Neutral Citation No: [2024] NICA 77 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **McC12648** *ICOS No:* **21/066972/A01** *Delivered:* **20/11/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF AN APPLICATION BY ROBIN McMINNIS FOR JUDICIAL REVIEW

and

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY

[1] ROBIN McMINNIS

and

[2] THE COMMISSIONER FOR OLDER PEOPLE FOR NORTHERN IRELAND ("COPNI")

v

THE DEPARTMENT OF HEALTH

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Mr Tony McGleenan KC and Mr Terence McCleave (instructed by the Departmental Solicitor's Office) for the Department of Health
Ms Fiona Doherty KC and Ms Bobbie-Leigh Herdman (instructed by COPNI Head of Legal Services) for COPNI

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Before: McCloskey LJ, Horner LJ and McBride J

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McCLOSKEY LJ (*delivering the judgment of the court*)

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APPENDICES

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GLOSSARY

2009 Act	Health and Social Care (Reform) Act (NI) 2009
BHSCT	Belfast Health and Social Care Trust
CHC	Continuing Healthcare
2010 Circular/Policy	Circular HSC (ECCU) 1/2010 - 'Care Management, Provision of Services and Charging Guidance'
2021 Circular/Policy	Circular HSC (ECCU) 1/2021 - 'Continuing Healthcare in Northern Ireland: Introducing a fair and transparent system'
COPNI/The Commissioner	Commissioner for Older People for Northern Ireland
DOH/The Department	The Department of Health
ECNI	Equality Commission for Norther Ireland

EQIA	Equality Impact Assessment
HSC	Health and Social Care
HSC Board	The Health and Social Care Board
HSCT	Health and Social Care Trust
NIPSO	Northern Ireland Public Services Ombudsman
NISAT	Northern Ireland Single Assessment Tool
NNAT	National Nursing Assessment Tool
NHSCT	Northern Health and Social Care Trust
1972 Order	Health and Personal Social Services (NI) Order 1972
1991 Order	Health and Personal Social Services (NI) Order 1991
1993 Regulations	Health and Personal Social Services (Assessment of Resources) Regulations (NI) 1993
SHSCT	Southern Health and Social Care Trust
SEHSCT	South-Eastern Health and Social Care Trust
WHSCT	Western Health and Social Care Trust
NHSCT	Northern Health and Social Care Trust

1. Introduction

[1] Since the partition of the island of Ireland a century ago, health and social care (formerly health services and personal social services) has been a devolved ("transferred") matter, thereby lying within the competence of the Northern Ireland ("NI") legislature for the time being. With the exception of earlier statutes (para [25] infra), the legislation in this jurisdiction has had two core themes. First, in contrast with England and Wales, NI has developed an integrated system of health care and social care, now of some 50 years vintage. Second, in NI health care and social care are distinct concepts.

[2] One further feature of the Northern Irish legislation must be highlighted. Notwithstanding the principle of the free welfare state, very focused provision has

been made for charging the beneficiary citizen for certain types of service. The particular statutory provisions of this *genre* which arises in these appeals are those which empower the relevant public authority to charge the beneficiary for the cost incurred in providing the person with accommodation for their social care. Accommodation provided for a person's health care is, in contrast, free of charge by statute unless provided in a setting other than a hospital. The conundrum exposed by this appeal belongs to the interface and combination of health care and social care. In the abstract, it is difficult to conceive of a person accommodated at the expense of the State having health care needs and no social care needs. How, therefore, to assess the cost of and levy a charge for the latter? This is the testing question which has given rise to these proceedings.

2. Parties and Remedies

[3] The two parties who initiated these judicial review proceedings are, respectively, Robin McMinnis and The Commissioner for Older People for Northern Ireland ("COPNI"/"the Commissioner"). This appeal is brought by the Department of Health ("the Department"). At first instance a fourth party, namely the Belfast Health and Social Care Trust ("BHSCT") was involved. Pursuant to the judgment of Scoffield J, the High Court made an order quashing the impugned decision of BHSCT coupled with a remittal for reconsideration. Mr McMinnis, therefore, succeeded at first instance. There is no appeal by BHSCT against this quashing order. And, unsurprisingly, no appeal by Mr McMinnis.

[4] As a result, there are but two parties to this appeal, namely COPNI and the Department. The dispute between these two parties concerns the Department's policy relating to the provision of "continuing health care" (CHC), which denotes the practice of the health service meeting the cost of any social care need which is driven primarily by a health need in Northern Ireland in a post – hospital setting. The CHC policy of the Department was previously contained in a 2010 instrument (which applied in the case of Mr McMinnis) which was followed by a revised measure introduced in 2021. As against the Department the High Court granted the following two remedies:

(a) A declaration that the Department had irrationally (and, hence, unlawfully) failed to provide guidance to the five Northern Ireland Health and Social Care Trusts ("HSCTs") in determining eligibility for continuing CHC under the 2010 policy.

(b) An order quashing the 2021 CHC policy as it was in breach of the duty imposed upon the Department by section 75 of the Northern Ireland Act 1998 in that the preceding screening exercise "… did not begin to properly consider the true impact of the new policy on older people".

3. Statutory Framework

[5] The integrated system of health and social care (formerly health and personal social services) which has prevailed in Northern Ireland for some 75 years is comprehensively regulated by statute. For almost four decades, the Health and Personal Social Services (Northern Ireland) Order 1972 (the "1972 Order") was the dominant statutory measure. This largely superseded the Health Services Act (NI) 1948 and certain subsequent related measures, together with the National Health Service Act (NI) 1948. While certain of the provisions of the 1972 Order continue to apply, it now co-exists with and is in a number of respects overtaken by the Health and Social Care (Reform) Act (Northern Ireland) 2009 (the "2009 Act"), giving rise to an unfortunately complex and untidy marriage. Various provisions of both measures were considered in the recent judgment of this court in *Re Wilson and Kitchen* [2023] NICA 54, at paras [6] – [12]. As this is a lengthy judgment and the statutory references are bulky, these have been assigned to three Appendices to this judgment. All of the statutory provisions noted in paras [6] – [13] are collated in Appendices 1 and 2.

[6] Section 2 of the 2009 Act is the dominant statutory provision. It stands at the pinnacle of the statutory arrangements for the provision of health care and social care in this jurisdiction. It requires the Department to promote in Northern Ireland an "integrated system" of healthcare and social care. It further prescribes a series of individual duties, including the formulation of "general policy and principles", incidental to this umbrella duty. Section 3 is to be contrasted. Here the statutory language, notably, is that of "power" and "may", to be contrasted with the consistent use of "shall" throughout section 2. It confers powers on the Department designed to facilitate the performance of the overarching duty in section 2. In section 21, in language closely resembling that of section 2(1), the focus is on Health and Social Care Trusts ("HSC Trusts"), which are the Department's statutory agents.

[7] The legislation establishes a clear and consistent dichotomy of health care and social care. Both terms have wide statutory definitions. The former denotes "any services designed to secure any of the objects of [section 2] subsection (1)(a)". The latter, meaning "any services designed to secure any of the objects of [section 2] subsection (1)(b), encapsulates what was previously described by statute as "personal social services".

[8] Summarising, the 2009 Act subjects the Department to a duty to promote integrated health and social care; established a single regional Health and Social Care Board which in particular was to oversee the commissioning, financial management and performance management of the five integrated HSCTs; placed responsibility on the HSCTs for primary, secondary and community health care instead of the regional Health Authority; and created a Public Health Agency. While the decade which followed has been marked by frequent policy publications, only those of direct relevance to the issues raised in these proceedings are addressed in Chapter 4 infra.

[9] While (as noted) the 2009 Act is the most recent landmark measure of statutory intervention in this field, certain provisions of the 1972 Order continue to apply (see Appendix 2). First, Article 5 obliges the Department to provide "to such extent as it considers necessary" specified types of accommodation and services, including hospitals and other premises. The latter are required for the provision of any of the services provided under the 1972 Order or the 2009 Act. Article 7 prescribes the Department's function relating to the prevention and treatment of illness and creates a discretion to charge for services provided other than in a hospital.

[10] Article 15 of the 1972 Order has as its exclusive focus "social care". To this end, each HSC Trust shall provide advice, guidance, assistance, facilities, residential or other accommodation and home help facilities "… as it considers suitable and adequate". Trusts are empowered to execute contracts for these purposes. Article 36 operates in tandem with Article 15. In particular, it requires that where services provided to a person consists of or include "accommodation", this must be in either (a) a registered residential care home or (b) a registered nursing home.

[11] Within the broad sweep of Articles 5, 7(1), 15 and 36 of the 1972 Order, one of the specific statutory functions is that of providing accommodation to appropriate persons for the purposes of health care and social care. These provisions constitute the more detailed out-workings of the "macro" duty enshrined in section 2 of the 2009 Act and operate in tandem with section 8 thereof.

[12] Articles 98 and 99 also fall to be considered (see Appendix 2). These are two of the "charging" provisions of the legislation. They enact the general rule that services provided under the 1972 Order and certain other specified statutory measures "*shall* be free of charge", except where a statutory provision authorises "the making and recovery of charges".

[13] These are labyrinthine provisions indeed. Happily, those elements which are of importance in these proceedings are relatively few in number. The judge offered the following summary at para [17] of his judgment:

> "A basic summary of the position as set out above may be said to be as follows: (1) the Department or Trusts may charge a service user for social care services, although they are not obliged to; except that (2) they are obliged to charge a service user for accommodation provided by way of social care (subject to the user's means); provided always that (3) they cannot charge in that way for any nursing care provided by a registered nurse."

We shall revisit this summary infra: see especially paras [111] – [112] (and see also para [47]).

4. The CHC Policies: Evolution

[14] The Continuing Health Care ("CHC") policy which is the subject of the trial judge's declaratory order was adopted by the Department in 2010. A revised version followed in 2021. An outline of their extra-statutory genesis is appropriate. While the period under heaviest scrutiny in these proceedings has consistently been 2010 – 2021, it must not be overlooked that (per the Department's affidavit evidence) the 2010 Circular formed part of a policy continuum which can be traced to the seminal "People First" publication, in 1990. This enunciated a landmark policy shift from long term hospital care to long term community care. The immediately preceding sentence serves to illuminate the meaning of CHC: this term denotes continuing health care in a setting other than a hospital following hospital care. This term omits any express reference to social care.

[15] People First inter alia drew attention to the aforementioned health care/social care dichotomy, simultaneously highlighting the distinction between Northern Ireland and Great Britain, where health care and social care are not integrated, ie they are provided by separate authorities. Unsurprisingly, the need for liaison between health care professionals (on the one hand) and social care professionals (on the other) was emphasised. Another striking feature of this publication is the emphasis on the uniqueness of every person's care needs and personal and social circumstances. There is a related emphasis on the need for a proper assessment of the needs and circumstances of every individual.

[16] People First also noted certain evolving developments in the provision of the care needs of people in Northern Ireland. At that time, for those requiring residential or nursing home care, provision was made by a range of statutory, private and voluntary establishments. Of particular significance was the phenomenon of the substantial increase in the number of places provided by the private sector. This was attributed largely to the availability of social security funds (mainly Income Support) upon which the individual could draw to pay for the services provided. The Northern Ireland integration of health care services and social care services features particularly in chapter 9 of the publication, again in the context of the policy shift towards expanding care in the community. In furtherance of this policy development, the Health and Social Care Boards, thitherto providers of care only, became appointed purchasers of care. This in effect meant contracting with the private sector owners of nursing care and residential care establishments for the purpose of discharging the statutory functions and duties in play.

[17] The fundamental policy shift which People First enunciated is encapsulated in chapter 10:

> "10.1 Community care is being practiced, with varying degrees of energy, financial input and success, in every area of Northern Ireland. The proposals in this paper are

intended to create a clearer framework and better opportunities for its successful practice.

10.2 Good progress has already been made in shifting the balance of care from hospital to the community and enabling clients to stay in the community. Much more remains still to be achieved. the Department expects further work to be done in the spirit of this policy paper and in line with the central objectives set out in Chapter 1.

10.3 Although this paper calls for changes in the way in which community care is planned and delivered, the overall direction of these changes is not new. Because the paper presents a vision for the decade, in its totality it offers a great many challenges. However not all the changes which it foreshadows have to be introduced immediately, and some will have to be made gradually, over a period of years. The availability of resources overall will naturally influence the pace at which the new policy is implemented.

10.7 The evolutionary nature of some of these changes means that Boards will plan systematically for their introduction over a longer period, building on existing good practise and piloting innovative services. These longer term changes include developing the case management approach, promoting a mixed economy of care and introducing new purchasing and contracting arrangements. This developmental work should all be driven by the central aim of identifying and meeting clients' individual needs. In taking this work forward, Boards will have to take the initiative in creating a partnership with the independent sector which allows for frank and open discussion of the needs which Boards identify and of the provision which they wish to purchase. A partnership of mutual trust and understanding should enable the independent sector to assess market opportunities more accurately and should permit Boards to identify the most appropriate contribution to be made by that sector to their clients' care.

10.8 The Department intends to support Boards in the implementation of the changes in this paper by issuing guidance; by linking into implementation work under way at national level; and by participating in the disseminating the outcomes of national professional development projects."

The need for planning and phased changes was highlighted. Simultaneously (and unavoidably) the importance of resources was noted:

> "The availability of resources overall will naturally influence the pace at which the new policy is implemented."

One of the four governing principles was that of concentrating on those with the greatest needs [para 1.13]. One of the specific policy aims was to expand the availability of domiciliary care, thereby providing a counterbalance to what was noted regarding the previous decade [in para 1.9]:

> "The arrangements for public funding have contained a built-in bias towards residential and nursing home care, rather than services for people at home."

[18] Some two decades later, in Research Paper 44/10 (30 November 2009) the Northern Ireland Assembly ("NIA") was informed that older people, particularly those living alone, constituted the largest single group of users of community social care services. The paper noted that People First had been followed, in 2002, by the publication of the Department's "Review of Community Care", which focused particularly on enabling people to live in their own homes. The largest increase in care packages for those aged 65 and over had been in the nursing home sector, with residential care packages increasing only marginally, while domiciliary care provision had increased by 12%. Notably, progress in the desired shift from institutional care was described as static by reason of the "continuing pressure of increasing nursing home placements".

[19] The next port of call is the 2010 Circular, which inter alia embodies the CHC policy. Summarising, the 2010 CHC policy was subsumed within this larger instrument of policy guidance and had a lifespan of approximately 10 years, being superseded by its 2021 successor. The contents of this measure make clear its indelible nexus with People First. Its self-description is "updated guidance …. [on inter alia] …. the care management process including assessment and case management of health and social care needs …. [and] … charging for personal social services provided in residential care homes and nursing homes." Upon perusing these introductory passages the reader is at once alerted to a particular phenomenon, namely that of the provision of personal social services to persons receiving health care in residential care homes and nursing homes ("personal social services" being the outdated descriptor of "social care.")

[20] Pausing, the ambiguity foreshadowed in the comment immediately above becomes at once apparent. Stated succinctly, "CHC" is a misnomer, being both the label and the language of a policy which addresses both health care and social care. One further observation appropriate at this stage is that this misnomer is not one of

the constituent elements of the case made (and accepted by the judge) that the Department's failure to promulgate guidance on the operation of the 2010 CHC policy was irrational.

[21] Notably, the Northern Ireland Single Assessment Tool (NISAT), which was first introduced at around the same time, features prominently in the initial pages of the Circular. This, it is stated –

> "… has been developed and validated, primarily in relation to assessing the needs of older people … [It] supports the exercise of professional judgement in the care management process and the earliest possible provision of safe and effective health and social care …
>
> It is structured in component parts and using domains which will be completed according to the level of health and social care needs experienced from non-complex to complex."

The passages which follow draw attention to the broad range of health care professionals and social care professionals expected to be involved in the utilisation of NISAT for health care and social care assessments. Forthcoming NISAT training is also noted. In passing, this mechanism coexists with the National Nursing Assessment Tool (NNAT).

[22] It is in this context that the key provision of the 2010 Circular (in the present context), paragraph 17, located in the chapter entitled "Assessment of Need", falls to be considered:

> "Similarly, the distinction between health and social care needs is complex and requires a careful appraisal of each individual's needs. In this context, it is for clinicians, together with other health and social care professional colleagues and in consultation with the service user, his/her family and carers, to determine through a comprehensive assessment of need whether an individual's primary need is for healthcare or for personal social services. In the latter case the service user may be required to pay a means tested contribution."

Notably, the terminology "primary need" is not the language of any of the statutory provisions under scrutiny. It derives, rather, from the 2010 CHC policy.

[23] Certain further passages in the 2010 Circular should be highlighted. By paragraphs 63 and 64:

> **"63. The Health and Personal Social Services (Northern Ireland) Order 1972 requires that a person is charged for personal social services provided in residential care or nursing home accommodation arranged by a HSC Trust.** There is no such requirement, or authority, to charge for healthcare provided in the community, either in the service user's own home or in a residential care or nursing home. **Consequently, all references to financial assessment and charging hereafter apply to the provision of personal social services in residential care or nursing home accommodation.**
>
> **64. A financial assessment should only commence** after **an assessment of the service user's health and social care needs has been completed. The financial circumstances of individuals** should never **be used as the reason for failing to offer assessment of need or, as appropriate, access to the care management process."**
> **[emphasis in original]**

Paragraph 17 must be juxtaposed with paragraph 88:

> "When contracting with homes, HSC Trusts should contract for the full cost of the placement, and, where there had not been a determination of continuing healthcare need, seek reimbursement under the 1993 Regulations. Residents can, however, seek the agreement of both the HSC Trust and the home to pay their assessed contribution directly to the home…"

[24] Summarising, the various elements of the CHC policy are contained in paragraphs 17, 63, 64 and 88 of the 2010 Circular. While these provisions must of course be considered together, paragraph 17 is, in the context of these proceedings, the stand-out provision. We remind ourselves that the construction of any policy or other document is a question of law for the court (see para [88] infra).

[25] In paras [1] and [15] above we have adverted to the differences between the regimes in Northern Ireland (on the one hand) and England and Wales (on the other) governing the provision of health services and social services. As already highlighted, the NI integrated system of health care and social care is not replicated in the other jurisdiction. The terminology "National Health Service "("NHS") applies exclusively to the jurisdictions of England & Wales and Scotland. This terminology contains no mention of social care, reflecting the fundamental distinction already noted. "NHS" is a statutory term, traceable to the National Health Service Act 1946 and subsequent kindred measures, all confined to the other two jurisdictions. Meantime, Northern Ireland ploughed its own furrow with the Health Services Act (NI) 1948 and the

Welfare Services Act (NI) 1949, with the later advent of the unified statutory regime via the 1972 Order.

[26] Unlike Northern Ireland, in its original conception and statutory incarnation, the NHS comprised the tripartite elements of hospital services, primary care and community services. All of these related to the provision of health care only. The distinction between the two jurisdictions is highlighted by one of the many reforms which the England and Wales system has undergone, namely the reorganisation in 1974 which united the services provided by hospitals and those provided by local authorities via the introduction of regional health authorities. Further reforms during the three decades which followed have served to preserve and emphasise the distinction noted.

[27] In England and Wales (unlike Northern Ireland) the concept of social care (or personal social services) was not created by legislation. The National Assistance Act 1948, which did not apply to Northern Ireland, established in substance a welfare state of last resort administered by local authority social services departments and having as its focus the most impoverished members of society. It effectively replaced the Victorian Poor Laws with their infrastructure of workhouses. It operated outside the realm of the NHS. The corresponding post-war statutory measure in Northern Ireland was the Welfare Services Act (NI) 1948.

[28] In the jurisdiction of England and Wales what does "Continuing Healthcare" denote? Within the voluminous documentary evidence, some indication of the definition of this term is found in the Department's consultation paper of June 2017 (para [41]ff infra):

> "In England, NHS Continuing Healthcare is the name given to a package of care which is arranged and funded solely by the NHS for individuals outside of hospital who have ongoing health needs …
>
> In Wales, Continuing NHS Healthcare is a package of care provided by the NHS for those individuals with complex and primarily health-based needs."

The absence of any mention of social care in these passages reflects the differences between the regimes in the two jurisdictions highlighted above. The evidence amassed before this court indicates that the concept of "continuing health care" exists in the jurisdiction of England and Wales. However, as the foregoing resume demonstrates, caution is required in any purported comparison between the two jurisdictions.

[29] One further reason for caution is the nature of the evidence bearing on this issue. Thus, for example, little of substance can be drawn from the indication that in the other jurisdiction there are "… detailed eligibility criteria guidance which includes a detailed Decision Support Tool for NHS continuing Healthcare" (per the 2016

Ministerial submission: para [42] infra). The mere inclusion of these detailed and technical instruments in the voluminous documentary evidence before this court achieves little in the resistance offered to the Department's appeal. This observation applies with particular force in a context where the references to these materials in counsels' arguments were notably limited. Furthermore, they receive scant illumination in affidavit evidence sworn by suitably qualified officials or experts. In addition, and understandably, this bulky evidence received limited attention in the judgment of Scoffield J. It follows necessarily that this court will tread warily on this discrete front.

5. From 2010 to 2021

[30] Certain material events belonging to the period 2010 to 2021 must be considered as they form the evidential foundation for the declaration of the High Court, under appeal, that the Department had irrationally failed to provide guidance to the five NI HSCTS on the operation of the CHC provisions in the 2010 policy. First, in May 2014 Age NI published "The Denial of NHS Continuing Healthcare in Northern Ireland". A perusal of the report indicates that the sources of its information included the four NIHSC Trusts, a Ministerial response to a Northern Ireland Assembly question, a response letter from the Department Minister's Office and certain unidentified public authorities in the three neighbouring jurisdictions.

[31] The Age NI publication invites careful analysis:

(a) To begin with, it contains three case studies relating to the provision of CHC to three people resident in other jurisdictions in GB where different legislation and policies apply.

(b) It compares data from the two jurisdictions without any consideration of their fundamentally different populations (that of NI being circa 2% that of England and Wales).

(c) There are but two NI case illustrations. In both, the person concerned had to fund their care in a nursing home. In the first case it is asserted that if the person had lived in Great Britain they would have been eligible for fully funded NHS Continuing Healthcare. This resolves to bare, unreasoned and unparticularised assertion.

(d) In the second case illustration, there is again a bare, unreasoned and unparticularised assertion that if the relevant HSC Trust had properly applied paragraph 88 of the 2010 Circular the subject would have qualified for CHC.

(e) There is no mention of the NISAT or the NNAT in the context of either case illustration.

(f) The NISAT receives but one brief reference in the report, accompanied by the statement that it does not refer to CHC. This is plainly erroneous, as the terms of the CHC policy, which gives prominence to NISAT, confirm.

[32] The Age NI report has a discrete section outlining the responses which it received from the five NI HSC Trusts, which invites careful analysis:

(a) The Western HSC Trust response was that CHC operates only in England/Wales and Scotland. This response, which betrayed a fundamental misapprehension, made no mention of Circular 1/2010 and was based on demonstrably fallacious advice ("… We have been advised that …"). Furthermore, this response made no mention of something obviously material and ascertainable from other parts of the evidence, namely the existence of a relevant policy operated individually by this Trust.

(b) The Northern HSC Trust response was that since 2006 it had assessed 14 people as eligible for CHC. This response specifically referenced the 2010 Circular.

(c) So too did the Belfast HSC Trust response, which further indicated that there was no systematic collation of individual cases assessed as eligible for CHC since 2006.

(d) The South-Eastern HSC Trust confirmed in its response that it has been operating the 2010 Circular and further disclosed an appreciation of the inapplicability of the English National Framework (supra). It confirmed the number of cases in which CHC eligibility had been established.

(e) The Southern SHC Trust also based its response on the 2010 Circular. This Trust stated that placements in nursing homes and residential homes were made in accordance therewith.

[33] In the section of the report purporting to deal only with certain statistics, one finds the statement "Age NI believes that the absence of clear and proper guidance, significant numbers of people are not being assessed as eligible for NHS Continuing healthcare with substantial financial consequences for some older people and their families".

["the absence" is clearly to be construed as "in the absence".]

This is yet another illustration of purely subjective, unparticularised and unsubstantiated belief.

[34] In its recommendations the Age NI report states inter alia:

> "… developments across GB that should have had a direct bearing on Northern Ireland appear to have made no impact on the provision of health and social care in Northern Ireland."

This statement manifestly fails to recognise that, as demonstrated in Chapters 1 and 5 above, by virtue of devolution (since partition) Northern Ireland has had entirely separate legislative arrangements and associated policies governing the provision of healthcare and social care. In the passages which follow it is stated that CHC is provided by only two of the five HSC Trusts in Northern Ireland. This is fallacious as one of the suggested non-providers, Belfast HSC Trust, did not provide a response to this effect. This misstatement is one of the ingredients in what the report describes as "a confusing picture". Many of the others suffer from the frailties exposed in the analysis in the immediately preceding paragraphs. The suggestion of "a lack of a clear and consistent framework" is in the estimation of this court unsustainable in consequence.

[35] The fallacious reliance on GB, specifically its "case law and the subsequent development of guidance", is then repeated. This is followed by an assertion that the HSC Board (the regional oversight agency) lacked certain material information which (a) is unsubstantiated and unparticularised and (b) finds no elaboration or support in the body of the report, or otherwise.

[36] The Age NI report concludes that "… the current guidance is not in itself sufficient". As the preceding analysis demonstrates, there are multiple frailties in the building blocks underpinning this conclusion. This is followed by a suggestion of a "… mistaken belief that NHS continuing healthcare was no longer available in Northern Ireland": as our analysis indicates, this suggestion contains an erroneous reference to the NHS regime and, insofar as this can be overlooked and interpreted generously as an inaccurate reference to the NI 2010 CHC policy, it is mere conjecture in any event. Furthermore, the failure to engage with paragraph 17 of the 2010 Circular and to do so in tandem with the NISAT and the NNAT is striking.

[37] Age NI recommended that the Department –

> "… draft and publish guidance on NHS Continuing Healthcare in Northern Ireland to provide clarity and to require collation and monitoring of data in a standardised way."

The Department reacted by arranging a meeting with Age NI personnel. This was followed by a circular letter to all HSCTs. The process thus initiated was described as:

> "… an exercise to re-examine the broader issue of continuing healthcare and specifically the need to develop further NI guidance."

Circular 2010 was attached to the letter, together with a questionnaire designed to identify "… current practice on continuing health care across each of the HSC Trusts". A so – called "scoping exercise" ensued.

[38] Sequentially, the next development was a letter dated 4 November 2014 from the Department to the NI HSC Trusts. This letter stated: in October 2012, the Department sought and received from all Trusts an assurance that they were acting in compliance with Circular 01/2010; in April 2013 the Department obtained legal advice that the CHC policy in Circular 01/2010 "... strikes an appropriate balance between setting out the Department's policy position while providing suitable discretion for local decision making at HSC Trust level"; the Age NI report had recently drawn attention to this issue; "HSC Trusts have made representations to the HSC Board seeking clarity about how the existing continuing healthcare guidance should be interpreted"; in consequence of all of the foregoing, the Department had initiated an exercise of re-examining the topic of CHC; and, to this end, the Department had devised a questionnaire (attached) which each HSC Trust was being asked to complete. Finally, having reproduced para 17 of the 2010 Circular, the letter stated:

> "It is the responsibility of HSC Trusts to ensure that appropriate assessments of needs for individuals are carried out, including those with continuing healthcare needs ….
>
> As you will be aware, within the integrated system in Northern Ireland, it is clinicians, together with other health and social are professionals, who are responsible for assessing the needs of the individual and for making decisions about appropriate long- term care. This is done in consultation with the client, the client's family and their carers. At a minimum, a formal review of a client's care needs should take place once a year. More frequent reviews may be required in response to changing circumstances or at the request of service users or other persons including carer."

[39] Pausing, neither the "representations" of any HSC Trust to the HSC Board nor any ensuing or related communication by the HSC Board to the Department are detailed in or annexed to this letter. Nor are these contained in the voluminous documentary evidence.

[40] Next, while considering the HSC Trusts' responses, the Department wrote to them once again, by letter dated 7 August 2015, reproducing paragraph 17 of Circular

2010. Attached to this letter was a digest of the five HSC Trusts responses to the Department's circular. Again, these must be examined in a little detail:

> (a) BHSCT stated that it "… does not consider the concept of 'continuing healthcare' relevant or easily definable within an integrated health and social care system. The term continuing healthcare is not referenced within the care management circular and pertains to GB …." The use of both the NISAT and NNAT in multi-disciplinary assessments to determine the long care needs of persons with complex needs was confirmed. Furthermore "… BHSCT does not use specific policies/protocols or guidance to determine whether an individual's primary need is healthcare or for personal social care sources. These needs are indivisible and the central responsibility of the multi-disciplinary team is to ensure those needs are met." In response to two later questions, BHSCT confirmed that it <u>was</u> making CHC decisions and that it had CHC eligible cases, which were reviewed on a daily or weekly basis. Replying to a further question, BHSCT stated unambiguously that it was following the 2010 CHC policy. Replying to yet another question, this Trust stated that the concept of "continuing healthcare …. does not apply in an NI setting".
>
> (b) NHSCT described "… difficulty in determining eligibility due to lack of detailed guidance that goes beyond statements in the 2010 Circular. The absence of specific criteria and guidance results in confusion for assessors, clients and relatives …" This response further disclosed that this Trust had, since 2010, been applying its own guidance. This internal document is dated 20 July 2010 (notably, postdating the Department 2010 Circular by some four months). It addresses the concept of "Continuing healthcare needs" ("CHCN"). It enunciates the general rule "CHCN can only apply where the service user's needs would normally have been met in a hospital environment and they require 1:1 supervision/interventions from a specifically trained Healthcare Professional". According to this guidance, the consequence of a positive CHCN assessment is that the recipient would not have to make any financial contribution. The text makes unequivocally clear that it is <u>based on English case law and the English National Framework</u>. The NHSCT response to the Department questionnaire further states that this Trust's specific guidance "…. was not widely issued but has been referenced when dealing with retrospective requests for consideration for eligibility for CHCN". In a later response, this Trust stated that it <u>was</u> "… following the approach set out in [the 2010 Circular]". This Trust further indicated that in April 2011 – September 2014 it

had assessed 11 persons as eligible for CHC under the 2010 Circular.

(c) The SHSCT response demonstrated a correct understanding of the concept of CHC and a clear awareness of paragraph 17 of the 2010 Circular. The use of the NISAT and/or the NNAT was also recorded. This Trust further indicated that it "… would welcome definitive DHSS PSNI policy in relation to ……." CHC eligibility assessments. In a later response this Trust stated unequivocally that it was "… following the approach set out in …." the 2010 Circular. This response specifically recognised that CHC placements could be in hospital, in a residential home or in a nursing home. Regarding the relevant three-year period, while there had been 24 requests for CHC assessments none of the persons concerned had been "… assessed as either eligible or ineligible for continuing healthcare within a continuing care placement, all of them having been transferred from hospital to a placement of this kind".

(d) The SEHSCT response also rehearsed correctly paragraph 17 of the Circular. This Trust further stated that it had received an unspecified number of requests for what it described as "continuing healthcare funding", each of these cases relating to residential or nursing home placements, "with the majority being self-funding" and most requests having been retrospective in nature. Continuing, it indicated that decision making on the application of the paragraph 17 criterion had been "extremely difficult" in the absence of "clear policy direction", giving rise to an effective moratorium while awaiting "regional guidance". Furthermore, this Trust mentioned, without elaboration "a number of legal challenges" and two cases "…. currently with the Ombudsman". There are two further noteworthy features of this Trust's response. First, it stated without equivocation that it was acting in compliance with the 2010 Circular. Second, it disclosed that it had adopted with some amendments the NHSCT internal guidance (supra) "… to provide similar guidance for multi-professional panels assessing eligibility for Continuing Healthcare".

(e) WHSCT responded that it was applying Circular 1/2010, using the NISAT and involving a multi-disciplinary team in each case. The merits of NISAT were emphasised. This Trust also provided data indicating that 15 positive CHC decisions had been made between April 2013 and September 2014.

[41] The evidence includes two earlier letters from WHSCT to Age NI, written in July 2013 and April 2014. These state that "continuing health care" denotes "a package of care that is arranged and funded solely by the NHS for individuals who are not in hospital who have complex ongoing healthcare needs", operating only in England, Scotland and Wales. This invites the observation that, as already noted, between April 2013 and September 2014 WHSCT made 15 positive CHC eligibility decisions. This evidence is uncontested. It indicates that by April 2013 at latest, WHSCT was applying the CHC policy in the 2010 Circular. It follows that no court could properly attribute significant weight to the aforementioned letters: for reasons unknown, their authors were making statements manifestly contradicted by other evidence.

[42] The Department's next step, in September 2016, was to secure Ministerial approval for initiating a public consultation exercise on CHC in Northern Ireland. The basic stimulus for this course was described thus:

> "… the Department found there to be an apparent lack of understanding across a range of groups and inconsistent application of departmental guidance and continuing health care practice across HSC Trusts."

In its ensuing consultation paper, the Department specifically acknowledged "... the need for further clarity and revision to the local continuing health care policy …" One aim was an outcome "… which ensures that there is a transparent and fair system in place for all service users". In the consultation paper which followed, in June 2017, one finds the following salient passage in the introductory paragraphs:

> "**What is continuing health care? …..**
>
> Continuing health care, which is for adults, is the term used for the practice of the health service meeting the cost of any social care need which is driven primarily by a health need."

[43] In the same passage there is a statement of some materiality:

> "Eligibility for continuing health care depends on an individual's assessed needs and not on a particular disease, diagnosis or condition. If an individual's needs change, then their eligibility for continuing health care may also change. **So as not to interfere with professional and clinical judgment, the Department has, to date, refrained from drafting administrative guidance on a specific continuing health care assessment**." [emphasis added]

The contrast between the bespoke, unique Northern Ireland system and its English counterpart is then noted, with particular reference to the concept of "NHS continuing health care" in that jurisdiction.

[44] Sequentially, having noted the Departmental review preceding publication of the consultation paper, the findings of the former are summarised. The headline finding was the following:

> "There is confusion about continuing health care and its applicability in Northern Ireland. Specifically, there is a lack of understanding that the Check List Tool and Decision Making Tool used by authorities in England to assess and determine eligibility for continuing health care do not apply here and are not part of our existing assessment process."

Variances in the practices of individual HSC trusts were further noted, as were the tribulations of the multi-disciplinary panels established by the Trusts to make the requisite determinations. It was further recorded that all Trusts were employing the NISAT and, where required, the NNAT. It is stated that 43 persons had been assessed as eligible for continuing health care in Northern Ireland. Pausing, taking into account the inevitability that each would have received a mixed package of health care provision and social care provision in a public accommodation setting, this meant that the social care element was being provided at no cost to the recipient.

[45] Continuing, the consultation paper described the Department's evaluation of the prevailing state of affairs in these terms:

> "The outcome of the review has provided the Department with sufficient evidence that further clarity and revision to the local continuing health care policy is now required. In undertaking any steps to revise the current continuing health care policy, **the Department is seeking to achieve an outcome which ensures that there is a transparent and fair system in place for all individuals who may or may not have a continuing health care need**."
> [emphasis in original]

The phenomenon of "well documented increasing financial pressures on the wider health and social care system" is then noted.

[46] Four options for the adoption of a new CHC policy were identified. Officials indicated their preference for Option 3, namely the adoption of the following single eligibility criterion question –

> "Can your care needs be properly met in any other setting other than a hospital?"

Option 3 was said to be similar to the arrangements introduced in Scotland in 2015. The adoption of Option 3 as the new CHC policy in Northern Ireland would mean the following: if the person concerned were discharged to either a residential care home or a nursing home they would be fully responsible for their social care costs. It is appropriate to emphasise the following: the difference between Option 3 and the policy enshrined in paragraph 17 of Circular 2010 is that pursuant to the latter mechanism a person would not have to pay for their social care costs provided that their primary need was for health care. Paragraphs 32 – 34 of the consultation paper explained the proposed charging arrangements:

> "32. If the individual required placement in a residential care home, then they would be subject to the same charging policy as other residents and would contribute to the cost of their care depending on their financial circumstances.
>
> 33. If the individual required placement in a nursing home, then they would be subject to the same charging policy as other residents and would contribute to their accommodation and personal care costs depending on their financial circumstances. HSC Trusts would still remain responsible for meeting the cost of providing nursing care to the individual in the nursing home. This payment, which is currently set at £100 per week, would be paid directly by the relevant NHS Trust to the care provider.
>
> 34. For an individual discharged to return to their own home, they would if required, receive relevant support through a domiciliary care package which is not a chargeable service in Northern Ireland."

[47] At this juncture, it is necessary to recognise the existence of four basic alternatives in the realm of health care and social care in Northern Ireland, namely: continued care in hospital; continued care in a nursing home; continued care in a residential home; and continued care in one's home. What would adopting Option 3 mean? The first and fourth of the Department's options would entail no financial cost to the recipient. In contrast the third alternative (Option 3) would entail some financial payment by the recipient (subject to their financial circumstances). So too Option 2, as it seems inconceivable that there would be no social care element in the provision made for any resident of a registered nursing home or a registered residential home, a matter about which the parties were agreed.

[48] The justification proffered by the Department for favouring Option 3 was that, in particular, (though not exhaustively) -

> "… all individuals needing to avail of residential or nursing home care services would be subject to the same charging regime."

In its consultation paper, the Department expressed its view that this would provide a "clear and easily understood test" which would "… ensure regional consistency in continuing health care outcomes across HSC Trusts, importantly addressing any existing inequality issues for individuals". The Department further reasoned that this option would "create a fairer system where all individuals needing to avail of residential or nursing home care services would be subject to the same charging regime". The views of consultees were sought accordingly. The Department emphasised that it was consulting with an open mind.

[49] Next, an event of some significance materialised. In April 2017, Mr McMinnis applied to BHSCT for CHC. This application was refused, culminating in a successful complaint to the Northern Ireland Public Services Ombudsman ("NIPSO" - see infra). The key event in this sub-plot was the application. The reason for this is that, in response to the court, Ms Doherty KC submitted that April 2017 heralds the date when the Department's failure to promulgate guidance on the 2010 CHC policy became irrational. An observation is appropriate at this juncture. This submission does not reflect an express finding/conclusion by the judge to this effect. However, the exercise of considering the judgment as a whole, in particular para [138] considered in tandem with the earlier passages in paras [58] – [62], confirms that this is what the judge in substance decided. This is relevant to the question of whether this legal challenge is defeated by the limitation provision in Order 53, rule 4 of the Rules of the Court of Judicature, given that these proceedings were not initiated until September 2021 (see para [153] infra).

[50] Reverting to the consultation exercise, a lively debate ensued. There were 43 respondents, comprising statutory agencies, voluntary and community groups, private sector organisations, political parties and individual members of the public. Approximately one third favoured the adoption of Option 3. Those opposed to Option 3 contended, inter alia, that it would mean the eradication of CHC in Northern Ireland. Approximately one half of respondents favoured either Option 2 or Option 4.

[51] Over three years later, in 2021, the Department published a combination of (a) its new CHC policy and (b) its consultation responses analysis report. In short, as foreshadowed at the consultation stage, Option 3 was formally adopted. Its effect was described by the judge at para [57] thus:

> "It is now clear that only healthcare needs of a level of severity requiring hospitalisation will be covered by CHC. Healthcare needs which do not require hospitalisation will not be covered by CHC. In short, the previous facility for

> CHC funding of accommodation costs in a nursing home or residential care home has been brought to an end."

In passing, the evidence indicates that the hiatus of some three years dating from September 2017 was attributable to the absence of a functioning government and legislature in Northern Ireland. This delay has formed no part of the Commissioner's challenge.

[52] The outcome was the publication by the Department, in May 2021, of Circular HSC (ECCU) 1/2021. This specifically advised HSC Trusts that the new circular contained an "update to paragraphs 17 and 88 only" of Circular 1/2010. The contents make clear that the change thereby effected entailed the introduction of the following single eligibility criterion question:

> "Can your care needs be properly met in any other setting other than a hospital? If the answer is "yes", then the individual will be discharged to the appropriate care setting and depending on the type of care package be subject to the relevant charging policy."

Any undetermined applications for "continuing health care" predating 11 February 2021 were to be assessed in accordance with the unamended provisions of Circular 1/2010.

[53] Next, in July and August 2021 three versions of possible Departmental guidance to HSC Trusts were generated. Notably, these were the work of a working group whose membership comprised Departmental officials, HSC Trust officials, Age NI, the Chief Nursing Officer Group and the Social Services Group. The activities of the working group continued and, ultimately, in May 2022 the Department disseminated a new Circular which superseded paragraphs 17 and 88 of the 2010 Circular. This recorded that the new Department CHC policy had been introduced in February 2021.

[54] Mr McMinnis' complaint to NIPSO of maladministration by the BHSC Trust fared as follows. In short, he contested the Trust's failure to assess him as having a primary health care need (which would have made him eligible for CHC funding). The impugned decision of the Trust was documented in a letter to Mr McMinnis dated 06 February 2018, in tandem with a subsequent letter dated 13 March 2018. Notably, these letters contain no reference to any provision of the 2010 Circular. There are certain noteworthy passages in these letters:

> "Where an individual's needs are deemed to require personal social care services an appropriate clinical pathway is recommended …

> [The Trust] does not place patients with continuing healthcare needs in nursing homes as these facilities would not be able to meet their clinical needs … the Trust also does not provide continuing healthcare assessments for the purposes of abatement of nursing home fees ….
>
> The Trust is struggling with this issue in the absence of an appropriate framework and operational guidance in relation to continuing healthcare ….
>
> The issue of continuing healthcare within Northern Ireland has been recognised by the Department of Health to require further policy clarification."

[55] In its December 2020 report, NIPSO upheld the complaint of maladministration. The report states emphatically that the Trust had been subject to a duty to devise processes compliant with the 2010 Circular and had failed to do so. The report further found the Trust guilty of a specific misunderstanding that CHC under the 2010 Circular was not available to existing residents of nursing homes. Furthermore, the Trust had failed to carry out the multi-disciplinary assessment required by paragraph 17 of the 2010 Circular.

[56] Having regard to one element of the submissions on behalf of the respondent, advanced with some emphasis, and a corresponding passage in the judgment of Scoffield J, we shall address another specific feature of the evidential framework. In an affidavit sworn by the Commissioner's legal officer information is provided about seven individual cases which had come to the attention of that agency. Four of these concerned the South-Eastern HSCT. In these cases the following assertions were made. In the first case, there is no indication of a CHC factual framework and no suggestion of any refusal or other decision by this Trust. In the second case illustration, this Trust began a CHC assessment which it failed to complete, for reasons undisclosed. In the third case illustration this Trust initially adopted the stance that there was no specific CHC assessment tool. This stance was reversed subsequently when the Trust agreed to conduct a CHC assessment by applying a multi-disciplinary approach and the NISAT mechanism. In the fourth case illustration, this Trust refused three times to conduct a CHC assessment. The initial refusal entailed an indication that CHC assessments do not exist in Northern Ireland.

[57] The Commissioner's legal officer describes three further case illustrations. The first of these, concerning the Belfast HSCT, has no CHC factual framework. The second, concerning the Southern HSCT, involves the assertion that this Trust failed to undertake a CHC assessment of the person concerned notwithstanding numerous requests by the family to do so. The third, and final, case involving the Northern HSCT concerns a person who died whilst waiting an assessment under the revised 2021 CHC policy.

[58] The court is unable to objectively evaluate the accuracy or completeness of the information provided in the legal officer's affidavit as it is formulated in the terms of factual summaries and the source material is not exhibited. Furthermore, there is no indication of whether the Commissioner was aware of cases in which positive CHC assessments had been undertaken, with the result that the court is unable to apply any material barometer to the seven cases considered as a whole. Thus it is not clear how the judge could reliably describe these seven cases as a mere "sample", at para [103] of his judgment.

[59] The judge's approach to this discrete chapter in the evidential framework was the following. At para [102] he provided his own summary of the seven cases. Having done so, at para [103] he stated:

> "I accept that this sample of cases shows that there is a degree of widespread concern among older people who wish to avail of CHC and contend that they should be considered eligible for it; and that there is evidence to suggest systemic issues about its operation over the last number of decades."

This analysis does not co-exist comfortably with this court's outline of the seven cases in paras [56] – [57] above. Secondly, it does not engage with the issues raised in this court's observations immediately above. Thirdly, it entails something of a gloss as it fails to recognise the variations among the several cases. Finally, there is no acknowledgement of the incontrovertible fact that the seventh of the cases had nothing whatsoever to do with the issues before the court and could not, therefore, contribute to the general conclusion in para [103].

[60] Pausing, when one juxtaposes paras [102] – [103] of the judgment of Scoffield J with paras [138] – [140], it is clear that the judge's assessment of this discrete chapter of the evidence contributed to the evidential foundation giving rise to the conclusion that the Department had irrationally failed to provide Trusts with guidance on the application of the 2010 CHC policy. The same observation applies to the Age NI report, which we have examined in paras [31] – [39] above. We have, therefore, subjected this particular evidence to the same kind of examination. Likewise we have in paras [38] – [55] above compiled a detailed digest of other material components of the evidential matrix. In this context we refer also to para [69] infra. In summary, as demonstrated much of this evidence suffers from material frailties.

6. The High Court's Decision

[61] As noted in para [4] above, the High Court made two orders against the Department. The first of these entailed the grant of declaratory relief, holding the Department's failure to provide guidance on para 17 of the 2010 Circular to be unlawful. The amended Order 53 pleading pursued (a) an order quashing both the 2010 and 2021 policies and (b) a declaration that the 2021 policy was unlawful. The

asserted legal infirmity in the 2010 policy was described as *Wednesbury* irrationality in these terms:

> "The failure of the proposed Respondents to issue guidance on the operation of the 2010 Policy is so unreasonable that no reasonable decision maker properly directing itself in relation to its duties could justify its application in the absence of such guidance."

In compliance with this court's direction a further incarnation of the amended Order 53 Statement was provided in consequence and the amendments were authorised.

[62] The declaration made by the High Court recites that the Department -

> ".. acted unlawfully in failing to provide guidance to Health and Social Care Trusts as to the methodology to be applied in determining eligibility for … CHC under [the 2010 Circular]."

In enunciating the determination of the court to grant this relief – in para [182] – the judge stated his conclusion that the Department had "… acted unlawfully (for the reasons given at paras [138] – [141] above)." These passages are contained in a section of the judgment entitled "the Department's Responsibility for the Lack of Clear Guidance". At para [136] the judge states:

> "The level of information and guidance provided by the Department in relation to CHC was minimal. There is evidence to suggest that some individuals may have qualified for CHC under the 2010 Policy but were either completely unaware of the concept or availability of CHC or, perhaps worse, were misinformed that it did not exist in this jurisdiction. The Belfast Trust's 2015 review response indicated that no requests for CHC assessments had been received between 1 April 2011 to 30 September 2014. Given the size of the Trust's area of responsibility and the population within that area, this seems surprising."

[63] In an earlier passage, at para [22], the judge recorded the publication of the Age NI Report "… claiming that older people were being denied CHC in Northern Ireland, largely due to a lack of guidance having been published in relation to it". The judge observed that one of the mischiefs which this could cause was the depletion, or extinction, of the financial resources of an older person accommodated in a nursing home in circumstances where any social care provided was driven primarily by a health need. (In passing, all applications for CHC made before 11 February 2021 continue to be determined under the 2010 policy.)

[64] The judge next examined the 2010 Circular noting, correctly, at para [25], that its key provision as regards CHC is para [17]:

> "Much of the 2010 Circular is irrelevant for present purposes. Key provisions relating to the subject matter of these proceedings are paras 17, 63-64 and 88. Para 17 of the 2010 Circular - which first mentions the "primary need" test - is in the following terms:
>
> > 'Similarly, the distinction between health and social care needs is complex and requires a careful appraisal of each individual's needs. In this context, it is for clinicians, together with other health and social care professional colleagues and in consultation with the service user, his/her family and carers, to determine through a comprehensive assessment of need whether an individual's primary need is for healthcare or for personal social services. In the latter case the service user may be required to pay a means tested contribution.' "

The judge digested this provision in his own words, at para [26]:

> "Albeit in somewhat opaque terms, para 17 of the 2010 Circular is what effectively sets out the 2010 Policy as regards CHC. A determination is to be made of whether the individual's primary need is for health care or social care. In the latter case, the individual may be required to pay. It is not expressly stated what the charging arrangements will be in the former case; but it may be thought to be implicit that, in that case, the service user will not be required to pay a means tested contribution. That is supported by para 88 of the circular..."

[65] The judge next highlighted certain features of the Department's 2017 consultation paper. He then considered the BHSCT's response to the 2015 review, which in his view had particular significance. This was indicative of "a high level of uncertainty as to how CHC eligibility should be dealt with …" It further reflected "a clear misdirection as to the applicability of CHC in Northern Ireland as set out in the 2010 Circular". The judge was further perturbed by this Trust's description of health care needs and personal social care needs as "indivisible", given the clear distinction between these two types of need/service in both the legislation and Departmental policies.

[66] The judge next addressed the further discrete issue of whether there was anything unlawful about the use of the NISAT device in making CHC eligibility assessments. He resolved this issue at para [135] thus:

> "However, it would be unlawful to use NISAT as the sole or main tool for the purpose of determining CHC eligibility. This is because it is simply not designed as a tool for the answering of the key question and does not, of itself, contain sufficient guidance to allow that question to be answered in a way which is fair and rational (in the sense of ensuring consistency within and between Trusts), having regard to the requirements of procedural fairness in this context."

Pausing, this statement is couched in conclusionary, rather than analytical, terms and, further, does not engage with the multi-disciplinary character of every CHC assessment. In this context, the judge recorded his anterior conclusion at para [116] that the impugned decision of the Trust, whereby the application of Mr McMinnis for CHC had been refused, was vitiated by a blend of procedural unfairness and irrationality on the ground that –

> "… sufficient guidance had to be provided … to enable Mr McMinnis, and others, to meaningfully engage with the detail of the process and whether he met the eligibility requirement for CHC."

[67] By the unavoidably protracted route charted in the preceding paragraphs, which is attributable not least to the commendably detailed manner in which the judge addressed the issues, one returns to the judge's reasoning underpinning the first remedy granted, namely the declaratory order. The judge first described the level of information and guidance provided by the Department relating to the 2010 CHC policy as "minimal". In this context he adverted to some of the evidence considered immediately above. Next, noting his anterior finding of procedural unfairness in the BHSCT's adverse determination of the application of Mr McMinnis for CHC, the judge continued:

> "…… [it] would be to unfairly lay sole or primary responsibility at the door of the Trust when, in reality, the Department has been responsible for a plain dereliction in its duty in this sphere. The Trust's responses, in 2015, to the Department's own review were such as to show that there were huge problems with the administration and effectiveness of the 2010 policy ….
>
> An overwhelming theme was that Trusts did not know how to address CHC or determine who was eligible for it.

> Remarkably, some Trusts …. went as far as to suggest that it did not apply in this jurisdiction."

[68] Next the judge addressed the operative legal standard, at para [139]:

> "This failing was pleaded as an instance of irrationality as well as procedural unfairness and, indeed, I consider that it could properly be characterised as a course which no reasonable Department would adopt: to stand by and decline to issue guidance when, as a result of its own review, it became clear that Trusts, both internally and as between each other, were in an utter state of disarray and inconsistency in seeking to apply the 2010 policy …"

This is followed by the key conclusion:

> "I am satisfied that the Department's resolute failure to seek to ameliorate the situation by way of providing regional guidance was unreasonable in the **Wednesbury** sense. There was no logical reason whatever why it would not seek to bring some clarity ….
>
> When it adopted the 2021 policy, with the express aim ….. of introducing a fair and transparent system, it effectively accepted that it had permitted an unfair system which lacked transparency to pertain up to that point."

At para [140] the judge concluded, in substance, that the Department had acted in dereliction of its duties under section 2 of the 2009 Act. The remedy of the impugned declaration followed.

[69] As appears from the resume above and in particular para [108] of the judgment of Scoffield J, the main building blocks in the assessment of the High Court that the Department had acted irrationally in failing to provide guidance in respect of the 2010 CHC policy were (a) the Age NI report 2014, (b) the BHSCT 2015 submission, (c) the NHSCT response, (d) the SEHSCT response, (e) what the judge considered to be the surprisingly low number of positive CHC eligibility decisions and (f) the Department's 2017 consultation paper. All of these have been addressed in Chapters 4 & 5 above.

[70] These several ingredients combined to generate the robust criticisms contained in paras [138] – [140] of the judgment of the High Court. At heart, the judge was unreservedly critical of the Department's conduct during the period 2015 to 2021. He concluded that the Department did "nothing" during this period to address the "obvious problems" existing. The judge considered that the Department's review had exposed, vis-à-vis the Trusts, "… an utter state of disarray and inconsistency in

seeking to apply the 2010 Policy". In the submissions on behalf of the Commissioner, this is described as "the undisputed chaos which was abounding …" Understatement there was none.

7. The Wednesbury Principle

[71] Before addressing the important question of whether the *Wednesbury* principle provides the appropriate standard of review in this context, we shall assume, in favour of the Commissioner, that it does so. It is essential to keep in mind throughout the analysis which follows that what the Commissioner contended to be irrational and what the judge condemned as irrational was a failure on the part of the Department, namely a failure "… to issue guidance on the operation of the 2010 Policy …" (see above).

[72] Substantial quantities of notional judicial and academic ink have been devoted to the exposition and analysis of the *Wednesbury* principle. Some 70 years have passed since the celebrated formulation of this principle by Lord Greene MR in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. During this period this principle, being a construct of the common law, which is nothing if not dynamic and responsive to changing times and circumstances (the ECHR "living instrument" doctrine surely deriving at least in part from this), has undergone a certain evolution. Notably, there has been no attempt to define or codify it by statutory intervention. With the passage of time, shedding some of its initial rigidity, the principle has gradually become more context sensitive.

[73] The doctrinal rationale of the *Wednesbury* principle is readily ascertainable. First, it lies in the true legal character of the judicial review jurisdiction of the High Court. This jurisdiction is one of supervisory superintendence, to be contrasted with the appellate jurisdiction enjoyed by other courts and tribunals. Second, it is linked to the separation of powers. Third, it entails a recognition that in those cases where a challenge is based upon the *Wednesbury* principle the court finds itself engaged in an exercise of substantive review – to be contrasted with, for example, issues of pure legality, such as the observance or interpretation of statutory provisions and issues of procedural fairness.

[74] The aforementioned evolution of the *Wednesbury* principle can be traced through decisions of the highest courts relating to fundamental common law (or, as sometimes classified, constitutional) rights. Notable illustrations are *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514, *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 and *R v Lord Chancellor, ex parte Witham* [1997] 2 All ER 779. These three cases concerned, respectively, the common law right to life, the common law freedom of expression and the constitutional right of access to a court. These developments also entailed the emergence of the test of "anxious scrutiny": see in particular *R v Ministry of Defence, ex parte Smith* [1996] QB 517 at 554. Recalling the broader context, these developments unfolded at a time when the European Convention on Human Rights and Fundamental Freedoms did not form

part of the domestic law of the United Kingdom. This feature of UK law largely evaporated with the advent of the Human Rights Act 1998, operative from 2 October 2000 ("largely" because the ECHR rights have not been incorporated in full).

[75] What, therefore, does irrationality denote in contemporary public law? The virtues and vices of the *Wednesbury* principle having been the subject of debate for many years, the Supreme Court pronounced authoritatively on this subject in *Kennedy v Charity Commission* [2014] UKSC 20 at paras [51] – [56] especially. Lord Mance stated at para [51]:

> "The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle … The nature of judicial review in every case depends on the context."

Lord Neuberger and Lord Clarke agreed with Lord Mance, while Lord Toulson agreed with his reasoning.

[76] The decision in *Kennedy* heralded the advent of what may be described as the modified *Wednesbury* principle, with its greater emphasis on context. In *Pham v Secretary of State for the Home Department* [2015] UKSC 19, Lord Mance drew attention to this, at paras [94] – [95]. The three members of the seven-judge court who expressly agreed with Lord Mance also agreed with Lord Sumption, who in turn agreed with Lord Mance and Lord Carnwath: see para [110]. Lord Reed, the seventh member, agreed with the judgment of Lord Carnwath and with "much" in the judgments of Lord Mance and Lord Sumption: see para [112]. Lord Sumption, at para [107], in discussing "how broad the range of rational decisions is in the circumstances of any given case", stated:

> "That must necessarily depend on the significance of the right interfered with, the degree of interference involved **and notably the extent to which, even on a statutory appeal, the court is competent to reassess the balance which the decision maker was called on to make given the subject matter.**" [Emphasis added]

He continued at para [108]:

> "…. The security of this country against terrorist attack is on any view a countervailing public interest which is potentially at the weightiest end of the scale … The court must of course have regard to the fact that the Home Secretary is the statutory decision-maker, and to the executive's special institutional competence in the area of national security."

The doctrine of the separation of powers shines brightly in these passages.

[77] The aforementioned jurisprudential evolution has not performed the burial rites of the *Wednesbury* principle in its original incarnation. The legal lexicon now includes the expressions "hard edged" and "soft edged" review. The raw, untamed and unmodified force of Lord Greene's formulation remains capable of applying in certain contexts. Ministerial evaluative judgements about matters of national security provide one illustration (see the recent decision of this court in *Re Secretary of State's Application (Thompson Inquest)* [2024] NICA 47, para [36] ff). Another is that of decisions concerning the allocation of scarce public finances.

[78] What does Lord Greene's formulation in its unvarnished form denote? For this purpose, a single quotation will suffice. In the memorable words of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 408, a public authority's decision is unreasonable in the *Wednesbury* sense where it is –

> "… so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

Other colourful formulations of the principle, including taking leave of one's senses and lapsing into perversity or absurdity, abound. It is by reason of this formulation (and kindred formulations) of the standard (or threshold) of review that in those cases where the *Wednesbury* principle applies in its original, unabated incarnation the hurdle for the challenging litigant is a formidable one. This daunting threshold can, of course, be softened by the factor of context in appropriate cases. For completeness, I add the observation that the *Wednesbury* principle has not been supplanted by the doctrine of proportionality in those cases which do not belong to the regime of the Human Rights Act: see *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1335 (at, for example, para [132] per Lord Neuberger).

[79] By the foregoing route one arrives at an issue of legal principle of particular purchase in the context of this appeal. It is an entrenched feature of modern society that public authorities are endowed with discretionary powers. Writing in 1954, Roscoe Pound observed:

> "Almost all of the problems of jurisprudence come down to a fundamental one of rule or discretion …. both are necessary elements in the administration of justice … there has been a continual movement in legal history back and forth between wide discretion and strict detailed rule, between justice without law, as it were, and justice according to law."

(Introduction To The Philosophy Of Law, revised ed 1954.)

It has become commonplace for statutes to expressly confer discretions on public authorities. Furthermore, in some instances it is legitimate for a court to spell out of a given statutory regime the existence of a discretion by a process of construction and/or implication.

[80] Discretions conferred on public authorities vary in their terms and scope. Towards the narrower end of the notional spectrum belong discretions which confine the decision maker's freedom of choice by a duty to have regard to specified considerations or to give particular weight to specified factors. At the other end of the notional spectrum one finds "macro" duties and discretionary powers and functions expressed in broad and open-textured terms. Statutory provisions of this *genre* confer on decision makers broader choices and greater freedom of action. While the performance of a macro duty or the exercise of this type of discretion must always be compliant with the applicable legal standards which the common law superimposes, the scope for a successful *Wednesbury* challenge in such cases is necessarily limited. These cases are characterised by the inter-related themes of judicial restraint and less intrusive judicial scrutiny. In cases of this kind one frequently encounters the judicial assessment that the legislature has conferred on the decision maker a wide margin of appreciation and that "light touch" judicial superintendence is the appropriate standard of review.

8. The Irrationality Declaration: Arguments and Conclusions

[81] The cornerstone of the case on behalf of the Department is the submission that the Department's election to address the issues relating to the 2010 Circular by the mechanism of new policy development rather than the formulation of guidance to Trusts was one of a range of rational options at its disposal and, hence, legally unimpeachable. It is further contended that the court failed to fully assess and correctly appreciate the approach adopted by the Department post-2015. Mr McGleenan KC also submitted that the court's assessment of irrationality, giving rise to the impugned declaration, is not supported by the material evidence considered as a whole: in particular, the engagement with various Health Ministers about the appropriate response to the scoping exercise in 2015; the decision to conduct a public consultation exercise; the associated Ministerial approval and the exercise itself, both belonging to the period February – September 2017; the unavoidable hiatus thereafter, until 2020, due to the paralysis of the devolved institutions; further engagement with the Minister from October 2020; and, finally, the promulgation of the 2021 Circular in May 2021.

[82] Furthermore, on behalf of the Department attention is drawn to certain correspondence with the Trusts in November 2014 and July 2018, coupled with the Department's repeated affirmation that the Trusts were responsible for devising the requisite processes consistent with the 2010 Circular. The Department's associated

reluctance to trespass upon matters of professional and clinical judgement was also highlighted.

[83] It was further argued by the Department, as recorded by Scoffield J at para [109]:

> "A major theme of the Department's submissions was that, in Northern Ireland we benefit from an integrated system of health and personal social care and that this therefore renders any comparison with the position in England and Wales limited. The Department further submits that it was down to local Trusts to develop additional guidance on CHC and to ensure that appropriate assessments were undertaken, since the primary responsibility for such assessments rested with the clinicians. It [the Department] operates at a strategic level and was not bound to descend into the detail of the application of the 2010 Policy."

In short, it was submitted that the Department's response to concerns about the 2010 Circular entailed the choice of opting for policy development and appropriate consultation and that, taking into account the context (as outlined above), this lay within the range of responses reasonably available to it.

[84] The contrary argument on behalf of the Commissioners, advanced in forceful terms by Ms Doherty KC, may be distilled to the following. The failure of the Department to issue guidance in the face of clear evidence that the Trusts were, at best, "extremely confused" about how to lawfully apply the 2010 Circular and, at worst, applying it unlawfully, was a failure of which no reasonable Department would be guilty, giving rise to unreasonableness in the *Wednesbury* sense. The Commissioner contends that there is no material error in the reasoning and conclusion of the trial judge, which they urge this court to adopt.

[85] We evaluate the competing arguments in the following way. The declaratory order made by the judge at first instance was based upon the application of the *Wednesbury* principle in its unvarnished, Lord Greene MR, incarnation. Thus, the legal standard which the judge applied was that of outright, unadulterated irrationality. In evaluating the sustainability of this the main contextual factors are to our mind the following: the Department was the statutory decision maker; the "decision" to be made in this context was whether to exercise its statutory function of promulgating policies or, alternatively phrased, guidance on the application of an extant policy (section 2(3) of the 2009 Act); the legislature has conferred this decision making function on the Department and not the court; in determining whether to exercise this function it was for the Department to identify the choices available to it; the legislature has conferred on the Department broadly formulated "macro" duties and has invested it with a series of open-textured discretionary powers; the sphere of public health is one in which the courts cannot lay claim to possessing any particular expertise; in

contrast, the Department is the presumptively expert public authority; and the narrow context under scrutiny includes the elements of how to collect revenue for the public purse and the expenditure of finite public finances. We consider that these factors, in tandem, point towards the engagement of the "*Wednesbury*" principle at a point towards the upper end of the notional spectrum. Ultimately, this was not contested on behalf of the Commissioner.

[86] On the assumption that the unvarnished *Wednesbury* principle represents the applicable standard of review (an issue to which we return in para [100] *infra*) the question for this court is whether this challenging threshold has been overcome. It is trite that this threshold can be surpassed in any given case only where a sufficient evidential foundation exists. The question to be determined is whether this foundation exists in the present case.

[87] In determining this question we remind ourselves of something which is sometimes overlooked, namely that the exercise of the judicial review jurisdiction of the High Court, while belonging to the domain of public law, does not entail some kind of open-ended enquiry. Rather, it unfolds in a structured manner in which, *inter alia*, the onus rests on the challenging party to make good their case and the standard of proof is the civil one ie the balance of probabilities. See for example *R v Birmingham City Council, ex parte O* [1983] 1 AC 578, 597 C-D per Lord Brightman.

[88] In the particular context of these proceedings, there is another established legal principle of some resonance. The large quantity of documentary material before this court includes reports, Ministerial submissions, consultation invitations, consultation responses and much correspondence. The meaning of certain material passages within some of these sources is not clear and self-evident. Rather, an exercise in construction is required. This engages the principle that the meaning of any document is a question of law to be determined by the court (see for example *Re McFarland [*2004] UKHL 17, para [24], per Lord Steyn.) We have applied this principle particularly in Chapters 4 and 5 above.

[89] This court's determination of this ground of appeal must address the meaning of, and distinction between, the health care needs and the social care needs of any given individual. The broader subject is, of course, regulated by a combination of primary legislation and associated policy and guidance. It is to the legislature that one must turn first in a quest to discover the meaning of the two terms in question. This dichotomy has been at the heart of Northern Ireland legislation from the enactment of the 1972 Order. Indeed it can be traced to certain provisions in the predecessor statutory measure, namely the Health Services Act (Northern Ireland) 1948. As the outline of the relevant provisions in paras [5] – [13] above indicates, there is no statutory definition of these terms of the orthodox kind. However, in the statutory language guidance is not lacking. As noted briefly in para [7] above, section 2(1) of the 2009 Act provides:

(a) "Health care" is concerned with securing the improvement in the physical and mental health of members of the population in Northern Ireland, which is linked to the prevention, diagnosis and treatment of illness; whereas -

(b) "Social care" is concerned with securing improvement in the "social wellbeing" of the same population.

[90] The concept of social care is elastic in nature and potentially broad. It includes in particular all forms of personal care and other practical assistance in the activities of daily living. In its "Discussion document" published in 2012, the Department offered the following definition:

> "Services provided or secured by HSC Trusts towards adults who need extra support, either to live their lives as independently as possible, who are vulnerable or who may need protection. Examples of services include day care, domiciliary care, nursing and residential home care, equipment and adaptations and the provision of meals."

In its "Our Health, Our Care, Our Say" publication in 2006, social care was defined at para 1.29 as:

> "The wide range of services designed to support people to maintain their independence, enable them to play a fuller part in society, protect them in vulnerable situations and manage complex relationships."

It is important to emphasise that neither of these passages is a statutory definition. Furthermore, neither purports to be couched in exhaustive terms. Both are contained in pure policy statements. Subject to these qualifications, we are satisfied that both passages are harmonious with the legislative framework.

[91] We have in para [69] above identified the central ingredients in the assessment of the High Court that the failure of the Department to promulgate guidance on the application of the 2010 CHC Policy was irrational in the *Wednesbury* sense. In the body of this judgment we have analysed in some detail the evidence underpinning this assessment. This gives rise to the following review of the judge's conclusion and ensuing declaratory order.

[92] First, the Age NI report, one of the foundations of the judge's conclusion, is in our judgement beset by a multiplicity of frailties: see our commentary in paras [31] – [37] above. We consider that this report can provide no sustainable basis for contributing to the judge's conclusion. Second, one of the features of the responses of certain HSCTs was an unvarnished misunderstanding of the law in this jurisdiction. There are several references to advice having been sought and obtained. This court

takes judicial notice of the fact that within every HSCT in Northern Ireland there are highly qualified officers and legal advice from fully trained personnel is available. It is unclear to this court how pure policy Departmental guidance on the operation of the 2010 CHC Policy could have rectified the mischief of flawed legal advice and, we would add, the contrary case is not made.

[93] We turn to the responses from the five HSCTs to the Department. These did indeed differ. However, as paras [38] – [40] above indicate, they must be probed in some detail. One striking feature of these responses is the unequivocal statement of all five Trusts that in practice they were giving effect to and complying with the 2010 CHC Policy. Scoffield J did not engage with this discrete issue. Furthermore, as appears from our analysis in paras [56] – [60] above, the judge's uncritical and undifferentiated acceptance of the seven case illustrations cannot be readily sustained.

[94] Next, as our somewhat laborious review of the 11-year period under scrutiny demonstrates, the Department, from an early stage and consistently thereafter, linked its reluctance to promulgate guidance with its preference not to intrude on the evaluative assessments and decision-making function of the multi-disciplinary team of health and social care professionals in every case requiring a CHC eligibility determination. Furthermore, from 2015 the Department opted for the mechanisms of review and public consultation. We consider it impossible to apply to either of these approaches the condemnation of *Wednesbury* irrationality. The judge did not engage with these discrete matters in his conclusion to the contrary.

[95] Furthermore, the judge did not pose, and answer, one question of particular importance, bearing in mind that the Commissioner's case is that the Department's descent into *Wednesbury* irrationality dated from the application for CHC by Mr McMinnis on 4 April 2017. There are in our view two particular considerations in this context. First, we find it impossible to conclude that the mere fact of this application properly triggered the *Wednesbury* irrationality condemnation. Second, this application postdated, by approximately one month, the Minister's decision to approve a CHC public consultation exercise in Northern Ireland. Having regard to the detailed retrospective analysis which this court has been obliged to conduct, we consider that it was incumbent upon the judge to squarely confront the question of whether this Ministerial decision, whether in its original making or in its maintenance thereafter (taking into account the *McMinnis* timescale), qualified for the extreme condemnation of irrationality. The judge did not engage with this question. This court, for its part, finds no basis for concluding that the Ministerial espousal of this course of action lay outwith the range of options reasonably available to him at either the time when it was made or subsequently.

[96] It is also significant that at the time when the irrationality condemnation was applied by the High Court, ie early/mid 2017, it is clear from an uncontentious evaluation of all the documentary evidence that the Department was alert to the possibility that the promulgation of guidance on the operation of the 2010 CHC policy would be appropriate. Standing back and applying an elementary public law

framework, it seems inconceivable that this step could have been lawfully taken in the absence of the exercise which followed thereafter having regard to the twin requirements of procedural propriety and the legal obligation to take into account the views, representations and evidence emanating from all of those who were consulted, including the five HSCTs. The High Court's diagnosis of *Wednesbury* irrationality and ensuing declaratory order is further undermined on this discrete ground.

[97] In our outline of the evidential matrix we have considered inter alia the NIPSO report: see paras [54] - [55] above. It has four noteworthy features. First, neither NIPSO nor the independent nursing expert engaged had any difficulty in understanding what was required by the 2010 CHC policy. Second, neither of them identified any complexity or opacity in the central paragraph 17 criterion, namely the need to determine by a multi-disciplinary assessment whether the individual's primary need was for health care or social care. Third, both evidently considered that the 2010 CHC policy could be operated by HSC Trusts. Finally, neither espoused the view that the 2010 Circular was unworkable in practice, or even challenging or complex, in the absence of further Departmental advice.

[98] The High Court's conclusion that the Department's failure to promulgate guidance on the operation of the 2010 CHC Policy was irrational raises one further question, namely which aspects of the policy demanded such guidance and what such guidance might entail? In broad terms, and eschewing detail, what should the shape and substance of the missing guidance have been? It is in our view striking that this question is nowhere addressed in any meaningful way by any of the interested agencies or, indeed, their legal representatives at any stage of the protracted period under consideration. This analysis is reinforced by the inability of the agencies concerned to reach agreement on the content of the Department's guidance which was in contemplation post-dating the adoption of the reviewed 2021 policy. As of today, no such guidance exists. Furthermore, the complaint that the Department acted irrationally in failing to promulgate guidance on the operation of the 2010 CHC policy does not engage with the fact, disclosed by the evidence, that certain HSC Trusts were, at times, denying the very existence of the policy. The "*disarray*" diagnosed by the trial judge relates in substantial part to this latter fact and cannot, in our view, lend any support to the *Wednesbury* case as advanced at both first instance and on appeal.

[99] Giving effect to and taking into account all of the foregoing, the exercise which this court has conducted does not support the judge's view that the operation and effectiveness of the 2010 CHC policy were beset by "huge problems" in 2015 or that Trusts were in "an utter state of disarray and inconsistency". Doubts, inconsistencies and uncertainties there evidently were: but a dispassionate, objective and balanced analysis by a court of supervisory superintendence does not in our view warrant the extreme judicial condemnation of unvarnished Wednesbury irrationality. Furthermore, we consider that the conclusion that the Department was guilty of an irrational failure to provide guidance is undermined by the absence of any suggestion or identification of even the rudimentary elements of what such guidance might entail. It is further weakened by the absence of any exercise challenging this court's

analysis of paragraph 17 of Circular 2010. This court must also take into account the absence of any developed complaint or critique about the NISAT or the NNAT in the evidence. We conclude that the condemnation of *Wednesbury* irrationality, expressed in the uncompromising language of the judge, cannot be sustained for the reasons given.

9. Irrationality and the Gillick Principle

[100] The exercise undertaken in Chapter 8 above has been based on the premise that the *Wednesbury* principle represents the correct standard of review for the determination of the Commissioner's challenge to the Department's failure to promulgate guidance relating to the operation of the material passages in the 2010 Circular. As noted already, this is how the Commissioners' case was pleaded and advanced at first instance and this provided the route to and rationale of the first of the judge's two declarations. Before this court it was submitted by Mr McGleenan KC that the *Wednesbury* principle does not provide the correct standard of review in the context of this challenge. To this argument we shall now turn.

[101] This argument is founded on two comparatively recently decisions of the Supreme Court. In the first of these, *R(A) v Secretary of State for the Home Department* [2021] UKSC 37 the subject matter of the challenge was guidance issued by the Secretary of State to police officers relating to the handling of requests for information about whether any given person having contact with children had any convictions for sex offences involving children. The challenge was based upon the twofold complaint that the guidance (a) gave rise to an unacceptable risk of unfairness at common law and (b) did not satisfy the standards of clarity, predictability and accessibility enshrined in the "in accordance with the law" requirement in Article 8(2) ECHR. The challenge failed at every judicial tier.

[102] In its unanimous judgment, the Supreme Court recalled what the House of Lords had decided in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, per Lord Scarman at 181f:

> "It is only if the guidance permits or encourages unlawful conduct in the provision of contraceptive services that it can be set aside as being the exercise of a statutory discretionary power in an unreasonable way."

The Supreme Court observed, at para [34]:

> "Thus, Lord Scarman was explicit that it was not the role of policy guidance to eliminate all uncertainty regarding its application and all risk of legal errors by doctors. It was to be read objectively, having regard to the intended audience …

> The drafter of a policy statement is not required to imagine whether anyone might misread the policy and then to draft it to eliminate that risk. As Lord Scarman explained, it was only if the guidance, on a reasonable reading of it, positively encouraged a doctor to think that he was authorised to prescribe without the patient's consent whenever he thought fit that it would be unlawful."

At para [38] the court formulated the following test:

> "… does the policy in question authorise or approve unlawful conduct by those to whom it is directed? …
> It is not a matter of rationality …."

[103] Elaborating, the court explained that in any case where the test is satisfied:

> "… it can be said that the public authority has acted unlawfully by undermining the rule of law in a direct and unjustified way. In this limited but important stance, public authorities have a general duty not to induce violations of the law by others."

At para [39] the court provided the following exposition of the modern function of policies:

> "The approach to be derived from *Gillick* is further supported by consideration of the role which policies are intended to play in the law. They constitute guidance issued as a matter of discretion by a public authority to assist in the performance of public duties. They are issued to promote practical objectives thought appropriate by the public authority. They come in many forms and may be more or less detailed and directive depending on what a public authority is seeking to achieve by issuing one. There is often no obligation in public law for an authority to promulgate any policy and there is no obligation, when it does promulgate a policy, for it to take the form of a detailed and comprehensive statement of the law in a particular area, equivalent to a textbook or the judgment of a court. Since there is no such obligation, there is no basis on which a court can strike down a policy which fails to meet that standard. The principled basis for intervention by a court is much narrower, as we have set out above."

At para [40] the court observed that the *Gillick* test had the virtue of excluding the courts from the task of producing "… elaborate statements of the law to deal with

hypothetical cases which might arise within the scope of a policy." The court added at para [42]:

> "As in **Gillick** so also in this case it was not incumbent on the Secretary of State in issuing the Guidance to eliminate every legal uncertainty which might arise in relation to decisions falling within its scope."

At para [46] the Supreme Court provided the following guidance:

> "In broad terms, there are three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others: (i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (ie the type of case under consideration in *Gillick*); (ii) where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position; and (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position."

[104] The decision of the Supreme Court in *R (BF Eritrea) v Secretary of State for the Home Department* [2021] UKSC 38 was promulgated on the same date as *A*. This case concerned the legality of policy guidance relating to assessments of the age of asylum seekers issued by the Secretary of State to immigration officers. Ultimately the challenge failed. While there is an obvious consonance with its judgement in *A*, in this judgment one finds a somewhat greater focus on the legal duties of the agency devising and disseminating the guidance in question. This is evident at, for example, para [48]:

> "In our judgment in the A case, to which we refer, we have sought to provide general guidance regarding the principles to be applied to test the lawfulness of policy guidance. In a case where the lawfulness of policy guidance is in issue, it has to be asked what the obligation or obligations were of the person promulgating the guidance with regard to its content."

At para [49] the obligation enshrined in *Gillick* is described as the "principal obligation in play". At para [51], addressing and rejecting a discrete argument on behalf of the claimant, the court stated:

> "It would transform the obligation from one not to give a direction which conflicts with the legal duty of the addressee into an obligation to promulgate a policy which removes the risk of possible misapplication of the law on the part of those who are subject to a legal duty. There is no general duty of that kind at common law."

The court added at para [52]:

> "Whenever a legal duty is imposed, there is always the possibility that it might be misunderstood or breached by the person subject to it. That is inherent in the nature of law, and the remedy is to have access to the courts to compel that person to act in accordance with their duty. An asylum seeker has the same right to apply to the courts as anyone else. Save in specific contexts of a kind discussed below and in our judgment in the A case, there is no obligation for a Minister or anyone else to issue policy guidance in an attempt to eliminate uncertainty in relation to the application of a stipulated legal rule. Any such obligation would be extremely far-reaching and difficult (if not impossible in many cases) to comply with. It would also conflict with fundamental features of the separation of powers. It would require Ministers to take action to amplify and to some degree restate rules laid down in legislation, whereas it is for Parliament to choose the rules which it wishes to have applied. And it would inevitably involve the courts in assessing whether Ministers had done so sufficiently, thereby requiring courts to intervene to an unprecedented degree in the area of legislative choice and to an unprecedented degree in the area of executive decision-making in terms of control of the administrative apparatus through the promulgation of policy."

[105] We have noted the essence of the Department's submission in para [100] above. On behalf of the Commissioner, the riposte of Ms Doherty KC was an argument based on the judgment of Lord Dyson JSC in *Lumba v Secretary of State for the Home Department* [2011] UKSC 12, paras [34] – [35]:

> "The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance

> powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements ….
>
> The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute ….”

The context to which these passages belong was a challenge by foreign nationals who had completed their sentences of imprisonment to the Secretary of State’s policy governing the exercise of his statutory power relating to the detention of such persons pending a determination of whether they should be deported.

[106] We consider that the foregoing short outline of the context of the *Lumba* litigation exposes a sharp contrast with the litigation context before this court. In contrast with *Lumba*, the present case is not concerned with a policy relating to the circumstances in which statutory criteria will be applied. Quite the contrary: in the instant case, the Department exercised its statutory power/duty to promulgate guidance by its adoption of the 2010 CHC policy. Secondly, this was not a secret, unpublished policy: quite the contrary. Thus there was no lack of transparency. Furthermore, there is no issue in this case of any infringement of the public law right of the citizen to have their case considered under the relevant policy. In addition, the act of publication of the 2010 CHC policy ensured that everyone could ascertain what the policy was. Given this analysis, we are satisfied that paras [34] and [35] of *Lumba* do not detract from the decisions of the House of Lords and UK Supreme Court in the *Gillick* line of authority. They lend no support to the Commissioner’s case. Furthermore, while there is brief mention of *BF (Eritrea)* in the judgment of Scoffield J – at para [141] – there is no substantive engagement with the principles to be distilled from the passages reproduced in paras [102] – [104] above.

[107] We consider that in the context of this appeal the first question to be addressed is the following: what was the legal obligation on the Department in devising and promulgating paragraphs 17 and 88 of the 2010 Circular? It is trite that the answer to this question must be informed by the statutory context in which the Department was operating: (see paras [5] - [13] above) and the overlay of associated legal principle. More specifically, the particular statutory provisions engaged in the promulgation of the two material provisions in the 2010 Circular are, in the view of this court, section 2(1) and section 2(3)(a), (c) and (f) of the 2009 Act, considered in conjunction with Article 5(1), Article 7(1) and (2), Article 36(2) and Article 98 of the 1972 Order. In passing, there was no suggestion on behalf of the Commissioner that the Department’s

promulgation of the 2010 Circular did not reflect the purported exercise of one or more of the aforementioned statutory duties/functions/powers.

[108] In our judgement, the answer to the first question is that in promulgating the 2021 CHC policy the Department was obliged to act in accordance with the statutory provisions engaged and the overlay of public law principles. There is no suggestion that it failed to do so. This leads to the second question, namely whether the non-exercise by the Department of any material statutory power between 2010 and 2017 to provide guidance on the 2010 CHC policy was unlawful in the manner asserted i.e. irrational. The *Gillick* line of authority presents a formidable hurdle to the Commissioner's contention that the Department, having promulgated the 2010 CHC policy, acted unlawfully by failing to provide guidance on its operation. However, before determining this issue we consider that an anterior question must be addressed.

10. The Vires Issue

[109] In the case management phase of this appeal the court invited the parties to provide certain further materials and, further, formulate additional submissions on (inter alia) the question of whether paragraphs 17 and 88 of the 2010 Circular were ultra vires the Department's statutory powers. We record our appreciation of the parties' engagement in response. The question is: are these two paragraphs in the 2010 Circular in conflict with the cost charging provisions in the 1972 Order and in consequence ultra vires the Department's statutory powers, being vitiated by the infirmity that they sanction the provision of accommodation involving social care elements free of charge to certain people contrary to the relevant statutory provisions?

[110] We resolve this issue in the following way. The starting point is Article 98 of the 1972 Order (para [12] supra and Appendix 1). This provision enunciates a general rule and an exception. The general rule is that the services provided under the 1972 Order and certain related statutory measures "shall be free of charge". The exception to the general rule arises where any provision of the 1972 Order or certain other specified statutory measures "… expressly provides for the making and recovery of charges". The construction of Article 98 is straightforward. In a sentence, health and social care shall not be provided free of charge where any of the statutory exceptions applies.

[111] At this juncture we summarise the "charging" provisions of the 1972 Order thus:

(i) Where the Department provides health care in a setting other than that of a hospital it has a discretionary power to recover from the individual recipient such charge as it considers appropriate: Article 7(2), 1972 Order.

(ii) A HSC Trust providing social care services under Article 15 of the 1972 Order has a discretionary power to recover in respect of assistance, help or facilities provided such charges if any as the Trust considers appropriate: Article 15(4) 1972 Order.

(iii) Where a person is in receipt of social care together with nursing or personal care in a registered residential care home or a registered nursing home, and where the payments made by the HSC Trust concerned to the home provider include any amount in respect of nursing care by a registered nurse, the individual beneficiary "shall refund" to the Trust the amount paid by the Trust to the home provider less the proportion thereof relating to the nursing care: Article 36(4), 1972 Order.

(iv) Where the individual beneficiary for whom residential care or nursing accommodation is provided (or proposed to be provided) satisfies the HSC Trust that they are unable to refund fully the amount required by Article 36(4), the Trust shall assess the lower rate of the refund to be made by such person: Article 36(5).

(v) Where social care accommodation is provided by a HSC Trust under Article 15, the Trust shall recover from such person the amount determined pursuant to the relevant statutory mechanism and regulations made thereunder: Article 99(1), 1972 Order.

[112] In this context, it is appropriate to reproduce paragraph 17 of the 2010 Circular:

> "Similarly, the distinction between health and social care needs is complex and requires a careful appraisal of each individual's needs. In this context, it is for clinicians, together with other health and social care professional colleagues and in consultation with the service user, his/her family and carers, to determine through a comprehensive assessment of need whether an individual's primary need is for healthcare or for personal social services. In the latter case the service user may be required to pay a means tested contribution."

As already noted, "primary need" is a term devised by this policy, rather than a statutory term.

[113] The contours of the vires issue which arises are as follows. The effect of para 17 of the 2010 Circular is that in any case where a person is in receipt of a combination of health care and social care and an assessment is made that their primary need is for

health care, the social care shall be provided free of charge. This prima facie conflicts with Article 36(4) and Article 99(1) of the 1972 Order.

[114] The argument on behalf of the Commissioner focuses exclusively on Article 7(2) of the 1972 Order (para [9] supra). The first step in this argument is uncontroversial: it entails the contention that the word "may" is presumptively empowering. Thus, at the time of promulgating the 2010 CHC Policy (and, indeed, thereafter) the Department was empowered to recover from persons in receipt of a health care service provided other than in a hospital such charges as it considered appropriate. Focusing on the statutory word "appropriate", Ms Doherty KC developed the argument that para 17 of the 2010 Circular (para [22] supra) is properly to be viewed as a policy outworking of Article 7(2) to the effect of identifying cases where it is not appropriate for the Department to recover any proportion of the financial cost of providing a person with health care services other than in a hospital.

[115] We consider the Commissioner's argument misconceived for the following reasons. The statutory discretion to levy a charge created by Article 7(2) of the 1972 Order relates to "any service provided …. under this Article …" By virtue of Article 7(1) this denotes any service "… for the purposes of the prevention of illness, the care of persons suffering from illness or the after-care of such persons". Social care is not embraced by this terminology. Rather, Article 7(2) is directed solely to health care services. The question raised by the vires issue relates to social care and not health care. We reject this argument accordingly.

[116] Section 2(1)(3)(a) and (f) of the 2009 Act (see para [6] above) are the dominant statutory provisions in this context. The 2010 Circular is properly viewed as a promulgation of Departmental policy effected thereunder, in particular subsection (3)(f), as the discretion enshrined in Article 7(2) of the 1972 Order is correctly to be considered a "function" of the Department. In a nutshell, the Department was plainly not empowered to promulgate a policy conflicting with the primary legislation.

[117] The court concludes, therefore, that the CHC policy enshrined in the 2010 Circular is unlawful as it is ultra vires the Department's statutory powers. The parties shall have an opportunity to address the court on the outworkings of this conclusion and, in particular, whether any discretionary public law remedy (and, if so, which) should follow.

11. The Gillick Principle: Conclusions

[118] We return to the principles established by the decisions in *Gillick, A* and *BF*. We have made two principal conclusions. First, the absence of Departmental guidance on the operation of the 2010 CHC Policy was not irrational in the *Wednesbury* sense. Second, the policy itself was ultra vires the Department's statutory powers. At this point, it is necessary to return to the principles established by the decisions in *Gillick, A* and *BF*.

[119] The *Gillick*, *A* and *BF* principles prescribe a prism more nuanced than the *Wednesbury* standard to be applied to the 2010 CHC policy. We consider it plain that neither the second nor the third of the three possibilities postulated in para [46] of *A* (para [103] supra) arises – and the contrary was not argued. The effect of the first possibility postulated is that guidance would be unlawful if it included "… a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way …." (A, para [46]). In light of our conclusion that the 2010 CHC policy was ultra vires the Department's statutory powers, this question does not arise. However, if the aforementioned conclusion is incorrect we consider that the policy does not suffer from this malaise as it contains no positive statement, or misstatement, about the law – and, once again, the contrary was not argued and even the most generous construction of the Commissioner's challenge does not favour any other conclusion.

12. The Impugned Quashing Order: The Section 75 Issue

[119] The second remedy granted by the High Court was an order quashing the decision of the Department to adopt the new 2021 policy on the ground that this entailed a breach of its duty under section 75 of the Northern Ireland Act 1998. The judge explained:

> "The screening exercise undertaken in this case, regrettably, did not begin to properly consider the true impact of the new policy on older people."

This may be linked with an earlier statement in the judgment at para [173]:

> "I granted leave …… on the basis that it was arguable that the breach in this case was so egregious as to fall into the exceptional category where the court would be prepared to consider the claim."

[120] The starting point is section 75 of the Northern Ireland Act 1998, which is reproduced in Appendix 2. The Department is a "public authority" to which section 75 applies. In a nutshell, section 75 obliges every relevant public authority to have due regard to the need to promote equality of opportunity between persons belonging to a series of specified groups or persons of a specified status. Schedule 9 is described as the mechanism which "… makes provision for the enforcement of the duties under this section …." Section 76, a sister provision, is also reproduced in Appendix 2.

[121] The operation of section 75 and Schedule 9 is addressed in *Re Stach's Application* [2020] NICA 4. Paras [98] – [100] are germane in the present context:

> "[98] Schedule 9 provides for the enforcement of a public authority's duties under Section 75 and is given effect by

section 75(4). Paragraph 1 of the schedule outlines the role of the Equality Commission as follows: - 52 `The Equality Commission for Northern Ireland shall- (a) keep under review the effectiveness of the duties imposed by section 75; (b) offer advice to public authorities and others in connection with those duties; and (c) carry out the functions conferred on it by the following provisions of this Schedule.' By paragraph 2(1) of the Schedule all public authorities (except those notified by the Commission that the sub-paragraph does not apply to them) must submit an equality scheme to the Commission. Under paragraph 4(1) the scheme must show how the authority proposes to fulfil its obligations under section 75 and by paragraph 4(2) the scheme must set out the authority's arrangements in relation to a number of specified functions. The relevant function for present purposes is to be found in paragraph 4(2)(b) which requires that a statement be made as to the arrangements for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity. Paragraph 4(3)(a) requires a scheme to conform to any guidelines which are issued by the Commission with the approval of the Secretary of State. By paragraph 6(1) the Commission may approve the scheme or refer it to the Secretary of State.

[99] Under the rubric 'Duties arising under equality schemes' paragraph 9(1) and (2) of Schedule 9 provide: `9. - (1) In publishing the results of such an assessment as is mentioned in paragraph 4 (2) (b), a public authority shall state the aims of the policy to which the assessment relates and give details of any consideration given by the authority to - (a) measures which might mitigate any adverse impact of that policy on the promotion of equality of opportunity; and (b) alternative policies which might better achieve the promotion of equality of opportunity (2) In making any decision with respect to a policy adopted or proposed to be adopted by it, a public authority shall take into account any such assessment and consultation as is mentioned in paragraph 4(2)(b) carried out in relation to the policy.' Paragraph 10 deals with complaints. If the Commission receives a complaint made in accordance with paragraph 10 it must investigate it or give reasons for not doing so. By sub-paragraph (2) the complaint must be made in writing by a person who claims to have been directly affected by the failure of the public authority to comply with an

> equality scheme. There is no time limit for making a complaint.
>
> [100] The manner in which complaints are to be investigated is provided for in paragraph 11 of Schedule 9. These sub-paragraphs deal with transmission of the Commission's investigation report to the Secretary of State (NI) and notifying him of a failure of a public authority to take action recommended by the Commission. Where, as a result of an investigation carried out under paragraph 11, the Commission believes that a government department may have failed to comply with an equality scheme it may lay before Parliament and the Northern Ireland Assembly a report of its investigation."

[122] This aspect of the judicial review challenge relates exclusively to the revised CHC policy adopted by the Department in 2021. The material factual matrix bearing on the section 75 issues is ascertainable mainly from two formal equality screening documents generated in June 2017 and February 2021 respectively, considered in conjunction with the related affidavit evidence.

[123] The discrete decision impugned by both respondents is that of the Department not to undertake a full equality impact assessment ("EQIA"). The challenge to this decision has two central components. First, the Department's assessment that the likely impact of the new policy on equality of opportunity for those falling within the section 75 "age" category was likely to be both minor and positive in nature is unsustainable. Second, the Department's reasoning that an EQIA was not required on the further grounds that it will be "… based on assessed need and will be applied equally across all section 75 categories" is equally untenable as one of the key purposes of an EQIA would be to assess the possibility of a disproportionate impact on one particular group amounting to indirect discrimination. It is argued that in consequence of this assessment possible implications in respect of the disproportionate adverse impact of the policy upon older people have not been considered.

[124] In the consultation exercise noted above, the Commissioner contended that the adoption of Option 3 could have a greater adverse impact upon older people than any other age group in society as the ageing population in Northern Ireland was more likely to require assistance with health and social care needs, particularly in the nursing home setting and would also be more likely to have accumulated resources, such as a pension or a mortgage-free home. Evidentially, this found support in the second of the Department's screening documents. This recorded that as at June 2016 there were 12,368 residential and nursing care packages of which some 81% of the beneficiaries belonged to the Elderly Programme of Care. Furthermore, the ageing population trend was expected to continue. It was stated:

> "Therefore, older people requiring residential or nursing home care may be impacted to a greater extent by the proposed revisions to the current policy."

It is in this context that the averments in the Department's affidavit (supra) must be evaluated.

[125] The judge's assessment and determination of this ground of challenge was one of irrationality, per paras [177] – [178]:

> "… The gravamen of the new policy [is] to remove any possibility of CHC funding where an individual [is] cared for in a non-hospital setting …
>
> When that consequence is understood, it can properly be said to be irrational in my view to characterise the effect on older people as being only minor and positive. For older people who would or might lose out on CHC eligibility, it would have very significant financial consequences which might lead to the loss of life savings or a family home."

The judge added at para [180]:

> "The screening exercise undertaken in this case, regrettably, did not begin to properly consider the true impact of the new policy on older people."

[126] The judge then debated the question of whether the section 75 issues raised were justiciable by the litigation mechanism of the judicial review challenge of which the court was seized. His affirmative answer to this question paved the way for the quashing order.

[127] The quashing order is challenged on two grounds. First, it is submitted by Mr McGleenan KC and Mr McCleave that the evidence was insufficient to support the judge's conclusion that a substantive breach of the section 75 duty had been established. Attention is drawn to the two screening exercises undertaken by the Department and the consideration given to the information thereby generated. Per counsels' skeleton argument:

> "Properly viewed, the reasoning of the court at paras [176] – [179] focuses on the weight attached by the Department to the various issues that were under consideration … the standard of review in respect of such issues is that of irrationality. The conclusion reached by the Department … fell within the range of reasonable conclusions and

> demonstrated compliance with the procedural duty contained within section 75."

[128] The second basis upon which the quashing order is challenged by the Department entails the contention that the judge erred in law in permitting the section 75 challenge to proceed. This ground involves the now familiar argument that this challenge should have been pursued by the enforcement mechanism provided in Schedule 9 to the Northern Ireland Act. Logically, it is appropriate to address this issue first.

[129] This issue has been considered both by this court and in a number of first instance decisions. It has been examined by this court in *Re Neill* [2006] NICA 5 and *Re Stach* (supra). In *Re Neill*, the complaint advanced by the mechanism of judicial review proceedings in the High Court was that the public authority concerned (NIO) had failed to comply with its equality scheme under section 75 of and Schedule 9 to the 1998 Act. The High Court held that judicial review was not available. The Court of Appeal concurred. See paras [27] – [28]:

> "[27] It is important, we believe, to focus on the context of the present dispute in deciding whether judicial review will lie to challenge the validity of the 2004 Order. At the kernel of this is the avowed failure of NIO to comply with its equality scheme. This is precisely the type of situation that the procedure under Schedule 9 is designed to deal with. Equality schemes must be submitted for the scrutiny and approval of the Commission. It is charged with the duty to investigate complaints that a public authority has not complied with its scheme (or else to explain why it has decided not to investigate) and is given explicit powers to bring any failure on the part of the authority to the attention of Parliament and the Northern Ireland Assembly.
>
> [28] It would be anomalous if a scrutinising process could be undertaken parallel to that for which the Commission has the express statutory remit. We have concluded that this was not the intention of Parliament. The structure of the statutory provisions is instructive in this context. The juxtaposition of sections 75 and 76 with contrasting enforcing mechanisms for the respective obligations contained in those provisions strongly favour the conclusion that Parliament intended that, in the main at least, the consequences of a failure to comply with section 75 would be political, whereas the sanction of legal liability would be appropriate to breaches of the duty contained in section 76."

In *Stach*, this court, having considered *Neill*, stated at para [117]:

> "The decision in **Neill** promulgates a strong general rule. Its juridical aetiology can be traced to two inter-related principles of unassailable pedigree, namely: (a) judicial review is a remedy of last resort and (b) any alternative remedy should normally be exhausted, therefore, prior to recourse to judicial review."

[130] There are, therefore, powerful statements of principle in earlier decisions of this court strongly contra-indicating the propriety of pursuing by judicial review a challenge which lies within the compass of section 75 of and Schedule 9 to the 1998 Act. Indeed there are further considerations which perhaps have not attracted sufficient emphasis in the case law to date. The first is that the exercise of supervisory superintendence by the High Court in judicial review proceedings has certain intrinsic limitations: see para [67] above. The second is that the court cannot lay claim to any particular expertise in the section 75 sphere. The third is the presumptive expertise of the public authority concerned, ECNI. The fourth is that a Schedule 9 investigation by ECNI will entail a quite different and more wide-ranging exercise than judicial review. We elaborate as follows.

[131] In enacting section 75(4) and Schedule 9, the legislature has entrusted to a specialised statutory body the task of and responsibility for investigating and determining a complaint that a relevant public authority has failed to discharge either or both of the section 75 duties. In practice, the complaint will usually (though not necessarily invariably), as here, be that the authority concerned has failed to comply with its statutory equality scheme.

[132] Two particular features of section 75 must be highlighted. The first is the presumptively mandatory "shall" in section 75(4). The second is the statutory gateway to the Schedule 9 machinery: this is governed by the words "the enforcement of the duties under this section". Paraphrasing, in any case where a question arises about whether a public authority has discharged its duty under section 75(1) or section 75(2), thereby raising an issue concerning the enforcement of either of those duties, the Schedule 9 machinery, which has the rubric "Equality: Enforcement of Duties", shall apply.

[133] The next consideration is constitutional in nature, namely that in cases where the High Court decides to adjudicate upon such a complaint, there is judicial intrusion in a field in which the legislature has conferred sole responsibility on a specified and presumptively expert agency. This leads to a further, related consideration namely that the High Court in judicial review exercises the jurisdiction of supervisory superintendence and has no appellate function. Furthermore, the High Court is not endowed with the tools and mechanisms available to ECNI in its investigation and determination of a complaint under Schedule 9.

[134] We would add that the series of subjective judicial judgements embedded in the key passages of the High Court's judgment under appeal – in paras [176] – [178] - falls to be contrasted with the course which a Schedule 9 ECNI investigation would be expected to typically follow: evidence gathering, correspondence with the public authority and perhaps other sources (including the complainant), raising questions, meetings, interviews *et al*. The exercise which the High Court carries out in judicial review cases, being intrinsically one of supervisory superintendence, entailing none of the foregoing traits, stands in stark contrast. This is another indicator that judicial review did not provide the correct method of challenge in the present case.

[135] There is a further material consideration relating to remedies and outcomes. At first instance, the judge opted for the relatively draconian remedy of quashing the new 2021 policy in its entirety. This is to be contrasted with the powers available to ECNI in cases where the outcome of its investigation is – in the language of para 11(1) of Schedule 9 – that:

> "It believes that a public authority may have failed to comply with a [equality] scheme …"

In such cases transmission of its report to the Secretary of State is obligatory. In addition, there is specific provision for further involvement of both the Secretary of State and the Northern Ireland Assembly in any case where a report recommends that the public authority concerned takes certain action and ECNI considers that this has not been effected within a reasonable time. In such a case the Secretary of State is specifically empowered to give directions to the public authority.

[136] We further consider that the clearest guide to the identification of cases in which the High Court should properly adjudicate in section 75 issues is found in the language of para 10(1) of Schedule 9. This empowers ECNI to conduct an investigation where it receives a complaint that a public authority has failed to comply with its statutory equality scheme. The legislature has reserved all cases belonging to this category to ECNI.

[137] Whither the scope for judicial review by the High Court? In this context the prism of *vires* falls to be considered. If an issue related to section 75 raised by an aggrieved person or body does not fall squarely within the foregoing statutory framework, ECNI will not have the vires to investigate. Should it choose to do so it would be acting ultra vires. Alternatively, the High Court would be competent to adjudicate on a refusal or failure to act by ECNI in a case said to fall within para 10(1) of Schedule 9. A misconceived acceptance by ECNI of jurisdiction to act would similarly attract a challenge by judicial review proceedings. It is precisely in such cases that the supervisory jurisdiction of the High Court would properly be engaged. As in Neill, we repeat that any attempted compilation of an exhaustive list of such cases would be both inappropriate and unprofitable.

[138] While Scoffield J lamented the absence of clear appellate court guidance on the identification of cases on which the exceptional recourse to judicial review might be appropriate, this is to be viewed simply as a consequence of the character and potency of the "strong general rule" enunciated in *Stach* and the self-evident undesirability of judicial venturing into *obiter* fields. In a common law jurisdiction, overly prescriptive principles having the character of absolute rules have no place. In this sphere, as in others, the law will develop incrementally, on a case by case basis.

[139] Summarising, the principle of heavily limited recourse to the supervisory judicial review jurisdiction of the High Court in any case falling within the enforcement mechanism constituted by section 75(4) of and Schedule 9 to the Northern Ireland Act is a powerful one. The recognition in both *Neill* and *Stach* that an application for judicial review has not been altogether excluded by this statutory model is properly to be viewed as a faithful application of the "non-ouster " principle.

[140] The argument on behalf of the Commissioner was founded on the following passage in *Re Neill*, at para [30]:

> "The conclusion that the exclusive remedy available to deal with the complained of failure of NIO to comply with its equality scheme does not mean that judicial review will in all instances be unavailable. We have not decided that the existence of the Schedule 9 procedure ousts the jurisdiction of the court in all instances of breach of section 75. **Mr Allen suggested that none of the hallmarks of an effective ouster clause was to be found in the section and that Schedule 9 was principally concerned with the investigation of procedural failures of public authorities. Judicial review should therefore be available to deal with substantive breaches of the section**. It is not necessary for us to reach a final view on this argument since we are convinced that the alleged default of NIO must be characterised as a procedural failure. We incline to the opinion, however, that there may well be occasions where a judicial review challenge to a public authority's failure to observe section 75 would lie. We do not consider it profitable at this stage to hypothesise situations where such a challenge might arise. This issue is best dealt with, in our view, on a case by case basis."
>
> [our emphasis]

It was argued that in this passage the court affirmed the availability of judicial review in cases of alleged "substantive breaches" of section 75.

[141] We consider this argument unsustainable. In our view, properly construed, the material sentence in this passage (highlighted above) was a rehearsal of the argument being advanced by the advocate concerned. Furthermore, the court expressly declined to adjudicate on the argument. Thus the submission to this court cannot be sustained. We would add the following *(obiter*). The suggested dichotomy of procedural and substantive breaches of section 75 received minimal consideration in *Neill*. Furthermore, in this appeal, the juridical foundation of this dichotomy was not explored in argument. Ultimately, the question is one of statutory construction. It is not clear to this court that there is any tenable basis for the distinction. We consider that considerable caution is required before diverting into any enquiry of whether a breach of section 75 is procedural or substantive in nature. Beyond that we do not venture, recognising the *obiter* nature of our observations with the consequence that more detailed examination of this issue will be required if the opportunity arises in some appropriate future case.

[142] The judge was clearly exercised by what he considered to be the flaws in the evaluative judgements formed by the Departmental officials concerned. However, in our view the diagnosis of deficiencies of this nature was plainly a matter for the Commission and not the court. To summarise, for the reasons given we conclude that the High Court should not have entertained the section 75 challenge.

[143] We would add the following. We consider this conclusion to be entirely compatible with the rule of law. The exhaustion of non-judicial remedies is an entrenched element of the rule of law. There is no departure from the rule of law in a judicial assessment that this principle must be observed on the basis that this course is mandated by the legislature. In the present context, giving effect to this principle means that the quasi-judicial responsibilities of ECNI must be discharged. Subject to any insuperable hurdle (eg, limitation – and none was canvassed in argument) this will lead to a decision of the public authority designated and entrusted by the legislature to conduct investigations and make decisions in this sphere which, in turn and in principle, will be vulnerable to the supervisory review of the High Court. See for example *Re Belfast Telegraph Newspapers' Application* [2001] NI 78. Thus the function and authority of the High Court are unaffected and undiminished by our ruling. The recent decision of the Supreme Court in *Re McAleenan* [2024] UKSC is plainly distinguishable and does not in our view require a different approach.

13. Section 75: The Standard of Review

[144] We shall address one further discrete issue notwithstanding that it has been rendered otiose by our immediately preceding conclusion. We do so by reason of the importance of the issue and taking into account the detailed submissions developed by Mr McGleenan KC. In doing so we turn to certain English decisions which featured in those submissions. In England and Wales, the statutory analogue of section 75 of the Northern Ireland Act is section 149 of the Equality Act 2010 (see Appendix 3). Section 75 of the 1998 Act is not, of course, couched in identical terms. However, there are substantial similarities and, in particular, the two provisions have in common (a)

the presumptively mandatory "shall" and "must", together with (b) the language of "have due regard to the need to ….. (etc)".

[145] Section 149 of the Equality Act was considered by the Supreme Court in *Hotak v Southwark LBC* [2016] AC 811. At para [73] Lord Neuberger of Abbotsbury, delivering the majority (4/1) judgment of the court, cited with approval several decisions of the English Court of Appeal, including *Baker v Secretary of State for Communities (etc)* [2009] PTSR 809, paras [30] – [31]. He continued at para [74]:

> "As Dyson LJ emphasised, the equality duty is `not a duty to achieve a result', but a duty `to have due regard to the need' to achieve the goals identified in paras (a) to (c) of section 149(1) of the 2010 Act. Wilson LJ explained that the Parliamentary intention behind section 149 was that there should `be a culture of greater awareness of the existence and legal consequences of disability'. He went on to say in para 33 that the extent of the `regard' which must be had to the six aspects of the duty (now in subsections (1) and (3) of section 149 of the 2010 Act) must be what is `appropriate in all the circumstances'. Lord Clarke suggested in argument that this was not a particularly helpful guide and I agree with him. However, in the light of the word `due' in section 149(1), I do not think it is possible to be more precise or prescriptive, given that the weight and extent of the duty are highly fact-sensitive and dependant on individual judgment."

Lord Neuberger continued at para [75]:

> "As was made clear in a passage quoted in Bracking, the duty `must be exercised in substance, with rigour, and with an open mind' (per Aikens LJ in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), [2009] PTSR 1506, para 92. And, as Elias LJ said in Hurley and Moore, it is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that `there has been rigorous consideration of the duty'. Provided that there has been `a proper and conscientious focus on the statutory criteria', he said that `the court cannot interfere … simply because it would have given greater weight to the equality implications of the decision'."

Pausing, we agree with Mr McGleenan that there is a clear nexus between this approach and that enshrined in *Stach*.

[146] The decision in *Hotak* marked the beginning of a clear and consistent line of authority in England and Wales. The Court of Appeal jurisprudence which followed includes in particular *R (Jewish Rights Watch) v Leicester CC* [2018] EWCA Civ 1551, at para [29] and *R (End Violence Against Women Coalition) v DPP* [2021] EWCA Civ 350, which contains the following passage worthy of reproduction, at para [86]:

> "Section 149 of the 2010 Act applies to a public authority when it exercises its functions (see section 149(1)). It requires a public authority to give the equality needs which are listed in section 149 the regard which is 'due' in the particular context. It does not dictate a particular result. It does not require an elaborate structure of secondary decision making every time a public authority makes any decision which might engage the listed equality needs, however remotely. The court is not concerned with formulaic box-ticking, but with the question whether, in substance, the public authority has complied with section 149. A public authority can comply with section 149 even if the decision maker does not refer to section 149 (see, for example, *Hottak v Southwark London Borough Council* [2015] UKSC 30; [2016] AC 811)."

[147] Our attention was also drawn to the decision of the English High Court in *R (Khalsa Academies Trust) v Secretary of State for Education* [2021] EWHC 2660 (Admin). The judgment of Deputy High Court Judge Mansfield QC, while not of course having precedent status in this court, makes a notable contribution to the jurisprudence belonging to this sphere. This decision sounds squarely on the standard of review to be applied in the context of the section 75 quashing order made by Scoffield J. It concerns what is frequently described in the world of judicial review as a public authority's "duty of enquiry". At para [114] the judge identified the issue, which was the standard of review applicable to the enquiries undertaken by the public authority concerned.

[148] The Secretary of State's arguments are summarised in a lengthy passage at para [115] which we reproduce at Appendix 5. We are satisfied that these passages contain an exposition of orthodox dogma.

[149] As rehearsed in para [4](b) above the terms in which the judge diagnosed a breach by the Department of its section 75 duty are these:

> "An order quashing the 2021 policy as it was in breach of the duty imposed upon the Department by section 75 of the Northern Ireland Act 1998 in that the preceding screening exercise "… did not begin to properly consider the true impact of the new policy on older people".

Summarising, in the context of the present case section 75 of the Northern Ireland Act obliged the Department, in developing the new 2021 CHC policy, to "have due regard to the need to promote equality of opportunity" between persons of different age. The Department, in performing this statutory duty, was obliged to act in compliance with its Schedule 9 equality scheme. Any failure by the Department to do so triggered the investigatory function of ECNI under para 10(1) of Schedule 9 upon receipt of a complaint to this effect. The Department's equality scheme contains arrangements for the screening of developing policies and the conduct of equality impact assessments where considered appropriate. The Commissioner's complaint, properly analysed, is that the Department's screening exercise unlawfully failed to determine that an equality impact assessment was required. This in our estimation is properly viewed as a complaint that the Department failed to comply with its equality scheme.

[150] Given the strong parallels between sections 75 of the 1998 Act and its English statutory counterpart it is appropriate to give consideration to the relevant jurisprudence generated in the neighbouring jurisdiction. We can identify no reason why the principles expounded in the English cases considered above should not apply to section 75/Schedule 9 of the 1998 Act in this jurisdiction. This is so basically because the parallels between the statutory regimes in the two jurisdictions and the overlay of public law are strong. The contrary was not argued with any conviction.

[151] The effect of the applicable principles is that in order to conclude that the Department had been in breach of its section 75 duty it was incumbent on the judge to find a failure by the Department to carry out further enquiries by progressing from the screening exercise to a full equality impact assessment which was irrational in the Wednesbury sense. But this is not how Scoffield J directed himself. We consider that, rather, the judge approached and determined this issue on the unspoken premise that, in essence, the High Court was exercising an appellate jurisdiction. The correct standard of review was not in substance applied and the judge's conclusion cannot be sustained in consequence on this further discrete ground.

[152] Some observations about the decision in *R (Grogan) v Bexley NHS Care Trust* [2001] QB 187, on which Scoffield J placed considerable reliance, are appropriate. *Grogan* is a first instance decision of the English Administrative Court binding on neither the Northern Ireland High Court nor this court. It concerned a challenge to guidance on eligibility for continuing nursing care issued under the different statutory regime prevailing in England and Wales. That represents the first point of distinction. The second is that the guidance under scrutiny did contain criteria for assessment entitlement. The third is that the challenge was to the clarity of these criteria. The court held that the criteria did not provide sufficiently clear assistance in the application of the guidance and concluded that the guidance was unlawful in consequence. In addition to the points of distinction already noted, it is a feature of this decision that the court did not identify the legal standard which it was applying and, simultaneously, did not engage with the *Wednesbury* principle. In our view, the approach of the court was in substance that of conducting a merits appeal. For these reasons the High Court's reliance on this decision was misplaced.

14. Time Barred? Order 53, Rule 4

[153] Order 53, rule 4(1) of the Rules of the Court of Judicature provides:

> "An application for leave to apply for judicial review shall be made [promptly and in any event] within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

This provision was considered extensively by this court in *Re Allister & Others* [2022] NICA 15, para [567] ff. We refer particularly to para [49] above. The assessment that the initiation of these proceedings was manifestly out of time is in our estimation incontestable. The discretion of the court is therefore engaged. In this respect we are mindful that the time issue may not have been canvassed by the Department forcefully at first instance, while before this court it was (correctly) something of a makeweight in the submissions of Mr McGleenan KC. We also take into account that there has been a vast investment of judicial resource both at first instance and on appeal. We must further weigh that these proceedings raise some weighty issues of law. We formally extend time in favour of the Commissioner accordingly.

15. Omnibus Conclusions and Order

[154] Our conclusions are the following:

(i) The 2010 CHC policy contained in Circular HSC (ECCU) 1/2010 was ultra vires the Department's statutory powers insofar as it enabled certain people to receive social care in an accommodation setting free of charge, in conflict with the relevant statutory provisions.

(ii) The Department was under no legal obligation to publish guidance relating to the 2010 (ultra vires) policy and its failure to do so was not vitiated by *Wednesbury* irrationality in any event.

(iii) The Department's pursuit of a new policy development process and consultation exercise which culminated in the adoption of a new CHC policy in 2021 and its associated declination to issue guidance on the (ultra vires) 2010 CHC policy were not infected by *Wednesbury* irrationality.

(iv) The declaratory order of the High Court cannot therefore be sustained.

(v) The section 75 complaints relating to the adoption of the new 2021 CHC policy should not have been considered by the High Court, as they clearly fell within the scope of the statutory remedy machinery constituted by section 75(4) of and Schedule 9(2) to the Northern Ireland Act 1998.

(vi) The order quashing the 2021 CHC policy cannot be sustained in consequence.

[155] The parties will have an opportunity to propose a draft order having considered this judgment. In particular, the parties will give consideration to whether the court should, in the exercise of its discretion, make any specific order – in particular a declaratory order – consequential upon the first of its conclusions. In considering this issue information on whether decisions in accordance with the 2010 CHC policy continue to be made would be material.

[156] For the reasons elaborated the Department's appeal succeeds.

Postscript

Having considered the parties' further representations:

(i) The court gives effect to the protective costs mechanism previously agreed *inter – partes;*

(ii) With regard to para [155] above, in the exercise of its discretion the court declines to include any specific remedy in its final order.

APPENDIX 1

Health and Social Care (Reform) Act (NI) 2009

Section 2

"Department's general duty

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 well-being 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 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 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."*

Section 21

"It is the duty of an HSC trust to exercise its functions with the aim of improving the health and social well-being of,

and reducing health inequalities between, those for whom it provides, or may provide, health and social care."

APPENDIX 2

Health and Personal Social Services (NI) Order 1972

Article 5

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

(a) hospital accommodation, including accommodation within the meaning of Article 110 of the Mental Health Order;

(b) premises, other than hospitals, at which facilities are available for all or any of the services provided under this Order or the 2009 Act;

(c) medical, nursing and other services whether in such accommodation or premises, in the home of the patient or elsewhere.

(2) In addition to its functions under paragraph (1), the [Department] may provide such other accommodation and services not otherwise specifically provided for by this Order or the 2009 Act as it considers conducive to efficient and sympathetic working of any hospital or service under its control, and, in relation to any person and notwithstanding anything contained in section 2(1)(a) of the 2009 Act, to provide or arrange for the provision of such accommodation or services, and in connection therewith, to incur such expenditure as is necessary or expedient on medical grounds.

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

(4) The [Department] may permit any person to whom this paragraph applies to use for the purposes of private practice, on such terms and conditions as the [Department] may determine, the facilities available at accommodation or premises provided under this Article.

(5) The persons to whom paragraph (4) applies, being persons who provide services under this Order or the 2009 Act, are as follows -

(a) medical practitioners;

(aa) persons providing primary medical services under a general medical services contract or in accordance with Article 15B arrangements;

(b) dental practitioners;

(c) ophthalmic opticians;

(d) pharmacists; and

(e) such other persons as the [Department] may determine."

Article 7

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

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

(3) No arrangements made under paragraph (1) may be given effect to in relation to a person to whom section 115 of the Immigration and Asylum Act 1999 applies solely-

(a) because he is destitute; or

(b) because of the physical effects, or anticipated physical effects, of his being destitute.

(3A) Subsections (3) and (5) to (8) of section 95 of the Immigration and Asylum Act 1999, and paragraph 2 of Schedule 8 to that Act, apply for the purposes of paragraph (3) as they apply for the purposes of that section, but for the references in subsections (5) and (7) of that section and in paragraph 2 of that Schedule to the Secretary of State substitute references to the Department."

Article 15

"(A1) The functions conferred by this Article are to be exercised as part of the system of social care designed to secure improvement in the social well-being of people in Northern Ireland mentioned in section 2(1)(b) of the 2009 Act.

(1) An authorised HSC trust shall make available advice, guidance and assistance, to such extent as it considers necessary, and for that purpose shall make such arrangements and provide or secure the provision of such facilities (including the provision or arranging for the provision of residential or other accommodation, home help and laundry facilities) as it considers suitable and adequate.

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

(1B) An authorised HSC trust may assist any body or person carrying out any arrangements under paragraph (1) by-

(a) permitting that body or person to use premises belonging to the trust;

(b) making available vehicles, equipment, goods or materials; and

(c) making available the services of any staff who are employed in connection with the premises or other things which the trust permits the body or person to use,

on such terms and conditions as may be agreed between the Department and that body or person.

(2) Assistance under paragraph (1) may be given to, or in respect of, a person in need requiring assistance in kind or, in exceptional circumstances constituting an emergency, in cash; so however that before giving assistance to, or in respect of, a person in cash the trust shall have regard to his eligibility for receiving assistance from any other statutory body, and, if he is so eligible, to the availability to him of that assistance in his time of need.

(3) Where under paragraph (1) a trust makes arrangements or provides or secures the provision of facilities for the engagement of persons in need (whether under a contract of service or otherwise) in suitable work, the trust may assist such persons in disposing of the produce of their work.

(4) [A trust] may recover in respect of any assistance, help or facilities under this Article such charges (if any) as the trust considers appropriate.

(5) In so far as it relates to the provision of accommodation, this Article is subject to Articles 36 and 99.

(6) Assistance may not be provided under paragraph (1) in respect of any person to whom section 115 of the Immigration and Asylum Act 1999 applies if his need for assistance has arisen solely-

(a) because he is destitute, or

(b) because of the physical effects, or anticipated physical effects, of his being destitute.

(7) Subsections (3) to (8) of section 95 of the Immigration and Asylum Act 1999, and paragraph 2 of Schedule 8 to that Act, apply for the purposes of paragraph (6) as they apply for the purposes of that section, but for references to the Secretary of State in subsections (5) and (7) of that section and in paragraph 2 of that Schedule substitute references to an HSC trust."

Article 36

"…(1) Subject to paragraph (2), arrangements must not be made under Article 15 for the provision of accommodation together with nursing or personal care for persons such as are mentioned in Article 10(1) of the Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003 (residential care homes) unless-

> (a) the accommodation is to be provided, under the arrangements, in a residential care home or nursing home (within the meaning of that Order); and
>
> (b) a person carrying on or managing the home is registered in respect of it under that Order.

(2) The Department may by regulations make provision for or in connection with the making of arrangements under Article 15 for the provision of accommodation in Great Britain, the Channel Islands or the Isle of Man.

(2A) Any question under this Order as to whether a person is ordinarily resident in the operational area of an authorised HSC trust is to be determined by the trust.

(3) Any arrangements made by virtue of this Article shall provide for the making by the HSC trust to the other party thereto of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements; and, subject to paragraph (7), the HSC trust shall recover from each person for whom accommodation is provided under the arrangements the amount of the refund which he is liable to make in accordance with the following provisions of this Article.

(4) Subject to the following provisions of this Article, a person for whom accommodation is provided under any such arrangements shall refund to the HSC trust-

> (a) where the payments made in respect of him under paragraph (3) include any amount in respect of nursing care by a registered nurse, the amount of such payments less any amount paid in respect of such nursing care;

(b) in any other case, the amount of the payments made in respect of him under paragraph (3).

(4A) In paragraph (4) "nursing care by a registered nurse" means any services provided by a nurse registered under Article 5 of the Nursing and Midwifery Order 2001 (SI 2002/253) and involving-

(a) the provision of care, or

(b) the planning, supervision or delegation of the provision of care,

other than any services which, having regard to their nature and the circumstances in which they are provided, do not need to be provided by a nurse so registered.

(5) Where a person for whom accommodation is provided, or proposed to be provided, under any such arrangements satisfies the HSC trust that he is unable to make a refund at the full rate determined under paragraph (4)(a) or (b), the trust shall assess his ability to pay, and accordingly determine at what lower rate he shall be liable to make a refund.

(6) Regulations may make provision for the assessment, for the purposes of paragraph (5), of a person's ability to pay.

(7) Where accommodation in any home or premises is provided for any person under arrangements made by virtue of this Article and the HSC trust, the person concerned and the voluntary organisation or other person managing the home or premises (in this paragraph referred to as "the provider") agree that this paragraph shall apply-

(a) so long as the person concerned makes the payments for which he is liable under sub-paragraph (b), he shall not be liable to make any refund under paragraph (4) or (5) and the trust shall not be liable to make any payment under paragraph (3) in respect of the accommodation provided for him;

(b) the person concerned shall be liable to pay to the provider such sums as he would otherwise

(under paragraph (4) or (5)) be liable to pay by way of refund to the trust; and

(c) the Department shall be liable to pay to the provider the difference between the sums paid by virtue of sub-paragraph (b) and the payments which, but for sub-paragraph (a), the trust would be liable to pay under paragraph (3).

(8) An HSC trust may, on each occasion when it makes arrangements by virtue of this Article for the provision of accommodation for a person and irrespective of his means, limit to such amount as appears to the trust reasonable for him to pay the refunds required from him for his accommodation during a period commencing when the trust began to make the arrangements for accommodation for him and ending not more than 8 weeks after that."

Article 98

"(1) The services provided under this Order or the 1991 Order or the Health Services (Primary Care) (Northern Ireland) Order 1997 shall be free of charge, except where any provision contained in or made under this Order or the Health Services (Primary Care) (Northern Ireland) Order 1997 or the 2009 Act expressly provides for the making and recovery of charges.

(2) The provisions of Schedule 15 shall have effect in relation to the making and recovery of certain charges and to the other matters mentioned in that Schedule."

Article 99

"… (1) Where a person is provided under Article 15 with accommodation in premises provided by an HSC trust, the trust shall recover from him the amount of the payment which he is liable to make in accordance with the following provisions of this Article.

(2) Subject to the following provisions of this Article, the payment which a person is liable to make for any such accommodation shall be in accordance with a standard rate determined by the Department for that accommodation.

(2A) Different rates may be determined under paragraph (2) for (in particular)—

(a) different descriptions of accommodation;

(b) accommodation provided by different trusts.

(2B) The standard rate determined for accommodation provided by any trust must represent the full cost to the trust of providing that accommodation, other than any costs in respect of nursing care by a registered nurse (within the meaning given by Article 36(4A)) at that accommodation.

(3) Subject to paragraph (4), where a person for whom such accommodation is provided, or proposed to be provided, satisfies the trust that he is unable to pay for the accommodation at the standard rate, the trust shall assess his ability to pay, and accordingly determine at what lower rate he shall be liable to pay for the accommodation.

(4) The liability of any person to pay for accommodation under this Article may be reduced by reason of any work which he performs and which assists materially in the management of the premises.

(5) Regulations may make provision for the assessment, for the purposes of paragraph (3), of a person's ability to pay.

(6) An HSC trust may, on each occasion when it provides accommodation mentioned in paragraph (1) for any person and irrespective of his means, limit to such amount as appears to the trust reasonable for him to pay the payments required from him for his accommodation during a period commencing when the trust began to provide the accommodation for him and ending not more than 8 weeks after that."

APPENDIX 3

Section 75, Northern Ireland Act 1998

"Statutory duty on public authorities.

(1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity—

(a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;

(b) between men and women generally;

(c) between persons with a disability and persons without; and

(d) between persons with dependants and persons without.

(2) Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

(3) In this section "public authority" means—

(a) any department, corporation or body listed in Schedule 2 to the Parliamentary Commissioner Act 1967 (departments, corporations and bodies subject to investigation) and designated for the purposes of this section by order made by the Secretary of State;

(4) Schedule 9 (which makes provision for the enforcement of the duties under this section) shall have effect."

Schedule 9, Northern Ireland Act 1998

"Equality: enforcement of duties

The Equality Commission

1 The Equality Commission for Northern Ireland shall—

(a) keep under review the effectiveness of the duties imposed by section 75;

(b) offer advice to public authorities and others in connection with those duties; and

(c) carry out the functions conferred on it by the following provisions of this

Equality schemes

2(1) A public authority to which this sub-paragraph applies shall, before the end of the period of six months beginning with the commencement of this Schedule or, if later, the establishment of the authority, submit a scheme to the Commission.

(2) Sub-paragraph (1) applies to any public authority except one which is notified in writing by the Commission that that sub-paragraph does not apply to it.

3(1) Where it thinks appropriate, the Commission may—

(a) request a public authority to which paragraph 2(1) does not apply to make a scheme;

(b) request any public authority to make a revised scheme.

(2) A public authority shall respond to a request under this paragraph by submitting a scheme to the Commission before the end of the period of six months beginning with the date of the request.

4(1) A scheme shall show how the public authority proposes to fulfil the duties imposed by section 75 in relation to the relevant functions.

(2) A scheme shall state, in particular, the authority's arrangements—

(a) for assessing its compliance with the duties under section 75 and for consulting on matters to which a duty under that section is

likely to be relevant (including details of the persons to be consulted);

(b) for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity;

(c) for monitoring any adverse impact of policies adopted by the authority on the promotion of equality of opportunity;

(d) for publishing the results of such assessments as are mentioned in paragraph (b) and such monitoring as is mentioned in paragraph (c);

(e) for training staff;

(f) for ensuring, and assessing, public access to information and to services provided by the authority.

(3) A scheme shall—

(a) conform to any guidelines as to form or content which are issued by the Commission with the approval of the Secretary of State;

(b) specify a timetable for measures proposed in the scheme; and

(c) include details of how it will be published.

(4) In this paragraph—

- "equality of opportunity" means such equality of opportunity as is mentioned in section 75(1);
- "the relevant functions" means the functions of the public authority or, in the case of a scheme submitted in response to a request which specifies particular functions of the public authority, those functions.

(5) But where the public authority is designated by order under section 75(3)(a) or (d)—

- "equality of opportunity" does not include equality of opportunity in relation to which (by virtue of the order) the public authority has no obligations under section 75(1);
- "the relevant functions" does not include functions of the public authority so far as the obligations imposed by section 75 do not (by virtue of the order) apply to their exercise.

Textual Amendments

Sch 9 para 4(5) inserted (13.3.2014) by Northern Ireland (Miscellaneous Provisions) Act 2014 (c 13), **ss 22(2)**, 28(1)(f)

5 Before submitting a scheme a public authority shall consult, in accordance with any directions given by the Commission—

(a) representatives of persons likely to be affected by the scheme; and

(b) such other persons as may be specified in the directions.

6(1) On receipt of a scheme the Commission shall—

(a) approve it; or

(b) refer it to the Secretary of State.

(2) Where the Commission refers a scheme to the Secretary of State under sub-paragraph (1)(b), it shall notify the Assembly in writing that it has done so and send the Assembly a copy of the scheme.

7(1) Where a scheme is referred to the Secretary of State he shall—

(a) approve it;

(b) request the public authority to make a revised scheme; or

(c) make a scheme for the public authority.

(2) A request under sub-paragraph (1)(b) shall be treated in the same way as a request under paragraph 3(1)(b).

(3) Where the Secretary of State—

(a) requests a revised scheme under sub-paragraph (1)(b); or

(b) makes a scheme under sub-paragraph (1)(c),

he shall notify the Assembly in writing that he has done so and, in a case falling within paragraph (b), send the Assembly a copy of the scheme.

8(1) If a public authority wishes to revise a scheme it may submit a revised scheme to the Commission.

(2) A revised scheme shall be treated as if it were submitted in response to a request under paragraph 3(1)(b).

(3) A public authority shall, before the end of the period of five years beginning with the submission of its current scheme, or the latest review of that scheme under this sub-paragraph, whichever is the later, review that scheme and inform the Commission of the outcome of the review.

Duties arising out of equality schemes

9(1) In publishing the results of such an assessment as is mentioned in paragraph 4(2)(b), a public authority shall state the aims of the policy to which the assessment relates and give details of any consideration given by the authority to—

(a) measures which might mitigate any adverse impact of that policy on the promotion of equality of opportunity; and

(b) alternative policies which might better achieve the promotion of equality of opportunity.

(2) In making any decision with respect to a policy adopted or proposed to be adopted by it, a public

authority shall take into account any such assessment and consultation as is mentioned in paragraph 4(2)(b) carried out in relation to the policy.

(3) In this paragraph "equality of opportunity" has the same meaning as in paragraph 4.

Complaints

10(1) If the Commission receives a complaint made in accordance with this paragraph of failure by a public authority to comply with a scheme approved or made under paragraph 6 or 7, it shall—

(a) investigate the complaint; or

(b) give the complainant reasons for not investigating.

(2) A complaint must be made in writing by a person who claims to have been directly affected by the failure.

(3) A complaint must be sent to the Commission during the period of 12 months starting with the day on which the complainant first knew of the matters alleged.

(4) Before making a complaint the complainant must—

(a) bring the complaint to the notice of the public authority; and

(b) give the public authority a reasonable opportunity to respond.

Investigations

11(1) This paragraph applies to—

(a) investigations required by paragraph 10; and

(b) any other investigation carried out by the Commission where it believes that a public authority may have failed to comply with a scheme approved or made under paragraph 6 or 7.

(2) The Commission shall send a report of the investigation to—

(a) the public authority concerned;

(b) the Secretary of State; and

(c) the complainant (if any).

(3) If a report recommends action by the public authority concerned and the Commission considers that the action is not taken within a reasonable time—

(a) the Commission may refer the matter to the Secretary of State; and

(b) the Secretary of State may give directions to the public authority in respect of any matter referred to him.

(4) Where the Commission—

(a) sends a report to the Secretary of State under sub-paragraph (2)(b); or

(b) refers a matter to the Secretary of State under sub-paragraph (3)(a),

it shall notify the Assembly in writing that it has done so and, in a case falling within paragraph (a), send the Assembly a copy of the report.

(5) Where the Secretary of State gives directions to a public authority under sub-paragraph (3)(b), he shall notify the Assembly in writing that he has done so.

Government departments

12(1) Paragraphs 6, 7 and 11(2)(b) and (3) do not apply to a government department which is such a public authority as is mentioned in section 75(3)(a).

(2) On receipt of a scheme submitted by such a government department under paragraph 2 or 3 the Commission shall—

(a) approve it; or

(b) request the department to make a revised scheme.

(3) A request under sub-paragraph (2)(b) shall be treated in the same way as a request under paragraph 3(1)(b).

(4) Where a request is made under sub-paragraph (2)(b), the government department shall, if it does not submit a revised scheme to the Commission before the end of the period of six months beginning with the date of the request, send to the Commission a written statement of the reasons for not doing so.

(5) The Commission may lay before Parliament and the Assembly a report of any investigation such as is mentioned in paragraph 11(1) relating to a government department such as is mentioned in sub-paragraph (1)."

APPENDIX 4

Section 149, Equality Act 2010

"Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant

protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to—

(a) a breach of an equality clause or rule;

(b) a breach of a non-discrimination rule.

(9) Schedule 18 (exceptions) has effect."

APPENDIX 5

(from) *R (Khalsa Academies Trust) v Secretary of State for Education* [2021] EWHC 2260 (Admin)

"[115] In considering the enquiries made, the Defendant submits that the question for the court is whether the steps taken were rational. The Defendant submits that the following principles apply:

i) The obligation is only to make such inquiries or take such steps as are reasonable: *R (Plantagenet Alliance Ltd.) v Secretary of State for Justice* [2015] EWHC 1662 (Admin).

ii) It is for the public body, and not the court, to decide upon the manner and intensity of any inquiry to be undertaken: *R (Khatun) v Newham LBC* [2005] QB 37, *Plantagenet Alliance* para 100(2). It will only be unlawful for a public body not to undertake a particular inquiry if it was irrational not to do so. The court should not intervene merely because it considers that further enquiries would have been sensible or desirable: *Plantagenet Alliance* para 100(3).

iii) The court should establish what material was before the public body at the relevant time, and should only strike down a decision not to make further inquiries if no reasonable public body possessed of that material could suppose that the inquiries they made were sufficient: *Plantagenet Alliance* para 100(4). "

The judgment continues, at paras [116] – [118]:

> "Neither *Bridges* nor *Bracking* expressly deal with the standard of review where it is alleged that reasonable enquiries or investigations were not made. Two first instances decisions, both dealing with s.149 challenges, do address the issue. In *R (D) v Hackney LBC* [2019] EWHC 943 (Admin) para 84 Supperstone J said:
>
> > `What constitutes `due regard' will depend on the circumstances: *Surrey*, at para 80. Moreover, the `duty of inquiry' is an application of the *Tameside* duty on a public body to take reasonable steps to acquaint itself with the relevant information necessary to enable it properly to perform the relevant function: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065. It will only be unlawful for a public body not to undertake a particular inquiry if it was irrational for it not to do so.'
>
> [117] In *R (Joint Council for the Welfare of Immigrants) v SSHD* [2021] EWHC 638 (Admin) at paragraphs 21-24 Lieven J said the following:
>
> > `21. I turn, then, to my conclusions. Ground 1; I accept that there is a duty of inquiry pursuant to *Tameside*. It seems to me that must be inherent within s.149. But the law is clear that a judicial review can only be brought in respect of an alleged failure to meet the duty of enquiry on *Wednesbury* rationality grounds. To some degree, I accept that *Wednesbury* will be context specific, whilst remaining a necessarily high test for a claimant. However, I do not accept on the case law that the burden is in some way reversed so that the Secretary of State has to prove that what she has done is not irrational or that the scope of the *Wednesbury* test is in some way watered down.
> >
> > 22. Mr Bowen relies, as I have said, on the case law in *Bridges*, *R (on the application of) v Chief Constable of South Wales Police*, a decision of the Court of Appeal concerning a facial recognition scheme being run by the police. In my view, *Bridges* is not of very great assistance to the current case because the nature of what data is required and the detail of the data and

> the scope of the error is necessarily going to be very fact-specific in cases concerning the public sector equality duty, which is a duty that can arise in a wide range of different contexts.
>
> 23. In *Bridges*, on my reading of the Court of Appeal decision, first of all, there was really very limited data that was said to meet the inquiry inherent in the PSED duties; secondly, the potentially discriminatory effect of the facial recognition technology in issue was very obvious and very stark; thirdly, this was, it would be fair to say, novel technology, certainly in the context in which it was being used. Mr Bowen says, `Well, the Settlement Scheme is a novel scheme,' and, of course, almost anything is novel when it comes for judicial review. But, in my view, the crucial point is that there is nothing novel about designing a bureaucratic scheme by which you check that people with protected characteristics have access to the scheme. That is a totally different context, in my view, to a facial recognition scheme being used by police. Importantly, as I read *Bridges*, the Court of Appeal is not shifting the legal burden in a PSED case onto the public authority and is not seeking to establish that normal principles of *Wednesbury* rationality do not apply.
>
> …'

118. I accept the Defendant's submissions on this point. I respectfully agree with and adopt the analysis of Supperstone J and Lieven J. There is nothing in *Bracking* nor *Bridges* that requires a different approach. Whether or not there has been a failure of enquiry in carrying out the PSED analysis is subject to normal principles of *Wednesbury* rationality, though the application of that test is necessarily context specific."