

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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PH's Application [2014] NIQB 60

AN APPLICATION BY PH ('A PERSON UNDER A DISABILITY') ACTING BY HIS  
NEXT FRIEND BH FOR JUDICIAL REVIEW

AND

IN THE MATTER OF DECISIONS OF THE WESTERN HEALTH & SOCIAL CARE  
TRUST IN RESPECT OF THE CHRONICALLY SICK AND DISABLED PERSONS  
(NORTHERN IRELAND) ACT 1978 AND ARTICLE 15 OF THE HEALTH AND  
PERSONAL SOCIAL SERVICES (NORTHERN IRELAND) ORDER 1972

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**TREACY J**

**Introduction**

[1] This is a challenge to decisions of the Western Health & Social Care Trust by which it commenced charging for respite care for the applicant where previously the applicant had received same without charge.

**Order 53 Statement**

[2] The applicant sought the following relief:

- (a) A declaration that the charge for and/or amount of payment for respite care being provided to the applicant by the Trust is unlawful and/or in breach of the applicant's Convention rights and/or in breach of the United Nations Convention on the Rights of Persons with Disabilities.

(b) An order of certiorari quashing the decision of the Relevant Authority to charge and or not to reduce the amount of payment for respite care in accordance with the assessed needs of the applicant.

(c) An order of mandamus directing the Relevant Authority to reconsider the care needs of the applicant and to provide the respite care required on the basis of the applicant's assessed needs without charge or, at a significantly reduced amount.

(d) Damages in respect of the respite accommodation charges paid by the applicant from the date of change of policy to present.

[3] The grounds on which the said relief was sought included:

(a) The Relevant Authority is acting in breach and unlawfully with respect to the charge for, or amount of payments charged, for respite care of the applicant contrary to Section 2 of the Chronically Sick and Disabled Persons (Northern Ireland) Act 1978 ('the 1978 Act') and Article 15 of The Health & Personal Social Services (Northern Ireland) Order 1972 ('the 1972 Order') in that the Relevant Authority has a duty to provide such respite care given the applicant's assessed need.

(b) The Relevant Authority is acting in breach and unlawfully with respect to the charge for, or amount of payments charged for respite care of the applicant contrary to Article 99(6) of the Health & Personal Social Services (Northern Ireland) Order 1972 in that the Relevant Authority, being aware of the chronic nature of the applicant's disability, and of his assessed need for respite care, and having discretion in respect of payments for temporary respite care charges the applicant which is the amount he receives in respect of his Severe Disability Allowance.

(c) The Relevant Authority is acting in breach of the applicant's rights under the European Convention, contrary to its obligations under section 6 of the Human Rights Act 1998, and, in particular, has violated the applicant's rights

pursuant to Article 8 (right to respect for private and family life) by failure to provide adequate free respite care such that the applicant's benefits are thereby used to pay for such care thus depriving the applicant of resources necessary to maintain private and family life with respect to his disability.

(d) The Relevant Authority failed to take a material consideration into account, namely that the applicant has a chronic disability with an assessed need for regular respite care and that no charge for respite care of the applicant should have been made.

(e) The Trust is acting in breach of the applicant's rights under Articles 19 and 20 of the United Nations Convention on the Rights of Persons with Disabilities, ratified by the United Kingdom on 8 June 2009 and incorporated into European Union Law by SI 2009/1181 European Communities (Definition of Treaties) (UN Convention on the Rights of Persons with Disabilities) Order 2009.

(f) The Relevant Authority's decisions and actions are disproportionate in all the circumstances.

(g) The Relevant Authority's decisions and actions are in breach of the legitimate expectation of the applicant that a policy change in respect of charging for respite accommodation will not be applied retrospectively.

### **Factual Background/Sequence of Events**

[4] The applicant is a 42 year old man who suffers from moderate learning disability and manic depressive illness. He requires full-time care and supervision which is provided by his father and mother with whom he lives as a member of the family. He receives respite care at the Shepherds Way respite facility operated by the Western Health and Social Care Trust on a regular basis, approximately every six weeks. He has been attending this unit for the past 18 years. He also attends Maybrook Adult Day Centre usually Monday to Friday. PH requires assistance with basic personal hygiene tasks.

[5] Currently PH receives a Severe Disablement Allowance and Income Support. He also receives a Disability Allowance (Mobility) and a Disability Living Allowance (Care) neither of which is counted as income when computing his liability to pay the cost of respite care. The weekly cost of respite care is £61.35. In addition to this attendees are

required to have between £15 to £25 pocket money per week for planned activities. In addition the attendees are required to bring their own toiletries which PH's father estimates at a cost of £13 per week.

### **Correspondence with the Trust**

[6] On 7 July 2004 the predecessor to the Trust wrote to all parents, carers and guardians to indicate that the Western Trust were the only health Trust in Northern Ireland who were not charging for adult respite care and that in order to comply with the relevant legislation the Trust was proposing a minimum charge for adult respite.

[7] On 11 March 2005 BH wrote to Mr Trevor Millar, programme manager for learning disability within the Trust, outlining his concerns at the implementation of costs. Mr Millar responded to this on 16 March 2005.

[8] On 17 January 2006 BH wrote again to the Trust regarding the cost of meals whilst in respite care. Mr Millar responded on 24 February 2006 as follows:

“... I have once again sought clarity from the Department regarding day care costs for clients attending respite and have received the same answer. The Department is clear meal costs should be paid whilst in respite care. They provided me with the example of older persons who are in receipt of respite and who also pay for their meals whilst in day services. I therefore have no flexibility in this issue.”

[9] BH was not satisfied with this response and lodged a complaint on 22 July 2006 which was acknowledged by the Trust on the 27 July 2006. The Trust requested further information which was provided during the summer of 2006. As no response had been received BH requested an update on or about 29 August 2006. The Trust responded on 5 September 2006.

[10] A decision was issued by the Convenor on 3 October 2006. The content of that decision, briefly, was as follows:

(a) The Trust had correctly interpreted the CRAG Regulations (Charging for Residential Accommodation Guide). The amount charged was reasonable and in line with the policy to charge the minimum cost in respect of the first eight weeks of a temporary stay.

(b) The Convenor recommended that while the charges for meals complied with the relevant legislation but that bearing in mind the Disability Discrimination Act 1995 (s21) and the fact that PH was accessing another service during the

day (i.e. the day care facility) he was recommending that the Trust consider that the meals had already been paid for in the day care facility and that this should be taken into account.

(c) The Convenor felt it was not unreasonable to expect that some of the attendee's personal allowance be used to buy toiletries.

(d) The total amount that PF would be likely to have to pay during a respite week came to £104.25 which was £12.40 more than his income support and severe disablement allowance combined.

[11] The Convenors assessment was considered by the Trust and it issued its decision on 25 October 2006. In line with the Convenors recommendations the Trust elected to deduct the cost of meals paid for at the day care facility (ie £11.10 per week) from the charge for the respite care. This was to be introduced from 1 December 2006. Despite this being agreed no action had been taken on it and no refunds paid at the time by mid-March 2013.

[12] BH remained dissatisfied and took the matter up with the Northern Ireland Ombudsman on 6 October 2006. The Ombudsman replied on 15 March 2007 noting that the deductions made in respect of meals plus an arrangement whereby the Trust would provide certain toiletries meant that there remained no necessity for any top up payment being required to ensure PH's income meets his necessary expenses during periods of respite. As a result the Ombudsman decided not to take any further action on the complaint.

### **Correspondence with Foyle Jobs & Benefits Office**

[13] On 19 November 2004 the applicant's father (and next friend in these proceedings) contacted Foyle Jobs & Benefits office ("JBO") on behalf of PH to enquire if money could be claimed back for the respite charges as PH was in receipt of Severe Disablement Allowance and Disability Living Allowance.

[14] The JBO responded to the applicant's mother and appointee for the purposes of social welfare correspondence outlining the rules for income support for people entering a residential care home for a period of respite care.

[15] On or about 22 November 2004 BH provided the JBO with further details including the dates of PH's proposed respite care. Then on 7 March 2005 BH wrote to the JBO again requesting them to consider an application for Income Support Shortfall for the cost of respite care. On 21 March 2005 BH sent a further letter to the JBO

applying for respite charges for the period 24 – 30 January 2005 (€48.06 claimed) and for the period 10 – 14 March 2005 (€32.04 claimed). In this letter BH outlined the outlay for a one week stay.

[16] The application was rejected and appealed. The appeal was heard on 16 December 2005 and was disallowed on the basis that there was no provision which authorised the increase of income support where a person is in residential accommodation on a temporary basis. It was accepted that during the times when PH was at respite care he did have additional expenses over and above his weekly applicable amount of income support.

### **Recent Developments**

[17] On 30 January 2013 PH had a care review which stated:

‘he enjoys his outings and tells us that he likes the Oak Tree Centre and all his programmes. PH is best with structure and the only time he misses his programme is if he refuses to participate or at times of heighten behaviour [sic].’

[18] BH corresponded with the Department of Health, Social Services and Public Safety on the 20<sup>th</sup> February 2012. The Department responded on 24 February 2012 stating

‘The current charging policy for residential care in Northern Ireland is based on the principle that help should be given to those who cannot afford to help themselves. HSC Trusts are required by the Health and Personal Social Services (NI) Order 1972 to assess a person’s ability to contribute to the costs of residential accommodation. The Health and Personal Social Services (Assessment of Resources) Regulations (Northern Ireland 1993 prescribe a financial assessment that must be carried out to determine how much each individual should contribute to the cost of their care.

Articles 15, 36 and 9 of the Health and Personal Social Services (NI) Order 1972 require the HSC to charge for care arranged in a residential or nursing home. The charging framework is set out in the Health and Personal Social Services (Assessment of Resources) Regulations (NI) 1993...’

[19] On 11 March 2012 the Department of Health, Social Services and Public Safety issued a circular to the Chief Executives of all Trusts entitled Care Management, provision of services and charging guidance – Circular HSC (ECCU) 1/2010.

[20] In light of that circular and the judgment by Girvan LJ in the case of PF & JF's Application [2011] NIQB 20 BH wrote to the Northern Ireland Ombudsman again to revisit his original complaint and to highlight the content of the judgment. The Ombudsman replied on 10 May 2012. The response from the Ombudsman noted that the previous complaint was particularly focussed on the fact that 'having made the necessary payment for his care, PH was left with an amount less than the required personal allowance rate'. The Ombudsman noted that at the time of the original complaint (in 2006) BH *agreed* with the principle of charging with respite care, where at this stage (2012) BH's issue was the *legality* of PH being required to pay for respite care out of benefit income. As a result the Ombudsman concluded that it was not appropriate to 'review' the decision of 2007 as there was a new issue. The Ombudsman advises that BH now must in the first instance address his concerns to the appropriate Trust.

[21] On 12 May 2012 BH wrote to Elaine Way, Chief Executive of the Trust highlighting his areas of concern. The concerns outlined were that PH's incapacity benefit had to be given to the Trust at the time of admission to respite care and that it was his belief, based on the circular and Girvan LJs judgment that state benefits should not be taken into account when considering care needs. He notes that at para 24 in that judgment it is stated that benefits are paid to reflect the additional living costs associated with disability. Further, he submits in his letter that the Trust rely on CRAG and because PH only gets temporary care no financial assessment is carried out. 'However, since PH gets more than 4 weeks respite per year CRAG is used by the Trust to take his incapacity benefit. If he was assessed it would be free of course.' Finally, the letter requests that the Trust inform BH of the legal authority upon which the Trust is relying to take this course of action.

[22] Receipt was acknowledged on 18 May 2012. No substantive response was received all summer and a request for a response was sent by BH on 27 August 2012. This complaint was finally responded to on 16 October 2012. This response indicated that the Trust is of the view that the charges being applied are correctly due. The letter was in the following terms:

"Mr Millar has advised that your complaint is essentially requesting the Trust to justify and set out the legal basis for the charges made in respect of the respite provided to PH...

'... Mr Millar wished to clarify that respite care is an example of a community care service and all the Trust's respite units, except when provided in a hospital situation, are categorised as residential facilities. Where respite care is provided in a residential or nursing home, the Western Health and Social Care Trust, in accordance with Charging for Residential

Accommodation Guide (CRAG) 2012, has the discretion as to what to charge for the first eight weeks of any respite stay. From the beginning of the ninth week, the Trust is required to carry out a financial assessment ... to determine how much that person can afford to contribute. It should be noted that this is not a payment for care but a reasonable charge for the provision of respite.

The Trust's practice in determining the charge for residential respite is based on the minimum benefit rate per week, for the age band of the client, minus the personal expenses allowance.

Mr Millar has advised that with regard to your question about PH's state benefit being used to pay for care, ... CRAG 2012 states that when assessing a client's ability to pay, 'Where the resident is a temporary resident, Attendance Allowance or Disability Living Allowance (Care Component) should be completely ignored.

In relation to the Ministerial correspondence this relates to non-residential social services therefore it would not be relevant to the issues relating to residential care. The judgment of Girvan LJ in the PF case ... relates to direct payments therefore would also not be relevant."

[23] On 22 August 2012 Ms Louise Skelly of the Patient and Client Council wrote to the Department of Health, Social Services and Public Safety to clarify the position in respect of patient and carer contributions for residential respite. A response was received on 11 September 2012 in the following terms:

'Respite care is an example of a community care service. As you have mentioned, where respite care is provided in a residential or nursing home, HSC Trusts have discretion as to what to charge for the first 8 weeks of any respite stay. From the beginning of the 9<sup>th</sup> week, HSC Trusts are required to carry out a financial assessment of the client's capital and income to determine how much that person can afford to contribute to the cost of their care. This 8 week discretion is based on Articles 99(6) and 36(8) of the Health and Personal Social Services (Northern Ireland) Order 1972.

'With regard to your question about temporary clients using state benefits to pay for care, CRAG 2012 states that when



assessing a client's ability to pay, 'Where the resident is a temporary resident, Attendance or Disability Allowance Care Component should be completely ignored...

Furthermore, the 1999 Ministerial statement that you refer to in your letter continues to reflect current policy; Attendance Allowance and Disability Living Allowance should not be taken into account in decisions about providing and charging for community care services. All HSC Trusts have confirmed that they are compliant with this guidance and exclude these benefits when carrying out financial assessment on temporary residents.'

[24] On 21 August 2012 Ms Skelly wrote to the Trust and the Trust responded to her on 21 September 2012. The Trust provided the following responses to Ms Skelly's questions:

**What is the Western Trust policy on charging for respite, including residential respite?**

The Western Trust policy is to charge a basic charge and not to financially assess clients who have been placed in respite within residential or nursing homes for a period of up to 8 weeks.

...

**How are 'reasonable' charges for respite care determined, ie assessment / criteria?**

The 'reasonable' charges are based on the standard rate of benefits that these clients would be entitled to. For example - Over 60 standard rate of £107.45 less personal allowance of £23.50 leaves a respite charge for this category of £83.95.

**Whether, in the current absence of financial assessment for residential respite care of less than 8 weeks duration, people in receipt of state benefits are required to use their allowances to buy respite care?**

People in receipt of state benefits (which excludes attendance allowance and DLA) are required to use these to buy respite care. A Personal Allowance of £23.50 is allowed for their personal use. This is not used as a contribution towards respite care.

[25] On 5 November 2012 the social security agency provided a breakdown of how much PH is entitled to. It is calculated that PH needs £71.00 per week to live on, plus an additional £30.35 'because you are sick or disabled' (presumably to cover additional costs associated with being disabled) and a further £14.80 'because of the Disability Income Guarantee'.

[26] It then calculates how much PH has coming in, which is £80.70 in severe disablement allowance. As a result there is a shortfall between what he needs to live (£116.15) and what he has coming in (£80.70 – severe disablement allowance). It concludes that he is therefore entitled to £35.45 in income support.

### **Statutory Framework**

[27] The relevant articles of the Care Management, Provision of Services and Charging Guidance – Circular HSC (ECCU) 1/2010 provide:

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

...

49. Respite services at a minimum should:

- Properly reflect the needs of modern living. Offer a range of options so that cared for persons and carers can choose that which best meets their unique needs.
- Be age appropriate, of high quality and ensure the safety of the individual being cared for.
- Be easily accessible by cared for persons and carers when, how, and where it is needed.
- Be available both in and out-of-hours, at weekends and accommodate crisis/emergency situation.

...

63. The Health and Personal Social Services (Northern Ireland) Order 1972 *requires* that a person is charged for

*personal social services provided in residential care or nursing home accommodation arranged by a HSC Trust. There is no such requirement, or authority to charge for healthcare provided in the community, either in the service user's own home or in a residential care or nursing home. Consequently, all references to financial assessment and charging hereafter apply to the provision of personal social services in residential care or nursing home accommodation [my emphasis].*

64. A financial assessment should only commence after an assessment of the service user's health and social care needs has been completed. The financial circumstances of individuals should never be used as the reason for failing to offer assessment of need or, as appropriate, access to the care management process.

65. The Health and Personal Social Services (Assessment of Resources) Regulations (Northern Ireland) 1993 ('the 1993 Regulations') set out the form of financial assessment used to determine how much an individual is required to contribute toward the cost of personal social services provided in residential care or nursing home. While the Department's Charging for Residential Accommodation Guide 2009 (CRAG) explains the application of the regulations, it is emphasised that the 1993 rRgulations are the only authoritative statement of the law. CRAG serves as an aid to assist in interpretation of the regulations and should be read only in conjunction with the legislation.

...

67. In addition, income is also assessed in the financial assessment. All residents who contribute from their income must retain a weekly Personal Expenses Allowance (PEA) designed for them to spend on personal items. Where a service user's assessed contribution is less than the cost of an appropriate place in a residential care or nursing home, HSC Trusts will make up the difference."

[28] The 1999 Ministerial Letter provides:

‘...receipt of Attendance Allowance or other disability related benefits should not be taken into account in decisions about the provision of community care services’.

[29] Art 4 of the Health and Personal Social Services (Northern Ireland) Order 1972 provides:

“It shall be the duty of the Department of Health, Social Services and Public Safety:

(a) To provide or secure the provision of *integrated health services* in Northern Ireland designed to promote the physical and mental health of the people of Northern Ireland through the prevention, diagnosis and treatment of illness.

(b) To provide or secure the provision of *personal social services* in Northern Ireland designed to promote the social welfare of the people of Northern Ireland.

And the (Department) shall so discharge its duty as to secure the effective coordination of health and personal social services.”

[30] Art 51(1) provides:

“In the exercise of its functions under Article 4(b) the Ministry 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.”

[31] Art 15 (1B)(4) provides:

“The Department may recover in respect of any assistance, help or facilities such charges (if any) as the Department considers appropriate.”

[32] Art 16(1) provides:

“The (Department) shall by order establish bodies to be called Health and Personal Social Services Boards, for such areas as it may by order determine.”

[33] Art 17(a) provides:

“The Health and Social Services Boards shall exercise on behalf of the (Department) such functions (including functions imposed under an order of any court) with respect to the administration of such health and personal social services as the (Department) may direct ... and shall do so in accordance with regulations and directions.”

[34] Art 99 provides:

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

(2) Subject to the following provisions of this Article, the payment which a person is liable to make for any such accommodation shall be in accordance with a standard rate determined by the Department for that accommodation and that standard rate shall represent the full cost to the Department of providing that accommodation, other than any costs in respect of nursing care by a registered nurse .....

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

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

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

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

[35] Reg 3 of The Health and Personal Social Services (Assessment of Resources) Regulations (Northern Ireland) 1993 provides:

"For the purposes of Articles 36(5) and 99(3) of the Order the regulations to which a Board shall give effect in assessing a resident's ability to pay are those set out in these regulations."

[36] Section 2 of the Chronically Sick and Disabled Persons (NI) Act 1978 provides:

"Where the Department of Health and Social Services 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 articles 4(b) and 15 of the Health and Personal Social Services (Northern Ireland) Order 1973 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 Department under the said Articles 4(b) and 15 for promoting the social welfare of such persons or, with the approval of that Department, in any services provided otherwise than as aforesaid which are similar to services which could be provided under such arrangements.

(e) The provision of assistance for that person in 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.”

[37] Art 19 of the UN Convention on the Rights of Persons with Disabilities entitled ‘Living independently and being included in the community’ states:

“States parties to this convention recognize the equal right of all persons with disabilities to live in the community with choices equal to others, and shall take effective and appropriate measure to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

(a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement.

(b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community.

(c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsible to their needs.”

[38] Art 20 – Personal Mobility provides:

States parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by:

(a) Facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost.

(b) Facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost.

(c) Providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities.

(d) Encouraging entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities.

## **Arguments**

### ***Applicant's Arguments***

[39] The applicant argued that the responsibilities in Sections 1 and 2 of the Chronically Sick and Disabled Persons (NI) Act 1978 (“the 1978 Act”) devolve on the respondent Trust in the present case.



[40] The 1978 Act makes provision for chronically sick and disabled persons in addition to the provision already existing in the 1972 order.

[41] In LW [2010] NIQB 62 it was decided that there are three separate though interconnected exercises contemplated by Section 2 of the 1978 Act. The first is assessment of the individuals social welfare needs. It is argued that the Trust had assessed PH as requiring regular respite care.

[42] The second exercise is one of determining, by reference to the table of services and facilities in paras (a)-(h) what measures the authority concerned considers necessary in order to meet the individuals assessed social welfare needs. It is argued that this exercise is evident by the actions and decisions taken by the Trust over many years in respect of the provision of PH's respite care.

[43] The third exercise calls for action on the part of the authority concerned, by reference to the word provision.

[44] In LW the court considered that in stages 1 and 2 the authority may consider budget constraints and particularised circumstances of the family involved however, once the assessment is made the discretion to consider these matters is supplanted by a duty to provide for the needs discovered by assessment. That is, stage 3 is mandatory and resource implications cannot be taken into account.

[45] It is argued that the respondent Trust does not appear to have recognised this duty when it commenced charging for respite care which it previously provided at no cost ie the Trust had previously provided to Stage III when it assessed the applicant as requiring respite care and having it provided it at no cost cannot revisit the issue of resources. Therefore, it is submitted that the action of charging in these circumstances is unlawful as a breach of the respondent's duty pursuant to Section 2 of the 1978 Act.

[46] It is argued that the applicant has a legitimate expectation that the Trust will not exercise its discretion or make a decision which will change his position with regard to charging for respite care. It is important to note that Article 99 of the 1972 Order does not only provide for mandatory charging of fees for residential care but also provides a discretion (Art 99(6)) in respect of such charging where the individual is unable to pay the appropriate rate. The respondent Trust has effectively changed its policy of charging zero to that of charging £75 per week to a disabled individual who relied upon the practice of receiving respite care 'gratis' in breach of his legitimate expectation.

[47] The applicant submits that the issue of delay is not relevant to the substantive hearing expect in relation to remedy.

[48] The applicant submits that A19(2) of the UN convention places an enforceable duty on the respondent as a public authority to provide such services as are necessary to facilitate the applicant in living with his family. It is submitted that this places an

enforceable duty on the respondent to provide such services as are necessary to facilitate the applicant in living with his family. Respite care is essential to this. Decisions to charge for respite care are incompatible with the rights provided in this article and if the decisions are compliant with domestic legislation then such domestic legislation is not compliant with EU Law. The domestic legislation should be read in a manner consistent with the rules of EU Law.

[49] The applicant submits that his Art 8 rights are engaged as his ability to remain with his family and receive care in their home depends upon the receipt of respite care. The decision to charge for same engages these rights. Therefore, Section 2 of the 1978 Act and Arts 14 and 99 of the 1972 order must be interpreted consistently with the HRA.

### *Respondent's Arguments*

[50] The respondent argued that the decision to begin charging was not a policy decision but a response to the statutory requirement which the Trust, until then, had not been implementing.

[51] The respondent argues that the application has not been made promptly and is well outside the three month time limit. It is further argued that the applicant, who bears the onus for establishing that there is a good reason for delay, has failed to establish same.

[52] Under the functions of the Health and Social Services Board (No 1) Direction (NI) 1973, as amended, the Department has delegated to HSC Board/Trusts, the duty to provide or secure the provision of personal social services to promote the social welfare of the people of Northern Ireland.

[53] The Trust may make an assessment of ability to pay to determine the amount required to be refunded to the Trust, but this is not necessary where a person is availing of respite or temporary stay. The Charging for Residential Accommodation Guide (CRAG) was issued under Article 17(1) of the Health and Personal Social Services (Assessment of Resources) Regulations (NI) 1993 to give guidelines on same. At para 3.005 of CRAG it states:

“An assessment of ability to pay is not required for the first 8 weeks of a temporary stay. It will be for the Trust to decide in each case whether to make an assessment. Where the Trust decides it is appropriate to make an assessment, follow the guidance in Sections 4 to 13. Where no assessment is made, the charge is the amount it appears reasonable to the Trust for the resident to pay.”

[54] The Trust therefore do not carry out a formal assessment of ability to pay. His contribution is based on the weekly amounts which are assessed by the DHSS as

necessary to enable a person of the applicant's age and disability to live on. This is the least amount of money assessed by the government required to meet basic living standards. It also takes into account a personal living allowance.

[55] The respondent argues that the service of respite provision is *not* included in the list at section 2 of the Chronically Sick and Disabled Persons (NI) Act 1978. Therefore, it is argued that the respondent does not have a duty to provide it. Therefore, the Department could not have assessed same as necessary and been under a consequent duty to provide it (as per LWs application).

[56] This means that the provision which the Department/Trust is under an obligation to provide is that found at s15 (1) of the 1972 Order ie '... to such an extent as it considers necessary' and 'as it considers suitable and adequate'.

[57] The Trust is obliged to meet the costs of health care needs pursuant to the legislation, but not the cost of social care needs. In fact, the Trust is obligated to recover the costs of social care. In this regard the cases of LW and PF can be distinguished as they both related to health care needs.

[58] In the current case there is a statutory obligation to charge for respite accommodation. The fact that the service is provided does not impose a duty to provide it free of charge as indicated in the statute.

[59] In relation to the applicant's contention that the Trust is acting unlawfully with respect to the charge/amount of charge for respite care contrary to Section 2 of the 1978 Act and Article 15 of the 1972 Order, the respondent contends there is no statutory basis for this assertion as the services do not fall within the list at Section 2 of the 1978 Act and that section is thus not engaged. The provisions only go so far as to ensure that Trusts have reasonable services available to persons in need with the detail of same being left to the Trust. Parliament has not stated that such services should be provided free of charge, as is explicitly stated in relation to health care services, instead parliament has specifically provided for charging for such services. In this case, which is in the context of respite accommodation the 'reasonable amount' assessed is the minimum required to live on: it is the same test applied to all recipients of this respite service and is in keeping with the charges being made by other Trusts across Northern Ireland. It does not take into account personal allowances or other benefits such as attendance allowance.

[60] In relation to the applicant's argument concerning the discretion in Art 99(6) of the 1972 Order the respondent states that article 99(6) gives the Trust the statutory authority to decide whether it will carry out a financial assessment or whether it will charge an amount that appears reasonable for him to pay. Thus the Trust assert that they are acting lawfully in charging this minimum payment which would be used otherwise by PH to meet his weekly living expenses.

[61] In relation to the applicant's assertion that the Trust is acting contrary to its obligations under s6 HRA and Art 8 ECHR by failing to provide adequate free respite care such that the applicant's benefits are thereby used to pay for such care thus depriving the applicant of resources necessary to maintain private and family life with respect to his disability. In relation to this the respondent states that the Trust provides the requisite support and services to maintain the applicant in his home with his family, that the payment towards respite is the minimum amount and that the applicant has all his needs met for the week that he remains there. The money provided to pay for this service is the money that is provided to meet the basic living costs of the applicant. He is not deprived of resources necessary to maintain private and family life. He retains his personal allowance and other benefits. The applicant also has other finances available to him through his parents, namely the Independent Living Fund. The Trust also provides the day care facilities at a minimal cost. The Trust submit that in all respects it has recognised and upheld the applicant's rights.

[62] In relation to the applicant's contention that the Relevant Authority failed to take a material consideration into account namely that the applicant has a chronic disability with an assessed need for regular respite care the respondent argues that the applicant does not have an assessed need for regular respite care, nor does he have a 'chronic disability' which would require intervention from health care professionals. Respite provision is provided at the request of the parents according to *their* assessed need.

[63] In relation to the applicant's contention that the respondent breached A19 and A20 of the UN Convention on the Rights of Persons with Disabilities the respondent argues that there has been no such breach as he gets mobility and travel allowance and there is no issue relating to the facilities provided.

[64] In relation to the allegation of disproportionality the Trust submit that they have acted reasonably and proportionately in all manners.

[65] The respondent submits that there is no legitimacy in an expectation that a public body will breach its statutory duty.

## **Discussion**

### ***Has the respondent Trust breached their obligations under S2 of the 1978 Act and A15 of the 1972 Order?***

[66] Section 2 of the 1978 Act provides that 'where the Department .... is satisfied in the case of any person to whom section 1 ... applies that it is necessary in order to meet the needs of that person for that Department to make arrangements under articles 4(b) and 15 of the [1972 Order] for all or any of the following matters ... '( identified in sub paras a - g) '... that the Department *shall* make those arrangements'. 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 is one of the matters identified (at sub para f). 'Holidays' is not defined.

[67] Thus, when the Department is satisfied that it is necessary in order to meet the needs of a chronically disabled person for it to make one of the enumerated arrangements, which are personal social services arrangements falling under Articles 4(b) and 15 of the 1972 Order, the Department is under a mandatory statutory duty to arrange same.

[68] Where a person is provided under art 15 with accommodation in premises provided by the Department art 99(1) imposes a mandatory statutory duty on the Department to recover from that person the amount of the payment which he is liable to make in accordance with the other provisions of that article.

[69] The applicant argues that in charging for the 'assessed' needs pursuant to section 2 of the 1978 Act the respondent has breached its duty. The applicant equated respite care to the holiday arrangements enumerated at sub para (f) of the 1978 Act. The respondent submitted that respite is not one of the section 2 arrangements, that the applicant has not been assessed as requiring respite and that the applicant does not have a chronic illness.

[70] Respite could arguably fall within the section 2 arrangements and I consider that the applicant does fall within the definition of a chronic illness. However, PH has not been assessed as requiring respite, this is not in his care plan.

[71] However, even if the duty were upon the Trust to provide respite under section 2 of the 1978 Act, they are still under the obligation to charge for same under section 15 of the 1972 order. For this reason I find no breach of these provisions.

***Has the respondent breached art 99 (6) of the 1972 Order?***

[72] Art 99(6) states that the Department may limit the amount of charge for respite to what it considers reasonable for the first 8 weeks before undertaking a financial assessment. The applicant argues that in light of his assessed need it is unreasonable to take these monies from his severe disability allowance.

[73] The manner in which the Trust should charge for Health and Personal Social Services is set out in The Health and Personal Social Services (Assessment of Resources) Regulations (Northern Ireland) 1993.

[74] The 1993 Regulations deal with how to undertake a financial assessment. Assessment of resources is based on an assessment of income and capital. Part 1 of Schedule 3 outlines the types of income which can be disregarded. Many types of income are disregarded including attendance allowance and disability living allowance.

Severe Disablement Allowance however is not included as an amount which should be disregarded, it is therefore properly considered as income.

[75] The Department, in the eight week period in which it has a discretion as to whether or not to undertake a financial assessment have opted not to, and instead charge temporary residents at the *minimum* rate of benefits received by persons of the same age as the resident minus a personal expenses allowance. The benefits considered in relation to the applicant are the severe disablement allowance. As above the Department has an obligation to charge for Art 15 services and has acted lawfully in taking into account the severe disablement allowance as provided for in the 1993 Regulations.

***Has the respondent breached Art 8 ECHR?***

[76] The applicant argues that in using his benefits money to pay for respite care the respondent breaches his Art 8 rights by depriving him of the resources necessary to maintain private and family life with respect to his disability. While I accept that this factual scenario falls within the ambit of Art 8, and while it is common case that the applicant's benefits money is in fact being used to pay for his respite care, there has been no evidence or argument demonstrating how the substance of Article 8 has actually been interfered with. The applicant continues to use the respite care and it provides him and his family with a break which is helpful to *maintaining* his private and family life.

***Did the respondent fail to take into account a relevant factor ie the applicant's chronic disability and his assessed need for respite?***

[77] As above there is no evidence of an assessed need for respite.

***UN Convention on the Rights of Persons with Disabilities***

[78] If this Convention does have the effect of placing the duty claimed on the respondent then the respondent is discharging this duty. The applicant is in fact living at home with his family and he takes regular respite breaks to facilitate this. There is nothing in Article 19 which makes unlawful the charging for such services.

**Legitimate Expectation**

[79] I accept that no legitimate expectation can arise that a Department will disobey its statutory duty.

**Conclusion**

[80] For the above reasons the application for judicial review is dismissed.