

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY MARGARET HANNA FOR
JUDICIAL REVIEW

COGHLIN J

[1] The applicant in these proceedings, Margaret Hannah, was at the institution of the proceedings some 85 years of age and, at that time, residing in the Elderly Medicine Unit of the Laganvalley Hospital Lisburn. She had been resident in that unit since admission on 16 November 2000. The applicant had suffered several strokes associated with brain damage, she was confused and lacking the legal capacity to institute and conduct proceedings. Consequently, this application was brought, on behalf of the applicant, by her son-in-law and next friend John McGowan. However, during the course of this judgment I shall refer to Margaret Hannah as the applicant. The applicant was represented by Mr Richard Gordon QC and Mr John Larkin QC while Mr McCloskey QC appeared with Mr Goode for the Craigavon and Banbridge Community Health and Social Services Trust ("the Trust") and with the Mr McMillan for the Department of Health, Social Services and Public Safety for Northern Ireland ("the Department"). I am grateful to both sets of counsel for their detailed skeleton arguments and well constructed oral submissions.

The factual background

[2] The applicant was originally admitted to Ward 12 of the Laganvalley Hospital, Elderly Medicine Unit on 16 November 2000 after suffering a stroke and, at the time of the admissions, the applicant had been living alone in a warden assessed dwelling receiving meals on wheels one day a week and other forms of care attendance. Ward 12 is a multi-disciplinary rehabilitation unit comprising Nursing, Physiotherapy, Occupational Therapy, Social Work,

Speech and Language Therapy and Medical Staff. As a result of her stroke, the applicant's speech and swallow were affected and she required to be treated with a Peg tube.

[3] On 25 January 2001 the Trust received a referral for hospital discharge as a result of which a Level 3 Care Management Meeting was arranged for 8 February 2001, just over 2½ months after the original admission. The purpose of the Level 3 meeting was to determine whether to recommend the applicant for discharge and, if so, the appropriate care package that should be provided. The meeting was attended by a number of relevant personnel concerned with the nursing and social work aspects of the applicant's care as well as by her daughter and son-in-law. The applicant expressed a wish to return home but it was felt that such an outcome was not feasible given her current levels of need. While the majority of her functional assessments suggested residential care it was noted that the requirement for the Peg tube required nursing care. In the circumstances, after discussion of a number of care options, a decision was taken to place the applicant's name on a waiting list for admission to a community nursing home of her choice. At the time of this assessment the applicant was 89th on the list of persons waiting for a nursing home place and, as of 5 July 2001, she was 27th on the list. Since the institution of the proceedings an appropriate nursing home place has been found for the applicant and, consequently, the only relief sought is a declaration.

[4] The Trust is almost entirely reliant upon the Southern Health and Social Services Board ("the Board"), which acts as the agent of the Department, for the provision of funding required to perform the Trust's functions including the provision of places in community nursing homes. The Trust is also required to comply with relevant policies promulgated by both the Board and the Department. The problems faced by the Trust in seeking to implement policies against a background of limited resources have been set out in detail in the affidavits sworn by Roisin Burns, Director of Elderly and Primary Care for the Trust, together with the exhibits thereto. Placements into residential and nursing homes have to be funded by the Trust and, despite additional funding from the Board in the financial years 1997 to 2000, throughout the 1990s the demand for beds outstripped the funds available to the Trust to fund such placements. In such circumstances, in November 1996, the Trust was compelled to devise the "waiting list criteria" published in the Care Management Manual of December 2000. Essentially, these criteria provide for patient/clients whose needs qualify them for transfer to an independent nursing or residential home to be prioritised in order of the date of the Level 3 care management meeting at which it was decided to recommend admission to such a facility. As a result of the restriction of funding provided to the Trust this list has to be managed upon a "one out one in" basis subject to those whose needs justify immediate priority as an emergency. It appears that, subsequent to the Level 3 care management meeting, a place did become available at the home of choice for the applicant,

Lisadane, Hillsborough, but she did not qualify for transfer because of her priority on the waiting list at the material time. By 7 September 2001 the applicant was 8th on the date order waiting list. On the same date, 7 September 2001, Dr S P Gawley, consultant physician in geriatric medicine, in a letter to the applicant's solicitors summarising the applicant's condition at that time said:

"The nurses have noted that Mrs Hanna is tearful when neighbouring patients are discharged from the ward. Currently she mobilises independently within the ward which can create problems with regard to cross-infection control. She contracted MRSA around her Peg tube site on 15 July 2001. The organism had not been grown previously on cultures from the site. It has been successfully treated. However this lady poses a risk both to herself and other patients as she enters areas where patients are barrier nursed.

Mrs Hanna remains in an inappropriate environment although her needs for nourishment, cleanliness and warmth are being met she does not receive activity nursing or diversional therapy to stimulate her mind."

The relevant statutory framework

[5] The following statutory provisions are relevant to these proceedings:

The Health and Personal Social Services (Northern Ireland) Order 1972 as amended ("the 1972 Order")

Article 4

- "4. It shall be the duty of the [Department] -
- (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 co-ordination of health and personal social services.”

Article 5:

“5(1) The [Department] shall provide throughout Northern Ireland, to such extent as it considers necessary, accommodation and services of the following descriptions -

- (a) Hospital accommodation, including accommodation within the meaning of [Article 110 of the Mental Health Order];
- (b) Premises, other than hospitals at which facilities are available for all or any of the services provided under this Order;
- (c) Medical, nursing and other services whether in such accommodation or premises, in the home of the patient or elsewhere.

(2) In addition to its functions under paragraph (1), the [Department] may provide such other accommodation and services not otherwise specifically provided for by this Order as it considers conducive to efficient and sympathetic working of any hospital or service under its control and, in relation to any person and notwithstanding anything contained in Article 4(a), to provide or arrange for the provision of such accommodation or services, and in connection therewith to incur such expenditure as is necessary or expedient on medical grounds.

(3) Where accommodation or premises provided under this Article afford facilities for the provision of general medical, dental or ophthalmic services or of pharmaceutical services, they shall be made available for those services on such terms and conditions as the [Department] may determine.”

Article 6:

“The Department shall secure the provision of general medical, dental and ophthalmic services and of pharmaceutical services in accordance with Part VI.”

Article 7:

7(1) The [Department] shall make arrangements, to such extent as it considers necessary, for the purposes of the prevention of illness, the care of persons suffering from illness or the after care of such persons.

(2) The [Department] may recover from persons availing themselves of any services provided by the [Department] under this Article, otherwise than in a hospital, such charges (if any) in respect of the service as the [Department] considers appropriate.”

Article 14A:

“14A(1) The Department may make arrangements for the provision by any other body or person on any of the health services on such terms and conditions as may be agreed between the Department and that other body or person.

(2) The Department may assist any body or person carrying out arrangements on the paragraph (1) by -

(a) permitting that body or person to use premises belonging to the Department ... on such terms and conditions as may be agreed between the Department and that body or person.”

Article 15:

“15(1) 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.

(1A) Arrangements under paragraph (1) may include arrangements for the provision by any other body or person of any of the personal social services on such terms and conditions as may be agreed between the Department and that other body or person ...

(4) The [Department] may recover in respect of any assistance, help or facilities under this article such charges (if any) as the [Department] considers appropriate."

Articles 16, 17, 18 and Schedule 1 of this Order provide for the establishment by the Department of Health and Social Services Boards and the constitution and functions of such Boards.

The Health and Personal Social Services (Northern Ireland) Order 1991 as amended ("the 1991 Order")

Articles 8, 10, 13 and Schedules 3 and 4 of this Order provide for the establishment by the Department of Health and Social Services Trusts and their functions and powers.

The Health and Personal Social Services (Northern Ireland) Order 1994 ("the 1994 Order")

Articles 3 and 4 of this Order permit Health and Social Services Boards, with the approval of the Department, to authorise a specified Health and Social Services Trust to exercise certain functions on behalf of the Board. Article 4 requires a relevant Health and Social Services Trust to submit a scheme to the relevant Health and Social Services Board providing for the exercise by the Trust of relevant functions on behalf of the Board and, in turn, the Board is required to submit such a scheme as it approves for approval by the Department.

National Assistance Act 1948 ("the 1948 Act")

"21-(1)It shall be the duty of every local authority, subject to and in accordance with the provisions of this Part of this Act, to provide -

(a) Residential accommodation for persons who by reason of age, infirmity or any other

circumstances are in need of care and attention which is not otherwise available to them;

(b) Temporary accommodation for persons who are in urgent need thereof, being need arising in circumstances which could not reasonably have been foreseen or in such other circumstances as the authority may in any particular case determine.

(2) In the exercise of their said duty a local authority shall have regard to the welfare of all persons for whom accommodation is provided, and in particular to the need for providing accommodation of different descriptions suited to different descriptions of such persons as are mentioned in the last foregoing section.

(3) A local authority shall exercise their functions under this section in accordance with a scheme made thereunder.

(4) Accommodation provided by a local authority in the exercise of their said functions shall be provided in premises managed by the authority or, to such extent as may be specified in the scheme under this section, in such premises managed by another local authority as may be agreed between the two authorities and on such terms, including terms as to the reimbursement of expenditure incurred by the said other authority as may be so agreed."

The applicant's submissions

[6] On behalf of the applicant Mr Gordon QC advanced two main submissions arguing that:

(1) Section 21 of the 1948 Act and Article 15 of the 1972 Order were "structurally similar" and, accordingly, when properly construed Article 15, like Section 21, gives rise to a general obligation which may crystallise into a duty to meet the need of an individual in full once that need has been assessed. In this context, Mr Gordon QC argued that, once the Level 3 care management meeting on 8 February 2001 had assessed the applicant as being in need of residential nursing care the Trust were subject to a duty to ensure that the applicant was provided with such care and, as a matter of law, it was not open to the Trust to rely upon a lack of available resources to defer the

fulfilment of that need. Insofar as he required support for such an interpretation of Article 15 of the 1972 Order Mr Gordon QC sought to rely upon Section 3 of the Human Rights Act 1998 (“HRA”) and Article 8 of the European Convention on Human Rights and Fundamental Freedoms (“the Convention”).

(2) Mr Gordon QC also argued that any interpretation of Article 15 of the 1972 Act which permitted the Trust to rely upon the lack of available resources would give rise to a disparity between England and Wales and Northern Ireland would therefore amount to unlawful discrimination contrary to Articles 8 and 14 of the Convention.

The decision

[7] It seems to me that the fundamental difficulty faced by Mr Gordon QC is that, far from being similar, Section 21 of the 1948 Act and Article 15 of the 1972 Order are very different and involve the imposition of quite distinct duties. Section 21 of the 1948 Act is located within Part III dealing with Local Authority services and falling under the heading of “Provision of Accommodation “ for those persons who, by reason of age, infirmity or any other circumstances, are in need of care and attention which is not otherwise available. The section as originally enacted provided that:

“(1) It shall (my emphasis) be the duty of every local authority, subject to and in accordance with the provisions of this Part of this Act, to provide –“.

As a result of subsequent amendment Section 21 now reads:

(1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing - ...”

The section as amended invests the local authority with a discretion, to be exercised with the approval of the Secretary of State, and subjects it to a duty to act in accordance with any direction of the Secretary of State to provide a specific facility, namely accommodation, for the classes of persons specified. In R v Sefton MBC [1997] 4 All ER 532 as a result of a letter from the Department of Health Lord Woolf MR noted at p537 that, there was “... no doubt that the Department of Health did not intend local authorities to take into account their financial resources when funding residential care.”

[8] By contrast, the “functions” referred in Article 15 of the 1972 Order, which was the Order that combined health and personal services in Northern

Ireland, are the functions performed by the Department in the course of its duty, in conformity with Article 4(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 which duty is to be discharged by the Department so as "... secure the effective co-ordination of health and personal social services." Thus, the "advice, guidance and assistance" which the Department is under a duty to make available by virtue of Article 15 is such that the Department "considers necessary" in securing the effective co-ordination of health and personal social services in the interests of the social welfare of all the people of Northern Ireland. Article 15 also requires the Department to make "such arrangements and provide or secure the provision of such facilities" as it considers suitable and adequate "for that purpose" ie for the general and fundamental purpose of providing social services to promote the social welfare of the people of Northern Ireland and securing the effective co-ordination of health and personal social services. It seems to me that such a duty on the part of the Department to promote the "social welfare" of all the people in Northern Ireland and to secure the effective co-ordination of health and personal social services is very far removed from the specific duty placed upon a local authority by Section 21 of the 1948 Act. If anything, this type of duty is similar in structure to the duty to provide a health service placed upon the Secretary of State by Section 1(1) of the National Health Service Act 1977. Despite coming into force some 24 years after the 1948 Act, the 1972 Order contained no equivalent of Section 21 nor has any comparable provision been subsequently enacted in Northern Ireland. The contrast becomes even more stark when it is recalled that Section 21 of the 1948 Act did have an equivalent in Section 3(1) of the Welfare Services Act (Northern Ireland) 1971 but that such a provision was never re-enacted after the repeal of the latter Act by the 1972 Order.

[9] Unlike the authorities to which Mr Gordon QC referred in argument Article 15 does not refer to any specific need – see, for example, residential accommodation in R v Kensington and Chelsea RLBC ex parte Kujtim [1999] 4 All ER 161. In such circumstances, I do not think that it is appropriate to conceive of Article 15 placing the Department or, in this case, its agent the respondent Trust under a mandatory duty to fulfil any specific need once that need has been assessed. In my view, in the context of this application, the duty imposed upon the Department and its agencies by Article 15, is to provide such facilities by way of residential nursing accommodation as it considers suitable and adequate to meet the needs of the applicant, consistent with its overall duty to promote the physical and mental health and social welfare of all of the people of Northern Ireland, including those whose needs may, depending on the circumstances, be more urgent and pressing than those of the applicant. In achieving this goal it seems to be inevitable that will be necessary to take into account available resources and, in my view, this has been practically achieved in a reasonable manner by the scheme administered by the defendant Trust. It is important to bear in mind that the respondent

trust has not refused to meet the applicant's assessed needs, it has recognised those needs but has been compelled by the resources available to it to adopt a system which seeks to balance the fulfilment of those needs with the needs of others. Accordingly, I reject the argument that the provisions are "structurally similar".

Article 8

[10] Article 8 of the Convention provides that:-

"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 in accordance with the law and necessary in a democratic society in the interests of national security, public safety for 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."

[11] In Sheffield & Another v United Kingdom [1998] ECHR 22985, the Strasbourg Court said in the course of giving judgment:

"52. The Court reiterates that the notion of 'respect' is not clear-cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notions requirements will very considerably from case to case. In determining whether or not the positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention."

[12] In this case it is quite clear from the minute of the level 3 meeting held on 8 February 2001, that the applicant's desire to return home was considered by the respondent Trust in conjunction with her son and daughter-in-law as well as with the relevant medical staff and social care workers. The decision taken at that meeting was to transfer the applicant to a residential nursing home, in accordance with the wishes of her relatives, but to do so by adding her name to the waiting list owing to the restricted availability of resources. In acting as it did, I consider that the respondent Trust did have respect for the applicant's private and family life having regard to the balance which

requires to be struck between the interests of the applicant and the interests of those other members of the community placed at a higher level on the waiting list including those whose needs were assessed as being more urgent and pressing than those of the applicant. Accordingly, I do not consider that the applicant has established a breach of Article 8.

[13] If I am wrong in so concluding and the applicant has established a breach of Article 8 in deferring the applicant's transfer to a residential nursing home by placing her on the waiting list once her need had been established, then it seems to me that any such interference may be justified as being for the protection of the rights and freedoms of others, in accordance with Article 8(2). While Mr McCloskey QC accepted that the Trust itself had not specifically engaged in carrying out an Article 8(2) balance, that is not essential (Buckley v UK [1996] 23 EHRR 101; Chapman v UK [2001] 33 EHRR 399) and it seems to me that the court is required to do so in discharging its duty as a public authority in accordance with the provisions of Section 6 of the HRA. In particular, in arriving at the assessment and waiting list system described by Roisin Burns, the respondent Trust has respected the Article 8 rights of others whose needs have also been assessed including those with needs found to be more urgent and pressing than those of the applicant. I respectfully agree with Silber J who has expressed the view that financial resources are an important element to be considered in the balancing exercise required in the application of Article 8(2) - see R (on the application of Haggerty & Others) v Helen's Council [2003] EWHC 803 (Admin.) at paragraph 60. I also consider that decision-makers charged with resolving economic and social issues, including the need to balance conflicting rights, may be entitled to expect some degree of judicial deference from the court. However, in the particular circumstances of this case, I have not found it necessary to exercise any significant degree of deference since I am satisfied on the basis of the detailed, reasoned and transparent affidavits filed on behalf of the respondent, that the solution which it has adopted, is lawful, legitimate and proportionate thereby providing adequate justification for any interference with the applicant's Article 8 rights that may have occurred.

Article 8 in conjunction with Article 14 of the ECHR

[14] Article 14 of the Convention imposes a prohibition against discrimination and provides that:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political, or other opinion, national or social origin, association with a national minority, property, birth or other status."

In "Human Rights Law and Practice" (Lester & Pannick, Butterworths 1999), the learned authors point out in relation to Article 14 at page 226, para 4.14.4:

"The application of the Article does not, however, presuppose a breach of any of the substantive provisions of the Convention: such an interpretation would leave no practical function of Article 14. A measure which in itself conforms with the substantive Article of the Convention may violate Article 14 because it is discriminatory in nature."

Thus, even if the applicant has not succeeded in establishing a breach of her Article 8 rights, she would be entitled to rely upon an alleged breach of Article 14 provided the facts of the case fall within the "ambit" of Article 8.

[15] Mr Gordon QC argued that section 3 of the Human Rights Act 1998 requires the court to construe Article 15(1) of the 1972 Order, so far as is possible, in a manner that is compatible with any relevant Convention right which, in this case, requires the court to construe the section in such a way as to avoid any violation of Article 14. He further submitted that, if Article 15(1) of the 1972 Order, is construed as entitling the respondent Trust to have regard to its financial resources in declining to meet the assessed need of the applicant, a significant disparity would exist between the provision of residential care in England and Wales in accordance with section 21 of the 1948 Act and Northern Ireland for which there was no objective justification.

[16] While I have earlier held that the applicant has failed to establish a breach of Article 8 of the Convention, it does seem to me that the applicant's situation may be justifiably said to fall within the "ambit" of Article 8 – see, for example, Rasmussen v Denmark (1984) 7 EHRR 371; Abdul Aziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471. There was some debate during the hearing as to whether an applicant's place of residence could constitute a "status" within the meaning of Article 14 but I note that such a proposition appears to have been accepted by the Court of Appeal in (Carson) v Secretary of State for Work and Pensions [2003] EWCA Civ. 797. Indeed, in that case, the issue appears to have been conceded on behalf of the Secretary of State.

[17] However, establishing that the applicant's claim falls within the ambit of Article 14 is to answer positively only the first of the four questions posed by Brooke LJ in Wandsworth LBC v Michalak [2002] 4 All ER 1136. In particular, the applicant must also establish that her chosen comparators, ie those seeking to claim in accordance with Article 21 of the 1948 Act are in an analogous situation to the applicant. (Van Der Musselle v Belgium (1993) 6 EHRR 163).

[18] I have already held that section 21 of the 1948 Act and Article 15 of the 1972 Order are very different and involve the imposition of quite distinct duties. Indeed, it seems to me that the history of these two pieces of legislation demonstrates a clear intention by Parliament to institute for Northern Ireland a different system from that in operation in England and Wales.

[19] In Northern Ireland the Welfare Services Act 1948 contained identical provisions to those contained in section 21 of the National Assistance Act 1948 and the 1949 Act was consolidated in the Welfare Services Act 1971.

[20] In England and Wales the Local Government Act 1972, the Housing (Homeless Persons) Act 1977 and the National Health Service and Community Care Act 1990 brought about amendments as a result of which section 21 of the 1948 Act now reads:

"(1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing - (a) residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them

(2) In making such arrangements a local authority shall have regard to the welfare of all persons for whom accommodation is provided, and in particular to the need of providing accommodation of different descriptions suited to different descriptions of such persons as are mentioned in the last foregoing subsection."

The Secretary of State's Approvals and Directions under section 21(1) of the 1948 Act published as Appendix 1 to Department of Health Circular No. LAC (93) 10 (which came into force on 1 April 1993) provided that:

"2(1) The Secretary of State hereby -

(a) Approves the making by local authorities of arrangements of the section 21(1)(a) of the Act in relation to persons with no settled residence

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

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

(2) Without prejudice to the generality of sub-paragraph (1), the Secretary of State hereby directs local authorities to make arrangements under section 21(1)(a) of the Act to provide temporary accommodation for persons who are in urgent need thereof in circumstances where the need for that accommodation could not reasonably be foreseen.

[21] Thus, in England and Wales, Parliament retained the obligation on the part of local authorities to provide accommodation for the needy within the specific provisions of section 21 of the 1948 Act which it amended from a duty to a discretion to be exercised with the approval of the Secretary of State and a duty to act at his direction.

[22] While the Northern Ireland Welfare Services Act of 1949 and 1971 may well have been passed in accordance with the then current "step-by-step" policy, the Order of 1972, passed some 4 or 5 months after prorogation of the Stormont Parliament, involved the repeal of the Northern Ireland "step-by-step" legislation in this field and what can only have been intended by Parliament to be a basic re-structure of the provision of health and personal social services in that jurisdiction. Accordingly, I have come to the conclusion that the applicant has failed to satisfy me that the circumstances with which she seeks to compare herself are analogous to her own situation or, to use the words of Laws LJ,

"... so similar as to call, in the mind of a rational and fair-minded person, for a positive justification for the less favourable treatment ..." (R (on the application of Carson) v Secretary of State for Work and Pensions at page 21 of the judgment).

[23] I should add that, quite apart from the issue as to whether the circumstances contended for by way of comparison, constitute a truly analogous situation to that of the applicant, the applicant has also failed to persuade me, on the balance of probabilities that she has suffered unfavourable treatment within the ambit of Article 8. The basic submission put forward on behalf of the applicant was that, in accordance with the legislation in force in England and Wales, once the applicant had been assessed as being in need of care in a residential nursing home in February 2001, she would have been transferred to such a home. While a number of cases were cited in support of this proposition, no factual evidence was placed before the court to confirm that a person in the position of the applicant would have been facilitated in such a manner in England and

Wales. In particular, no evidence was forthcoming to establish that she would have been so facilitated irrespective of others whose needs had been established as more extensive and urgent.

[24] Subsequent to the second oral hearing, Mr Gordon QC and Mr Larkin QC, furnished a further written submission on behalf of the applicant drawing attention to paragraphs 8 to 12 of the second affidavit sworn by Ms Roisin Burns on behalf of the respondent Trust, in which they argued that the Trust were taking their resources into account at two stages. They claimed that, first, resources were being considered in the determination of the issue as to whether a person should be placed in the emergency category, secondly, resources were also being regarded as relevant when deciding when the assessed need should be met. This submission appears to be generated by combining some parts of some of the speeches of their Lordships in R v Gloucestershire County Council, ex parte Barry [1997] 2 All ER 1, with the system operated in Northern Ireland. It seems to me that the difficulty about this submission is the absence of any real evidence to indicate that the respondent Trust does take into account resources when initially considering the needs of individuals. As the minute of the level 3 meeting held in relation to the applicant illustrates, her needs were assessed in relation to illness/disabilities, date of admission to hospital, living status, identified need/problems, existing care package and care options including the views of clients/family/carers/professionals. Those who receive priority above the position they would otherwise be in as a consequence of the date of their level 3 management assessment are those whose physical/mental health or domestic care circumstances are sufficiently grave to warrant such priority. Thus, while the existence of the priority list is undoubtedly due to the limited resources available to the respondent Trust, the position of individuals upon that list is determined solely by their health and domestic care circumstances.

[25] Finally, even if the applicant had persuaded me that a breach of Article 14 in conjunction with Article 8 had been established in accordance with the formula suggested by Brooke LJ and refined by Laws LJ, it would have been necessary to consider whether that any such breach could be objectively justified by the respondent Trust. I am quite satisfied that the priority waiting list system as outlined by Ms Burns, is necessary for the protection of the rights and freedoms of others. It seems to me that it is a proportionate solution which, as I have already indicated, is designed to secure the balance between individuals and other relevant members of the community which is inherent in the Convention. In reaching such a conclusion I would have been prepared to afford the respondent Trust some degree of judicial deference in the context of an issue giving rise to difficult social and economic issues and involving the resolution of potentially conflicting rights.

[26] Since I have not found that the applicant has established a breach of either Article 8 or Article 14 of the Convention the obligation to read and give effect to Article 15 of the 1972 Order in a way compatible with Convention rights does not arise. However, even if such breaches had been established, it seems to me that the differences in structure, Parliamentary intention and legislation history between that provision and Section 21 of the 1948 Act are so great that the court would be faced with formidable difficulties in making the declaration sought and I bear in mind the words of Lord Woolf CJ in Poplar Housing v Donoghue [2001] 4 All ER 604 when he said at page 624:

“... S 3 does not entitle the court to *legislate* ...”

[27] According, the application will be dismissed.