Neutral Citation No. [2013] NIQB 7 | *Ref:* **McCL8735**

Judgment: approved by the Court for handing down | *Delivered:* **07/05/11 31/01/03**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

JR 47's Application [2013] NIQB 7

IN THE MATTER OF AN APPLICATION BY JR 47 FOR JUDICIAL REVIEW

PREFACE

Judgment herein was given originally on 7th May 2011- see [2011] NIQB 42. The outcome was an order dismissing the application for judicial review. An appeal was ensued. This resulted in an incomplete hearing in the Court of Appeal and remittal to this court. This was an exercise of the power contained in section 38(1)(b) of the Judicature (NI) Act 1978. In essence, the twofold impetus for the remittal was the Appellant's wish to rely on new arguments and new evidence. While the Order of the Court of Appeal required the Appellant to provide amended grounds of challenge by 18th June 2012, this did not materialise until 22nd November 2012. Furthermore, while the case had proceeded solely against the Department of Health, Social Services and Public Safety for Northern Ireland initially, the remitted phase of these proceedings entailed the joinder of an additional Respondent, the Belfast Health and Social Care Trust. The further hearing eventually ended on 25th January 2013. The judgment of the Court has been augmented accordingly: see paragraphs [46] – [87].

McCloskey J

I INTRODUCTION

[1] The subject matter of this application for judicial review is the resettlement into the community of an adult person, whom I shall describe as Mr. "E", from the setting of Muckamore Hospital, County Antrim, where he has resided since 1997. The Respondent is the Department of Health, Social Services and Public Safety "*the Department*". Mr. E's challenge is, of course, fact specific. However, its resolution by the court potentially has implications for the other members – some two hundred in total - of the cohort to which he belongs. In this respect, I am conscious of certain other judicial review applications which are effectively (though not formally) stayed, pending the promulgation of this judgment. Having made the aforementioned observations, it is appropriate to add that the extent to which this judgment is determinative of any of the other cases will be a matter for reflection and evaluation.

[2] Mr. E's case, as formulated, traces the beginning of the "story" to 1978. The landmarks belonging to the period under scrutiny, of approximately three decades, can be readily identified in a chronological table helpfully prepared by the parties at the request of the court, which I reproduce below.

Date	Document/Event	Description
1978	Service for Mentally Handicapped in NI	Departmental Policy document
1997	Applicant readmitted to Muckamore Abbey Hospital	**Hospital Order under the Mental Health Order**
1997-2002	Regional Strategy for Health and Wellbeing 1997-2002	
2000	Applicant's Hospital Order ended, but continued in hospital as voluntary patient receiving therapeutic interventions – offence related	
2002	Bamford Report Commissioned	Equal Lives Report relating to

Date	Document/Event	Description
	by DHSSPS – completed in 2007	Learning Disability – September 2005
2004	A Healthier Future: A Twenty Year Vision for Health and Wellbeing in Northern Ireland 2005-2025	
2007	October 2007 – NI Executive first Draft Programme for Government	
May 2008	Hansard Report on Health Committee response to Bamford Review	Debate
2008	DHSSPS Priorities for Action 2008-2009	
June 2008	Response of NI Executive to the Bamford Review – Delivering the Bamford Vision	NI Executive Consultation Document
2009	DHSSPS Priorities for Action 2010-2011	
2009	Belfast Health and Social Care Trust	Mental Health and Learning Disability Modernisation Framework
February 2009	Resettlement Steering Group Report	
7 October 2009	Northern Ireland Audit Office Report	

Date	Document/Event	Description
October 2009	Delivering the Bamford Vision Bamford Action Plan	NI Executive Response and Action Plan – reiterates commitment to resettlement for mental health and learning disability Baseline figures – 2007-2008 – Action – DHSSPS/DSD/HSC/NIHE
20 November 2009	Applicant offered place in Dympha House	Applicant refused placement
January 2010	Applicant offered placement in Molinos on Glen Road	Applicant refused placement
25 February 2010	Public Accounts Committee Minutes	
19 May 2010	DHSSPS Priorities for Action 2010-2011	
24 May 2010	DHSSPS Commissioning Plan Direction 2010-2011 to HSC Board	Direction issued under Section 8(3) of the Health and Social Care (Reform) Act (NI) 2009
24 May 2010	Departmental Allocation Letter	Resource Allocation for 2010-2011
2010-2011	Health and Social Care Board Commissioning Plan	
2010-2011	Belfast Trust Delivery Plan	

[3] It is not disputed that from the date when he acquired the status of voluntary patient, upon expiry of his Hospital Order in 2000, the Applicant has been capable of being resettled in the community. In this respect, as the table shows, two possibilities (only) have materialised during the eleven year period under consideration, in November 2009 and January 2010. Neither of these possible placements was considered suitable by Mr. E and, in harmony with the relevant Government policies, he exercised his right to decline.

[4] Accordingly, some eleven years after Mr. E's resettlement in the community first became theoretically possible, he continues to reside in the setting of Muckamore Abbey Hospital. The question which arises is whether this continuing state of affairs is unlawful, by reference to any of the three legal standards in play:

(a) A legitimate expectation of the substantive species.

(b) Article 8 ECHR, whether singly or in tandem with Article 14.

(c) Article 15 of the Health and Personal Social Services (Northern Ireland) Order 1972 and Section 2 of the Health and Social Care Reform Act (Northern Ireland) 2009.

These are the three grounds upon which this application for judicial review is advanced. While other grounds of challenge were canvassed at an earlier stage of these proceedings, these were not pursued, following exchanges with the court. In short, as the submissions on behalf of Mr. E explicitly acknowledged, the issue to be determined by the court is whether the aforementioned persisting state of affairs can be attributed to a relevant legal failing belonging to the realm of any of the permitted grounds of challenge.

II THE EVIDENCE: A SUMMARY

Government Papers and Publications

[5] Mr. E's assertion of a substantive legitimate expectation is founded on a series of Government papers and publications, dating from 1978. These also bear on the question of the exercise of relevant statutory powers and discretions. In the first of these (published in 1978), the Department's predecessor promulgated a report entitled "*Services for the Mentally Handicapped in Northern Ireland – Policy and Objectives*". In a chapter entitled "Residential and Hospital Accommodation", the following was stated:

> "When a mentally handicapped child or adult can no longer remain in the family home alternative accommodation should be available. The main aim of future policy will be to enable as many mentally handicapped people as possible to live at home or when necessary in residential homes …
>
> The clear intention is that hospitals for the mentally handicapped will be relieved of the need to provide residential accommodation for those who presently are there only because they have nowhere else to go and, as a result, hospitals will be able to concentrate on

> those aspects of treatment and care for which they will be staffed and equipped …
>
> Community facilities can be made available only as fast as resources permit and hospitals will remain responsible for this group for some years to come …
>
> It will be essential to expand and improve the services to meet the requirements outlined earlier in this paper. This will mean sustained action over many years by the Department and the Health and Social Services Boards …
>
> The Department and Boards have determined that by 1984 about half of the required residential places and almost all of the day places required to make up shortage will have been provided. This major programme will provide thirty-five new residential homes and ten new adult training centres, giving an additional 525 places in residential accommodation and an additional 700 places in adult training centres."

At the time of publication of this report, membership of the relevant group totalled approximately 1,400. As already noted, twenty-three years later this figure has reduced to around 200.

[6] Some two decades later, the Government published its regional strategy for health and social welfare pertaining to 1997/2002. This recorded that there were over 8,000 people affected by a learning disability in Northern Ireland. It noted that a comprehensive policy review report had been published in 1995, described in the following terms:

> "The review highlighted the importance of including people with a learning disability in society. Access to mainstream services can broaden their horizons and social circles, widen experiences, offer opportunities and challenges and stimulate achievement."

The 1997 Strategy continued:

> "The review recommended that settlement in the community of those long stay patients still in hospital should be pursued. At present, however, underdeveloped community services are resulting in over reliance on treatment in specialist hospitals and in

> appropriate residential care and nursing home placements."

The Strategy then identified the objective of providing the individual with a choice of living accommodation and day activities appropriate to assessed needs. It urged inter-agency co-operation and identified the following "Targets":

> "Each Board and Trust should develop a comprehensive range of supportive services for people with a learning disability and their carers. **The overall objective is that, by 2002, long term institutional care should no longer be provided in traditional specialist hospital environments ...**
>
> Financial and manpower resources should be fundamentally reallocated to facilitate the development of comprehensive community care geared to the resettlement of hospital patients and a reduction in hospital admissions …
>
> Provision should be made to ensure that no one remains in hospital unduly on completion of their treatment through lack of alternative community care."

[Emphasis added].

When this Strategy was published, membership of the relevant group totalled around 700.

[7] The next significant development was the much publicised "Bamford Review", which began in 2002 and was concluded in 2005. Prior to its termination, in 2004 the Department published a new Regional Strategy, under the banner "A Healthier Future". In the Preface, the Permanent Secretary stated that this Strategy –

> "… aims to … provide a vision of how our health and social services will develop and function over the next twenty years. In order to succeed, it must embrace the measures needed to promote health and wellbeing, support, protect and care for the most vulnerable and facilitate the delivery of services."

The Permanent Secretary continued:

> "The time frame for delivery of this vision will be affected by a range of factors, including the future availability of resources. **In keeping with any long**

> **term plan, A Healthier Future is an aspirational document.**"

[Emphasis added].

The Strategy noted that some 16,400 people were suffering from moderate, severe and profound learning disabilities. The Strategy continued:

> "An understanding of human rights is central to valuing people with a learning disability, their rights to full citizenship, equality of opportunity and self determination. This approach reflects changing expectations. We have come a long way from the days when services for people with a learning disability meant separating them from the rest of society. We must strive to ensure that people with a learning disability get the same chances and choices as everyone else."

The strategy then identified the following "**Key Outcomes**":

> "By June 2010 all people with a learning disability living in long stay hospitals should be able to relocate to appropriate and supportive community accommodation, with the option of holding their own tenancy …
>
> Regionally, policy has not always kept pace with these changing views."

Having referred to the Bamford Review, the Strategy continued:

> "The review team have also identified a number of core objectives for future policy for the next fifteen years …
>
> [Objective 4] To enable people with a learning disability to lead full and meaningful lives in their neighbourhoods and have access to a wide range of social, work and leisure opportunities."

Certain related Objectives were also enunciated. At the time of publication of this Strategy, it would appear that membership of the relevant group had dropped to a figure in the vicinity of 450.

[8] At the conclusion of the Bamford Review "Equal Lives" was published in September 2005. This contained a chapter dedicated exclusively to the subject of accommodation and support for those suffering from a mental health or learning disability. In this Chapter it was noted:

> "Around 450 live in hospitals and on average will have lived there for twenty years."

Mr. E belonged – and continues to belong – to this group. The Report noted the continued existence of this group with concern, highlighting that resettlement in the community had been the "*cornerstone*" of Government policy in Northern Ireland since 1995. It continued:

> "We have identified a number of issues with current administrative systems that threaten the development of more appropriate housing and support options for people with a learning disability …
>
> There has been a lack of bridging finance to the same extent as it was available in Great Britain to enable people to be resettled from hospitals…
>
> **As yet no commitment has been given to the resettlement of all long stay patients by a designated date."**

[My emphasis].

The Report proposed appropriate action, in the following terms:

> "We propose that the following service principles and aspirations should guide the development of future housing and support options for people with a learning disability …
>
> People with a learning disability have the right to the same range and standards of accommodation available to their non-disabled peers…
>
> **Resettlement of long stay patients from hospitals within the context of supported living principles must be progressed as rapidly as possible. By June 2011, all people living in a learning disability hospital should be relocated to the community. Funds need to be provided to ensure that on average eighty people will be resettled per annum over the five year period from 2006 to 2011."**

[My emphasis].

[9] In January 2007, the Department published "Priorities for Action". Amongst the specified "*principal targets*" was the following:

> "**Learning Disability:** By March 2008, Boards and Trusts should have resettled forty people currently being cared for in learning disability hospitals to appropriate places in the community …
>
> Funding of £5,000,000 has been allocated for the resettlement of fifty people from mental health and learning disability long stay hospitals and for learning disability patients to be accommodated, in line with their care plans, in unlocked wards."

The formal response of the Northern Ireland Executive to the Bamford Reports followed, in June 2008. This stated:

> "Efforts to prevent people remaining in mental health or learning disability hospitals for lengthy periods will be renewed. Resettlement within the community, which has been DHSSPS policy for many years, will mean that long term living in a hospital will become a thing of the past …
>
> An overriding consideration … will be that the community placement must provide 'betterment' – the person must be able to receive better care and support in the community than in the hospital setting."

The Report then identified the following targets:

> "By 2011 ensure a 25% reduction in the number of long stay patients in learning disability hospitals …
>
> By 2011 ensure a 10% reduction in the number of long stay patients in mental health hospitals …
>
> **By 2013 no person with learning disability will have hospital as a permanent address.**"

[My emphasis].

This publication further noted that a "Regional Resettlement Team", supported by three "Active Discharge Teams", based at each of the learning disability hospitals, had been established.

[10] At the same time, the Northern Ireland Assembly Committee for Health, Social Services and Public Safety debated the Bamford Review. According to the Hansard record:

> "As members know, there are major financial implications…
>
> The review envisages a programme of reform that will last for between ten and fifteen years and substantial additional funding will, therefore, be required in future spending rounds …
>
> With regard to learning disability, the steps to be taken are a reduction of 25% in those resident in learning disability hospitals, ensuring that by March 2009, no child is resident."

I interpose the observation that in an affidavit sworn by the Department's Director of Mental Health and Disability Policy on 1st March 2011, there is an averment expressing an expectation that the target of resettling 120 long stay patients from learning disability hospitals by March 2011 will be exceeded.

[11] Sequentially, there followed a further Departmental "Action Plan 2009 – 2011", entitled "Delivering the Bamford Vision" and published in October 2009. In the Foreword, the Minister stated:

> "The overall vision for mental health and wellbeing and for learning disability will take ten-fifteen years to achieve …
>
> The implementation of this Action Plan will be monitored through an Interdepartmental Group on Mental Health and Learning Disability."

It is evident that an interdepartmental ministerial group was established in autumn 2007. In this action plan, under the rubric "Learning Disability Service Improvement", it was stated:

> "A number of specific service improvements have taken place. These include:

> The learning disability resettlement target of 40 long stay patients to be resettled by March 2008 was successfully achieved and the 08/09 target has also been achieved. The target to resettle all children has been achieved."

The relevant Chapter concluded as follows:

> "Whilst much progress has been made over the last few years to enhance health and social care services, more work still needs to be done."

This was followed by an "Action Plan" for the period 2009 – 2011, containing the following:

> "Resettlement of long stay patients from mental health hospitals –
>
> By 2013 (Programme for Government Target)"

[12] The next significant event was the publication of the Northern Ireland Audit Office ("*NIAO*") Report "Resettlement of Long Stay Patients from Learning Disability Hospitals", in October 2009. As recorded in this report, the Northern Ireland Programme for Government 2008 – 2011 included the following target:

> "By 2013, anyone with a learning disability is promptly and suitably treated in the community and no one remains unnecessarily in hospital."

The NIAO expressed the view that between 2002 and 2007 there had been "*a lack of strategic focus and energy*" probably attributable to the disbandment of an oversight group in 2002. This prompted the observation:

> "While normal commissioning of services would have continued during this period, we consider that the interests of patients with learning disabilities may not have been championed as effectively as they should have been."

The report further recorded that, with the passage of time, increased resources had been allocated to the Department, giving rise to the latter's contention that appropriate momentum had been maintained. The report noted the existence of certain obstacles, in the following terms:

> "The slower progress in resettling patients in Northern Ireland has been due partly to limited resources but

> also a shortage of suitable alternatives in the community, which require input from [DSD] and [DRD] in relation to housing and transport. In addition, there has been resistance to resettlement from a significant number of patients, carers and relatives. The Department pointed out that the resettlement process is, to an extent, complicated by the need to compassionately address the concerns of those within pressure groups … many of whom believe that the needs of their relatives are best met within a hospital setting."

This passage neatly encapsulates the polycentric nature of the subject. The NIAO Report also noted that the purpose of resettlement is to improve the lives of long term patients and provide them with the same rights and choices as other members of the population, rather than reduce costs. The "betterment" principle requires that resettlement be undertaken only where the chosen option is clinically appropriate, clearly meets the patient's needs, has the potential to enhance the patient's life and accords with the wishes of the patient's family. Next, the report noted the need for "*significant additional investment*" to fulfil the policy commitment of full resettlement.

[13] The next agency to publish a report in this heavily documented sphere was the Northern Ireland Assembly Public Accounts Committee, in April 2010. This report observed:

> "The Committee agrees with the Department that the resettlement programme has not received the priority it deserves. It notes the Department's view that 'Equal Lives' acted as a catalyst in redirecting attention to the programme. The Committee considers that, for transparency, it is now necessary for the Department to publish the detailed costing plans which support the resettlement programme."

The latter was the Committee's first recommendation. The other recommendations related mainly to matters of administration and implementation. The following month, on 24th May 2010, the Department exercised its power under Section 8(3) of the Health and Social Care (Reform) Act (NI) 2009, in the form of a "Commissioning Plan Direction" directed to the Regional Health and Social Care Board (established under Section 7). The effect of this was to require the Regional Board's Commissioning Plan, prepared under Section 8(3), to provide an overview of its commissioning intentions for health and social care services during the period April 2010 to March 2011 in a series of specified priority areas, which included the improvement of mental health services and services for people with disabilities. The Direction referred to the "Priorities for Action 2010/2011" instrument (viz. the Departmental priorities), which contains the following exhortation:

> "During 2010 – 11 and beyond, Commissioners and Trusts should ensure that progress is made in the following areas to improve access to health and care and to enhance outcomes for individuals with a learning disability and their carers:
>
> Continued resettlement of the long stay population and the development of innovative approaches to prevent delayed discharges."

One of the identified "*key themes*" was that of "*supporting people to live independent lives*".

[14] In May 2010, the Department also confirmed the availability of a "*ring fenced*" fund of £3.1 million for the learning disability sphere in the 2010/2011 period. Next, the Regional Health and Social Care Board published a "Commissioning Plan 2010/2011", in response to the Departmental Direction. In the Foreword this warns, gloomily:

> "2010/11 will be the most difficult financial year for Health and Social Care in a generation."

Under the rubric "Resources", the recurring theme of limited finances re-emerges. At a later stage, the Commissioning Plan highlights "*funding pressures*" of almost £300,000,000 and states specifically:

> "In mental health, investment of £9.6 million will be deferred …
>
> In learning disability we will not be able to invest £5 million …"

The availability of £3.09 million (consistent with the related Departmental letter) is later acknowledged.

[15] The final instrument of significance is the Belfast Health and Social Care Trust Delivery Plan 2010/2011, wherein it is stated:

> "The priority for the organisation must be to maintain the quality and safety of the services it delivers. This must be achieved against the background of significant financial pressures and increasing demand for services."

It warns that certain targets will not be achievable and difficult choices will have to be made. It then identifies a total of fifty-four targets. Amongst these, Target No. 38 is expressed in the following terms:

"Target: 38 ***Priority Area 6: Improve Mental Health Services and Services for People with Disabilities*** ***Target Details: Resettlement of learning disability patients****: by March 2011, the HSC Board and Trusts should resettle 120 long stay patients from learning disability hospitals to appropriate places in the community compared to the March 2006 total. (Note: PSA target 6.2 for the resettlement of mental health patients has already been achieved.)*
Service Group and Co-Director Responsible: ***SG – Social and Primary Care Services*** ***Co-Dir –……………..***
Delivery Plan Key Actions / in year activity milestones to deliver target from Aug / Sep onwards: *The Trust's target is to resettle 26 patients by March 2011 (17 patients had been resettled by March 2010).* *The Trust will meet its share of the resettlement target dependent upon confirmation of funding for the remaining patients identified for resettlement in the CSR period and the replacement of resettlement funding used to discharge two patients last year under the direction of the Mental Health Tribunal.*
Achievement of target is dependent on confirmation of funding. ***Funding is required for 9 patients."***

[My emphasis]

The most recent milestone in this moderately lengthy paper trail is the Department's "Consultation Paper on the Draft Budget 2011-15: Settlement and Proposals", published in late 2010. The consultation period was scheduled to expire on 9th February 2011 and, at the time of writing this judgment, the Government's response is awaited. Within this publication, a so-called "*absolute funding gap*" of £2.3 billion is identified.

Mr. E

[16] Mr. E's factual matrix is, in substance, uncontentious. He is aged forty-eight years and has a mild learning disability. His admission to Muckamore Abbey Hospital occurred in October 1997, pursuant to a Hospital Order imposed following conviction. The Hospital Order expired three years later and, in principle, Mr. E has

been eligible for resettlement in the community ever since. Throughout this most recent phase his status has been that of a voluntary patient under the framework of the Mental Health (NI) Order 1986. He was accommodated in a hospital ward until February 2009, when he transferred to more conventional living accommodation in one of several houses located in the hospital grounds. This he occupies with certain other adult males. He operates a small car washing business on a part time basis. It appears that his customers are mainly hospital staff. He has eight weekly sessions in the hospital's Work Skills Department where he attends, *inter alia*, computer classes. He also assists in the hospital's recycling squad. His leisure activities are swimming, cycling and pool. He has a steady girlfriend. During recent years he has received occasional therapeutic intervention.

[17] Mr. E's first request to leave Muckamore was made some time in 2009. Since then, two possible community placements have been declined by him on the ground of unsuitability. He would evidently consider an appropriate Northern Ireland Housing Executive dwelling and he is currently on their waiting list. The Trust has devised a community support package for him, to be implemented following his resettlement. Mr. E first instructed his present solicitor around the beginning of December 2009. These proceedings were initiated in October 2010. In the pre-proceedings Protocol letter, it was asserted:

> "Our client instructs that it is lonely in hospital without his own family and he is still subject to the rules and regime of the hospital. Our client feels able to return to the community with suitable support and indeed he would like to be discharged as soon as possible. We are of the view that if our client's treatment is at an end and on the basis that your client's needs assessment has identified a clear need for supported living, then your client should make the necessary arrangements to effect our client's discharge to suitable accommodation without further delay."

The composition of both parties' letters during this phase was admirable and is to be complimented accordingly. Ultimately, the Department took its stand on a combination of limited resources and the following summary:

> "It must be accepted that, historically, there have been problems in ensuring the resettlement of patients. Nevertheless, any objective review of the Departments since 2007/08 will show determined efforts to deal with the acknowledged problems of resettling long stay patients in the Learning Disability Hospitals. These problems have also included the opposition of some of the patients (and their families) …

> The Department continues to work towards the delivery of the Programme for Government target under which, by 2013, anyone with a mental health problem or learning disability is promptly and suitably treated in the community and no one remains unnecessarily in hospital."

These excerpts encapsulate the essence of the case made subsequently in the Department's affidavits and in argument.

Professor McConkey

[18] An affidavit sworn by Professor McConkey was filed on the Applicant's behalf. The deponent holds the post of Professor of Learning Disability within the Institute of Nursing Research, University of Ulster. His qualifications and credentials are impressive and they include membership of the Bamford Review Learning Disability Committee. Professor McConkey espouses strongly the thesis that significant individual and broader advantages attach to the resettlement of individuals such as Mr. E in the community. He avers, *inter alia*:

> "There is clear evidence that people's quality of life broadly improves and is better for those living in community settings …
>
> Compared to living in hospital people in community settings tend to have greater choice – such as in the meals they eat and activities available to them; more participation – for instance in preparation of meals, undertaking household tasks, shopping and managing money – and have a wider social circle with family and friends. Although these individuals may require supervision, they will nevertheless have greater freedom of movement and access to community facilities – including education and employment – than they would if they had to continue living in hospital …
>
> The longer people remain in institutional settings the greater is the risk that they lose the skills they had acquired in looking after themselves allied with emotional impacts such as lack of self confidence and poorer self esteem."

Based on the findings of research and his personal experience, Professor McConkey suggests that the "*quality of life gains*" achieved by transferring from an institutional to a community setting are personal development, self determination, enhanced interpersonal relationships, social inclusion and employment, the acquisition and

enjoyment of basic rights, emotional wellbeing, physical wellbeing and material wellbeing. I detect no significant challenge by the Department to the averments of Professor McConkey.

Other Evidence

[19] The other evidence includes an affidavit of Ms Piggot, Northern Ireland Director of the Royal Mencap Society. Much of this affidavit reproduces the central themes expounded by Professor McConkey. It is evident from this affidavit that Mencap, amongst other activities, assists the transition to the community of some who have spent much of their lives in hospital. In part, the affidavit complains about how the Department has prioritised the expenditure of its budget. The following averments are also noteworthy:

> "I believe that the Health and Social Services authorities in Northern Ireland have failed to make adequate provision for the discharge of patients from Muckamore Abbey Hospital. People who wish to leave hospital and have been identified by the hospital as ready for resettlement do not have plans made for their discharge. Resettlement experience in different parts of the United Kingdom and internationally demonstrates that solutions can be found if the will exists …
>
> Those who have not been discharged have had to endure the detrimental impact of institutional life on fundamental personal aspects including autonomy, wellbeing, identity, relationships, skills and social inclusion."

The Department's case is substantially made in the various government papers and publications outlined extensively above. Its affidavits confirm the absence of any dispute that Mr. E became eligible for discharge eleven years ago. The following averments are especially noteworthy:

> "In summary, [Mr. E] has an active life outside out Muckamore Hospital and can make autonomous decisions regarding activities outside the hospital environment …
>
> The Trust has made considerable investment in [Mr. E's] ongoing care and support and has actively sought his discharge in the past and is currently doing so, once a suitable home can be found for him in his preferred choice of South Belfast. In the meantime,

> considerable effort has been made to promote his independence and social inclusion."

The Department also emphasizes that resettlement can be a challenging and complex process, requiring the involvement of multiple disciplines and agencies. Furthermore:

> "The principle of betterment applies to all Trust resettlement programmes …
>
> The crucial point is that 'no one size fits all' …
>
> Resettlements are planned to meet the assessed individual needs of the patient and costs and residential settings will reflect the range and complexity of support required to meet those needs."

III STATUTORY FRAMEWORK

[20] Two statutory provisions are invoked in support of the Applicant's challenge. The first is Section 2 of the Health and Social Care (Reform) Act (Northern Ireland) 2009 ("*the 2009 Act*"), which provides:

> "**2.**(1) The Department shall promote in Northern Ireland an integrated system of-
>
> (a) health care designed to secure improvement-
> (i) in the physical and mental health of people in Northern Ireland, and
> (ii) in the prevention, diagnosis and treatment of illness; and
>
> (b) social care designed to secure improvement in the social well-being of people in Northern Ireland.
>
> (2) For the purposes of subsection (1) the Department shall provide, or secure the provision of, health and social care in accordance with this Act and any other statutory provision, whenever passed or made, which relates to health and social care.
>
> (3) In particular, the Department must -
>
> (a) develop policies to secure the improvement of the health and social wellbeing of, and to reduce health inequalities between, people in Northern Ireland;

(b) determine priorities and objectives in accordance with section 4;

(c) allocate financial resources available for health and social care, having regard to the need to use such resources in the most economic, efficient and effective way;

(d) set standards for the provision of health and social care;

(e) prepare a framework document in accordance with section 5;

(f) formulate the general policy and principles by reference to which particular functions are to be exercised;

(g) secure the commissioning and development of programmes and initiatives conducive to the improvement of the health and social well-being of, and the reduction of health inequalities between, people in Northern Ireland;

(h) monitor and hold to account the Regional Board, the Regional Agency, RBSO and HSC trusts in the discharge of their functions;

(i) make and maintain effective arrangements to secure the monitoring and holding to account of the other health and social care bodies in the discharge of their functions;

(j) facilitate the discharge by bodies to which Article 67 of the Order of 1972 applies of the duty to co-operate with one another for the purposes mentioned in that Article.

(4) The Department shall discharge its duty under this section so as to secure the effective co-ordination of health and social care.

(5) In this Act-

"health care" means any services designed to secure any of the objects of subsection (1)(a);

"health inequalities" means inequalities in respect of life expectancy or any other matter that is consequent on the state of a person's health;

"social care" means any services designed to secure any of the objects of subsection (1)(b)."

Section 2 should be considered in its full statutory context. Per Section 3, under the cross-heading "**Department's General Power**":

"**3.**(1) The Department may -

(a) provide, or secure the provision of, such health and social care as it considers appropriate for the purpose of discharging its duty under section 2; and

(b) do anything else which is calculated to facilitate, or is conducive or incidental to, the discharge of that duty.

(2) Subsection (1) does not affect the Department's powers apart from this section."

This is followed by Section 4:

"4. (1) The Department shall determine, and may from time to time revise, its priorities and objectives for the provision of health and social care in Northern Ireland.

(2) Before determining or revising any priorities or objectives under this section, the Department must consult such bodies or persons as it thinks appropriate.

(3) Where the Department is of the opinion that because of the urgency of the matter it is necessary to act under subsection (1) without consultation -

(a) subsection (2) does not apply; but

(b) the Department must as soon as reasonably practicable give notice to such bodies as it thinks appropriate of the grounds on which the Department formed that opinion."

Sections 2-4 of the 2009 Act are readily comparable with their statutory predecessors in Part I of the Health and Personal Social Services (NI) Order 1972 ("*the 1972 Order*"), wherein lies the second of the statutory provisions invoked by the Applicant, Article 15(1), which provides:

> "In the exercise of its functions under Section 2(1)(b) of the 2009 Act 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."

IV THE MENTAL DISABILITY ADVOCACY CENTRE SUBMISSION

[21] The court permitted a written intervention by the Mental Disability Advocacy Centre ("*MDAC*"), an international human rights organisation which advances the rights of children and adults who have intellectual and/or psycho-social disabilities. The overarching aim espoused and promoted by this organisation is equality of treatment. Their written submission is a model of its kind and MDAC is to be commended accordingly. It focuses particularly on the United Nations Convention on the Rights of Persons with Disabilities ("*the UN Convention*"), which entered into force on 3rd May 2008 and was ratified by the United Kingdom on 8th June 2009. While this international treaty does not create new rights, it is considered to be the first legally binding instrument which comprehensively reaffirms and reinforces existing civil, political, economic, social and cultural rights in a framework specific to persons with disabilities. At the heart of the MDAC submission is Article 19 of the UN Convention, which is entitled "Living Independently and being included in the Community. It provides:

> "States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:
>
> (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others

> and are not obliged to live in a particular living arrangement;
>
> (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
>
> (c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs."

[22] It is submitted by MDAC that, at its core, Article 19 recognises that living in the community is an inalienable right, the enjoyment whereof does not require a person with a disability to prove their eligibility, ability or entitlement. The MDAC submission also draws to the attention of the court the decision of the Supreme Court of the United States in Olmstead –v- LC (98-536) 527 US 581 (1999), where two women suffering from mental health problems were confined in a psychiatric unit notwithstanding medical advice that they be cared for in the community. The Supreme Court held that this –

> "… unjustified isolation … is properly regarded as discrimination based on disability … [and] … institutional placements of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."

The submission also draws attention to the decision of the European Court of Human Rights in Glor –v- Switzerland [Application No. 13444/04, 30th April 2009] where it was stated that the UN Convention is the basis for –

> "… the existence of a European and universal consensus on the need to protect persons with disabilities from discriminatory treatment."

[See paragraph 53].

The MDAC submission further highlights the longevity of the United Nations and Council of Europe policies promoting the independent living and social inclusion of persons with disabilities. The submission concludes:

> "[23] People with disabilities have the right to live with dignity and to make personal life decisions to the best of their ability on an equal basis with others. The right to live in the community as laid out in Article 19 of the CRPD requires states to realize the right of persons with disabilities to choose where they live. The economic and social aspects of the right are an articulation of what must occur in order to realize the underlying civil and political nature of this right. States which compel persons to live in institutions either intentionally or as a result of the failure to develop alternatives do so in violation of Article 19 of the Convention."

[23] I would observe that in the court's evaluation of this extremely helpful submission, it is important to bear in mind two factors in particular. The first is Article 4/1 of the UN Convention which, under the rubric of "General Obligations", provides:

> "States Parties undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. …"

While one of the specific treaty obligations which follows is the adoption of all appropriate legislative, administrative and other measures for the implementation of the rights enshrined in the Convention, this must be considered in the context of Article 4/2, which provides:

> "With regard to economic, social and cultural rights, each State Party undertakes to take measures **to the maximum of its available resources** and, where needed, within the framework of international co-operation, **with a view to achieving progressively the full realisation of these rights,** without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law."

[My emphasis].

Article 4/2 seems to me an illustration of the kind of protracted inter-state negotiation and compromise which not infrequently precedes adoption of the final text in international treaties. Pausing here, if the correct question to be addressed were whether the state of affairs pertaining to Mr. E is tantamount to an

infringement of the UN Convention, Article 19 in particular, I would supply a negative answer, having regard to Article 4/2 and the evidential matrix rehearsed *in extenso* above.

[24] However, in my view, the question formulated immediately above is inappropriate, given the consideration that of the UN Convention is an international treaty which has not been incorporated in domestic law. I consider that the "***Brind***" doctrine must apply to this Convention: see R –v- Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 692. This doctrine is expressed with particular clarity in the uncompromising statement of Lord Oliver, at p. 500C:

> "Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation."

This is sometimes described as the principle in the International Tin Council case: see [1987] 1 CH 419. More recently, in R –v- Lyons [2003] 1 AC 976, the House of Lords reiterated this principle, describing it (per Lord Hoffmann) as "*the principle that the courts apply domestic law and not international treaties*": see paragraph [40]. Furthermore, in Briggs –v- Baptiste [2000] 2 AC 40, the Privy Council re-emphasized "*the constitutional principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation*" (at p. 54A). The doctrinal basis of this principle is that accession to or ratification of an international treaty is an act of the executive government and not of the legislature: see Thomas -v- Baptiste [2000] 2 AC 1, at p. 23B (per Lord Millett). In short, while it retains its unincorporated status, the UN Convention on the Rights of Persons with Disabilities cannot be the source of rights or obligations in domestic law.

V THE PARTIES' SUBMISSIONS

[25] I pay tribute to the quality and economy of the written and oral submissions of Mr. Potter (on behalf of the Applicant) and Mr. David Dunlop (on behalf of the Department). I have derived much assistance from both parties' submissions and have considered them in full. What follows is a condensed version only.

[26] It was submitted by Mr. Potter that the status conversion of Mr. E to that of voluntary patient, which occurred around 2000, was tantamount to an assessment of need under Article 15 of the 1972 Order, the assessed need being residential accommodation in the community, giving rise to a statutory duty of provision which the Department has failed to discharge. It was further argued that the Department's published policies lend strength to the assessment assertion. Insofar as any failure to assess has occurred, Mr. Potter submitted that the Department cannot escape the consequences of an unlawful omission. Further, or alternatively, Mr. Potter submitted that this failure constitutes a breach of the Department's specific duty to Mr. E under Section 2 of the 2009 Act, with specific reference to subsection (3)(c), (h)

and (j). The second main submission advanced was that the offending state of affairs infringes Mr. E's rights under Article 8 ECHR, contrary to Section 6 of the Human Rights Act 1998. This submission embodies the proposition that, in Mr. E's particular circumstances, the Department has a positive duty to provide him with a home in the community. Mr. Potter's third principal submission is that if there is no infringement of Article 8 in isolation, a contravention of Article 8 in tandem with Article 14 ECHR is established. The proposition lying at the centre of this ground of challenge is that Mr. E is the victim of a directly discriminatory practice whereby he and all other members of the relevant group are treated differently from everyone else in society, on account of some "*other status*", constituted by the factor of learning disability. Insofar as any question of possible justification arises, it is submitted that limited State resources cannot justify an abject failure of this duration and dimensions. Finally, Mr. Potter submitted that the various Government publications engendered in Mr. E a substantive legitimate expectation of resettlement in the community which has been thwarted without adequate justification.

[27] Replying on behalf of the Department, Mr. Dunlop submitted that the evidence fails to establish an assessment of need that Mr. E be transferred to community accommodation. Rather, there is nothing more than an aspiration, or statement of intent, to this effect. Mr. Dunlop further submitted that, in any event, resources can properly be taken into account in any determination of a person's need. As regards the challenge under Article 8 ECHR, it was submitted that there are two pre-requisites which have not been satisfied, namely a direct and immediate link between the benefit sought and the embrace of Article 8 *and* the demonstration that the action sought by Mr. E must not be disproportionate in nature. It was argued that, in the context before the court, the State has a wide margin of appreciation wherein the balance principle resonates strongly. With reference to Article 14 ECHR, Mr. Dunlop submitted that the Applicant's challenge fails to establish an analogous group and, hence, no disparate treatment has occurred. His final submission was that there has been no clear, unambiguous and unqualified representation sufficient to engender the legitimate expectation advanced. This submission also highlighted the absence of detrimental reliance and the macro-economic field to which the subject matter belongs, giving rise to the proposition that no abuse of power is established.

VI CONCLUSIONS

Legitimate Expectation

[28] It is convenient to address this discrete ground of challenge in advance of the others. I recently considered the governing principles in this sphere *in extenso* in In Re Loreto Grammar School's Application [2011] NIQB 30: see paragraphs [92] – [104]. I consider that, doctrinally, the cornerstone of any legitimate expectation is a clear and unambiguous representation by the Respondent concerned, devoid of any relevant qualification. In my view, the Government statements on which Mr. E relies, in the terms employed and considered in their context, cannot be said to

possess these attributes. Rather, they are properly regarded as aspirations or statements of intent. They are replete with cautionary qualifications. They do not have the quality of contractual promises or undertakings. While the earlier history cannot be ignored, given the broad context in play, it is appropriate to focus particularly on the more recent official statements, not least because I find that the expectation asserted by the Applicant does not predate the year 2009. The reason for this finding is that the Applicant was apparently content beforehand, first asserting a community resettlement wish in 2009. I further find, specifically, that the pre-2009 Government publications and statements did not engender *any* expectation in Mr. E. They had no impact on him because he was content with his circumstances. It is not coincidental that the first manifestation of his discontentment coincided fairly closely with the establishment of the relationship with his present girlfriend.

[29] Furthermore, in my view, concentration on the more recent Government statements and publications is appropriate for the further reason that each of the successive representations, or broadcasts, updated and overtook its predecessors. It is appropriate to observe that Mr. E did not mount any legal challenge on the occasion when any of the relevant policies came into operation. In principle, upon the introduction of one of the more recent policies, he could have launched proceedings, claiming that the effect of the new policy was to frustrate his legitimate expectation generated by a predecessor policy. This would have constituted a direct challenge to the policy itself. However, that did not occur. Analysed in this way, Mr. E's challenge is brought in something of a vacuum and is really a complaint about *a state of affairs*. In other words, Mr. E's legitimate expectation challenge is not directed to any specific act or conduct on the part of the Department. Rather, he complains of omission and delay.

[30] In January 2007, the Department's published "*Priorities for Action*" and "*Principal Targets*" were (a) a 25% reduction in the number of long stay patients in learning disability hospitals by 2011 and (b) community resettlement for all members of this cohort by 2013. I consider that, as a matter of law, these are the main current, operative policies. The evidence establishes that the first of these targets has been achieved, while the second does not arise for consideration at present. True it is that Mr. E is not one of the 25% who have been successfully resettled. However, in my view, neither he nor any member of this group can assert a substantive legitimate expectation to this effect. Any such expectation is confounded by the language in which the Department's statements were couched: see paragraph [28] above. This gives rise to the conclusion that the substantive legitimate expectation asserted by Mr. E has no foundation.

[31] Furthermore, the subject matter of this challenge belongs *par excellence* to the so-called "*macro-economic/macro-political*" field. The notorious fact of progressively diminishing state resources surfaces and resurfaces repeatedly in the publications under scrutiny. These disclose that delicate and difficult decisions about the determination of priorities in the allocation of finite resources have had to be made. The merits of Mr. E and the other members of his group are undoubtedly strong.

The court genuinely sympathises with them. However, regrettably, there exists within society a multiplicity of meritorious individuals and classes – the infirm, the elderly, neglected children and the unemployed, to name but a few. Properly analysed, I consider that the present challenge resolves to a complaint – a genuine one – about how Government has chosen to allocate its limited budget. The difficulties inherent in challenging resource allocation decisions are graphically illustrated in R –v- Cambridge Health Authority, ex parte B [1995] 1 WLR 898, which involved an unsuccessful challenge to a health authority's decision that it would not provide expensive and speculative medical treatment to a girl aged eleven years suffering from acute leukaemia. Sir Thomas Bingham MR stated:

> "Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients …
>
> It would be totally unrealistic to require the authority to come to the court with its accounts and seek to demonstrate that if this treatment were provided for B there would be a patient C who would have to go without treatment."

In Administrative Law (Wade and Forsyth, 10th Edition), the authors observe (p. 327):

> "In these discretionary situations it is more likely to be unlawful to disregard financial considerations than to take account of them."

While a complaint of this kind does not *per se* lie beyond the purview of this court's supervisory jurisdiction, bearing in mind the doctrines and principles in play its nature makes judicial intervention inherently improbable. Given my primary findings and conclusions, no issue of public interest justification arises. However, if it did, I would have concluded that ample public interest justification has been demonstrated. Unfairness amounting to an abuse of power – the applicable legal touchstone – would not have been established.

Breach of Statutory Duty

[32] I shall address firstly Mr. E's challenge under Article 15 of the 1972 Order. Mr. Potter's basic submission was that Mr. E is the recipient of an assessed need, which he framed as residential accommodation in the community. This, it was contended, gives rise to a statutory duty to make the requisite provision. The cornerstone of this argument is that an assessment of need in the terms advanced has been made by the Department or its agents. In my view, the evidence fails to establish any such assessment. Mr. E was, in theory, fit to be discharged to reside in

the community following the expiry of the Hospital Order of which he was the subject. I have already found that he was a truly voluntary patient during the ensuing nine years. Throughout this period, he was neither asserting nor exhibiting an actual or possible need demanding of assessment. Furthermore, it is appropriate to observe that he was the recipient of certain therapies during this period. This fact tends to contra indicate the suggestion that he was genuinely fit for discharge. In any event, I find that no Article 15 assessment of Mr. E's residential needs was carried out, in the terms asserted or at all, until late 2009 at the earliest. Taking into account the intensively fact sensitive nature of the situation and circumstances of every member of the cohort to which Mr. E belongs, I reject the submission that the various statements of Government policy were tantamount to an assessment in the terms advanced. Since late 2009, two concrete attempts to resettle Mr. E in the community have been unsuccessful. In accordance with the governing policies, he has exercised his right of refusal. In my view, no duty of provision under Article 15 of the 1972 Order can properly arise until, taking into account all of the factors in play, including individual choice, a specific proposed resettlement option acceptable to the individual materialises. I find that this factual matrix does not exist and has at no time existed in the present case.

[33] Moreover, I consider that assessments conducted under Article 15 entail the exercise of a clear measure of discretion and do not occur in a policy vacuum. Statutory provisions such as Article 15 require the adoption of related policies and criteria. This was explicitly recognised by the House of Lords in R –v- Gloucester CC, ex parte Barry [1997] AC 584. See also the recent decision of this court in Re McClean's Application [2011] NIQB 19 (Chapter III in particular). Properly analysed, I consider Mr. Potter's submission to resolve the contention that irrespective of whether Mr. E was assessed at any material time, he has acquired a right to be discharged into a residential setting in the community acceptable to him with minimum delay. In my view, absent a concrete assessment of this kind, no crystallised duty and corresponding right under Article 15 of the 1972 Order arise. In the specific factual matrix of the present case, the Department has at all material times been operating within the ambit of discretionary statutory powers, with no statutory duty crystallising. Furthermore, having regard to the terms of the successive Government policies, I find that the Department's exercise of these statutory powers has been harmonious therewith. Finally, insofar as there might have been any failure on the part of the Department to properly assess Mr. E's residential needs prior to late 2009, such failure is, at this remove, purely historical in nature and I record that the relief sought on behalf of Mr. E does not include a historical declaration to this effect. In any event, the arguments of the parties did not focus fully on this discrete issue and even if a basis for the grant of a declaration were in principle established, I consider it highly unlikely that the court would be prepared to grant a backward looking and inefficacious remedy of this kind.

[34] The next and final limb of Mr. E's breach of statutory duty challenge focuses on Section 2 (3)(c), (h) and (j) of the 2009 Act. My first conclusion is that Section 2(3)(c) is couched in heavily qualified terms and confers on the Department a

discretion of manifest breadth. On the evidence, I find no infringement by the Department of this discrete statutory provision. Secondly, I find that the Department has taken positive steps in fulfilment of the requirement enshrined in Section 2(1)(h) and no infringement thereof is established. Thirdly, I find no evidence that the Department has infringed Section 2(1)(j). In making these conclusions, I have intentionally employed the neutral language of "infringe" and "infringement". Applying this tool of assessment, none of the asserted infringements (or contraventions) is established. In short, I find that no illegality in the Department's exercise of these discretionary statutory powers has been established. More specifically, having regard to the contours of this discrete ground of challenge, I find that no crystallised duty owed by the Department to Mr. E has arisen. I elaborate on this finding in the following paragraph. This suffices to defeat this discrete aspect of Mr. E's challenge.

[35] The specific question is whether Mr. E can establish a rights/duties axis on the facts of his case. Where statutory provisions of this kind are concerned, the debate which is frequently stimulated focuses on whether these are so-called "target" duties. This nomenclature and that of target setting legislation (which is not the same: see, for example, Section 1(1) of the Climate Change Act 2008 and Section 1 of the Child Poverty Act 2010) have become established features of the legal lexicon during recent years. In R (G) –v- Barnett LBC [2004] 2 AC 208, the statutory provision under consideration was Section 17 of the Children Act 1989. Lord Hope observed that one of the central features of target duties is that they are "*… concerned with general principles and not designed to confer absolute rights on individuals*": see paragraphs [76] – [88] of his opinion and that of Lord Millett. This expansion of the legal lexicon can be traced to the judgment of Woolf LJ in R –v- Inner London Education Authority, ex parte Ali [1990] 2 ALR 822 and its evolution can be traced through decisions such as R –v- Radio Authority, ex parte Bull [1998] QB 294 (at p. 209 especially).

[36] The three statutory provisions under scrutiny here are couched in manifestly broad, elastic and non-prescriptive terms. I consider that they confer a significant measure of discretion on the Department. In my view, the general principle in play is that statutory provisions of this kind do not create enforceable duties on the part of the public authority concerned. This accommodates the proposition that, *in a certain factual matrix*, an enforceable statutory duty owed to an individual could conceivably crystallise – an issue which I do not determine here. Insofar as this analysis is doctrinally sound, I find that the Department at no time owed any such duty to Mr. E. This finding is made swiftly in the wake of formulating the duty asserted. It seems to me that Mr. E is asserting that these statutory provisions imposed on the Department a duty to provide him with suitable accommodation in the community, of his liking and acceptable to him, within a reasonable period following his first ventilation of a wish to this effect. In my view, a duty in these terms simply cannot be spelled out of the statutory, factual and policy matrix before the court.

<u>Articles 8 and 14 ECHR</u>

[37] It is common case that in order to succeed under Article 8 ECHR, the Applicant's quest to establish an interference with his right to respect for his private life (family life not being in issue, in my view), Mr. E must demonstrate a positive obligation on the part of the Department in essentially the same terms as those formulated in the immediately preceding paragraph. The possibility that Article 8 can be the source of positive obligations on the part of the State was recognised by the European Court of Human Rights in <u>Botta –v- Italy</u> [1998] 4 BHRC 81, where it was stated:

> "[33] In the instant case the Applicant complained in substance not of action but of a lack of action by the state. While the essential objective of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves …
>
> **In order to determine whether such obligations exist, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, while the state has, in any event, a margin of appreciation.**"

[My emphasis].

In the immediately succeeding paragraph, the court recalls that an obligation of this kind requires a finding of "*a direct and immediate link between the measures sought by an Applicant and the latter's private and/or family life*". The difficulties involved in establishing that Article 8 can, in certain circumstances, create a positive duty on the part of the public authority concerned to provide accommodation to the individual are illustrated in <u>Marzari –v- Italy</u> [1999] CD 218. In another decision belonging to this field, <u>Sentges –v- The Netherlands</u> [Application No. 27677/02, 8th July 2003], the European Court spoke of "*exceptional cases*" and the need to demonstrate the existence of "*a special link*" between the offending state of affairs and the particular needs of the individual's private life: see p. 4. Self-evidently, the threshold to be overcome is an elevated one. Even where such a special nexus is demonstrated, regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole and the wide margin of appreciation in play. The judgment continues (at p. 4):

> "This margin of appreciation is even wider when, as in the present case, the issues involve an assessment of the priorities in the context of the allocation of limited State resources … "

The court, in finding that the complaint was manifestly ill-founded, concluded that the Respondent State had acted within the boundaries of its margin of appreciation. I have also considered the decisions in R (Bernard) –v- Enfield LBC [2003]LGR 423 and Anufrijeva –v- Southwark LBC [2004] 1 FLR 8.

[38] I must next consider the factual matrix of Mr. E's private life. In my view, it has many positive and commendable aspects. While he does not reside in conventional accommodation, he has not been accommodated in a hospital ward for some considerable time. Rather, he shares independent living facilities with other adults. He is the beneficiary of other arrangements and facilities on a daily basis. These include beneficial and therapeutic activities and an income earning operation. He further benefits from a reasonable measure of freedom of movement and is at liberty to pursue his private life with his female partner, albeit subject to certain constraints. There is no suggestion that the development of their relationship has been significantly inhibited. All in all, I find that the failure of which Mr. E accuses the Department does not interfere with his right to respect for his private life. It falls short of the notional threshold. The requisite direct and immediate nexus has not been demonstrated. In the language of ***Sentges***, I conclude that this is not one of those exceptional cases where the asserted failure has occurred in circumstances of *a special link* between the offending state of affairs and the particular requirements of Mr. E's private life. Accordingly, no interference with Mr. E's rights under Article 8 ECHR is established.

[39] If the conclusion expressed immediately above is incorrect, the next questions to be addressed are those of legality ("*in accordance with the law*"), legitimate aim and proportionality. As regards the first and second of these requirements, the parties were *ad idem*: both are satisfied. There is no suggestion that the asserted interference is not in accordance with the law (as this is to be understood, by reference to well established principles) and the legitimate aims are constituted by the economic welfare of the state and the protection of the rights and freedoms of others. Thus the real issue is that of proportionality. In my view, taking into account the factors bearing on Mr. E's private life highlighted immediately above, the broader context, the policy context, the factor of the allocation of limited state resources, the balance principle and the margin of appreciation (or discretionary area of judgment) in play, if there is any interference with Mr. E's right to respect for his private life it is plainly proportionate to the legitimate aims in play. The necessary imbalance has simply not been demonstrated.

[40] Finally, I turn to consider the Applicant's complaint that his rights under Article 8 ECHR, in tandem with Article 14, are infringed by the failure and state of

affairs of which he complains. I find that the "ambit" test is satisfied in Mr. E's favour on the basis that there exists a sufficient nexus between the ingredients of his complaint and the potentially protective sphere of Article 8. In developing this aspect of Mr. E's challenge, Mr. Potter confronted squarely the need to establish disparate treatment. As recorded in paragraph [23] above, his submission was that Mr. E (and all other members of his group) are treated differently from everyone else in society. This differential treatment, it was argued, is based on their learning disability.

[41] I am prepared to accept that learning disability constitutes an "*other status*" within the compass of Article 14. However, in my view, this element of Mr. E's challenge founders on the rock of the need to establish disparate treatment: see, for example, R (Hooper) –v- Secretary of State for Work and Pensions [2003] 1 WHR 2623, paragraph [84]. In short, those with whom the alleged victim of discrimination seeks to compare himself must be in a truly analogous situation. This involves, necessarily, comparing the treatment of which Mr. E complains with others in a properly comparable situation. Any asserted comparison must not be artificial: Stubbings –v- United Kingdom [1996] 23 EHRR 213, paragraph [71]. In the present case, the "others", it is submitted, are all other members of society. In my view, this asserted comparison is fallacious. The characteristics pertaining to Mr. E are that he is a person suffering from a mild learning disability who was convicted of a criminal offence and sentenced by the imposition of a hospital order, following which he has been a voluntary patient who, latterly, has developed a preference to live in the community with his girlfriend rather than in his current accommodation. Other ingredients in this equation include the assertion of a right to select the accommodation and a right to reject offers of accommodation deemed unsuitable. The highly fact sensitive and unique features of this matrix require no emphasis. Where discrimination is asserted, a rational and sustainable comparison between the offending treatment condemned by the asserted victim and the "treatment" to which others are subjected must be established. In short, the comparison must be a realistic and true one. In my view, no such comparison is established in the present case. The distinctions between Mr. E and all other members of society are manifest and legion. In my view, *all other members of society* do not constitute a coherent, homogenous group. Rather, they are distinguished by innumerable points of differentiation: these include where they live, how they live, whether they have homes at all, the quality of their residential accommodation, homelessness, age, income, earning ability, personal resources and individual choice. The asserted comparison is vague, generalised and opaque. It simply does not withstand analysis. For this reason alone, the Article 14 complaint must fail.

[42] If my primary conclusion is wrong, I find that any asserted differential treatment is objectively justified. The guiding principle is that any disparate treatment must pursue a legitimate aim, accompanied by a reasonable relationship of proportionality between the means employed and the aim pursued. See, for example, Darby –v- Sweden (1990) 13 EHRR 774, paragraph [31]. In the present case, the justification which I find rests on, firstly, my earlier finding that Mr. E has

been a contented and truly voluntary patient during the greater part of the period under scrutiny. Secondly, I find that the Department has not been equipped with the necessary resources to respond satisfactorily to Mr. E's desire, dating from 2009, to be accommodated in a suitable community setting of his choice. Limited state resources is plainly an admissible factor in this context and the margin of appreciation (or discretionary area of judgment) also comes into play. I further find that since late 2009 the Department made at least two genuine attempts to resettle Mr. E in the community, which did not find favour with him. There is no suggestion that these were not serious and conscientious efforts or that such efforts have not continued. Furthermore, the undisputed evidence is that the exercise of terminating Mr. E's current accommodation arrangements and substituting them with community accommodation is both complex and, on any showing, expensive. These factors too bear on the court's assessment of objective justification. Finally, having regard to the analysis and conclusions in paragraph [39] above, the requirement of proportionality is satisfied, for the reasons already elaborated.

Disposal

[43] I dismiss the application for judicial review accordingly. I urge the Department to continue its efforts to resolve Mr. E's predicament. I further urge that Mr. E be as flexible, reasonable and co-operative as possible in this exercise.

[44] Finally, the other cases belonging to this group can be reviewed by the court when the parties have had an opportunity to absorb this judgment.

Postscript

[45] I note with pleasure that Mr E is now to be resettled.

Remittal from the Court of Appeal

[46] As appears from the Preface, following the dismissal of the application for judicial review an appeal ensued. The Court of Appeal declined to adjudicate on the merits of the appeal when it became apparent that the Applicant was seeking to rely on new evidence and new arguments. An Order was made under section 21(a) of the Interpretation Act (NI) 1954 remitting the matter to this Court.

[47] In this further, ensuing phase of proceedings, this Court acceded to the Applicant's application for joinder of a further Respondent, the Belfast Health and Social Care Trust ("*the Trust*"). Per the amended pleading authorised by Order of the Court, the Applicant seeks the following relief:

(a) A declaration that the Respondents were at all material times under "*a legal and resource free duty*" to ensure that assessments of need were completed and kept under review in respect of "*all persons in Northern*

Ireland who appear to need community care services" by virtue of Article 15 of the Health and Personal Social Services (NI) Order 1972 ("*the 1972 Order*").

(b) A declaration that the Respondents were at all material times under "*a legal and resource free duty*" to ensure that assessments of need were completed and kept under review in respect of "*all persons in Northern Ireland who appear to need community care services*" by virtue of the Government publications "People First… Care Management… Guidance on Assessment and the Provision of Community Care" and "People First".

(c) A declaration that Article 15 of the 1972 Order "*imposes a resource free duty to identify and provide suitable and adequate services as soon as the Respondents have decided that it is necessary, to meet a person's needs, for a particular type of social care to be provided*".

(d) A declaration that where a duty to assess a person who appears to need community services is triggered, the assessment must be carried out in accordance with the "People First (Guidance etc)" publication (*supra*).

I shall address the content and formulation of these declarations *infra*. As appears from their terms (explicitly or implicitly) the twofold legal grounds of the Applicant's reformulated challenge are Article 15 of the 1972 Order and substantive legitimate expectation. The Applicant's case is that the Respondents were under a duty to resettle him and failed in the discharge of such duty. This contention is based on **an assertion** that by around October 2005, or mid-2006 at latest, the Respondents "*had formed the opinion that the Applicant was a person for whom it was necessary, in principle, to provide residential accommodation in the community, plus support*". It is further contended that during a period of 4 – 6 years, beginning around October 2005, the Respondents "*failed to assess or adequately assess the Applicant as required by statute, guidance and common law as identified above*".

[48] In order to understand the genesis and scope of this remittal, I refer to the following passages in the judgment of Girvan LJ:

> "[17] As the argument before us proceeded it became increasingly clear to us that the case raised issues which had not been fully and adequately raised before the Judge. In particular the Judge was not directed to the key relevant document, namely the relevant Guidance …
>
> [this] contains clear directions to the relevant Boards (and hence the Trusts) requiring them to ensure that there would be in place by 1st April 1993 effective publicised

> assessment procedures and requiring them to ensure that responsibilities for operating them were properly assigned at all levels …
>
> The Guidance describes the arrangements which the Boards should put in place in order to identify and meet the community care needs of individual clients and clearly envisages changes in practice required for the implementation of the community care reforms. Since the Judge had not been directed to this Guidance and did not have the benefit of the arguments which the Appellants sought to raise before us … we concluded that in the interests of justice the matter should be remitted to the Judge for reconsideration."

The Court also pronounced itself satisfied that the appeal was not academic, referring in terms, though not explicitly, to paragraph [1] of this judgment. I was informed that the content and abstract character of the new declarations now pursued represent the considered decision made by the Applicant's legal representatives in response to this passage. It is worth noting the statutory power exercised by the Court of Appeal. Section 38(1)(b) of the Judicature (NI) Act 1978 provides:

> "……….. the Court of Appeal shall, in addition to all other powers exercisable by it, have all the jurisdiction of the original Court and may ……….
>
> (b) remit the appeal or any matter arising thereon to the original Court with such declarations or directions as the Court of Appeal may think proper."

In the instant case, the effect of the remittal order was to give this Court a reasonable measure of latitude in exploring the new issues raised. I would observe that the recalibration of the Applicant's case is substantial.

[49] The effect of this fundamental reorientation of the challenge is that, in substance, the Applicant is no longer seeking any relief personal to him. Rather, in effect, the continued pursuit of this challenge is on behalf of the entire cohort of actual or potential beneficiaries of community care in Northern Ireland under Article 15 of the 1972 Order. In reality, this has now become a pure public interest challenge. The contours of the new case advanced by the Applicant can be ascertained from the newly formulated declarations set out above. This remittal, fundamentally, requires the Court to determine the impetus for any duty of assessment of social care needs imposed on either Respondent under Article 15 of the 1972 Order **or** in accordance with associated policies, via the medium of

substantive legitimate expectations ; secondly, where such duty arises, how the assessment is to be conducted; and, finally, the nature of the duty, if any, owed by either of the Respondents upon the completion of an assessment which determines that the subject has specified social/community care needs.

[50] The first duty for which the Applicant contends, which is directly related to the first and second of the new draft declarations now pursued, was formulated by Mr Knafler QC and Mr Potter (of counsel) as follows:

> "To assess every person who it appears might have community care needs and to provide such services that are assessed as being necessary to provide, by making suitable and adequate arrangements."

It was submitted that this duty arises in either or both of two ways:

(i) Under Article 15 of the 1972 Order, properly construed.

(ii) From two newly adduced Government policy publications, via the doctrine of substantive legitimate expectation.

The second declaration pursued is founded upon a contention that where a duty to assess arises, the ensuing assessment must be conducted in accordance with the requirements and methodologies contained in the "People First Guidance (etc)" publication. The fourth new declaration now pursued focuses on the post-assessment phase and proceeds on the premise that the assessment has identified specific social care needs requiring to be addressed. In argument, the decision of this Court in Re LW's Application [2010] NIQB 62 was invoked. Counsels' submission acknowledged that financial resources can be taken into account at the assessment stage but contended that this is an impermissible consideration at the [logically later] stage of having to provide an appropriate service or facility post-assessment.

[51] Accordingly, at this stage, no relief is sought which would be of any benefit, however indirect or remote, to the Applicant. As a result, the evidence bearing directly on the Applicant received comparatively little attention in the presentation of Counsel's arguments. While it featured to some extent, my impression was that this occurred largely as a result of the Court's observation that a new party – the Trust – had, following the remittal order, been joined, pursuant to the Applicant's application, resulting in the generation of a substantial quantity of material evidence not previously adduced. (A summary of all new evidence is provided in paragraphs [55] to [62], *infra*). As regards the newly added Respondent, it is contended that the Applicant was at no time assessed by the Trust in the manner required by the relevant policies. The fundamental default attributed to the Trust is a failure to carry out "*care planning*" in respect of the Applicant in compliance with the "*People First [Guidance] etc* " requirements [*infra*] from 2005/2006.The nub of the complaint

is that such assessment of his needs as was undertaken by the Trust was inadequate and non-compliant with the relevant policy requirements. In particular, it is argued, there was no care plan at any stage and there was no attempt to agree the assessment of the Applicant's needs with him. In summary, with specific reference to the newly assembled evidence, it was submitted that a duty of provision crystallised in the Applicant's case by 2006 at the latest, contrary to my initial conclusion in paragraph [32] above and that the Trust's assessment of the Applicant's needs was unlawful as it was non-compliant with the relevant Departmental policies.

[52] It is convenient to outline the parties' main submissions at this juncture. I venture to summarise and construe the Applicant's arguments in the following way. The functions (a deliberately neutral term, to begin the analysis) enshrined in Article 15 of the 1972 Order are to be analysed by the application of a threefold prism. The first element in the analysis is the imposition of **a duty** on the Respondents to assess the social care needs of certain members of the population of Northern Ireland. The persons who (it is argued) must be thus assessed are those who, to the knowledge of the responsible authority, appear to need one or more of the benefits available under Article 15. The argument canvassed is that this duty arises both under Article 15 and by virtue of a substantive legitimate expectation generated by the two aforementioned Government publications. The second and third elements of the analysis focus on the mechanics of assessment, at which stage there is a fusion of legal duty and discretionary choice. The legal duty canvassed is a duty to conduct the assessment in accordance with the "People First Guidance (etc)" methodology. The discretionary choice dimension recognises that <u>at the assessment stage</u> the Respondents are empowered to take into account a broad range of factors and to give these such rational weight as they see fit. There is no dispute that such factors include available resources, budgetary demands, the particular circumstances of the individual concerned and their family, including their resources, the availability of facilities and responsibilities owed to others: see **LW,** paragraph [45]. The third element of the analysis is directed to the duty of provision: where a social care need has been assessed, it is argued that the Respondents are under a duty to address/satisfy this by the provision of such of the benefits available under Article 15 as is or are considered appropriate and, having made this assessment, to provide accordingly. As regards **timing**, the terminology of the declarations now pursued is that the duty of provision must be performed "*as soon as*" the corresponding decision has been made.

[53] On behalf of the Department, Mr McGleenan QC and Mr Dunlop (of counsel) argued that the Court is invited by the Applicant to conduct an exercise that is purely historical and academic in nature, in circumstances where it is common case that both assessment of the Applicant's needs and corresponding provision in respect thereof have been completed. Subject thereto, counsel submitted that Article 15 of the 1972 Order, properly construed, empowers the Department and its agents to conduct assessments and subjects them to no duty until an assessment is complete. The further, initial duty now canvassed on behalf of the Applicant was

resisted on the basis that to imply the existence of such duty in Article 15 would be impermissible. As regards the substantive legitimate expectation limb of the Applicant's renovated and reformulated challenge, it was acknowledged that the promulgation of policies associated with the exercise of statutory powers can give rise to the public law consequence of having to comply with policy commitments absent appropriate countervailing factors. It was not disputed that the policy materials newly invoked by the Applicant applied to him historically. It was submitted, however, that these policy instruments contain no commitments giving rise to the legal duty for which the Applicant contends. It was further submitted that they have the status of mere guidance only, incapable of generating any substantive legitimate expectation. Finally, the third of the three declarations now sought by the Applicant was opposed on the ground that ample judicial guidance, beginning with the decision of the House of Lords in ***Barry*** and including decisions of this court exists.

[54] On behalf of the Trust, it was acknowledged by Mr Montgomery (of counsel) that at the stage when the relevant therapies had been completed, ie in 2006 the Trust had assessed the Applicant as a person capable of resettlement in the community. The burden of his argument was that the Trust acted reasonably at all times, having regard particularly to the very specific needs and circumstances of the Applicant his policy right of choice, the need to finalise an appropriate arrangement and environment and the limited community placement options available. Reliance was placed on the reviews of the Applicant carried out in 2006 and 2007. It was suggested that, thereafter, the focus of the Trust's attention was the acquisition of accommodation suitable for the Appellant. Mr Montgomery also highlighted the evidence indicating that funding for the resettlement of the Applicant was available throughout most of the period 2006-2011. Finally, emphasis was placed on the evidence indicating unsuccessful attempts by the Trust to resettle the Applicant in the community beginning in 2007.

<u>The new evidence</u>

[55] As I have observed, the beginning of this new chapter of the litigation was marked by the Applicant's attempt to rely on certain new evidence when his appeal was first listed before the Court of Appeal. Subsequently, the joinder of the Trust has generated a substantial quantity of new evidence emanating from this additional Respondent. The new evidence upon which the Applicant places reliance consists of the following three Government publications:

(a) "People First – Community Care in Northern Ireland for the 1990s", a publication of the Department's predecessor.

(b) "People First – Care Management: Guidance on Assessment and the Provision of Community Care – Community Care in Northern Ireland for the 1990s" (which I shall describe as "the People First Guidance (etc) publication"), also published by the Department's predecessor.

(c) "Discharge from Hospital and the Continuing Care in the Community of People with a Mental Disorder who could represent a Risk of Serious Physical Harm to Themselves or Others", published in May 2004.

I shall consider each of these publications in turn. Before doing so, I interpose the observation that a further segment of evidence adduced at the end of the trial confirmed that the "People First Guidance (etc)" publication remains in force, neither amended nor superseded. It coexists with other instruments, including a Departmental circular concerning the choice of residential and nursing home accommodation promulgated in 30th April 1993 (of no direct relevance in the current litigation context); a further Departmental circular entitled "Care Assessment and Placement Guidance" [No 3/2006], published in July 2006; another Departmental circular "Guidance on Risk Assessment and Management in Mental Health and Learning Disability Services" [No 3/09], published in September 2009; and, most recently, a further Departmental circular entitled "Care Management, Provision of Services and Charging Guidance", published in March 2010 [No 1/2010]. None of these four further instruments sounds directly on the various forms of declaration now sought. They have some relevance, however, since they serve to illuminate the full framework within which the Applicant's care plan and certain other related assessments were compiled at the stage when the saga ultimately ended viz upon his resettlement in the community in June 2011. In passing, one finds a daunting menu of circulars, guidance, protocols and other kindred instruments in Annex B to the 2010 Circular.

"People First"

[56] This was a publication of the Department's predecessor at the beginning of the 1990s. Its subtitle is "Community Care in Northern Ireland for the 1990s". It heralded the introduction of new arrangements for the care of relevant individuals in the community. This was expressed to be driven by three overarching principles, namely the promotion of independent living, the provision of flexible and sensitive responses to individual need and the concentration of professional skills and public resources on those most in need. It noted that the GB White paper "Caring for People", published the previous year, applied as fully to Northern Ireland as to Great Britain. It acknowledged the "*unique integrated health and social care services*" regime in Northern Ireland. The overarching policy in play was a shift from hospital, residential and nursing home care towards care in community settings, such as one's home or something kindred. The policy (and legislative) changes being implemented throughout the British Isles were expressed to be the vehicle for giving effect to the report of Sir Roy Griffiths "Community Care: Agenda for Action", published in March 1988. "People First" addressed certain cohorts of members of society in need for community care. These included the group described as "People with a mental handicap". The publication noted that around 70% of this group of some 7,300 members of the population resided at home. [The

Applicant has at all material times been a member of the minority group of 30%]. The policy articulated was "*to keep to a minimum the need for care in a hospital or other institutional settings*". It was noted that, consonant with the Department's "Regional Strategy", since 1987 the three mental handicap hospitals in Northern Ireland had developed rehabilitation and resettlement programmes, with a view to fulfilling the policy goal of reducing the occupancy of these establishments.

"People First: Care Management: Guidance (etc)":

[57] This is the Government policy instrument on which counsel for the Applicant placed greatest reliance. The full title of this related departmental publication is "People First: Care Management: Guidance on Assessment and the Provision of Community Care". This is, self evidently, a kindred policy publication. It enunciated [in paragraph 2.2] that in a staged fashion between July 1990 and April 1993 –

> "Health and Social Services Boards will be required to assess the care needs of any person who appears to them to be in need of community care services and to decide, in the light of that assessment, whether they should provide, or arrange for the provision of, any services."

This publication describes itself with some emphasis as "*guidance*". The text continues:

> "The guidance concentrates particularly on assessment, which is the process of objectively defining needs and determining eligibility for assistance against stated criteria. Assessment is central to the needs – led approach to care management proposed in People First …
>
> Only those with complex health and social care needs will require comprehensive assessment."

This publication stresses the need for Boards to operate care management arrangements reflective of the Department's community care policy. Having detailed the "*essential features of comprehensive assessment systems*", it then addresses the topic of "*care planning: decisions on service provision*", stating:

> "Each comprehensive assessment should lead to the production of an agreed care plan …
>
> It should be designed in consultation with the client, his or her case manager (if one is assigned), informal carers and the other agencies and professionals involved …

The principle of ensuring that service provision should as far as possible preserve or restore independent living must always be paramount."

In the hierarchal sequence which follows, precedence is given to "*a package to support the person at home, including living aids and adaptations to the home, where necessary*". It is stated that the "*package*" should be agreed **and** "*…. should be recorded in plain language in the individual care plan*". The prescription for the latter is that it –

> "…. should cover the decisions reached about agreed care needs; the desired outcomes; **what is to be done, by whom and by when;** who is going to manage the case …
>
> Copies of the care plan should be supplied to clients, their carers and all relevant professional officers and agencies …
>
> Care plans should be explained to clients so that they understand as fully as possible what is to be done for them."

[Emphasis added]

By the terms of this publication, Boards were required to ensure the introduction of effective assessment procedures, duly publicised, by 1st April 1993. It was a specific requirement that these procedures include arrangements for (*inter alia)* involving clients and their carers in the assessment process; informing them of assessment decisions and recording same; deciding the services to be provided; monitoring the operation of the assessment system; reviewing the needs and packages of care of clients; reacting to suggestions and complaints; and recording and responding to evidence of needs which "*cannot be met within existing patterns of service*". These procedural steps and requirements are detailed in paragraph 19.2 of the publication, upon which the Applicant places substantial reliance.

"Discharge from Hospital (etc) …."

[**58**] I mention this publication, which formed part of the new evidence adduced, for completeness only. This is another Departmental publication, promulgated in May 2004. It is described as "*guidance*". Its purpose is expressed thus:

> "The specific aim of this guidance is to ensure that people with a mental disorder who are being discharged from hospital and who could represent a risk of serious physical harm to themselves or others receive appropriate continuing support in the community."

It will be at once apparent that this publication does not apply directly to the Appellant. Moreover, it did not feature in Counsels' arguments and cannot be related to any of the three new forms of relief now sought by amendment. Accordingly, I decline to consider it further.

The Trust's Evidence:

[**59**] I preface this part of the judgment with the observation that the remittal order of the Court of Appeal and the ensuing joinder of the Trust as second Respondent generated a substantial quantity of new evidence (some 300 pages) exhibited to a detailed affidavit sworn by the person occupying the post of "Operations Manager, North and East Belfast Community Learning Disability Teams". The joinder of the Trust in the proceedings and the consequential generation of a large quantity of new evidence are developments which do not readily coexist with the purely abstract form of declaratory relief now pursued. It is undeniable that, in consequence of these steps, the Court now knows a great deal more about the Applicant's story during the critical person 2005 to 2011. The evidence has swollen exponentially.

[60] I draw attention to the following averments in the Trust's affidavit:

> "He [the Appellant] continued to clearly receive active treatment until into 2006 **when discharge with a community care package became much more feasible and likely to succeed**…
>
> Work … from 2007 onwards was much more geared towards actively resettling him **in light of the determination that he was ready for same …"**

[Emphasis added]

The deponent then describes three possible resettlement mechanisms for the Applicant which emerged subsequently. As regards the first, another patient was given priority for the relevant vacancy. The second, later possibility was a new build project which lasted some 2 years and was extinguished when the Board "*withdrew the funding*" in August 2009, to the benefit of another competing social care group. Some few months later, a **third** possible community resettlement option materialised, but was rejected by the Applicant and the finding allocated to him was expended otherwise in the remainder of the financial year 2009/2010, resulting in the resettlement of another patient. Next, there was a further multi-disciplinary assessment of the Applicant's needs on 1st October 2010 and, ultimately, he was transferred to a supported residential community setting, in June 2011 (just after this judgment was first delivered) where he remains. The deponent identifies two specific dominant factors, namely Departmental and Board strategy, which required

prioritisation amongst members of the cohort in question and the availability of funding. This is followed by the averment:

> "The Trust's ability to meet **assessed community care needs** for any patient's needs is limited by these factors."

[My emphasis]

I highlight also the following averments:

(a) The Applicant was assessed as ready and suitable for community resettlement in 2006/2007.

(b) Next, he was one of 26 patients identified as eligible for funding, in the following financial year.

(c) During that year, his funding eligibility survived a resources cull.

(d) His actual resettlement in the community was dictated by "*available finance and availability of suitable resources*".

(e) His needs were the subject of "regular review".

It is further averred, in terms, that the Trust made reasonable and genuine efforts to resettle the Applicant in the community.

[**61**] The Trust's interaction with the Applicant throughout the relevant period is documented in a series of records. I summarise some of the salient entries, in chronological sequence:

(a) At a multi-disciplinary review conducted in July 2005, it was contemplated that the Applicant would be ready for resettlement, within some months, upon the completion of specified therapies.

(b) Next, in March 2006, he was identified in a hospital census as a person belonging to the **delay category** of "*no appropriate community based service exists*". At this stage, membership of this group consisted of approximately 220 persons. All belonged to the same omnibus cohort viz "*patients whose transfer from Muckamore Abbey Hospital is delayed*". At this juncture, he had attended 26 therapeutic sessions during the previous 9 months.

(c) In a psychological report dated 5th June 2006, it was recorded:

> "… There remains a need for ongoing skills practice, especially if the specifics of a community

> placement become available and contextual risk factors must then be considered. It is likely that [the Appellant] will need ongoing support in developing skills in effectively conducting a range of relationships. A period of direct therapeutic support from Psychology will be of benefit at the time of any transition to community placement."

(d) In a further census conducted in March 2007, the Applicant continued to belong to the group of "*patients whose transfer from Muckamore Abbey Hospital is delayed*".

(e) The Applicant was the subject of an "*annual review*" in June 2007. While this assembled information under a series of headings, apparently in accordance with a template, it documents no concrete plan or outcome. The possibility of the Applicant being transferred to the "Dunmisk Project" was noted.

(f) In November 2007, the Applicant was considered for resettlement in one of two vacancies at a specific address.

(g) In December 2008, while it was noted that the 26 "*agreed packages*" of one whereof the Applicant had been a beneficiary had been reduced by half, his funding survived.

(h) As of January 2009, the Applicant was one of 186 members of the resettlement list in Muckamore Abbey Hospital. The records document the impossibility of resettling all of them and a prioritisation exercise is recorded. The lack of funding "*for both resettlement and community services*" was noted. The impossibility of resettling all 186 members of the group was acknowledged. The following entries are of particular note:

> "*Resettlement of people from long stay learning disability hospitals has been a Government strategy for many years …*
>
> *Many decisions have to be taken remembering that the amount of money available each year is limited. Sometimes a Mental Health Tribunal rules that someone is to be discharged immediately and so some of the money is spent on helping that person leave. This means that the pot of money for others waiting gets smaller. The staff teams in hospital and community services work together with patients and their families to consider a range of issues before final decisions are made. It is often a matter of balancing a number of*

> *issues to help make the right decision. Sometimes if special requirements are needed such as a particular location, this may slow the process down.*"

It was recorded that there were two eligibility requirements [both satisfied by the Applicant] for discharge and transfer to community living. The first was admission to hospital prior to 1st April 2006. The second was that "*the multi disciplinary team at the hospital has agreed that hospital treatment is no longer necessary and a continuing treatment and care plan is in place or being developed*". The main factors in play were grouped under the headings of geographical, personal, emotional needs, clinical, risk, pragmatic and environmental. Projecting forward to the period 2010/2011, it was recorded:

> "… The combination of the above factors with the availability for suitable housing options limits the scope for selection from within the present patient population. The situation needs to be turned around so that the needs of all patients to be resettled are planned with a view to their needs being met in the community by 2014. This can only happen with adequate commitment and funding for both resettlement and community services being made available …"

The associated unfairness to patients and their families was noted.

(i) In August 2009, the loss of the new build project in question (noted above) to the learning disability programme was noted. By October 2009, the Applicant had declined the offer of a concrete resettlement option which he considered unattractive.

(j) On 1st October 2010, the Applicant's preference for public housing in Belfast, to reflect a relationship with a female which he had developed, was recorded.

(k) On 22nd October 2010, there was a "***resettlement support planning meeting***" in respect of the Applicant. It would appear that this was the first meeting of its kind.

(l) Ultimately, the Applicant was transferred from Muckamore Hospital to public housing on 13th June 2011. The last formality which evidently preceded this was the preparation of a "Comprehensive Risk Assessment and Management Plan".

At this point, the documentary trail comes to an end.

[62] Based on the Trust's affidavit and documentary evidence, I formed certain impressions and, in the interests of clarity and fairness, I decided to elicit some brief further evidence from the Trust's deponent at the hearing. This confirmed the following:

(a) The first "*Resettlement Support Planning Meeting*" in respect of the Applicant was held on 22nd October 2010: see paragraph [59](K) above.

(b) As of October 2010, the Applicant's resettlement prospects were increasing. Specifically, he had applied for NIHE residential accommodation and a report on his needs had been requested in consequence.

(c) The next of these resettlement planning meetings was held in January 2011. The discharge of the Applicant from hospital and his transfer to a suitable community setting gained momentum thereafter.

(d) The first "Comprehensive Risk Assessment and Management Plan" in respect of the Applicant was stimulated by and coincided with his discharge and transfer, in June 2011. Ditto the first care plan concerning him.

The Trust's deponent readily concurred with the pithy analysis that the Applicant, having satisfied the two relevant qualifying conditions, was assessed as eligible for resettlement in the community by around mid-2006 but did not reap the benefit of this decision until some 5 years later. By virtue of the various constraints and complexities in play, the mid-2006 decision, viewed in retrospect, was in substance a decision *in principle*, with no accompanying implementation timetable or plan.

Statutory History and Comparison

[63] The subject of health and personal social services (now relabelled "social care") has been a matter lying within the competence of the local legislature since the creation of this State by the Government of Ireland Act 1920: see sections 4-5 and related provisions which reserved other matters to the Westminster Parliament. I refer also to the relevant provisions of the Northern Ireland Constitution Act 1973 and the Northern Ireland Act 1998, pursuant to which health and social services remained a "*transferred*", ie devolved matter: see section 2 of and Schedules 2 and 3 to the 1973 Act and section 4 of and Schedules 2 and 3 to the 1998 Act. As a result, while the Westminster Parliament introduced major enactments such as the National Health Service Acts 1946 and 1977, these did not extend to Northern Ireland (or Scotland). This separation of legislative competence is further reflected in the statutory vehicle for the introduction of the National Health Service in Northern Ireland, which was, initially, the Health Services Act (NI) 1948, followed quickly by the Welfare Services Act (NI) 1949. Notably, the statutory precursor of Article 15 of

the 1972 Order was a combination of provisions, beginning with section 1 of the 1949 Act:

> "It shall be the duty of the Ministry of Health and Local Government …. to promote, in accordance with the provisions of this Act, the provision of welfare services for the benefit of such of the people of Northern Ireland as may stand in need thereof and to take such steps as are necessary to secure the effective co-ordination of those services …"

Section 4(1) provided:

> "It shall be the duty of every welfare authority to provide residential accommodation for persons who by reason of age, infirmity or any other circumstance are in need of care and attention which are not otherwise available to them."

The broader concepts and related mischiefs which have evolved in the two major statutory interventions since then, in 1972 and 2009, are those of personal social services and social care needs. Similarly, the main legislation in this jurisdiction, the Health and Personal Services (NI) Order 1972 ("*the 1972 Order*"), was particular to Northern Ireland. This was a major statutory reform, not replicated elsewhere in the British Isles. In the same vein, the most recent significant legislative intervention in this field, the Health and Social Care (Reform) Act (NI) 2009 ("*the 2009 Act*"), is a measure of the Northern Ireland Assembly.

[64] "Community Care" has become a catchphrase in this field in the British Isles during the past two decades. However, this is not, in Northern Ireland, a statutory expression. This is in marked contrast to England and Wales, where it is the subject of specific statutory prescription under the National Health Service and Community Care Act 1990. Pursuant to this measure, the statutory vocabulary in England and Wales includes the expressions "*community care services*" and "*assessment*": see in particular sections 46 and 47. The latter provides, in material part:

> "(1) Subject to subsections (5) and (6) below, where it appears to a local authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such services, the authority -
>
> (a) Shall carry out an assessment of his needs for those services; and

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

Notably, the threshold test enshrined in section 47(1) was considered by Scott Baker J to be "very low": see R v Bristol CC, ex parte Penfold [1998] 1 CCLR 315, p 323. Subsections (5) and (6) empower the accelerated provision of services, pending a completed assessment of need, in urgent cases. Thus the trigger for an assessment of an individual's need for community care services is the formation of an opinion by the authority concerned that such person "*may be in need of*" such services. The same language is employed in the equivalent Scottish statute: see section 12A of the Social Work (Scotland) Act 1968, together with section 55 of the 1990 Act, which applies exclusively to Scotland. Neither the English nor the Scottish statutory provision has any direct equivalent in Northern Ireland. In short, while a new statute was enacted in England and Wales and an existing statute was amended in Scotland, neither of these courses was replicated in Northern Ireland.

[**65**] Notably, the new English statute coincided with the publication of the Government policy paper "People First". It is clear that this new policy applied to the United Kingdom as a whole. It is evident that its implementation gave rise to a divergence between the two jurisdictions. Whereas specific legislation was deemed appropriate in England and Wales, this was not replicated in Northern Ireland. Accordingly, one finds no trace of the English 1990 statute in the statutory reforms which were introduced in Northern Ireland by the Health and Personal Social Services (NI) Order 1991 ("*the 1991 Order*") or its relative, made three years later. Furthermore, at this stage, there was no amendment of the core provisions of the 1972 Order viz Articles 2, 4 and 15. Accordingly, the Government policies enunciated in "People First" and kindred publications were implemented in Northern Ireland within the extant statutory framework, as modified by the 1991 Order. This gave rise to the familiar model of a broad, high level statutory regime containing (*inter alia*) general principles, "macro" duties and discretionary powers and choices, supplemented by Government policy.

[**66**] In substance, as Mr McGleenan QC submitted, the Applicant's argument invites the Court to construe Article 15 of the 1972 Order by importing the trigger provisions contained in section 47 of the English 1990 Act and its Scottish equivalent. While, superficially, this may seem ambitious, I am bound to address the merits of the argument assiduously. In considering the parties' competing contentions, I am conscious that while there was statutory innovation in Northern Ireland subsequent to the promulgation of the "People First" policies in 1990, in the form of the 1991 and 1994 Orders, Article 15 was not amended. I would observe that the 1991 and 1994 Orders were mainly concerned with the restructuring of the national health system in Northern Ireland associated with the creation of Health and Social Services Trusts (recently renamed Health and Social Care Trusts) and the associated new arrangements, including the Trust's legal relationships with the

Department and Boards and the related new pyrammidical structures. Notably, the further legislation introduced in Northern Ireland in 1991 and 1994 did not replicate either sections 45/46 of the English 1990 statute or section 12A of the 1968 Scottish statute, as amended. I am also conscious that nothing comparable to any of those provisions was enacted in this jurisdiction when the Northern Ireland Assembly legislated in this field as recently as 2009, in the form the 2009 Act (*supra*). As a result, several legislative opportunities to follow the precise path of the other two jurisdictions, in this discrete respect, have arisen and have not been seized.

General Conclusions

[67] The starting point is that the trigger factor for an assessment of possible social care need is not spelled out in Article 15 of the 1972 Order. None of the parties disputed that there must be an ingredient of this kind. In determining this discrete question, I consider the fundamental question to be: what was the legislative intention underpinning Article 15 of the 1972 Order at the time when it was enacted? Given this undoubted *lacuna* in Article 15, it is necessary to focus on the permissible role of the court and the guiding principles and, in doing so, to be alert to the boundary between construction and legislating.

[68] In R (Quintavalle) – v – Secretary of State for Health [2003] 2 AC 687, Lord Bingham stated:

> "The basic task of the Court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed …
>
> Every statute other than a pure consolidating statute is, after all, enacted to make such change or address some problem, or remove some blemish or effect some improvement in the national life. The Court's task, within the permissible bounds of interpretation, is to give effect to Parliaments purpose. So the controversial provisions should be read in the context of the statute as a whole and the statute as a whole should be read in the historical context of the situation which led to its enactment."

It is trite that the task of the Court is to interpret the provision which Parliament has enacted and not to give effect to an inferred intention of Parliament not fairly to be derived from the language of the statute: R – v – Z [2005] UKHL 35 and [2005] NI 468, para [16] per Lord Bingham. It is suggested that judicial reaction to the effect that the legislature could have included certain words is unreliable (Bennion on Statutory Interpretation, 5th Edition, page 491). Having regard to the paramount importance of context in every exercise of statutory construction, I consider it conceivable that this could be a significant factor in certain instances. Where an

implication is considered to be necessary, it may legitimately be made. Lord Nicholls stated in B (A minor) – v – DPP [2000] 2 AC 428, at page 464:

> "Necessary implication connotes an implication which is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament …"

The tool of necessary implication is not, however, an exclusive one. This is captured in the following passage in Bennion (*op.cit.),* page 496:

> "It is always proper to find some implication where the express language of the enactment is insufficiently precise to determine the point at issue."

Thus the threshold for an implication in a statutory text is not confined to the more exacting pre-requisite of necessity.

[69] In the present context, lack of precision and incompleteness of language are, in my view, the hallmarks of the point in issue, namely the trigger for an assessment of possible need under Article 15 of the 1972 Order. In my opinion, it is beyond plausible dispute that, in enacting Article 15(1) of the 1972 Order, the legislature contemplated that the responsible authority would make individual assessments in appropriate cases. Any contrary suggestion simply does not make sense. What is the trigger for conducting an assessment of this kind? The text of Article 15 does not expressly answer this question. I am satisfied that, as a matter of principle, it is permissible for the Court to fill this gap by a process of implication. There are sufficient indicators in the overarching legislative policy and objectives, in the surrounding statutory provisions and in Article 15 itself to facilitate this exercise. As regards presumed Parliamentary intention I consider that it cannot have been intended that every request for or suggestion of an assessment of need under Article 15 must be satisfied. Equally, the decision whether to assess is not to be whimsically or arbitrarily made. I draw attention to the benefits which can be provided under Article 15(1). These are social care benefits falling within the embrace of the statutory formula of "*advice, guidance and assistance*". In the exercise of construing Article 15, I would formulate the following propositions:

(a) An initial decision on whether to assess any given person must be made by the responsible authority.

(b) If the responsible authority is of the opinion that a particular person (or group of persons) might potentially be the recipient of any of the benefits available under Article 15, a failure to assess whether any such entitlement actually arose would clearly frustrate the legislation.

(c) The legislation would equally be frustrated if the responsible authority were to conduct an assessment in a case where it had not formed this opinion.

(d) The formation of an appropriate opinion is, on any sensible view, a necessary prerequisite to the initial decision to be made.

But what is the trigger for the exercise of forming the necessary opinion?

[70] I consider that the overarching policy of the legislation is to make available certain health and social care benefits to those members of the population who genuinely need them. Possible need must, as a matter of common sense, be investigated and assessed. It is equally evident that the underlying legislative intention was that only certain persons would qualify for such assessment. Thus there must be a threshold to be surpassed. The construction which I espouse must promote the policy and objects of the legislation, giving full effect to the "Padfield" principle. It must also be harmonious with the "macro" duties and the discretionary powers and choices conferred on the responsible authority by the legislature in other key provisions of the legislation: I refer particularly to Articles 3, 4 and 7, together with Article 15 itself. This mix is one of the clear themes of the 1972 Order which, in passing, has been perpetuated in the most recent significant statutory measure, the 2009 Act: see sections 2 – 4 of the latter. My conclusion is that , considered in its full statutory context, Article must be construed so as to impose on the responsible authority a duty to assess those who, in its opinion, might qualify for the conferral of any of the benefits available thereunder. I consider the formation of this opinion to be the trigger for the duty of assessment.

[71] Thus, I consider that Article 15 of the 1972 Order requires the relevant authority to form an opinion, in the sense explained above. It was accepted in argument, in my view correctly, that this requirement is confined to persons already within the knowledge or contemplation of the authority. Thus there is no "duty of discovery" applicable to the population as a whole. Rather, the requirement to form the requisite opinion is confined to those who, in one way or another, have already come to the attention of the authority, by whatever means. Applying orthodox public law principles, the exercise of forming this opinion would be subject to review by the Court on well established grounds – including rationality and the obligations to take into account all material factors and to disregard anything immaterial. If the exercise of forming this opinion gives rise to a negative outcome for the person concerned, the story ends, subject to judicial review. In contrast, if the outcome of this exercise is that the person should be assessed for the statutory purpose viz to ascertain whether any of the benefits available under Article 15 should be conferred, I consider that a duty of assessment arises. To construe Article 15 otherwise would clearly frustrate the legislation. This question did not arise in **LW**. Nor has it arisen in any of the other Northern Ireland decisions belonging to

this sphere. I have supplied the answer which I consider is dictated by the clearly ascertainable policy and purposes of the legislation.

[**72**] The second question to be determined is whether paragraph 2.2 of the "People First Guidance (etc)" publication gives rise to a substantive legitimate expectation which, in essence, replicates Article 15 of the 1972 Order as construed above. The argument advanced by Mr Knafler QC focused specifically on paragraph 2.2, which states:

> "As was announced on 18th July 1990, the Government intends that the new framework for community care set out in 'People First' will be introduced in stages to 1st April 1993. From that date **Health and Social Services Boards will be required to assess the care needs of any person who appears to them to be in need of community care services** and to decide, in the light of that assessment, whether they should provide, or arrange for the provision of, any services."

[My emphasis]

Chapter 7 of the same application contains a template, or methodology, for the exercise of "*comprehensive assessment*" of the person. The subject matter of chapter 8 is "*Care Planning – Decisions on Service Provision*". This stage is, logically, subsequent to the assessment stage. When it is reached decisions must be made. Where, following assessment, it is proposed to provide services, the vehicle for this is to be "*an agreed care plan*", designed in consultation with the person and any appointed case manager. It is further stated, in full harmony with the "*People First*" philosophy:

> "The principle of ensuring that service provision should as far as possible preserve or restore independent living must always be paramount ……
>
> The agreed package should be recorded in plain language in the individual care plan. [The latter] should cover the decisions reached about agreed care needs; the desired outcomes; what is to be done, by whom and by when; who is going to manage the case; or, if there is to be no care manager, who is to be the nominated professional officer … and arrangements for monitoring and review."

There is a further requirement to provide the care plan to the client, any carer and all professional officers and agencies involved and to explain it fully to the client.

[73] Pausing at this junction I understand the Applicant's argument to be that the "*People First Guidance [etc.]*" publication generates the following twofold substantive legitimate expectation:

(a) That the relevant authority would, from 1st April 1993, assess the care needs of any person in its area who appears to them to be in need of community care services and would decide, in the light of such assessment, whether they should provide, or arrange for the provision of, any services.

(b) That in those cases where it is decided to conduct an assessment of this kind, the assessment and its outcome will be compliant with the requirements and methodologies enshrined in Chapters 7 and 8 of the same publication.

It is appropriate to observe that these are distinct issues. Whereas expectation (a) simply replicates, under a different doctrinal guise, what I have already found to be implicit in Article 15 of the 1972 Order, expectation (b) does not. Rather, it seeks to establish the existence of a different kind of duty imposed on the relevant authority which can arise only through the medium of a substantive legitimate expectation. While (a) is linked to the second of the declarations pursued, (b) is connected with the third.

[74] Having regard to my construction of Article 15 of the 1972 Order, the first of the two substantive legitimate expectations rehearsed above is provided by statute. Paragraph 2.2 of the "*People First Guidance*" publication simply replicates the construction which I have applied to the statutory provision in play. This, in my view, renders otiose the debate revolving around substantive legitimate expectations to precisely the same effect. By reason of the doctrine of Parliamentary sovereignty, statute law [subject, of course, to EU law] is supreme in our legal system and, hence, statutory provision prevails over extra-statutory promises and representations. Where, coincidentally, the latter replicate in substance an extant duty prescribed by statute, I consider them redundant as a source of legal rights and obligations. The statute is the supreme instrument and source to which all concerned must look. There is, in my view, no place for the judge made common law doctrine of substantive legitimate expectations in such a case. This doctrine is equally impotent in cases where statutory prescription confounds the promise or representation on which an asserted substantive legitimate expectation is based: see R – v – Department of Education and Employment, ex parte Begbie [2000] 1 WLR 1115, in particular paragraph [53] per Peter Gibson LJ:

> "…… any expectation must yield to the terms of the statute under which the Secretary of State is required to act."

See also paragraphs [75] and [96]. Stated succinctly, Governmental policies, promises, commitments and representations cannot permissibly occupy territory already occupied by statute – or, for that matter, EU law. While, in certain instances, the policy of a public authority can legitimately supplement the statutory provision or regime to which it is related, it cannot substitute or amend the same.

[75] Turning to the third of the three declarations now pursued, I acknowledge that the issue of whether chapters 7 and 8 of the "*People First Guidance*" publication generate a <u>different</u> type of substantive legitimate expectation is freestanding of my construction of Article 15 of the 1972 Order. This question falls to be determined within the framework of a set of increasingly clear and authoritative principles. These were rehearsed *in extenso* in <u>Re Loreto Grammar Schools Application</u> [2011] NIQB 30, paragraphs 92 – 104. Lying at the heart of this doctrine is the requirement to identify a clear and unambiguous representation devoid of any relevant qualification, having a character comparable to contractual promises or undertakings. Fundamentally, it is essential to consider the context in which the relevant statements are made, the audience to which they are directed and the words used. I take into account that, in the statutory sphere under scrutiny in these proceedings, policies are, if anything, of greater importance than ever before. In clearly mandatory terms, section 2(3) of the 2009 Act dictates that the Department –

> "……… **must** ……….
>
> (a) develop policies to secure the improvement of the health and social well being of, and to reduce health inequalities between, people in Northern Ireland …
>
> (f) formulate the general policy and principles by reference to which particular functions are to be exercised."

[my emphasis]

Accordingly, under the new statutory arrangements, there is an inextricable nexus between Departmental policy (on the one hand) and the Department's general statutory duty to promote health care and social care under section 2 and its associated discretionary powers under section 3. I consider that the "*People First Guidance [etc.]*" publication is a relevant statement of Departmental policy to be viewed through this lens. It matters not that it predates the 2009 Act. In my view, Chapters 7 and 8 thereof do not express mere aspirations or statements of pious intent. Rather, as required by the parent policy publication, "People First", they describe and specify assessment and care planning procedures and methodologies, couched in clear and comprehensible terms. They prescribe the "*essential features*" of a proper assessment process. They do so in terms which recognise that in certain aspects the responsible authority exercises discretionary choices: see in particular

paragraphs 7.1, 7.4, 7.6, 8.1, 8.2 and 8.5. I consider that these two chapters are correctly construed as establishing, and promising, *a basic framework* for the twin exercises of assessment of a person's social care needs and ensuing care planning. Their clear intention and effect is that this basic framework should be observed in the generality of cases. While I do not overlook that the publication purports to describe itself as "guidance"¸ I consider that substance must prevail over form and I adopt, while recognising the different context, the approach of Dyson J in R – v – North Derbyshire Health Authority, ex parte Fisher [1997] CCLR 150, page 156. For these reasons, I conclude that Chapters 7 and 8 of the "*People First Guidance [etc.]*" publication generate a substantive legitimate expectation that a social care needs assessment and any ensuing care planning decisions, including care plans, will normally be compliant with the frameworks set out therein.

[76] Reverting briefly to the second of the declarations now sought, I have explained in paragraph **[74]** my reasons for rejecting the argument that paragraph 2.2 of the "People First Guidance (etc)" publication generates a substantive legitimate expectation to the effect that from 1st April 1993 the relevant authority:

> "…… will be required to assess the care needs of any person who appears to them to be in need of community care services …."

This rejection is based on my construction of Article 15 of the 1972 Order and the implications thereof. I must, nevertheless, consider the scenario of an appellate court disagreeing with this construction. If Article 15 is not to be construed in the manner which I have espoused, I consider that paragraph 2.2 does indeed engender a substantive legitimate expectation in the terms set out in the text. I thus conclude applying essentially the same reasoning as in paragraph [75] above. Thus I attribute no weight to the "*Guidance*" label and I adopt once again the robust approach espoused by Dyson J in Ex parte Fisher *(supra)*. I consider that paragraph 2.2 of the "People First Guidance (etc)" publication has the character of an unequivocal representation to a narrowly focused group of people that the relevant authority will, as a matter of obedience to the parent agency, assess the possible care needs of any person who appears to it to be in need of community care services. The language is clear and unambiguous, devoid of any exception or qualification. Neither knowledge nor detrimental reliance on the part of the Applicant is required. The rationale of the doctrine is that public authorities should abide by their promises unless there is a cogent reason, normally rooted in a relevant public interest, to release them from this duty. I conclude, on the hypothesis expressed, that a substantial legitimate expectation of the type canvassed is established.

[77] I shall now address one discrete issue. The court enquired whether it was contended that paragraph 2.2 of the 1990 "People First Guidance" publication had the status of a direction issued by the Department's predecessor to all Health and Social Services Boards under Article 17 of the 1992 Order. Following due reflection

an affirmative answer to this question was provided. I acknowledge that the legislation contains no special procedure or prescription for Article 17 directions. However, in my view it was contemplated by the legislature that these would be formulated and expressed in a solemn and formal manner, with explicit prescription, which would convey to the Board/s in question a duty to obey. This is confirmed by the body of opinion which holds that statutory directions of this kind are to be viewed as a species of subordinate legislation: see Administrative Law (Wade and Forsyth, 10th Edition), page 740. In principle, one would expect statutory directions to have the appearance of an order of mandamus, addressed to the subordinate authority concerned, in both form and content. I consider it intrinsically unlikely that a formal statutory direction from Department to Board would be expressed and communicated in a broad statement of Government policy promulgated to the public as a whole. This is far removed from the form and setting contemplated, by implication, in the legislation. An example is provided by the "DHSSPS Commissioning Plan Direction" issued to the Board on 24th May 2010 under the current statutory provision, section 8(3) of the 2009 Act: see the 22nd item in the table contained in paragraph [2] above. I consider that paragraph 2.2 of the policy instrument in question does not have this character. Firstly, it is contained in a publication described as "Guidance" an expression which is repeated in the text. In this particular context, I attach weight to this appellation. Secondly, it finds its place in a typical statement of Government policy. Thirdly, the introductory sentence of paragraph 2.2 speaks of *the intention of Government*. Fourthly, the instrument spells out a series of **principles**. Finally, discretionary powers and choices abound. These factors, in my estimation, confound the submission that one isolated part of this instrument – paragraph 2.2 – has the status of a statutory direction under Article 17.

[78] I am satisfied that the first three questions of law arising out of the Applicant's reformulated challenge raise new issues, not previously the subject of judicial adjudication, of some importance. The first concerns one particular aspect of the construction of Article 15 of the 1972 Order not previously decided. The second and third concern whether an important statement of Government policy generates either or both of the two types of substantive legitimate expectation canvassed. These two questions also belong to virgin territory. The fourth, and final, question, however, does not, subject to one exception. It was addressed squarely by this Court in Re LW's Application [2010] NIQB 62 and was determined in the following way, in paragraph [45(e)]:

> "Once a decision on what the authority considers 'necessary' and/or 'suitable and adequate' has been made, the discretion in play is exhausted. The assessment having been made, a duty of provision arises ….
>
> When the assessment has been made, I consider that discretion is supplanted by duty."

In the same passage, I made clear that during the anterior assessment stage the responsible authority can lawfully take into account factors such as available resources, the demands on its budget, the particular circumstances of the individual concerned and their family, including their resources, the availability of facilities and its responsibilities to other members of the population. None of the parties before the Court dissented in any way from the statutory construction and analysis in paragraph [45] of ***LW***.

[79] In my opinion, the fourth of the declarations now pursued by the Applicant does not raise any new issue, except that of **timing**. As I have already noted, the formulation of this declaration is to the effect that the relevant service, benefit or facility will be provided by the authority concerned **as soon as** the corresponding decision has been made. I reject this contention. I consider that the legislature must have envisaged that there would be cases where, for good reason, the implementation of an assessment decision would undergo some delay. The legislature must have contemplated, for example, the phenomena of particularly complex and challenging cases and swiftly changing circumstances. The need to engage with an array of persons and agencies following the decision – such as other health and social care professionals, other agencies, the individual beneficiary, any representative of the latter and family members – must equally have been foreseen. I consider that the legislature must also have contemplated the inevitability of intensely fact sensitive cases. In some, more or less immediate provision would be required: the example of an elderly accident victim about to be discharged from hospital on crutches or with a walking aid, with an assessed need for specified home help services (cleaning, cooking and so forth), springs readily to mind. The legislature must simultaneously have foreseen that there would be other cases where immediate provision of an assessed service or benefit would not be required. This would embrace those cases where compliance with some of the array of official guidance instruments and circulars noted in paragraph [62] above would first be necessary. Legislation of this kind is enacted in the framework of the *soi disant* real world. It is not made in a vacuum. These various factors and this analysis impel to the conclusion that the post-assessment duty imposed on the relevant authority is to provide the assessed benefit **within a reasonable time**. It is trite to add that the measurement of this period will inevitably vary, tailored to its particular context.

[**80**] I return at this juncture to Mr E. While I have highlighted above that, at this stage, the Applicant is not seeking any relief personal to him, I am conscious that the remittal of this case by the Court of Appeal has resulted in the joinder of the Trust as second Respondent and the consequential generation of a substantial body of new evidence. I am now equipped to decide whether, on the facts of this case, a duty to assess the Applicant under Article 15 of the 1972 Order arose. The main secondary question is whether, if such a duty arose, the outcome of such assessment gave rise to a duty which the Trust failed to discharge. I conclude without hesitation that each of these questions invites an affirmative answer. The new evidence is overwhelmingly in favour of this conclusion. The Trust does not dispute that it had a duty to assess whether the Applicant should be the recipient of benefits under

Article 15. An assessment was – indeed successive assessments were – duly conducted. The initial investigation gave rise to a diagnosis and, in its wake, the prescription was that the Applicant should be transferred from his hospital setting and resettled in the community. This outcome is stamped all over the Trust's affidavit and documentary evidence. It follows that some of the findings expressed in paragraph [32] of my initial judgment cannot stand. Next, I pose the question: what time limit, if any, was thereby generated?

[81] I have already concluded that Article 15, properly construed, permits the elapse of a reasonable period between prescription and provision, bearing in mind that at this, the final, stage of the Article 15 exercise, the availability of resources is not a permissible consideration. In principle, in some cases, the need which is assessed as requiring satisfaction by the provision of one of the available social care benefits or facilities may be so pressing as to demand immediate provision. In other cases, swift, but not immediate, provision may be appropriate. In still others, somewhat more delayed provision could be harmonious with the legislative intention. Every case will be unavoidably fact sensitive, governed by the omnipresent shadow of the policy and objectives of the statute. I consider that, in the Applicant's particular circumstances, the decision made was a resettlement decision, with certain qualifications. The timing of the discharge of the duty of provision was dictated by three main factors. The first was the necessity to carry out detailed advance planning, in due observance of official guidance - this could not be sensibly or practically done until an initial, 'in principle', decision had been taken. The second was the Applicant's policy right of choice – which, according to the evidence, resulted in two refusals of offered placements in November 2009 and January 2010. The third was the availability of a suitable placement. In this context, I consider that "suitable" means a placement appropriate to the Applicant's complex needs and circumstances, which include factors bearing on his protection and that of members of the community. In my estimation, it is overly simplistic to view this discrete factor through the crude lens of resources. The resettlement of learning disabled members of the population from hospital settings into the community is undoubtedly embraced by the framework of Article 15 of the 1972 Order. However, given the various complexities, sensitivities and burdens which this can generate – the Applicant's case being a typical example – I am satisfied that, at the final stage, where the duty of provision is engaged, the legislature cannot be deemed to have envisaged <u>immediate</u> action in every case. Rather, it must have contemplated that the activities and deliberations of the health and social care professionals involved, the necessary interaction with the person concerned and others [such as family members and advocates], consideration of the interests of the wider community and the limited availability of an ideal community setting for every potential beneficiary could result in delays of more than minimal proportions. In my view, this is not tantamount to allowing the impermissible intrusion of resources at this stage: in the Applicant's particular case, the necessary financial resources were available virtually throughout. Rather, a more sophisticated and pragmatic approach is required.

[82] Having carefully reviewed all the detailed evidence relating to the Applicant now available, I have concluded that the delay of approximately 5 years in resettling him in the community, following the initial decision that this provision was necessary to satisfy his duly assessed social care needs under Article 15, was so excessive as to be unlawful. I make this conclusion having made due allowance for the various factors highlighted immediately above. The policy and objects of the legislation were clearly frustrated in his case. This conclusion overtakes and replaces the relevant aspects of my earlier assessment in paragraph [32] above.

[83] Out of fairness to the Trust, it is appropriate to add the following. It is abundantly clear from the evidence that the Applicant's case was the subject of meticulous and conscientious periodic consideration by the health and social care professionals concerned at all material times. Their consistent lament was that, in the hypothetical perfect world, swift resettlement of all members of the cohort of patients in question, over 200 at the outset, would occur. However, they found themselves operating in an imperfect world in which the factors highlighted above, including the reality of limited resources, particularly of the physical type, were of potent influence and effect. They cannot be faulted. They were at all times doing their best. The solution to this conundrum available to the courts is, in the exercise of discretion, to either formulate a non-intrusive remedy [eg by declaration] or to decline to grant any remedy. See <u>R v Newham LBC, ex parte Begum</u> [2000] 2 ALL ER 72, pp 79-80, per Collins J. I note, in passing, that my construction of the duty of provision [where it arises] under Article 15 as importing a qualification of reasonable time differs from his Lordship's construction of section 47 of the English Act, albeit the practical result might not differ greatly in practice where a judicial review challenge materialises.

<u>The declarations now pursued: conclusion</u>

[84] At this juncture, having regard to the nature of the declaratory relief now pursued, I must turn my gaze to the broader landscape. In this context, I refer to paragraphs [1] and [48] of this judgment and paragraph [17] of the judgment of Girvan LJ. The information now available to the court has expanded significantly. The Court was informed that the cohort of learning disabled patients accommodated in Muckamore Hospital who have been assessed as qualifying for discharge and resettlement in the community, the so-called "*transitional*" group, has been reduced from an initial membership of 223 [in 2005] to around 175 [in 2013]. The size of the group has undergone alteration due to other causes, including natural wastage and new additions. It is evident that resettlement has been painstakingly slow and the various departmental goals and targets have not been met. In particular, there was a specific goal that all learning disabled persons would be discharged from hospital and resettled in the community by the year 2013: see paragraph [9] *supra*. Thus the Muckamore "*delayed transfers*" group has a current membership of substantial dimensions, well in excess of what was projected from time to time during recent years. The Court has also been informed that a large number of this group, believed to be around 40 – 50, have instructed a firm of solicitors. Additionally, the Court

was advised that the Law Centre, which represents the Applicant, has instructions from four other members of the group and is in the course of preparing proceedings. None of this is contested by either Respondent.

[85] This litigation has, in essence, been converted into abstract public interest proceedings. I remind myself that declaratory relief is not granted for the asking. Rather, a declaration is a discretionary public law remedy. In this particular case, I have embarked upon an analysis and construction of important statutory provisions and related Government policies and have made conclusions accordingly. In doing so, it is evident that the court has entered virgin territory. These exercises clearly transcend the immediate boundaries of the present litigation. Furthermore, the issues of statutory construction and substantive legitimate expectation ventilated in the remittal phase of these proceedings are novel and, on any showing, of wider impact. In reflecting on the propriety of granting any of the declaratory relief now sought, I consider the main criterion in the present context to be that of **utility**. Where the grant of declaratory relief would serve an important practical purpose, this will clearly count as a positive indicator: see The Declaratory Judgment (Zamir and Woolf, 4th Edition), paragraph 4 – 99 and following. I refer particularly to the following passage:

> "If …………….. the grant of declaratory relief will be likely to achieve a useful objective, the Court will be favourably disposed to granting relief ……..
>
> [Conversely] a declaration which would serve no useful purpose whatsoever can be readily treated as being academic or theoretical and dismissed on that basis."

The authors add, in paragraph 4 – 134:

> "The fact that the subject matter of the declaration is of public interest is clearly an important consideration which may induce the Court to make the declaration ……."

In the succeeding passages, the authors dilate on the significance of declarations relating to future rights.

[86] I conclude with some confidence that, taking into account the substantially broader and fuller landscape which is now apparent, coupled with the importance of the issues of statutory construction and policy impact which have been raised following remittal, the Court should make certain declarations. The desirability of making appropriate declarations is strongly reinforced by contemporary public policy which discourages unnecessary and inappropriate litigation, with its associated delays, uncertainty and expense.

Omnibus Conclusions

[87] Giving effect to the above analysis, reasoning and conclusions:

(a) I propose to declare, first, that under Article 15 of the Health and Personal Social Services (NI) Order 1972 the Department and/or its statutory agent/s is/are under a duty to subject to appropriate assessment and inquiry any person within the scope of their knowledge or attention who appears to them might reasonably qualify for the enjoyment of any benefit available thereunder.

(b) Insofar as my primary conclusion is incorrect, I would have declared that paragraph 2.2 of the "People First Guidance [etc.]" publication generates a substantive legitimate expectation to like effect.

(c) My second declaration is that Chapters 7 and 8 of the same publication generate a substantive legitimate expectation that assessments of social care needs and any resulting care plan will normally accord with the frameworks specified therein.

(d) Thirdly and finally, I declare that in those cases where an assessment has been carried out, the Department and/or its statutory agent/s is/are under a duty to provide the assessed social care benefit within a reasonable time.

Footnote – Of Dying Rainforests and Overriding Objectives

[i] I am pleased to report that the court was the ultimate victor in a truly epic battle. Following a tenacious judicial rear-guard action, seven daunting lever arch files were reduced to two for the trial. The core bundle consisted of some 600 pages. Of these, reference was duly made to substantially less than 200. An intimidating quantity of authorities was eventually whittled down to a single volume of some 300 pages, with reference made to about one third. More than half of the decided cases in the contents did not merit a mention at the hearing. Pre-trial, a proliferation of the most basic judicial directions and repeated case management hearings proved necessary. A trial date had to be vacated along the journey.

[ii] Some judges, increasingly weary, may continue to tirelessly lead the cultural revolution. The malaise highlighted above, duly seasoned by related misdemeanours such as missing and illegible pages and seemingly endless non-compliance with reasonable court directions and timetables, is a recurring one in the majority of cases which I try. The wasted costs, lost time, delays, inefficiencies and countless frustrations thus generated are highly regrettable. There are real and worrying wastes of the valuable commodities of judicial preparation time and court time.

[iii] These mischiefs are illustrated graphically in Ulster Bank v Taggart [2012] NIQB 24. They are pre-eminently avoidable and are constantly frustrating the overriding objective. Wasted costs orders, or the threat thereof, do not seem to be the solution. Practice Directions and innovative initiatives such as the Certificate of Readiness and the related Checklists in certain species of High Court appeals have proved insufficient. Litigants, whom the legal system exists to serve, are the ultimate losers. I trust that the relevant committees of the two branches of the profession will quickly take the initiative to address and remedy these endemic problems. I am confident that the judiciary will participate in a partnership approach. Unhappily, the "unholy trinity" of excessive cost, delay and complexity seems to be alive and thriving. Its resourceful longevity continues to perplex.