Therese could mean the placement would become unviable. The London Borough of Sutton has not identified a second person to share this with Therese and they confirm there had been no further contact with SENSE to discuss the viability of such a proposal. They did confirm that a housing strategy committee had been set up to look at property and Mrs Tucker was part of this*

J *and had viewed one and a part of another one. They confirmed that the proposal had not gone to the Social Services Committee and in fact for approval for funding social services committee was not necessary but finance had been looked at.*

It was unclear from our discussion what actual work had happened with regard to this and other proposals that the proposals set out in the above

K *document are now not being pursued.*

It is apparent from that document dated 14th February 1996 that the SENSE

options had by this stage been abandoned, contends Mr Gordon. I accept that that contention is well founded. The fact that there had been an abandonment of the SENSE proposal is clear from the respondent's letter of 26th February 1996 at page 126. That letter sets out the matter which was referred to in the minute of 14th February as to the information that the Health Service Trust intended to change the use of 1A Farm Lane into a respite emergency provision and that that fact meant that the Borough now had to consider the alternatives for Therese which were for her to remain at 1A Farm Lane with further services provided to try to maintain the level of care, or (2) for her to be placed in an out of Borough placement. The letter went on to set out the need to plan for the longer term and to identify two properties which were currently being investigated, one of them in Wallington which was not named but which was in fact Clifton Manor to which I shall come later. It was clear from that letter that the view was that either of those properties 'may be a very good permanent solution for Therese in the longer term'. It was equally clear that 'the local authority are also still considering the York Road provision, but this will not be completed within 18 months'. The letter went on to state that:

> *Until we know the suitability or otherwise of these two new homes, we do not think it advisable to investigate further the proposal with regard to setting up a special two bedroomed residential establishment managed by SENSE for Therese.*

It then set out the rider that:

> *Even if another person similar to Therese were to be found, there is concern that, if for any reason, that person did not remain in the property, such a two bedroomed residential unit would not be viable.*

Despite the fact that it had already been accepted that the placement of Therese had to be local, a letter of 20th March 1996 from the respondent contemplates a SENSE resource at Birmingham as a long-term placement.

On 19th September 1996 the respondent produced in a letter from Mr Pringle the draft care plan in relation to the proposed placement at Clifton Manor to which I have already referred.

As to the medical assessment at this time that can be seen from the report of Dr Amitta Shah, a consultant clinical pyschologist, at page 265. The recommendations of Dr Shah at page 271 are that:

> *Therese's complex needs are unlikely to be met within any existing service in the borough of Sutton. She needs a carefully planned tailor-made service. It is important that Therese is provided a service locally as a move out of the borough at this stage will be unsettling and stressful and would increase the risk of Therese regressing further in her skills and behaviour. I would recommend the following broad requirements of the residential and day-care service for Therese.*
>
> *1. A small group home of up to 4 people, carefully selected and matched. It is important that clients who are highly volatile, loud and unpredictable are not included. The most ideal client group would be those who have a learning disability and autism and are fairly calm and passive and need a highly structured and consistent environment and programme. Also, there should not be any respite beds to ensure stability and permanence of the group.*

Dr Shah's conclusions are approved by Hilary Crowhurst of SENSE in her affidavit at page 223, and in particular at paragraph 12 where Miss Crowhurst says:

Dr Shah's report confirms the assessments of Therese undertaken by members of SENSE staff. My only additional recommendation would be that Dr Shah suggests Therese should share with up to three others. I believe it would be beneficial if those residents also had sensory disabilities as this would enable the use of a total communication environment. A total communication environment is one where use is made of physical surroundings. Colour and texture are used as cues, sign, gesture and speech are used routinely. Everything that will offer a cue to communication is used at all times. This can be done for one person, however it is my experience that it rarely happens consistently unless all residents have similar needs.

13. My experience and the experience of SENSE is that it would be extremely difficult to maintain the consistent and skilled approach required for service to meet Therese's needs unless this is specifically designed for service users who have sensory disabilities. In order to achieve this the London Borough of Sutton should purchase a small residential home to provide care for not more than four residents who all have sensory disabilities. This service should be staffed and managed by SENSE using skilled workers who are trained and supported by SENSE and the outreach team. The staff in such a house would need to have on going training and supervision in developing and maintaining the skills necessary to work with this client group.

Dr Bird, a consultant psychiatrist of learning disabilities, had passed the opinion in March 1996 at page 26 that:

. . . the proposed local SENSE placement, advocated by Mrs Tucker which, in my view would provide an optimum solution for the following reasons . . .

and he had gone on to identify those reasons. Among the reasons he said at page 27:

Local provision does not currently include a SENSE placement, but I think it is also worth making the point that such a placement within the borough would have comparatively little difficulty in finding other appropriate learning disabled clients, and could act as a valuable resource for training and promoting communication awareness among local health and local community care staff in general.

He said later:

I think it would be difficult for a consultancy like SENSE which could teach specific communication skills to ensure and maintain them in an environment with a mix of clients.

On 28th May 1996 Mr Pringle, the respondent's senior care manager, swore an affidavit in which he dealt with potential considerations at page 281. He said:

The SENSE provision as outlined in the SENSE report will take a considerable length of time to set up. At the present time this is only a general proposal, and if agreed, would need to be set out in a working contract. As yet there are no other clients with similar needs in the borough that I am aware of who could use the project and have funding agreed. The project will require a property to be found and purchased either from the private market or via London Borough of Sutton housing stock. If it is from the London Borough of Sutton housing stock, it would have to be given to a housing association for them to manage and provide the necessary changes to the infrastructure as well as decorate. If purchased privately as is being suggested by Mrs Tucker, then it would need to be inspected and

registered. Who would own the property? Mrs Tucker, a Trust or her sponsor and on what terms? How can Mrs Tucker guarantee a place for Therese there. It is not clear from Mrs Tucker's proposals as to whether the property would only be occupied by Therese or others. If by others, then on what basis? Further clarification is being sought as there are other concerns.

Mr Gordon points to that paragraph as setting out the SENSE provision for the first time as 'only a general proposal', when in fact it had been a specific option already decided and as to which funding was being sought at a much earlier stage. Mr Gordon submits that there is not the right consideration being given there by the asking of all the rhetorical questions which are found in that paragraph.

On the same day, 28th May 1996, Francis McCabe for the respondent swore an affidavit in which she dealt with the current proposal for Therese. Her conclusion was expressed at paragraph 8:

The London Borough of Sutton has not reached a final decision on the proposals outlined in 7.3.

Those proposals were a SENSE establishment in Birmingham or a small provider in the London Borough of Sutton. They did not include any local SENSE provision and the reason given for not reaching a final decision was:

. . . because Mrs Tucker will not agree to any proposal other than her preferred solution. The London Borough of Sutton submit that Mrs Tucker's refusal is unreasonable. Therese's needs can be met at a number of establishments in our view.

Then came the care plan being put forward by the respondent in September 1996 which is at page 525. As to timescales it is said that:

Most of the actions required by the Care Plan are on-going and being met at the current time. The remainder relate to Therese's long term needs. Unless otherwise indicated, the timescales relate to the date that Therese can be placed with a provider.

Mr Gordon submits that this is not a care plan, or if it can be regarded as a care plan, it is woefully inadequate and suffers from the same faults as were pinpointed by Sedley J in the case of *Rixon* at pages 19, 20 and 24 [(1998) 1 CCLR 119 at pp129 to 131]. Mr Gordon says there is no stated overall objective in terms of long term obligations or carers' obligations or those of the service providers. Since no objectives are recorded there is equally no criteria for the measurement of the objectives. There are no costings and no long term options as to residential care options considered. There are no recorded points of difference between the parties and there is no reference to unmet needs or the reasons therefor. There is no reference to the next date of review. Mr Gordon submits that the care plan is as far from the guidance given in the policy guidance as was the care plan in the *Rixon* case. What, he submits, it should have done was to demonstrate the efforts made by the Local Authority and show a realistic time scale for discharge of their obligations. It should have recorded the long term needs and Mrs Tucker's needs, but in fact it marks a concerted, contradictory and unyielding stance by the Local Authority to finding any long term placement.

Mr Gordon's final legal arguments are that no service provision has been made under section 47(1)(b). As at 20th September 1996 at page 51 the respondents were saying that they faced the three options which I have recently read. Mr Gordon submitted the first was totally contradicted by Dr Shah in his report of 10th October 1996. The second was not an option but a consequence, and the

A third was flatly contradicted by paragraph 7.2 of the respondent's own affidavit at page 442. That option was that Therese remained at 1A Farm Lane until another suitable placement was found, but Miss McCabe had said in her affidavit that 'the arrangements at 1A Farm Lane must be clarified as soon as possible. Whilst Therese is being provided with good care it was not intended as a long term B placement and whilst she stays there other patients who have been identified as requiring respite care are not receiving it.'

Mr Gordon submitted that there was a total exclusion of the real fourth option, the SENSE option, accepted earlier. Instead at this stage Miss McCabe was saying that the fourth option was the Birmingham option, which again was totally con- C tradicted by medical and other opinions. There is, says Mr Gordon, in fact only one option, the SENSE proposal, which Mr Pringle does not properly deal with in his affidavit at page 281 (which I have recently read) but merely throws up a set of rhetorical questions as potential stumbling blocks.

Mr Gordon says that the respondent cannot just pray in aid any question of D resource limitations, nor can they use their continuing duty to make interim decisions to mask a duty to put a care plan in place. The Local Authority cannot, says Mr Gordon, use their general discretion as to time to trump the clear matters set out in the policy guidance. He submits that once the respondent has undertaken an assessment of need for community care services under section 47(1)(a) E of the 1990 Act, it is required to make a service provision decision under section 47(1)(b) in the light of that assessment. The duty to make that provision lies solely on the social services department of the Local Authority (the respondent). The respondent may take into account services likely to be made available by, for instance, the health authority under section 47(3) of the Act. However, a series of F short-term service provision decisions under section 47(1)(b) merely designed to deal with the patient's needs while in National Health Service provision and which leave a patient under National Health Service provision managed by a Hospital Trust does not constitute compliance with section 47(1)(b) of the Act. He says that whilst, in general, a Local Authority has a discretion as to the nature, G extent and timing of the community care services it decides to provide, such discretion must comply with statutory guidance issued under section 7 of LASSA and such discretion must take account also of non-statutory guidance. Statutory policy guidance on hospital discharge emphasises that it is most undesirable that anyone should remain in hospital when their care could be more appropriately H provided elsewhere in paragraph 3.41 of the policy guidance. That is a discrete elaboration of the principle underpinning community care set out in paragraph 3.24 of the policy guidance which refers to 'the objective of ensuring that service provision should, as far as possible, preserve or restore normal living'. He submits that where a Local Authority has assessed a hospital's patient's needs as being I most appropriately met by 'a SENSE-type placement for two persons' under sections 21 and 26 of the National Assistance Act 1948, it is not open to that authority to offer placements which are inconsistent with its assessment in purported discharge of its statutory obligation under section 47(1)(b). Under existing guidance a patient may not be forced into residential accommodation from hospital J against his or her wishes. A Local Authority again cannot pray in aid the provision of services under section 2(1) of the Chronically Sick and Disabled Persons Act 1970 or section 29 of the National Assistance Act as being a sufficient exercise of the council's subsisting obligations in law. He submits finally that the complaints machinery is not a true alternative remedy, since discrete principles of law are K engaged making judicial review a more appropriate forum.

Mr Eccles for the respondent submitted that there was no blanket decision the

Local Authority could make and that this was a very anxious case for it. There had to be provision for a one to one case worker, there had to be provision for education and recreational facilities, psychological monitoring, for medication and other matters. He submitted that the final offer of long term placement was the only service provision which had not been made. He submitted that that was a matter within the discretion of the Local Authority. He said that the carer could not be the decider as to how resources were spent and it was for the Local Authority to decide such questions. He stressed that the respondent was the second or third smallest London Borough.

He took me to the documents in chronological order in the way in which Mr Gordon had and made his submissions on the way in relation to the respondent's discretion. He took me to the SENSE assessment report at page 286 and the summary at pages 301 and 302 in which Anne Voil, the SENSE training and advice consultant, had said:

> *A full signing environment based initially on Makaton is also a priority along with the maintenance of clear boundaries through existing behaviour management strategies.*

She had also said:

> *Exposure to a signing environment, with speech, throughout her day is highly desirable as signing supports Therese's understanding of objects and events as well as being a channel of communication. She needs to be encouraged to attend habitually to signs and to sign in response to simple questions. Management support is often the crucial factor in the successful establishment of a signing environment.*

She had also made it clear that whenever she was being taught Therese would require one to one support.

Mr Eccles accepted that these were recommendations but submitted that there was nothing prescriptive in those requirements. He submitted at that stage nobody could tell the Borough what steps should be taken to move forward. He also took me to the report of Anne McEntee of the Merton and Sutton Community National Health Service Trust of 28th April 1994 which he accepted concluded with the words:

> *It is strongly felt by the staff who are working with Therese that the most suitable placement would be a local one, preferably a total signing environment, it is paramount that Therese maintains the intensive relationships she has built up with her family and friends.*

He took me to the first SENSE proposal at page 417 which involved a plan to open a five person home in Sutton. He took me to the minutes of the care package review at page 80 which included the words:

> *Therese's assessment has been completed at 8 Farm Lane with the conclusion that they are no longer meeting her needs. Everyone agreed about this.*

Dr Banerjee was quoted in the minute as explaining that Therese had initially settled well at 8 Farm Lane but he said she now needed a more stimulating environment in a long term placement and that there was no longer any need for her to be in a hospital environment. The doctor later said that Therese would need a transitional change before making a move into a long term placement. Mr Eccles reminded me of the provisions of paragraphs 3.41 and 3.44 of the policy guidance.

He also reminded me of the respondent's proposal at page 85 for future care in

her own home with 24 hour live-in carers trained by SENSE. He accepted that this proposal concluded that:

> *All those involved with Therese Blackmore agree that it is in her best interests to continue living locally. It is not in her best interest, nor is it 'normal' for her to continue living on the Orchard Hill site, even if the venue within Orchard Hill changes.*

Mr Eccles reminded me of the SENSE proposal of 8th March 1995 at page 89 based on a home of her own supported by SENSE staff. The way forward was put in this way:

> *The costing for the above service is necessarily high as the staffing needs to be 24 hour. I would suggest that Therese moves into a three bedroomed house, and that over the next 2–3 three years, two other people with sensory impairments move into the house as well.*

He reminded me of the letter and medical report of the consultant psychiatrist Dr Bird. In the 28th April 1995 report Dr Bird had said:

> *She is ready to be discharged to a suitable residential placement. In my opinion it is in her* best *interests that this should be soon, and local, to minimise environmental disruption and allow her to preserve elements of her Day programme, with staff who are familiar to her.*
>
> *Ideally such a place should be small scale, and offer a total communicating environment, along the lines specified within the SENSE report. Her carers should be advised and trained in appropriate signing, communicating, and behaviour management strategies, which would be adopted for any other residents.*

Mr Eccles referred me to the third SENSE proposal which is undated but which may have been about 23rd June 1995 which involved the provision of the house 'preferably with one other person who has similar needs to Therese'. Mr Eccles referred to the specification of the house in that document and said that the Local Authority were presented with a number of different ways of meeting Therese's needs, all of which involved different resource implications and he argued that those resource implications were matters for discretion of the Local Authority.

He took me to Mr Pringle's paper on assessing the needs dated 21st August 1995 at page 179 and Mr Pringle's recommendation at page 185:

> *I am of the opinion that Therese Blackmore's continuing care needs are best met by a placement at 1A Farm Lane, this placement being a secure placement, whilst alternative resources continue to be investigated and evaluated.*

In relation to that recommendation he posed the question: 'Are the local authority going down a perverse route?' and submitted that the answer was in the light of the different proposals, that it was not imperative for the Local Authority to make a decision there and then.

Against that Mr Gordon for the applicant would ask the question 'Why not?' and would point to the fact that it was already 16 months since the assessment was completed.

Mr Eccles took me to the letter of 5th October 1995 at page 141 from the respondent which accepted that they could not look out of the Borough but said that they were assessing all possible options and noted that:

> *We understand however that no second person for this option has yet been identified.*

Mr Eccles submitted that in the light of that fact it was reasonable for the Local Authority not to have committed itself.

He referred to the meeting of 14th February 1996 when the Local Authority thought that the SENSE 2 proposal was not going to be a viable option and the letter of 26th February 1996 from the respondent which confirmed that. That letter contained the information that the Trust intended to change the use of 1A Farm Lane to a respite/emergency provision from 8th March 1996 and Mr Eccles referred me again to its contents which I have recently summarised. That was the letter that first referred to Clifton Manor and thought that it or the other property in the Borough mentioned might be 'a very good permanent solution for Therese in the longer term'. In relation to the matters included in that letter on the subject of concern that if a second person did not remain in the property a two bedroomed residential unit would not be viable, Mr Eccles argued that the Local Authority was correct to come to that decision which was one to which it was entitled to come within its discretion. He took me to the affidavit of Francis McCabe and in particular to paragraph 5 where she dealt with considerations on reaching a service provision decision and he submitted that what Miss McCabe put forward could not be said to be irrational. He accepted that in Dr Bird's report of 18th March 1996 at page 26 Dr Bird had said that

> *. . . the proposed local SENSE placement, advocated by Mrs Tucker . . . would provide an optimum solution.*

Mr Eccles argued that Dr Bird was writing of the optimum solution but that was not prescriptive of the actual decision. He said that the information shown in the care management review of 29th March 1996 at page 365 was information which the Local Authority was entitled to take into account.

Mr Eccles said that the position as at April 1996 was that there were two possible places in Sutton of which one was Clifton Manor which was described at page 542 as being 'initially for five to six clients of mixed sex with ages ranging from 20 to 45 with or without challenging behaviour and with or without associated mental needs'.

Mr Eccles referred me to the letter of Dr Bouras to Dr Bird dated 14th June 1996 which is at the end of the bundle, in which Dr Bouras had said:

> *She may do better in an environment as the one suggested by the assessment by SENSE or in a community house where staff will have the appropriate skills and training to support her and respond to her communication needs. In any case her behaviour will require monitoring regularly by psychiatric services within the context of the multi-disciplinary team.*
>
> *In summary Miss Blackmore has been provided with appropriate care for her complex and difficult needs and she does not require continuous hospital admission. She could be supported in a community residential environment by staff who can respond to her sensory impairments and be followed up by a specialist multi-disciplinary team.*

He also referred me to the report of Dr Shah in July 1996 at page 271, two paragraphs of which I have already quoted.

Mr Eccles referred to the Clifton Manor Action Plan at page 554 before taking me to the final document to which he referred which was the recent report of Dr Shah of 10th October 1996. That report said:

> *My conclusions are that the service proposal at Clifton Manor would not be suitable to meet the needs of Therese. However it could be tailor made further to*

make it suitable. The only possibility would be if Mr Ali takes on fewer than 8 clients. Ideally if there were a total of six clients there would be a lot of benefits and the service could be amended to meet Therese's needs.

Those were the principal documents to which Mr Eccles took me as a basis for his overall submissions which he had set out under eleven points. The first and second of those points flowed into each other in argument and can be taken together. They were that:

(1) The respondent had a duty to assess the applicant under section 47 of the 1990 Act but in relation to the services under consideration in this case had a discretion as to the nature, extent and timing of the community care services it decides to provide.

(2) In exercise of its discretion the respondent was entitled to have regard to all relevant considerations including the cost and practicability of services which have been proposed to meet the applicant's needs and whether it should be a purchaser rather than a provider of services for the applicant.

He submitted in relation to these two heads of his argument that the applicant was disabled and had been assessed under sections 47(1)(a) and 47(2) and under section 4 of the 1986 Act, the Disabled Persons (Services Consultation Etc) Act. She was provided and would continue to be provided with recreation facilities and assistance in taking advantage of educational facilities but no complaint was made or really sought so far as those services were concerned. He submitted that in deciding, pursuant to section 47, whether it was necessary to provide 1970 Act services in order to meet the assessed needs of a disabled person, a service provision decision must be taken and the services must be provided regardless of cost, subject to choosing the least expensive option, pursuant to a duty owed to the individual. Where community care services other than those under the 1970 Act may be required upon assessment of needs, the remainder of the assessment was carried out under section 47(1)(a). The Local Authority then had regard to the assessment in accordance with section 47(1)(b) and decided whether the needs call for the provision of community care services. He said this was a matter of discretion and the Local Authority was not under a duty to provide community care services to meet the assessed needs even if recommended but had a discretion. He referred in support to *R v Gloucestershire County Council ex parte Barry*, CA, 27th June 1996; (1997) 1 CCLR 19. He said community care services for which the applicant had been assessed are those apart from the Chronically Sick and Disabled Persons Act which are available under Part III of the National Assistance Act. Such services not only include accommodation under section 21 but other welfare services under section 29(1) and paragraph 2 of the Secretary of State's approvals and directions under section 21(1) of the National Assistance Act 1948 [Appendix 1 to LAC(93)10]. Those services were provided either under repair or a target duty. The availability of resources, the potential cost of the services proposed to meet the needs of the assessed person, and the practicability of the proposals, were lawful and relevant considerations for the Local Authority in determining what service provision decision should be taken and when. The extent of discretion was also exemplified by section 47(4) [of the 1990 Act] and by the duty of the Local Authority to act under the general guidance of the Secretary of State in the exercise of its social services functions. Guidance had been issued in the document 'Community Care in the Next Decade and Beyond'. Further policy guidance empowered and required local authorities to have regard to

resources and costs and limits the duty to assess. He further relied on the white paper and the practitioners' guide to care and management and assessment and in particular the passages at paragraphs 4.23 and 4.26. He said the guide recognises that needs may be unmet without asserting that it is unlawful per se to fail to meet an assessed need.

Mr Eccles' third point was that the respondent was not under a duty to provide a service which had been proposed as meeting the applicant's assessed needs, even if the applicant or, as here, her carer, refused consent to an alternative package of services provided that the respondent's decision was within the ambit of its discretion. He said that the respondent had sought and Mrs Tucker as carer had refused consent to the respondent's proposals to investigate other types of accommodation and packages of care apart from the arrangement proposed or adopted by her. Her failure to consent was material in two respects. First, it was important for the respondent to obtain her consent if possible and her refusal to consent afforded a lawful reason for delaying a long term service provision decision, but she could not, by refusing consent, force the respondent to make provision which it reasonably decided should not be made. He placed reliance on policy guidance, the white paper and the practitioners' guide. He submitted that it was only if accommodation was available to meet the assessed needs of a person that the obligation to meet a preferred choice might arise and Mrs Tucker's preferred accommodation was not available in Sutton.

Mr Eccles' fourth submission was that the respondent was entitled to make a series of service provision decisions to meet the short-term needs of the applicant and to delay making a long term service provision decision if, in the reasonable judgment of the respondent, it was in the interests of the applicant that further enquiries be made and/or further assessments be carried out and/or further efforts be made to obtain the consent of the applicant or the applicant's carer.

In support of that submission Mr Eccles accepted and conceded that a long term decision for the applicant's accommodation and package of care had yet to be made. He submitted that there was no existing resource in Sutton which met all her needs and Mrs Tucker had refused to countenance the respondent's proposals. If, as he contended, it was reasonable to decide not to establish and finance the accommodation and care package demanded by Mrs Tucker, it was within the ambit of the respondent's discretion to delay the long term service provision decision provided that the applicant's needs continued to be met in the short-term. It was inherent in care management that final decisions might have to be delayed pending the result of all assessments. Equally, delay might have to occur when new resources have to be located, investigated, adapted, especially in cases of complex need. The respondent had carried out or arranged to carry out a number of assessments of the applicant and of possible packages of care and accommodation. Its decision to continue enquiries was within the ambit of its discretion, as was its judgment that the applicant's needs in the short-term continued to be met at 1A Farm Lane. He referred to Dr Bouras' report.

His fifth point was that the respondent was entitled and is under a duty to review and reassess the applicant's needs and the availability of human, physical and financial resources from time to time and was entitled to have regard to such reviews and re-assessments in deciding whether different services should be provided to meet the assessed needs of the applicant from those originally considered and in deciding the timing of long term service provision. He submitted that even if the accommodation and packages of care which the respondent wished to investigate did not meet all of the applicant's needs as originally assessed by SENSE, for reasons already argued the respondent was not under a

duty to provide all the services recommended. The respondent was also entitled now to have regard to those reviews and re-assessments and Dr Shah's report of July 1996 and the progress made by the applicant at 1A Farm Lane, in deciding that the applicant's needs could be met by accommodation and a care package other than a SENSE or a SENSE-type placement and the respondent might lawfully investigate and recommend the provision which Clifton Manor could make.

Mr Eccles' sixth point was that the respondent's decisions from April 1994 to date not to make a long term service provision decision but to continue to provide short-term services for the applicant was within the ambit of its reasonable discretion having regard to the facts and matters referred to in the evidence. He accepted that the applicant's assessments were substantially completed by April 1994 though not wholly so. He also accepted that at that date a SENSE placement in Sutton would have afforded the best chance of meeting the applicant's needs subject to availability and cost. However, no SENSE resource existed in Sutton and the respondent's decision to continue short-term provision while Mrs Tucker and SENSE came up with proposals was reasonable. The respondent had considered it should be a purchaser rather than a provider and it was entitled to reject the first SENSE proposal and the proposals of 'Seeability' and 'Mencap' in 1994 on the grounds of cost and the extent to which it was being asked to be a provider or underwriter and the general practicability. He submitted that the respondent reasonably decided to continue short-term provision in late 1994 and early 1995 while exploring the respondent's proposal that the applicant live in her own accommodation. When SENSE found against it in March 1995 the respondent reasonably took no further steps to explore it. He submitted that the decision to reject the second SENSE proposal in March 1995 on the grounds of finance and policy as to a purchase provider and practicability was within the respondent's discretion. Likewise was the decision not to accept the third SENSE proposal advanced in June 1995. He conceded the proposed change of use of 1A Farm Lane in February 1996 and the increased risk that further delay might affect the applicant's welfare, but further submitted that in the light of the limited number of residents admitted to Farm Lane on the change of use by the community health trust and the respondent's judgment that the applicant's present needs were in fact still being met, it was reasonable for the respondent to make further attempts to obtain Mrs Tucker's consent to one or more of the options before deciding to move the applicant to a long term placement. He submitted it was within the ambit of discretion not to proceed with the third SENSE proposal. The respondent was entitled to have regard to the cost and practicability of the scheme in the absence of any assurance that other suitable long term residents could be found and funded. The respondent's decision that the applicant's long term needs could be met by fitting an appropriate package of care to the services and accommodation provided by a non-specialist organisation – such as Clifton Manor – was within the ambit of its discretion and the respondent acted reasonably in the steps taken to investigate suitable homes in Sutton and elsewhere. The respondent had acted reasonably in investigating and, subject to funding, now recommended Clifton Manor as the best resource in all the circumstances for meeting the applicant's needs. He submitted there was no identified SENSE accommodation for Therese other than the home in the West Midlands. He submitted that the respondent had not failed to co-operate with hospital managers but that it was Mrs Tucker's refusal to consent to the respondent's proposals that had prevented discharge of the applicant from Orchard Hill. He said there was no evidence that the health authority consider a SENSE home should be provided by the respondent either with or without health authority funding and submitted

that the respondent's case was that the health authority supported its approach to finding accommodation and a care package for the applicant. A

As his seventh point Mr Eccles submitted that the duty to provide accommodation under the National Assistance Act sections 21 and 26 was a target duty and was not a duty owed individually to the applicant. Reference to that duty therefore did not alter the content of the obligation owed to the applicant under the B National Health Service and Community Care Act 1990, nor was it the source of any other individual duty. Alternatively the applicant did not have the locus to complain of the sufficiency of the provision of residential accommodation in Sutton.

His eighth point was that the respondent's care plan for the applicant was and C always had been lawful.

He then moved to alternate submissions, the first of which, submission 9, was that if, contrary to any of the above submissions, the respondent had acted unlawfully, the court should in its discretion refuse any relief having regard to the alternative remedies under the Local Authority Social Services Act 1970. D

As to that he submitted that a complaints procedure was provided for under LASSA, section 7B, and the Complaints Procedure Directions 1990, a copy of which was in the bundle, in relation to the respondent's own scheme. He said there were also default powers of the Secretary of State provided under section 7D of LASSA which had originally been in section 36 of the National Assistance Act. E The power to order an enquiry arose under section 7C [of LASSA]. He submitted that the decisions not to implement the various SENSE proposals fall within the scope of the alternative remedies. The review panel or the Secretary of State could bring particular expertise to bear on the question whether the respondent, in co-operation with the health authority, should or should not accept the substantial F cost and financial risks and staff commitment involved in setting up a SENSE home in Sutton. He referred me both to the respondent's own scheme and policy on the complaints procedure which is at page 455 in the bundle and to the eight complaints which Mrs Tucker had in fact brought and which were decided under the procedure on 24th November 1994. He submitted that in the absence of good G reason the court should decline to grant relief where alternative remedies were available. He took me to *R v Royal Borough of Kingston on Thames ex parte T* [1994] 1 FLR 798 and in particular to the questions which Ward J (as he then was) set himself in that case, namely:

H

(1) Was there a decision capable of judicial review?
(2) Should I decline to exercise the jurisdiction I have to judicially review the decision because there are alternative remedies available to the applicant which she has not yet exhausted?
(3) The question of *Wednesbury* unreasonableness.

I

He also sought support from *R v London Borough of Brent ex parte S* [1994] 1 FLR 203 and *R v London Borough of Barnet ex parte B* [1994] 1 FLR 592. He submitted that *R v Devon County Council ex parte Baker* [1995] 1 All ER 73, to which Mr Gordon had referred, was unclear as to its ratio. He submitted that judicial review was not a more suitable procedure in this case and that there was J no point of law other than the reasonableness of the respondent's decision making.

As his tenth point he submitted that the relief sought by the applicant required the provision of a package of services part of which was to be funded by the health authority which was not a party to the application and in any event owed duties K in connection with the provision of medical services which are target and not

A individual duties. He submitted that in its discretion the court should refuse relief. He submitted that relief ordered against the respondent would not provide a certainty of outcome for the applicant unless the respondent was ordered to pay the whole or an inordinate amount of the expense if the health authority declined to make any or any significant contribution. For this reason he submitted no relief B should be granted.

As his final and eleventh submission Mr Eccles said that the relief sought by the applicant in effect required the respondent to acquire and/or adapt a suitable property, locate and enter into contracts with suitable staff and locate and obtain the consent of other similarly disabled persons to reside with the applicant C and procure funding from its own budgets or the budgets of other authorities to pay for the placement of residents and supervise and manage such an establishment for the rest of the applicant's life unless her present needs change. Such relief he submitted was not appropriate to be granted. It was full of contingencies, uncertainties and detail as to how it should be planned and imple- D mented and would involve long term supervision by the court. He submitted that the court in its discretion, even if it found against him on other matters, should refuse relief in the circumstances and find that the respondent had been doing its best.

Mr Gordon in reply took up the point that Mr Eccles had made that it would be E difficult to grant relief. He submitted that that would not be so and gave a number of examples of a form of declaration which the court should order. He submitted that there was no difficulty in granting Mandamus which was ordinarily awarded to compel reconsideration of a decision according to the law. There was here in fact, as was conceded by Mr Eccles, no decision and Mandamus was therefore F sought to require the authority to come to a service provision decision under section 47(1)(b). He said it was elementary that Mandamus lay to compel performance of public law obligations. He submitted, further, that relief should not be refused on the basis that the effect of any relief would be to require the respondent to provide, manage and finance a long term SENSE home and associ- G ated care package. Mr Gordon pointed out that the relief sought only compelled Sutton to 'provide, manage and finance a long term SENSE home' if such placement was a matter of legal obligation. Mr Gordon pointed out that if relief was granted Sutton would be free to reach any service provision decision as to accommodation for Therese provided it was lawful.

H Mr Eccles had submitted that it was not possible for Mr Gordon to submit successfully that there was a breach of the policy guidance because of the generality of such material. Mr Gordon pointed to the decision of Sedley J in *Rixon* and in particular that Sedley J had no difficulty in granting declaratory relief in respect of the deviation from the policy guidance. He pointed to the order of the court I which was at paragraph 2:

> *In reaching its decision under section 47(1)(b) of the National Health Service and Community Care 1990 Act, the respondent has acted unlawfully and departed without good reason from the policy guidance issued by the Secretary of State.*

J As to the submission made by Mr Eccles that paragraph 3.41 of the policy guidance could not be breached because all that a Local Authority had to do to comply with it was to understand it as being undesirable that anyone should stay in hospital when their care could be more appropriately provided elsewhere, Mr Gordon submitted that that was to misunderstand the effect of the policy guid- K ance. The guidance was general but it had to be acted under, under section 7 of LASSA. A Local Authority did not act under paragraph 3.41 of the policy guidance

if it took no effective steps to ensure that a person who was in hospital and who needed care in the community was discharged from that hospital.

Mr Gordon submitted that the applicant's case was founded on clear breaches of mandatory policy guidance and in the exclusion of any effective course of action to enable the applicant to be discharged from hospital within a realistic timetable which was a breach of the policy guidance and of its statutory obligations and a failure to produce a lawful care plan. Mr Gordon lit on the frank concession which Mr Eccles had made when dealing with his eighth point that this was not the strongest part of his case, and emphasised the failure to provide any provision for long term care. What Mr Eccles had submitted in relation to paragraph 8 was that there were two ways to impugn a care plan either by its substance or the way it was recorded. Mr Eccles had frankly accepted that the best practice was in the practitioners' guide. He had equally to accept that Sedley J had held in *Rixon* that if the details were insufficiently recorded the care plan became an unlawful one. Mr Eccles conceded also that in the respondent's documents a long term placement was not recorded at all. Mr Eccles had sought to refer to documents in August 1995 and in September which dealt with further enquiries and he submitted that whatever was not recorded in the 1996 care plan, though it was not the best practice, nonetheless he said that the court should not be concerned with the way the matter was written out but should be concerned with the actual decisions made. Mr Gordon submitted that Mr Eccles was frankly conceding that the situation was parallel to the situation in *Rixon* and that what Mr Eccles was doing was inviting the court to deal with the matter by criticism in the judgment rather than by way of granting relief.

As to the suggestion that the behaviour of Mrs Tucker was unreasonable, Mr Gordon accepted that a carer could not be the decider. He pointed, however, to the fact that the respondent accepted that Mrs Tucker's endorsement of any proposal was essential to Therese's welfare and that a placement would break down without such endorsement. Mr Gordon submitted further that all the evidence showed that Mrs Tucker was not being unreasonable. I have to say that I find that to be a correct analysis of the situation and I find that she was not being unreasonable. It is quite clear that when Mrs Tucker emphasised the importance of an in-Borough placement, so did Dr Shah, so did other earlier comments from the Health Trust and indeed from the respondent in early 1994. Where Mrs Tucker emphasised the importance of the SENSE two bedroomed proposal, so did Dr Bird. When Mrs Tucker said that Clifton Manor did not meet Therese's needs, so did Dr Shah and so earlier had reports on proposals which had emphasised the necessity for a smaller number of occupants and/or the acceptance only of those with similar disabilities to the applicant. Again, when Mrs Tucker rejected a SENSE placement in Birmingham, SENSE itself had to rule it out and it was in any event contrary to many of the recommendations already before the Local Authority. Mr Gordon submitted that what the respondent was doing was contemplating any option other than the one which its own assessments disclosed was the optimum solution. Mr Gordon accepted Mr Eccles' submission that in the real world the optimum may not be possible, but he said that where, as here, there was no other option on Sutton's own reasoning, there could be no rationality in excluding the very option that would meet or virtually meet Therese's needs. Mr Gordon submitted there must be a necessary irrationality in insisting on any option that envisages a non-local placement such as SENSE Birmingham, still relied on in the affidavit of Mrs McCabe or an option that Mrs Tucker had already ruled out in relation to Clifton Manor.

As to Clifton Manor Mr Gordon stressed that Clifton Manor was the only extant

proposal and the second local property provided by Care Management had, for whatever reason, not been progressed. The reason Mrs Tucker had rejected Clifton Manor, Mr Gordon said, was because all the expert evidence on analysis discloses that it does not sufficiently meet Therese's needs. Again I find that to be an accurate submission on the part of Mr Gordon. It is quite clear that what is proposed does not sufficiently meet the needs of Therese as set out in the evidence before me. The only support for such a proposition comes from the report of Dr Bouras. It had hitherto always been accepted that Therese needed a very small number of companions in the home where she was to be and that there needed to be particular emphasis on their having like problems to Therese so that the concentration on signing could be maintained.

Mr Gordon points out that the respondent entirely accepts that Therese's principal need is for a consistent communication environment as described in Dr Shah's first report and in Mrs McCabe's affidavit at paragraph 6.2. Equally Dr Shah had described a total communication environment but had held that such an environment could not be provided if there was a mix of residents. The evidence before Sutton was that Therese's principal need could not be supplied in residential accommodation with a mix of residents. That again is a submission of Mr Gordon's with which I agree. Dr Shah had only concluded finally that Clifton Manor was not suited to Therese's needs and had referred to the only possibility to make it tailor-made to the needs of Therese as being the owner taking on fewer than eight clients and possibly a total of six. There was no evidence that the owner could or would be prepared to countenance such major amendments.

Mr Gordon took up the submission of Mr Eccles that the effect of relief would be to prevent Sutton from progressing Clifton Manor and pointed out that the relief sought merely required a lawful service provision decision. What the respondent could not do at this remove of time was simply to delay and to carry out further assessment and investigate new projects without at the same time progressing the one option that was available.

As to the care plan, Mr Gordon submitted that despite all Mr Eccles had put forward in his argument on his eighth point, there really was no difference between the situation in this case and the decision in *Rixon*. Again that is a submission which I find to be correctly based. There is, in my view, no substantial difference.

Mr Gordon finally submitted that the respondent acted and continued to act unlawfully in having no effective option for Therese's discharge from hospital more than two years after she was fit to leave. That was not because there was no effective option in prospect, it was rather because Sutton had provisionally excluded such option, had taken no steps to reverse it and had excluded an early move to SENSE 2 accommodation even whilst still looking for a second person. Again I find those submissions to be well founded.

Mr Gordon submitted that Sutton had acted unlawfully in having no lawful care plan which would show exactly the points of disagreement between Mrs Tucker and Sutton which would identify unmet need and would set out clearly the objectives for Therese and the criteria for meeting such objectives. Had there been such a care plan the efforts or lack of efforts of the Local Authority would have been transparent. Again I find Mr Gordon is right in his criticisms of the document which is put forward as a care plan in that, as he correctly submits, there are no stated overall objectives in terms of long term obligations, carers' obligations or service providers, there is no criteria for the measurement of objectives because the objectives themselves are not recorded in any care plan.

There are no costings, no long term options, no residential care options considered, there are no recorded points of difference, there is no reference to unmet need and there is no reference to a next date of review. I am satisfied that the criticisms that Mr Gordon makes of the care plan are valid ones.

As to whether I should in my discretion refuse relief on the basis of any alternate remedy, I find there is here a discrete point of law to be decided as to whether or not the respondent has acted unlawfully in failing to make a service provision decision under section 47(1)(b) of the National Health Service and Community Care Act 1990. That decision involves consideration of the statutory guidance issued under section 7 of the Local Authority Social Services Act 1970 and the non-statutory guidance as well. In particular it requires consideration of paragraphs 3.24 and 3.41 of the statutory policy guidance. In that situation I hold that the applicant is not precluded from making this application for judicial review by the availability of any other remedy such as the complaints procedure under section 7B of LASSA or the default powers under section 7D. I have to consider in relation to available remedies or avenues of redress, as they were referred to by Simon Brown LJ in *R v Devon County Council ex parte Baker*, the question of which avenue is the more convenient, expeditious and effective. I am quite satisfied that judicial review is here the avenue to be preferred on those bases. I do not consider the default powers to be an alternative remedy where there is a discrete point of law (see *ex parte S*). If the matter were to go by the complaints procedure under section 7A Mrs Tucker as a non-legally aided person would be forced to argue points of law before a non-qualified body. That could not be convenient, expeditious or effective. There is, in fact, no true alternative remedy. The position might be otherwise if the case were founded simply on *Wednesbury* irrationality or if it were a Children Act case (see *ex parte T* at pages 814F and 815C). I am further satisfied that there is here a clear failure to follow the guidance given in paragraphs 3.24 and 3.41 of the policy guidance which is clearly binding on local authorities and the respondent in particular. The respondent had discharged its duty under section 47(1)(a) of the 1990 Act to carry out an assessment of the applicant's needs by 13th April 1994. I find that the respondent is in clear breach of its duty under section 47(1)(b) in that it has still not made the decision which is called for by that section. There is still no service provision decision. Equally there is no care plan, as Mr Eccles accepts, in that there is still no provision for Therese's long term placement and therefore for her discharge from National Health Service care.

I accept the criticisms made by Mr Gordon of what is said to be the care plan in this case, those criticisms I have just referred to. I accept Mr Gordon's submissions that the care plan sought to be put forward in this case is as far from the policy guidelines as was that in the *Rixon* case. I find the respondent has acted unlawfully and departed without good reason from the policy guidance issued by the Secretary of State. I find that the respondent has used its undoubted discretion to make short term and interim decisions in relation to the care of the applicant. The use of such discretion cannot in my view replace the duty to make a service provision decision as to the long term future of the applicant. I therefore find the respondent has acted unlawfully in the matters and in the manner I have indicated. I would also be prepared to find that such actions were *Wednesbury* unreasonable if that were necessary. As to the relief to be granted by the court I shall listen to any submissions from counsel.

MR GORDON: May I hand up the first page of the written text of my reply [handed]. This is the one that sets out the possible forms of declaration. My Lord, may I

first indicate that we do seek, and my learned friend agrees, an order of Mandamus in the following terms. It would be Mandamus to provide within 21 days a care plan which complies so far as possible with the practitioner guide and with paragraph 3.25 of the policy guidance. It is understood that that will be a care plan which sets out the current position. My Lord, that is the order of Mandamus.

MR ECCLES: May I indicate, so that my clients hear it, although I have explained it, that is being agreed to as an appropriate form of relief on the basis as my learned friend has indicated that the Local Authority are required as it were to write into the existing care plan those matters which have not formally been recorded in respect of decisions which have already been taken hitherto reflecting their present intentions and the present differences of opinion which exist. But it is not one that requires them to, within the period, make new decisions which should then be recorded.

MR JUSTICE HIDDEN: Yes, I am grateful for that indication.

MR GORDON: If your Lordship would look at the declaration at 3. We propose that that forms part II of the order, the second item of relief, and be amended to read as follows:

A declaration that the respondent has acted unlawfully and in breach of paragraphs 3.24 and 3.41 of the policy guidance in failing to make a service provision decision . . .

We would then add the words:

. . . under section 47(1)(b) of the National Health Service and Community Care Act 1990 . . .

And then we would omit the words:

. . . in respect of the applicant's accommodation . . .

And substitute them with the words:

. . . as to the long term placement of the applicant.

My Lord the final declaration would be in what is currently 1 on that sheet and it would be a declaration that the respondent has acted unlawfully and we would add the words:

And contrary to paragraph 3.25 of the policy guidance . . .

And then it continues:

. . . in failing to produce a lawful care plan.

My Lord, we would omit the declarations currently on that sheet numbered 2 and 4 and these three forms of relief are intended to be in substitution for that claimed in the form 86A.

MR JUSTICE HIDDEN: Yes. I am grateful for that. Mr Eccles is there anything you wish to say on that particular point?

MR ECCLES: My Lord, no. Those declarations reflect the findings of your Lordship's judgment. They do not necessarily make it easy for the Local Authority to know where they go next, but they reflect the mistakes which your Lordship has found they have made hitherto. But that is as far as my learned friend seeks by way of relief and I say nothing more.

MR JUSTICE HIDDEN: I did not want to say more in my judgment because I did not want to put the Local Authority under any further constraints.

MR ECCLES: My Lord, we will do our best to deal with that. My learned friend has another application to make.

MR GORDON: My Lord, the next logical step is to make an application for costs, the applicant's costs, with legal aid taxation of those costs, if I may.

MR JUSTICE HIDDEN: Mr Eccles?

MR ECCLES: My Lord, I cannot resist that.

MR JUSTICE HIDDEN: Thank you.

MR ECCLES: My Lord, I have an application to make and that is at this stage to invite your Lordship to grant leave to appeal, not against your Lordship's decision in relation to the care plan but in relation to the other declaration which has been made as to the failure to make a service provision decision in respect of the long term placement of Therese. My Lord, there are two issues which would arise if they were to be put in a formulation at this stage for the Court of Appeal. One relates to the issue whether the Local Authority's failure is, as your Lordship has found, a failure in law to comply with a legal duty to have arrived at that decision. Your Lordship will appreciate from the argument that underlying the whole of the Local Authority's case is the very real concern about the financial commitment which they will have to enter into if in fact they have no other room for manoeuvre but now to decide that they must recommend a provision for Therese there being nothing else apparently at the moment. Therefore those have considerable consequences for a relatively small Borough in the light of the obligations which they have to undertake which may or may not be obligations which the health authority are prepared to undertake. Your Lordship has helpfully set out all the rival submissions in relation to that and there is nothing I can add to those at this stage, save to emphasise the significance of the decision which your Lordship has arrived at in categorising this as a legal obligation in relation to a patient who is at the moment in hospital accommodation. This decision must be taken even if it is a decision which the Local Authority, having regard to their resources, feel is one that should not be an obligation on their part.

MR JUSTICE HIDDEN: I think McCowan LJ said something about that in the *Gloucester County Council* case, did he not? A resources point.

MR ECCLES: The resources point there relates to section 2 of the 1970 Act and that is a separate point as to the construction of the 1970 Act and the House of Lords will, in February next year, hear argument in relation to that. Here there is a wider discretion about which there is no dispute under section 47 and it is very important for this and other local authorities to determine whether in these circumstances, for it to be determined in these circumstances at as high a level as we may, how far those resources may be taken into account where a patient has such very complex and expensive needs to meet. My Lord I do not repeat the submissions I have made and I cannot emphasise the importance of it, we submit as part of the Local Authority's duties as they have now been found to be.

My Lord the second point, and it is another area upon which it would be very helpful indeed for local authorities to have guidance from the Court of Appeal as well as from your Lordship, is the relationship between the complaints procedure and the judicial review route. Your Lordship has helpfully indicated that in

Children Act cases there may be considerations which the court considers to be particularly relevant to that class of case.

MR JUSTICE HIDDEN: I was thinking of what Ward J (as he then was) said at page 815 about the . . .

MR ECCLES: My Lord, undoubtedly there is a complaints procedure which is in existence and in our submission there may be many circumstances in which any complaint that is made where services have not been provided in accordance with a user's wishes may have to involve reference to either the policy guidance or the practitioners' guide and one appreciates that wherever that may happen undoubtedly it does cause a difficulty, particularly since the appendix to policy guidance recommends, if not requires, that solicitors should not be instructed and indeed should not appear and tribunals will not listen to them. But it is a matter possibly of considerable public concern as to an interest as to the circumstances in which it is right for judicial review to be used, bearing in mind, as I say, that in almost any case one could refer to the policy guidance and practitioner's guide in support of an argument that the Local Authority have not provided services in accordance with the user's wishes and requirements.

My Lord there are those two areas which in our submission go beyond simply the facts of this case in which in our submission it would be helpful to have guidance from the Court of Appeal and therefore without any disrespect to your Lordship's judgment in this case we would submit it would be appropriate to grant leave.

MR JUSTICE HIDDEN: Do you have anything to say, Mr Gordon?

MR GORDON: My Lord, only this. As to the second of the points, the relationship or interrelationship between the complaints procedure and judicial review was considered by the Court of Appeal in the *Baker* case so that is not, in my respectful submission, an issue that needs to go further.

So far as the first point is concerned, the relationship or interrelationship between financial resources and uniquely driven service provision decisions in my respectful submission the true issue is the application of the policy guidance to the facts of this case and it was not in dispute that the policy guidance is binding.

My Lord, the third point is that there has been huge delay in this case already. My submission is that if my learned friend wishes to pursue it further he should go to the Court of Appeal because on any view he does not seek to appeal against your Lordship's finding on the care plan and in my respectful submission this is the sort of case where the Court of Appeal if asked should be invited to consider whether it truly raises a point of public importance.

MR JUSTICE HIDDEN: Thank you.

MR ECCLES: My Lord I have not taken instructions as to whether one appreciates the argument about the interim and delay having occurred no doubt that is a matter about which undertakings could be given, but I do not have undertakings at hand and it would be a matter for your Lordship to say whether they should be given but in the interim the Local Authority should at least put in place a decision making process in the event that the Court of Appeal, if it adjudicated upon this matter and upheld your Lordship's judgment and in those circumstances it was found that Therese should have something in the nature of a SENSE-type placement, no doubt that decision making process could be undergone in the meantime, and indeed, no doubt, the Local Authority would be well advised to prepare

for the eventuality if this matter was appealed and if a further finding was made against them. A

MR JUSTICE HIDDEN: Thank you.

The relief I shall grant is first an order of Mandamus to provide within 21 days a care plan which complies, as far as possible, with the practitioners' guide and with paragraph 3.25 of the policy guidance. Secondly, a declaration that the respondent has acted unlawfully and in breach of paragraphs 3.24 and 3.41 of the policy guidance in failing to make a service provision decision under section 47(1)(b) of the National Health Service and Community Care Act 1990, as to the long term placement of the applicant. Thirdly, a declaration that the respondent has acted unlawfully and contrary to paragraph 3.25 of the policy guidance in failing to produce a lawful care plan. B C

The respondent will pay the applicant's costs and there will be legal aid taxation for the applicant.

Mr Eccles, I am afraid you will have to go to the Court of Appeal for your leave.