CO/1002/95

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice

Friday, 15th March 1996

Before:

MR. JUSTICE SEDLEY

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Crown Office List

THE QUEEN

-v-

LONDON BOROUGH OF ISLINGTON
Rx parte JONATHAN RIXON

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(Transcript of the Handed-Down Judgment of John Larking, Chancery House, 53/64 Chancery Lane, London, WC2A 1QX. Telephone Number: 0171-404 7464. Shorthand Writers to the Court.)

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MRS. J. RICHARDS (instructed by The Disability Law Service, London) appeared on behalf of the Applicant.

MR. J. McCARTHY (instructed by London Borough of Islington) appeared on behalf of the Respondent.

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J U D G M E N T
(As approved by Judge)

MR. JUSTICE SEDLEY:

The issues

This application for judicial review concerns alleged failures of the London Borough of Islington to make provision according to law for the social, recreational and educational needs of the applicant, Jonathan Rixon, who is now 25 and suffers from Seckels syndrome. He is blind, microcephalic, practically immobile, doubly incontinent and largely unable to communicate. He suffers from severe deformities of the chest and spine, a hiatus hernia and a permanent digestive disorder. His size and weight are those of a small child, but his helplessness and dependency are those of a baby. He is reliant on the devoted care of his mother and of others who assist her.

With the support of concerned organisations the applicant's mother has for some time now been in dispute with her local authority, the London Borough of Islington, about the provision of statutory services suitable to Jonathan's needs and condition. The dispute has now reached this court, and although it has been conducted on both sides with moderation and with a shared concern for Jonathan's welfare, it has presented the court with problems some of which are beyond the competence of courts of law. This judgment is confined to those issues which I consider to be justiciable and on which the evidence is

sufficiently clear to enable me to reach a conclusion. It deliberately avoids incursion into difficult and sensitive areas of specialised decision-making, some of them within the local authority's province and some within that of Jonathan's carers. With counsel's agreement I have deferred any question of relief until the parties have read my judgment, and at that stage too it will be necessary to consider whether the better course is to defer the possible grant of relief.

The reason for this is that a review of the care plan for Jonathan is at present under way, with a hoped-for completion date of the 21st March 1996. Further, a long-wanted day centre is to open in April 1996 and it is hoped that some at least of Jonathan's needs will be able to be addressed there. For reasons which will become apparent, it would be wrong for this court to anticipate the changes which these developments may bring. At the same time, there is continuing doubt and difference as to what the law requires of the local authority in approaching the question of provision for Jonathan and those like him, and so far as possible it is to this that my judgment is addressed. I say 'and those like him' because the evidence indicates that there are something under 500 adults with learning difficulties in the London Borough of Islington, and that some 20 of them suffer from a similar level of handicap to Jonathan's. Miss Richards, in a lucid and economical submission, has singled out five

aspects of the local authority's functions where she contends there has been a failure in one form or another to comply with the requirements of the law, and in relation to which she seeks to prevent the coming care plan and provision from repeating the errors of the past.

The law

Some of the relevant legislation contains what are known as 'target duties'. This is a phrase coined by Woolf LJ in *R v Inner London Education Authority, ex parte Ali* (1990) 2 Admin LR 822, 828, in relation to the duty created by section 8 of the Education Act 1944 for every local education authority to secure that there are in their area schools sufficient in number, character and equipment to afford education to pupils of all ages, abilities and aptitudes. The metaphor recognises that the statute requires the relevant public authority to aim to make the prescribed provision but does not regard failure to achieve it without more as a breach.

By section 46 of the National Health Service and Community Care Act 1990 local authorities are required to publish and keep under review a plan for the provision of community care services in their area. By section 47(1) it is provided that, subject to exceptions which are not presently material:

> "where it appears to a local authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such services, the authority
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> (a) shall carry out an assessment of his needs for

those services; and

(b) having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of any such services."

By sub-section (2) this duty is extended, in the case of a disabled person, to deciding under section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986, whether the disabled person's needs call for the provision by the authority of welfare services under section 2(1) of the Chronically Sick and Disabled Persons Act 1970 - an exercise in which, by section 8 of the Act of 1986, regard is to be had to the carer's ability to provide continuing regular care.

So far, therefore, the legislation creates a duty to assess the needs of a disabled person and to decide what local authority provision they call for, but not to implement the decision.

It is section 2(1) of the Chronically Sick and Disabled Persons Act 1970 which creates the principal duty to respond to assessed need. Because it is predicated upon section 29 of the National Assistance Act 1948, it is first necessary to set out the latter provision in its amended form:

"(1) A local authority may, with the approval of the Secretary of State, and to such extent as he may direct in relation to persons ordinarily resident in the area the local authority shall, make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons aged 18 or over who are blind ... or who suffer from mental disorder of any description and other persons aged 18 or over

who are substantially and permanently handicapped by ... congenital deformity."

Subsection (4) gives examples of arrangements which may be made under sub-section (1), including instruction and recreation. All provision under this section comes within the definition of community care services for the purposes of the National Health Services and Community Care Act 1990: see s.46(3) of that Act.

In relation to such persons, section 2(1) of the Act 1970 provides:

> "Where a local authority having functions under section 29 of the 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 ...
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> (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
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> ....
>
> then, subject to the provisions of section 7(1) of the Local 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) it shall be the duty of that authority to make those arrangements in the exercise of their functions under the said section 29.'

This section, therefore, creates a positive duty to arrange for recreational and 'gateway' educational facilities for disabled persons. It is, counsel agree, a

duty owed to the individual and not simply a target duty. I will come later to the question of its legal ambit and content. It introduces in turn section 7(1) of the Local Authority Social Services Act 1970:

> "Local authorities shall, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State."

(By an amendment introduced into the statute, section 7A *requires* local authorities to exercise their social services functions in accordance with any such *directions* as may be given to them by the Secretary of State.)

What is the meaning and effect of the obligation to 'act under the general guidance of the Secretary of State'? Clearly guidance is less than direction, and the word 'general' emphasises the non-prescriptive nature of what is envisaged. Mr McCarthy, for the local authority, submits that such guidance is no more than one of the many factors to which the local authority is to have regard. Miss Richards submits that, in order to give effect to the words 'shall .....act', a local authority must follow such guidance unless it has and can articulate a good reason for departing from it. In my judgment Parliament in enacting section 7(1) did not intend local authorities to whom ministerial guidance was given to be free, having considered it, to take it or leave it. Such a construction would put this kind of statutory guidance on a par with the many forms of non-statutory guidance issued

by departments of state. While guidance and direction are semantically and legally different things, and while 'guidance does not compel any particular decision' (*Laker Airways Ltd v Department of Trade* [1967] QB 643, 714 per Roskill LJ), especially when prefaced by the word 'general', in my view Parliament by s.7(1) has required local authorities to follow the path charted by the Secretary of State's guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course.

The Secretary of State between the passage and the coming into force of the National Health Service and Community Care Act 1990 issued guidance under s.7 of the 1970 Act which remains in force, 'Caring for People: Community care in the next decade and beyond'. It describes itself as 'policy guidance', setting out what government expects of statutory authorities and the framework within which community care should be planned and implemented, distinguishing this from how, by good practice, to give effect to the policy guidance. It allocates the latter to three processes: assessment, design of a care package, and implementation and monitoring of the package. Under the heading 'Care Plans' the guidance says:

> "3.24 Once needs have been assessed, the services to be provided or arranged and the objectives of any intervention should be agreed in the form of a care plan."

It then sets out a broad order of priorities, starting with 'Support for the user in his or her own home' and moving through alternative forms of accommodation. In particular it says:

> "3.25 The aim should be to secure the most cost-effective package of services that meets the user's care needs, taking account of the user's and carer's own preferences. Where supporting the user in a home of their own would provide a better quality of life, this is to be preferred to admission to residential or nursing home care. However, local authorities also have a responsibility to meet needs within the resources available and this will sometimes involve difficult decisions where it will be necessary to strike a balance between meeting the needs identified within available resources and meeting the care preferences of the individual. Where agreement between all parties is not possible, the points of difference should be recorded. .....
>
> 3.26 Decisions on service provision should include clear agreement about what is going to be done, by whom and by when, with clearly identified points of access to each of the relevant agencies for the service user, carers and for the care manager."

Returning, then, to section 29 of the National Assistance Act 1948, this section operates in tandem with section 2(1) of the Act of 1970. Not only does the latter trigger a duty to exercise the functions spelt out in the former; the former contains its own trigger provision in the form of any direction given by the Secretary of State, the effect of which is to make mandatory what is otherwise discretionary under the section. The Secretary of State has given such directions, initially in 1974 and now in a consolidating measure captioned 'Secretary of State's

Approvals and Directions under Section 29(1) of the National Assistance Act 1948', published as an appendix to departmental circular LAC(93) 10 and coming into force on the 1st April 1993. Paragraph 2 of the Approvals and Directions provides:

> "(1) The Secretary of State hereby approves the making by local authorities of arrangements under section 29(1) of the Act [of 1948] for all persons to whom that sub-section applies and directs local authorities to make arrangements under section 29(1) of the Act in relation to persons who are ordinarily resident in their area for all or any of the following purposes -
>
> ....
>
> (b) to provide, whether at centres or elsewhere, facilities for social rehabilitation and adjustment to disability including assistance in overcoming limitations of mobility or communication;
>
> (c) to provide, whether at centres or elsewhere, facilities for occupational, social, cultural and recreational activities ...."

The apparent choice given to the local authority by the phrase 'all or any' is illusory. It may be derived from section 2(1) of the Chronically Sick and Disabled Persons Act 1970, where it is apposite; but the 1974 approvals and directions which were the ancestor of the 1993 ones by paragraph 9 make it clear that it is all the specified forms of arrangement, not merely any which the local authority chooses, to which the direction relates. Mr McCarthy for the local authority has not contended otherwise.

Thus under section 29(1) of the Act of 1948 a parallel set of target duties has been brought into being

to make arrangements for the social rehabilitation and adjustment to disability of persons covered by the section (who include the applicant) and to provide social, cultural and recreational activities for them.

The pattern, in broad terms, is therefore this. For people with such disabilities and needs as Jonathan's, the local authority is to assess the individual's needs and to decide accordingly which community care and welfare services those needs call for. The local authority is then required to make arrangements for the provision for that individual of recreational and gateway educational facilities and 'in relation to' such persons, for rehabilitative and adjustment facilities and for social and cultural activities.

Alongside this provision stands section 41 of the Education Act 1944 as substituted by the Further and Higher Education Act 1992, section 11. In its present form section 41 begins by providing:

> "(1) It shall be the duty of every local education authority to secure the provision for their area of adequate facilities for further education."

By sub-section (8):

> "In exercising their functions under this section a local education authority shall also have regard to the requirements of persons over compulsory school age who have learning difficulties."

Such difficulties are defined by the next sub-section

as either greater difficulty than the majority of others in learning or a disability which impedes the use of ordinary further education facilities. Jonathan satisfies both tests, with the consequence that he is within the class to whose requirements Islington, as the local education authority, is required to have regard. This, like section 29 of the National Assistance Act 1948, is a target duty; but where the Education Act duty is free-standing, the duty under section 29 of the Act of 1948 and the directions made under it are paralleled by a related set of duties brought into being by section 2 of the Chronically Sick and Disabled Persons Act 1970 and owed to the individual - none the less so because the arrangements are then to be made in the exercise of the authority's functions under section 29 of the 1948 Act.

A failure to comply with the statutory policy guidance is unlawful and can be corrected by means of judicial review: *R v North Yorkshire County Council, ex parte Hargreaves* (Dyson J, 30th September 1994). Beyond this, there will always be a variety of factors which the local authority is required on basic public law principles to take into account. Prominent among these will be any recommendations made in the particular case by a review panel: *R v Avon County Council, ex parte M* [1994] 2 FLR 1006 (Henry J). In contradistinction to statutory policy guidance, a failure to comply with a review panel's recommendations is not by itself a breach of the law; but

the greater the departure, the greater the need for cogent articulated reasons if the court is not to infer that the panel's recommendations have been overlooked.

A second source of considerations which manifestly must be taken into account in coming to a decision is the practice guidance issued by the Department of Health. This currently takes the form of a Practitioners' Guide entitled 'Care Management and Assessment', which sets out 'a set of principles' derived from 'current views of practice'. The guidance breaks care management down into a series of stages, moving through communication and assessment to assembly of a care plan, and then on to the implementation, monitoring and periodic review of the plan. An element critical to the present case, step 4, is described thus:

> "The next step is to consider the resources available from statutory, voluntary, private or community sources that best meet the individual's requirements. The role of the practitioner is to assist the user in making choices from these resources, and to put together an individual care plan."

While this formulation puts resources clearly into the picture, Miss Richards points out that it comes in the wake of the assessment of need. It follows, she submits, that resources ought not to be treated as a prior fixed quantity. Depending upon the assessment of need either individually or generally, the question may arise of seeking an increase of resources whether absolutely or by a reallocation of those currently available. This I

accept, as I do her proposition that the extent of the statutory duties to meet need has a particular bearing on the question of available resources.

Nevertheless, even an unequivocal set of statutory duties cannot produce money where there is none or by itself repair gaps in the availability of finance. In *R v Gloucestershire County Council, ex parte Mahfood* (Divisional Court, 16th June 1995) McCowan LJ concluded in relation to the group of statutory duties which I am now considering:

> "... a local authority is right to take account of resources both when assessing needs and deciding whether it is necessary to make arrangements to meet those needs. I should stress that there will, in my judgment, be situations where a reasonable authority could only conclude that some arrangements were necessary to meet the needs of a particular disabled person and in which it could not reasonably conclude that a lack of resources provided an answer ...
>
> On any view section 2(1) is needs-led by reference to the particular needs of a particular disabled person. A balancing exercise must be carried out assessing the particular needs of that person in the context of the needs of others and the resources available, but if no reasonable authority could conclude other than that *some* practical help was necessary, that would have to be its decision.
>
> Furthermore, once they have decided that it is necessary to make the arrangements, they are under an absolute duty to make them. It is a duty owed to a specific individual and not a target duty. No term is to be implied that the local authority is obliged to comply with the duty only if it has the revenue to do so. In fact, once under that duty, resources do not come into it.
>
> It would certainly have been open to the Gloucestershire County Council to re-assess the individual applicants as individuals, judging their current needs and taking into account all relevant

> factors including the resources now available and the competing needs of other disabled persons. What they were not entitled to do, but what in my judgment they in fact did, was not to re-assess at all but simply to cut the services they were providing because their resources in turn had been cut. This amounted to treating the cut in resources as the sole factor to be taken into account and that was, in my judgment, unlawful."

(I am told that this decision is the subject of an appeal which is expected to be heard in April 1996.)

The chief inspector of the Social Services Inspectorate of the Department of Health, Mr Herbert Laming, on 14th December 1992 issued a guidance letter on the process of assessment for care purposes, paragraph 15 of which recommended that care plans should spell out the extent to which users' needs qualified for assistance, and should define what each agency and professional was going to contribute to meeting them. The letter contained a postscript: "This letter will be cancelled on 1 April 1994." Miss Richards accepts that it has no mandatory force, but submits that its proposals for the proper formulation of a care plan are still relevant. In the sense that it gives plainly sensible advice, she is no doubt right (in paragraph 13 the letter anticipates the decision in the *Gloucestershire* case on the relationship of resources to needs), but not in any strictly legal sense.

In relation to provision for Jonathan's further education, Miss Richards, recognising that section 41 of the 1944 Act affords no more than a target duty, contends

that the respondent council, this time as local education authority, has erred in law in contending that it owes no duty to Jonathan and those who are similarly disabled because their needs are to be met under section 2 of the Act of 1970; and correspondingly in failing to make any educational provision whatsoever for persons with learning difficulties as severe as Jonathan's, or to make proper arrangements for assessing their needs as advised by the Department for Education.

The applicant

Until July 1990 Jonathan went to a special needs school where, it appears, he enjoyed the company and learnt some elementary skills such as holding a cup and using a spoon. Since leaving school, such intermittent care provision as has been made for him has not preserved these skills. SCOPE (formerly the Spastics' Society) believes that Jonathan has more potential than has been appreciated. But in attempting to make provision for him the respondent local authority, recognising a shortfall (though not one as great as Mrs Rixon contends), has been forced to plead a lack of the necessary resources. It is not necessary for me to recount the unhappy history in any detail. It included, however, a complaint by Mrs Rixon that the assessment of Jonathan's needs completed in August 1993 was deficient. In July 1994 a panel of the local authority concluded that

> "there should be an immediate thorough review of the care plan - and continuing reviews thereafter - to

> ensure that Jonathan's care package was in response to and maintains a balance between, his recreational, therapeutic, educational and rehabilitative needs and his mother's concerns that he remains close to home. The Panel would expect the revised care plan to demonstrate in detail how the individual activities in the care plan will try to meet Jonathan's identified needs, and will reverse the deterioration in Jonathan's skills since he left school.
>
> The Panel expressed the clear view that the current care plan is not a satisfactory document as it does not make clear how the specific services being provided are intended to meet Jonathan's needs."

The panel was also critical of the want of communication with Mrs Rixon and of delay in decision-making. In consequence of the report the local authority carried out a reassessment of Jonathan's community care needs, formulating its reassessment in the new care plan of February 1995 which has been the immediate focus of the present challenge.

It is Miss Richards' first submission that in order to comply with the statutory duties, both personal and 'target', and to demonstrate that regard has been had to other relevant matters, the local authority must prepare a care plan which addresses the issues required by law and, where it deviates from the target, explains in legally acceptable terms why it is doing so. Mr McCarthy responds by pointing out first of all that nowhere in the legislation is a care plan, by that or any other name, required. This Miss Richards accepts, but she contends, in my judgment rightly, that she is entitled to look to the care plan (which is commended in the statutory policy

guidance) as the best available evidence of whether and how the local authority has addressed Jonathan's case in the light of its statutory obligations. If, of course, further evidential material bears on this question, it too is admissible in relation to the challenge before the court. In other words, as I think Mr McCarthy accepts, his submission that a care plan is nothing more than a clerical record of what has been decided and what is planned, far from marginalising the care plan, places it at the centre of any scrutiny of the local authority's due discharge of its functions. As paragraph 3.24 of the policy guidance indicates, a care plan is the means by which the local authority assembles the relevant information and applies it to the statutory ends, and hence affords good evidence to any inquirer of the due discharge of its statutory duties. It cannot, however, be quashed as if it were a self-implementing document.

The 1995 care plan tabulates Jonathan's needs, beginning with all the things that he cannot do for himself and continuing:

> "(12) Jonathan needs opportunities for social contact and to meet people and be with people on a regular basis, particularly people of his own age.
>
> (13) Jonathan needs access to recreational activities, including opportunities to use and explore different equipment. He needs opportunities to exercise his choice and show his preferences.
>
> (14) Jonathan needs regular exercise and his carers need ongoing advice on the management of his physiotherapy needs.
>
> (15) Jonathan needs companionship and physical

contact.

(16) Jonathan needs help in breaking habits stemming from boredom, ie grinding his teeth, bashing and pawing his face.

(17) Jonathan needs daytime activities which will stimulate and promote his sensory, physical, intellectual and emotional capabilities.

(18) Jonathan needs suitable transport when travelling outdoors and an escort at all times.

(19) Jonathan needs someone to wheel his buggy for him.

(20) Jonathan needs his personal and daycare needs to be provided within a warm and safe environment.

(21) Jonathan needs his care needs to be met by people who have time to get to know him well in order that they can understand his verbal and non-verbal communication and that he can recognise them."

The challenges

First Miss Richards points to the current timetable of provision for Jonathan. It includes some provision on every day of the week from a variety of sources including the Independent Living Fund. There is respite care on two days. But the only positive provision made by Islington is through its Shape Project from 1.30 pm to 5.00 pm on Friday afternoons for massage and from 2.00 pm to 5.00 pm on Wednesdays for swimming with the Flexiteam service. The latter, however, is subject to a fallback plan of attendance at home from 3.30 pm to 5.00 pm if swimming is not available; and the evidence indicates that this has been the more usual situation, often because of the want of specially trained lifesavers at the swimming bath. The massage session on Fridays is funded by the local

authority but is actually provided by a Crossroads worker. It is Miss Richards' submission that this care plan is so deficient as to amount to a non-compliance with the statutory and related duties of the local authority.

The practice guidance to which I have referred counsels against trimming the assessment of need to fit the available provision. For reasons I have given, this properly reflects the law. The guidance then counsels the inclusion of specific objectives for each relevant service provider and an agreement with each service provider as to how each service is to be delivered and measured. It also counsels:

> "Having completed the care plan, the practitioner shall identify any assessed need which it has not been possible to address and for what reason. This information should be fed back for service planning and quality assurance. It needs to be recorded and collated in a systematic way."

Its model outline of a care plan proposes the following headings:

The overall objectives

The specific objectives of

- users
- carers
- service providers

The criteria for measuring the achievement of these objectives

The services to be provided by which personnel/agency

The cost to the user and the contributing agencies

The other options considered

Any point of difference between the user, carer, care planning practitioner or other agency

Any unmet needs with reasons - to be separately notified to the service planning system

The named person(s) responsible for implementing, monitoring and reviewing the care plan

The date of the first planned review.

The present care plan, Miss Richards submits, is deficient in the following respects: it fails to indicate how the proposed services will reverse the deterioration in Jonathan's skills; it fails to show in detail how the proposed activities will meet Jonathan's needs; it fails to identify his unmet needs and the reasons why they are not being met; it fails to set out the objectives of social services intervention; and it omits any criteria for measuring the achievement of the objectives. Such linkage between needs and services as it contains, she submits, is so inadequate as to represent a non-compliance with the statutory duty. Thus the proposal that Jonathan's recreational needs should be supplied by the Flexiteam and by the Shape Project does little or nothing to meet the complaint panel's recommendations as reflected in paragraphs 13 and 17 of the care plan's own assessment of Jonathan's needs, and does little more than recycle the previous, flawed care plan. Miss Richards submits accordingly that the implicit view that the plan meets the needs which it identifies is simply untenable and so

irrational; and that if, instead, it represents a decision to depart from the complaint panel's recommendations it does so without any visible reasons and indeed without recognising that it is doing so. Further, she submits, it fails to follow the mandatory policy guidance and departs from the advisory guidance without any or adequate reason. Mr McCarthy accepts that there has been to date a shortfall in comprehensively addressing Jonathan's needs. In addition to unplanned lacunae there continue to be gaps dictated by a lack of available resources. It is accepted, moreover, that the current care plan does not fully match up to, at least, the relevant practice guidance. Beyond this, however, there is a difference between Islington on the one hand and Mrs Rixon's advisers on the other as to the full extent of Jonathan's needs. For all these reasons the respondent local authority accepts that the care plan needs to be reviewed - as, currently, it is being.

Moreover, although Islington has day centre provision for both the physically disabled and the learning disabled, it has no centre for adults with difficulties of the same order as Jonathan's. For a good 3 years it has recognised this unmet need in the borough, and for the last 2 years has been planning to meet it. The plans have now reached the point at which daycare provision for the severely physically and learning disabled is imminently to be made at the St John's Centre. It is to be run by an

independent organisation, Real Life Options.

In these circumstances, although Miss Richards understandably urges me to decide, to the extent which the evidence makes possible, the issues of law which she has canvassed in relation to the current care plan and provision for Jonathan, there are two major objections to my doing this. One is that the material upon which I am asked to decide is obsolescent. The other is that the legal issues shade at many points into specialist judgements which this court is unequipped to evaluate, much less to undertake on its own. But there remains, I accept, a live interest for both parties in approaching the new care plan and its implementation on a correct basis of law, and it is to this end that such findings as I consider can usefully be made are directed.

There are two points at which, in my judgment, the respondent local authority has fallen below the requirements of the law. The first concerns the relationship of need to availability. The duty owed to the applicant personally by virtue of section 2(1) of the Chronically Sick and Disabled Persons Act 1970 includes the provision of recreational facilities outside the home to an extent which Islington accepts is greater than the care plan provides for. But the local authority has, it appears, simply taken the existing unavailability of further facilities as an insuperable obstacle to any further attempt to make provision. The lack of a day care

centre has been treated, however reluctantly, as a complete answer to the question of provision for Jonathan's recreational needs. As McCowan LJ explained in the *Gloucestershire* case, the section 2(1) exercise is needs-led and not resources-led. To say this is not to ignore the existing resources either in terms of regular voluntary care in the home or in budgetary terms. These, however, are balancing and not blocking factors. In the considerable volume of evidence which the local authority has provided, there is no indication that in reaching its decision on provision for Jonathan the local authority undertook anything resembling the exercise described in the Gloucestershire case of adjusting provision to need.

The care plan, as Mr McCarthy readily admits, does not comply either with the policy guidance or the practice guidance issued by central government. There has been a failure to comply with the guidance contained in paragraph 3.24 of the policy document to the effect that following assessment of need, the objectives of social services intervention as well as the services to be provided or arranged should be agreed in the form of a care plan. For the reasons which I have given, if this statutory guidance is to be departed from it must be with good reason, articulated in the course of some identifiable decision-making process even if not in the care plan itself. In the absence of any such considered decision, the deviation

from the statutory guidance is in my judgment a breach of the law; and so a fortiori is the reduction of the Flexiteam service from 3 hours as originally agreed, whatever the activity, to 3 hours swimming or 1½ hours at home. I cannot accept Mr McCarthy's submission that the universal knowledge that no day centre care was available for Jonathan was so plainly the backdrop of the section 2 decision that there was no need to say so. It is one thing for it to have been a backdrop in the sense of a relevant factor, but another for it to have been treated as an immoveable object. The want of any visible consideration of it disables the respondent from showing that it was taken into account in the way spelt out in the *Gloucestershire* case. I do, however, accept Mr McCarthy's submission that Miss Richards' further contention that the respondent has failed to consider alternatives to day centre care for Jonathan comes so late that there has been no opportunity to file evidence about it. Further, the whole situation in relation to day centre provision is about to change, making this element marginal save perhaps by way of fallback.

The care plan also fails at a number of points to comply with the practice guidance on, for example, the contents of a care plan, the specification of its objectives, the achievement of agreement on implementation on all those involved, leeway for contingencies and the identification and feeding back of assessed but still

unmet need. While such guidance lacks the status accorded by section 7 of the Act of 1990, it is, as I have said, something to which regard must be had in carrying out the statutory functions. While the occasional lacuna would not furnish evidence of such a disregard, the series of lacunae which I have mentioned does, in my view, suggest that the statutory guidance has been overlooked.

In such a situation I am unable to accede to Mr McCarthy's submission that the failures to follow the policy guidance and practice guidance are beyond the purview of the court. What he can, I think, legitimately complain of is the fact that both of these submissions, in their present formulation, have emerged for the first time in the presentation of the applicant's case in court and were not adumbrated earlier. While he has not suggested that the lateness of the points has prevented material evidence from being placed before the court, Mr McCarthy may be entitled to rely on it in resisting any consequential relief, and I will hear him in due course on this.

Next, Miss Richards undertakes the heavier task of establishing a breach of the target duty under section 29 of the Act of 1948. One of the features of a target duty is that it is ordinarily accompanied by default powers vested in the Secretary of State, to which in general the courts defer save where a true question of law arises: see Woolf LJ in *R v Inner London Education Authority, ex*

parte Ali (1990) 2 Admin L R 822, 829, citing his own earlier decision in *R v Secretary of State for the Environment, ex parte Ward* [1984] 1 WLR 849. Although counsel have drawn attention to no material default power in the National Assistance Act 1948, specificity is given to the provisions of section 29, as amended, by (a) the power to direct the making of arrangements under the section and (b) the grafting on to it of section 2(1) of the Chronically Sick and Disabled Persons Act 1970. In my judgment, the individual rights afforded under section 29 of the 1948 Act (at least in the sense of a sufficient interest to seek judicial review of failures of provision) militate against the existence of any locus standi to assert a failure in the target duty created by the section. If there has been such a failure it will show, so far as material, in a want of personal provision which is separately justiciable. This view is in fact implicit in the argument by which Miss Richards seeks to distinguish cases such as *R v Barnet, ex parte B* [1994] 1 FLR 592, *R v Secretary of State for Social Services, ex parte Hincks* (1980) 1 BMLR 93 and *R v Central Birmingham Health Authority, ex parte Walker* (1987) 3 BMLR 32 on the ground that the first concerned not whether but how provision for children in need should be implemented and that the latter two concerned very widely framed duties. By pointing to the specificity of the directions given under section 29 as the distinguishing feature of the

present case, Miss Richards has narrowed her focus from the target duty to a question which I have already dealt with in this judgment. The same is true, I believe, in relation to the association between the target duty and assessment under section 47(1)(b) of the Act of 1990. Miss Richards' submission that the two in combination make it unlawful to fail to provide under section 29 the resources identified in the assessment of need under section 47, rather than bringing the broad section 29 duty within the purview of the court, brings the argument back to the personal duties generated under section 29 by the Secretary of State's directions and by Parliament in section 2 of the Act of 1970.

In *R v Secretary of State for the Environment, ex parte Ward* [1984] 1 WLR 834 Woolf J followed the decision of the Court of Appeal in *Meade v Haringey London Borough Council* [1979] 1 WLR 637 in holding that the breach of a target duty might be justiciable if it was 'not a simple failure.....[but] a decision positively to stop production, as it were'. This, in my view, is different from the situation of which Miss Richards complains, which is that the local authority is relying on its own failure to make provision under section 29 or section 41 in order to say that it cannot make the necessary provision for Jonathan. If it cannot be separately demonstrated that there has been a decision to 'stop production' under the target provision, recourse will be either to the Secretary

of State under any available default provision or to the court for breach of derivative duties owed to the applicant personally. Although Miss Richards' argument is superficially attractive, it involves on analysis an impermissible process of adjudicating on a target duty by reference to individual cases - something against which the law at present sets its face.

Miss Richards seeks to carry her client's concern forward to the plans for the new day care centre. Mr McCarthy, on instructions, has been able to allay the concern that not only the running of the centre but the taking of service provision decisions is going to be delegated to Real Life Options. As to Miss Richards' suggestion, based on the evidence of the respondent's Community Living Commissioner, Mr Rich, that Jonathan is going simply to be offered whatever is available at the new centre and that this is going to be treated, contrary to the *Gloucestershire* case, as a fixed limit on provision for him, I have said enough in this judgment, I hope, to enable the local authority to approach this question within the law.

The duty under section 41 of the Education Act 1944 is again a target duty. Islington now accepts in the light of sub-section (8) that it was wrong to say, as it did at an earlier stage, that it was the Further Education Funding Council which was responsible for making provision for Jonathan under this section. The questions which Miss

Richards therefore poses are these:

(a) Is the respondent in breach of section 41 by failing to make any educational provision for persons with learning difficulties as severe as Jonathan's?

(b) Is the duty to make provision under section 2 of the 1970 Act a lawful alternative to or substitute for the section 41 duty?

(c) Is there a duty to ensure that adequate arrangements are in place for the assessment for the needs of persons with severe learning difficulties?

As to the first question, the evidence satisfies me that there is no provision made by the London Borough of Islington for the 20 or so persons who share Jonathan's degree of learning difficulty. By a letter of the 1st May 1995 to the applicant's solicitor, Maryon Chester of the Disability Law Service, Islington's Head of Special Education has made the borough's position clear:

> "It is Islington Council's view that Jonathan's educational needs should be met as part of the provision to be made pursuant of [sic] the Chronically Sick and Disabled Persons Act 1970, rather than any duty arising under Education legislation."

This, in my view, is advanced not as a proposition of law (it would clearly be wrong if it were) but as a conclusion that in practice the right way to meet Jonathan's educational needs is by means of the provision required to be made for him by reason of his illness and disability. For an individual whose difficulties are as intense as

Jonathan's this is not an impossible conclusion: it is at least conceivable that a local authority which, as education authority, has had due regard to the requirements of persons over compulsory school age with learning difficulties (section 41(8)) may conclude that in relation to some with the gravest learning difficulties the duty under sub-section (1) to secure the provision for their area of adequate facilities for further education will be met by the provision under section 2 of the Act of 1970 of lectures, games, outings and other recreational facilities, especially where 'assistance to that person in taking advantage of educational facilities available to him' (the 'gateway' provision) cannot bridge the gap between the individual's learning difficulties and the facilities properly so called which are or could be made available to him.

But it is Jonathan's case, advanced by his mother and professionals concerned with his future wellbeing, that Jonathan has certain educational needs which are capable of being met and which are not co-extensive with the recreational facilities called for by section 2 of the 1970 Act. This is not something upon which this court can adjudicate, but it is something which the local authority must take very seriously and assess with care and sensitivity. Circular 1/93 issued by the Department for Education contains these two paragraphs:

"71. **Students with learning difficulties**. LEAs' duties and powers in relation to further

> education ..... apply equally to students with learning difficulties. Moreover, in exercising their functions, LEAs continue to be under a specific duty under section 11(8) of the Act [viz the Further and Higher Education Act 1992], to have regard to requirements of this group of students. The definition of the term learning difficulty, which is carried over from previous legislation, includes all types of disability. The Government's aim is that, so far as is consistent with LEAs' other obligations, learning difficulties should be no bar to access to further education.
>
> 72. It remains a matter for LEAs to determine what facilities they should make available in pursuit of their continuing duty to ensure that adequate provision .....is available for those aged 19 and over with learning difficulties. In discharging this duty, LEAs should ensure that adequate arrangements exist for assessing the needs of these students and identifying the provision that will be appropriate, and for the provision of such support services as are necessary. Where students with learning difficulties are moving from LEA provision to the new further education sector, LEAs will need to liaise in appropriate cases with colleges, and the Further Education Funding Council to ensure the identification of suitable provision. Information about the individual's needs which has been built up during a period of LEA provision, and possibly incorporated in a statement, will be of particular value to the assessment."

For reasons which I have given earlier in relation to non-statutory guidance, this circular must be conscientiously taken into account by Islington's education department in coming to its decisions about Jonathan. The revision of the care plan and the introduction of the day care facilities at the St John's Centre will, in my view, make it incumbent upon the education department to look again at its section 48 provision in relation to persons like Jonathan. If due regard is had to the circular, serious consideration will

have to be given to making arrangements for assessment of educational need in such cases, with particular regard to available information - such as exists in Jonathan's case - about what he proved capable of achieving during his time at school. While Miss Richards cannot, it seems to me, bring the duty home to Jonathan personally, there is force in her contention that the section 41 target duty involves giving appropriate consideration to the admittedly small group to which Jonathan belongs. The mode in which such attention is given, and the extent to which it involves inquiry into individual cases, is a matter in the first instance for the local authority.

Other relevant factors in any assessment will include the fact that the review panel in 1994 advised that there should be an assessment of Jonathan's educational needs as well as a revision of his care plan, and the apparent fact that in the provision that is made by, for example, City and Islington College, no distinction is made between those suffering from moderate and those suffering from severe learning difficulties.

Thereafter, in spite of both counsels' willingness for the court to become involved, it will in my view be a matter for the Secretary of State under section 68 or section 99 of the Education Act 1944. I accept that section 99 is a last-ditch default power, and that section 68, by applying a test of unreasonableness, gives the Secretary of State the equivalent of a judicial review

function; but in performing either of these functions the Secretary of State has a fund of professional expertise to draw on which is available to the court only in the form of potentially contested expert evidence. In spite, therefore, of Mr McCarthy's reluctant preparedness to let Miss Richards canvass the Education Act issues before me, I would accept his submission that in the event of an alleged breach of section 41 the proper recourse will be to the Secretary of State.

As indicated, I will hear the parties on any questions of relief and, of course, on costs; but I indicate my present view that in the present fluid situation, and given the genuine endeavours being made on both sides to do the right thing for Jonathan, neither prerogative nor injunctive nor declaratory relief will be helpful. What I hope will be helpful is as much as I have been able to decide on matters of law in the course of this judgment.

MR. JUSTICE SEDLEY: I will hear counsel on relief and costs in the light of the judgment.

MISS GRAY: My Lord, I appear in place of Miss Richards. Might I address the issue of relief and hand up a page on which I have set out the four declarations which we would invite my Lord to make, notwithstanding the preliminary comments in your Lordship's judgment. On behalf of the applicant, we have drawn attention in the four orders sought to the four points which we consider either to be of general interest or principle arising out of your Lordship's judgment; alternatively, it would be of assistance to Jonathan and his parents when the reassessment does in fact take place.

Your Lordship will see that at the top of each

declaration sought there is a page reference. The page number accords with your Lordship's judgment where the issue arises. The first is at page 12 of your Lordship's judgment. This is in the light of your finding in the judgment, that a second source of considerations which manifestly must be taken into account in coming to a decision is the practice guidance issued by the Department of Health. From that we have sought to draw the declaration set out in the first of the four which I have put before your Lordship. It is one of general application and interest and will be of assistance in the future. We would invite your Lordship to make that declaration in view of its general importance as a statement of the local authority's duty and also because it will impact upon the review process in his case.

The second declaration sought is that which relates to a statement at page 22 of your Lordship's bundle. I have invited the court to make a declaration, to quash, if your Lordship thinks it appropriate, as is set out in the issues formulated for your Lordship, that the decision by the respondent under section 2(1) of the Chronically Sick and Disabled Persons Act 1970 as to the recreational facilities it is necessary to provide for the applicant was unlawful, by reason of the respondent's failure to balance the applicant's needs against the resources available. Your Lordship has the passage on page 22 where you have found that: "But the local authority has, it appears, simply taken the existing unavailability of further facilities as an insuperable obstacle to any further attempt to make provision." We would submit that this is an issue which is likely to be live between the parties in the future, notwithstanding any changes in the provision Islington is proposing to make in the future because of the existence of a day centre. It is our concern that unless a declaration is made the same problem will raise its head in the future with, as it were, the failure or lack of provision of, say, a painting class to be used as the be all and end all, the end of a case, to stop a case being made by the applicant that such a facility should be provided.

At page 23 we have picked up your Lordship's statement: "For the reasons which I have given, if this statutory guidance is to be departed from it must be with good reason, articulated in the course of some identifiable decision-making process even if not in the care plan itself. In the absence of any such considered decision, the deviation from the statutory guidance is in my judgment a breach of the law ..." That statement by your Lordship has been cast in the form of declaratory relief. So too has the following statement: "... and so a fortiori is the reduction of the Flexiteam service from 3 hours as originally agreed, whatever the activity, to 3

hours swimming or 1 1/2 hours at home."

If I may observe generally in relation to all of these forms of relief sought, first of all, we would not accept that the fact that a review is shortly to take place is not a reason of itself not to grant declaratory relief. It is a common feature of any judicial review application in which a finding has been made by the court that at least some element of the past practices adopted by the respondent have been unlawful or reflected a misdirection in law. There will be a review of the needs, the relationship between the applicant and the respondent to be performed in the future. In that respect, this case is no different from any normal judicial review procedure. The only difference in this case is that we have known during the hearing of the application that the review was to take place. We have a date set for it. The fact that the review is known to be taking place in the future is not of itself a reason why your Lordship should refuse declaratory relief. In my submission, it makes the usefulness of declarations no less so than in any other case.

MR. JUSTICE SEDLEY: Have you considered the utility for your client of an alternative course, which is to invite me to reserve any questions of relief and give you liberty to apply?

MISS GRAY: It is an item that I have taken instructions on. Our view is that that in itself could raise some problems. It might involve your Lordship in adjudicating on points which might potentially be the subject of a second application.

MR. JUSTICE SEDLEY: The answer to that problem is that it would not because it could not. There would have to be fresh proceedings. It is simply that time is going to tell, time in the relatively short term, whether these issues have become history or remain live. The judgment itself is declaratory. It sets out holdings of law. Do declarations have any use that the judgment itself lacks?

MISS GRAY: Clearly, the local authority would be under an obligation to determine the applicant's needs, to assess his needs, in the review according to the terms of your Lordship's judgment. That much is right. Nevertheless, we would submit that declaratory relief would give a certain clarity and further form to some of the statements made upon the law in your Lordship's judgment. This would mean, in particular, that this would enhance the correspondence pointing out that they have failed to follow the policy guidance. If it were always the case that there was nothing served by declaratory relief, it would of course be an academic and unnecessary remedy in

any case. It would never be granted.

MR. JUSTICE SEDLEY: Declarations often do have value in judicial review in order to place on the record, for others, what has been canvassed between two parties.

MISS GRAY: The first, and to a lesser extent the third of the declarations that I seek, would be of general utility, not merely in this case but in others as well. It is of concern to those instructing me that in the past there has been correspondence pointing out the fact that the practice guidance and policy guidance has not been followed. That has not resulted in any change to his needs assessment. Equally well, there have been findings by the review panel, in our favour, which have not necessarily resulted in the assessment of his needs or the services provided to him ----

MR. JUSTICE SEDLEY: I am aware of the history. Are you coming on to costs now?

MISS GRAY: May I respond more directly to my Lord's question?

MR. JUSTICE SEDLEY: This point is still related to the declaration?

MISS GRAY: Yes. If your Lordship is not minded to make the declarations which I have sought today, I would invite your Lordship to adjourn the issue of any relief until the results of the impending assessment are available to the court. That would be a useful fall-back position.

MR. McCARTHY: We find the terms of your Lordship's judgment of immense assistance in carrying out their duties, not only in relation to Jonathan but in relation to people with particular difficulties. Your Lordship will be keenly aware from the arguments you have heard that it involves extremely complex issues where the legal guidance is particularly pronounced.

My Lord, the purpose in granting declarations in such a case as this would normally be the alternative to the case in which the court thinks that the local authority needs to be compelled to carry out its task in a particular way but cannot be ordered to do so by way of mandamus, because the detailed provision which the authority would be advised to make would be too specific to be encompassed in an order for mandamus. Declaratory relief would be of a precautionary nature. It is to make clear to the local authority that unless they do particular things they will be acting unlawfully. In that respect this court needs to know what the local authority's stance is in relation to the reasons which the court has given. I do not make that explicit but your

Lordship can take that into account in deciding whether or not declarations are to be made.

Before I do that, may I suggest that if you were to make declarations in these areas, how they might appropriately be worded. One starts with the first one, the reference at page 12. Your Lordship will be better aware than any of us of the subtleties of phrases such as "take into account" or "have regard to". It may very well be that in any given case they mean precisely the same.

MR. JUSTICE SEDLEY: This was not a contentious point, was it?

MR. McCARTHY: I do not believe it was. The issue between the parties was what the consequence was of a failure to take into account. The issue was whether there is some type of presumption in favour of pursuing the guidance in the absence of a good reason. The terminology which your Lordship specifically used at page 12 is that the local authority is obliged to take it into account. It may be a matter of impression that there is not much difference. I would suggest that if one is going to reproduce the reasons, one needs to use the wording. Your Lordship used the phrase "manifestly must be taken into account". Your Lordship was articulating that as one of the factors which the local authority is required on basic public law principles to take into account. If it said "take into account" that would be correct. I say that it is the stance of Islington, that is what they propose to do in this case. They do not require that to be set out in a declaration for that purpose.

MR. JUSTICE SEDLEY: The reason the word "manifestly" is there is to make it clear that, in my view, the matter was not a matter of dispute either. This is not the class of consideration which the decision-maker may at his discretion either take into account or not take into account without being able to be criticised by the way. It is in the hard class of things that are there and cannot be overlooked. You have never disputed that.

MR. McCARTHY: No, my Lord. The issue was how you handled the matter after that, what one sees as the need to be a balancing factor on the other side. In effect, it is an argument that an obligation follows unless. That was the dispute between us. It is a public document articulated by an authoritative body. It will have to be taken into account. Islington do not require it in this case. If one is looking at the interests of the more general public and local authorities, the consequence of being part of your Lordship's reasons is precisely the same as being there as part of a declaration. There is no advantage to third parties in the matter being put in declaratory form.

If I may say so, your Lordship has stated the points to this quite concisely.

Point 2 is more of an issue as to whether or not this is a declaration which can be properly granted, having regard to the fact that this matter was not actually raised prior to the commencement of argument. In terms of the declaration itself, your Lordship has contrasted the balancing of resources against needs, taking the lack of resources as an imponderable factor to which no thought need to be given because it was there ever present. It is correctly articulated if a declaration needs to be made.

Point 3 emerges from page 23. It is not correctly articulated. Your Lordship's judgment is that the respondent is obliged to act in accordance with the policy guidance without a good reason. Therefore, if a declaration is necessary -- I say it is not because Islington are going to provide this -- it would have to say that the respondent has acted unlawfully in departing from the policy guidance issued by the Secretary of State without good reason.

With regard to point 4, I do not have anything to say about the phraseology. I will have something to say about whether or not the declaration is granted. That is what I have to say about the terminology.

As to point 1 of these declarations, I accept that that was there present throughout. It is one of the central features of the Form 86A. It is one of the central points of the applicant's case. If your Lordship thinks that a declaration is necessary, I cannot quarrel with it being granted in those terms.

With regard to point 2, the declaration is nowhere asserted upon the applicant's case in the Form 86A. It is nowhere asserted as part of the applicant's case in the skeleton argument that was put in on behalf of the applicant. The fact that it surfaced at all in argument was because in part of the skeleton argument put in on behalf of the respondent reference was made to the Gloucestershire decision. It was a general observation to the effect that resources can always be taken into account in section 2 decisions. My learned friend, Miss Richards, for very proper reasons, wished to question that proposition and say: "But in this case there is no evidence that that actually happened." The issue is that it was not there in the first place. It was an interesting debate between the parties. I accept that there is no evidence on the respondent's side that it explicitly balanced resources against need. The reason, if one looks into the papers, is that it was not raised as

one of the issues in the case. Therefore, for that reason alone, a declaration would be inappropriate. Declarations are only a proper consequence in relation to matters that are set out in dispute between the parties and the evidence which has been filed.

Point 3 I accept entirely. That is at the heart of the applicant's complaint. If your Lordship thinks that a declaration is necessary, I cannot quarrel with the terminology.

With regard to point 4, this is a matter to which no reference was made, either in the Form 86A or in the applicant's skeleton argument. The point emerges from the fact that in one of the documents appended to one of the most recent affidavits on behalf of the respondent there was a document entitled "Care Plan" at page 214 in the respondent's bundle which referred to the alteration from 3 hours to one and a half hours. My learned friend, again for a very understandable reason, developed an argument explaining what the background was about that which I felt constrained to explain on the respondent's side as part of a process of agreeing between the two parties involving discussion between the mother and the social workers. My instructions, however, were disputed on the applicant's behalf. It would not be proper for a declaration to be granted on that matter because it is nowhere asserted in the papers against the applicant.

Your Lordship has identified in your Lordship's judgment that there might be some difficulties of this sort. Might I take your Lordship to the bottom of page 24. Your Lordship refers to the fact that they can legitimately complain of the fact that both of these submissions in their present formulation have emerged for the first time in argument. In fact, your Lordship was perhaps being less than generous in enumerating a number of points which I say arose at a late stage.

MR. JUSTICE SEDLEY: You say there are more than these two?

MR. McCARTHY: Indeed, there were. Certainly, the Flexiteam was one of them. About that there is no dispute. The balancing of resources against need was another. The resources and need is in declaration no. 2. There were others. One of them your Lordship may recollect was a matter developed in argument on behalf of the applicant, to the effect that a failure to consider adequate provision otherwise than in a day centre was itself an unlawful decision on the part of the respondent. That was not something that was developed in the papers. There were in fact three matters which had not been developed in advance. Therefore, in the circumstances, it is my submission that no declaration should be granted in

this case, (a) because they would serve no useful purpose in this case; (b) because they are not necessary to clarify or set out your Lordship's views in this case, and (c) in relation certainly to two of the declarations that are proposed, they are not properly sought anyway because they are matters which arose for the first time in the course of oral argument. Those are my submissions on the declarations.

MR. JUSTICE SEDLEY: Miss Gray, do you want to add anything?

MISS GRAY: I would invite your Lordship, if there is to be any question of refusing declaratory relief, to adjourn the matter until after the review in this matter. It would be unhelpful to close the door entirely when the matter may need to be further canvassed after that review.

MR. JUSTICE SEDLEY: I am not sure that you can have the penny and the bun. Either you have to accept the invitation to defer questions of relief or you have to do what you have done, which is argue for your relief. If you do not get it, then you cannot come back on another occasion to try again. I am treating this as the application for relief. I will determine the application.

MISS GRAY: In relation to the issue on the wording of the relief sought, I would not dissent from my learned friend's comments, that "take into account" rather than "have regard to" is more appropriate in the first point. I would not wish to quarrel with that, if my Lord wishes to follow exactly the wording of the judgment. Equally, I take the point raised by my learned friend on the third one, without a good reason. I would reiterate what I have said as to the general utility of all the declarations sought in this case. In relation to whether or not these points were raised in the past, I defer to my Lord's recollection of the way in which all the issues were raised ----

MR. JUSTICE SEDLEY: I can help about that. I am not going to decide this on the basis of whether points were raised. That may go to costs. I do not think it goes to relief. I have dealt with the points in the judgment without objection by Mr. McCarthy. The question now is what follows.

MISS GRAY: I do not think I can assist your Lordship any further, save to say that the mere fact that Islington does intend to follow your Lordship's guidance would not be thought a reason not to grant declaratory relief. These are indicative of the issues raised between the parties.

MR. JUSTICE SEDLEY: Miss Gray, I am prepared to give you the

first and third of the declarations you seek in the modified form that Mr. McCarthy has suggested and you have accepted. They will be drawn up in that form. The second I refuse, not because of the stage at which the point arose but because it is no more than a rather elliptical statement in declaratory form of something that is much better said in the Gloucestershire judgment delivered by McCowan LJ. It is to that, rather than to any attempt at condensation, that people will do much better to turn. The last of the four declarations seems to me to be of no utility outside the four corners of the judgment itself where it belongs. The other two I accept are capable of being of assistance either to the parties or to others. You may have them.

MISS GRAY: I turn to the issue of costs. It would be my submission that this is a matter on which, in substance, the interpretation raised by the applicant has been successful. I ask for costs.

MR. JUSTICE SEDLEY: You came originally looking for what in terms of relief?

MISS GRAY: We did seek orders of certiorari and declaratory relief. I am told by my learned friend, Miss Richards, that she made it clear to my Lord that declaratory relief was rather more the substance of the issues between the parties than any order of certiorari. I am looking at paragraph 2 of the Form 86A. There are various reliefs sought there. One is certiorari and two orders of mandamus and a general declaration of the Council's failure to meet ----

MR. JUSTICE SEDLEY: I think I am prepared to accept what Mr. McCarthy says, that the purpose of this application was more to sort out what the law required to be done in Jonathan's interests than to get one form of relief rather than another. You have succeeded to some extent but by no means to the full extent in the arguments that Miss Richards advanced. Questions of the target duties have gone the other way. It is right that one should consider whether a full order for costs is appropriate.

MISS GRAY: One of the initial grounds was that the local authority had made an error of law which was accepted by them when the respondent put in evidence. One can certainly not doubt that the proceedings up to that stage had been properly instituted. Equally, the fact that the proceedings were persisted in after an offer of a re-assessment had been made and had been refused does not change the applicant's contentions and they cannot be criticised. There continues to be substantial issues between the parties ----

MR. JUSTICE SEDLEY: You may be anticipating an argument that Mr. McCarthy is not going to advance.

MISS GRAY: Indeed. On the general point that your Lordship raised that we failed on the target duties, I would observe that your Lordship, notwithstanding that you have found in favour of the respondent, has, even on this part of the case, said at the bottom of page 30 of your Lordship's judgment that there are clearly issues to which consideration must be given by Islington's education department to Jonathan's care and educational needs under the education circular. Even on that issue, where we failed on justiciability, I would say that the substance of the argument went in the applicant's favour. Perhaps I can say a little more when I have heard what my learned friend has to say.

MR. JUSTICE SEDLEY: It is certainly right that while not going the distance with Miss Richards on section 41, I have gone some way down the road with her.

MR. McCARTHY: The declarations which were sought on behalf of the applicant were more extensive in the hearing than they had been in the Form 86A. The evidence has come in and the skeletons on both sides crystallised the issues. My learned friend handed up to your Lordship a list of seven proposed declarations. They covered a number of issues.

MR. JUSTICE SEDLEY: What are you proposing I should do by way of costs?

MR. McCARTHY: No order as to costs is appropriate, the reason being that if one enumerates the points that were in issue, either in the Form 86A or in the skeletons, on the great majority of the issues the respondent has been successful. It was in the special circumstances of this case, having regard to the general issues raised, that it was a case which was going to go to court unless the respondent offered to the applicant everything which was sought. In the Form 86A the complaints were as follows. The first was the form of the care and the breach of policy guidance that rendered that unlawful. On that point the applicant has been successful. The second point was that the overall nature of the provision which Islington had made or not made to him was Wednesbury unlawful. On that point the applicant has been unsuccessful. The third point was that there was a breach of the so-called target duty under section 41. The applicant has been unsuccessful on that. The fourth point is that arising out of section 41(8) of the Education Act, there is a duty on the local authority to carry out an individual assessment of the applicant. The applicant has been unsuccessful on that point. The issues, as they were before the skeletons, were, if you

like, three-one in favour of the respondent. If one enumerates the issues that came out of the statements before your Lordship, your Lordship might find it useful to have the skeleton argument of Miss Richards. She laid out nine issues on pages 4 and 5. There are eight issues. On one of them the applicant has been successful. Would my Lord turn to paragraph 13 at page 4. She has been successful on (a) because of the breach of the policy and the practice guidance. On point (b) she was unsuccessful and so on.

MR. JUSTICE SEDLEY: That is right in formal terms. One of the values of oral argument, particularly with knowledgeable counsel, is that the case changes shape, to everybody's advantage. Bad points fall away and good points crystallise. I have your point, that the applicant's counsel came to court looking for far more than she obtained.

MR. McCARTHY: This means that unless one is in the area where one can say fifty/fifty, it is proper to say no order as to costs. I would invite your Lordship on a numerical basis to find something like 12 1/2 per cent. If one tries to build into the overall process how much expenditure that had in fact occupied, it is difficult to say. The real complexity in this case lay in the evidence which developed the detail of the provision that had been made in the past. There was a considerable amount of documentation which analysed in minute detail what had happened at the day centre and things of that sort, all of which falls to the side because of the way in which your Lordship has dealt with the matter. I would say that 12 1/2 would be unfair to the respondent. In the circumstances, because costs do not have a punitive or a symbolic value in a case such as this, the most important thing, and one can bear this in mind, is that because Islington have had it all clarified and are going to find it easier to make a correct decision in relation to the applicant, he has really got what is most useful to him. For that reason also, I say that costs would not be appropriate.

MR. JUSTICE SEDLEY: The applicant is legally aided.

MR. McCARTHY: Yes.

MR. JUSTICE SEDLEY: From your client's point of view, costs come out of the social services budget?

MR. McCARTHY: They are overstretched. I do not have to balance resources against need.

MR. JUSTICE SEDLEY: It is not strictly a material consideration. I ask you in order to forget what you

told me.

MISS GRAY: I have a duty to the legal aid fund to recover costs. It is a crude basis to take the issues as formulated in general terms in the skeleton and then to say that Miss Richards has succeeded only in the first. The issues formulated by your Lordship in the judgment were more refined.

MR. JUSTICE SEDLEY: I am not going to deprive you of all your costs. Do you want to address me further on what proportion?

MISS GRAY: It is difficult to say what proportion. I would ask you to take into account that until one gets to the educational side of this particular series of arguments and the issues on the target duty under the Act, it would be my submission that the judgment went with the applicant rather than with the respondent. My Lord found in a number of detailed respects that the provision made to the applicant was unlawful. If one then takes into account the fact that the approach of the authority was criticised, I would say that there is an argument for 80% in our favour.

MR. JUSTICE SEDLEY: I propose to order the respondent to pay one half of the applicant's costs. It is not ordinarily necessary to give a reasoned judgment on costs. I will say that this is not a judgment of Solomon. It reflects in broad terms what has been decided. The applicant has succeeded in a significant part of what he came to court to achieve but by no means all of it.

MISS GRAY: May I ask for legal aid taxation?

MR. JUSTICE SEDLEY: You may.

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