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2013/59436

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Between:

IN THE MATTER OF AN APPLICATION BY FOLD HOUSING ASSOCIATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Applicant

and

IN THE MATTER OF A DECISION BY THE MINISTER WITH RESPONSIBILITY FOR THE DEPARTMENT FOR SOCIAL DEVELOPMENT MADE IN OR ABOUT APRIL 2013

Respondent

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HORNER J

Introduction

[1] This judicial review commenced in June 2013. It has proceeded at a leisurely pace through the courts for a number of reasons. At the heart of this judicial review lies the withdrawal of Special Needs Maintenance Allowance ("SNMA") or a sum that represents the amount of SNMA previously paid prior to 2003 to housing associations in general, and the applicant in particular, in respect of different types of accommodation, but in this case to Loughview Fold ("Loughview"). SNMA was introduced in 1993 and its purpose was to pay for the additional cost of providing "special needs housing". It is asserted that the discontinuance of SNMA will have grave and disastrous consequences for the applicant's ability to fund various housing schemes it runs for vulnerable persons, including the frail and elderly, some of whom suffer from dementia and who reside at Loughview. However, the respondent had agreed to continue to make SNMA payments albeit discounted ones, while this litigation continued. Further, the original dates allotted for the hearing proved to be inadequate and different single hearing dates have been allocated as

and when the diaries of counsel and the court permitted. This has been less than ideal and should not be repeated. The continuity of a case is important and the disjointed nature of the hearings assisted neither counsel nor the court. Counsel have worked exceptionally hard over an extended period of time to make detailed legal and factual submissions. The industry and ingenuity of counsel cannot be faulted. However, part of the problem has been the unfocussed nature of the submissions from both sides. There had been complaints from the respondent that the applicant has strayed far and wide from the original grounds for which leave had been granted. The applicant has criticised the respondent for relying on grounds of defence seen for the first time in the written submissions and/or made for the first time orally in court. Those problems are, at least in part, a consequence of the way in which the hearing has progressed.

[2] No stone has been left unturned by either side. Every possible point has been the subject of detailed argument. The parties cannot even agree whether this case is about the failure to pay SNMA to the applicant or whether SNMA has been abolished and this is "legacy SNMA". For the avoidance of doubt I am going to use the term "SNMA" to cover both SNMA and legacy SNMA. In truth the parties have been unable to agree even what they disagree on. The result is that the court has been submerged with documents, written arguments and oral arguments. It is simply not possible for me to deal with all the many and various arguments set out in detail in both the written and oral arguments advanced by the applicant and the respondent. If I had attempted to do so, the judgment would have been unnecessarily long and even more unwieldy and indigestible than it presently is. I emphasise that I have considered all the points raised by counsel and given them due attention. But for the sake of brevity, I do not intend to deal with each and every point, some of which have little or no merit. I will confine myself to the main grounds set out in the Order 53 Statement and for which leave was granted.

Order 53 Statement

[3] The application is to challenge the decision of the respondent to effectively abolish the payment of SNMA to registered housing associations providing housing with care schemes ("HWCS") such as the applicant, which runs 5 HWCS including Loughview. The decision of the respondent was first communicated to the applicant on 10 April 2013. It is claimed that the decision, which has potentially disastrous consequences for the applicant and other housing associations, is unlawful. It is not disputed that about £2.2m will be lost by the housing associations through the withdrawal of SNMA. Although the respondent is adamant that the money saved will be reinvested to "develop, promote and support independent housing schemes".

[4] The Order 53 Statement alleges:

(i) The respondent misdirected himself as to the law. He proceeded on the basis that the residents of Fold had only a bare licence. He removed SNMA which

was provided for by legislation but did not pass amending legislation as he was obliged to do so. Finally, he proceeded on the basis that Fold (and other similar institutions) could remodel and therefore deregister from the Regulation and Quality Improvement Authority ("RQIA") so as to qualify for another stream of funding from the Supporting People Fund ("SPF") which financed the Supporting People Programme ("SPP").

(ii) The respondent failed to take into account many material considerations, or if he did so, he failed to afford them sufficient weight. These included:

(a) Failure to make a fair comparison between the services offered by an HWCS and residential care homes ("RCH") run by the private sector.

(b) The respondent ignored relevant evidence tendered by the applicant which could have influenced the review. He did not take into account all of those services which had the potential to demonstrate that the services being provided by these two types of provider were materially different.

(c) He failed to take into account the impact of the removal of SNMA on the residents and their families.

(d) He did not seek or take into account the view of Northern Ireland Housing Executive ("NIHE") which administers the Supporting People Programme.

(iii) The respondent took into account irrelevant considerations, namely:

(a) The difference in funding received by the HWCS and the funding received by RCH.

(b) He did not appreciate that it is not possible to fairly compare the services of HWCS with RCH.

(iv) The respondent failed to consult adequately with those affected and breached Section 75 of the Northern Ireland Act 1998 ("the 1998 Act") and his duty to promote equality of opportunity. It is alleged that there was no equality screening or equality impact assessment carried out when these changes were bound to affect elderly frail persons, some of whom suffer from dementia. Nor did he consult with the NIHE as he was required to do so by Article 5 of the Housing Support Services (NI) Order 2002 ("the 2002 Order").

(v) There was a procedural and substantive unfairness arising out of the respondent's creation of a legitimate expectation. In particular it is claimed that the respondent had made it clear that any changes to the payment of

SNMA would be made through the Assembly and that individual housing associations would be consulted.

(vi) The decision of the respondent was irrational in the Wednesbury sense.

(vii) The respondent failed to give adequate reasons for his decision to stop paying SNMA to the applicant in particular and housing associations in general.

Background Facts

[5] The applicant is a housing association. It provides accommodation to a number of different users. Five of its HWCS had the benefit of SNMA which was introduced in 1993. Its stated purpose was to pay for the cost of providing services delivered by registered Housing Associations in HWCS. It was stated to be used to "cover additional housing costs incurred in special needs housing". HWCS are subject to additional housing management performance measures. The court was told that RCH are not subject to such measures.

[6] The applicant caters for the elderly and infirm, some of whom suffer from dementia at Loughview. Different HWCS cope with different types of vulnerabilities. It is claimed that the payment of SNMA permitted the delivery of an enhanced range in the quality of services to a variety of different types of vulnerable resident. In 2003 the SPP was introduced. This was part of the drive towards Independent Living which I will also discuss in some detail later in this judgment. A number of legacy funding streams including SNMA were combined into a single funding stream known as the SPF. However, the amount of SNMA payments to housing associations was ring fenced although the respondent considered that the schemes fell outside the SPP. The decision to ring fence these payments was, it is claimed, in response to considerable political pressure exerted on the government by the applicant, other housing associations and their supporters.

[7] The legislation enabling this to happen, and which I will set out in some more detail later on in the judgment was the Housing Support Services (NI) Order 2002 ("the 2002 Order") which placed a statutory duty on the NIHE to secure the provision of housing support services: see Article 3(2). The Housing Support Services Regulations (NI) 2003 ("the 2003 Regulations") were made pursuant to Article 4 of the Order.

[8] In 2010 a review of the continuing payment of SNMA to the housing associations was recommended by the Northern Ireland Audit Office ("NIAO"). However, in the subsequent audit for the accounts of 2011 the NIAO was satisfied as to the regularity of the payments and removed any qualification. NIAO stated that it was not in a position to carry out an independent review of the schemes in receipt of SNMA because this was "not an area that we would usually consider within our audit work". The respondent says that the audit report played no part in its deliberations or decision.

[9] The applicant has made various criticisms of the approach of the respondent. These include:

(a) Assuming that HWCS offer no security of tenure.

(b) Assuming HWCS offer no assistance for independent living.

(c) Assuming that HWCS would be able to absorb the loss of SNMA and carry on regardless.

(d) Assuming that deregistration from HWCS would provide the answer.

(e) Asserting that SNMA creates an uneven playing field favouring HWCS over RCH, although they are both offering essentially the same services. The respondent claims that the 34 housing association schemes receiving additional funding through SNMA were providing the same or similar services to RCH.

[10] The respondent does not accept the criticisms which have been made of it. But most importantly it denies that HWCS as presently constituted can ever be part of the SPP. The respondent considers that HWCS are not materially different to RCH. Both are registered care homes under the 2002 Order and both are subject to regulation by the RQIA. It also denies it in any way advocated de-registration. It does accept that it did discuss the possibility of remodelling the schemes to achieve a more supported living environment. But the issue of de-registration was exclusively a matter for the RQIA. The issue of de-registration and remodelling turned out during the course of argument to be peripheral to the main issues between the parties.

Chronology

[11] On 1 April 1993 SNMA was introduced to pay for housing costs and was paid to housing associations providing housing with care. It was not paid to RCH. As I have noted both HWCS and RCH are registered care homes and subject to inspection by RQIA. Article 10 of the Health and Personal Social Services (Quality Improvement and Regulation) (NI) Order 2003 states that:

> "An establishment is a residential care home if it provides or is intended to provide, whether for reward or not, residential accommodation with both board and personal care for persons in need of personal care by reason of—
>
> (a) old age and infirmity …"

[12] On 1 March 1996 the DOE published a consultation paper on the funding of special needs housing. On 9 May 2001 it published a further paper entitled "Towards Supporting People in Northern Ireland" and invited comments from those interested and confirmed that the revised policy had been screened but that an equality impact assessment was considered to be unnecessary. Supporting People NI looked at the SPP in Great Britain. It noted that from April 2003 housing benefit would be payable only in respect of housing costs. The aim was to allow people "to live independently in the community".

[13] Legislation followed in 2002 and 2003. Plans to transfer SNMA out of the housing budget were deferred "pending review of all the schemes". After the review "decisions can be taken about future funding".

[14] The next document of interest was the Supporting People Strategy 2005-2010. Its aim was to "improve the quality of life and independence of vulnerable people". One of its principles was to promote the independence of vulnerable people.

[15] On 12 March 2010 the respondent wrote to the applicant informing them that SNMA would continue to be paid until the respondent had reviewed the relevant legislation. In June 2011 there were visits to six HWCS and a template for reviewing them was set up. An NIHE Housing Related Support Strategy 2012-2015 followed which reiterated that one of the principles of the Strategy was "promoting the independence of vulnerable people by commissioning services …". An NIHE Housing Related Support Strategy for 2012-2017 followed in 2012.

[16] On 2 April 2012 the respondent wrote to the applicant making it clear that registered care homes providing 24 hour board and care as opposed to individual tenancies, were considered to be outside the scope of the SPP. The Northern Ireland Federation of Housing Associations ("NIFHA") responded on 11 April 2012 setting out why HWCS differed from RCH, and in particular:

(a) Complied with the 1992 Housing Order and that any care and support provided was incidental to the provision of housing accommodation.

(b) On 17 April 2012 Dr Quinn, Director of Regulation of RQIA, wrote stating that there was no "discernible difference in nature or quality of care delivered by either category of service", that is HWCS and RCH.

[17] On 22 May 2012 the NIAO wrote saying that payment of SNMA was "not being appropriately monitored" and declining to assist with determining whether SNMA was still meeting the "original policy intent of funding an enhanced housing management service".

[18] On 3 September 2012 a meeting took place between the applicant and the respondent. The purpose was to agree the way forward for removal of funding from SNMA schemes for which the respondent had responsibility. Both the Department

of Social Development ("DSD") and the Department of Health, Social Services and Public Safety ("DHSS") were "very clear about the policy to withdraw funding". But each scheme would be assessed "on an individual basis".

[19] On 19 December 2012 the applicant sent a pre-action protocol letter. A reply was received from the respondent on 4 February 2013. A number of points were made in answer to the pre-action protocol letter which are worth highlighting. These are:

(i) Registered care homes were excluded from receipt of SNMA because they were considered to be "outside the scope of the Supporting People policy intention which was to enable people to live independently".

(ii) Registered care homes managed by housing associations (that is HWCS) "do not support the policy aim to live independently" and this was "not an appropriate use of the Supporting People grant which is designed to promote independent living".

(iii) There was no discernible differences between the registered care homes, that is RCH on the one hand and HWCS on the other and that residents did not have a sufficient level of independence to achieve the policy intent.

(iv) The housing associations would continue to receive SNMA until the legislation had been changed.

Independent Living

[20] At this stage it is appropriate that I should make some comment about the concept of "independent living" which is presently driving government policy. It is important to understand that independent living for disabled people means that disabled people should have "the same freedom, choice, dignity and control" as other citizens at home, at work and in the community. Living independently is not necessarily synonymous with living by yourself or fending for yourself. It is essentially about offering disabled persons the same choices, where possible, as non-disabled persons. The Independent Living Movement grew out of the United States Civil Rights Consumer Movements of the late 1960s. The Independent Living philosophy spread from the United States to Europe and in doing so has become "enriched by different cultures and economic conditions in the process". The government has adopted the wording proposed in 2002 by the Disability Rights Commission and defined independent living as "all disabled people having the same choice, control and freedom as other citizens – at home, at work and as members of the community. This does not necessarily mean disabled people doing everything for themselves, but it does mean that any practical assistance people need should be based on their own choices and aspirations."

[21] Two affidavits were filed by residents of Loughview, Joan Doherty and Deirdre Hamill. Joan Doherty is 88 years and welcomes both the independence and the support that living at Loughview offers. Deirdre Hamill is 82 years and a member of the Board of the applicant. She is concerned that the removal of SNMA will necessarily result in a "diminution of the services that are available at Loughview Fold". They may be right to be concerned because that is the outcome feared by Mr John McLean, the Chief Executive of the applicant. However, it goes without saying that this judicial review is not an appeal and the court is not concerned with the merits. I will discuss this issue in more detail later in this judgment.

[22] It is, of course, necessary to point out that the provision of care is not a matter for the respondent. It is a matter for another department, DHSS, its Minister and its health trusts. Quite naturally the respondent does not want to fund the continuing provision of care out of its own budget, especially given the external pressures on its financial resources.

The Legislative Background

[23] SNMA was first paid originally in 1993 pursuant to a statutory power exercise by the Department of the Environment under Article 33(1) of the Housing (NI) Order 1992. The DOE and the then respondent made the grant of SNMA to registered housing associations to cover the cost of "**additional housing costs incurred in special needs housing**". The principles of, and conditions for payment of SNMA were set out in the statutory Housing Association Guide ("HAG"). SNMA was only paid to housing associations. SNMA was not paid to RCH.

[24] The Housing Support Services (NI) Order 2002 ("the 2002 Order") provided in Article 3(1) that the "functions of the Executive shall include securing the provision of housing support services". Article 3(2) permitted NIHE to do such things in connection with securing the provision of Housing Support Services including incurring expenditure and giving financial assistance to any person.

[25] Article 3(2) provided that:

> "The Executive may do such things as it considers appropriate for an in connection with securing the provision of Housing Support Services and may, in particular –
>
> (a) incur expenditure;
>
> (b) give financial assistance to any person …"

Article 3(3) defined "Housing Support Services" as:

> "Including any service which provides support, assistance, advice or counselling to any individually with particular needs with a view to enabling him to occupy or to continue to occupy, as his only or main residence, housing accommodation in Northern Ireland, other than accepted accommodation."

Article 5 provided that:

> "Before making any regulations under Article 3 or 4 the Department shall consult:
>
> (a) the Executive;
>
> (b) such recipients or representatives of recipients, of housing support services as appear to the Department to be appropriate;
>
> (c) such providers, representatives of providers, of housing support services as appear to the Department to be appropriate."

[26] The 2003 Regulations set out at Regulation 3 what were housing support services for the purposes of Article 4 of the Order. Those comprised a very wide range of services including:

(a) Provision of general counselling and support including befriending, encouraging social intercourse, advising in food preparation, reminding and non-specialist counselling, where this does not conflict with similar services provided as personal care.

(b) Assistance with the security of the dwelling required because of the needs of the service user down to the cleaning of the residents own rooms and windows. It also involved encouraging social intercourse and "arranging social events for residents".

Discussion

[27] I consider that the complaints made by the applicant can be grouped together in the following broad categories:

(i) Whether there was a failure on the part of the respondent to take into account material considerations and/or to give them adequate weight and/or did the

respondent take into account immaterial or irrelevant considerations? ("Ground 1")

(ii) Whether the withdrawal of SNMA could only be achieved by amending the legislation? ("Ground 2")

(iii) Whether the representation to remove SNMA only through the amendment of the relevant legislation operated as a legitimate expectation and, if so, could it be frustrated lawfully? ("Ground 3")

(iv) Whether there was a legitimate expectation that there would be consultation, before there was any change in the payment of SNMA and whether there was a failure to consult and/or whether there was a failure to give reasons? ("Ground 4")

(v) Whether there was a breach of Section 75 of the 1998 Act? ("Ground 5")

(vi) Whether the decision of the respondent was Wednesbury unreasonable? ("Ground 6")

[28] It is important to emphasise that the court is not undertaking a merit based appeal. It is reviewing the decision making process to ensure that it is fair and lawful. Needless to say the court is not in a position to determine how best to allocate scarce resources or what is the best policy to deal with the most vulnerable members of society. It is not for the judges "to weigh utilitarian calculations of social, economic or political preference": see De Smith's Judicial Review at 1.033. The court acknowledges that it lacks expertise in this area. It is ill-equipped to make findings of fact and to resolve all but the most straightforward of disputes. But the court is entitled to demand compliance with the law; it is entitled to expect the decision of the respondent to be fair in the knowledge that this of itself will improve the quality of the decision and the decision making process.

Ground 1

[29] The requirement of a decision maker not to take into account irrelevant considerations and the failure to take into account relevant considerations is discussed in detail at 5-120 and 5-121 of De Smith's Judicial Review (7th Edition). It should be uncontroversial to note that a decision made by a decision maker may be unlawful if the decision maker acts in ignorance of relevant considerations and/or takes into account irrelevant considerations and that any decision taken as a consequence may be struck down as unlawful.

[30] The parties ranged far and wide in debating this issue. The applicant complained that the respondent failed to make a fair assessment as to the nature of the different services provided by HWCS and RCH. Instead it relied on the RQIA in determining whether there was a discernible difference between these types of

registered residential homes. It proceeded on the basis that residents in HWCS had no security of tenure and that it was plain wrong to use receipt of housing benefit as a "proxy indicator of independence". The respondent countered that an extensive review had been carried out of the facilities of 12 care homes, six HWCS and six RCH by RQIA which confirmed that the receipt of SNMA did not provide its residents with independent living and further that none of the residents qualified for the receipt of housing benefit, a further indicator that they were not living independently.

[31] It seems clear from the evidence that extensive lobbying by the housing associations at the time of the legislation enabled them to keep their payments of SNMA which they had insisted were essential if they were to provide the schemes as they presently operate. The court is not in any position to make a judgment on this issue. It was certainly never suggested that housing associations would be guaranteed SNMA payments or their equivalent. The respondent had promised a review before taking any further action as I have noted. This seemed both reasonable and unremarkable. Quite naturally the respondent did not want to make payments for "care" when responsibility for that lay with another ministerial department. Further, and again quite properly, the respondent wanted to make sure that other providers such as RCH, which he considered provided similar services for similar vulnerable residents, were treated fairly.

[32] While acknowledging that the respondent had different avenues open to him to make a lawful decision in respect of whether or not to continue SNMA, a lawful process would necessarily have included consideration of the following matters:

(a) The policy driver for SPP was the concept of "independent living". Accordingly, the respondent would want to make sure that he fully understood what "independent living" involved and how the SPP put this into effect.

(b) Any review carried out before terminating SNMA would look at what the payment of SNMA was for and whether such payment furthered the concept of independent living as captured in the SPP.

(c) The decision maker would then have to look at whether the services, if any, provided for by the payment of SNMA in HWCS produced a materially different outcome for the residents compared with those at RCH and whether that outcome was in accordance with the purpose of the SPP, namely independent living.

[33] Once the respondent had carried out the above, he would then be able to say whether the payment of SNMA was in accordance with the SPP and independent living, and whether he was treating HWCS and RCH equally and fairly and whether given other budgetary demands, it was reasonable that SNMA should continue to be

paid to HWCS. It is difficult to see how a decision maker could make a fully informed decision without at least considering these issues.

[34] It is clear that no such structured review was carried out in this case. Indeed, it is difficult not to obtain the impression that the decision was made on the superficial basis that as both HWCS and RCH were registered care homes under the Order offering care to vulnerable residents and as there was no discernible difference between the care offered by either type of organisation, it would be unfair to continue to pay SNMA to HWCS only. Accordingly, the payment of SNMA should cease so as to create a level playing field. Certainly some of the reasons now offered to justify the decision appear to amount to a post decision rationalisation. In any event the respondent's attempt to justify his decisions has exposed some serious flaws in the decision making process.

[35] In her second affidavit Ms O'Neill, Head of the Department for Social Development Housing Division's Social Inclusion and Support for People says that the high level of care provided at HWCS is "incompatible with the assertion of independent living". That is obviously untrue. If it did form part of the decision making process as initially the court was led to believe, then that process had to be seriously skewed. Indeed, Ms O'Neill had to resile from this claim because as she later accepted someone could be completely disabled, require round the clock care and yet could live independently. Another person who has no disability and requires no care may not live a wholly dependent existence. It depends on the circumstances. It was pointed out to her that there were 43 schemes which formed part of the SPP in which the residents received more care than in the applicant's HWCS: see Ms O'Neill's last affidavit of 13th February 2105. Eighty per cent of the appointed Supporting People Schemes received greater care and support than that provided by the applicant: see paragraph 4 of the affidavit of John McLean sworn on 5th January 2015.

[36] Having resiled from her statement about the levels of care being incompatible with independent living, she then claimed that the care provided by HWCS is different to those provided by Supported Housing Schemes. First of all she claims that residents in Supported Housing Schemes received domiciliary care, a different type of care package. But she does not satisfactorily explain why one is compatible with independent living and the other is not. It cannot be because a domiciliary care package is provided to the recipients in their own home because firstly, she has made it clear that tenure and security of tenure is irrelevant and secondly, because some of the schemes within the SPP are provided with residential accommodation.

[37] In her second affidavit Ms O'Neill places great weight, indeed she claims it is the main factor, on the fact that HWCS and RCH are registered with the RQIA and this "inexorably denotes the need for a high level of personal care, a factor which is incompatible with an assertion of independent living". But it turns out that, for example, Knockeden, which is part of the SPP, is registered with the RQIA as well. There is no response from Ms O'Neill when this wholly inconvenient fact is pointed

out to her by Ms McAnespie for the applicant in her last affidavit. If registration is the main factor shaping the respondent's deliberations, then it should have been applied across the board. There does not appear to be any good reason offered as to why this was not done.

[38] The respondent says that it considered the payment of housing benefit to be a proxy indicator of independent living: see the second affidavit of Ms O'Neill. Nowhere in any affidavit from any deponent on behalf of the respondent is there any logical justification for such a statement. The payment of housing benefit is dependent on two matters: the nature of a person's occupation of a property and on the person's financial means. But the respondent has already said that "security of tenure was irrelevant in the consideration of whether a person lives independently". There also can be no logical explanation as to why self-funders, that is persons whose financial means do not entitle them to receive housing benefit can never be said to live independently. The choice of housing benefit as a proxy indicator of independent living seems on the face of the evidence produced to this court to be wholly unsupportable.

[39] Further, on the basis of the evidence adduced, there has been no objective attempt to even consider the housing support services that the payment of SNMA permits Fold (and other housing associations) to provide to their vulnerable residents (and which RCH do not provide to their residents). It may be that the respondent is unimpressed by the Housing Support Services provided by HWCS. Perhaps the respondent thinks that they provide poor value for money and that the money could be better spent elsewhere. Indeed, more importantly, the respondent may not consider that these services further the aim of independent living espoused by the SPP. However, what the respondent cannot do is ignore completely, as he seems to have done, the duty to assess and understand the services purchased with SNMA by Fold and other housing associations and also fail to objectively assess whether or not these services are in accord with independent living and the SPP before making a decision as to whether or not the payment of SNMA should be discontinued.

[40] Without reaching a final conclusion, there does appear to be some force in the complaint of the applicant that the decision to remove SNMA has been rationalised afterwards. That explains why the respondent has been grasping at straws such as incompatible levels of care and housing benefit. However, when examined carefully, these explanations far from providing support serve only to undermine the respondent's argument. For example, taken to its logical conclusion, elderly people who are "self-funders", and not entitled to housing benefit and can never live independently.

Ground 2

[41] The applicant argues that the payment of SNMA to HWCS run by housing associations, such as Loughview for frail and elderly people can only be stopped by amending the relevant legislation. The respondent denies this. Whether the applicant is correct is a matter of statutory construction.

[42] I have set out the relevant legislative provisions earlier in the judgment. The use of the word "functions" in Article 3(1) of the 2002 Order is intended to comprise both "powers" and "duties". In other words the provision of housing support services is one of the Executive's functions. Article 3(2) went on to say that the Executive "may do such things it considers appropriate for and in connection with securing the provision of housing support services and may, in particular:

> "(a) incur expenditure …"

[43] Accordingly, I conclude that the Executive has a discretion to do various things to secure the provision of housing support services and this includes a discretion to provide financial assistance. This discretion to provide financial assistance in order to secure the provision of housing support services can only be given by the NIHE to HWCS run by housing associations, as they are not "excepted accommodation".

[43] Accordingly, I do not read the 2002 Order as making the payment of SNMA mandatory pursuant to any duty. Rather the payment of financial assistance, including SNMA, is a power which the Executive has and which permits it to make payment to HWCS run by housing associations. Further, there is nothing in the legislation that requires the Executive (or the DSD) to amend the 2002 Order or any legislation before discontinuing the payment of SNNMA to HWCS. Nor does the legislation require the making of regulations before SNMA is stopped. It follows that Article 5 does not apply and there is no statutory obligation on the respondent to consult the Executive or the recipients of housing support services or such persons who provide housing support services.

[44] I am supported by my interpretation of the word "functions" by what Lord Templeman said in <u>Hazell v Hammersmith and Fulham London Borough Council</u> [1992] 2 AC 1 29F. He said that:

> "The word "functions" as construed under Section 111 of the Local Government Act 1972 embraced "all the duties and powers of a local authority: the sum total of the activities Parliament has entrusted to it."

[45] I consider that to be the position here. Accordingly, I am driven to conclude that the decision whether or not to discontinue SNMA is a discretionary one for the Executive and does not require the Executive or the respondent to amend any legislation.

Ground 3

[46] The alternative, but complementary argument, is that if the legislation does not require the NIHE (or the respondent) to amend the legislation before discontinuing "SNMA" (and the relevant provisions apply to the Executive not to the respondent), the applicant argues that the representation made on behalf of the respondent that the legislation would be amended if SNMA was to be withdrawn, should be given effect as a legitimate expectation.

[47] The doctrine of legitimate expectation operates as a control over the exercise of discretionary power conferred on a public authority "… it applies in cases where the decision-making has committed itself in advance to a particular course of conduct": see Philip Sales on Legitimate Expectation in [2006] JR 186 J. As Cranston J put it in UK Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs [2013] EWHC 1959 (Admin) at [80]:

> "The doctrine of substantive legitimate expectation operates in certain circumstances as a constraint on the power of public authorities to change public policy."

[48] There are two types of legitimate expectation, procedural and substantive. These are explained by Philip Sales and Karen Steyn in Public Law 2004 at page 565 as follows:

> "Legitimate expectations fostered may be as to a benefit which the decision-maker will in fact confer when it comes to exercise its discretionary power (generally referred to as a substantive expectation) and as to the procedure which the decision-maker will adopt before taking the decision how to exercise this discretionary power (generally referred to as a procedural expectation).

[49] A procedural legitimate expectation arises where a public authority has provided an unequivocal assurance, whether by means of an express promise or an established practice, that it will give notice or embark upon consultation before it changes an existing substantive policy: see paragraph [29] R (On the Application of Bhatt Murphy (A firm) and others) v Independent Assessor [2008] EWCA Civ 755.

[50] A substantive legitimate expectation arises where the court allows a claimant to enforce the continued enjoyment of the content – the substance – of an existing practice or policy, in the face of the decision maker's ambition to change or abolish it: see paragraph [32] of R (On the Application of Bhatt Murphy (A firm) and others) v Independent Assessor [2008] EWCA Civ 755.

[51] The legitimate expectation under consideration here is a substantive one, namely the requirement to amend the legislation before discontinuing "SNMA". Regardless of whether the legitimate expectation is substantive or procedural, it is important to appreciate that:

> "The legislature in conferring statute discretionary powers cannot cater for all eventualities. The decision-maker will have to make decisions in the light of changing circumstances. The need for flexibility is the underlying rationale for the principal that decision-makers cannot lawfully fetter their discretion through inflexible policies – the court will thus lean against the finding of a fettering of a discretion. If the doctrine of legitimate expectation were too loosely and widely interpreted and applied public authorities could too readily be disable by their representations from acting subsequently in what they consider to be and what may very well be the public interest." (See Re Pollock's Judicial Review [2013] NICA 16 at [46])

[52] Laws LJ answered the question of when a court should give effect to a legitimate expectation in R (Bhatt Murphy v Independent Assessor [2008] EWCA Civ 755 at paragraph [28] when he said:

> "The doctrine will apply in circumstances where the change or proposed change of policy or practice is held to be unfair or an abuse of power."

[53] Sales and Steyn in 2004 Public Law said:

> "A legitimate expectation is not a legal entitlement in the sense of a non-defeasible legal right defined by statute or the common law (for example, under a contract) to require a public authority to confer some benefit or advantage. Rather, it is an expectation, which is in some sense protected by the law, as to how the public authority will carry out it discretionary functions when deciding whether to confer a benefit or advantage upon a person in respect of which that person does not have such a right."

[54] In Finucane's (Geraldine) Application [2013] NIQB 45 Stephens J reviewed the authorities on substantive legitimate expectation and the circumstances in which a substantive legitimate expectation could lawfully be frustrated. His conclusion which appears at paragraph [22] after a most careful and comprehensive consideration of those relevant authorities is as follows:

"[22] This legal analysis of substantive legitimate expectation identifies a number of questions that arise for determination in this case, as follows:

a) Whether the applicant has established a promise to hold a public inquiry which promise was a clear and unambiguous representation devoid of relevant qualifications.

b) If so, then whether the respondent has identified any overriding interest or interests to justify the frustration of the expectation.

c) If so, then whether the decision in this case lies in what Laws LJ called the macro-political field or whether the facts of this case are discrete and limited, having no implications for an innominate class of persons and without wide-ranging issues of general policy, or none with multi-layered effects upon whose merits the court is asked to embark.

d) In either event, but informed by the degree of intensity of review, whether the consequent frustration of the applicant's expectation is *so unfair* as to be a misuse of the respondent's powers.

e) If the applicant has successfully established a challenge on this ground then what, in the exercise of discretion, is the appropriate remedy."

[55] The first stage for the court is to consider the nature of the representation relied upon by the applicant. The evidence adduced must establish that there was a clear and unambiguous representation devoid of relevant qualifications: see Paponette and others v AG for Trinity and Tobago [2012] 1 AC 1 at paragraph [37]. It is not necessary that there should be detrimental reliance but if there is then this can feed into the fairness of whether the respondent should be able to resile from such a statement. The onus is on the applicant at this stage to establish that such a statement has been made. It is not seriously disputed in this case that clear representations were made reflecting the (mistaken) understanding of the respondent that SNMA could only be discontinued by amending the legislation.

[56] The second stage involves the respondent adducing evidence of an overriding interest or interests to justify a change of mind. The respondent, may, for example, as here, receive legal advice which changes its understanding as to its statutory

obligation. The reason the respondent can change his mind is set out in Bhatt Murphy by Laws LJ at paragraph [41] where he says:

> "… thus a public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Nor will the law often require such a body to involve a section of the public in its decision-making process by notice or consultation if there has been no promise or practice to that effect. There is an underlying reason for this. Public authorities typically, central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally, they must be masters of procedure as well as substance; and as such are generally entitled to keep their own counsel … This entitlement – in truth, a duty – is ordinarily repugnant to any requirement to bow to another's view, albeit in the name of a substantive legitimate expectation."

[57] As Stephens J pointed in Re Finucane's (Geraldine) Application [2013] NIQB 45 at paragraph [15]:

> "At the second stage it is for the respondent to identify any overriding interest or interests on which he relies to justify the frustration of the expectation and it will then be a matter for the court to weigh the requirements of fairness against that interest or those interests. When the court is carrying out that exercise of weighing the requirements of fairness against that interest or those interests the degree of intensity of review will vary from case to case depending on the character of the decision. The intensity of review is greater in cases where the facts are discrete and limited, having no implications for an innominate class of persons and without wide-ranging issues of general policy, or none with multi-layered effects upon whose merits the court is asked to embark. By contrast the intensity of review by the court is limited in cases falling within the macro-political field, see *R (Patel) v General Medical Council* [2013] 1 WLR 2801 at paragraph [61] …"

[58] Thirdly, this is a case where the court is going to exercise a light touch review given the decision to stop paying SNMA involves a macro-political issue, namely

whether or not a payment should continue to be made of SNMA for a particular purpose, that is to fund "housing support services".

[59] Fourthly, the onus being on the respondent to justify the frustration of the expectation, the court has to determine "whether the consequent frustration of the applicant's expectation is so unfair as to be a misuse of the respondent's powers": see paragraph [82] of R v North East Devon Health Authority ex parte Coughlan [2001] QB 213.

[60] Even allowing for the necessary light touch of any review, it is clear that there was a conspicuous unfairness visited on the housing associations in that the respondent because of a failure to consult or engage with the housing associations (which I discuss later in this judgment) does not appear to have understood that SNMA was used to purchase housing support services for these vulnerable residents. Instead, the respondent concluded that it should be stopped because housing benefit was a proxy indicator of independence instead of simply a means tested benefit. Furthermore, high levels of care, although lower than other supported living programmes, were incompatible with independent living. I do not see how upholding the decision despite such egregious errors, and even adopting a light touch review, can be said to be in the public interest.

Ground 4

[61] It was alleged that there should have been consultation if "SNMA" was going to be withdrawn from HWCS whether pursuant to an amendment of the legislation and/or pursuant to policy change. The respondent claims that any consultation which was required to be carried out had been performed in 2003 and that comprehensive consultation was unnecessary for a routine policy review that affected only 34 housing associations. It went on to point out that the circumstances in the case of R v N and E Devon Health Authority ex parte Coughlan [2001] QB 213 did not apply as the respondent never intended to embark on a formal consultation.

[62] It is clear that the respondent, its servants and agents, did represent that he would consult with the housing association before any attempt was made to withdraw SNMA. On 12 March 2010 Heather Cousins from DSD is recorded as saying in a letter to the chairman of the applicant:

> "The department will consult with all Housing Associations impacted by revised arrangements."

[63] Indeed, Ms O'Neill maintained that consultation had taken place. She stated in her affidavit of 22 January 2014 at paragraph 56:

> "The withdrawal of payment of SNMA is a routine policy review that does not require comprehensive consultation

> because it affects only a small number of select registered care homes."

However, she went on to say:

> "Although there is no statutory requirement by the respondent to consult following its decisions to cease payment of SNMA, the respondent has however engaged in discussion as to the impact of this with the affected stakeholders and NIHE."

[64] It is clear that the respondent mistakenly thought the consultation was required under Article 5 of the 2002 Order and this is likely to have informed his approach and the statements that were made on his behalf. However, I am satisfied that in the circumstances these did give rise to a procedural legitimate expectation. Furthermore, I am satisfied that fairness requires proper consultation in the circumstances of this case. Indeed, if there had been adequate consultation the respondent should have been able to assess, inter alia, the claims made by Mr McLean that:

(a) their additional costs incurred in special needs housing paid for by SNMA;

(b) whether the inhabitants of Loughview required intensive housing management services in order to live independently; and

(c) if so, whether Fold and other housing associations in similar positions are providing value for money.

[65] Instead what happened was conspicuously unfair in that, inter alia, there was only a superficial comparison made of the care regimes provided by HWCS and RCH. The respondent was not in a position to deal fairly with the issues raised. In the circumstances I conclude that the applicant has made good its claim that the decision is unlawful because of a failure to carry out adequate consultation in accordance with a procedural legitimate expectation.

[66] The applicant also relies on Sedley J's decision in R v The Universities Funding Council ex parte Institute of Surgery [1993] EWHC Admin 5 where he found:

> "[1] There is no general duty to give reasons for decision, but there are classes of cases where there is such a duty.
>
> [2] One such class is where the subject matter is an interest so highly regarded by the law, for example,

personal liberty fairness requires that reasons, at least for particular decisions, be given as of right.

[3](a) In other classes where the decision appears aberrant. He in fairness may require reasons so the recipient may know where the aberration is in the legal sense real (and so challengeable) or apparent.

(b) It follows that this class does not include decisions which are themselves challengeable by reference only to the reasons for them. A pure exercise of academic judgment is such a decision."

It is asserted that this case falls into category 3(a).

[68] The respondent says that there is no statutory requirement to give reasons and the respondent relied on the dicta of Lord Mustill in R v Secretary of State ex parte Doody [1993] AC 564 where he said:

> "The law does not at present recognise the general duty to give reasons for an administrative decision."

[69] I am persuaded that fairness in the particular circumstances of this case required reasons to be given. Indeed, if the respondent had understood that reasons were required to be given, I suspect that the decision-making process would have been much more carefully structured and that the respondent would have concluded the reasons offered such as that the care regime at HWCS was automatically inimical to independent living, that there was no discernible difference between HWCS and RCH without making any assessment of housing support services and that eligibility for housing benefit was a proxy indicator for independent living, all offered subsequent to a decision being made, were hopelessly unreliable on so many levels.

Ground 5

[70] Section 75 of the 1998 Act provides that:

> "A public authority in carrying out its functions relating to Northern Ireland shall have due regard to the need to promote equality of opportunity between, where relevant, persons of different age and persons with a disability and persons without."

The applicant claims that the respondent as a public authority failed to consider its obligations in reviewing the effect of the withdrawal of SNMA and how that could

positively contribute to the advancement of equality of opportunity. It should have considered what steps were required to remove or minimise disadvantage suffered by older people or those with a disability. There was, it is asserted, a failure to carry out an equality screening or an impact assessment.

[71] The respondent says that there was a screening and it did identify a potential impact upon the frail and elderly but that that impact was mitigated because:

> "The elderly fall under the responsibility of the Health and Social Care authorities which will ensure that all elderly will receive the same level of health care."

[72] Furthermore, the position of the Trust has always been that they will fund any necessary care for old, frail people. There will therefore be no detriment suffered.

[73] A complaint was made late in the day that there had been no "formal approval" of the equality screening form. So I do not think it fair to allow the respondent to make such a case after the respondent had finished its submissions. On the present evidence, I am not satisfied that there is any breach of the duties imposed upon the respondent by Section 75 of the 1998 Act.

Ground 6

[74] The task of persuading a court that the decision of the respondent was "Wednesbury" unreasonable is a formidable one, namely that the court can only interfere if the decision is "so unreasonable that no reasonable authority could ever come to it".

[75] For the reasons which I have set out in Ground 1 there were material defects in the decision making process which lacked "ostensible logic or comprehensible justification" (see De Smith at 11-036).

[76] There were material mistakes and/or a failure to take into account material factors which rendered the decisions irrational or unreasonable. In this case it cannot be said to be a reasonable exercise of power where the decision maker has taken irrelevant considerations into account and ignored relevant ones: see Profession Anthony at 6.06 of Judicial Review in Northern Ireland (2nd Edition).

Conclusion

[77] On the basis of the evidence before me I have no hesitation in concluding that the decision to remove the payment of "SNMA" to HWCS was fundamentally flawed for the reasons which I have set out in this judgment. The respondent quite obviously took into account considerations it should not have taken into account and ignored others which it should have taken into account. It did so, largely because it

failed to consult adequately before reaching a decision. It is likely that had there been genuine engagement, the errors the respondent made would not have occurred. The respondent would then have been in the position to make an assessment as to:

(a) whether SNMA was being used to pay for housing support services as the applicant asserts and more importantly what was the nature of those services;

(b) whether these services furthered "independent living" for their residents;

(c) whether those services were in accordance with the SPP; and

(d) if so, whether given other budgetary pressures, it was a good use of public money.

These are matters that should have been addressed by the respondent and were not properly or adequately addressed.

[78] I will hear the parties on the issues of what is the appropriate relief I should grant and on the issue of costs.