Neutral Citation Number: [2021] EWHC 268 (Admin)

Case No: CO/1990/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 15th February 2021

Before:

HH JUDGE EYRE QC

- -

Between:

THE QUEEN on the application of LANCASHIRE COUNTY COUNCIL	**Claimant**
- and -	
THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Defendant**
-and-	
1) JM **2) ST HELENS COUNCIL**	
Interested Parties	

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- -

James Goudie QC and Sophie Cartwright (instructed by **Laura Sales**) for the **Claimant**
Jonathan Auburn and Hannah Slarks (instructed by **Government Legal Department**) for the **Defendant**
Adam Fullwood (instructed by **Jayne Doran**) for the **Second Interested Party**

Hearing dates: 22nd January 2021

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JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time of hand-down were 2.00pm on 15th February 2021.

HH Judge Eyre QC:

Introduction.

1. The First Interested Party, JM, sustained a serious brain injury in a road traffic accident in January 1990. Before May 2010 he had been living in accommodation he owned in Edenfield in Bury which is within the area of Lancashire County Council ("Lancashire"). That accommodation had been bought with funds from a damages award made in JM's favour and the funds were at the material times under the control of Mr. Hugh Jones ("the Deputy") JM's property and affairs deputy acting under the supervision of the Court of Protection. In May 2010 JM moved to live at a Transitional Rehabilitation Unit ("the TRU"), a private facility located in the area of St Helens Council ("St Helens"). JM subsequently moved to a different Transitional Rehabilitation Unit albeit one still within the area of St Helens.

2. A dispute arose between Lancashire and St Helens as to which authority had responsibility for funding JM's accommodation at the TRU. The question of responsibility turned on which authority was to be regarded as the one in whose area JM was ordinarily resident for the purposes of the National Assistance Act 1948. Lancashire and St Helens referred their dispute to the Secretary of State for determination pursuant to the Care Act 2014. By his decision of 3rd March 2020 ("the Decision") the Secretary of State determined that JM was ordinarily resident in Lancashire.

3. The Claimant seeks judicial review of the Decision and the matter came before me for a remote hearing conducted by MS Teams pursuant to permission given by HH Judge Stephen Davies. JM acting by his Deputy served a brief Acknowledgement of Service saying that no substantive representations were being made in the current proceedings but drawing the court's attention to the fact that separate proceedings brought by JM against St Helens are stayed pending resolution of the dispute as to JM's place of ordinary residence. St Helens also served a brief Acknowledgement of Service expressing the view that the Decision was correct but indicating that St Helens was not seeking to defend the judicial review claim. Mr. Fullwood representing St Helens attended the hearing but on a noting basis only.

4. For the reasons set out below I have concluded that the challenge to the Decision fails and that the claim is to be dismissed.

The Factual Background.

5. In January 1990 JM who was then aged five suffered serious brain injuries in a road traffic accident. He ultimately received a damages award of £3.1m in July 2003. That award was structured as an annuity together with a capital sum to be managed by a receiver – now the Deputy. The capital sum was used to buy the accommodation at Edenfield (together with an adjoining property to be occupied by JM's mother). Save for a brief interlude when he lived in Sheffield JM lived at the house in Edenfield until his move to the TRU.

6. JM first came to the attention of Lancashire in 2000 when a safeguarding reference was made because of concerns about potential financial abuse.

7. In December 2008 the Deputy was a partner in the solicitors' firm of Pannone LLP and on 12th December 2008 Gillian Hitchin of that firm telephoned Lancashire. She explained the background of JM having suffered a brain injury and said that police officers had attended at JM's home and had found it to be in a "terrible state". Miss. Hitchin was "asking if Social Services can offer help to this gentleman and undertake an assessment of his needs". Lancashire responded saying that it did not believe that there was any role for Social Services at that time because JM had made an "informed choice" as to how he lived and because he had not requested that the matter be referred to the Council. However, Miss. Hudson of Lancashire did discuss with Miss. Hitchin the possibility of the Deputy seeking to obtain an assessment of JM's mental capacity and then potentially reverting to the Council.

8. It appears that in the period from March to June 2009 JM was allocated a social worker by Lancashire but it is unclear what involvement that social worker had with JM save for participation in the safeguarding meetings to which I now turn.

9. On 3rd February 2010 there was a meeting of the Lancashire Safeguarding Adults Board to consider JM's position. That meeting was chaired by an officer of Lancashire and attended by two further Lancashire social workers. That meeting considered questions of potential financial and emotional abuse of JM but it also noted that there were "issues of self-neglect" and that his home was in a poor condition and considered the possibility that JM suffered from depression. It was agreed that the TRU would be approached with a view to a possible residential placement. The minutes of the meeting record that all were agreed that JM was a "vulnerable adult at risk of significant harm and that he needs to be deprived of his liberty to safeguard him and also to get an assessment due to JM not previously engaging with services."

10. There was a further meeting of the Safeguarding Board on 11th March 2010. This was again chaired by a Lancashire officer and attended by a further social worker. The meeting noted that the Deputy was to arrange a meeting with JM and a member of staff from the TRU to consider a move to the TRU. The minutes record that if the outcome of that meeting was "negative" (in the sense apparently of JM declining to move to the TRU or to agree to a capacity assessment) then the Deputy was to inform Elaine Chippendale (the manager of Lancashire's Physical Disabilities Team) with a view to Miss. Chippendale and a police officer visiting JM to undertake a capacity assessment.

11. As matters turned out JM was agreeable to the move to the TRU and the Deputy signed a contract for his accommodation there on 9th April 2010. JM moved to the TRU on 6th May 2010. However, in the meantime on 16th April 2010 there had been a further meeting of the Safeguarding Board again chaired by a Lancashire officer and attended by two of the Council's social workers. The meeting noted JM's agreement to move to the TRU and that a contract had been entered. A further meeting was planned for July 2010 but that was cancelled and the safeguarding investigation closed after Lancashire was told on 8th June 2010 that JM had settled well at the TRU.

12. JM later moved to a different TRU but the events after his initial move to the TRU are not relevant for current purposes save to say that they ultimately led to

the dispute between Lancashire and St Helens about where JM was ordinarily resident and so to the referral to the Secretary of State.

13. Lancashire put in evidence two statements from Rachael Meadows-Hambleton, the head of its service for Community East, Reablement, and Occupational Therapy. The latter of these was in response to a statement from Robert Crookes, St Helens' Assistant Director for Adult Social Care and Health. These three statements do not materially advance matters. They consist in large part of comment on the documents which were put before the Secretary of State and an explanation of what happened after JM had moved to the TRU. Miss. Meadows-Hambleton's statement also contains an expression of her opinion as to the conclusion which Lancashire would have reached if it had undertaken an assessment of JM in 2010. To the extent that goes beyond unnecessary comment it amounts to an inappropriate attempt to introduce opinion evidence. It does not in any event assist with the matters which I have to address namely whether the Secretary of State applied the law correctly in the Decision and reached a conclusion open to him having had proper regard to relevant considerations and having disregarded irrelevant ones.

The Relevant Legal Framework.

14. The starting point is section 47 (1) of the National Health Service and Community Care Act 1990 which provides that:

> Subject to subsections (5) and (6) below, 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—
>
> (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.

15. Although the relevant local authority is not required to carry out an assessment unless the specified matters appear to it to be present the threshold is a very low one and once it is crossed an assessment must be carried out. As Scott Baker J explained in *R v Bristol CC ex p Penfold* (1998) 1 CCLR 315 at 322 E – G:

> "It seems to me that Parliament has expressed Section 47(1) in very clear terms. The opening words of the subsection, the first step in the three stage process, provide a very low threshold test. The reference is to community care services the authority may provide or arrange for. And the services are those of which the person may be in need. If that test is passed it is mandatory to carry out the assessment. The word shall emphasises that this is so. The discretionary element comes in at the third stage when the authority decides, in the light of the results of the assessment what, if any, services to provide.
>
> Usually, but not inevitably, the section will be triggered by, or on behalf of, a person claiming to have a need. But the initiative could come from the local authority. …"

16. The effect of sections 46 (3) and 47 (8) of the 1990 Act is that "community care services" include services provided under Part III of the National Assistance Act 1948.

17. Turning then to Part III of the 1948 Act regard is to be had to section 21. For present purposes subsections (1)(a) and (2A) are relevant and they provide as follows:

> (1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing—
>
> (a) residential accommodation for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them; …
>
> (2A) In determining for the purposes of paragraph (a) or (aa) of subsection (1) of this section whether care and attention are otherwise available to a person, a local authority shall disregard so much of the person's resources as may be specified in, or determined in accordance with, regulations made by the Secretary of State for the purposes of this subsection.

18. I note in passing that although the National Assistance Act has now been superseded its provisions remained relevant for the purposes of the determination of JM's habitual residence as between Lancashire and St Helens by reason of the transitional provisions I will consider below.

19. The operation of section 21 (1)(a) was considered in *R (on the application of Wahid) v Tower Hamlets LBC* [2002] EWCA Civ 287. At [21] Pill LJ emphasised that the need for care and attention was a pre-condition for the duty to provide accommodation to arise. Hale LJ explained the position thus at [30] – [34]:

> "30. …Some basic points may deserve emphasis given the recent expansion of litigation in this field. Under section 21(1)(a) of the National Assistance Act 1948 , local social services authorities have a duty to make arrangements for providing residential accommodation for people over 18 (who are ordinarily resident in their area or in urgent need) where three inter-related conditions are fulfilled:
>
> (1) the person is in need of care and attention;
>
> (2) that need arises by reason of age, illness, disability or any other circumstances; and
>
> (3) that care and attention is not available to him otherwise than by the provision of residential accommodation under this particular power.
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> Three further points are also relevant:
>
> (1) it is for the local social services authority to assess whether or not these conditions are fulfilled, and if so, how the need is to be met, subject to the scrutiny of the court on the ordinary principles of judicial review;
>
> (2) section 21 does not permit the local social services authority to make provision which may or must be made by them or any other authority under an enactment other than Part III of the 1948 Act (see s 21(8)); but
>
> (3) having identified a need to be met by the provision of residential accommodation under section 21, the authority have a positive duty to meet it

> which can be enforced in judicial review proceedings (see *R v Sefton Metropolitan Borough Council, ex parte Help the Aged* [1997] 4 All ER 532, CA ; *R Kensington and Chelsea London Borough Council, ex parte Kujtim* [1999] 4 All ER 161, CA).
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> …
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> 32.. But it does not follow that because residential accommodation can mean ordinary housing and the claimant is in need of ordinary housing, a duty arises to provide him with that housing under section 21(1)(a). That duty is premised on an unmet need for 'care and attention' (a 'condition precedent', as this Court put it in the *Westminster* case, at p 93E). These words must be given their full weight. …
>
> …
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> 34.. That is sufficient to decide this appeal. Had it been that the combination of the claimant's mental health and a severe housing problem gave rise to a need for care and attention, this claim would still have faced considerable difficulties. He would have had to show that the care and attention he required was not otherwise available to him. …"

20. In referring to the effect of those preconditions Mr. Goudie QC reminded me that, as Justine Thornton QC, then sitting as a Deputy Judge, explained in *R (on the application of Barking & Dagenham LBC) v Secretary of State for Health* [2017] EWHC 2449 (Admin) at [42], "Caselaw makes clear that residential accommodation under section 21 is accommodation of last resort". That is undoubtedly so but it remains important to remember that those words are a paraphrase and to have regard to the conditions laid down in the section and to remember that a duty to provide accommodation arises when those conditions are fulfilled.

21. Lady Hale, as she had become, gave further guidance as to the operation of section 21 (1)(a) in *R (on the application of M) v Slough BC* [2008] UKHL 52 explaining, at [15], that "the words 'which is not otherwise available to them' govern the words 'care and attention' and not the words 'residential accommodation'". Thus "a person may have a roof over her head but still be in need of care and attention".

22. The effect of the National Assistance (Assessment of Resources) Regulations 1992 and of the National Assistance (Residential Accommodation) (Disregarding of Resources) (England) Regulations 2001 is that funds deriving from personal injury damages awards fall within the disregard laid down in section 21 (2A).

23. The Department of Health has repeatedly set out its view that the law requires that assessments under section 47 are to be undertaken regardless of the resources of the person in question and that the relevant person's resources are immaterial to the questions of whether there should be an assessment and of the care needs which are to be identified in that assessment.

24. Thus Circular LAC (98)19 says at [8] and [9]:

"8. Local authorities are under a legal duty under the NHS and Community Care Act 1990 to assess the care needs of anyone who, in the authority's view, may be in need of community care services. It is the Department's view that the law does not allow authorities to refuse to undertake an assessment of care needs for anyone on the grounds of the person's financial resources, eg because they have capital in excess of the capital limit for residential accommodation. Even if someone may be able to pay the full cost of any services, or make their own arrangements independently,(but see paras 9 and 10) they should be advised about what type of care they require, and informed about what services are available.

9. The legislation regarding Part III residential accommodation provides for authorities to assess under section 21 of the National Assistance Act 1948 whether anyone requiring residential care services is "in need of care and attention which is not otherwise available to them". Once the LA has completed a financial assessment of a resident's resources and their capital is above £16,000, this means that the resident has to pay the full charge, and may be in a position to make their own arrangements. However, that does not exempt Social Services Department from its duty to make arrangements for those people who are themselves unable to make care arrangements and have no-one to make arrangements for them. Under the NHS and Community Care Act 1990 local authorities are required to provide information to the public. The Department's 1991 publication of Practice Guidance and Care Assessment identified that published information as the first stage of the care management process."

25. Similarly the Guidance "Prioritising need in the context of People First" published in 2010 said at [76] and [77]:

"76. Councils should, however, be aware of the risks of screening people out of the assessment process before sufficient information is known about them. Removing people from the process too early could have a significant impact upon their well-being as well as potential economic costs, as it may well lead to them re-entering the system at a later date with a higher level of need. To avoid such situations, the initial response to people seeking help should be effective. Councils should ensure that their staff are sufficiently trained and equipped to make the appropriate judgements needed to steer individuals seeking support towards either a more formal community care assessment, a period of re-ablement or more universal services, as appropriate to their particular needs and circumstances.

77. In particular, any assessment of a person's financial situation must not be made until after there has been a proper assessment of needs. In a survey undertaken by CSCI, one third of people who failed to get an assessment reported that they were told they did not meet their council's financial criteria.40 From the beginning of the process, councils should make individuals aware that their individual financial circumstances will determine whether or not they have to pay towards the cost of the support provided to them. However, an individual's financial circumstances should have no bearing on the decision to carry out a community care assessment providing the qualifying requirements of section 47(1) of the NHS and Community Care Act 1990 are met. Neither should the individual's finances affect the level or detail of the assessment process."

26. The responsibility for providing residential accommodation to a given person lies by virtue of section 24 (1) of the 1948 Act on the local authority "in whose area the person is ordinarily resident".

27. The dispute referred to the Defendant was as to whether JM was to be regarded as having been ordinarily resident in Lancashire or St Helens. It is common ground that the TRU is in St Helens and the properties owned by JM at Edenfield are in Lancashire. It is also common ground that but for the potential effect of section 24 (5) of the 1948 Act JM would fall to be regarded as ordinarily resident in St Helens while living at the TRU. However, St Helens contended and subsequently the Defendant concluded that the position was changed by reason of section 24 (5) and the application of the approach set out by Charles J in *R (on the application of London Borough of Greenwich) v Secretary of State for Health* [2006] EWHC 2576 (Admin) and it is to those matters that I now turn.

28. Section 24 (5) provides that:

> "Where a person is provided with residential accommodation under this Part of this Act, he shall be deemed for the purposes of this Act to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before the residential accommodation was provided for him."

29. The application of that provision was considered in the *Greenwich* case. There Greenwich LBC challenged the Secretary of State's decision that it was the authority responsible on the ground of ordinary residence for funding the residential placement of an elderly lady, Mrs. D, living in a residential care home. The Secretary of State's decision had turned on her application of section 24 (5) and so it was that Charles J addressed the operation of that section. In that case it was common ground that as at the relevant date (on the facts of that case 29th June 2002) a local authority should have made arrangements for the funding of Mrs. D's accommodation and also that no such arrangements had in fact been made. Charles J considered whether the deeming provision in section 24 (5) applied in such circumstances and concluded that it did.

30. Charles J had been referred to the decision of the House of Lords in *The Chief Adjudication Officer v Quinn* [1996] 1 WLR 1184 but noted, at [55], that the House of Lords had not there considered "what the position would be if the arrangements should have been made but had not been made". He went on to say:

> "55. … It seems to me that if the position is that the arrangements should have been made — and here it is common ground that on 29th June a local authority should have made those arrangements with the relevant care home — that the deeming provision should be applied and interpreted on the basis that they had actually been put in place by the appropriate local authority.
>
> 56. In the arguments advanced in this context on behalf of the Secretary of State it was accepted that (a) a failure to comply with that statutory duty would be the subject of judicial review, and (b) if and when the court found that a local authority had acted unlawfully in not entering into the arrangements, the effect would be that the arrangements would be put in place retrospectively, not in the sense of contract, but in the sense that the result would be that the local authority

would have to make the appropriate payments from the relevant date. That, it seems to me, supports the conclusion I have reached.

57. That does not however determine the issue as to whether or not the deeming provision applies. In that context it is right to remember the definition in section 21(5) which I have set out earlier. That is the definition of the reference to accommodation provided under this Part.

58. Returning to the deeming provision, a point which I raised on its language, which I accept is a bad point, is whether the reference in the end of the subsection to "immediately before the residential accommodation was provided" could include residential accommodation other than residential accommodation under this Part of this Act. It seems to me that the primary meaning of the words is one whereby "residential accommodation" at the end of the subsection refers to the residential accommodation under this Part of this Act mentioned at the beginning of the subsection.

59. Accordingly, one has to look at the deeming provisions and ask what is the trigger date when residential accommodation under this Part of this Act was or should have been provided in this case — that is 29th June. Then one has to ask what is the position immediately before that? That interpretation of the subsection opens up the second issue which the Secretary of State has to determine, namely what the ordinary residence of Mrs D was on, let us say, 28th June."

31. Mr. Goudie pointed out that in the *Greenwich* case it had been conceded that arrangements should have been put in place but in the current case Lancashire robustly contended that it had not been obliged to conduct an assessment let alone provide funding in respect of JM's accommodation needs. That is a difference in fact between the current case and the circumstances of the *Greenwich* case and I will in due course have to consider the Defendant's conclusion that there should have been such an assessment. The principle enunciated by Charles J is not, however, confined to those cases where it is conceded that an assessment should have been made or that funding should have been provided nor did Mr. Goudie ultimately seek to contend that it was. The principle is that the deeming provision of section 24 (5) operates not just where accommodation is in fact provided by an authority but also where at the relevant date it should have been provided even if it was not.

32. As I have already indicated Justine Thornton QC considered these provisions in the *Barking & Dagenham* case. That was a further instance of a challenge to a decision by the Secretary of State as to where a person in need of accommodation was ordinarily resident. Miss. Thornton summarised the effect of the *Greenwich* case and of the approach to be taken when the deeming provision does not apply thus at [29] and [30]:

"29. If a local authority fails to comply with its statutory duty under section 21 and a court finds that a local authority acted unlawfully in not entering into section 21 arrangements, the deeming provision under section 24(5) will apply and be interpreted on the basis that the section 21 arrangements had actually been put in place by the appropriate local authority (*R(Greenwich) v Secretary of State for Health* [2006] EWHC 2576 (Admin) Charles J).

30. There is no definition of ordinary residence in the NAA. In circumstances where the deeming provision does not apply, and where capacity is not in issue,

> the question of ordinary residence falls to be determined on the principles laid down in the leading case of *R v LB Barnet, ex parte Shah* [1983] 2 AC 309 . Broadly speaking, a person's ordinary residence will be his "abode in a particular place …which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being …" (per Lord Scarman at 343). Additional tests may apply where people are not considered to have capacity to make their own decisions about where they wish to live."

33. At [43] the Deputy Judge emphasised that it is for the relevant local authority and not for the court or the Secretary of State to assess the needs of the person in question and that the authority's decision will only be challengeable on the normal public law grounds of lawfulness and rationality. It follows that the *Greenwich* principle comes into play only when the failure to provide accommodation amounts to a breach of duty by the relevant authority. It is not sufficient that the Secretary of State or a different authority let alone the court would have made a different decision.

34. On the facts of that case Miss. Thornton concluded that there had been no breach of duty by the relevant local authority and that at the relevant time that authority had not had a duty to provide residential care under section 21. That in turn meant that neither section 24 (5) nor the principle enunciated in the *Greenwich* case came into play.

35. Miss. Thornton did, however, proceed to express her assessment of the duration of the effect which section 24 (5) would have had if it had been applicable saying at [50]:

> "However, as the issue becomes relevant if a different conclusion is reached on issue i) and the parties made submissions on the point, I express the view that the deeming provision in section 24(5) applies for so long as a person remains in residential accommodation provided pursuant to section 21. I base my view on the use of the present tense in " Where a person is provided with residential accommodation under this Part of the Act". The wording of Section 21(5) appears to support this interpretation by construing references to 'accommodation provided under this part' of the Act so as to exclude section 29."

36. Neither Mr. Goudie nor Mr. Auburn sought to suggest that at this level I should depart from the approach set out in the *Greenwich* and the *Barking and Dagenham* cases. Rather as I have just indicated and as will appear more fully below there was difference between them as to the interpretation of those decisions and as to their application to the circumstances of this case.

37. The Defendant's power to determine disputes between local authorities about where an adult is ordinarily resident derives from section 40 of the Care Act 2014 and from the Care and Support (Disputes between Local Authorities) Regulations 2014. One effect of the transitional provisions accompanying the coming into force of the 2014 Act is that a person who was when the 2014 Act came into force deemed to have been ordinarily resident in a local authority's area by virtue of section 24 (5) of the 1948 Act is to be treated as ordinarily resident in that area for the purposes of the 2014 Act. It follows that in determining the dispute between Lancashire and St Helens the Secretary of State was to exercise powers under the 2014 Act but was to make the determination

as to JM's ordinary residence by reference to section 24 (5) if that provision would otherwise have been applicable to JM's case.

The Decision.

38. In the Decision the Defendant set out the factual background and summarised the submissions made by Lancashire and St Helens. The Defendant had been provided with a bundle of documents including the records of the meetings and exchanges which I have listed above. In setting out the factual background the Defendant referred to the meetings of the Safeguarding Board albeit in brief terms. He then identified the issue before him thus at [53]:

> "On the facts, it is clear JM moved to the area of SHC under private arrangements. The question is whether, for the purposes of the principle identified by Charles J at paragraph 55 of *Greenwich*, JM should not have had to move there privately but should instead have had those arrangements made for him by LCC. If yes, then the deeming provisions will fall to be treated as applying and JM will be ordinarily resident in LCC. If not, then the deeming provisions will not be treated as applying to him and JM will be ordinarily resident in SHC."

39. The Defendant then stated that the first question to be considered was whether Lancashire had been under a duty to assess JM because if Lancashire had not had such a duty the chain of consequences on which St Helens relied would not have been triggered.

40. The Defendant set out the three criteria identified by Hale LJ in *Wahid* and concluded that the first and second criteria were satisfied namely that JM had a need for care and attention and that this arose as the result of a disability.

41. At [60] the Defendant commenced his consideration of the third criterion thus:

> "The third of the three criteria is the most difficult in this case. The question is whether, applying the low test referred to in *Penfold*, it ought to have appeared to LCC that the care and attention may be "otherwise [un]available" absent the provision by it of accommodation under section 21 of the NAA 1948. In other words, did it appear that the package of residential care needed to be provided by a local authority pursuant to s.21 of the NAA 1948, or was it clearly "otherwise available" via private funding."

42. At [61] and [62] the Defendant noted the involvement of the Deputy and the use of JM's funds from the personal injury award to pay for the accommodation at the TRU. He noted the potential argument that this meant that the accommodation was "otherwise available" but then proceeded to consider the effect of section 21 (2A) and the "very limited relevance" of a person's financial circumstances to the assessment exercise.

43. At [63] the Defendant directed himself that:

> "This difficult question boils down to the fact-sensitive issue of whether, having regard to all the circumstances of this case, it ought to have appeared to LCC that JM may be in need of section 21 accommodation notwithstanding the apparent willingness of his deputy to fund the placement at TRU."

44. The Defendant noted that JM had come to the attention of Lancashire at the latest by reason of the safeguarding alerts; that the consensus opinion was that JM had a need for care and attention and that residential accommodation was needed to meet that need; and that JM's finances were to be disregarded as deriving from a personal injury damages award. It was in the light of those matters that the Defendant then concluded that the threshold for carrying out a section 47 assessment had been crossed.

45. At [65] the Defendant concluded that:

> "… had LCC assessed JM, then the evidence suggests that the only rational conclusion that LCC could have reached (and did in fact reach) was that JM had needs for care and attention which, at least for the time being, could only be met in residential accommodation."

46. The Defendant found that consequent upon Lancashire reaching that conclusion the following financial assessment would have concluded that JM was entitled to local authority funding. At [67] the Defendant reflected that the Deputy would then have had a choice between funding the TRU placement from JM's resources or accepting local authority funding and decided on the balance of probabilities that if he had been given the choice to do so the Deputy would have accepted local authority funding.

47. The Defendant then set out his determination that JM remained ordinarily resident in Lancashire summarising the reasoning that had led to that conclusion thus at [68]:

> "…. I conclude on the basis of the evidence available to me that:
> a. The low threshold for carrying out a community care assessment under s.47 of the NAA 1948 was met during the safeguarding process in February to April 2010.
>
> b. LCC was therefore under a public law obligation at that time to carry out a community care assessment. It did not do so but, applying the principle identified by Charles J in *Greenwich* at [55], it should be treated for the purposes of invoking the deeming provision as having done so.
>
> c. Had LCC carried out a community care assessment, it would have found that JM was in need of care and accommodation in a residential setting. LCC would also have been bound to find that such care was not "otherwise available". As such, LCC would have been required to offer to fund a placement for JM.
>
> d. Had such an offer been made, JM's deputy is on a balance of probabilities likely to have accepted it. LCC would thus have found itself having to arrange, or fund, JM's placement at TRU.
>
> e. Had LCC funded JM's placement at TRU, then the deeming provision would have applied and JM would have remained ordinarily resident in LCC's area."

48. The Decision was made with regard to the state of affairs in the run up to JM's move to the TRU. There was no dispute that this was the relevant period. The Claimant placed emphasis on the fact that the move was the result of a decision by the Deputy and that the contract had been entered before the move while the Defendant drew my attention more to the matters leading up to the decision to make the move. The difference is not material for present purposes because all

are agreed that the appropriate period was that immediately before the move but when the move was being contemplated and when it was envisaged that it would be funded by the Deputy's use of JM's funds.

The Parties' Contentions in Outline.

49. It was common ground that the move to the TRU meant that JM would fall to be treated as having been ordinarily resident in St Helens unless section 24 (5) came into operation by reason of the application of the *Greenwich* principle.

50. For the Claimant Mr. Goudie and Miss. Cartwright say that the Decision was erroneous in law and flawed in that account was taken of irrelevant matters and because the Defendant failed to take account of matters which were truly relevant (in particular the fact that accommodation was already being provided for JM). The conclusions that Lancashire should have assessed JM and should have provided accommodation and that the Deputy would have accepted an offer from Lancashire to fund the accommodation at the TRU involved, the Claimant says, inappropriate speculation and an unwarranted extension of the *Greenwich* principle amounting to "deeming upon deeming". The approach which the Defendant took to the application of section 21 (1)(a) was wrong in law because accommodation meeting JM's needs was otherwise available and was clearly so with the consequence that there had been no requirement on Lancashire to assess JM let alone to provide accommodation. Further there is said to have been a failure correctly to consider and apply the approach set out in the *Barking & Dagenham* case. Conversely the Defendant erred in taking account of section 21 (2A) which was irrelevant because the Claimant had no regard to JM's resources.

51. For the Defendant Mr. Auburn and Ms. Slarks contend that the Defendant approached the exercise of determining JM's ordinary residence correctly. It was necessary for the Defendant to reach conclusions as to what would have happened in the circumstances as they existed in 2010. In particular the Defendant had to make a judgment as to whether there should have been an assessment by the Claimant and as to what the outcome would have been if there had been such an assessment. That exercise was, the Defendant says, not speculation but inherent in making the determination. The conclusions which were reached were merited by the factual background and well within the range of conclusions open to the Defendant. The Defendant's case is that the interpretation and application of sections 21 (1)(a) and 24 (5) contained in the Decision were correct as a matter of law and that the operation of section 21 (2A) rather than being irrelevant was of central importance.

52. In their skeleton argument Mr. Auburn and Ms. Slarks had put forward an alternative line of argument. They had contended that Lancashire had acted unlawfully "by allowing itself to be unjustly enriched by the Deputy's mistake" in using JM's funds to pay for accommodation which should have been funded by Lancashire. It was said that this also brought the *Greenwich* principle into play. Before me Mr. Auburn explained that the Defendant no longer relied on this alternative approach. Consequently I heard no argument on the questions of whether Lancashire had been unjustly enriched at JM's expense and whether such unjust enrichment triggered the application of the *Greenwich* principle and

will not address them further. It is to be noted that the argument flowing from the alleged unjust enrichment had not played any part in the Defendant's decision.

Discussion.

53. It was for the Defendant and not the court to make the determination as to JM's ordinary residence and so the Decision is only susceptible of challenge if the Secretary of State erred in law or if in making the Decision he failed to take account of relevant matters and/or took account of irrelevant matters (irrationality in any wider sense not being suggested by the Claimant). The Claimant says that here the Secretary of State erred in the application of the law and as a consequence both had regard to irrelevant matters and also failed to take account of relevant ones.

54. The Claimant placed considerable emphasis on what was described in the Grounds as the Defendant's "failure to consider the impact of the decision" in the *Barking & Dagenham* case and a failure to consider and assess that decision; in the skeleton argument that was described as the absence of "any meaningful deliberation of the implications of the judgment" and as a "disregard" of the decision; and in Mr. Goudie's oral submissions it was said to be a failure to engage with and apply the approach set out in that case.

55. There is no substance in that line of challenge to the Decision. In *Barking & Dagenham* Miss. Thornton summarised the effect of the *Greenwich* case and explained that neither the principle enunciated there nor the deeming provision in section 24 (5) applied in a case where the relevant authority's failure to provide accommodation was not a breach of duty. In doing so Miss. Thornton was not departing from or altering the approach of Charles J in the *Greenwich* case: she was simply applying that approach. In the *Greenwich* case Charles J made it clear that the deeming provision was only being extended from cases where arrangements had been made by the relevant authority to those cases where arrangements should have been made by the authority but had not been. It was inherent in Charles J's reference at [55] to cases where "arrangements should have been made" that he was not addressing instances where the authority in question had no duty to make such arrangements. The decision in *Barking & Dagenham* was an example of a case where section 24 (5) did not apply because although no arrangements had been made in fact that failure did not amount to a breach of duty on the part of the authority. It was not an instance of a new or different principle with which the Defendant had to engage. The Defendant properly and correctly considered whether Lancashire should have provided JM with accommodation in the Spring of 2010.

56. The true substance of the Claimant's challenge lies in its contention that the conclusion that it should have provided accommodation by way of funding JM's placement at the TRU was unlawful or irrational. It is in that regard that the Claimant says that the conclusion that section 24 (5) applied was not open to the Defendant as a matter of law when relevant matters were considered and irrelevant ones ignored.

57. Mr. Goudie characterised the Defendant's approach in the Decision as involving "deeming upon deeming". That was a reference to the chain of conclusions namely that Lancashire should have assessed JM's needs; that having made an assessment Lancashire should have found that JM had a need of accommodation which was not otherwise available; that Lancashire should accordingly have offered to fund the placement at the TRU; that the Deputy would have accepted funding from Lancashire; and that as a consequence section 24 (5) came into operation by virtue of the *Greenwich* principle. This was said to involve speculation and to be an illegitimate extension of the *Greenwich* approach.

58. This line of argument was coupled with the contention that the care and attention of which JM was in need by way of the provision of accommodation was otherwise available because it was to be provided at the TRU and funded by the Deputy. It was sufficiently clear that JM's needs were being met for there to be no duty on Lancashire to undertake an assessment or the position was such that if there had been an assessment it would inevitably have concluded that JM's needs were being met by otherwise available provision. It follows, the Claimant says, that there was no breach of duty on the part of Lancashire in failing to fund the accommodation at the TRU and no scope for the operation of the *Greenwich* principle or the application of section 24 (5).

59. Mr. Goudie stressed the use of the present tense in section 21 (1a) with the references to persons who "<u>are</u> in need of care and attention which <u>is</u> not otherwise available to them" (emphasis added). He contended that this required close consideration to be given to the actual situation at the time of the postulated assessment. Were that to be done then the conclusion would follow that appropriate accommodation meeting JM's needs was available otherwise than by way of provision from Lancashire because as a matter of fact JM's needs were being met (or, depending on the time, were about to be met) at the TRU and were being provided from resources other than those of Lancashire namely from the funds under the control of the Deputy. In those circumstances the question of a duty on Lancashire to provide or to fund accommodation simply did not arise.

60. Similarly the Claimant contended that there had been no transgression on its part of the provisions of section 21 (2A). That was because it had taken no regard of JM's resources at all and so had no need to disregard any part of those resources. The question of JM's means and resources would only have arisen if and when an assessment had concluded that he had a need for care and attention by way of accommodation which was not available otherwise than by way of provision from Lancashire. Mr. Goudie contends that because JM's needs were being met by accommodation which was in fact available otherwise then there was neither need of nor scope for any consideration of JM's resources by Lancashire even if an assessment had been required.

61. I have concluded the Claimant's contentions are misconceived. The application of the *Greenwich* principle must inevitably include the exercise of considering whether the relevant authority had a duty to undertake an assessment and what the outcome of such an assessment would have been. That will necessarily involve consideration of the circumstances at the time when it is said there should have been an assessment and an analysis of what would or would not

and what should or should not have been done and by whom. Without such an analysis it is not possible to know whether accommodation should have been provided and such a determination is the key to the application of the *Greenwich* principle. The position was correctly and succinctly summarised by Mr. Auburn and Ms. Slarks when they said at [74] in their skeleton argument:

> "By definition, application of the *Greenwich* principle requires the SoS to engage in what LCC characterises as an exercise of 'speculation'. It is impossible for the SoS to apply the deeming provision to the arrangements that 'should have' been made, without reaching a view on the facts as to what arrangements would have been made if the local authority had complied with its duties at the 'trigger date'."

62. The Secretary of State's conclusion that in the early part of 2010 Lancashire had a duty to undertake an assessment under section 47 was a matter of law but also of judgement as to what should have appeared to Lancashire and as to whether those matters should have caused Lancashire to undertake an assessment. In making that judgement the Defendant properly had regard to the very low threshold which has to be crossed for an assessment to be required and to the circumstances at the time. The Secretary of State had to consider whether JM's circumstances were such as to indicate that he was potentially in need of community care services and also to consider whether Lancashire had sufficient knowledge of JM and of his circumstances to be aware of that potential need. The material before the Secretary of State and to which reference was made in the Decision in setting out the factual background and at [58] – [63] provided ample basis for the conclusion that at the relevant time Lancashire was aware of JM and of his needs such that the threshold for an assessment had been passed. The crucial element was that Lancashire's staff took part in a number of meetings relating to JM in which his circumstances were described. No further request for an assessment had been made after the request from Gillian Hitchin had been summarily dismissed in December 2008 but the Defendant was entitled to conclude that the need for such an assessment should have been apparent to the staff taking part in those meetings and so to Lancashire. The series of meetings had been triggered by the safeguarding concerns which had been raised in respect of JM and so the meetings were understandably focused on safeguarding matters but there were repeated references to JM's needs more generally and in particular to his need to move to a facility such as the TRU. The fact that Lancashire learnt of JM's accommodation needs in the context of meetings about safeguarding concerns does not mean that Lancashire was in some way entitled to disregard the consequences for JM's need for community care services of the information it obtained.

63. Consideration of JM's need for care and attention and whether there was accommodation otherwise available to meet that need inevitably required consideration of the resources available to meet that need and the nature and source of those resources. Mr. Goudie emphasised the use of the present tense in section 21 (1a) saying that as a matter of grammar this required consideration of the position as it actually was. In the same way, however, consideration of whether accommodation was available inevitably involves as a matter of sense and language consideration of the resources which were available to pay for that accommodation. If a person is planning to move to accommodation which is not

to be provided free of charge and does not have the funds to pay for his or her time in that accommodation then that accommodation cannot be said to be available for that person. The concept of the availability of accommodation inevitably connotes not just physical availability in the sense of the accommodation not being occupied by others but also an entitlement to remain in the accommodation by right either by way of ownership or by way of being able to pay the charges which will give a right to remain there. This reading of section 21 (1a) also follows from the presence of section 21 (2A). That subsection provides that certain parts of a person's resources shall be disregarded in the determination being undertaken for the purposes of section 21 (1)(a). It follows that if it were not for the statutory disregard regard would be had to those resources in the section 21 (1)(a) determination. That in turn demonstrates that the determination in section 21 (1)(a) of whether residential accommodation is otherwise available necessarily includes consideration of the resources from which accommodation can be provided or from which accommodation charges can be met.

64. The Claimant made repeated references to the fact that the arrangements for the accommodation at the TRU had been put in place by the Deputy who was performing his professional duties in doing so and was using funds under his control. This line of argument might have some force if instead of the Deputy the arrangements had been made by a third party individual or a charity using funds other than those of JM but it carries no weight in respect of the actions of the Deputy. The Deputy was, indeed, exercising his professional judgement but he was standing in the shoes of JM and acting on his behalf in respect of matters where JM could not act on his own behalf and, crucially, he was using funds which were held for JM. The resources which the Deputy was using were JM's and when the questions of the availability of accommodation and of the resources which existed to pay for the accommodation were considered no distinction was to be drawn between the funds controlled by the Deputy and any other resources which belonged to JM.

65. Thus the determination which should have been undertaken for the purposes of section 21 (1a) of whether accommodation to meet JM's needs was otherwise available required a consideration of the resources which JM had to fund the necessary accommodation. By reason of section 21 (2A) the funds deriving from the personal injury damages were to be disregarded in that exercise. That had the consequence that JM was to be regarded as having no resources from which he could meet his need for accommodation. If JM's resources had not been derived from a personal injury award and if, for example, they had derived from an inheritance then Lancashire would have been entitled in the postulated assessment to have concluded that although JM's need for care required the provision of accommodation that need was being met otherwise than by accommodation which it was to provide. In those circumstances Lancashire would indeed have been entitled to conclude that JM was in (or about to move to) accommodation meeting his needs and that he had the resources of his own to be and to remain there. However, once account is taken of section 21 (2A) and the source of the funds the position changes. Then, as the Defendant concluded, JM was to be seen as having needs which were to be met by the provision of accommodation of a particular kind and as lacking the resources

which were necessary to provide that accommodation. It follows that it could not be said that the necessary accommodation was available to JM otherwise than through provision by Lancashire. The Claimant is right to contend that the Secretary of State had to have regard to the actual position at the date of the postulated assessment. However, that actual position included not just the facts that JM was in appropriate accommodation and that payment for that was coming from the funds under the control of the Deputy but also the facts that the funds in question belonged to JM and derived from the personal injury damages award with the consequence that they were to be disregarded. The actual position had to be considered in its entirety and the consideration could not stop at the point of noting the accommodation to be occupied by JM but had to proceed to consider the nature of the funds available to pay for JM's stay in that accommodation.

66. Mr. Goudie argued that in the Decision the Secretary of State conflated need and availability. He contended that the Defendant had erred by failing to consider need and availability separately and had failed to appreciate that JM's needs were being met by accommodation being provided otherwise than by Lancashire. I reject these contentions. The Decision does show the Defendant having separate regard to the need for and the availability of accommodation although the consideration of the two was inevitably very closely related. The real difficulty is that the Claimant's criticism of the Defendant's conclusion as to availability fails because of the Claimant's failure to take account of the role which consideration of the presence or absence of resources must play in determining issues of availability and the consequences for that consideration in JM's case of the source of the funds controlled by his Deputy as I have explained above.

67. Once the Secretary of State had concluded that Lancashire should have made an assessment and that the assessment should have found that JM had a need for accommodation which was not otherwise available then it was appropriate for the Secretary of State to consider whether the offer of provision which Lancashire should have made would have been accepted by the Deputy. This was not speculation as the Claimant asserts but instead an exercise of judgement in considering what the position would have been if Lancashire had undertaken the required assessment. The conclusion which the Secretary of State reached in that regard was properly reasoned and again well within the range of conclusions open to him. It would have been, putting it at the lowest, a bizarre decision for the Deputy to have declined to allow local authority funds to be used to pay for the TRU if an offer of such funding had been made and the Defendant's conclusion that such an offer would have been accepted is unimpeachable.

68. It follows that I am satisfied that the Secretary of State approached the determination in the correct manner. The exercise inevitably required the Secretary of State as a matter of judgement to reach conclusions as to what should have been done and as to what would have happened if the appropriate steps had been taken in the Spring of 2010. The conclusions which were reached in the Decision were ones which the Defendant was properly entitled to reach on the material before him. There was no error of law in the Defendant's

approach or in the conclusions reached and in particular in the conclusions that Lancashire had a duty to undertake an assessment; that the assessment should have resulted in a finding of need which was not being met from resources available otherwise than from Lancashire; and that as a consequence the deeming provision of section 24 (5) came into play. The challenge to the Decision accordingly fails.