R v Bristol CC ex p Penfold (Alice)

Queen's Bench Division
Scott Baker J
23 January 1998

Local authorities have no discretion to refuse to carry out an assessment under the National Health Service and Community Care Act 1990 on the ground that lack of resources means that in practice there is no prospect of making a community care service available to the applicant. Local authorities do have power to provide normal housing under the National Assistance Act 1948 when provision is made to meet needs which would otherwise have to be satisfied by the provision of other community care services.

Facts

The applicant was a 52-year-old single parent who lived with a dependent teenage daughter. She suffered from anxiety and depression and received care and support from members of her family living in central Bristol. In December 1995 the applicant applied to the respondent local authority for housing assistance under Housing Act 1985 Part III (homelessness). On 22 May 1996 the respondent authority decided that it owed a duty to secure suitable accommodation for the applicant and her daughter. The applicant refused an offer of accommodation in central Bristol on the ground that she suffered from claustrophobia. In September 1996 her appeal was dismissed and the respondent authority lawfully concluded that it had discharged its duty towards her under Housing Act 1985 Part III.

The respondent authority continued, however, to provide temporary accommodation and in due course the applicant was offered accommodation on the outskirts of Bristol, under Housing Act 1985 Part II (ordinary waiting list). The applicant rejected this offer on the ground that her daughter, who was of mixed race, would be at risk in that area, and that she needed to be near her family in central Bristol. Her appeal was rejected.

On 30 January 1997 the applicant asked to be assessed under National Health Service and Community Care Act 1990 (NHSCCA) s47 and for her daughter's needs to be assessed under the Children Act 1989 and the Carers (Recognition and Services) Act 1995 with a view to being provided with accommodation within central Bristol. The respondent authority declined to carry out any assessment of the applicant or her daughter on the ground that there was no prospect that it would provide the applicant with a community care service having regard to the resources available to the respondent authority and the two offers of accommodation already made. Subsequently, the respondent authority stated that the applicant did not qualify for assessment under NHSCCA 1990 s47 because she did not 'appear' to be a person who needed any services which the respondent had power to provide. The respondent authority also asserted, in the alternative, that it had carried out an assessment, albeit an informal one, and concluded that the applicant had no needs for which it was appropriate for social services provision to be made. The respondent further contended that it had no power to provide 'normal' housing under National Assistance Act 1948 (NAA) s21 because NAA 1948 s21(8) restricts the power to provide normal housing to provision under the Housing Act 1985. The respondent further contended that even if it had the power to provide 'normal' housing under NAA 1948 s21 there would have to be an existing rather than a prospective need and that while the applicant and her daughter remained in temporary accommodation their need was merely prospective.

Held:

1 On the facts, the court found that there was in truth no assessment by the respondent authority of the applicant's needs under NHSCCA 1990 s47. This was because the respondent authority considered that there was no prospect that it would make provision for any needs that might emerge in the course of such assessment, given its knowledge of the applicant and of the services which it could in practice provide under community care legislation.

2 There is, however, a mandatory duty to carry out an assessment under NHSCCA 1990 s47(1) once the low threshold test has been satisfied, namely, that it appears to the authority that the applicant *may* be in need of a service which the authority *may* provide or arrange. The authority has no discretion to decide not to carry out an assessment because it believes, however reasonably, that there is no or no sensible prospect that it will award services given what it knows of the applicant and of the constraints on its own resources. *R v Gloucestershire CC and Secretary of State for Health ex p Barry* (1997) 1 CCLR 40, HL, decided that the cost of meeting needs was a relevant consideration in deciding what provision, if any, should be made to meet needs. Resources are, however, an irrelevant consideration in deciding whether to undertake an assessment under NHSCCA 1990 s47(1) of a person's needs.

3 The respondent local authority was not justified in asserting that no duty arose to assess under NHSCCA 1990 s47(1) on the ground that the applicant did not appear to be a person who might be in need of services which it might provide or arrange because it must have appeared to all at the relevant time that the applicant did have a need for a service which the respondent was empowered to supply.

4 If, contrary to the view of the court, the respondent local authority had carried out an informal assessment under NHSCCA 1990 s47(1) and concluded that the applicant did not have any needs for which it was appropriate for social services to make provision, then the respondent's decision was unlawful for two reasons. First, the assessment failed to comply with the Policy Guidance and, secondly, it failed to incorporate an assessment of the applicant's daughter under Carers (Recognition and Services) Act 1995 s1, such an assessment having been made informally on a reasonable construction of the correspondence. Furthermore, an assessment is something that is directed at the particular person who presents him/herself with an apparent need. An assessment cannot be said to have been carried out unless the authority concerned has fully explored that need in relation to services it has the power to supply.

5 Accommodation provided under NAA 1948 s21 does not have to be a residential home with board and services. Notwithstanding the provisions of NAA 1948 s21(8), the respondent local authority had power under NAA 1948 s21 to provide 'normal' accommodation providing the need was not coincident with a need purely for housing simpliciter but was a function of a need which would otherwise have to be met by other community care services, eg, the need of a person to live close to a drug rehabilitation centre. In this case the applicant sought accommodation near her family who provided her with care and support. If she did not obtain such accommodation the applicant's needs for care and support might have to be met by the provision of other community care services.

6 Although NAA 1948 s21 uses the present tense in referring to persons who 'are' in need of care and attention which 'is' not otherwise available to them, imminent events must fall for consideration as to present need. It cannot realistically be said that a housing need does not arise until an eviction actually

takes place: *see R v Westminster CC and Others ex p M, P, A and X* (1997) 1 CCLR 85, CA.

7 The applicant did not on the facts have an apparent possible need, as the result of mental disorder, for services under NAA 1948 s29, Chronically Sick and Disabled Persons Act 1970 s2, Health Services and Public Health Act 1968 s45 and National Health Service Act 1977 s21 and Sch 8.

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.

Buccleuch (Duke of), Re (1889) XV PD 86.

R v Avon CC ex p M [1994] 2 FCR 259; [1994] 2 FLR 1006; [1995] Fam Law 66, QBD.

R v Berkshire CC ex p P (1998) 1 CCLR 141; 95 LGR 449; (1996) *Times*, 15 August, QBD.

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

R v Islington LBC ex p Rixon (1998) 1 CCLR 119; (1996) 32 BMLR 136; [1997] ELR 66; (1996) *Times*, 17 April, QBD.

R v Westminster CC and Others ex p M, P, A and X (1997) 1 CCLR 85; (1997) 9 Admin LR 504; (1997) *Times*, 19 February, CA.

Legislation/guidance referred to in judgment:

Asylum and Immigration Act 1996 – Carers (Recognition and Services) Act 1995 s1 – Children Act 1989 – Chronically Sick and Disabled Persons Act 1970 s2 – Health Services and Public Health Act 1968 s45 – Housing Act 1985 Parts II and III – Local Authority Social Services Act 1970 ss7 and 7A – National Assistance Act 1948 ss21 and 29 – National Health Service Act 1977 s21 and Sch 8 – National Health Service and Community Care Act 1990 ss46 and 47 – Secretary of State's Approvals and Directions under s21(1) of the National Assistance Act 1948 at Appendix 1 to LAC(93)10 – *Community Care in the Next Decade and Beyond* (LASSA guidance, November 1990) (The Policy Guidance).

This case also reported at:

Not elsewhere reported.

Represenation

R Gordon QC and J Luba (instructed by Bobbetts Mackan) appeared on behalf of the applicant.

I McLaren and H Mulvein (instructed by Bristol City Council) appeared on behalf of the respondent.

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Judgment

MR JUSTICE SCOTT BAKER: The relevant words of Section 47(1) of the National Health Service and Community Care Act 1990 provide:

> *. . . where it appears to a local authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such services, the authority –*
>
> *(a) shall carry out an assessment of his needs for those services; and*
>
> *(b) having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of any such services.*

The Applicant is a 52 year old single parent who lives with her dependent

A teenage daughter Karen. She suffers from anxiety and depression. She depends on other members of her family living in central Bristol for her care and support. She claims the Respondent has acted unlawfully because it should have carried out an assessment of her needs under this Section but did not.

The facts can be fairly shortly stated. In December 1995 Mrs Penfold applied B to the Respondent for housing as a homeless person. On 22 May 1996 the Respondent decided that she was unintentionally homeless and in priority need and that accordingly it owed a duty to secure suitable accommodation for her and Karen. She had previously been in Cornwall living with her sister but had returned to Bristol to live with her two sons who had a council tenancy. When she was C interviewed on 20 June 1996 she did not exclude any particular area as being an inappropriate one in which to be housed.

The Respondent offered her permanent accommodation at 17 New Street Flats which is in central Bristol. She refused the offer, claiming to suffer from claustrophobia, and appealed but the appeal was dismissed on 13 September 1996. The D Respondent treated its duty under Part III of the Housing Act 1985 as having been discharged. She was told that if she maintained her refusal she could continue to apply on the ordinary housing list.

On 30 December 1996 the Respondent made another offer, this time under Part II of the Housing Act 1985. The property was 224 Broadlands Drive, Lawrence E Weston. She rejected it as unsuitable. Again she appealed unsuccessfully. Her grounds of refusal were that she worked in the Fishponds area, that she needed to be near her family and that her daughter, who is of mixed race, would be at risk in Lawrence Weston.

She is presently living in accommodation temporarily provided to her by a F housing association.

On 30 January 1997 the Applicant's solicitors wrote to the Respondent (which is a social service authority) asking for an assessment under the community care legislation and also an assessment of her daughter's needs under the Children Act. The offer of 224 Broadlands Drive was kept open, but on 26 February 1997 her G solicitors wrote stating that:

(i) she no longer worked;
(ii) she would lose daily contact with people if, she moved to Broadlands Drive;
(iii) she could not afford the bus fares to and from Bristol; and
(iv) she was keen for her daughter, whose company she found helpful, to continue to live with her. H

On 5 March 1997 her solicitors wrote that it was their expectation that the services the Applicant and her daughter would require would be suitable accommodation within the central area of Bristol, so that the appropriate support I mechanisms could be left in place and so that she and her daughter could continue to live together. They continued:

> *Whilst the local Housing Department are maintaining that they have discharged their duty to our client under the Homelessness Legislation there remains in place the linked obligation under the National Assistance Act 1948 Section 21 to* J *persons 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.*

They drew attention to a duty to assess not only under Section 47 of the 1990 Act and the Children Act 1989 but also the separate but related duty under the K Carers (Recognition and Services) Act 1995.

On 10 March 1997 the Respondent replied saying, *inter alia*:

Before deciding whether or not to carry out a Section 47 assessment, therefore, it is incumbent upon the Social Services Department to put its mind to the question as to whether or not Section 47 is satisfied. If you like this is a pre-assessment.

I am informed by Ms Ayensu that she has put her mind to the question as to whether or not a community care assessment should take place in respect of Mrs Penfold and has reached the view that no assessment needs to be undertaken.

I understand from Ms Ayensu that this is on the basis of her knowledge of Mrs Penfold and her awareness of what services can be provided as community care services.

The Applicant's solicitors themselves commissioned an extra statutory community care assessment by a consultant, Mr Stamp. This was dated 12 March 1997 and recommended that the Social Services Department undertake an assessment of need under community care legislation. However, the Respondent was not prepared to do so.

The Applicant claims that the decision of 10 March 1997 to refuse the application for an assessment and the subsequent failure to revise that decision is unlawful, *ultra vires* and void. She contends first that no local authority properly directing itself to Sections 46 and 47 of the National Health Service and Community Care Act 1990 could properly have been satisfied on 10 March 1997 (or after that date when it was asked to reconsider its decision) that the Applicant did not appear to be 'a person for whom they may provide or arrange for the provision of community care services' and who 'may be in need of any such services'.

The Applicant's Needs

In housing terms Mrs Penfold does not want to leave central Bristol and hence lose the support of her family who live in the area. This is what will happen if she moves and takes up the Respondent's second housing offer. But the Council has discharged its duties under the Housing Act and has no further obligation under the housing legislation to find her anywhere to live. What it really, I think, comes to is this: if she is to stay in central Bristol, and therefore continue to have the support of her family, somebody is going to have to find her accommodation. If she moves away, for example to the accommodation that she has been offered but declined, she will need support to replace her family. There is some evidence that she suffers from depression and chronic anxiety. This appears to have become worse in the period both leading up to and since the decision of 10 March 1998. Until relatively recently she was in employment. She was not seen for assessment by the community psychiatric nurse until 23 April 1997 i.e. after leave to apply for judicial review had been granted (see letter at p164). There are I think quite a lot of question marks about the true extent of Mrs Penfold's needs, and what they would really turn out to be following a detailed assessment. Mr McLaren graphically put it that this case is really all about the cost of a bus ride between the Applicant and her family if she moves to the offered accommodation.

The position of the two sides is really as follows. The Respondent says the Applicant has not got what she wants under the Housing Act. She has for present purposes exhausted her rights thereunder and is seeking what is in effect preferential housing treatment through the vehicle of the community care legislation. If she is allowed to do this it will lend to a flood of requests from dissatisfied and unsuccessful housing applicants. The Applicant says she has a real, or at the very least apparent, need for community care provision because she cannot cope living away from her family i.e. other than in central Bristol. Therefore she needs either accommodation in central Bristol or, if she has to live elsewhere, other

support. Accordingly she passes the threshold test for assessment under Section 47 of the National Health Service and Community Care Act 1990.

The two main issues are:

(i) whether the Respondent acted unlawfully in not making an assessment under Section 47 and;

(ii) whether there is power to provide housing under Section 21 of the National Assistance Act 1948.

Before coming to these questions it is necessary to consider whether the Respondent did in fact make an assessment under Section 47. Mr Gordon QC for the Applicant points to an inconsistency of approach by the Respondent. As first it was saying (see Mr McNamara's letter of 10 March 1997) that it had not made a Section 47 assessment because of (i) Ms Ayensu's knowledge of Mrs Penfold; and (ii) her awareness of what services could be provided. Then Ms Ayensu said in her Affidavit of 23 April 1997 that it would have been preferable to have said she had made an assessment but had concluded there was no need for which it was appropriate for the social services to provide any residential accommodation. In other words she was drawing a distinction between on the one hand a formal assessment and on the other an informal assessment or cursory look at the situation. As Jane Ashman says in paragraph 11 of her affidavit of 23 April 1997, where in the opinion of a team manager (in this case Ms Ayensu) the person under consideration has no prospect of being offered any community care services it is the approved practice for her to decide that the assessment should proceed no further. Mr Gordon also observes that there are many forms of community care that may be provided other than a residential home placement and the fact that the Applicant is nowhere near qualifying for such a placement does not indicate she may not qualify for some other service provision.

Mr McLaren puts his case in the alternative. Either Ms Ayensu's decision was one where 'it appeared to her' that the Applicant was not a person who may be in need of provision, or her consideration of the matter did amount to an assessment within the meaning and for the purposes of the Section. He accepts that it was not, however, a full formal assessment such as would be required for someone in respect of whom it appeared there was a need for some service provision.

I was referred on many occasions by both sides to the Second Edition of *Community Care Assessments* by Gordon and Mackintosh (the book). Mr McLaren referred to p397 and the 'housing letter' of 14 December 1992. It has the following to say about Section 47 assessments.

> *Level of Assessment*
> *9. The type and level of assessment that is offered to an individual should relate to the level and complexity of the need that is being presented, the aim being to keep the process as simple and efficient as possible. Most assessments are likely to be simple and straightforward.*
>
> *10. Authorities should, therefore have:*
> *(a) a procedure for screening or filtering referrals according to agreed criteria.*

There is another passage in the book at p188 para 3.20:

> *Assessment arrangements should normally include an initial screening process to determine the appropriate form of assessment. Some people may need advice and assistance which do not call for a formal assessment. Others may require only a limited or specialist assessment of specific need. Others may have urgent needs which require an immediate response. Procedures should be sufficiently*

comprehensive and flexible to cope with all levels and types of need presented by different client groups.'

These passages of policy guidance clearly indicate, what might be said to be obvious, that the level and nature of the assessment required varies according to the circumstances of the particular case. Mr McLaren argues that the Government material suggests that there is confusion as to the nature of an assessment but I do not agree. What is necessary in one case will not be necessary in another. An assessment is something that is directed at the particular person who presents with an apparent need. One cannot be said to have been carried out unless the authority concerned has fully explored that need in relation to services it has the power to supply. In some cases the exercise will be very simple; in others more complex.

Mr McLaren's primary argument is that it did not appear to Ms Ayensu that Mrs Penfold was in need of community care services and that accordingly there was no assessment. In my judgment Ms Ayensu's statement in her Affidavit of 23 April 1997 that it would have been preferable to say she had made an assessment but had concluded there was no need is indicative that the Respondent's initial position is the correct one. There was in truth no assessment and so I find.

Mr McLaren's basic position is that this is a simple *Wednesbury* case and that the Respondent's decision of 10 March 1997 was one that was within the band of reasonableness open to it. However, I do not accept this. This case as Mr Gordon contends, raises issues of construction namely:

(i) what was the Respondent entitled to take into account when determining the threshold criteria for an assessment under Section 47(1)(a)? and
(ii) whether as a matter of *vires* Section 21 of the National Assistance Act 1948 permits a service provision decision thereunder as a function of a social welfare need?

Section 47
Mr Gordon contends that Section 47 involves a two stage process:

(i) the assessment of need; and
(ii) the service provision decision i.e. the decision reached in the light of the assessment as to what, if any, community care services should be provided.

Mr McLaren for the Respondent says that there are really three stages: first it must appear to the local authority that the relevant person may be in need of a service it is empowered to supply, second there is the assessment of need and third the decision whether or not to meet the identified needs. I prefer Mr McLaren's analysis.

Mr Gordon points out that the threshold test to trigger the operation of the section is a low one and that it is mandatory to carry out an assessment when it appears that the person concerned *may* be in need of community care services. The so called approved practice of not assessing where there is no hope of meeting any need is unlawful. He argues that it is unlawful primarily because it confuses the service provision decision stage of the process with the assessment stage. The two are quite separate. The first is mandatory, the second discretionary. He points out, and this is not disputed, that the authority is required when carrying out an assessment to consider all services which it is empowered to provide or arrange see *R v Berkshire County Council ex parte Parker* (1998) 1 CCLR 141; 95 LGR 449.

Mr McLaren submits that this application for assessment is a blatant attempt to bypass the homeless persons legislation. Mr Gordon contends that it is not. It is

A simply an application for an assessment of need which may be responded to either:

(i) by the provision of accommodation as a function of the Applicant's need to continue to receive support from her family; or
(ii) by the provision of alternative support services.

B

The Relevance of Resources

The question is whether in conducting the first stage of the exercise under Section 47(1), that is in deciding whether the Applicant may be in need, the Respondent is entitled to take into account resources. Mr McLaren points out that there are very C serious cost implications. He said, although there was no evidence of this, that an assessment can take 15 hours. It is also, and this is clearly correct, expensive in manpower and consequently money. It would he argues be pointless for local authorities to spend vast sums of money on conducting assessments when there is no hope of meeting any established need. The man hours and consequent cost D would be better spent elsewhere. Mr McLaren's argument is that once it is accepted that 'need' can be a resource related test, the matters the local authority, or team leader on its behalf, can take into account include their knowledge of current policy within that authority.

It seems to me that Parliament has expressed Section 47(1) in very clear terms. E The opening words of the subsection, the first step in the three stage process, provide a very low threshold test. The reference is to community care services the authority *may* provide or arrange for. And the services are those of which the person *may* be in need. If that test is passed it is mandatory to carry out the assessment. The word *shall* emphasises that this is so. The discretionary element F comes in at the third stage when the authority decides, in the light of the results of the assessment what, if any, services to provide.

Usually, but not inevitably, the section will be triggered by, or on behalf of, a person claiming to have a need. But the initiative could come from the local authority. In practice however only those who think they have a need will ask for a G community care assessment. As a matter of logic it is difficult to see how the existence or otherwise of resources to meet a need can determine whether or not that need exists. The practical reality of success of the Applicant's argument is that the potentially deserving cases will be prioritised in terms of:

H (i) assessed needs that are to be met;
(ii) assessed needs that must remain current but will be recorded in the local authority's records for planning purposes; and
(iii) aspirations that following assessment turn out not to be a need.

I do not, therefore accept Mr McLaren's submission that Parliament cannot I have intended expenditure to a pointless end when it was clear that any established need could not be met. Even if there is no hope from the resource point of view of meeting any needs identified in the assessment, the assessment may serve a useful purpose in identifying for the local authority unmet needs which will help it to plan for the future. Without assessment this could not be done.

J If the Respondent's argument on construction is accepted, the consequence will be that not only can authorities set wholly disparate eligibility criteria for services they intend to provide but they may also utilise such criteria as a basis for whether they will undertake a community care assessment at all. This cannot be right. The mere fact of unavailability of resources to meet a need does not mean K that there is no need to be met. Resource implications in my view play no part in the decision whether to carry out an assessment.

Furthermore, I do not accept Mr McLaren's argument that the Applicant's construction provides a route to queue jump or bypass the housing list. If the Applicant's Section 21 argument succeeds (as to which see below) the consequence is that she will be entitled to consideration of need i.e. an assessment of need for housing *as a function of social welfare need*. In each such case there will be three hurdles for an applicant to surmount: The local authority will have to decide:

(i) whether the Applicant falls within the category of a person who has an apparent need for such a service. Such a need will not exist if it is coincident purely with housing simpliciter, for that is the quite separate function of the housing authority;
(ii) whether following assessment such a need exists; and
(iii) whether a service provision decision is to be made in the Applicant's favour.

As Mr Gordon puts it, where there are three separate exercises of judgment or discretion there can hardly be said to be a bypass of the housing list.

If a service provision decision is made in the Applicant's favour utilising Section 21 of the National Assistance Act, in the event that the assessment produces a recommendation that her need for social support can be met by accommodating her in central Bristol, there are a number of ways of the Respondent achieving this. It might, for example, invite the housing association to keep her where she is. It might refer her to another housing association or it might provide her with a deposit and rent in advance to enable her to take private accommodation. These are matters that could, and no doubt would, be explored on assessment.

In my judgment the central question comes back to this. Did the Respondent apply the wrong test at stage one, that is in deciding whether Mrs Penfold had an apparent need of community care services. The answer to this is quite independent of establishing an actual need. It is dependent only on the question whether the Respondent was entitled to take into account the resources it would be able to provide. In my view it was not so entitled. In the result the Respondent applied the wrong test. The decision is flawed and must be quashed.

It does not follow merely from the fact that the wrong test was applied that the Applicant is necessarily entitled to an assessment of need. However, it does seem to me that had it applied the correct test i.e. left resources out of account, it could not have refused to undertake an assessment of Mrs Penfold's needs. How detailed that assessment will have to be will turn on the nature and extent of any need identified.

The nub of Mr McLaren's argument is that need is a relative term in the community care legislation and that it is related to the prospect of supply. This, he contends, is clear from the decision of the House of Lords in *R v Gloucestershire County Council ex parte Barry* (1997) 1 CCLR 40; [1997] 2 WLR 459. Accordingly there is no purpose and indeed no obligation to assess any possible needs where there is no prospect of meeting them. I turn therefore to consider *Barry* to see what if any light is thrown upon the true construction of Section 47.

The House held by a majority of 3 to 2 that in assessing an applicant's need for a service under the Chronically Sick and Disabled Persons Act 1970 the local authority had to balance the severity of the applicant's disabling condition against the cost of the service and the availability of resources. It is important to have in mind the point that the case raised. It is succinctly stated by Lord Nicholls at p469B [(1997) 1 CCLR 40 at p49B-C]:

Can a local authority properly take into account its own financial resources

A *when assessing the needs of a disabled person under Section 2(1) [of the Chronically Sick and Disabled Persons Act 1970]?*

Lord Nicholls with whom Lords Hoffmann and Clyde agreed said at p469C [(1997) 1 CCLR 40 at p49C-F]:

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

This is an alluring argument but I am unable to accept it. It is flawed by a failure to recognise that needs for services cannot sensibly be assessed without having some regard to the cost of providing them. A person's need for a particular type or level of service cannot be decided in a vacuum from which all
E *considerations of cost have been expelled.*

And at p470C [(1997) 1 CCLR 40 at p50C-E]:

Once it is accepted, as surely must be right, that cost is a relevant factor in assessing a person's needs for the services listed in section 2(1), then in deciding
F *how much weight is to be attached to cost some evaluation or assumption has to be made about the impact which the cost will have upon the authority. Cost is of more or less significance depending upon whether the authority currently has more or less money. Thus, depending upon the authority's financial position, so the eligibility criteria setting out the degree of disability which must exist before*
G *help will be provided with laundry or cleaning or whatever, may properly be more or less stringent.*

Lord Clyde drew attention to the fact that the words 'necessary' and 'needs' are both relative expressions, admitting in each case a considerable range of meaning. He then said at p475G [(1997) 1 CCLR 40 at p55D]:

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It is not necessary to hold that cost and resources are always an element in determining the necessity. It is enough for the purposes of the present case to recognise that they may be a proper consideration. I have not been persuaded that they must always and necessarily be excluded from consideration.

I

Based on this Mr McLaren submits that 'need' is a relative word within the care legislation. The Respondent therefore can carry out its statutory duty by having regard to need being determined by reference to the prospect of supply. No prospect of supply equals no need equals no requirement to assess.

J

However, I can find nothing in the speeches of the majority in *Barry* to suggest that resources should be brought into the equation in the first stage of the Section 47 exercise, that is in deciding whether a particular person may be in need of a service it has power to provide or arrange. *Barry* was not concerned, as is the present case, with whether a local authority was under a duty to assess but with a

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different question of whether in undertaking an assessment the cost of meeting the need could be a relevant consideration.

There is, it seems to me, a clear opportunity to take resources into account in the third stage of the Section 47 exercise, that is under Section 47(1)(b).

I do not think that *Barry* assists the Applicant's case. My conclusion is therefore that the availability of resources is an irrelevant consideration in deciding whether to undertake a Section 47 assessment.

The Relevant Services

The community care services for which a persons needs are to be assessed under Section 47 are defined in Section 46(3) and Section 47(8):

> *. . . 'community care services' means services which a local authority may provide or arrange to be provided under any of the following provisions:*
> *(a) Part III of the National Assistance Act 1948;*
> *(b) section 45 of the Health Services and Public Health Act 1968;*
> *(c) section 21 of and Schedule 8 to the National Health Service Act 1977; and*
> *(d) section 117 of the Mental Health Act 1983.*

This case is primarily concerned with Section 21 of the National Assistance Act 1948. But Mr Gordon points out there is a whole range of care other than residential placements that local authorities are, in appropriate circumstances, empowered to provide.

Section 21(1) provides:

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

And Section 21(8):

> *Nothing in this section shall authorise or require a local authority to make any provision authorised or required to be made (whether by that or by any other authority) by or under any enactment not contained in this Part of this Act or authorised or required to be provided under the National Health Service Act 1977.*

Mr Gordon argues that Section 21(1) expressly enables the local authority to provide accommodation in certain circumstances albeit only as a fall back provision in view of Section 21(8). To this Mr McLaren has two answers. First he says what the Applicant is seeking is 'normal' housing; that is to be rehoused in a house of her own choice in a location selected by her. This is something that falls to be dealt with as a discrete function by a housing authority under the relevant legislation namely, as it was then, the Housing Act 1985. 'Normal' housing cannot be provided under Section 21(1)(a) because of Section 21(8). The claim put forward by the Applicant is prevented by Section 21(8) from being within the *vires* of the authority. Secondly he says that Section 21(1)(a) deals with existing rather than prospective need.

Mr Gordon's answer to the first point is that 'normal' housing can be provided under the National Assistance Act 1948 when it is a function of 'need' which would otherwise have to be met by other community care services. What Mrs Penfold needs is a house, or some other accommodation, where her family, i.e. her support, is round the corner. The Applicant is not merely seeking accommodation as a homeless person. Accommodation provided under the 1948 Act does not have to be a residential home with board and services. The meaning of

accommodation is quite wide and flexible as is apparent from Section 21(5). Mr Gordon supports his argument that normal housing can be provided by reference to LA Circular (93)10 and the Secretary of State's Approvals and Directions under Section 21(1) (see p235 of the book and in particular paragraph 2).

Such an approach seems to me to fit in with Section 47(3) of the 1990 Act which provides that if during the course of an assessment it appears that the Applicant may be in need of services falling within the functions of a housing authority it shall invite it to assist in making the assessment and take into account any services likely to be made available by the housing authority. In this case the Respondent is a unitary authority, but in other cases the situation may be different.

The Applicant's argument is fortified, it seems to me, by *R v Westminster City Council and Others ex parte A and others* (1997) 1 CCLR 85; (1997) 9 Admin LR 504 (*The Asylum Seekers Case*). It was there held by the Court of Appeal that the Asylum and Immigration Act 1996, which restricts the rights of asylum seekers to receive certain state benefits, does not prevent a local authority from considering whether it has a responsibility to provide accommodation under Section 21(1)(a) of the 1948 Act. Lord Woolf MR said at p513C [(1997) 1 CCLR 85 at p93B-E]:

> *Basing their submissions upon this division, the appellants argue that the purpose of section 21(1)(a) was not to provide money for those in need of money or to provide accommodation for those who need 'accommodation per se' but to provide accommodation for those who required care and attention. Such persons could be rich and own their own homes but still could need the local authority's assistance under section 21(1)(a). The accommodation was not in itself an end but a means whereby the required care and attention can be provided.*
>
> *From this base the appellants urge that it is only necessary to take one further and final step. They contend that asylum seekers' needs are for food and accommodation and not for care and attention and consequently asylum seekers cannot avail themselves of section 21(1)(a).*
>
> *Clearly that proposition is too broadly stated. A late-claiming asylum seeker who was old, ill or disabled could certainly rely on the section. But even excepting such asylum seekers, it is at this final stage that the appellants' arguments break down. The fact that asylum seekers have a need for food and accommodation which would but for the statutory prohibition contained in the 1996 Act be met under other statutory provisions does not mean that they cannot qualify as having a problem which results in their needing care and attention which is a condition precedent to their being entitled to rely on section 21(1)(a) of the 1948 Act.*

And at p514H [(1997) 1 CCLR 85 at p94D-F]:

> *The effect of the 1996 Act is to prevent local authorities relying upon subsection 8, since there are no longer any relevant provisions so far as asylum seekers are concerned, with the consequence that the local authorities' responsibilities are wider than they otherwise would be. As the Secretary of State has recognised in giving the 1993 Directions, it is clearly the intention of Parliament that section 21(1)(a) should be used 'to provide temporary accommodation for persons in urgent need thereof in circumstances where the need for that accommodation could not reasonably have been seen' and 'to meet the needs of persons for (a) the prevention of illness.'*

Mr Gordon gave the example of a person who needs to live next door to a drug rehabilitation centre. The provision of basic or normal accommodation could in such circumstances be a function of meeting such a person's care needs.

In my judgment while Section 21(1)(a) is not a basic safety net for everybody, it can in appropriate circumstances extend to the provision of 'normal' accommodation. 'Normal' housing can be provided by this subsection when it is the answer to a need which would otherwise have to be met by other community care services.

As to the second point that Section 21 deals only with actual rather than prospective need I reject the suggestion that only when the Housing Association evict Mrs Penfold does she have an actual need that can be met by the section. Mr Gordon relies on *R v Avon County Council ex parte M* [1994] 2 FLR 1006 where Henry J held that needs included psychological needs. I do not think that decision greatly advances Mr Gordon's argument because, as Henry J pointed out at p1017, the panel correctly found that in law the assessment must be based on current needs. The position, however, as I see it is that although Section 21 uses the present tense referring to persons who *are* in need of care and attention which *is* not otherwise available to them, imminent events must fall for consideration as to present need. It cannot realistically be said that the need does not arise until the eviction actually takes place. I agree with Mr McLaren that the Court has to look at the matter as to the date of the assessment, but that does not mean that one must disregard what is about to happen. Lord Woolf in the *Asylum Seekers Case* specifically drew attention at p516B [(1997) 1 CCLR 85 at p94] to the ability of authorities to anticipate the deterioration which would otherwise take place in the asylum seekers' condition by providing assistance under Section 21.

I was taken through the legislative provisions relating to other community care services that it was within the Respondent's power to provide, the point being that assessment was necessary in the event of apparent possible need. Mr Gordon relied on Section 29 of the National Assistance Act 1948 which covers *inter alia* people who suffer from mental disorder, but I do not think that such evidence as there is of Mrs Penfold's depression goes near to creating a possible need that would qualify under this Section.

Then there is Section 2 of the Chronically Sick and Disabled Persons Act 1970 but this is, as it were, an extension of Section 29 of the National Assistance Act 1948. Again I do not think it avails Mrs Penfold on the evidence before the Court, even on the basis that she will become more depressed without the support network contended for.

Next comes Section 45 of the Health Services and Public Health Act 1968. This has no relevance for present purposes as it relates to old people. Finally there is Section 21 of and Schedule 8 to the National Health Service Act 1977 whose provisions again do not seem to me to arise on the facts of this case.

By amendment to the form 86A the applicant advanced two further grounds on which the failure to assess was unlawful. These are:

(1) Failure to have regard to the role of Karen as a carer to her mother, pursuant to the policy guidance, and to the council's obligations under the Carers (Recognition and Services) Act 1995.

(2) Failure to have regard to statutory guidance and/or directions given by the Secretary of State, this being required by Section 7A of the Local Authority Social Services Act 1970.

First, Section 1 of the Carers (Recognition and Services) Act 1995 provides:

. . . in any case where –
(a) a local authority carry out an assessment under section 47(1)(a) of the

A *National Health Service and Community Care Act 1990 of the needs of a person ('the relevant person') for community care services, and*

(b) an individual ('the carer') provides or intends to provide a substantial amount of care on a regular basis for the relevant person,

the carer may request the local authority, before they make their decision as to B *whether the needs of the relevant person call for the provision of any services, to carry out an assessment of his ability to provide and to continue to provide care for the relevant person; and if he makes such a request, the local authority shall carry out such an assessment and shall take into account the results of that assessment in making that decision.*

C

Mr Gordon's argument is that in this case Karen is a carer and that by implication she, through the solicitors, asked the local authority to conduct an assessment under the 1995 Act. He accepts that if there is no assessment under Section 47 there is no free standing right to an assessment under Section 1 of the Carers Act 1995. This point becomes relevant in the event that there was an assessment. D If there was an assessment, it should have extended to a Carers Act assessment because requests were made: (1) in the letter of 5 March 1997; and (2) through Mr Stamp's assessment, which was submitted to the Respondent under cover of letter of 13 March 1997.

In my judgment these did amount to requests and I think the Respondent so E took them. Ms Ayensu said in her Affidavit of 23 April 1997 (paragraph 10):

If I had taken a view that a formal Section 47 assessment of Mrs Penfold should take place then I would have considered whether or not Karen should receive an assessment pursuant to the Carers (Recognition and Services) Act but not F *otherwise.*

Mr Gordon observed that Ms Ayensu did not consider whether there should be a Carers Act assessment because she felt (rightly) that there was no entitlement to one in the absence of a Section 47 assessment. This, he says, clearly indicates, as I have concluded that no Section 47 assessment was in fact carried out.

G

Mr McLaren's response to the 1995 Act point is as follows. He agrees there are three criteria to be met under the section.

1. There must be an assessment under Section 47;
2. There must be an individual who 'provides or intends to provide a substantial H amount of care on a regular basis for the relevant person'; and
3. There must be a request from that person.

Since there was no assessment under Section 47 that is effectively the end of the matter. However I think the other two criteria were met. If, however, contrary to my view there was a Section 47 assessment, of whatever cursory nature, the I Respondent should have carried out a Carers Act assessment under its umbrella.

In my view the correspondence, reasonably construed, does in reality contain a request. I note that the Act does not prescribe any particular formality for a request. As to actual or intended provision of care, there was material on which the Respondent could take the view that this criterion was met, but the true J position appears to be that it did not apply its mind to the matter at all.

The second point concerns guidance and directions of the Secretary of State and Sections 7 and 7A of the Local Authority Social Services Act 1970. Section 7 requires local authorities, in the exercise of their social services function including the exercise of any statutory discretion, to do so under the general guidance K of the Secretary of State. Section 7A requires every authority to exercise its social

services functions in accordance with any directions given by the Secretary of State.

Put shortly Mr Gordon's argument is that the Respondent failed to have regard to guidance and that this is an additional reason why the failure to assess was unlawful. Mr McLaren's response is that guidance is what it says: 'guidance'. It is not inflexible and it is not a direction. He does not accept there was any failure to comply with policy guidance. In *R v London Borough of Islington ex parte Rixon* (1998) 1 CCLR 119 at pp125I-126A; [(1997)] ELR 66 at p73 Sedley J said:

> *A failure to comply with the statutory policy guidance is unlawful and can be corrected by means of judicial review: R v North Yorkshire County Council, ex Parte Hargreaves (1997) 1 CCLR 104 (Dyson J, 30th September 1994). . .*
>
> *A second source of consideration which manifestly must be taken into account in coming to a decision is the practice guidance issued by the Department of Health.*

I respectfully accept that as a correct statement of the law.

I was referred to a number of passages in the book at p183 and the ten following pages. Suffice it to say that I accept Mr Gordon's submission that if there was a purported assessment under Section 47 there was a breach of the policy guidance.

Mr Gordon summarised his case by advancing 8 core propositions which I shall answer in turn:

1. *Where there is an apparent need for community care services which a local authority is empowered to provide then the authority must undertake an assessment under Section 47(1)(a) of the 1990 Act.*

I accept this submission.

2. *Even if it were the case that a service user has no sensible prospect of being awarded services because of constraints upon resources, that does not absolve the local authority from conducting a Section 47(1)(a) assessment.*

I accept this submission. Mr McLaren sought to rely on the words of Lindley LJ in *The Duke of Buccleuch* (1889) XV PD 86 at p96:

> *You are not so to construe the Act of Parliament as to reduce it to rank absurdity. You are not to attribute to general language used by the legislature, in this case more than any other case, a meaning that would not only carry out its object, but produce consequences which to the ordinary intelligence are absurd.*

For the reasons I have explained, the construction contended for by the Applicant does not produce absurd consequences albeit there will be cases where it will be clear from the outset that the assessment will not produce a benefit to the individual assessed.

3. *The discharge by a Housing Authority of its obligations under Sections 65 to 69 of the Housing Act 1985 does not preclude the need for a community care assessment.*

I accept this submission.

4. *A local authority is empowered to provide 'normal' accommodation under Section 21 of the 1948 Act.*

I accept this submission, provided the provision of accommodation is a function of need that would otherwise fall to be met by other community care services.

5. *Even if 'normal' accommodation cannot be provided, the Applicant is in apparent need of services that the Respondent is empowered to provide; in particular she is ostensibly suffering from mental disorder with the consequences that that entails.*

I reject this submission.

6. *The Respondent's decision not to assess was unlawful.*

I accept this submission. This follows from my acceptance of submissions 1 to 4.

7. *In any event the decision not to assess is flawed as being contrary to statutory policy guidance and/or as being made without undertaking or considering an assessment under the Carers (Recognition and Services) Act and/or has been made irrationally.*

Other than that in order to comply with various aspects of policy guidance a Section 47 assessment was inevitable, I do not think this submission adds anything to the other submissions.

8. *There is no basis to refuse relief in the exercise of the Court's discretion.*

I accept this submission. Mr McLaren submits that this appears to be a very thin case on the facts, and that because the prospects of the applicant in fact being awarded any service provision are negligible relief should be refused. Mr Gordon rejects this argument as circular. I agree. This is not a case in which to refuse relief once it is established, as it has been, that the local authority acted unlawfully.

Conclusion

1. The Respondent never conducted an assessment at all. The underlying reason was that there was no prospect of meeting any needs that might have emerged in the course of the assessment. It was not justified in concluding that the threshold test in Section 47 had not been met because it must have appeared to all that Mrs Penfold *may* be in need of a service it was empowered to supply.
2. If, contrary to my view, there was an assessment, within the meaning of Section 47, the decision is flawed because of the failure in conducting it to follow Policy Guidance.
3. The local authority has, following a community care assessment, power to provide accommodation, under Section 21 of the National Assistance Act 1948. 'Normal' housing can be provided when it would otherwise have to be met by other community care services.
4. The failure to assess was unlawful. Mrs Penfold is entitled to an assessment. This is, however, a far cry from saying that an assessment will result in any service provision decision that is of benefit to her. There are many features in the case that suggest the merits of her claim fall short of the way it is put in Mr Stamp's report, and as Sedley J pointed out on the leave application, there are probably a great many other people with similar needs.

The application succeeds. I shall hear the Applicant on the precise form of order. The decision not to undertake an assessment is quashed. The Respondent must forthwith commence an assessment of the Applicant's needs pursuant to Section 47(1) of the National Health Service and Community Care Act 1990.