Neutral Citation No. [2010] NIQB 62 | *Ref:* **McCL7866**

Judgment: approved by the Court for handing down | *Delivered:* **19/05/10**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

LW's (acting by her mother JB) Application [2010] NIQB 62

In the Matter of an Application by LW, acting by her mother JB, for Judicial Review

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McCLOSKEY J

Preface

I direct that there be no identification of the names of the Applicant or her mother in these proceedings, or of any other person who, or body which, could lead to such identification. The names of the individuals concerned and the relevant agencies have been anonymised accordingly.

I INTRODUCTION

[1] LW, the Applicant, was born in November 1973 and is now aged thirty-six years. She is, sadly, the victim of serious traumatic brain injuries and quadriplegia sustained as a result of her involvement in a road traffic accident almost twenty years ago, in November 1990. Her resulting profoundly disabled condition lies at the heart of this legal challenge.

[2] By her application for judicial review, the Applicant complains about the conduct and inaction of the Belfast Health and Social Care Trust ("*the Trust*") and seeks, primarily, declaratory relief accordingly. The essence of her challenge and the corresponding remedy pursued are captured in paragraph 2 of the statement filed pursuant to RCC Order 53, Rule 3:

> "*The relief sought is:*
>
> *(a) a declaration that the failure of the* [Trust] *to provide adequate and suitable domiciliary services for the Applicant is unlawful and ultra vires …*

> *(e) a declaration that the failure of the* [Trust] *to provide adequate and suitable residential placements for females with brain injury is unlawful and ultra vires*".

In what respects has the Trust allegedly acted unlawfully and *ultra vires*? The Applicant's pleaded grounds of challenge were initially formulated in imaginative and diffuse terms, which begged reduction and refinement. At the hearing, her counsel (Mr. O'Donoghue QC, appearing with Mr. White) focussed the Applicant's challenge on a primary contention that the Respondent Trust (as agent of the Department of Health, Social Services and Public Safety – "*the Department*" – see paragraphs [18] – [20], *infra*) has failed to discharge the duty which it owes to the Applicant under Section 2 of the Chronically Sick and Disabled Persons (Northern Ireland) Act 1978. This was developed, in argument, as the centrepiece of the Applicant's case. The Applicant, as a secondary ground of challenge, also relied on Article 15 of the Health and Personal Social Services (Northern Ireland) Order 1972, as amended, for reasons which will be apparent presently. In the event, none of the other pleaded grounds of challenge was pursued, as the final amended Order 53 Statement confirms.

II THE EVIDENCE

The Agreed Care Assessment

[3] The following statement in the Applicant's skeleton argument neatly establishes the context within which the factual matrix and associated issues of law arising in these proceedings are to be considered:

> "*It is common case that the arrangement which the Respondent seeks to provide and which best meets the needs of LW is a rotational care package being three or four days within a residential care unit and then the remainder of the week at home*".

It is appropriate to highlight, at the outset, that this is an agreed statement. Furthermore, the evidence about the Applicant's injuries and resulting disabilities is largely uncontroversial. In an uncontentious summary in the main affidavit sworn by her mother, the Applicant is described as a person requiring individual attention and afflicted by limited mobility and speech and impaired short term memory, requiring one carer throughout the day and night and two carers for certain purposes.

The Applicant's Care From 1990 to Date

[4] The ensuing sequence of events is uncontroversial. Following the accident in November 1990, the Applicant was admitted to hospital for over two years. Since then, she has resided occasionally in various residential homes

provided and managed by the Trust, for varying periods and with fluctuating degrees of success. Overall, she has spent most of her time living at home. At certain times, the arrangement has, during the weeks in question, entailed a mixture of residential and home placements. The following chronology is undisputed:

(a) In January 1994, the Applicant was discharged from hospital to a clinic in Newtownards, spending weekends at home.

(b) From August 1994 to April 1997, the Applicant had a residential placement, spending weekends at home.

(c) From April 1997 to April 2006, the Applicant lived at home with her mother, with a provision of some respite care until 2001.

(d) From April to July 2006, the Applicant resided in "AK" Nursing Home, Belfast.

(f) From July 2006 to August 2007, the Applicant resided at home.

(g) From August to November 2007, the Applicant resided in a nursing home in Belfast.

(h) Since November 2007, the Applicant has resided at home permanently, availing of recourse to a resource centre during the daytime on two days per week.

To be interposed in this chronology is an issue, of some significance, relating to the proposed introduction of a part time placement for the Applicant at "AK" *Residential* Home around September 2008. I shall revisit this discrete issue in some detail presently.

[5] Many of the prominent and recurring themes of this regrettable dispute feature in a letter dated 5th December 2006 from the Trust's Chief Executive to the Applicant's solicitor:

> "*Firstly I would like to assure you that we are doing all we can to provide LW with a full care package and regard this as a priority …*
>
> *LW's needs are highly individualised and particularly complex. Consequently, we are experiencing difficulty in finding suitably trained carers to meet all of LW's needs. We have brought the lack of suitable services for some*

> *young physically disabled people like LW to the attention of the Eastern Health and Social Services Board …*
>
> *The carers who provide care to LW in her own home require specialist training as the generic training given to domiciliary carers is insufficient to meet her needs. This specialist training necessitates the carers having direct contact with LW to gain first hand knowledge and experience of her needs …*
>
> [The] *care manager continues his efforts to find additional carers for LW at home …*
>
> [JB's antipathy to male carers] *inevitably reduces the number of possible carers …*
>
> *I wish to assure you that as a priority we are seeking to meet both LW's needs and to support JB by trying to find suitable and appropriate care*".

The clear import of this important letter is that, as of December 2006, the Applicant's assessed needs were *not* being met by the Trust. At this time, the Applicant had been residing at home almost continuously for a period approaching ten years. During the three-and-a-half-years which have elapsed subsequently the Applicant has continued to reside *mainly* at home. Moreover, the evidence indicates that JB, her mother, has been plagued with repeated difficulties regarding home carers. In addition, her mother is a carer but is of advancing years and in declining health. It being common case that the domiciliary and non-domiciliary arrangements for the Applicant during recent years and at present do not properly address her needs, the court will have to examine how and why this unfortunate state of affairs has evolved, in its quest to determine whether the Trust has fulfilled such legal obligations to the Applicant as are found by this judgment to exist.

The Applicant's Disabilities

[6] According to reports generated by Trust personnel, the Applicant has residual physical and learning difficulties. She resides in an adapted house with her mother. She has private carers assisting with her daily living needs. While she is wheelchair dependent she can weight bear for short periods, in transfer movements only. She has the assistance of one care worker for all transfers. The offer of a mobile hoist has been declined by her mother, who continues to discharge some of the duties of a carer. At a purely physical level, personal hygiene activities are the most difficult and challenging. As of December 2009, a satisfactory solution to this problem had not been found. The Applicant's extreme dependency on others for basic tasks of daily living is clear

from a perusal of the most recent care plan materials. In short, the Applicant is a profoundly disabled person.

[7] Two particular features of the Applicant's *psychological* condition emerge from the detailed evidence. The first is a behavioural problem which manifests itself in unexpected and apparently irrational loss of temper. Associated with this is marked personality change, manifest from time to time. The Applicant's mother and the Trust have some disagreement about the causes, nature and extent of these psychological dimensions of the Applicant's condition. Secondly, the Applicant suffers from short term memory loss, described in the most recent care report as a "*huge source*" of her problems.

The Shared Care Assessment

[8] In the Trust's affidavit evidence, the Applicant's needs are described as complex and long term, entailing challenging behaviour which has given rise to difficulties in the maintenance of a consistent care package. The Trust's assessment of the Applicant's needs has yielded a decision to provide a rotational care package involving three to four days weekly within a residential care unit, with the Applicant spending the remainder of the week at home. Each of these settings requires a high degree of domiciliary care, given the assistance which the Applicant requires in personal hygiene, bathing, dressings and other basic daily tasks, including close supervision when eating. The Applicant's care is co-financed by the Trust (for a number of specified hours per week, which have fluctuated) and her compensation fund. The Applicant's domiciliary care is purchased from the private sector. Her needs are such that specially trained carers are necessary. It is evident that the suitability and availability of such carers has been persistently problematic, as the Chief Executive's letter of 5th December 2006 (*supra*) confirms.

[9] The Trust's evidence includes a report of Dr. Goss, consultant clinical psychologist (neuropsychology) and co-ordinator of its Community Brain Injury Team, dated 12th February 2008. This report concludes:

> "*LW is one of a small sub group of those with brain injury who require long term specialist services to address complex needs including challenging behaviour. Whilst service provision for people with brain injury has increased significantly throughout Northern Ireland over the past ten years, some gaps in service provision remain.*
>
> *LW requires the support of a specialist residential facility, designed to meet the needs of younger people with complex needs following brain injury. Such a facility should offer a core group of specialist trained staff, a high staff/client, a high level of structure and opportunities for social interaction. The availability of such a service would*

> *support LW and her mother's aspiration for a shared care model of support.*
>
> *There is no such service available at present in Northern Ireland …*
>
> *Work is ongoing within the Mental Health Directorate of* [the Trust] *to progress this issue*".

While the provision of a "*specialist residential facility, designed to meet the needs of younger people with complex needs following brain injury*" is, evidently, the optimum solution for the Applicant and other comparable disabled persons in Northern Ireland, I do not interpret Dr. Goss's report as suggesting that the Applicant's needs cannot be adequately met under *existing* structures and arrangements. Furthermore, no competing interpretation or argument was advanced on the Applicant's behalf. Rather, the issues in this case were debated within the framework of the agreed shared care assessment recited in paragraph [3] and noted in paragraph [8] above.

[10] The evidence includes a comprehensive report compiled by John Walker, on the Applicant's behalf, which supports the analysis immediately above. Mr. Walker is an honours graduate in social sciences, a qualified social worker and an associate member of the British Association of Brain Injury Case Managers, in January 2009. His report contains the following critique:

> "*Since the time of LW's discharge from hospital, she does not appear to have been provided with services that have met her needs or requirements. The reasons for this are not entirely clear. However, it appears that there are no specific pre-existing brain injury services within LW's immediate geographic area.*
>
> *There appears to be significant difficulty in agreeing how LW's unmet needs may be addressed. There does not appear to be any obvious evidence that this unmet need has been seriously addressed or catered for via statutory services.*
>
> *LW's main carer, her mother, JB, is in poor health. It would be inappropriate for LW to be supported within any institution where the staff did not have expertise in assisting people with acquired brain injury. It would be inappropriate for LW to be cared for in a general nursing home …*
>
> *In the absence of dedicated residential establishment (with expertise in acquired brain injury) it may be appropriate for*

> *LW to be supported within a small group living situation. Alternatively, she is likely to need a very substantial support worker package, should she be assisted in her own home, a relative's home or in an independent living situation …*
>
> *The documentary evidence strongly suggests that LW in profoundly physically disabled, but that she retains significant cognitive capacity …*
>
> *JB appears to be physically and/or psychologically in deteriorating health …*
>
> *It is highly probable that LW would benefit from the input of a brain injury case manager.*"

[11] Mr. Walker's comprehensive report contains an evaluation of the suitability of the "AK" residential establishment for the Applicant. He notes that this facility consists of ten self-contained apartments dedicated to those suffering from profound disabilities. It is a private sector initiative, developed by the Cedar Foundation, characterised by "*innovative and assistive smart technology*", in which the inmates' support needs are met by carers. Mr. Walker observes:

> "*Based solely on the available information, the "AK" development appears to potentially provide LW with good quality accommodation, but there will be additional costs for staffing*".

Thus it is common case that, subject to the availability of (a) suitably trained and skilled carers and (b) a vacancy, a placement for the Applicant in "AK" (which would be part-time, probably for three or four days per week) would adequately meet her needs. Indeed, at the hearing, it was the common position of both parties that "AK" is the *only* such facility with this capacity, vis-à-vis the Applicant. However, the evidence is that neither of the aforementioned qualifying conditions is satisfied at present: there is no current vacancy in "AK" and there is no indication that adequate numbers of suitably trained and skilled carers are available. I shall consider the legal implications of this state of affairs presently.

[12] Mr. Walker's report generated a detailed response report on behalf of the Trust. A central theme of this report is the acknowledgment that there is no dedicated long term residential facility for brain injury victims in Northern Ireland, coupled with the assertion that the Trust acquires, by contract, services from independent private sector organisations specialising in the care of those who suffer from complex disabilities (in particular, the Cedar Foundation) and Homecare NI, a provider of specialist domiciliary services. The implication of

this seems to be that members of the Trust's own workforce are either insufficient in numbers or do not possess the requisite training and skills – or, perhaps, a combination of both. Whatever the explanation, it would appear that the Trust has at least some dependency upon the private sector, with all its fluctuations and volatility, for the provision of carers to provide services to those suffering from complex disabilities, including serious brain injury. The quality and adequacy of these private sector services have clearly been a source of significant difficulties for the Applicant and her mother during a protracted period. This does not appear to be disputed by the Trust.

The Failed "AK" Placement in September 2008

[13] While the evidence bearing on this discrete issue is voluminous, extensive recitation thereof is unnecessary, for the simple reason that, following careful analysis, it is apparent that this proposed part-time placement was superseded by a fresh care package agreed between the parties. In very brief compass, until 8th September 2008, a part-time "AK" placement for the Applicant was proposed. However, this was negated, in order to give effect to the wishes and preferences of JB, who was anxious to recruit the necessary carers personally, without any Trust intervention – and undertook to do so. Both parties proceeded accordingly. According to JB's affidavit sworn on 19th November 2008, she realised quickly that her aspiration was not feasible. Sequentially, the next material development was a letter dated 5th January 2009 from the Applicant's solicitor, which states:

> "*Should a suitable residential placement become available for LW at "AK", or another location, then it would be appropriate that staffing arrangements are in compliance with the Departmental Minimum Standards for Domiciliary Care Agencies (July 2008). In addition, new care staff should shadow care for LW before committing to her care plan, should undertake a minimum of 3 x 3 hour training shifts with LW in her home and should be familiar with her care needs and the mechanics of her household …*
>
> *I trust that this will be of use in the endeavours to obtain a suitable care package for LW*".

The import of this letter appears to be that as of 5th January 2009, a residential placement for the Applicant in "AK" was no longer available. Since this letter was written, a period of almost one-and-a-half years has elapsed and the situation remains unchanged. My conclusions in relation to this discrete issue are set out in paragraph [47] *infra*.

[14] The affidavit sworn by Mr. Noonan on 24th February 2009 does not engage with this last mentioned letter at all. Rather, Mr. Noonan simply refers

to the unsuccessful September 2008 "AK" placement. By a process of interpretation, his limited averments seem to suggest that the Trust considered that it had discharged its legal obligations to the Applicant by facilitating this placement some months previously. Notably, the letter did not elicit any response from the Trust's lawyers. On 18th February 2009, Dr. Goss compiled an updated report. This records that in April and November 2008, the Applicant was expressing a preference to live permanently at home. Dr. Goss also outlines the training programme devised for carers in advance of and with a view to the September 2008 "AK" placement:

> "*A formal introductory training programme was developed by the Community Brain Injury Team for Homecare NI and Cedar Foundation staff groups …* [3 sessions] …
>
> *Sessions 1 and 2 of the formal staff training programme were scheduled for July 2008. Session 1 was delivered to Cedar Foundation staff in July. As Homecare NI staff were not present, session 2 was deferred, in order to allow time for session 1 to be completed with Homecare NI staff. Following the withdrawal of Homecare NI from LW's care, session 2 was delivered in October 2008 to staff from the Cedar Foundation …*
>
> *Further training has been deferred to allow a new care/ respite package to be arranged*".

The plan also incorporated "*ongoing staff support and further training*" of carers at monthly intervals. As of February 2009, all of this was stagnant. As the final sentence of the passage quoted above makes clear, in February 2009 a "*new care/respite package*" for the Applicant had not been established by the Trust.

[15] There follows a striking gap in the evidence amassed in these proceedings. The next affidavit was not sworn until over one year later. In it, JB avers that the scheduled hearing of this application was adjourned for a second time, in June 2009, to put into effect a "*second*" agreement struck between the parties:

> "*The agreement was to the effect that the Trust would seek a new residential placement for LW, though it was acknowledged by both the Trust and I that this would prove difficult and that* ***Homecare NI would be contracted by the Trust to provide the domiciliary care services for LW*** *and would then follow LW into any placement …*".

[Emphasis added].

The words highlighted point up the difference between the mid-September 2008 arrangement and its June 2009 successor. At the former stage, the private sector carers were to be engaged by JB. However, the June 2009 arrangement transferred this responsibility to the Trust. This is of no little significance, given the subsequent problems and shortcomings relating to the Applicant's carers documented in the evidence and not disputed by the Trust.

[16] According to JB's further averments, there ensued a delay of some four months in recruiting staff, some training was then provided and the ensuing Homecare service proved inadequate, causing much disruption. This is documented in some detail. JB avers that the Trust then contracted with another private sector domiciliary care provider, Prime Care, in order to provide all necessary staffing for the various shifts. JB was still employing some carers directly. She suggests that a residential setting would remedy some of the difficulties. Her affidavit continues:

> "*The idea was that Homecare NI would provide persons who were to be trained up specifically to look after LW and then when a residential placement became available they would care for her in that setting. However, Homecare NI had simply recruited staff on a general basis and then sent those staff, if they are available to look after LW and to cover the shifts …*".

JB emphasizes, once again, the importance which she attaches to consistency of personnel. She also draws attention to her own declining physical and psychological health. Her affidavit concludes:

> "*In all of this the shared care arrangement for LW, which is the appropriate care package for her, has still not been achieved. The domiciliary care services have yet to be provided for the full period of Fridays to Mondays as was agreed in June 2009 and there have been no further developments in respect of a residential placement …*
>
> *I feel that I am now worse off than I was before Homecare NI and Prime Care became involved given the amount of difficulty in working with them*".

This is the state of affairs in which the court intervenes, at this stage, to adjudicate, by reference to the agreed assessment recited in paragraph [3] above.

[17] The Trust's most recent evidence takes the form of a "Court Report", spanning the period December 2009 to March 2010. This report and its accompanying materials, which include care plans, document the following matters:

(a) JB has enduring concerns about the private sector carers employed by her to meet the Applicant's needs.

(b) JB's physical and psychological health continue to deteriorate.

(c) No further placement in "AK" has become available and there is currently a waiting list of twelve disabled persons.

The most recent materials – care plans, schedules, minutes of meetings and "court reports" – confirm the fluctuating nature of the situation. Notably, the Trust's record of a meeting held on 14th January 2010 speaks of "*the current crisis*". The contents of this document and others confirm a series of difficulties and shortcomings relating to carers and shifts. At the next meeting, held on 18th February 2010, the two main issues debated were the competence of the carers and the proper scope of their duties. At the time of preparing this judgment [mid- May 2010], there is no further affidavit evidence from either party.

III STATUTORY FRAMEWORK

Chronically Sick and Disabled Persons (Northern Ireland) Act 1978

[18] By Section 1 of this statute ("*the 1978 Act*"), it is provided:

> ***"1 Information as to need for and existence of welfare services***
>
> "*(1) The Department … shall inform itself of the number of and, so far as reasonably practicable, the identify of persons who are blind, deaf or dumb and other persons who are substantially handicapped by illness, injury or congenital deformity and whose handicap is of a permanent or lasting nature or are suffering from a mental disorder … and of the need for the making by the Department of arrangements for promoting the social welfare of such persons under Section 2(1)(B) of the Health and Social Care (Reform) Act (Northern Ireland) Act 2009 and Articles 4(b) and 15 of the Health and Personal Social Services (Northern Ireland) Order 1972 …*".

Section 2 provides:

> **"***Provision of social welfare services*
> *2. Where the [Department of Health, Social Services and Public Safety] for Northern Ireland is satisfied in the case*

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

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

(b) the provision for that person of, or assistance to that person in obtaining, wireless, television, library or similar recreational facilities;

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

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

(e) the provision of assistance for that person in arranging for the carrying out of any works of adaptation in his home or the provision of any additional facilities designed to secure his greater safety, comfort or convenience;

(f) facilitating the taking of holidays by that person, whether at holiday homes or otherwise, and whether provided under arrangements made by that Department or otherwise;

(g) the provision of meals for that person whether in his home or elsewhere;

(h) the provision for that person of, or assistance to that person in obtaining a telephone and any special equipment necessary to enable him to use a telephone,

then, that Department shall make those arrangements."

It is common case that, under the pyramidical statutory arrangements governing the provision of health and social care in Northern Ireland, the responsibilities and functions specified in Sections 1 and 2 of the 1978 Act devolve on the Trust, in the context of the present case. The main components of the statutory jigsaw appear to be Sections 1 and 2 of the 1978 Act; Article 15

of the 1972 Order (as amended); Articles 3 and 10(1) of the Health and Personal Social Services (Northern Ireland) Order 1991 (as amended); Regulation 2 of, and the Schedule to, the Health and Social Services Trusts (Exercise of Functions) Regulations (NI) 1994 [SR 1994 No. 64, as amended by SRs 1996 No. 439, 1997 No. 132 and 2003 No. 200]; and Sections 1, 8 and 24 of the 2009 Act (*infra*). Further, per Article 2(2) of the Belfast Health and Social Services Trust (Establishment) Order (NI) 2006 (as amended by SR 2008 No. 426), the Trust's functions shall be:

> "*(a) To provide goods and services for the purposes of the Health and Personal Social Services and;*
>
> *(b) To exercise on behalf of Health and Social Services Boards such relevant functions as are exercisable by the Trust by virtue of authorisations for the time being in operation under Article 3(1) of the Health and Personal Social Services (Northern Ireland) Order 1994*".

Although the court has received no evidence of the relevant instruments in writing and authorisations (as required by statute), it is common case that these exist and, further, have the net effect of rendering the Trust the appropriate Respondents to this application for judicial review.

Health and Social Care (Reform) Act (Northern Ireland) 2009

[19] This statute ("*the 2009 Act*") effected important reforms in the structural arrangements for the provision of health and social care in Northern Ireland. It came fully into operation on 1st April 2009 (per SR 2009 No. 114). Section 2 provides:

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

(a) develop policies to secure the improvement of the health and social wellbeing of, and to reduce health inequalities between, people in Northern Ireland;
(b) determine priorities and objectives in accordance with section 4;
(c) allocate financial resources available for health and social care, having regard to the need to use such resources in the most economic, efficient and effective way;
(d) set standards for the provision of health and social care;
(e) prepare a framework document in accordance with section 5;
(f) formulate the general policy and principles by reference to which particular functions are to be exercised;
Health and Social Care (Reform) Act (Northern Ireland) 2009 c. 1
3
(g) secure the commissioning and development of programmes and initiatives conducive to the improvement of the health and social well-being of, and
the reduction of health inequalities between, people in Northern Ireland;
(h) monitor and hold to account the Regional Board, the Regional Agency, RBSO and HSC trusts in the discharge of their functions;
(i) make and maintain effective arrangements to secure the monitoring and holding to account of the other health and social care bodies in the discharge of their functions;
(j) facilitate the discharge by bodies to which Article 67 of the Order of 1972 applies of the duty to co-operate with one another for the purposes mentioned in that Article.
(4) The Department shall discharge its duty under this section so as to secure the effective co-ordination of health and social care.
(5) In this Act "health care" means any services designed to secure any of the objects of subsection (1)(a); "health inequalities" means inequalities in respect of life expectancy or any other matter that is consequent on the state of a person's health; "social care" means any services designed to secure any of the objects of subsection (1)(b)."

Per Section 3, under the cross-heading "**Department's General Power**":

"***3.****(1) The Department may*
(a) provide, or secure the provision of, such health and social care as it considers appropriate for the purpose of discharging its duty under section 2; and
(b) do anything else which is calculated to facilitate, or is conducive or incidental to, the discharge of that duty.

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

This is followed by Section 4:

> ***4.****(1) The Department shall determine, and may from time to time revise, its priorities and objectives for the provision of health and social care in Northern Ireland.*
> *(2) Before determining or revising any priorities or objectives under this section, the Department must consult such bodies or persons as it thinks appropriate.*
> *(3) Where the Department is of the opinion that because of the urgency of the matter it is necessary to act under subsection (1) without consultation*
> *(a) subsection (2) does not apply; but*
> *(b) the Department must as soon as reasonably practicable give notice to such bodies as it thinks appropriate of the grounds on which the Department formed that opinion.*"

Sections 2-4 of the 2009 Act are readily comparable with their statutory predecessors in Part I of the 1972 Order, (*infra*).

Health and Personal Social Services (NI) Order 1972

[20] This measure, one of the first Orders in Council introduced under Direct Rule in Northern Ireland, has survived, subject to a series of amendments and repeals, during a period of some four decades. It remains a main source of the patchwork quilt of statutory provisions regulating health and social care in Northern Ireland and now co-exists with the 2009 Act. By Schedule 7 to the 2009 Act, the repealed provisions of the 1972 Order include Articles 4 and 16. While the Department remains the parent body, per Sections 2-6 of the 2009 Act, the newly inaugurated Regional Health and Social Care Board is the Department's statutory agent, by virtue of Section 8(1) and, for present purposes, the link between the Board and Health and Social Care Trusts is provided by Article 10(1) of the 1991 Order and the other statutory provisions noted in paragraph [18] *supra*. Thus, while, in principle, these proceedings could have been brought against the Department, *qua* principal, or the Regional HSC Board, *qua* the Department's statutory agent, it is not disputed that the Trust is the appropriate Respondent to this application for judicial review.

[21] Article 15(1) of the 1972 Order (as amended), which is to be considered in conjunction with Section 2(1)(b) of the 2009 Act, provides:

> "*In the exercise of its functions under Section 2(1)(b) of the 2009 Act the* [Department] *shall make available advice, guidance and assistance, to such extent as it considers necessary, and for that purpose shall make such*

> *arrangements and provide or secure the provision of such facilities (including the provision or arranging for the provision of residential or other accommodation, home help and laundry facilities) as it considers suitable and adequate*".

By Article 15(1)(A):

> "*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 Department and that other body or person*".

This "external contracting" theme continues, in Article 15(1)(B):

> "*The Department may assist any body or person carrying out arrangements under paragraph (1) by*
>
> *(a) permitting that body or person to use premises belonging to the Department;*
> *(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 Department permits the body or person to use,*
>
> *on such terms and conditions as may be agreed between the Department and that body or person*".

Thus the Trust, via the statutory devolution route sketched above, is empowered to engage directly with private sector social care providers such as Homecare (NI), Prime Care and the Cedar Foundation (as regards "AK").

IV CONSIDERATION AND ANALYSIS

The 1978 Act

[22] As the matrix of statutory provisions laid out above demonstrates, Section 2 of the 1978 Act does not exist in a vacuum. Rather, it is to be considered in conjunction with Section 2 of the 2009 Act and Article 15 of the 1972 Order. While this statutory interplay must not be overlooked, it is of no little significance that Section 2 belongs to a discrete, freestanding statutory regime, introduced *subsequent to* the 1972 Order. The essential purpose of the 1978 Act can be ascertained from its long title:

> "*An Act to make **further** provision with respect to the welfare of chronically sick and disabled persons in Northern Ireland; and for connected purposes*".

I consider the word "*further*" emphasized above, to be of no little significance. In my view, the clear import of the long title, in conjunction with the provisions which follow, is that the 1978 Act was designed to make provision for chronically sick and disabled persons *in addition to* the provision already made for them under the 1972 Order. This is the clear central theme of Section 1, which specifically requires the Department and its agents (a) to proactively identify all members of this group and (b) to ascertain the need for making arrangements to promote the social welfare of each of them. There is no comparable obligation imposed on the Department under the 1972 Order vis-à-vis any members or groups of the population. This evaluation of the 1978 Act is reinforced by Section 2, upon which I shall comment further, *infra*.

[23] This analysis of the statute is supported by the historical context within which the equivalent English legislation – the Chronically Sick and Disabled Persons Act 1970 – was made, by reference to a departmental Circular (No. 12/70), dated 17th August 1970. It is noteworthy that circulars of this kind have a statutory basis, though they do not operate as statutes (see now, in this jurisdiction, Sections 5 and 6 of the 2009 Act and paragraph 6(2) of Schedule 3 to the 1991 Order). In this Circular, signed by the Second Permanent Under Secretary of State of the Department of Health and Social Security, councils were instructed on the import and operation of the 1970 statute. The Circular contains the following passage:

> "***Purpose of the Act -***
>
> *As your Council will know, the Act was introduced as a Private Member's Bill and had a wide measure of approval in both Houses of Parliament. Its underlying purposes are to draw attention to the problems, varying with age and incapacity, of people who are handicapped by chronic sickness and disablement; to express concern that these problems should be more widely known and studied and to urge that when priorities are settled, full weight is given to finding solutions. While recognising the effect of constraints on resources, the Government are confident that local authorities will have these purposes in mind in the administration of Sections with which they are concerned*".

With specific reference to Section 2 (the equivalent of the Northern Irish Article 2), the Circular states:

> "*The effect of subsection 2(1) … is … to create statutory duties in these matters together with certain additions. The duty requires the authority to assess the requirements of individuals determined by them to be substantially and permanently handicapped as to their needs in these matters. If they are satisfied that an individual is in any (or all) of these matters, they are to make arrangements that are appropriate to his or her case.*"

These passages identify with clarity the social mischief which the statute was designed to address and remedy. There is no reason to suppose that the equivalent Northern Ireland measure is to be considered, and construed, in any different context. Thus, while all chronically sick and disabled persons in Northern Ireland were, plainly, embraced by the 1972 Order, I conclude that they were singled out for special, additional treatment and attention by the 1978 Act.

[24] Thus, in the realm of the provision of social care, the feature which distinguishes the Applicant from most other beneficiaries of such services is her chronic disability. This brings her within the ambit of the specially established regime under the 1978 Act. Bearing in mind the decision in ***Barry*** *(infra)*, it is appropriate to highlight, at this juncture, that the issue of *the Trust's resources* does not feature in these proceedings. The Trust has at no time made the case that it is insufficiently resourced in either the assessment of the Applicant's needs or the provision required to satisfy her needs, as assessed. In simple terms, this case is not about money. Nor does this case turn on the fact that in Northern Ireland there exists no specialised residential facility for the victims of brain injury, as noted in paragraph [9] above. This factor does not feature as a purported justification or explanation in either the Trust's affidavit evidence or the arguments advanced on its behalf.

[25] In my view, three separate, though inter-related, exercises are clearly contemplated by Section 2 of the 1978 Act. The first entails an assessment of the individual's social welfare needs. The second exercise is one of determining, by reference to the table of services and facilities in paragraphs (a) – (h), what measures the authority concerned considers *necessary* in order to meet the individual's assessed social welfare needs. The third, and final, stage calls for action on the part of the authority concerned, by reference to the word "*provision*", which appears repeatedly throughout Section 2. In short, having diagnosed [stage one] and then prescribed [stage two], the authority must then provide [stage three]. A crucial question arising in these proceedings is whether, at this final stage, a statutory duty on the part of the authority, enforceable at the suit of the chronically sick or disabled person concerned by an application for judicial review, crystallises.

[26] This issue was considered, to some extent, in ***Re: Bailey's Application*** [2006] NIQB 47, where the Applicant challenged a refusal by the relevant Trust to provide payments of rent for temporary accommodation during proposed adaptations in her home. The Applicant asserted an entitlement to such financial assistance under Section 2 of the 1978 Act, while the Trust contended that it was not within the scope of the Section. In considering the interplay between Section 2 of the 1978 Act and Article 15 of the 1972 Order, Weatherup J stated:

> *"[6] Under section 2 of the 1978 Act the Trust must be "satisfied" that it is "necessary" to make "arrangements under [the 1972 Order]" for the provision of "assistance …. in arranging for the carrying out of any works of adaptation in his home or the provision of any additional facilities designed to secure his greater safety, comfort or convenience." The arrangements under the 1972 Order are to secure the provision of personal social services and in the exercise of those functions the Trust shall make available "assistance" as "necessary" by making "arrangements" and providing "facilities" as it considers "suitable and adequate".*
>
> *[7] The structure of section 2 of the 1978 Act is such that the arrangements are interlinked with advice guidance and assistance under the 1972 Order. Under section 2(e) of the 1978 Act the dual target of the arrangements concerns the carrying out of the works to the home or the provision of facilities for safety comfort or convenience. Under Article 15 of the 1972 Order the Trust provides adequate and suitable arrangements and facilities. The Trust's position is that neither the first limb of section 2(e) which applies to assistance in arranging for the carrying out of the works of adaptation to the dwelling nor the second limb of section 2(e) which applies to the provision of facilities for safety, comfort extends to financial assistance to secure alternative accommodation."*

The central issue determined by the judgment is whether the provision of financial assistance is embraced by the word "*facilities*" in Section 2(e). Resolving this issue in favour of the Applicant, the judge concluded:

> *"[15] I am satisfied that the proper interpretation of Section 2 of the 1978 Act permits a Trust to make payments for temporary accommodation costs. Whether the Trust should do so in a particular case requires an assessment by the Trust of all the considerations arising under Section 2".*

The court declared accordingly. As this concluding paragraph makes clear, the issue determined by the court in ***Bailey*** differs from the central issues arising in the current proceedings.

[27] In ***Re Judge's Application,*** [2001] NIQB 14, the Applicant complained of an alleged failure by the relevant Trust to discharge its asserted duty to her under Section 2 of the 1978 Act, by declining to install in her home a system of automatic central heating. The Trust, having made an assessment of the Applicant's needs, had specified the requisite provision as including a non-manual heating system. The Applicant resided in NIHE premises and the NIHE, *qua* owner, declined to implement the Trust's recommendation to install the heating system, on the ground that other adults living in the home could reasonably be expected to provide assistance in fire management. Coghlin J rejected the argument that, following an assessment of the Applicant's needs as requiring (*inter alia*) the installation of a new heating system, a duty of installation thereby arose. He stated:

> *"Once the provisions of Section 2 of the 1978 Act are read in the context of Articles 4(b) and 15 of the Health & Personal Social Services (Northern Ireland) Order 1972 it is clear that the duty of the Department is to make such "arrangements and provide or secure the provision of such facilities … as it considers suitable and adequate". Despite the letter from Mr Loughrey of 17 April 2000 and the letter from Messrs Brangam, Bagnall & Company of 25 September 2000, I am satisfied that these provisions afford the Trust a discretion which must be exercised in accordance with the usual Wednesbury principles. I reject the suggestion by the Applicant that the statutory provisions place the Trust under an obligation to "guarantee" that a non-manual system will be installed. The Trust have clearly taken reasonable steps to arrange for the installing of such a system taking account of the fact that the applicant's premises remain the property of a third party, namely, the Housing Executive."*

Thus the analysis was one of discretion, rather than duty and the criterion applied by the court was whether the Trust had made reasonable efforts to provide the assessed facility. The court further took into account that the Trust had no legal interest in or control over the relevant premises. The conclusion was that the Trust was not acting unlawfully.

[28] There is binding authority on how one aspect of Section 2 of the 1978 Act should be interpreted, as the House of Lords have considered, and construed, the equivalent English statutory provision, Section 2 of the Chronically Sick and

Disabled Persons Act 1970 in ***R –v- Gloucestershire County Council and Secretary of State for Health, ex parte Barry*** [1997] AC 584. Section 2 of the 1970 Act provides:

> ***"2.*** *Provision of welfare services.*
>
> *– (1) Where a local authority having functions under section 29 of the* [M1]*National Assistance Act 1948 are satisfied in the case of any person to whom that section applies who is ordinarily resident in their area that it is necessary in order to meet the needs of that person for that authority to make arrangements for all or any of the following matters, namely*
> *–*
> *(a) the provision of practical assistance for that person in his home;*
>
> *(b) the provision for that person of, or assistance to that person in obtaining, wireless, television, library or similar recreational facilities;*
>
> *(c) the provision for that person of lectures, games, outings or other recreational facilities outside his home or assistance to that person in taking advantage of educational facilities available to him;*
>
> *(d) the provision for that person of facilities for, or assistance in, travelling to and from his home for the purpose of participating in any services provided under arrangements made by the authority under the said section 29 or, with the approval of the authority, in any services provided otherwise than as aforesaid which are similar to services which could be provided under such arrangements;*
>
> *(e) the provision of assistance for that person in arranging for the carrying out of any works of adaptation in his home or the provision of any additional facilities designed to secure his greater safety, comfort or convenience;*
>
> *(f) facilitating the taking of holidays by that person, whether at holiday homes or otherwise and whether provided under arrangements made by the authority or otherwise;*
>
> *(g) the provision of meals for that person whether in his home or elsewhere;*

> *(h) the provision for that person of, or assistance to that person in obtaining, a telephone and any special equipment necessary to enable him to use a telephone,*
>
> *then, . . . F1subject [F2to the provisions of section 35(2) of that Act (which requires local authorities to exercise their functions under Part III of that Act . . . F3in accordance with the provisions of any regulations made for the purpose) and] [F4to the provisions of section 7(1) of the M2Local Authority Social Services Act 1970 (which requires local authorities in the exercise of certain functions, including functions under the said section 29, to act under the general guidance of the Secretary of State) [F5and to the provisions of section 7A of that Act (which requires local authorities to exercise their social services functions in accordance with directions given by the Secretary of State)]] it shall be the duty of that authority to make those arrangements in exercise of their functions under the said section 29."*

While the decision in ***Barry*** confirms the distinction between (a) assessment of a person's social care needs (on the one hand) and (b) consequential provision of services to satisfy such needs (on the other), by virtue of its *ratio decidendi* its authority is confined to a discrete issue viz. the intrusion of available financial resources at stage (a). Writing in Halsbury's Laws of England Centenary Essays (2007), Lord Neuberger of Abbotsbury states (at p. 70):

> "*Precedent involves rules or principles of law being made by the decisions of the courts. In general, a court is bound by the essential legal reasoning, or* ***ratio decidendi*** *of decisions made by courts superior to it, and it is either bound or normally will follow the* ***ratio*** *of decisions of courts of co-ordinate jurisdiction.*"

Thus the decision in ***Barry*** does not speak directly to the matrix in the present case.

[29] The reasoning of the majority [3/2] in ***Barry*** can be ascertained, firstly, from the speech of Lord Nicholls (at p. 604):

> "*At first sight the contentions advanced on behalf of Mr. Barry are compelling. A person's needs, it was submitted, depend upon the nature and extent of his disability. They cannot be affected by, or depend upon, the local authority's ability to meet them. They cannot vary according to whether the authority has more or less money currently available …*

> *This is an alluring argument but I am unable to accept it. It is flawed by a failure to recognise that* ***needs for services cannot sensibly be assessed without having some regard to the cost of providing them. A person's need for a particular type or level of service cannot be decided in a vacuum from which all considerations of costs have been expelled***".

[Emphasis added].

To like effect, Lord Clyde stated, at pp. 610-611:

> "*The determination of eligibility for the purposes of the statutory provision requires guidance not only on the assessment on the severity of the condition or the seriousness of the need but also on the level at which there is to be satisfaction of the necessity to make arrangements. In the framing of the criteria to be applied it seems to me that the severity of a condition may have to be matched against the availability of resources …*
>
> *It may also be observed that the range of the facilities which are listed as being the subject of possible arrangements … is so extensive as to make it unlikely that Parliament intended that they might all be provided regardless of the cost involved. It is not necessary to hold that cost and resources are always an element in determining the necessity. It is enough for the purposes of the present case to recognise that they may be a proper consideration.*"

In short, in the language of Lord Clyde, if an unmet need were to materialise in any given case –

> "*… such an unmet need will be lawfully within what is contemplated by the statute*".

As appears from the two reasoned opinions of the members of the majority, the authority concerned can properly take into account its resources prior to the final stage. Though this issue was not expressly decided, the unspoken conclusion in ***Barry*** appears to be that resources can play no part in *the final stage, viz. the provision of one or more of the specified statutory services to satisfy the assessed need.* Indeed, this was expressly conceded (at p. 598):

> "[Counsel] *on behalf of the Secretary of State conceded that at the* [final] *stage the duty is absolute. In other words, the Council cannot escape their duty to make*

> *arrangements to meet the need by saying that they do not have the money.*"

This concession seems to me harmonious with the central conclusion of the House, together with certain other passages in the speeches of their Lordships, considered in the following paragraph.

[30] The speeches in ***Barry*** contain some notable general pronouncements about the 1970 Act. Lord Lloyd (forming part of the minority) stated, at pp. 598-599:

> "*[Section 2] contemplates three separate stages. The Council must first assess the individual needs of each person to whom section 29 of the Act of 1948 applies. Having identified those needs, the Council must then decide whether it is necessary to make arrangements to meet those needs. There might be any number of reasons why, in the circumstances of a particular case, it might not be necessary for the local authority to make arrangements, for example, if the person's needs were being adequately met by a friend or relation. Or he might be wealthy enough to meet his needs out of his own pocket. But if there is no other way of meeting the individual's needs, as assessed, and the Council is therefore satisfied that it is necessary for them to make arrangements to meet those needs, then the Council is under* ***a duty*** *to make those arrangements. It is essential to a proper understanding of section 2 of the Act of 1970 to keep the three stages separate. Confusion arises if the stages are telescoped.*"

[My emphasis].

Furthermore, his Lordship characterised the duty under Section 2 as one "*owed to the disabled person individually*". This notion of duty also features prominently in the speech of Lord Clyde, at pp 609-610:

> "*The [Chronically Sick and Disabled Persons] Act of 1970 came in as a Private Member's Bill. Section 2(1) was in its day an important innovation. While section 29(1) of the National Assistance Act 1948 gave the local authority a power to make welfare arrangements for the persons there described, a power which they might have a duty to perform by virtue of an appropriate direction under section 29(2), section 2(1) imposed a duty on the local authority to make welfare arrangements for an individual where they were satisfied that in the case of that individual it was necessary in order to meet his needs to make the arrangements. This*

> *was not a general but a particular duty and it gave a correlative right to the individual which he could enforce in the event of a failure in its performance. Such a provision in this area of the legislation is not common. We were referred only to one other example of it, in section 117 of the Mental Health Act 1983.*"

Significantly, in the following paragraph, Lord Clyde underlines the distinction between assessment of the person's needs and consequential provision therefor. In a passage in which the concepts of duty and corresponding right feature prominently, he states, at p.610:

> *" The right given to the person by section 2(1) of the Chronically Sick and Disabled Persons Act 1970 was a right to have the arrangements made which the local authority was satisfied were necessary to meet his needs. The duty only arises if or when the local authority is so satisfied. But when it does arise then it is clear that a shortage of resources will not excuse a failure in the performance of the duty. However neither the fact that the section imposes the duty towards the individual, with the corresponding right in the individual to the enforcement of the duty, nor the fact that consideration of resources is not relevant to the question whether the duty is to be performed or not, means that a consideration of resources may not be relevant to the earlier stages of the implementation of the section which lead up to the stage when the satisfaction is achieved.* ***The earlier stages envisaged by the section require to be distinguished from the emergence of the duty. And if that distinction is kept in mind, the risk of which counsel for the respondent warned, namely the risk of the duty becoming devalued into a power, should not arise****."*

[My emphasis].

Thus, Lord Clyde's analysis is that at the final stage a duty – to be contrasted with a mere power – crystallizes.

[31] In the other majority speech in ***Barry***, Lord Nicholls also considers the question of whether any right is conferred by Section 2 on chronically sick and disabled persons. He states, at pp.605-606 :

> *" This interpretation does not emasculate section 2(1). The section was intended to confer rights upon disabled persons. It does so by giving them a valuable personal right to see that the authority acts reasonably in assessing their needs for certain types of assistance, and a right to have*

> *their assessed needs met so far as it is necessary for the authority (as distinct from others) to do so. I can see no basis for reading into the section an implication that in assessing the needs of disabled persons for the prescribed services, cost is to be ignored. I do not believe Parliament intended that to be the position.*"

In my view, the tolerably clear import of this paragraph is in alignment with the unequivocal statements of Lords Lloyd and Clyde that, at the final stage, a duty is conferred on the relevant authority, giving rise to corresponding - and enforceable - rights on the part of the disabled person concerned. This is a unifying theme of the three reasoned speeches. Furthermore, this duty is couched by their Lordships in absolute terms. Given the authority which they carry and their closely reasoned character, I propose to give effect to these dicta.

[32] I have given consideration to certain other decisions generated by the English equivalent of the 1978 Act. These include ***R (Spink) –v- London Borough of Wandsworth*** [2005] EWCA. Civ 302. I construe this decision as authority for the proposition that in considering what is necessary to meet the assessed needs of a disabled child, the authority concerned can properly evaluate what may reasonably be expected of parents with means. This is consonant with the analysis of Lord Lloyd in ***Barry***, noted in paragraph [28] above. See the conclusion in paragraph [46] of the judgment of Lord Phillips MR:

> "*… A local authority can, in circumstances such as those with which we are concerned, properly decline to be satisfied that it is necessary to provide services to meet the needs of disabled children until it has been demonstrated that, having regard to their means, it is not reasonable to expect their parents to provide these.*"

This decision is compatible with ***Barry*** and does not impinge on the duty analysis contained particularly in the speeches of Lord Lloyd and Lord Clyde. A further notable feature of the decision in ***Spink*** is the readiness with which the court was prepared to import into the statutory scheme the familiar standard of *reasonableness,* albeit within the confines of the **second** stage of determining what is necessary to satisfy the individual's assessed needs. To this extent, the reasoning in ***Spink*** chimes with that of Coghlin J in ***Judge*** .

[33] As I have already observed, all chronically sick and disabled members of society have been isolated for special attention and treatment under the 1978 Act. Fundamentally, they must be identified and then assessed. I consider that this distinguishes them from other members of the population. Until the introduction of the 1978 Act, the chronically sick and disabled members of society simply belonged to the general "pool" governed by Article 4(b) and Article 15 of the 1972 Order. The obligation to first identify and then assess the needs of these persons distinguishes them from all other members of the pool.

Moreover, it requires the Department to be proactive. This is the first advantage which the legislation confers on the members of this discrete group.

[34] The second advantage which, in my view, members of this group enjoy over other members of the population is the existence of an unequivocal *duty* on the part of the Department. This analysis is based on the language of Section 2; the use of the presumptively mandatory "*shall*"; the true import and effect of the cross reference to Article 15 of the 1972 Order; the contrasting language of the latter; the ascertainable legislative intention; and the speeches in ***Barry***. The essence of this duty is that when the Department makes an assessment of the "*needs*" of the members of this group **and** then determines what it considers "*necessary*" to meet those needs, by specific reference to the list in paragraphs (a) – (h) of Section 2, it is obliged to make provision accordingly. Moreover, this duty is consistently couched and portrayed throughout all the speeches in ***Barry*** as unqualified. While the discretion which characterises the first and second stages of the Section 2 exercise permits the intrusion of certain qualifications and limitations, as material considerations (see Wade & Forsyth, ***Administrative Law***, 10th Edition, pp. 321-322), I consider that these can have no influence at the final stage.

[35] In contrast, other members of the population cannot claim the protection of a duty of this kind. Rather, by virtue of Article 15(1) of the 1972 Order, the Department's statutory commitment (an intentionally neutral noun) to the remainder of the population is qualified by the words "*… to such extent as it considers necessary*" and "*as it considers suitable and adequate*". These words are not replicated in Section 2. The contrast between this linguistic formula and "*… then the Department shall make those arrangements*", with its clear mandatory overtones, is striking. In short, I consider that while Section 2(1)(b) of the 2009 Act and Article 15 of the 1972 Order constitute the statutory umbrella under which all social care services are provided, with Article 15 providing the necessary *powers* to give effect to the *duty*, Section 2 of the 1978 Act superimposes on this legislative structure a duty, owed to the members of a specifically identified group, which has the contours set out immediately above. This analysis, in my view, is not compromised by the inclusion in the equivalent English statutory provision of the word "*duty*" and its absence from Section 2 of the 1978 Act.

[36] It follows from the analysis above and, in particular, the speeches in ***Barry***, that, in my opinion, Section 2 of the 1978 Act is not a "*target duty*" or "*macro duty*" statutory provision. In this respect, it is to be contrasted with Section 2 of the 2009 Act and its statutory predecessor, Article 4 of the 1972 Order. The language of "*target duties*" features in ***R(G) –v- Barnett LBC*** [2004] 2 AC 208, which concerned Section 17 of the Children Act 1989: see in particular paragraphs [76] – [88] of the opinion of Lord Hope and the opinion of Lord Millett. As Lord Hope observed, a central feature of target duties is that they are "*… concerned with general principles and not designed to confer absolute rights on*

individuals". In my view, this characterisation does not apply to the *provision* dimension of Section 2 of the 1978 Act. Thus the starting point in the Applicant's case – of unquestionable importance – is that if either aspect of her agreed shared care package falls within the scope of Section 2, she can point to the existence of a specific statutory duty imposed on the Trust at the third, and final stage (viz. the *provision* stage) of the exercise to be performed.

[37] I consider that the analysis set out above provides the juridical framework within which the central ground of challenge in these proceedings falls to be considered and determined. The next question to be addressed is whether the agreed twofold provision for the Applicant's needs, noted in paragraph [3] above, falls within the menu of services listed in Section 2 of the 1978 Act. In this respect, Mr. O'Donoghue QC made clear that the Applicant's case is confined to Section 2(a) viz. "*the provision of practical assistance for that person in his home*". None of the other seven services included in this menu is in play. At this juncture, it is necessary to reflect on the twin aspects of the Applicant's complaint. The first aspect relates to the adequacy of carer services in the Applicant's home setting, while the second concerns the Trust's failure to provide the Applicant with the assessed extra-domiciliary care provision, in the sense recorded in paragraph [3] above.

[38] I am of the opinion that the first aspect of the Applicant's complaint clearly falls within the scope of Section 2(a) of the 1978 Act viz. "*the provision of practical assistance for that person in his home*". Unsurprisingly, this was not in dispute between the parties. The next question is whether there has been any breach of the Trust's duty to the Applicant, as analysed above, in this respect. In answering this question, I consider that Parliament must have intended that assistance rendered under this rubric would be adequate and effective. If otherwise, the legislation would be weak and meaningless, the duty would be diluted and the corresponding right would be emasculated. This analysis is reinforced by paragraph 6 of Schedule 3 to the 1991 Order, which provides:

> "*(1) An HSC Trust shall carry out* ***effectively, efficiently*** *and economically the functions for the time being conferred on it by an order under Article 10(1) and by the provisions of this Schedule*".

[My emphasis]

In my view, the persistent and extensive shortcomings in the home carer services provided to the Applicant highlighted throughout both parties' evidence impel to a conclusion of inadequacy and inefficacy. This conclusion applies equally, whether one views the Trust's legal obligation to the Applicant through the prism of an absolute (viz. unqualified) duty *or* a duty to act reasonably in supplying the assessed provision. In ***Judge***, the court, in considering whether the Trust had discharged its duty (as assessed by the

court) to the Applicant, was disposed to apply a criterion of *reasonableness*: had the Trust acted reasonably at the final, provision stage? Insofar as this approach is compatible with ***Barry***, which may be a matter of debate, I find no evidence of reasonable, conscientious and sustained efforts by the Trust in this respect. Moreover, the protracted period during which these problems and shortcomings have endured is a factor of obvious weight and speaks for itself. Finally, I find that the Trust does not dispute the Applicant's complaints about the adequacy and efficacy of the home carer services provided throughout a lengthy period. It follows that the Trust is in breach of its duty to the Applicant, in this respect.

[39] I turn to consider the second element of the Applicant's complaint. Viewed through the lens of Section 2(a) of the 1978 Act (the only provision invoked on the Applicant's behalf), the argument becomes demonstrably more difficult. The Applicant's contention is that a three or four days per week residential placement in "AK" constitutes "*the provision of practical assistance for* [her] *in* [her] *home*". In support, reliance was placed on a passage in the judgment of Ouseley J in ***R (T and Others) –v- London Borough of Haringey*** **[2005] EWHC 2235 (Admin),** where the Applicant's case was based on, *inter alia,* Section 2 of the Chronically Sick and Disabled Persons Act 1970 (set out above). The Applicant's case was that, by virtue of her medical condition, Section 2 entitled her to the provision of night care nursing/medical assistance in her home and in her extra-domiciliary day setting, such assistance being an assessed need. In rejecting this argument, the judge stated:

> "[77] *The first question is whether section 2(1)(a) – (c) CSDPA covers the provision of the care at issue here. For the same reasoning which I have set out in relation to section 17 and Schedule 2 to the Children Act, I do not consider that those subsections should be given so wide an interpretation as would cover the day or night respite care. Such care can be seen as "practical assistance" in the home, but in the context of those provisions and with the broad health and social services division in mind, that phrase is not apt to include this nursing care. Subsection (a)'s concept of "practical assistance" does not extend to medical treatment of that nature. This is not assisting in movement, dressing, feeding, hygiene, lavatory functions or any other of the aspects of life for which chronically sick and disabled need assistance. Still less does it come within the recreational provision in subsection (b). I do not find it easy to see that the concept of "assistance…in taking advantage of educational facilities" includes, in the context of lectures, games, outings and so on,* ***essential nursing care for medical reasons*** *enabling school to be attended in the first place.* "

[My emphasis]

[40] In my view, the passage set out immediately above does not support the Applicant's contention. It is clear from the extensive recitation of the factual framework in ***Haringey*** that the contentious services were to be provided, in part, for the Applicant *in her home*. One of the main issues was whether the responsible authority should supply ten hours nursing care at night in the Applicant's home, to provide her mother with appropriate respite: see in particular paragraphs [16], [24] and [28] – [31]. This contentious care was not to be provided for the Applicant *outside* her home. Thus, factually, ***Haringey*** differs from the present case. Moreover, the main issue addressed, in the context of Section 2 of the 1970 Act, was whether the contentious care [both domiciliary and extra-domiciliary] constituted nursing care or social care. This issue was resolved against the Applicant. In summary, I consider the purported analogy with ***Haringey*** misconceived.

[41] The essence of the contention advanced on behalf of the Applicant was that "AK" would become the Applicant's "*home*" during any periods of placement there, bearing in mind the intention and expectation that her domiciliary care arrangements would be "exported" there during the relevant days of the week: the Applicant's carers would simply change their place of work. The court is invited to construe the statutory words "*in his home*" accordingly. I am unable to accept the Applicant's argument, as it seems to me to distort the plain and ordinary meaning of the statutory language. Indeed, it is confounded by the latter, in particular the words "*in*" and "*home*", which are to be accorded their normal and widely recognised meanings. On the facts of this case, the Applicant has only one home - the dwelling house where she has (apparently) resided throughout her life, with her mother. Thus I find against the Applicant, on this issue.

Article 15 of the 1972 Order

[42] However, the conclusion set out immediately above does not preclude the court from holding that the Trust may be obliged to provide this discrete service/facility to the Applicant under Article 15 of the 1972 Order, rather than Section 2 of the 1978 Act. This is the next question which must, logically, be addressed. I consider, bearing in mind the language of Article 15, as amended, that this question can be formulated in the following abstract terms: where a Trust determines what social care arrangements and facilities are considered by it to be necessary and/or suitable and adequate for a given member of the population, does a consequential duty of provision, in tandem with a corresponding right, crystallize? And if "yes", what are the contours of the duty?

[43] In ***Re Hanna's Application*** [2003] NIQB 79, Coghlin J considered the question of the proper construction of Article 15 of the 1972 Order. On this occasion, in contrast with ***Judge***, Article 15 arose for consideration in isolation, on its own merits. Coghlin J concluded:

> *"… I do not think that it is appropriate to conceive of Article 15 placing the Department or, in this case, its agent the Respondent Trust under a mandatory duty to fulfil any specific need once that need has been assessed. In my view, in the context of this application, the duty imposed upon the Department and its agencies by Article 15, is to provide such facilities by way of residential nursing accommodation as it considers suitable and adequate to meet the needs of the Applicant, consistent with its overall duty to promote the physical and mental heath and social welfare of all of the people of Northern Ireland, including those whose needs may, depending on the circumstances, be more urgent and pressing than those of the Applicant. In achieving this goal it seems to be inevitable that it will be necessary to take into account available resources and, in my view, this has been practically achieved in a reasonable manner by the scheme administered by the Defendant Trust. It is important to bear in mind that the Respondent Trust has not refused to meet the Applicant's assessed needs, it has recognised those needs but has been compelled by the resources available to it to adopt a system which seeks to balance the fulfilment of those needs with the needs of others."*

Thus, for Coghlin J, the hallmark of Article 15 of the 1972 Order is discretion, rather than duty. Amongst the decided cases, the decision in ***Hanna*** approximates most closely to the present case. However, it is important to recognise that in ***Hanna*** there was no refusal by the authority to meet the Applicant's assessed need. Rather, the impugned determination was to the effect that the Applicant would have to await the availability of the relevant facility, which would be provided to her as soon as it became available. Thus, the precise terms of the impugned determination must be carefully recognised. Moreover, the central argument advanced, unsuccessfully, attempted to equate Article 15 of the 1972 Order with certain English statutory provisions. Finally, the arguments canvassed by the parties did not entail consideration and determination of the abstract question posed in paragraph [42], *supra*. Thus the factual and legal matrix in ***Hanna*** does not equate precisely with that of the present case.

[44] A duty was found to exist in the Scottish case of ***McGregor –v- South Lanarkshire Council*** [2000] Scot CS 317, where the statutory provision under

consideration was Section 12A of the Social Work (Scotland) Act 1968, as amended, which provides:

> *"(1) Subject to the provisions of this section, where it appears to a local authority that any person for whom they are under a duty or have a power to provide, or to secure the provision of, community care services may be in need of any such services, the authority -*
>
> *(a) shall make an assessment of the needs of that person for those services; and*
>
> *(b) having regard to the result of that assessment, shall then decide whether the needs of that person call for the provision of any such services."*

The court reasoned as follows:

> *"[10] Once a local authority has completed an assessment of the needs of an individual for community care services the next stage in the process is for the local authority to decide whether the needs of that individual call for the provision of any such services in terms of section 12A(1)(b). In undertaking this exercise the local authority could of course take into account the resources available to the individual including any additional support available to the individual from neighbours and friends. This would be particularly relevant in the context of an individual who was able to live independently but who required some support within the home, such as assistance with shopping or household chores. At the other end of the spectrum where the assessment of needs discloses that the individual is not capable of living independently, even with support, and requires to be provided with assistance by way of residential accommodation, the resources available to the local authority are relevant in considering how to meet the need for residential accommodation. In meeting this need a local authority may wish to take into account the availability of sheltered accommodation with the facilities of a warden as well as accommodation within hospitals in their area in addition to the availability of accommodation in residential nursing homes."*

The court's conclusion is encapsulated in the following passage:

> "[11] … *As will be apparent from what I have already said, I am of the opinion that once a local authority determines that*

> *an individual's needs call for a particular provision the local authority is obliged to make that provision. In particular having decided that an individual requires the provision of a permanent place in a nursing home in terms of section 12A(1)(b) of the Act a local authority could not in my opinion refuse to make such a provision simply because it did not have the necessary resources."*

Declining to grant a mandatory injunction, the court declared accordingly: see paragraph [12]. The court invited submissions from the parties on the decision in ***McGregor.*** On behalf of the Applicant, it was argued that the decision supports her case, while the Respondent sought to distinguish the present case factually. While mindful of the caution required when comparing one statutory matrix with another, it seems to me that Section 12A of the Scottish statute is reasonably comparable to Article 15 of the 1972 Order. As an exercise in statutory interpretation, the decision in ***McGregor*** seems to me unexceptional**,** lending some weight to the Applicant's contentions.

[45] In my opinion, Article 15 of the 1972 Order is to be analysed in the following way:

(a) It constitutes the more detailed outworkings of the general, unparticularised duty enshrined in Section 2(b) of the 2009 Act (formerly Article 4(b) of the 1972 Order), which is to be construed as a "macro" or "target" duty, akin to a general principle (per Lord Hope in ***Barnett LBC,*** *supra.*

(b) It is for the authority concerned to make available advice, guidance and assistance to such extent as it considers necessary. This plainly invests the authority with a *discretion*, to be exercised in accordance with well established principles.

(c) For the purpose of making available advice, guidance and assistance to such extent as it considers necessary, the authority shall make such arrangements and provide or secure the provision of such facilities as it considers suitable and adequate. This language also clearly confers a *discretion* on the authority.

(d) Bearing in mind the present context, it is expressly provided that such "*facilities*" may include the provision or arranging for the provision of residential or other accommodation.

(e) Once a decision on what the authority considers "*necessary*" and/or "*suitable and adequate*" has been made, the discretion in play is exhausted. The assessment having been made, a duty of provision arises.

This analysis accommodates the proposition that, *in making the assessment in each individual case*, the authority can properly take into account factors such as available resources, the demands on its budget, the particular circumstances of the individual concerned and their family, including their resources, the availability of facilities and its responsibilities to other members of the population. The ingredients of this proposition are a process of reasoning by analogy with the decision in ***Barry*** and the well established principles of public law summarised in ***Administrative Law*** (Wade and Forsyth, 10th Edition) pp. 321-322. Thus factors of this kind can properly influence the assessment to be made in an individual case. However, when the assessment has been made, I consider that discretion is supplanted by duty. This, in my view, is the effect of the presumptively mandatory "*shall*", which contra indicates any suggestion that discretion should prevail from beginning to end. Had the latter been the legislative intention, one would expect to find its expression in the discretionary "*may*".

V CONCLUSIONS

Inadequate Domiciliary Care

[46] The first limb of the Applicant's complaint is that, in her domiciliary setting, the services provided by the private sector carers are inadequate, inconsistent and subject to rapid fluctuation. Based on all the evidence, I find that, factually, the Trust does not dispute this discrete complaint and this is plainly a complaint of gravity and substance. As set out in paragraph [38] above, I conclude that this gives rise to a breach of the Trust's statutory duty to the Applicant under Section 2 of the 1978 Act.

The Failed "AK" Placement in September 2008

[47] The second limb of the Applicant's complaint is that the residential combination assessed by the Trust as appropriate for her has not been and is not being provided. The period under scrutiny is mid-2008 to date. I have summarised above, in paragraph [13], the evidence bearing on the failed "AK" placement in September 2008. This evidence points firmly to the conclusion that the Trust did all that could reasonably have been expected to bring about this placement. Its personnel made reasonable efforts at all times. Ultimately, those efforts were thwarted. Furthermore, the consensual arrangement made between the parties was overtaken by a new arrangement introduced, again consensually, around 8th September 2008, which substituted the previous agreed proposal that the Applicant would avail of "AK", on a part-time basis, at that time. Accordingly, I find no breach of the Trust's legal obligations to the Applicant in respect of the events of summer and autumn 2008.

"AK" Placement – the Continuing Failure

[48] The court must next consider whether any breach of the Trust's statutory duty has occurred since autumn 2008 and/or is occurring at present. In order to determine this question, I have reflected critically on all available evidence. I have already commented on the current state of the Trust's affidavit evidence: see paragraph [15] above. As over one-and-a-half-years have elapsed since the events of September 2008 and the status quo remains unchanged, a critical examination of the evidence belonging to this most recent phase is inevitable. During the hearing, the court enquired whether there is a vacancy in "AK" at present. Having taken instructions, Mr. Good indicated that there is not and, moreover, there is a waiting list. While I take this factor into account, it is striking that there has at no time been any revision by the Trust of the shared care assessment of the Applicant's needs, set out in paragraph [3] above. It seems to me that the legislation – both the 1978 Act and the 1972 Order – must contemplate revised social care assessments from time to time, in response to changing circumstances. However, there has been no revised assessment in the present case and the court must obviously proceed on the basis of the existing assessment.

[49] Whether viewed through the prism of an absolute (i.e. unqualified) duty of provision or a duty to be measured by the criterion of reasonableness (as in ***Judge***), I find in the Applicant's favour on this issue. There is no convincing evidence of reasonable efforts by the Trust to discharge its continuing statutory duty to the Applicant. This is exemplified by the inertia which appears to have characterised particularly the period January to October 2009, the proportions of the period under scrutiny (almost two years), the undisputed enduring complaints about the quality of service provided by the carers and the duration of those complaints, which predate September 2008. These domestic care issues are relevant to the continuing "AK" placement failure issue, as this latter failure is exposed and magnified in consequence. In her most recent affidavit, JB avers, in terms, that she and the Applicant are, at this juncture, worse off than at any time before (paragraph [16], *supra*). I concur: the evidence supports this *cri de coeur*. On the particular facts of this case, I conclude that the Trust is currently in breach of its duty to the Applicant under Article 15 of the 1972 Order.

Future Resolution

[50] It would appear that a most unfortunate stalemate, punctuated by occasional stand offs between the parties, has developed. If a fault based analysis were appropriate, one might well conclude that the responsibility for this is not unilateral. JB's conduct may well have been difficult on occasions and, in her strong maternal and human anxiety to achieve the best possible services for the Applicant, she may have lacked balance and objectivity from time to time. However, in my view, these factors do not operate to absolve the Trust from its obligation to fulfil the legal duties assessed above.

[51] I would urge the parties to consider some form of mediation, in an attempt to resolve this highly regrettable state of affairs. The tools of imagination, flexibility and determination are undoubtedly required – bilaterally. A mediator could conceivably import the invaluable attributes of specialised skills, expertise, balance, neutrality and objectivity. In my view, the parties should give serious consideration to this course.

Relief

[52] The court has been invited to grant the Applicant declaratory relief. I propose to make a declaration which reflects the two principal conclusions set out in paragraphs [46] and [49] above.