Neutral Citation No. [2011] NIQB 42 | *Ref:* **McCL8173**

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

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

JR 47's Application [2011] NIQB 42

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

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	Departmental Policy document

Date	Document/Event	Description
	Handicapped in NI	
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 by DHSSPS – completed in 2007	Equal Lives Report relating to 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

Date	Document/Event	Description
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	
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

Date	Document/Event	Description
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.

Articles 8 and 14 ECHR

[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 ***Botta –v- Italy*** [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 ***Marzari –v- Italy*** [1999] CD 218. In another decision belonging to this field, ***Sentges –v- The Netherlands*** [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.