R v Kirklees MBC ex p Daykin and Daykin

Queen's Bench Division
Collins J
26 November 1996

A local authority cannot be compelled to meet needs in a particular way, in the absence of a recognisable assessment of need and a decision as to how best to meet the assessed need.

Facts

Mr and Mrs Daykin were in their sixties and disabled. Mr Daykin was absolutely unable to manage stairs while Mrs Daykin was virtually unable. They lived in a first floor council flat that could only be reached by stairs. In 1993 the health authority's occupational therapist proposed but did not formally recommend that Mr and Mrs Daykin should have a stair or shaft lift installed. Mr and Mrs Daykin were happy with this recommendation. By February 1994 there was a new occupational therapist. Her view was that there were practical difficulties involved with a stair lift in that extensive structural work would be required to the house while the stair lift would not be very practical for Mr Daykin, who used a wheelchair. A lift shaft was not possible because Mrs Daykin was claustrophobic. The new occupational therapist proposed that ground floor, wheelchair-adapted accommodation should be found. Nothing could be found and by July 1994, Mr and Mrs Daykin had agreed on a lift shaft, although Mrs Daykin remained concerned on account of her claustrophobia. In August 1994 the occupational therapist formally recommended that a stair lift be installed and that Mr Daykin be provided with an additional wheelchair (so there would be one at the top and one at the bottom of the stairs). A formal application for the relevant adaptations was then made, by the social services department on behalf of Mr and Mrs Daykin, to the housing department. It was made plain that the works were urgently required. The housing department was, however, concerned that while the works would cost about £15,000, the cost of moving Mr and Mrs Daykin to ground floor accommodation and carrying out adaptations would be only about £3,000. It dragged its feet. Then in April 1995 the acting chief social services officer expressed the view (agreeing with the housing department) that rehousing rather than adaptations was the appropriate course and in June 1995 a decision was taken to that effect by the area housing manager on the ground of the cost implications of adaptation works. By the time of the hearing the respondent authority had located a ground floor property capable of being adapted. Medical evidence had been obtained showing that to move Mr Daykin even once could prove fatal: but a complicating factor was that he would have to be moved even if the stair lift was installed at his present home, while the structural work was being undertaken. A further issue arose because the ground floor tenants beneath Mr and Mrs Daykin were being disturbed by the noise of Mr and Mrs Daykin's air compressor.

Held (refusing the application):

1 The respondent authority never carried out its duty under National Health Service and Community Care Act 1990 s47 to assess Mr and Mrs Daykin's needs and decide what were the services that needed to be provided to meet those needs. The recommendation by the occupational therapist and the application by the social services department to the housing department for adaptations to be carried out did not amount to an assessment of need and a decision to provide services.

2 It is not always easy to differentiate between what is a need and what is merely the means by which such need can be met. In this case, Mr and Mrs Daykin's need was clearly a need to be able to get in and out of their dwelling. That need could be met either by rehousing to a dwelling where access was possible, or by adaptations including the provision of a stair lift. It was impossible to regard the provision of a stair lift as 'the need'.

3 A local authority is entitled to reconsider how best to meet a need and is entitled to be flexible as to how needs are met. That does not mean that an authority is entitled to drag its feet and debate with itself for a substantial period of time. In particular, once it has identified after discussion the manner in which needs are to be met, then the Act requires that it then proceeds to meet those needs.

4 Although the respondent authority had still not carried out a formal assessment or prepared a care plan, the court was not prepared to quash its proposals to rehouse Mr and Mrs Daykin in the ground floor property it had belatedly identified, in the manner proposed. There was a potentially fatal risk to Mr Daykin whether he was rehoused permanently or only temporarily pending adaptations. There was the costs aspect to consider and the effect on the current neighbours of the air compressor. There was no reason to believe that the authority had failed to balance these issues. Its conclusions were not *Wednesbury* unreasonable.

Cases referred to in judgment:

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

R v Gloucestershire CC and Secretary of State for Health ex p Barry; 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.

Legislation/guidance referred to in judgment:

Chronically Sick and Disabled Persons Act 1970 s2 – Disabled Persons (Services, Consultation and Representation) Act 1986 ss3 and 4 – Health Services and Public Health Act 1968 s45 – Local Authority Social Services Act 1970 Sch 1 – National Assistance Act 1948 Part III and ss29 and 30 – National Health Service Act 1977 s21 – National Health Service and Community Care Act 1990 ss46 and 47.

This case also reported at:

Not elsewhere reported.

Representation

J Friel (instructed by Ridley & Hall) appeared on behalf of the appellants.

T Straker QC (instructed by Sharpe Pritchard, acting as agents for the solicitor to the Kirklees MBC) appeared on behalf of the respondents.

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Judgment

MR JUSTICE COLLINS: The applicants, Mr and Mrs Daykin, are both in their 60s, both sadly suffer from disabilities, those of Mr Daykin being somewhat more severe than those of his wife. She is now 64. Her main complaint is of rheumatoid arthritis which she has had for a substantial period of time and for which she takes a considerable quantity of medication. The result of the arthritis is that she has difficulty in doing various necessary functions, for example, dressing and so

on but, more particularly, in the context of this case, she has great difficulty in managing stairs. Mr Daykin is now 65. He has what is described as chronic obstructive airways disease. This means he suffers from chronic breathlessness and has difficulty in moving any but very short distances. He can only get out and about at all with the assistance of a wheelchair. His expectation of life is sadly exceedingly short. Indeed the doctors indicate that he has outlived what they have expected of him. The problem therefore with both of the applicants is an inability to climb stairs of any sort; an absolute inability in the case of Mr Daykin, a virtual inability in the case of Mrs Daykin. They live in council accommodation, at 21 Leas Avenue, Netherfield, Huddersfield, within the area of the respondent council. The flat which they at present occupy is on the first floor. It can only be reached by stairs and the problem, having regard to what I have already indicated, is all too obvious.

Back in 1993 they applied to move to a ground floor flat simply because they were finding it impossible to manage the stairs and consideration was given by the council to that application. In the course of consideration of their needs, the occupational therapist a Mrs Hirst, who is employed by the Health Authority recommended that instead of moving to other premises they should have either a shaft lift or a stair lift installed at the premises thus enabling both of them to get in and out without having to climb. This was pursued because they decided that they did not want to move and that they would prefer that a lift of some sort was installed. This was for understandable reasons. They had lived in the premises for some ten years then. They had made a delightful home. They had decorated it to a high standard. They had had various appliances fitted to enable them to manage their affairs better, particularly in the kitchen and also, to some extent, the bathroom. Because, it was on the first floor, there was a view and because Mr Daykin was housebound for much of the time, he appreciated that to a greater extent than normal. Added to that, they did not want at their age and in their state of health the upheaval of having to move to other accommodation. Taking all those matters into account it was decided by the occupational therapist that she should recommend that they remain in those premises.

I take up the history from the papers before me and the various notes, and memoranda that are material. There is reference to a lady who is described as the Advocate Officer, Miss Hallas. Her function, as I understand it, is to put forward on behalf of applicants, such as the Daykins, who are disabled and who need particular facilities to be provided for them by the council, their needs and their requirements. Otherwise they might not be able to obtain what they were entitled to obtain by way of services from the council. It is a very enlightened approach to dealing with the needs of the disadvantaged and the disabled by the council. But it has this potential difficulty; it may appear to the individuals concerned that what is recommended on their behalf by the advocate officer is something that is bound to happen because the council man or woman, says that it will happen. That of course is not the position because the provision of the relevant services is normally and in this context certainly the concern of the council itself or of any committee or officer to whom a specific power is delegated.

Be that as it may, we find in June 1994 Miss Hallas writing to Councillor Firth, who was concerned with the problems that the applicants faced and was concerned too that the council seemed to be taking a very long time to deal with those problems. In that letter she says:

> *I have asked for written recommendations from the people directly involved with Mr and Mrs Daykin. However, some responses are still outstanding. As*

soon as I am in receipt of these, I will be in a position to respond fully to your letter.

Then we find a letter from Mrs Hirst, the Senior Occupational Therapist concerned with Mr and Mrs Daykin, again writing to Councillor Firth. The letter itself is undated but it is in reply to the letter from Councillor Firth of 21 June 1994. So far as material it reads as follows:

I do have a great of sympathy [sic] for this couple and agree that this situation has not been handled as effectively as it could have been.

This couple were originally assessed by my predecessor in October 1992 and identified as requiring assistance to stair climb.

At the time my predecessor proposed, but did not formally recommend, the installation of a stair lift. She did however some reservations [sic] regarding the feasibility due to the obvious requirement of additional, and quite extensive structural works.

I believe that at the time rehousing was considered but a suitable property was not available.

She then refers to a visit in February 1994 and points out that a stair lift would be difficult because of the need for Mr Daykin to have a wheelchair. The possibility of a vertical lift shaft was explored but Mrs Daykin was not happy with that because she suffered from claustrophobia and would find difficulty in using it. Mrs Hirst goes on:

It was at this point that rehousing was again suggested as all parties agreed that it would not be possible to provide a suitable adaptation to meet the multiple disabilities of both Mr and Mrs Daykin.

Mrs Daykin agreed to consider the possibility of rehousing.

It was decided that I would not process any recommendations until the avenue of rehousing had been explored by Mr and Mrs Daykin.

If Mr and Mrs Daykin now feel that they wish to remain in situ then I am willing to recommend the provision of a vertical lift shaft as I feel that it will meet Mr Daykin's requirements.

She goes on to point out that the lift was not suitable for visits. Pausing there, that particular problem was overcome because it was pointed out that a stair lift could still be provided and Mr Daykin could have a separate wheelchair in the premises and outside. The letter concludes:

I am aware that Mr and Mrs Daykin have spent a considerable amount of time and effort in creating a lovely home, but in my professional opinion – which has not been made without considerable thought – I feel that the most suitable solution to meet the long term requirements of this couple would be rehousing in wheelchair adapted ground floor accommodation.

That was her view in late June/early July 1994. The matter was actively pursued. Unfortunately the alternative accommodation that had been considered a possibility, a bungalow, was no longer available and there was no immediate prospect of the Daykins being able to find alternative accommodation at that time. In mid-July it was noted that, after much consideration, they wanted to remain in their own home and that they both agreed at that time that a shaft lift should be installed. That decision was reflected in a letter to the occupational therapist from Miss Hallas of 15 July in which she asked her whether she could formally recommend the provision of a lift and continues:

A *I feel they are a priority and meet both the essential criteria i.e. at physical risk of accident or injury and on the grounds of medical risks. I understand the recommendation is then passed to Social Services (Disability Services) to be endorsed by the Care Manager. The recommendation is then passed to Housing Services for the works to be carried out.*

B Miss Hallas clearly assumed that if a recommendation was made and approved then it would be a *fait accompli*.

In early August the Housing Manager, Mr Brook, indicated his agreement with the Occupational Therapist in a memorandum which antedated the change of heart by the Daykins that rehousing to a ground floor wheelchair adapted flat was C the most suitable solution. But he went on:

Disability services are still looking at installing a lift at this property.

He also recorded that:

D *The Daykins had previously refused the offer of a disabled adapted ground floor flat in good condition, as Mrs Daykin stated the decorations were not up to her standard and the design of ground floor flats is different from the design of first floor flats.*

E Read at face value, it may seem that Mrs Daykin had not been co-operative. I do not think on the history I have heard that that is a fair assessment of the situation. In any event, on 12 August 1994 Mrs Hirst, the Senior Occupational Therapist, made a formal recommendation that there should be an installation of a stair lift and the additional works as discussed on a joint site visit with the surveyor to the F council, a Mr Houseley. In the course of the report which led to that recommendation she said this:

Following considerable discussion, three options were suggested in order to meet Mr Daykin's need:

G
1. *Rehousing – Mr and Mrs Daykin do not wish to be rehoused.*
2. *Vertical lift shaft.*
3. *Curb stair lift to incorporate both flights of stairs.*

As Mr Daykin uses a wheelchair – it was considered that the vertical lift shaft would be most appropriate, however, Mrs Daykin did express some anxieties H *regarding this.*

It was therefore felt that if Mr Daykin was provided with an additional wheelchair for indoor use only the latter option would meet his needs most adequately.

That recommendation having been made Miss Hallas was able to write to I Councillor Firth a letter which was copied to the Chief of Social Services, to the Chief Housing Officer, to the Head of Resources, to Mrs Hirst and to the Care Manager who dealt directly with the Daykins in these terms:

I can now inform you that a formal recommendation for a stair lift has been made by Anita Hirst, Community Occupational Therapist. The written J *recommendation has been forwarded to Dianne Green, Care Manager (Disability Services). Dianne has agreed the recommendation as a priority and passed to Housing Services to carry out the work.*

If you require any further information, please contact me.

K She then gives the contact address.

That recommendation was followed by a formal application for the adaptations

to be made. It is dated 17 August. It is an application made by the Social Services Department to the Housing Department. The recommendations were for the installation of a curb stair lift and all necessary additional works. On 1 September Dianne Green the Care Manager wrote a memorandum which is attached to the document that forms the application for adaptations in these terms:

> *It is said the recommended adaptation is to be treated as a priority for one or more of the following reasons. It should therefore be implemented immediately. The reason given is that the client or carer may suffer accident or injury if the adaptation were not proceeded. It is essential that this adaptation is proceeded as soon as possible. As without access both and Mr and Mrs Daykin are at risk.*

That was followed by a further formal application for adaptations dated 9 September, this time signed by Mr or Mrs Foster who was the District Manager. The recommendation had thus been made and the application for the necessary adaptations also made and it had been made perfectly clear that it was essential in the view of the Social Services Department and those concerned with the welfare of the Daykins that it must be done as soon as possible because otherwise there might be harm to the Daykins. That was in August and September 1994. We are now in November 1996. It is, to say the least, unfortunate that the urgency which was indicated to Kirklees at the time has not apparently produced any speed in dealing with the situation. What happened was that the Housing Department, having received the request, began to say to itself that it would cost too much. In fact the cost would have been somewhere in the region of £15,000. That was the estimate that was given. A move to alternative accommodation on the ground floor and the adaptation of that accommodation to meet, so far as possible, the needs of the Daykins would have been substantially less. A figure of £3,000 has been referred to. It may be that that figure is somewhat on the conservative side but, in any event, it is quite clear and Mr Friel properly accepts, that it would have been substantially cheaper to have moved the Daykins.

To come back to the events of August/September 1994, we find that there was a care plan provided in November 1994. The care plan is a pro forma document which contains spaces to enable the relevant details of the individuals concerned to be set out so that their condition and their needs can be shown and what is to be done to meet those needs can also be shown. The form itself assumes that the work is to be done to their existing premises because under 'Housing', this is indicated:

> *1st floor LA (local authority) flat steps to door and steps inside up to flat (currently in process of outdoor stair lift as recommended by occupational therapist). Door-entry system.*

The proposed care plan involved a degree of personal assistance, help during each day of the week and the provision of assistance that was necessary to enable Mr and Mrs Daykin to live in the community. I do not think it is necessary to go into the details. Suffice it to say that the purpose of such a care plan is clearly to indicate the needs and to indicate what is to be done in order to meet those needs. This particular care plan is put forward by Janet Hallas, the Advocate Officer, but, so far as I can see and indeed there is no suggestion to the contrary, is not specifically approved by anyone in the council who had power to approve it. Nevertheless, it seems to have been acted upon and care in accordance with it was provided. That is important in the light of the legislation and duties of the council to which I will turn in due course.

As I have already said, the Housing Department appears to have been

considerably concerned about the expense. It seems to have acted exceedingly slowly and in March 1995 it indicated that the point had now been reached to ask itself whether it should go ahead and instruct the design practice to proceed. That would involve building regulations, planning consents and so on. Mr Macleod, a Principal Surveyor, in a letter of 3 March addressed to Mr Brook, the Housing Department, the Housing Manager, asked:

> *Are you satisfied that the question of this family offered alternative accommodation has been fully pursued?*
>
> *As you are aware, there are severe financial restraints on the Adaptation Budget, and if rehousing is possible this would be an obvious saving.*

Miss Hallas in the meantime was concerned about the delay and was pointing out that it was having a detrimental effect on what she described as the Daykins' emotional health. She said:

> *The delay in processing Mr and Mrs Daykin's application has compounded the emotional strain they are under and as such, I feel that if delays persist, will have a lasting detrimental effect on their health.*

In April the Acting Chief Social Services Officer wrote to Councillor Firth saying:

> *I now consider the most appropriate way forward is for Mr and Mrs Daykin to be rehoused.*

He pointed out the cost that would be incurred in doing the adaptations. He pointed out the history of the matter and the recommendation for adaptation submitted in September 1994. He went on:

> *Notwithstanding this submission it is now accepted that given the costs implications of adapting the property for these particular tenants, and the limited use that such an adaptation would have, for future tenants, rehousing to ground floor accommodation is considered the most sensible way forward especially in view of the much reduced budget allocation for adaptations.*

He said that the matter had been referred back for there to be a meeting to discuss rehousing. One is bound to say that the cost is a matter which should and could have been identified at a much earlier stage. To leave the matter for six months in the light of information about the possible effect on the Daykins' health was quite appalling.

Miss Hallas on 12 April wrote a reasoned letter to Mr Cotterill indicating why she felt that the adaptations to their home should be approved. I do not propose to read the letter in full. She pointed out the upheaval and the stress of moving to alternative accommodation, and that it was essential that they remained in the locality in order to provide a continuity of service. She pointed out the quite unreasonable delay leading to uncertainty over a lengthy period; that delay had occurred since 1993 when the matter had first been mooted. There was no appropriate alternative accommodation. She refers to the desirability of the view, the works that they had done to decorate the flat to a very high standard and the adaptations that were already in place. She concluded:

> *Mr and Mrs Daykin made it perfectly clear that they* do not *wish to move, having lived in the property for 11 years and for the reasons given above. Should a decision be made not to provide the adaptations the only area they would consider is Netherthong. As there is a limited amount of ground floor flats in this area, how long would they have to wait and how do they continue to cope under their*

present circumstances, bearing in mind that they both have severe deteriorating disabilities?

Mr and Mrs Daykin would not make a decision regarding rehousing until they have been informed of the decision, in writing, regarding the adaptation, and I feel they should not be pressurised to do so.

I must reiterate and stress that Mr and Mrs Daykin both have severe disabilities and the emotional strain they have been living under over the last 3 years has, I feel, had a detrimental on their health as would the thought and upheaval of moving.

There was a meeting held at the Daykins' house to consider the final decision that was going to be made. That meeting was not considered a very satisfactory way of dealing with the matter by Miss Hallas because it was intended merely to inform them that the position was that the adaptations would prove too expensive. However, it did clearly put the Daykins on notice that this was what was being proposed. On 14 June 1995 the Daykins receive a letter from Mr Brook, the Area Housing Manager, in these terms:

Your case has been discussed in great detail but I regret to advise you that due to the high cost of the works required the adaptations will not be carried out.

The cost implications of adapting the property and the limited use that such an adaptation would have for future tenants, rehousing to ground floor accommodation is considered to be the most sensible way forward.

As soon as a most suitable property becomes available it will be offered to you. I cannot guarantee that this will be in the Netherthong area, because of the low turnover of suitable properties in your area.

Assistance will be given to you in respect of removal costs and works will be carried out to the property to make it as comfortable as possible for you to move into.

I am sorry that I cannot be more helpful but if you have any further questions, please contact me again.

I am bound to say that that letter is about as insensitive a letter as one can imagine to deal with the situation that had arisen. It totally appears to ignore the essential requirements put forward by the Occupational Therapist and the Advocate Officer, Miss Hallas, that they must remain in the area. It also disregards the obvious concerns that the alternative accommodation must be properly adapted in order to enable them to look after themselves as much as possible and to talk about making it as comfortable as possible simply did not meet that concern. It is not in those circumstances in the least surprising that the Daykins were exceedingly upset at receiving that letter. It was following that that the matter was put into the hands of their solicitors.

That is the history to June 1995. I take it to that point because that is the decision which gave rise to this application for judicial review. It was an application which was initially lodged in November 1995. It has taken some time to reach me because there was a hearing before Popplewell J back in March 1996 when the matter was adjourned because it appeared that the authority was in the process of reconsidering the position and had found alternative premises which were in the same street and which could be adapted.

As it seems to me, I have to consider the situation as it now is. I have had to consider the history because of a submission made by Mr Friel that the council had already agreed to carry out the adaptation works (that is the installation of the stair lift) and they are not permitted in law now to change that agreement.

Accordingly, they have no option, he submits, but to carry out the work. Subject to that, if that is wrong, then I have clearly to consider the position today, because it would be quite absurd to talk in terms of judicial review of the council's decision if in fact they have now decided and are willing to do what is needed. They have agreed that the works which have been identified by Mrs Hirst will be done in the alternative accommodation before the applicants are required to move there. Those works are set out in a letter of 14 August 1996. I do not think it is necessary to specify them. They include the repair of pathways, the creation of a level access, then installation of a piped oxygen supply and of various other facilities in the premises. It is said therefore by the council that they, having found this nearby flat, meet all the conditions that have been referred to in the past and it is wholly reasonable to require the Daykins to move to this alternative accommodation rather than spend the substantial sum of money involved in adapting their existing flat.

There is also up-to-date medical evidence. Originally, back in 1994, the General Practitioner looking after the Daykins was prepared to accept that moving to another flat would be possible for Mr Daykin. He now takes the view, as does the specialist in charge, that moving Mr Daykin to alternative accommodation would be dangerous for him. The specialist puts it in these terms:

> *I would consider the upheaval of moving home at this stage of his illness to be a quite unreasonable stress for him.*

The GP puts it in this way:

> *Unfortunately I feel the situation has now changed in that Mr Daykin is no longer fit to be moved. His life expectancy is now extremely short and his removal to hospital if and when he has further excacerbation of his chest disease [sic].*

It is therefore to a degree the fact of movement as much as the type of movement which creates the danger. By the type of movement I mean movement to fresh accommodation rather than moving out of the existing accommodation and being able to move back. The council eventually persuaded the applicant's solicitors to permit them to put the matter to an independent medical assessor. They chose a Doctor Craig who is a specialist in the Department of Medicine for the Elderly. Doctor Craig sets out the background and the details of the problems faced by the Daykins. So far as Mrs Daykin is concerned he says, having indicated that clearly neither of them wanted to move and they were not impressed by the suitability of the alternative accommodation:

> *Mrs Daykin, however, despite her rheumatoid arthritis appears mentally and physically robust and I am sure would survive for an equally long period in alternative accommodation and would manage one or two movements probably without trouble.*
>
> *Mr Daykin, on the other hand, poses a considerable problem. His chest disease is so bad that I think even moving him once (even into temporary accommodation) would be a problem. I am sure this would cause a significant aggravation with his chest trouble and clearly his long-term expectancy is not good and a further infective excacerbation of his chest may be the last one.*

He concludes:

> *It appears to be a difficult problem. There is no doubt of the benefit of the stair lift to Mrs Daykin and yet moving them out of the flat for this to be installed without them moving house then this would be very reasonable [sic]. Clearly this is a*

structural issue but looking at the property it would seem access would not be possible whilst the stairlift was being constructed and hence the support that they require would not be available.

It appears that a period of at least 12 weeks or thereabouts would be needed for them to move out while the works are done. They appreciate that and are prepared to accept moving out temporarily provided they are able to move back. There is one added factor, apart from the question of expense to which the council had regard. That is a matter referred to by Mr Massey who is the Principal Legal Officer, in an affidavit sworn on 18 November 1996, where he says:

In my letter, I also made reference to a difficulty which exists with regard to the noise of the compressor in Mr and Mrs Daykins' present flat (that is the compressor which provides the oxygen supply for Mr Daykin).

The tenants who live in the flat beneath them are an elderly couple aged 75 and 85 respectively, both of the whom are in poor health.

They have complained to the Housing Service that for a number of years, they have been disturbed by the constant noise of the compressor in Mr and Mrs Daykins' flat, which operates from approximately 5.00 p.m. each evening to approximately 9.00 a.m. the following morning.

These tenants say they have made representations to Mrs Daykin with regard to this noise, without success, and I believe that the 85 year old gentleman involved has had to resort to sleeping in the living room of his flat in order to avoid disturbance.

It is also pointed out that the works would adversely affect them while they were being carried out.

It is right to say that, in response to that the applicants say that complaints had not been made, that in fact the compressor has been changed recently and the present one is much quieter and that if they move to a ground floor flat, there will be similar problems with the occupants of the first floor flat. Nonetheless the effect on the ground floor premises is clearly something which the council are entitled to take into account.

I now turn to the relevant statutory provisions. I start with the National Assistance Act of 1948. Section 29 provides:

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

Clearly the applicants are substantially permanently handicapped by illness. I then refer to section 2 of the Chronically Sick and Disabled Persons Act 1970 which by subsection (1) provides:

Where a local authority having functions under section 29 of the National Assistance Act 1948 are satisfied in the case of any person to whom that section applies who is ordinarily resident in their area that it is necessary in order to meet the needs of that person for that authority to make arrangements for all or any of the following matters, namely –

A *(a) the provision of practical assistance for that person in his home;*

. . .

(e) the provision of assistance for that person in arranging for the carrying out of any works of adaptation in his home or the provision of any additional facilities designed to secure his greater safety, comfort or convenience;

B . . .

subject to the provisions of section 7(1) of the Local Authority Social Services Act 1970 (which requires local authorities in the exercise of certain functions, including functions under the said section 29, to act under the general guidance of the Secretary of State) . . . it shall be the duty of that authority to make those

C *arrangements in exercise of their functions under the said section 29.*

That duty is one which the local authority must comply with if requested to do so by a disabled person, his authorised representative, or any person who provides care for him because the authority on a request by such person must decide whether the needs of such a disabled person call for the provision of any of the

D services under section 2. That follows from section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986. Further, by section 47 of the National Health Service and Community Care Act 1990 further obligations are placed on the local authority in these terms:

E *(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

F *(b) having regard to the results of that needs assessment, shall then decide whether his needs call for the provision by them of any such services.*

(2) If at any time during the assessment of the needs of any such person under subsection (1)(a) above it appears to a local authority that he is a disabled person, the authority –

G *(a) shall proceed to make such a decision as to the services he requires as is mentioned in section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986 without his requesting them to do so under that section; and*

(b) shall inform him that they will be doing so and of his rights under that Act.

H Then subsection (7) indicates:

This section is without prejudice to section 3 of the Disabled Persons (Services, Consultation and Representation) Act 1986.

I Section 3 of that Act makes specific provision for an authority to decide the needs of disabled persons, provides a right of representation to the disabled person and contains elaborate provisions ensuring that the local authority specifies and provides the necessary services. Unfortunately, and for whatever reason, section 3 of the 1986 Act is not in force. It has never been brought into force and so it can be

J disregarded. Subsection (8) of section 47 reads:

In this section –
'community care services' [has] the same [meaning] as in section 4 above.

I turn then to section 46(3) which defines 'community care services' as meaning:

K *. . . 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.

Mr Straker has raised the point that section 47 of the 1990 Act does not apply to section 2 of the 1970 Act because the services under section 2 are not community care services within the meaning of section 46(3) and so section 47. He says that is because there is no specific reference in section 46(3) to section 2 of the 1970 Act. If one looks at other statutes one sees that where Parliament has intended to include reference to the services under section 2, it has done so specifically. He draws my attention first to section 45 of the Health Services and Public Health Act 1968. That is a section referred to in section 46(3). He points out that that is a part of the Act specifically entitled 'Amendments connected with local authority services under the National Assistance Act 1948'. Section 45 itself deals with special provisions for the elderly, promoting the welfare of old people and by, for example, subsection (5), it provides:

> *The National Assistance Act shall have effect as if the following references include a reference to this section, that is to say, the reference, in section 32, to section 29 of that Act.*

Thus, there is a clear link with section 29 of the National Assistance Act 1948 which is in Part III of that Act. He refers also to the Local Authority Social Services Act of 1970 which was passed in the same year as the Chronically Sick and Disabled Persons Act of 1970. In Schedule 1 to that Act there is a reference to the functions that are to be assigned to Social Services Committees which have to be set up by all local authorities. They include the National Assistance Act, sections 29 and 30. Also there is a specific reference to the Chronically Sick and Disabled Persons Act, section 2. Mr Straker makes the point that here is Parliament, in an act passed in the same year as the act in question, specifically referring to it, independently of the National Assistance Act of 1948.

Finally, he refers to the other Act mentioned, that is to say, section 21 of the National Health Service Act 1977 which deals with local social services authorities co-operating in relation to care of mothers and young children and so on in relation to matters specified in Schedule 8 to that Act. Those are all matters which, on the face of them, might also fall under some provisions of Part III of the 1948 Act.

Mr Straker submits from that, that one cannot read section 47 as applying to section 2 and thus the duties set out in section 47 do not apply, he submits, to the provision of the welfare services under section 2 because welfare services in section 2 of the 1970 Act are not the same as community care services in the 1990 Act. It seems to me that if Mr Straker were correct, there would be an absurd situation. It is quite plain that section 2 of the 1970 Act specifically provides that the arrangements there set out are to be made in exercise of functions under section 29 of the 1948 Act. Those functions specifically relate to community care services. Thus, the assessment required, if Mr Straker is right, would be an assessment for services not in themselves community care services but which can only be provided as community care services under section 29 of the 1948 Act.

The purpose, as I see it, of the various provisions to which I have referred is to ensure that persons who are broadly speaking to be regarded as suffering from a disability of one sort or another should have that disability and their needs assessed, so that provision of services necessary to meet those needs can be

made. Having regard to the clear intention that these should all be closely interlinked, it seems to me that it would be quite absurd to suggest that Parliament had somehow not required that duty to be performed simply because the provision of the individual services was referred to in section 2 of 1970 Act rather than any more general provision.

It seems to me that my approach is consistent with that approach of the Court of Appeal in *R v Gloucestershire County Council ex parte Barry* [1996] 4 All ER 421; (1997) 1 CCLR 19. At page 436E [(1997) 1 CCLR 19 at p32J] Swinton-Thomas LJ, having referred to section 4 of the 1986 Act, said:

> *This section was enacted because local authorities were not required by section 2 of the 1970 Act to make any decision under it, and in some instances they were failing to do so. Hence a duty was laid on them to make such a decision.*

Pausing there, that Act was of course in 1986 and so the position in 1986 was that there was no section 47 of the 1990 Act and thus no duty existed. He goes on [(1997) 1 CCLR 19 at p32J–K]:

> *That was the only effect of section 4 and it was not submitted on behalf of the respondents or the Secretary of State that the section has any relevance to the resolution of the question as to whether in carrying out their duties under section 2 a local authority can or cannot take into account available resources. However the words used in section 4, 'shall decide whether the needs of the disabled person call for the provision by the authority of any services' have some materiality, as does the concession made by the respondents and the Secretary of State, because one finds those words picked up again in section 47(1) of the 1990 Act. Further a decision as to whether the needs of a disabled person call for the provision of services must be very close if not identical to a decision that it is necessary to meet the needs of a disabled person to make arrangements for that provision.*

He then refers to sections 46(3) and 47 of the 1990 Act. He goes on [(1997) 1 CCLR 19 at p33H]:

> *Section 47(1)(a) provides for the provision of community care services generally, the need for such services, the carrying out of an assessment and section 47(1)(b) gives the local authority a discretion as to whether to provide those services.*

It seems to me that the underlying assumption there is and must be that the section 47 requirements apply to section 2, just as much as they apply to the other community care services. Similarly, Sir John Balcombe at page 442B [(1997) 1 CCLR 19 at p38H] refers to section 29 of the National Assistance Act and says:

> *. . . [that] already gave to local authorities power to make welfare arrangements for disabled persons. The obvious purpose of section 2 of the 1970 Act was to impose a duty on local authorities to make such arrangements, and it would not have been a significant alteration to their existing position if local authorities had been intended to be able to escape from fulfilling the obligations imposed on them by the 1970 Act by pleading a lack of financial resources.*
>
> *The subsequent legislative history is entirely consistent with this interpretation of section 2 of the 1970 Act. In particular the distinction drawn between a local authority's general powers under section 47(1) of the National Health Service and Community Care Act 1990 and its specific duties under section 47(2) highlights the special position of section 2 of the 1970 Act.*

Again, it seems to me that the underlying assumption there is that section 47 and

section 2 go hand in hand. Parliament may in other acts have specifically mentioned section 2 but that was for the purposes of those acts and no doubt for the avoidance of any doubt. It seems to me quite clear that in the context of section 2 and section 47 the definition of 'community care services' is apt to include the services provided under section 2. I am bound to say I am not sorry to reach that decision because the whole purpose is to enable a care plan to be provided making the position clear so that the disabled person will know what his or her needs are and what services are to be provided to meet those needs and will be enabled to make the necessary application to the Secretary of State under section 36 of the 1948 Act if the duty is not being properly carried out.

The problem in this case, as it seems to me, is that the local authority never carried out their duty under section 47 and section 2 to assess the needs and to indicate what were the services that needed to be provided to meet those needs. Mr Friel submits that the recommendation made by the Social Services person responsible and the requisition, as it were, put to the Housing Department constitute an assessment and the necessary decision to provide the services which, in this case, involved the provision of the stair lift. Mr Straker points out that there is no delegated right for the person making the recommendation to make a decision which is the responsibility of the Council. This, as is clear, was but a recommendation. That seems to me to be, sadly, correct. I say 'sadly' because it means, as I have indicated, that this authority never complied with their duty to make the necessary assessment and to indicate what services ought to be provided thereunder and, to a degree, they are now profiting from that failure. But one has to differentiate between what are needs and what are the services to meet those needs because, as the case of *Barry*, which I have already cited, makes clear, financial considerations cannot enter into the assessment of needs whereas they can enter into the question as to how those needs are to be met. Once the needs have been established, then they must be met and cost cannot be an excuse for failing to meet them. The manner in which they are met does not have to be the most expensive. The Council is perfectly entitled to look to see what is the cheapest way for them to meet the needs which are specified.

In the context of section 2 of the 1970 Act, it is not always easy to differentiate between what is a need and what is merely the means by which such need can be met. I say that because if one looks at the judgments in the *Barry* case one sees that Swinton Thomas LJ at page 439 pointed out that some of the matters in section 2(1) of the 1970 Act may be regarded as themselves needs as opposed to the means of meeting the needs. For example, he says, if the need is a provision for the TV set (that is within section 2(1)(b)) that need can be met by the provision of a new or a second-hand set. It may be said that the need is a need for contact with the outside world in some form or another and that the television set provides that contact. Thus the television set is the means whereby the need is to be met. If one returns to the wording of section 2, it talks about the 'making of arrangements for all or any of the following matters in order to meet the needs of that person' which on the whole suggests that one is looking to the matters set out in (a) to (h) more in terms of the way in which the needs are to be met rather than the needs themselves, although that is not necessarily an entire guide. So far as the circumstances of this case are concerned, it seems to me perfectly clear that the needs that have led to the question about the provision of a stair lift are the needs for the applicants to be able to get in and out of the premises. Those are the relevant needs. They can be met, as it seems to me, either by removing them to other premises where access is possible for them, which in the context of this case, would be ground floor premises, or adapting the existing premises to provide a stair lift.

A It is, in my judgment, impossible to regard the provision of a stair lift at home as 'the need' . In those circumstances, it is open to the local authority to reconsider the way in which those needs can be met provided that there has been no positive decision to meet them in a particular fashion. I say 'provided there has been no positive decision', but of course such a decision itself could itself be changed upon B reconsideration. One must always bear in mind that it is the duty of the authority to meet the needs and that means to meet them as soon as is reasonably practical. It does mean that the authority is entitled to sit on things and debate with itself for a substantial period of time. Once they have identified after discussion the manner in which those needs are to be met, then the Act requires that they get on C with it and meet those needs. But it seems to me that they are entitled to the flexibility as to how those needs are to be met.

In this case, in addition to the access, it seems to me that the authority was bound to take into account that they should remain in the area because of the need for continuity of service and also the need that the premises to which they D moved, if they were to move, should themselves be adapted in such a way as would enable them properly to be able to live there. It is not simply a question of access, it is a question of the added needs peculiar to this couple. Certainly the requirement of remaining in the area and to a degree the need for the adaptations does not seem to have been appreciated, at least until these proceedings were in E train and the matter came before Popplewell J. Those matters have now been appreciated although, as I see it, there still is not the formal assessment and Care Plan approved by the Council, or approved by whoever has the delegated authority from the Council. The sooner that happens and the authority complies with what I regard to be its statutory duties, the better.

F Nevertheless, the situation now is that the proposals are as I have indicated. I can only strike those down if it is established that they are flawed in *Wednesbury* terms. It is not for me to substitute my view as to what is right for the authority to do for those of the authority. Clearly there is a risk whatever is done that the effect on Mr Daykin in particular will be fatal. One has to balance the medical evidence, G the costs aspect and the effect on the neighbours. I have no reason to believe that the authority has not done that. Indeed, they indicate now that they have. One of the problems in this case is that I do not doubt that attitudes, to a degree, have been affected by the inactions of the authority over a long period of time and the failing health of the Daykins and the greater concern that they now have under- H standably that they should not be messed around any more and should not have eventually to be moved out of their premises. If sensitively dealt with, it seems to me it should not be impossible for the Daykins to be able to appreciate that, although they consider it an evil, it is not as bad as they thought to move. I assume that the Council will in consultation with Mr and Mrs Daykin do the I necessary works so that Number 42, the new address, will be ready for them to move straight into so there will be no question of any temporary accommodation anywhere and that they will be able to move to a new ready made flat as soon as is reasonably possible. I imagine too that the local authority will reconsider the matter carefully in the light of all the information that is now before them and in J the light of the judgment that I have given. But, at the end of the day, I cannot say that it is an irrational decision for them to make, notwithstanding the medical evidence, that to move to the alternative accommodation is the reasonable course of action. Accordingly, I cannot strike the decision down as being one that is irrational.

K I have mentioned the alternative route of application to the Secretary of State. As I understand it, that would still be open to the Daykins and it is a matter for

them and their advisers whether they choose to go down that route. It may be that any further delay would itself be more damaging than seeking to obtain a reversal of the Council's present decision. That, as I say, cannot be a matter for me, it must be a matter for them and their advisers. In all those circumstances, and I am bound to say with some regret, I find it impossible to give the Daykins any relief. Accordingly, this application must be dismissed.

MR STRAKER: My Lord, I would ask your Lordship therefore formally to dismiss the application. My Lord, I wonder whether I might take a moment as far as any other consequential matters are concerned.

MR JUSTICE COLLINS: Mr Straker, you will not get them if you ask for them.

MR STRAKER: My Lord, there is no such request. The only matter which concerned us was the question of the alternative route and the clear indication given after Popplewell J as to the availability of that and the strength of that.

MR JUSTICE COLLINS: I follow that Mr Straker. On the other hand, if I am right, you are still in breach of your statutory duty in relation to the making of a proper assessment. I accept that in the light of my judgment it has not perhaps been particularly of fundamental importance but, nonetheless, it is a continuing breach. In any event, having regard to the whole history of this matter, and I accept including the appearance before Popplewell J, I would not have regarded it as a proper case for costs. Mr Friel, do you have any applications?

MR FRIEL: My Lord, apart from legal aid taxation, I am concerned that the Legal Aid Fund have been put to a great deal of expense. The authority has, as it were, rapidly adapted its situation after Doctor Craig's report. It was in some considerable difficulty before and remains in breach of statutory duty as has always been obvious. That was not the major plank for relief but it is a major issue in this case if you do not assess the needs. I would seek part of the costs.

MR JUSTICE COLLINS: Let me put this to Mr Straker. Mr Straker, there is some force in what Mr Friel says but in relation to the costs of launching these proceedings. I accept that once the matter was before Popplewell J, you have some argument that you can say that you should not have to pay anything thereafter. I think there is some force in Mr Friel's submissions in relation to the costs up to that time.

MR STRAKER: The actual launch, by the time that we appeared in front of Popplewell J, the position of the Council was plain, namely, (a) that this situation is kept always under review, and (b) that there was an alternative property available and that would be put in order for Mr and Mrs Daykin.

MR JUSTICE COLLINS: You did not make that one hundred per cent clear, did you, by the end of March? You made it clear by the Summer.

MR STRAKER: My Lord, before then because immediately after the hearing in front of Popplewell J, the letter went, dated 2 April 1996, which is within the bundle before the court. It refers to . . .

MR JUSTICE COLLINS: Which page?

MR STRAKER: My Lord, it will be at page 487. I think it appears in other places as well.

MR JUSTICE COLLINS: The letter of 2 April.

MR STRAKER: My Lord, it refers to the circumstances in which the hearing came to be adjourned:

> *It was plainly apparent that your clients could not gain anything further from the proceedings than that which would be anything further from the proceedings than that which would be achieved by an adjournment. In that regard it will be borne in mind that the situation before and after the adjournment was no different. Thus the Borough Council have consistently maintained that matters of this kind are kept under review by the Council. Further, it is, of course, apparent, and appeared to be recognised by the Counsel, that the Council are, in this matter, the decision maker having to decide what is necessary. The aim is to facilitate access from the place where your clients live to the outside world. In that regard we note that the criticism of the presently offered accommodation was in respect of a perceived difficulty as to dampness. We understand this to be remediable but will ensure that such is the case. The Borough Council would not invite your clients to inhabit any property that was unsuitable. We intend to keep you closely informed of progress.*

MR JUSTICE COLLINS: That all goes after Popplewell J. The problem with your Council is that it is very much a piecemeal matter and there has been the most appalling delay in meeting the needs of the Daykins.

MR STRAKER: My Lord, there has been delay and I cannot run away from that in any shape or form. Whether that delay should then find expression in an order for costs, however partial that order for costs may be, against the Council is, I would contend, a different matter, especially when one bears in mind, (a) that the Council and in substance the inhabitants of the area suffer in consequence of the order, and (b) when one bears in mind when it has been apparent throughout that those acting for Mr and Mrs Daykin could have taken the straightforward step of saying to the Secretary of State, 'Look, you have a terrible authority here, Kirklees, do something about them please and make them act as we would wish them to act.' That is a simple step which could be taken with no great cost involved. Instead, this exercise was followed. I would say that even a partial order for costs is not justified.

MR JUSTICE COLLINS: Mr Friel, I am going to give you a little. I am afraid it is only a very little.

MR FRIEL: My Lord, may I just point this out. On the hearing of 1 April Mrs Daykin was invited to go with Mrs Hirst the day before. What came back before the hearing before Popplewell J was that Mrs Daykin saw the property in pretty bad condition and no assurances had been given by that time to her. Mrs Hirst was in considerable doubt because of the emotional condition of Mr Daykin. When the matter came on for hearing, the authority had not put its Act in order which is one of the major reasons why the judge adjourned the case.

MR JUSTICE COLLINS: I think that the applicants should have their costs. The fair way of doing it, it is a slightly unusual order, is that they should have their costs up to and including all costs preparing for the hearing for Popplewell J. There shall be no order for costs of the hearing itself and thereafter.

MR FRIEL: I am obliged.

MR JUSTICE COLLINS: I am afraid it is rather rough justice, but then costs orders always tend to be. Doing the best I can, I think that reflects the proper position.