

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY KATHLEEN PORTER
FOR JUDICIAL REVIEW**

STEPHENS J

Introduction

[1] On 16 February 2007 Down and Lisburn Trust ("the trust") decided to close St. John's House, Pound Lane, Downpatrick, Co. Down, a residential home for the elderly. The applicant, Kathleen Porter, is a resident in St. John's. She has been offered an alternative place in Ardview, a residential home some 6 miles away. There is no obligation on her to take up that place but she has nowhere else to live. I find as a fact that the closure of St. John's will have as a consequence an enforced move for the applicant to Ardview.

[2] By these proceedings the applicant seeks to challenge the trust's decision to close St. John's. The grounds on which the applicant relies are set out in her amended Order 53 statement and fall under four headings:

- (a) Illegality by reason of the infringement of her Article 8 Convention rights;
- (b) Failing to fulfil her legitimate expectation of a home for life at St John's;
- (c) Failing to take account of proper considerations and only such considerations;
and
- (d) Irrationality in failing to properly inform itself of the relevant facts.

[3] Ms Higgins Q.C. and Mr. Lannon appeared on behalf of the applicant. Mr Hanna Q.C. and Mr. Schofield appeared on behalf of the trust. I am indebted to both sets of counsel for their careful preparation of the case and their well-marshalled written and oral submissions.

The Legislative and Policy Framework.

[4] The process which led to the decision to close St. John's has to be seen in the context of the legislative and policy framework. The Health and Personal Social Services (Northern Ireland) Order 1972 provides in Article 4 that:-

“It shall be the duty of the (Department of Health, Social Services and Public Safety):

(a) to provide or secure the provision of integrated health services in Northern Ireland designed to promote the physical and mental health of the people of Northern Ireland through the prevention, diagnosis and treatment of illness;

(b) to provide or secure the provision of personal social services in Northern Ireland designed to promote the social welfare of the people of Northern Ireland;

and the (Department) shall so discharge its duty as to secure the effective coordination of health and personal social services.”

Article 15(1) provides that:-

“In the exercise of its functions under Article 4(b) the (Department) shall make available advice, guidance and assistance to such extent as it considers necessary, and for that purpose shall make such arrangements and provide or secure the provision of such facilities (including the provision or arranging for the provision of residential or other accommodation, home-help and laundry facilities) as it considers suitable and adequate.”

Article 16(1) provides that:-

“The (Department) shall by order establish bodies to be called Health and Personal Social Services

Boards, for such areas as it may by order determine.”

Article 17(a) provides that:-

“The Health and Social Services Boards shall exercise on behalf of the (Department) such functions (including functions imposed under an order of any court) with respect to the administration of such health and personal social services as the (Department) may direct ... and shall do so in accordance with regulations and directions.”

[5] Accordingly the general duty to provide personal social services in Northern Ireland is on the Department but the exercise of the Department’s functions can be delegated to Health and Social Services Boards. Under Article 3 of the Health and Personal Social Services (Northern Ireland) Order 1994 the Boards in turn have power, with the approval of the Department, to provide for any such relevant functions to be exercisable by a Trust on behalf of the Board.

[6] The Eastern Health and Social Services Board, as part of its delegated functions, has set up policies within which the various Trusts in its area have to operate. One such policy is the “Older People, New Opportunities... Eastern Board’s health and well-being strategy for older people, 2006-2016”. In these proceedings there is no challenge to that policy. A part of that policy relates to “long-term living options” for the elderly. Paragraph 6.6 provides:-

“Frail, older people are citizens too; most still want to lead an active, fulfilling life even if their health is failing. Having choices and control over what happens, how and when, remains central to frail older people’s sense of wellbeing. The literature overwhelmingly shows that the majority of older people want to remain in their own home, or a home of their own, for as long as possible. Commissioning arrangements need to achieve, *through reinvestment*, (emphasis added) a significant shift in the balance of provision towards the services people want. As the Audit Commission comments:-

“The principle of community care makes it harder to justify resources to property rather than people. Sheltered housing must

accordingly reinvent itself as provision for older people who prefer the presence of a supportive community or it must rethink the levels of need it is able to support. If it does not it will face serious questions about its relevance in a system which can deliver high levels of support in ordinary housing.”

[7] Accordingly the policy concept for the elderly is one of providing care within the community rather than in institutions. That money saved in respect of institutions is to be reinvested in community care. There was no challenge to that policy in this application and indeed the policy is supported by a number of facts. There has been a decline in Northern Ireland in the numbers of available places in residential homes together with an increase in the total number of care packages. The Department’s statistics released in November 2006 confirmed a 10% decline in the average number of available places in residential homes in Northern Ireland between 2001/02 and 2005/06. This decline in Northern Ireland is replicated in the Trust’s area where there is a falling demand for residential places. There is no waiting list for any of the Trust’s residential homes. The policy gains further support from the fact that in England and Wales there are substantially fewer elderly persons cared for in residential homes than in Northern Ireland and a greater proportion are cared for in the community.

The process leading to the decision to close St. John’s.

[8] The Trust provides residential care for the elderly either in their own residential homes or by funding placements in the private sector. The Trust’s residential homes, otherwise known as resource centres, in the Down sector are as follows:-

- (a) Ardview.
- (b) Grove.
- (c) St John’s.

The Trust’s residential homes in the Lisburn sector are as follows:-

- (a) Drumlough.
- (b) Laurelhill.
- (c) Seymour.

The beds in these residential homes are categorised as “permanent residential beds”, “intermediate care/assessment/rehabilitation/respite”, “elderly and mentally infirm residential beds and respite” or “elderly and mentally infirm nursing beds”. Not all of the residential homes have beds in each category.

[9] In accordance with the policy set up by the Eastern Health and Social Services Board the Trust perceived that there should be a shift away from “permanent residential beds” and with the benefit of the savings thereby effected a consequent reinvestment in increased provision of care for the elderly aimed at maintaining the elderly in their own homes. The decision-making process as far as this application is concerned commenced in about May 2005 with the publication of a draft of the “Older Peoples Health and Wellbeing Strategy 2005-2015” by the Eastern Health and Social Services Board seeking the views of interested parties during a consultation period. The final version of this policy was published in May 2006 as the “Older People, New Opportunities... Eastern Board’s health and well-being strategy for older people, 2006-2016”

[10] In September 2005 the trust consulted its key professional staff and others in a workshop for the Trust’s staff, general practitioners and user providers. As a result a proposal emerged in November 2005 at a meeting of the Trust Board. This was a proposal to redesign services for older people within the Down Lisburn Trust. A paper entitled “Older Peoples Services Modernisation Project” was presented by Sarah Browne, Assistant Director of the Trust to the Board. That paper set out the policy context including the Eastern Health and Social Services Board’s draft “Older Peoples Health and Wellbeing Strategy 2005-2015”. It proposed creating a stronger pattern of primary and community based services to support more people at home and delay placements in residential homes. It was proposed “to release 80 beds from the current provision”. In broad terms this meant the closure of two of the Trust’s residential homes. These closures would lead to savings which at that stage were envisaged to amount to £250,000. Those savings would be reinvested in providing care for the elderly in their own home environment. No breakdown was given in respect of the savings of £250,000. The amount of savings available for reinvestment in providing care for the elderly in the community depended in part on the cost of re-providing care for the existing residents in the homes which were to be closed.

[11] The initial proposal in November 2005 to release 80 beds from current provision and the eventual decision in February 2007 to close 2 residential homes thereby reducing the total number of permanent residential beds by 85 was not based on a scientific investigation or calculation of the residual need for residential places if more resources were spent on care for the elderly in the community. The figure of 80 beds emerged from discussion amongst the Trusts professional staff in the internal consultation process leading up to the

November 2005 proposal. No assessment was made of the likely demand from the elderly for care in the community.

[12] The outcome of the Trust's Board meeting in November 2005 was to proceed to a period of public consultation in 2006. In preparation for that consultation process a meeting was held with the Equality Commission in January 2006 and an "Equality Screening Report Re the proposal to reduce by approximately 80 beds in the Trust's statutory elderly person's resource centres" was prepared by Elaine Somerville, Development Officer. This was issued in March 2006. It stated that to make the reduction of approximately 80 beds the Trust proposes to close 2 of the 6 elderly person's resource centres. It set out 9 draft criterion upon which a decision would be made as to which 2 of the 6 residential homes would be chosen for closure if the Trust did proceed with its proposal. At the Trust's Board meeting in March 2006 it was in effect unanimously agreed to proceed to public consultation on the proposals. The initial consultation document was then issued.

[13] This consultation process lasted from 19 April 2006 to 31 July 2006. It included public meetings. The feedback process was considered by a working group. At its 2006 August meeting the Trust's Board as a result of the consultation process, amended the draft criterion to be used in the selection process. The Trust's 6 resource centres were then evaluated against those amended criterion. St John's House and Seymour House were marked last and second last respectively in the scoring process against the criterion. Accordingly they were proposed as the 2 residential homes to be closed.

[14] On 18 October 2006 the working group produced a report entitled "Proposed Reshape of Older Peoples Services and on the proposals relating to Seymour House, Dunmurry; St John's House, Downpatrick". This report was presented to the Trust Board in October 2006. The Trust Board took the provisional view that it should close St John's House and Seymour House. At the stage of the earlier consultation process there was no identification of the two residential homes that the Trust proposed to close. In this meeting in October 2006 the Trust Board decided that there should be a further consultation process with a view to making a final recommendation to the Eastern Health and Social Services Board in February 2007.

[15] The second round of consultation took place between 30 October 2006 and 12 January 2007. This consultation was assisted by a revised version of the document entitled "Consultation on the Proposed Reshape of Older Peoples Services and on the proposals relating to Seymour House, Dunmurry, St John's House, Downpatrick." This revised version was dated 30 October 2006. There was also a revised version of the Equality Impact Report now entitled "Equality Impact Assessment on proposals relating to Seymour House and St John's House". It was envisaged at this stage that the savings achieved by the closure of St John's House and Seymour House would be £1.8

million annually. This could be spent on providing beds and reinvestment in community care for the elderly.

[16] In November 2007 another issue emerges from the minutes of the Trust Board meeting. A report had been commissioned from KPMG Chartered Accountants into care for the Elderly in Northern Ireland. A draft of that report was available to the Trust prior to its final publication in March 2007. One of the conclusions of that report was that residential care as provided by the Trust in its own residential homes did not represent effective value for money as compared to the private sector. It was therefore envisaged that a sum of £450,000 might be deducted from the Trust's budget on the basis that it ought to be able to achieve savings of that amount either by reducing its own costs or by contracting out to the private sector. The purpose of closing St John's House and Seymour House was to enable money to be reinvested. Initially there was equivocation as to whether part of the annual savings of £1.8 million brought about by the closure of St John's House and Seymour House would be used to cover this emerging budgetary deduction of £450,000. It has been suggested in these proceedings that a reason for the closure of St John's House and Seymour House was to free up funds to cover this anticipated budgetary deduction of £450,000. The decision to close St John's House and Seymour House was made on 23 February 2007. The KPMG report is dated March 2007 and the budgetary reduction was made in April 2007. During the course of these proceedings the Trust have given a clear and unequivocal undertaking that no part of the annual savings occasioned by the closure of St John's House and Seymour House will be used to cover any part of the budgetary deficit of £450,000.

Facts in relation to legitimate expectation

[17] The applicant, Kathleen Porter, is a retired hotel employee. From approximately 1994 until 2003 she lived at 43 Colmcille Road, Downpatrick. She has "a learning disability, a visual impairment and reduced mobility". There is a contact record with Social Services which establishes that she was visited by them on 15 May 2003. At that time the applicant was attending St John's Day Centre facility on Wednesdays and Saturdays. There were financial problems and a degree of vulnerability. There were no close members of her family upon whom she could rely for support and assistance. It appeared that the applicant was having difficulties in maintaining her independence. Her living conditions were not good and in the opinion of a social worker, she clearly needed care.

[18] The applicant then moved to an address at Ballymote, which is approximately one mile from Colmcille Road. She states that within a few weeks of moving to Ballymote she was informed by her social worker, Cyril McKinney, that there was "a permanent residence" available for her in St John's House, Downpatrick. The applicant states that Moire Peters, another

social worker employed by the Trust, also visited her at her home in Ballymote. The applicant states that Moire Peters explained the advantages of a “permanent residence” in St John’s. That it was close to where she had always lived, that it was close to the shops and to her social activities. That the applicant would have a supported living environment. That all her needs would be met there and it was close to her doctor’s surgery.

[19] The applicant states that Cyril McKinney informed her that St John’s would be her “permanent home for life”. That Moire Peters emphasised to her that if she moved into St John’s House “then St John’s would be my home for life”.

[20] The applicant states that as a result of the conversations with, and assurances given by, Cyril McKinney and Moire Peters that she agreed to move into St John’s House on a permanent basis. She vacated her Ballymote home and moved into St John’s on 1 August 2003. That approximately an hour after she arrived, she signed a resident’s contract. That before she signed the contract the contents were explained to her generally by Moire Peters. That it was again stated by Moire Peters that St John’s would be her permanent residence and her home for life.

[21] In response Moire Peters, social worker, stated that in August 2003 she received a call from her team leader expressing concern about Kathleen Porter. She was asked to visit the applicant in her home. Cyril McKinney, the applicant’s social worker, was on annual leave and Moire Peters was only involved as she was the duty social worker. Moire Peters was told by her team leader that if she had any concerns about Kathleen Porter living in her home she was to let her team leader know and bring Kathleen into St John’s to allow her to receive care. She visited the applicant in her home. The applicant’s living conditions were not good and Moire Peters was of the opinion that the applicant clearly needed care. Moire Peters then refers to a file note dated 4 August 2003 which states:-

“Bed available long term if required. Current respite bed until 15 August 2003”.

On the basis of this note Moire Peters states that when she was involved with the applicant it was only in relation to emergency respite care. That it is not the case that she gave any assurance to the applicant that St John’s home would be her permanent residence or her “home for life”.

[22] Moire Peters does not specifically deal with the applicant’s evidence to the effect that prior to her signing the resident’s contract on 1 August 2003 Moire Peters went through that document with the applicant and explained its terms to her stating, as she did so, that St John’s would be the applicant’s permanent residence.

[23] Cyril McKinney who was the applicant's social worker disagrees that he ever used the term "home for life" but he accepts that he explained to the applicant that she was being offered "a permanent bed as opposed to only a temporary bed in St John's". He states that this was because St John's home had temporary beds and permanent beds and it was a permanent bed that was offered. He states that he was explaining to the applicant the type of placement that was being offered, from which I take him to mean a permanent placement, but that he was not guaranteeing that she could or would remain in St John's for the rest of her days.

[24] In the event the applicant did leave her own home and did move into St John's. She has remained there since and she still lives there. She has no other place where she lives. It transpires that the applicant's time in St John's has been a success. All of her friends reside in and all her social activities are in, the Downpatrick locality. She goes to bingo and to a social centre 2-3 times per week. She also goes to other events from time to time. She goes into Downpatrick town centre for visits. She has no surviving relatives but relatives of other residents visit her when they come to St John's. She has many friends who reside in St John's and has good relationships with the staff.

[25] Cyril McKinney, social worker, confirms that the applicant is very happy in St John's. He states that her life has been very consistent and stable in contrast to her life prior to St John's. He appreciates that this is a difficult time for the applicant facing a potential change from St John's to Ardview. The difficulties faced by the applicant have been described by her. She does not want to move nor is she willing to leave her home at St John's. She will miss the relationships and social contacts if she were forced to move. She fears the isolation and the prospect of having to start again in strange surroundings among strangers.

Legitimate expectation

[26] Ms Higgins QC accepted on behalf of the applicant that in the context of judicial review and given the denials by both Cyril McKinney and Moire Peters that they used the expression "home for life", that the applicant would be unable to establish that such an expression was used see *Re Cranston's Application* [2002] NI1 at page 6d-f, *Re: Winchester's Application for Judicial Review* [2002] 1 NIQB 65 at paragraph [18] and *Re: T P, A Minor's Application* [2006] NIJB 171 at paragraph [12]. However Ms Higgins contended that it was common case that the applicant had been assured that St John's would be her "permanent" residence. That for the purposes of this case there was no difference between a home for life and a permanent residence in St John's.

[27] Mr Hanna, on behalf of the Trust contended that the applicant ought to have appreciated from the context that “permanence” was being contrasted with “temporary” and that it could only be permanent subject to the exigencies of budgets, cost saving exercises and value for money. The Trust denies that any legitimate expectation could be based upon the word “permanent” in the context in which it was spoken. In short that permanent has a blunted sense in the particular context in which the conversations took place. That permanent should not be construed as meaning enduring for life.

[28] The resident’s contract which the applicant signed is entitled “Contract Between Resident and Elderly Persons Resource Centre”. The contract is dated 1 August 2003. Clause 1 is in the following terms:-

“Introduction.

It is the intention of the resource centre to provide a comfortable and happy home suited to your special requirements. We undertake to consult you and/or your family together with any others acting in your interests in all matters to do with your well-being. The first 8 weeks will be considered a trial period with a review planned within this time.”

Clause 2 states:-

“Fees and Payment.

Each resident coming into the resource centre for respite or permanent care has a weekly contribution to pay for their maintenance. ...”

The space in which the applicant’s weekly contribution was to be specified was left blank.

Clause 7 provides for termination of the agreement:-

“The resource centre will endeavour to continue to meet the ongoing needs of each resident. If the resource centre is unable to meet the resident’s needs, a review will be arranged where appropriate forms of care can be discussed. Every assistance will be given in finding a more appropriate care setting. ...”

[29] In contrast to the applicant’s evidence as to what she was informed by Cyril McKinney and Moire Peters the contract provides for an initial 8 week trial period as opposed to an initial permanent place. However in Clause 2 it

refers to “each resident coming into the resource centre for respite or permanent care”. In addition the termination clause does not envisage the resource centre closing down but rather the resource centre endeavouring to continue to meet the ongoing needs of each resident. It is if the resource centre is unable to meet those needs that a review will be arranged whereby appropriate forms of care can be discussed.

[30] The applicant not only had learning difficulties but she was also under pressure in her then home environment in Ballymote. I consider that *she* understood the word permanent in its literal as opposed to any blunted sense. I hold that the Trust promised the applicant that she would obtain a substantive benefit that is that St John’s would be her permanent residence. The promise went further than stating that the Trust would assume a permanent responsibility to find a suitable residence for the applicant but yet retained the capacity to change the location. The assurance was specific to St John’s. That location would be her permanent residence. Accordingly I hold that an assurance was given by the Trust to the applicant that St John’s would be her permanent residence subject only to her needs not increasing to such an extent that they could not be met at that location.

[31] I also hold that the applicant was meant to and did rely on that assurance in coming to her decision to move to St John’s. However there is no evidence that in 2003 or at any later stage that she was considering going to some residence other than St John’s. Accordingly the assurance in relation to St John’s did not lead her to act to her detriment in the sense that she gave up an opportunity of a more settled life in some other residence.

Whether interference with Article 8(1) right.

[32] The Convention right which has been invoked in this case is set out in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Schedule 1 to the Human Rights Act 1998). It provides:-

Article 8

Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the

prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[33] The applicant contends that St John's is her home and that by requiring her to move from St John's either to Ardview or to some other home the Trust, which is a public authority, is interfering with a right to respect for her home. That furthermore the Trust cannot establish that such interference is in accordance with the law and is necessary in a democratic society for any of the legitimate objectives set out in Article 8(2). Furthermore that as the question of what is necessary in a democratic society depends on whether the interference satisfies a pressing social need and is proportionate and that the trust cannot identify such need or such proportion.

[34] Mr Hanna on behalf of the Trust contends that there will be no interference with the applicant's Article 8(1) rights and accordingly no obligation on the Trust to justify such interference under Article 8(2). Mr Hanna relied on the judgment of Lightman J in *R (Phillips & Rowe) v Walsall Metropolitan Borough Council* [2001] ECHR Admin 789. That case concerned an application for leave to apply for judicial review challenging a decision of the Walsall Metropolitan Borough Council ("the Council") to close the Fred Evans Elderly Persons Home provided by the Council. The first applicant was 89 years old, frail and vulnerable. The second applicant was 74 years old and had learning difficulties. The families of the applicants were concerned about the possible effect upon the health and well-being of the applicants of their removal from the place they recognised as their home. The applicants contended, inter alia, that the Council had infringed Article 8 of the European Convention on Human Rights. In refusing to grant leave Lightman J said at paragraph [11]:-

"I am ready to assume that in the present context Article 8 requires the Council permanently to provide a home for the applicants, but this cannot mean that the Council cannot substitute one home for another. Such substitution cannot constitute an interference with the right protected by Article 8".

[35] In support of his contention Mr Hanna also drew to my attention the decision in *R (Dudley, Whitbred & Ors) v East Sussex County Council* [2003] EWHC 1093 (Admin). This was another case involving a decision by a council to close a residential home for the elderly. In that case Maurice Kay J said at paragraph 32:-

"I am prepared to assume, without deciding, that Article 8 is engaged. That may be a generous assumption in a case which does not have the Coughlan element of a particular home for life and

when the Council will be finding alternative accommodation for the residents”.

The Coughlan element is a reference to the decision in *R v North & East Devon Health Authority ex parte Coughlan* [2000] 3 All ER 850. In Coughlan the applicant was a tetraplegic in need of specialised nursing care. She had been assured of a home for life and successfully relied on a legitimate expectation based on that assurance.

[36] Relying on these judgments Mr Hanna contended that substituting Ardview House for St John’s was not an interference with the applicant’s Article 8 right to respect for her home. In short Mr Hanna contended that in the absence an assurance of a “home for life” a substitution of one home for another could not amount to interference to the right to respect for the applicant’s home. That accordingly there was no need for the Trust in this case to embark on an Article 8(2) justification.

[37] It is clear that Article 8 creates a right to respect for the home; it does not create a right to a home as such. Article 8 does not in terms give a right to be provided with a home and does not guarantee the right to have one’s housing problems solved by the State, see *Chapman v United Kingdom* [2001] 33 EHRR 399 at (99) and *Marzari v Italy* [1999] 28 EHRR CD 175 at 179.

[38] However the concept of “home” as expressed in Article 8(1) of the European Convention is an autonomous concept. The question whether a particular habitation constitutes a person’s “home” is a question of *fact* which depends on whether the individual has sufficient and continuous links with it and not on whether his occupation of it was lawful. In *Harrow London Borough Council v Quazi* [2004] 1 AC 983, Lord Bingham stated at paragraph [8]:

“On a straightforward reading of the Convention, its use of the expression ‘home’ appears to invite a down-to-earth and pragmatic consideration whether (as Lord Millett put it in *Uratemp Ventures Limited v Collins* [2001] UKHL 43 at (31), [2002] 1 All ER 46 at (31), [2002] 1 AC 301) the place in question is that where a person ‘lives and to which he returns and which forms the centre of his existence’ since ‘home’ is not a legal term of art and Article 8 is not directed to the protection of property interests or contractual rights.”

He went on at paragraph [9] to quote from the Commission in *Buckley v UK* [1996] 23 EHRR 101 at 115 (para 63) that:-

“‘Home’ is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular habitation constitutes a ‘home’ which attracts the protection of Article 8(1) will depend on the factual circumstances, namely, the existence of sufficient and continuous links.”

See also the speeches of Lord Hope at paragraphs [61]-[69] and Lord Millett at paragraphs [98]-[99].

[39] In the case before me I find that the applicant’s links with the premises of St John’s were sufficient and continuous so that those premises may be regarded as her home for the purposes of Article 8(1).

[40] Conduct to amount to interference by a public authority with the right to respect for the applicant’s home has to attain a minimum level of severity to engage the operation of the convention. The effect of closing St John’s will be to require the applicant to leave her home and to move to Ardview. I consider that to be an interference with her right to respect for her home. Article 8(1) protects against potentially arbitrary decisions by public authorities. A public authority in effect deciding that an individual should live in Ardview as opposed to St John’s should justify its position under Article 8(2). To say to one individual or to whole groups of individuals that they should move homes is an interference with the dignity and privacy of that individual or those individuals. As Lord Hope said in *Harrow London Borough Council v Quasi* at paragraph 50:-

“The emphasis is on the person’s home as a place where he is entitled to be free from arbitrary interference by the public authorities.”

Lord Millett also stated at paragraph [89]:-

“A person’s ‘home’ is rather the place where he and his family are entitled to be left in peace free from interference by the state or agents of the state. It is an important aspect of his dignity as a human being, and it is protected as such and not as an item of property”.

[41] Once the applicant has established that St. John’s is her home, as I hold that she has done in this case, then it is for the respondent to justify under article 8(2) an enforced move from one particular place to another.

Legal framework in relation to a decision to override the applicant’s legitimate expectation.

[42] The Trust seeks to establish that it would not be unfair to frustrate the applicant's legitimate expectation of the substantive benefit of having St John's as her permanent residence. The Trust accepts that it is for the court to decide:-

"Whether the consequent frustration of the applicant's expectation is so unfair as to be a misuse of the (Trust's) powers."

See paragraph [82] of *R v North East Devon Health Authority ex parte Coughlan*.

[43] In arriving at a decision a fair balance has to be struck between the interests of the general community and the interests of the individual. That is a concept which also underlines the whole of the European Convention. In *Brown v Stott* [2003] 1 AC 861 at 704 e-f, Lord Bingham said:-

"The (European Court of Human Rights) has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention: see *Sporrong & Lonnroth v Sweden* [1982] 5 EHRR 35, 52, paragraph 69; *Sheffield & Horsham v United Kingdom* [1998] 27 EHRR 163, 191, paragraph 52."

In *R v North East Devon Health Authority ex parte Coughlan* Lord Woolf said at paragraph [89]:-

"In drawing the balance of conflicting interests the court will not only accept the policy change without demur but will pay the closest attention to the assessment made by the public body itself."

Accordingly I accept the policy consideration underlying the decision of the Trust and will pay the closest attention to the Trust's assessment.

[44] In *Nadarajah & Anor v Secretary of State for the Home Department* [2005] EWCA Civ 1363 Laws LJ at paragraph [68] described the decision-making process as follows:-

"Accordingly a public body's promise or practice as to future conduct may only be denied, ..., in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the

court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises will be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.”

He continued at paragraph [69] as follows:-

“... The question ... will be whether denial of the expectation is in the circumstances proportionate to a legitimate aim pursued. Proportionality will be judged, as it is generally to be judged, by the respective force of the competing interests arising in the case. Thus where the representation relied on amounts to an unambiguous promise; where there is detrimental reliance; where the promise is made to an individual or specific group; these are instances where denial of the expectation is likely to be harder to justify as a proportionate measure. They are included in Mr Underwood’s list of factors, all of which will be material, where they arise, to the assessment of proportionality. On the other hand, where the Government decision-maker is concerned to raise wide-ranging or ‘macro political’ issues of policy, the expectations enforcement in the courts will encounter a steeper climb. All these considerations, whatever their direction, are pointers not rules. The balance between an individual’s fair treatment in particular circumstances, and the vindication of other ends having a proper claim on the public interest (which is the essential dilemma posed the law of legitimate expectation) is not precisely calculable, its measurement not exact. These cases have to be judged in the round.”

He specifically dealt with the question of reliance at paragraph [70] in the following terms:-

“That there is no hard and fast rule about reliance to my mind illustrates the fact, which I have already sought to emphasise, that it is in principle no more than a factor to be considered in weighing

the question whether denial of the expectation is justified – justified, as I would suggest, as a proportionate act or measure.”

[45] In carrying out the balancing exercise I bear in mind that St John’s is the applicant’s home. As Kerr J stated in *R v Secretary of State ex parte Henry*:-

“To be required to leave one’s home at any stage of one’s life is traumatic. To have to face that prospect when one is elderly and frail must be particularly daunting and upsetting”.

Decision in relation to overriding the applicant’s legitimate expectation

[46] In *R v North East Devon Health Authority ex parte Coughlan* there was no offer of reasonably equivalent accommodation by the health authority to the applicant. At paragraph [89] Lord Woolf stated:-

“We cannot prejudge what would be the result if there was an offer of accommodation which could be said to be reasonably equivalent to Mardon House and the health authority made a properly considered decision in favour of closure in the light of that offer. However, absent such an offer, here there was unfairness amounting to an abuse of power by the health authority.”

[47] In the case before me there is an offer to the applicant of reasonably equivalent accommodation. The applicant has been offered alternative accommodation by the Trust in a resource centre known as Ardview. This is some 6 miles from Downpatrick. It is also run by the Trust. The nature of the physical accommodation and arrangements are exactly similar to St John’s. There is a minibus available to take the applicant and other residents from Ardview to Downpatrick and if, for any reason, that form of transport is not available to the applicant, then a taxi will be provided to her to take her to Downpatrick in order to maintain the social contacts which she has developed. There was reliance by the applicant on the initial assurance but no detriment in a sense of her preferring one residential home over another on the basis of that assurance. The degree of reliance by the applicant on the assurance has to be seen in the context that in 2003 she had no relations to rely upon and was in need of care. She would have come to a decision to enter a residential home either at the same time or shortly thereafter in any event and it is probable that she would have in any event entered St John’s in Downpatrick. I am also satisfied that the trust recognise the “daunting and upsetting” prospect that the applicant faces and that the trust has taken

proper and adequate measures in relation to the applicant including measures to maintain the applicant's social contacts.

[48] I consider that the competing interests of the general community objectively justifies the decision arrived at by the Trust. The legitimate aim has been clearly set out in policy documents such as "Older people, new opportunities . . . Eastern Board's health and wellbeing strategy for older people, 2006-2016". The Trust wishes to reallocate resources for the benefit of the wider population. It has clearly demonstrated that it will achieve a considerable saving. It undertakes that that saving will be reinvested in care for the elderly. The resources are being reallocated not cut. The Trust has made considered and appropriate arrangements for the applicant in alternative accommodation which is reasonably equivalent. They have recognised the need to maintain the applicant's social contacts by the provision of transport. The Trust decision is a proportionate response. Accordingly I conclude in relation to this aspect of the case that the trust has objectively justified the decision to override the applicant's legitimate expectation.

Decision in relation to Article 8(2)

[49] I also conclude that the Trust's interference with the applicant's right to respect for her home has been justified under Article 8(2). Moving the applicant from St John's to Ardview is for a legitimate objective in accordance with the law and necessary in a democratic society. There is a pressing social need for general care for the elderly in the community and the reallocation of resources from permanent residential beds. For the reasons I have already set out the response on behalf of the Trust is proportionate.

The decision making process.

[50] As appears from paragraph [2] of this judgment the applicant also challenges the Trust's decision under two further headings, namely:-

"...

(c) failing to take account of proper considerations and only such considerations; and

(d) irrationality in failing to properly inform itself of the relevant facts."

Ms Higgins embarked on a detailed review of the entire decision making process. A number of criticisms were made by her during the course of her extension review. I do not propose to detail each and every point that was made but rather to highlight the points of potential significance.

[51] In arriving at my decision in relation to this aspect of the case I bear in mind that the legislative framework which I have set out in this judgment does not specify any particular matters which must, as a matter of duty, be taken into or left out of account by the trust in deciding on the nature or extent of the accommodation arrangements which it should make for the elderly, either generally, or in respect of any particular individual. There is nothing which must as a matter of duty be taken into or left out of account by the trust. In essence it is for the trust's judgment to decide which matters it should take into or leave out of account. In *R (Khatun) -v- London Borough of Newham* [2004] 3 WLR 417 at paragraph 35 Laws LJ said:

“... where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision maker, then it is for the decision maker and not the court to conclude what is relevant subject only to *Wednesbury* review”

Accordingly subject to *Wednesbury* considerations, it is for the trust, and, it is not for this court, to decide what was, or was not relevant to the decision-making process. In doing so the decision maker must, of course, be guided by the policy and objects of the governing statute. It is for the applicant to identify any allegedly relevant consideration which was not taken into account, but which (applying the *Wednesbury* test) no reasonable Trust could have failed to take into account. It is not enough for the applicant to indicate that there may have been other considerations which a reasonable Trust might or might not have taken into account. It is also for the applicant to identify any allegedly irrelevant consideration which *was* taken into account, but which (again applying the *Wednesbury* test) no reasonable Trust could have regarded as relevant.

[52] I also bear in mind that questions of weight are generally left in the hands of the decision maker and that (subject to challenge on the ground that it is irrational or perverse) it is for him, and not the court, to assess the relative weight to be given to the various material considerations, see *Tesco Stores Limited -v- Secretary of State for the Environment* [1995] 1 WLR 759; *City of Edinburgh Council -v- Secretary of State for Scotland* [1997] 1 WLR 1447, per Lord Clyde at 1458. If, in reality, the applicant is seeking a 'merits' review then that is impermissible.

[53] As is apparent from paragraph [11] of this judgment the Trust in arriving at its decision to close St John's had not carried out a scientific investigation or calculation of the residual need for residential places if more resources were spent on care for the elderly in the community. The Trust contends that there is no recognised prescribed objective method of assessing the demands for care in the community and the residual demand for care in residential homes. That informing the assessment to release 80 beds reliance

was placed on the experience of their professional staff working on a daily basis in this area. That in contrast there are substantially fewer elderly persons cared for in residential homes in England and Wales and a greater proportion are cared for in the community. That there is in fact a falling demand for residential places in the Trust area. I accept those contentions and accordingly the applicant has not established that it was perverse or irrational for the Trust to leave out of account any informed calculation of the residual need for residential places if more resources were spent on care for the elderly in the community.

[54] An issue also arose as to whether the Trust was in fact taking into account in its decision making process the emerging budgetary deficit of £450,000. The facts in relation to this emerging deficit are set out in paragraph [16] of this judgment. The allegation was that the Trust faced with a potential deficit of £450,000 was intent on closing St John's to cover that deficit. As is apparent I received a clear and unequivocal undertaking that no part of the annual savings occasioned by the closure of St John's House and Seymour House will be used to cover any part of the budgetary deficit of £450,000. I find as a fact that the emerging budgetary saving of £450,000 played no part in the final decision.

[55] Criticism was also levelled on behalf of the application in relation to the weightings that were attached by the Trust to the various criterion used in the decision making process. I consider that issues of that nature go the weight to be attached to the various factors that were taken into account by the Trust. I reject any challenge on that ground.

[56] The applicant also challenged the trusts reliance upon reports and its alleged failure to take into account the capital value of the sites after closure. I do not consider that any of these factors is a proper ground for challenging the trusts decision.

[57] I consider that the decision making process was carried out with considerable care and was detailed. I reject any of the grounds of challenge in relation to the decision making process.

Conclusion.

[58] Accordingly, I am not satisfied that the applicant has established any of her grounds for Judicial Review. The application for Judicial Review is dismissed.