

Neutral Citation No: [2021] NIQB 23	Ref: COL11419
<i>Judgment: approved by the Court for handing down (subject to editorial corrections)*</i>	ICOS No: 2020/48984/01
	Delivered: 26/02/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY JR127
(PERSONS UNDER A DISABILITY) ACTING BY THEIR MOTHER
AND NEXT FRIEND FOR JUDICIAL REVIEW**

IN THE MATTER OF DECISIONS BY A HEALTH AND SOCIAL CARE TRUST

**Monye Anyadike-Danes QC with Sinead Kyle (instructed by Nicholas Quinn Solicitors)
for the Applicant**
Phillip Henry (instructed by the Directorate of Legal Services) for the Respondent

COLTON J

Introduction

[1] I am grateful to counsel in this case for their able oral and written submissions and to their instructing solicitors for the preparation of the trial bundles.

[2] The applicants are two severely disabled adults, acting by way of their mother JR127. The oldest adult is 27 years old. He has diagnoses of global development delay and epilepsy. He has no speech and is sight and hearing impaired. He has mobility issues. He requires assistance with all aspects of daily living for personal care, including dressing, showering, toileting, eating and swallowing. His younger brother is 24 years old. He has a diagnosis of Autism Spectrum Disorder. His autism means he has sensory needs and requires a structured day with regular routines. He is visually impaired which impacts on his mobility and he requires reasonable adjustments for his safety. His communication is limited to gestures and simple words. He has difficulty swallowing and eating. He too requires assistance with all aspects of daily living for his personal care, including dressing, showering and toileting.

[3] Because the applicants are profoundly disabled persons lacking in capacity I have anonymised these proceedings. I order that nothing should be published from this judgment which could identify the applicants. I shall refer to them and as J and L throughout the judgment. I shall refer to their mother as “the applicant.” I have also anonymised some of the facilities which were provided by the respondent in the judgment.

[4] J and L live at home with their parents. The applicant, their mother, is their main carer. Their father works full-time as an engineer and is regularly “on call.” The applicant works as a secretary. She is heavily involved in the voluntary sector, particularly in representing people with disabilities and carries out charitable work. In that capacity she sits on a number of bodies in her local area.

[5] It is apparent from all the material before the court that she has been and continues to be a devoted carer for her two adult children and is an able advocate for persons with disabilities.

[6] Unsurprisingly, given the extent of their disabilities both J and L have been the subject of assessment of their needs by the Trust. J was first assessed in June 2012 and L in December 2013. Their needs have been reassessed in the intervening period. In both cases J and L’s needs were assessed on 23 April 2018. The needs identified were reviewed and confirmed on 17 July 2019.

[7] Arising from that review J and L’s assessed needs are:

- (i) Day care: Monday-Friday for 7 hours, 9am-4pm, at the ML, including transport.
- (ii) Domiciliary care (“Flexi-Sit”: every Friday (excluding the first Friday of the month) for 3-4 hours per session.
- (iii) Overnight respite care to support their mother in her caring role – as per assessed need – annual or as and when required. In practice this was being provided on 38 days per year at NL with transport.

[8] As a result of the Covid-19 coronavirus public health crisis which emerged in Northern Ireland in March 2020, on 23 March the respondent ceased providing day care. On 27 March domiciliary care ceased. Since then this care has been provided on a fluctuating and increasing basis. At the date of hearing day care has been resumed for J and L at the ML, on 4 days per week including transport as opposed to 5 days per week. Domiciliary care has been restored to the pre-Covid assessed level. Transport has also been resumed.

[9] Respite care ceased when the NL facility closed on 27 March 2020 but emergency respite has been provided in the interim. A 5 night stay was provided from 29 July 2020 to 3 August 2020. A further 5 night stay was provided between

28 October 2020 and 2 November 2020. A further 5 night stay was provided between 6 January 2021 and 11 January 2021 bringing the total to 15 nights to date.

The Issue

[10] The issue in this case is whether or not the Trust has acted unlawfully by failing to provide the level of social care described in the assessment of needs of the applicants on 23 April 2018 and reviewed on 17 July 2019.

The Legal Context

[11] The key provision is section 2 of the Chronically Sick and Disabled Persons (Northern Ireland) Act 1978. Section 1 of the Act provides that persons embraced by the Act include those who are:

“Blind, deaf or dumb, and other persons who are substantially handicapped by illness, injury or congenital deformity and whose handicap is of a permanent or lasting nature or suffering from a mental disorder within the meaning of the Mental Health Act (Northern Ireland) 1961.”

[12] There is no dispute that J and L fall within this category.

[13] Section 2 provides:

“Where the Department of Health and Social Services is satisfied in the case of any person to whom section 1 above applies that it is necessary in order to meet the needs of that person for that Department to make arrangements under section 2(1)(b) of the Health and Social Services Reform Act (Northern Ireland) 2009 and Article 15 of the Health and Personal Social Services (Northern Ireland) Order 1972 for all or any of the following matters namely:

(a) The provision of practical assistance for that person in his home;

...

(c) The provision for that person of lectures, games, outings or other recreational facilities outside his home or assistance to that person in taking advantage of educational facilities available to him;

(d) The provision for that person of facilities for, or assistance in, travelling to and from his home for the purpose of participating in, any services provided under

arrangements made by that Department under section 2(1)(b) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 and Article 15 of the Health and Personal Social Services (Northern Ireland) Order 1972 for promoting the social welfare of such persons or, with the approval of that Department, in any services provided otherwise than as aforesaid which are similar to services which could be provided under such arrangements;

- (e) The provision of assistance for that person in arrangement for the carrying out of any works of adaption in his home or the provision of any additional facilities designed to secure his greatest safety, comfort or convenience;*
- (f) Facilitating the taking of holidays by that person, whether in holiday homes or otherwise and whether provided under arrangements made by that Department or otherwise;*

...

then, that Department shall make those arrangements."

Is there a duty on the Trust?

[14] It will be noted that section 2 imposes a duty on the "Department." These proceedings have been properly brought against the relevant Health and Social Care Trust which actually provides the care which has been assessed. The Department of Health is a Notice Party to the proceedings. The Trust has raised an issue as to whether or not the section 2 duty is placed on it and whether as a consequence the court can find that it is in breach of the section 2 duty. This will turn, inter alia, on whether or not the Trust was effectively an "agent" of the Department and the relative relationships between the department, the Health Board and the Department of Health. It was agreed at the outset by the parties that the case would proceed against the Trust only as to whether there has been a breach of the section 2 duty. For the purposes of this hearing it is presumed that the applicant is entitled to rely on the section 2 duty against the Trust but without prejudice to the Trust's ability to argue at a later date about where responsibility under section 2 lies. In this way the substantive issues viz a viz the applicants could be resolved as expeditiously as possible.

Does the applicant have an enforceable duty under section 2?

[15] This provision, including the same provision in England and Wales, has been subject to considerable judicial analysis, most notably in this jurisdiction by McCloskey J (as he was then) in **LW (Acting by her mother JB) Application** [2010] NIQB 62.

[16] In his analysis of section 2 McCloskey J had the benefit of the decision of the House of Lords in the case of **R v Gloucestershire County Council and Secretary of Health, ex parte Barry** [1997] AC 584 which dealt with the equivalent English legislative provisions. The Supreme Court further considered the analysis of the House of Lords in **Barry** in the case of **R (KM) v Cambridgeshire County Council** [2012] UKSC 23 and **R(McDonald) v Kensington and Chelsea RLBC** [2011] UKSC 33.

[17] The Supreme Court commented that the duties imposed by the equivalent English legislation required “*three separate tasks*” that the local authority must undertake when considering meeting the needs of a disabled person:

- “(i) *What are the needs of the disabled person?* - described by McCloskey J as the “diagnosis” stage.
- (ii) *Whether in order to meet those needs it is necessary for the local authority to make arrangements to provide any services?* – described by McCloskey J as the “prescription” stage.
- (iii) *If so, what is the nature and extent of those services?* - described by McCloskey J as the “provision” stage.”

[18] Although the specific context of each of these cases differed the ratio which emerges from the decisions is what are referred to as financial or resource considerations can only lawfully be taken into account in the earlier stages of the process but not at the third stage. If one reaches the third stage a duty, enforceable at the suit of the chronically sick or disabled person concerned crystallises.

[19] In the **Barry** case the court was dealing with a decision by the local authority to withdraw cleaning and laundry services which had previously been assessed as necessary for the applicant under the equivalent English statute. The House of Lords held that in assessing an applicant’s need for a service, the degree of that need and the necessity to make arrangements to meet it a local authority had to balance the severity of the applicant’s disabling condition against the cost of those arrangements and the availability of resources. However, this consideration applied only to the first two stages. As appears from the judgment at page 598 the Secretary of State conceded that at the third stage the duty is absolute. In other words, the council could not escape its duty to make arrangements to meet the need by saying that they do not have the money. In **Barry** the focus was on the first stage in respect of which the court determined that resource issues could be taken into account.

[20] In **LW** the applicant was a profoundly disabled adult who required domiciliary care that was sourced from the private sector. However, the suitability

and availability of the specially trained domiciliary carers which LW required meant that provision had been persistently problematic and fluctuating which resulted in LW having unmet care needs. There had been no revision or reassessment of LW's care needs. McCloskey J concluded that on the facts of the case, whether viewed through the prism of an absolute duty or provision of a duty to be measured by the criterion of reasonableness, the Trust was in breach. There was no evidence before him of reasonable efforts by the Trust to discharge its continuing statutory duty to the applicant.

[21] In **KM** the Supreme Court was dealing with the provision of direct payment to persons coming within the English equivalent of section 2. Applying the three stage process to which I have referred the court concluded that at stage (ii) the local authority was entitled to have regard to the scale of its resources and the weight of other demands upon it. In relation to the **Barry** case the court commented that insofar as it was there held that constraints upon resources were also relevant to what had been described as stage (i) there are arguable grounds for fearing that the committee fell into error. However, the court did not expressly consider this issue. In summary I proceed on the basis that it is settled law that issues of resources and the weight of demands placed on the Trust is a relevant consideration in respect of stage (ii) but not in respect of stage (iii), at which stage the duty upon the Trust crystallises.

Are the needs assessed within the scope of section 2?

[22] In order to establish a breach of section 2 of the 1970 Act the applicant must establish that the provision which she seeks to enforce comes within the scope of section 2 of the Act. There is no dispute that items (i) and (ii) are embraced by section 2. Day care provision falls within section 2(c) as "*other recreation facilities outside the home.*" Transport is provided for by section 2(d). Domiciliary care falls within "*practical assistance for that person in his home*" within section 2(a).

[23] The provision of item (iii) namely, overnight respite in the NL with transport is more problematic. It is the applicant's case that respite care falls within section 2(f) which it will be recalled relates to "*facilitating the taking of holidays by that person, whether at holiday homes or otherwise.*" Alternatively, it is argued that this provision may also fall within section 2(c) as "*Outings or other recreation facilities outside his home.*"

[24] The respondent argues that the short breaks provided at a residential facility to J and L which provides respite for the family carers on a relatively frequent basis are such that they cannot be considered "*holidays.*" This is because the purpose of the break, as the title suggests, is to give the carers a break from providing care, rather than provide a holiday for the recipient of the care. The respondents says that applying a similar logic the short breaks could not be held to fall within the scope of section 2(c). Properly analysed they are not "*recreation facilities*" outside the home. The focus in section 2(c) is on J and L rather than respite for family carers.

[25] The scope of section 2 was discussed by McCloskey J in the **LW** case. Specifically the court considered whether or not the provision of 3 or 4 days per week residential placement in “AK” Nursing Home in Belfast constituted “*the provision of practical assistance for her in her home.*” This contention was advanced on the basis that “AK” would become the applicant’s “home” during any periods of placement there bearing in mind the intention and expectation that her domiciliary care arrangements would be “exported” during the relevant days of the week; the applicant’s carers would simply change their place of work. McCloskey J was unable to accept this argument as it seemed to him to distort the plain and ordinary meaning of the statutory language. The factual matrix is different here. Respite care in the context of section 2 was considered by Treacy J (as he then was) in **Re PH** [2014] NIQB 60 where he cited “Care Management, Provision of Services and Charging Guidance – Circular HSC (ECCU) 1/2010” that provides:

“47. Respite care, sometimes known as ‘short breaks’ is when a person is cared for and a carer gets a chance to spend some time apart. This gives the cared for person a chance to experience new opportunities. It also gives the carer a break from the caring role.”

[26] Although **PH** was held not to have an assessed need for respite care, Treacy J commented at paragraph [70] “*respite could arguably fall within the section 2 arrangements.*” He did not however come to any conclusion on the issue.

[27] Looking at the particular circumstances of this case I consider that it would unduly stretch the plain meaning of the words in section 2 to suggest that these respite breaks could be considered “*holidays*” or the provision of “*recreation facilities*” outside the home. It seems to me this service is primarily for the benefit of the carer. However, it plainly does have a benefit for J and L as in effect it replaces the care provided by the carers to meet their needs in circumstances where it is recognised that the carers are entitled to respite in relation to the provision of the service.

[28] The fact that the respite care in question does not come within the scope of section 2 is not the end of the matter. The court is not precluded from holding that the respondent is under a duty in law to provide this service by virtue of its obligations under section 2(1)(b) of the Health and Social Services (Reform) Act (Northern Ireland) 2009 and Article 15 of the Health and Personal Services (Northern Ireland) Order 1972. Article 15(1) of the 1972 Order provides:

“(1) 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.”

In making the assessment in each individual case, the authority can properly take into account factors such as available resources, the demand 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. Thus, factors of this kind can properly influence the assessment to be made in the individual case. In this regard the Department is invested with a discretion. However, when the assessment has been made the discretion is then supplanted by duty.

Factual background since 27 March 2020 to date of hearing

[29] It is necessary to consider what in fact has occurred in relation to the provision of care since the initial cessation of services on 27 March 2020.

[30] The evidence is to be found in three affidavits from the applicant dated 22 July 2020, 28 August 2020 and 22 December 2020 together with exhibits and two affidavits from Tracey Rodgers, who is the Head of Community Service and Disability Services in the relevant Trust, dated 26 October 2020 and 16 December 2020 together with exhibits.

[31] Whilst there is a difference of emphasis in the accounts and differences of opinions expressed therein the essential facts can be reasonably ascertained.

[32] On 13 March 2020 the Trust wrote to the applicants’ family and other service users warning that changes were likely in the near future. The Trust wrote again a week later on 20 March 2020 stating that many of the facilities providing services were going to close on 23 March 2020 with a review on 24 April 2020. The day service facility the applicants’ previously attended, MC, closed on 23 March 2020. However, emergency out of home support commenced in the week commencing 6 April 2020. After 23 March 2020 day care was provided on a fluctuating and reduced basis. It was provided for two days in the week commencing 6 April 2020; 3 days in the week commencing 20 April 2020; 4 days in the week commencing 1 June 2020; 2 days in the week commencing 6 July 2020; 3 days in the week commencing 17 August 2020; no days from 23 October to 24 November 2020 and 4 days per week thereafter.

[33] Trust transport was redirected to perform other emergency tasks during the crisis period. Whilst she was not working the applicants’ mother was able to provide transport required to travel to and from the emergency out of home support service.

[34] After the initial closures in March it was clear, and the court accepts, that the applicant and her sons were experiencing difficulties because of the disruption in their previous routine. As a result, on 31 March 2020 the Trust's Head of Day Services agreed to provide "*emergency out of home day support*" two days per week (Tuesday and Thursday) at B SEC, in the week commencing 6 April 2020. As above the applicants' mother provided the necessary transport.

[35] The respondent avers that the feedback from staff in relation to the individual day care was that it was a positive experience for J and L. They settled into a routine quickly and enjoyed their time there.

[36] In response to further representations from the applicant the provision was increased from two days to three days, and later to four days per week. It was not possible according to the respondent to meet the applicant's request for a fifth day. J and L were occupying 4 of the 5 emergency care day time sessions provided in that area and the respondent had to build in some capacity for emergencies.

[37] The applicants' mother also requested that B SEC open at 8.30am rather than 9am, but this could not be facilitated because staff were required to carry out comprehensive cleaning schedules in line with the updated IBC guidance and to ensure that adequate supplies of PPE were available in segregated areas of the facility before sessions began. The preparation required additional time each morning.

[38] In July 2020 the respondent entered Phase 1 of the regional plan to return to pre-Covid-19 levels of service. This resulted in the re-opening of MC, so the applicants could return to their normal day care facility. Initially they could only attend two days a week but that has since increased to four days.

[39] Transport is currently being provided. In terms of day care the applicants currently receive 80% of the pre-Covid-19 care.

[40] In addition to the outstanding fifth day the respondent has looked at various alternatives which included offers to set up a bespoke programme for J and L with accredited carers at an independently run facility on the week day that they do not attend MC. The applicant agreed to consider this, but the respondent later received a letter from her solicitor requesting the fifth day at MC to be reinstated.

[41] Domiciliary care was suspended from 27 March 2020 but recommenced at pre-Covid-19 levels on 10 July 2020 and has continued at the same level since, save that it was declined for a number of weeks during the second lockdown because the applicant felt there was nowhere to socialise on Friday evenings, owing to the restrictions imposed to cope with the growing second wave of the virus. The respondent also suggested the possibility of adding an extra night of the domiciliary service so that a carer would attend the family home on a Wednesday night (as well as a Friday) to look after J and L.

[42] In relation to the respite facility at NL this too was closed on 27 March 2020 because of the Covid-19 restrictions. When the facility reopened in July, albeit at a reduced capacity because of infection control measures, the applicant was amongst the first to benefit. She obtained a five night stay for J and L, on 29 July 2020 with a further 10 nights stay provided since.

[43] In addition to the steps referred to above the Trust sought to provide assistance to J and L, some of which was beneficial but some of which was inappropriate and unsuitable for their particular needs.

[44] Shortly after the closure in March the Trust's Case Manager assigned to J and Ls' case agreed with the applicant to arrange weekly telephone sessions. During these sessions a number of options were discussed including:

- (a) The possibility of a carer cash grant application, which was made and quickly approved, providing additional cash for the benefit of the applicant;
- (b) The Case Manager offered a referral to the Behavioural Support Service, which was accepted.
- (c) Additional support in the form of "*direct payment*" was discussed and offered but declined (such payments are made to allow for the private employment of a carer to provide services as required by J and L).
- (d) Accessing support for the applicant via her GP and offers to make a referral to the Mental Health Team.
- (e) Support and reassurance for the family and service users.
- (f) Practical advice in relation to the delivery of food, medicines and essential supplies into the household.
- (g) Updates and advice on Trust homecare and flexible respite.
- (h) Online resources, namely the Learning Disability Senate, the Public Health Agency's advice for people with a learning disability and the PHA's advice for supporting those with learning disabilities and autism.
- (i) Advice on the provision of a specific PSNI reference number to provide to a police officer if stopped while outside the home in connection with daily exercise or any aspect of care provision.
- (j) Advice on the appropriate accessible information – the extension library on share point that case managers can access for the benefit of service users and their family.

- (k) The stress control online course was offered.
- (l) The “Care for a cuppa” video chat facility was offered.
- (m) The case manager offered a review of the applicant’s needs as a carer and this was accepted.
- (n) ID cards for carers were provided.

[45] The applicant was also contacted by the Trust team leader and an arrangement made for additional fortnightly telephone calls with the Trust Health Facilitator, aimed at providing her with additional opportunities for support.

[46] The applicant was offered supplementary domiciliary care to assist with caring for her sons in the family house during the lockdown period (for example getting them ready in the morning, bathing, feeding and/or putting them to bed). These offers were declined. In recent times there were indications this type of help would be accepted when it was re-offered for the purpose of freeing the applicant to do the family grocery shopping for several hours per week.

[47] Prior to the MC reopening the JC was offered as a possibility during the initial lockdown. This was able to open on a limited capacity basis during the lockdown period to offer day services but was declined by the applicant.

[48] The Trust offered to provide overnight care through the “*School house facility*” in A which is operated by an accredited independent service provider, “*IncredABLE*.” This was rejected by the applicants’ mother owing to concerns about environmental suitability.

[49] A similar facility which operated in K was offered but it too was declined due to location.

[50] I make it clear that I make no criticism of the applicant for declining these options. Her refusal was based on genuine concerns about the suitability of this alternative provision. Nonetheless, it was clear that the Trust was actively and conscientiously seeking alternative solutions to provide for J and L’s needs.

[51] On 27 April 2020 advice was provided regarding the specially designed sensory garden at SLH which provides families and carers with access to a safe space. A car can be driven in and the garden locked from within to ensure nobody else has access to it during a visit. This offer was declined as the family have a garden at their home.

[52] The applicant at her request was provided with PPE (gloves and masks).

[53] The following specialist services were offered:

- (a) Physiotherapy;
- (b) Behavioural Support Services;
- (c) Home treatment and crisis response;
- (d) Occupational therapy;
- (e) Speech and language therapy resources;
- (f) GP and primary care services;
- (g) Independent advocacy services provided through Disability Action.

[54] The applicants' mother was not happy with many of the suggestions of behavioural support service but has more recently engaged with the service and occupational therapy when they were offered.

[55] In my view any fair analysis of the factual background leads to the conclusion that there was a significant level of contact and support offered and provided by the respondent to the applicant during this period.

Consideration

The Applicant's Case

[56] The applicant's case is straightforward. J and Ls' needs have been assessed as recently as July 2019. Their needs have not been reassessed. Their needs have not changed. What has changed is the resources available to the Trust arising from restrictions imposed by the Covid-19 pandemic. Therefore, it is argued the respondent has not engaged in any review or reassessment of J and Ls' needs so as to set the clock back to stages (i) and (ii) of the three stage process. Instead, what the Trust has done is to take into account resource issues at the third and final stage which is impermissible and falls within the illegality identified in **Barry, LW and KM**.

[57] Ms Anyadike-Danes argues that the respondent's own evidence supports this submission. Thus, in the documentation provided by the respondent in relation to purported reviews or reassessments of J and L post-March 2020 it is noted that they continue to meet the criteria for day care due to complex needs, the criteria for bed base respite services and residential level of need (as per assessed needs) and the eligibility criteria for domiciliary care.

[58] By way of example in a review/reassessment of J dated 19 June 2020 in relation to day care it is noted that as at 23 March 2020 "*day service provision was stood down due to Covid pandemic by Assistant Director of Disability Services.*" Similar comments are made in relation to respite care and domiciliary care. Under the heading "Points of Difference" which reflects the applicant's views the following is recorded:

“Original care plan remains appropriate to meet J’s assessed need. However, respite, domiciliary and day care provision are currently not available in their entirety due to Covid-19 situation.”

[59] The applicant further submits that this approach is reflected in the respondent’s pre-action reply letter dated 24 June 2020 which states that *“further assessment was based on the reduced resources available during the pandemic”* and that *“throughout the entire Covid-19 period the Trust has kept J and Ls’ needs under continual review and adjusted the provision of service accordingly.”*

[60] In response to any argument that the consequences of the Covid-19 regulations (see paragraph 73 below) meant the respondent was unable to comply with its obligations under section 2 the applicant points out that some statutory duties were modified to recognise this reality. For example, the Coronavirus Act 2020 Temporary Modification of Educational Duties (No. 10) (Northern Ireland) 2020 modified the duties owed to children and parents by schools, health and social care authorities, the Education Authority etc to “best endeavours” duties where they were unable to comply with their original duties because of the outbreak of Covid-19 in Northern Ireland. Also, the Children Social Care (Coronavirus) (Temporary Modification of Children’s Social Care) Regulations (Northern Ireland) 2020 modified the obligations owed by Trusts to looked after children.

[61] In England, the Care Act 2014 repealed the Chronically Sick and Disabled Persons Act 1970. The Coronavirus Act 2020 allowed for time limit easements to care act duties imposed on local authorities in England. The “duty” to meet eligible needs was supplanted by a “power” to meet needs.

[62] In this jurisdiction the Health Minister confirmed in a letter to the applicant’s solicitor dated 15 May 2020 that the statutory duty in section 2 had not been modified, nor was there any intention of doing so in the future. In those circumstances the applicant contends that the absolute duty under section 2 remains extant. Undoubtedly, had legislation been introduced to modify the section 2 obligation the decision for the court would have been more straightforward. However, the court has proceeded on the basis of analysing the section 2 duty in accordance with the existing legal position.

The Respondent’s Case

[63] The respondent counters that, properly analysed, reviews/reassessments of the applicants were conducted in April, May, June, July, October, November and December and that provision was made for J and Ls’ needs in accordance with those reviews/reassessments.

[64] The court has been provided with substantial documentation in relation to the respondent's interaction with the applicant and J and L since March 2020. The documentation includes a detailed chronology. The chronology reveals very extensive contact between the respondent and the applicant. The contact was regular, often on a daily basis.

[65] The court has also been provided with the documentation under the headings "Review/Reassessments." The records provided indicate that a review/reassessment of J and L was carried out on the following dates:

- 12 May 2020 – completed 22 June 2020
- 2 July 2020 – completed 20 July 2020
- 27 October 2020
- 2 November 2020
- 4 November 2020
- 9 December 2020

[66] In short, the respondents say that the applicants' needs have changed as a result of these reviews/reassessments which have been required as a result of the effects of the Covid-19 pandemic.

[67] In relation to the section 2 duty the respondent in effect makes two points. Firstly, it is argued that J and Ls' needs clearly changed during the pandemic. The provision of services post March 2020 must incorporate the "need" to protect each of the applicants from the risk of Covid-19 infection. The changes made in the facilities which were available prior to March 2020 had to be adapted to provide as far as possible a risk free environment for users. That is why the ML facility originally closed and why it is now only available for use in a reduced capacity. The respondent argues that even if the needs have not changed it still is permitted to review and change the arrangements which are necessary for the services it makes in order to provide for those needs.

[68] That the Trust is entitled to reassess arrangements for the chronically sick and disabled persons' needs is clear. The applicant says that in this case there has not actually been a reassessment.

[69] In the case of **R(McDonald) v Kensington and Chelsea RLBC** [2011] UKSC 33 which dealt with the local authority's assessment of a claimant's needs under the National Health Service and Community Care Act 1990, at paragraphs 52 and onwards Lord Dyson says:

"52. ... It is not in dispute that it is open to a local authority to reassess a person's needs in a Care Plan Review. Nor do I understand it to be in issue that the fact that a person's underlying presenting need has not changed does not prevent a local authority from making a reassessment. Provided that it

does not act in a Wednesbury unreasonable way or in breach of a person's rights under the European Convention on Human Rights, it is open to an authority to make a reassessment in circumstances including that (i) there has been a change in the eligibility criteria for the assessment of needs; (ii) there have been relevant medical or technological developments which justify a change and (iii) the authority has simply had further thoughts and changed its mind as to what is the proper assessment of the need.

53. *In construing assessments and care plan reviews, it should not be overlooked that these are documents that are usually drafted by social workers. They are not drafted by lawyers, nor should they be. They should be construed in a practical way against the factual background in which they are written and with the aim of seeking to discover the substance of their true meaning."*

[70] Although dealing with a different statutory provision, it seems to me that the comments of Lord Dyson are apposite to this case. The examples provided by him are not exhaustive and it seems to the court that the circumstances that arose from the Covid-19 pandemic and the necessary restrictions imposed to protect public health must be relevant circumstances in this case.

[71] In my view it would be completely artificial and unrealistic to say that services deemed to be necessary to meet the needs of persons in J and Ls' position prior to the Covid-19 pandemic could not be lawfully reviewed or reassessed in light of the changes designed to deal with the public health emergency from March 2020 onwards. As was famously said by Lord Steyn in **R(Daly v Secretary of State for the Home Department) [2001] 2 AC 532** "*in law context is everything.*"

[72] The assessment of J and Ls' needs cannot be considered in a vacuum.

What then was the context for the purported reviews/reassessments?

[73] In March 2020 Northern Ireland faced the Covid-19 coronavirus public health crisis. Emergency legislation was introduced by the Department of Health in the form of the Health Protection (Coronavirus) Regulations (Northern Ireland) 2020.

[74] The regulations imposed severe restrictions across all aspects of life in Northern Ireland. This affected the manner in which the respondent was able to provide services to service users and their families.

[75] The regulations were designed to protect the public health during an unprecedented health crisis.

[76] The potential implications of the regulations for the provision of care to meet the needs of persons such as J and L was set out immediately prior to the introduction of the regulations on 13 March 2020 in a letter from the respondent to its service users in the following terms:

“... Disability (Mental Health) Services are at an advanced planning stage to address any impact of the coronal virus known as Covid-19 might have on the services provided for you and your loved ones. Our teams have developed detailed action plans which outline steps to be taken as service users or staff are affected with Covid-19. One of the key decisions to be taken may be to temporarily stand down services or part of a service, such as day services, short breaks, community teams, outpatient appointments and scheduled home visits. The public health agency are in daily contact with the Trust and the decisions we take will emerge according to this changing advice. We will only take a decision to reduce or stand down all, or parts of our services, if either the risk of cross-infection or staff sickness requires us to do so. We will strive to maintain services where possible, but we cannot guarantee we will be able to maintain all services, in light of possible impact of Covid-19. ...”

[My underlining]

This set the context for the subsequent reviews/reassessments and alternative arrangements made for J and L.

[77] In considering the reviews/reassessments it is important to remember that they were drafted by social workers and not by lawyers. Again, as per Lord Dyson in **McDonald** such documents “*should be construed in a practical way, against the factual background in which they are written and with the aim of seeking to discover the substance of their true meaning.*”

[78] Adopting that approach it seems to me that the reviews carried out by the respondent can properly be interpreted as applying to stage (ii) of the three stages.

[79] This finding does not give a “*blank cheque*” to the respondent. It simply means that the consequences of the pandemic were matters for proper consideration by the respondent in assessing the arrangements necessary to meet the needs of J and L while the restrictions imposed as a result of the pandemic were in play. The decisions of the respondent remain subject to the scrutiny of the court. It will carry out that scrutiny conscious of the rights of the applicant on behalf of J and L.

[80] In my view it is clear that throughout the relevant period the Trust made strenuous efforts to meet the needs of J and L within the context of the unavoidable restrictions. It is suggested that they did not take any account of the applicant’s wishes but this simply does not stand up to scrutiny. All the reviews expressly

record the views of the applicant. It is also clear from the regular and ongoing contact between the Trust and the applicant as set out in the chronology that there was extensive and real engagement. The records reveal that the applicant's view is and was that care should be restored to the pre-March 2020 level.

[81] Throughout the relevant period the Trust has sought to reinstate the full extent of the services provided to J and L prior to the pandemic restrictions. It was however compelled to do so in a way that ensured the facilities were provided in a safe way so as to prevent the risk of infection, particularly to vulnerable persons such as the applicants. This required significant adaptations to the facilities.

[82] As envisaged in one of the examples referred to by Lord Dyson in **McDonald** the consequences of the pandemic required a review of the eligibility criteria for day care placements which set out a four phase resumption plan.

[83] **Phase 1** commenced on 6 July 2020 whereby places were offered to those already attending day care pre-Covid based on regionally agreed thresholds (phased re-opening of day care centres at this stage). The majority of service users offered two days at day care based on professional knowledge and judgment of service user and carer needs.

[84] **Phase 2** commenced on 27 July 2020 when additional day care centres re-opened with reduced day care attendance being made available across multiple sites.

[85] **Phase 3** commenced on 10 August 2020 when places were offered to those requesting an additional day (third day) based on meeting one or more of agreed criteria.

[86] **Phase 4** – 19 October 2020 – consideration to be given to those requesting an additional third and fourth day at day care. The plan set out criteria for additional days which included:

- More than one sibling in the same household known to services with complex needs and/or challenging behaviour.
- Service users in need of protection as a result of current safeguarding concerns.
- Single carers or carers over 70 years experiencing extreme stress and fulfilling responsibility where there is limited family/social support.
- Other significant extenuating circumstances as agreed with relevant day care and community service heads of services at weekends or face meetings.

[87] The review also indicated that *“where there remains a level of unmet need in relation to day care placements, the Trust will continue to seek and agree with service users and carers the provision of alternative person centred supports. This includes DP/SDS and domiciliary care support.”* The increase in day care allocation was clearly subject to

ongoing review taking account of all relevant infection control and social distancing requirements. The safety of service users, families and staff were required to be taken into account by the Trust in ensuring all infection control requirements were met within the day care services which were provided to the applicants and others.

[88] The review included an appendix which set out detailed regional criteria and priority groups for the provision of this facility.

[89] These criteria were underpinned by the current best practice in infection control and government guidance regarding Covid-19 and were subject to ongoing review.

[90] It is clear to me from the papers that through its strenuous efforts the respondent conscientiously carried out their statutory obligations to assess and meet the needs of J and L under section 2. In my view they were entitled to take into consideration in assessing those needs the consequences of the Covid-19 pandemic. Their particular application to the applicants could in no sense be considered unreasonable in the Wednesbury sense.

[91] The court takes seriously its supervisory role in relation to the actions of the respondent in fulfilling its statutory obligations, particularly to vulnerable persons such as J and L. The court fully accepts and understands the distress and frustration of the applicant throughout this extremely difficult period.

[92] I have no difficulty in accepting that the changes to the care provided to J and L caused them significant upset. Equally, I accept that this in turn caused great stress for the applicant as their main carer. She has been a determined and committed advocate for them and she clearly has their best interests at heart. However, this does not mean that the respondent has acted unlawfully in the arrangements it made for the provision of care to J and L since March 2020.

[93] In assessing the obligations of the respondent a further relevant consideration is the impossibility of the continued provision of the arrangements assessed as needed prior to the Covid-19 pandemic. I do not consider that it can be reasonably argued that the respondent was not obliged to close down the ML when the Covid-19 pandemic struck. This was necessary to ensure that it could be opened safely. Indeed, in October 2020 after it had been re-opened it had to be closed for a number of days because of the outbreak of an infection. Put simply, it was impossible for the Trust to provide 5 day care to J and L at this facility. Thus, in assessing the obligations of the respondent under section 2 the court is entitled to allow a period of time to the respondent to comply with its obligations either by reopening the facility in a safe manner or providing reasonable alternatives. What is a reasonable time and what are reasonable alternatives will depend on the circumstances of the case. In different circumstances the courts in this jurisdiction have permitted Trusts time to comply with similar statutory duties – see the

judgment of O'Hara J in **SW2** [2018] NIQB 104 and McCloskey J (as he then was) in **JR47** [2013] NIQB 7.

[94] Whether the obligation of the respondent is assessed on the basis of an "*absolute duty*" or a duty subject to Wednesbury review I consider the reasonable period for the respondent for compliance has not elapsed and that reasonable alternatives have been provided. This is because these assessments must be made in the context of the restrictions arising from the Covid-19 pandemic.

Human Rights Claim

[95] Although not a central feature of their application the applicants allege that there has been a breach of their rights under Articles 3 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[96] In relation to Article 3 I do not see how the minimum threshold of severity necessary to establish a violation has been met in this case. Any review of the leading authorities in this field, in my view, provides no support or precedent for the suggestion that anything J and L have suffered, notwithstanding their vulnerability, or anything the Trust has done in this case comes close to the threshold of constituting torture or inhumane and degrading treatment. There is simply insufficient evidence before the court of the type which I would expect to see in support of a purported breach of Article 3. In coming to this conclusion, although not conclusive, I bear in mind that on no account could it be suggested that the respondent's purpose in relation to the altered provision of care to J and L was to humiliate or debase them.

[97] In respect of Article 8, for the purposes of this consideration I act on the basis that it is engaged for J and L. It seems to me that any interference clearly falls within the qualification of 8(2) and is lawful bearing in mind the public health crisis and the adjustments necessary to deal with the crisis. Any interference is in my view clearly within the law and is necessary in a democratic society in the interests of public safety, as set out in 8(2). In my view the respondent has struck an appropriate balance between the competing interests of J and L and the community as a whole. The respondent's actions constituted a proportionate response to J and Ls' needs. It seems to me that the courts' analysis of the Section 2 obligation both in this case and in the cases to which I have referred is entirely consistent with J and Ls' rights under Article 8. In truth the Article 8 argument adds nothing to the substance of the applicant's case.

Conclusion

[98] In summary I conclude that there has been no breach of the respondent's duty to J and L under section 2 of the Chronically Sick and Disabled Persons (Northern Ireland) Act 1978. In respect of the needs which came within the scope of section 2 I conclude that the arrangements necessary to meet those needs were lawfully

reassessed. That reassessment was necessary because of the difficulties that arose as a result of the restrictions imposed to deal with the Covid-19 pandemic. The resultant change in circumstances was a relevant factor to be considered by the respondent in complying with its section 2 obligations to J and L. On the evidence in this case the reassessments and reviews were fairly and lawfully applied to J and L. The relevant circumstances resulted in changed criteria which were necessary and were fairly applied to J and L.

[99] In relation to provision outside the scope of section 2 I again consider that the reassessment and subsequent provision carried out was both lawful and reasonable.

[100] As indicated in the judgment these conclusions do not give a “*blank cheque*” to the respondent who remains under an ongoing duty to make the necessary arrangements to meet J and Ls’ needs.

[101] The application for judicial review is therefore refused.