

R (on the application of Green) v South West Strategic Health Authority and others [2008] All ER (D) 21 (Nov)

[2008] EWHC 2576 (Admin)

Queen's Bench Division, Administrative Court

EnglandandWales

Wyn Williams J

28 October 2008

National Health Service – Health authority – Continuing National Health Service care – Authority finding that claimant not eligible for continuing National Health Service care – Authority's review panel allowing claimant's appeal in part – Whether review panel applying correct legal principles.

Abstract

National Health Service – Health authority. Queen's Bench Division, Administrative Court: The authority's published eligibility criteria and supplementary guidance relating to claimants' entitlement to a package of continuing National Health Service care, when properly interpreted, was not unlawful.

Digest

In 1996 the claimant was diagnosed with Alzheimer's disease. By 2003 her condition had deteriorated to the point where it had become necessary for her to be thoroughly assessed with a view to determining her medical and social needs. For that purpose she was admitted to a care home, then on to the mental health unit at W general hospital and finally on to a second care home. The hospital and second care home were both within the area administered by the first interested party which was funded by the defendant authority. It was argued on behalf of the claimant that she was entitled to a package of continuing National Health Service care (CHC) to be arranged and funded solely by the authority. The authority concluded that, applying the relevant published eligibility criteria and supplementary guidance, the claimant was not entitled to CHC, and the appeal against that decision, on her behalf, was dismissed. That decision was appealed to a duly convened review panel that recommended to the authority that the claimant was entitled to CHC, but only from 13 January to 10 August 2005. Judicial review of that decision was sought on behalf of the claimant, and a declaration was sought that the authority had adopted and applied eligibility criteria for CHC that were unlawful.

It was asserted that the review panel had relied on an unlawful criteria in reaching its decision which, for that reason, was vitiated. The authority contended that the published criteria, taken together with the supplementary guidance, was lawful and, in the alternative, that the review panel knew and applied the correct legal principles when considering the case.

The application would be dismissed.

Any decision-maker seeking to apply the authority's published criteria would know that he or she had to apply the Primary Healthcare Needs Test. The eligibility criteria relied on by the authority had to be read as a whole and applied in the light of the supplementary guidance. The supplementary guidance stated, in terms, that the ultimate objective for the decision-maker was to ensure that those with a primary healthcare need were fully funded by the NHS. Further, the guidance clearly and explicitly set out the content of the Primary Healthcare Needs Test. The decision-maker had to consider the whole of the care needs of the individual; in effect asking himself the question of whether the primary need was a health need (see [37],[40], and [41] of the judgment).

The authority's published criteria, when properly interpreted, was not unlawful (see [52] of the judgment).

Robert Weir (instructed by Hugh James Solicitors) for the claimant.

Roger McCarthy QC (instructed by Bevan Brittan Solicitors) for the authority.
Gareth Williams Barrister.

Judgment

[2008] EWHC 2576 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

28 October 2008

MR JUSTICE WYN WILLIAMS

APPROVED JUDGMENT

I DIRECT THAT PURSUANT TO CPR PD 39A PARA 6.1 NO OFFICIAL SHORTHAND NOTE SHALL BE TAKEN OF THIS JUDGMENT AND THAT COPIES OF THIS VERSION AS HANDED DOWN MAY BE TREATED AS AUTHENTIC.

MR JUSTICE WYN WILLIAMS:

1. The Claimant is a patient. She was born on 11 September 1932. In 1996 she was diagnosed with Alzheimer's disease. By 2003 the Claimant's condition was such that it became necessary for her to be thoroughly assessed with a view to determining her medical and social needs. For that purpose she was admitted first to a care home and then to the mental health unit at Weston General Hospital. In late 2003 (October), the Claimant became a resident at Woodspring Lodge Care Home. As I understand it that Care Home is operated by the local authority but geographically it is also within the area administered by the North Somerset Primary Care Trust. Prior to her taking up residence in that home the Claimant had been assessed by a multi-disciplinary team who had found that she did not qualify for continuing National Health Service care (hereinafter referred to as "CHC").

2. On 13 January 2005 the Claimant was transferred to Wilfred Leonard Care Home and she was resident at that home from that date at least until March 2006. That care home is also operated by the local authority and it is also within the area administered by North Somerset Primary Care Trust.

3. The Claimant contends that the between October 2003 and March 2006 she was entitled to CHC. The phrase continuing National Health Service care (CHC) is understood to mean a package of care arranged and funded solely by the NHS. The North Somerset Primary Care Trust (hereinafter referred to as "the Trust") has always resisted that contention.

4. The focus of these proceedings is the period 13 January 2005 to 7 March 2006. That is because the decision making process as to whether or not the Claimant is entitled to CHC during that period is complete.

5. The Claimant's eligibility for CHC during this period was first considered by a duly convened panel of the Trust on 27 April 2006. It concluded that the Claimant was not entitled to CHC. As was her right the Claimant appealed against that decision to a local appeal panel convened by the Trust. Her appeal was considered on 27 November 2006 but was dismissed. The Claimant had the right to ask the Defendant to review that decision. She elected to pursue that course of action and on 5 March 2007 a panel convened by the Defendant considered the Claimant's case. In the remainder of this judgment this panel will be referred to as "the review panel." The review panel made recommendations to the Defendant which it accepted. The Defendant communicated a decision to the Claimant by letter dated 16 April 2007. The decision of the Defendant was that the Claimant was entitled to CHC but only for the period from 13 January 2005 to 10 August 2005. Between 10 August 2005 and 7 March 2006 the Claimant was not so entitled.

6. These proceedings were commenced on 15 July 2007. The permission stage was hotly contested. It suffices that I say that permission was granted after an oral hearing on 11 March 2008. In the Claim Form the Claimant identifies the decision to be judicially reviewed as:

"the decision of South West Strategic Health Authority Review Panel of 5 March 2007 (communicated to the client by letter dated 16 April 2007) that the client is not eligible for continuing NHS healthcare from 11/8/05 to 7/3/06 applying their eligibility criteria."

In the Claim Form the only substantive remedy sought is a declaration that the Defendant adopted and applied eligibility criteria for CHC that were unlawful. In oral argument, however, Mr Weir confirmed that he was seeking a quashing order in respect of the decision identified.

7. The central thrust of the Claimant's case is easily stated. The Claimant asserts that when it considered her case the review panel determined the issue of whether or not the Claimant was eligible for CHC by applying a set of criteria which the Defendant's predecessor authority had published previously. Mr Weir, on behalf of the Claimant, submits that the criteria as published were and are unlawful. Consequently, the argument runs, in applying criteria which were unlawful the review panel, inevitably, reached a decision which was unlawful.

8. The Defendant accepts that the review panel set out to and did apply its published criteria. Its primary case is that the criteria were lawful. However Mr McCarthy QC also submits that if, as a matter of interpretation, there is a conflict between the published criteria and the correct legal principles to be applied the review panel fully understood the correct legal principles and in applying the criteria, it applied them in the light of those principles and in such a way so as to be consistent with them in its consideration of this case.

9. The significance of the dispute, of course, is financial. If the Claimant had been assessed as being eligible for CHC her accommodation and care costs would have been paid from the NHS budget. If, however, as was the case, she was assessed as not being so eligible she was responsible for payment of those costs. As I understand it, her means were such that the local authority which owns and operates the Care Home was entitled to charge her for the services provided. If the Claimant succeeds in this challenge, therefore, she expects to be and no doubt would be reimbursed for the sums paid by her.

10. With these introductory remarks, I turn to identify the statutory provisions, legal principles and national guidance which are of relevance to the determination of this case.

THE LAW AND NATIONAL GUIDANCE

11. Section 3 National Health Service Act 1977, so far as is material to this case, reads as follows:-

R (on the application of Green) v South West Strategic Health Authority and others [2008] All ER (D) 21 (Nov)

“(1) It is the Secretary of State's duty to provide throughout England and Wales, to such extent that he considers necessary to meet all reasonable requirements –

- (a) hospital accommodation;
- (b) other accommodation for the purpose of any service provided under this Act;
- (c) medical, dental, nursing and ambulance services,
- (d)
- (e) such facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health Service;
- (f) such other services as are required for the diagnosis and treatment of illness.”

12. Section 21 of the National Assistance Act 1948 provides so far as material:-

“(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 that he may direct, shall make arrangements for providing

- (a) residential accommodation for persons aged 18 or over who by reason by age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them;

13. These two provisions, together with section 1 of the 1977 Act (which I need not set out in this judgment) and their relationship to each other were considered by the Court of Appeal *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213.

14. Mrs Coughlan had been rendered tetraplegic in a road traffic accident in 1971. She had spent many years thereafter in hospital. In 1993 she and seven comparably disabled patients were moved with their agreement from hospital to an institution (Mardon House) which was a National Health Service facility for the long term disabled. When the move took place the Health Authority responsible for Mardon House assured the Claimant and the other patients that it would be their home for life. In 1996 the Health Authority published eligibility criteria for long term NHS care. In simple terms the published guidance indicated that “specialist” nursing services should be provided by the NHS but that “general” nursing care should be purchased by local authorities. Subsequently the Health Authority concluded that the Claimant and the other residents of the facility did not meet those criteria. In 1998, following public consultation, the Health Authority decided to close Mardon House and transfer the long term general nursing care of the Claimant to the local authority.

15. The Claimant sought judicial review of this decision and her claim was upheld at first instance. On appeal by the Health Authority the Court of Appeal analysed sections 1 and 3 of the 1977 Act and also section 21 of the 1948 Act and it set out its conclusion on the ambit of and relationship between these sections in paragraph 30 and 31 of its judgment. The paragraphs read:-

“30. The result of the detailed examination of the three sections can be summarised as follows.

- (a) The Secretary of State can exclude some nursing services from the services provided by the NHS. Such services can then be provided as a social or care service rather than as a health service.

- (b) The nursing services which can be so provided as part of the care services are limited to those which can legitimately be regarded as being provided in connection with accommodation which is being provided to the classes of persons referred to in section 21 of the 1948 Act who are in need of care and attention; in other words as part of a social services care package.
- (c) The fact that the nursing services are to be provided as part of social services care and will have to be paid for by the person concerned, unless that person's resources mean that he or she will be exempt from having to pay for those services, does not prohibit the Secretary of State from deciding not to provide those services. The nursing services are part of the social services and are subject to the same regime for payment as other social services. Mr Gordon submitted that this is unfair.However, as long as the nursing care services are capable of being properly classified as part of the social services responsibilities, then, under the present legislation, that unfairness is part of the statutory scheme.
- (d) The fact that some nursing services can be properly regarded as part of social services care, to be provided by the local authority, does not mean that all nursing services provided to those in the care of the local authority can be treated in this way. The scale and type of nursing required in an individual case may mean that it would not be appropriate to regard all or part of the nursing as being part of "the package of care" which can be provided by a local authority. There can be no precise legal line drawn between those nursing services which are and those which are not capable of being treated as included in such a package of care services.
- (e) The distinction between those services which can and cannot be so provided is one of degree which in a borderline case will depend on a careful appraisal of the facts of the individual case. However, as a very general indication as to where the line is to be drawn, it can be said that if the nursing services are (i) merely incidental or ancillary to the provision of the accommodation which a local authority is under a duty to provide to the category of persons to whom section 21 of the 1948 Act refers and (ii) of a nature which it can be expected that an authority whose primary responsibility is to provide social services can be expected to provide, then they can be provided under section 21. It will be appreciated that the first part of the test is focusing on the overall quantity of the services and the second part on the quality of the services provided.
- (f)

31. The Secretary of State accepts that, where the primary need is a health need, then the responsibility is that of the NHS, even when the individual has been placed in a home by a local authority. The difficulty is identifying the cases which are required to be placed into that category on their facts in order to comply with the statutory provisions."

16. As I indicated above, the panel relied upon published eligibility criteria in coming to its conclusion. The Court had this to say about eligibility criteria:-

"43 The fact that there is [a] background of possible confusion makes it important that any eligibility criteria should be drawn up with particular care. They need to identify at least two categories of persons who, although receiving nursing care while in a nursing home, are still entitled to receive the care at the expense of the NHS. First, there are those who, because of the scale of their health needs, should be regarded as wholly the responsibility of a health authority. Secondly, there are those whose nursing services in general can be regarded as being the responsibility of the local authority, but whose additional requirements are the responsibility of the NHS.....

48. It is for the Health Authority to decide what should be the eligibility criteria in its area in the co-operative framework envisaged by the circulars. In doing so it can take account of conditions in its area. We do not

accept the argument that there cannot be variations between the services provided by the NHS in different areas. However the eligibility criteria cannot place a responsibility on the local authority which goes beyond the terms of section 21.”

17. On 28 June 2001 the Department of Health issued a Circular. It was described as both a Health Service and Local Authority Circular and its series number was HSC 2001/015: LAC(2001/18). One of its express purposes was to “consolidate guidance on continuing NHS Healthcare in light of the judgment in *ex-parte Coughlan*;...”. I will deal with this Circular in more detail shortly.

18. In 2004 the Secretary of State for Health, exercising powers conferred on him by the National Health Service Act 1977 made and published “The Continuing Care (National Health Service Responsibilities) Directions 2004.” Direction 2 made it mandatory for a Strategic Health Authority to establish a single set of eligibility criteria for the provision of continuing care by Primary Care Trusts and NHS Trusts for which the Strategic Health Authority was the appropriate strategic health authority. Direction 3 made it mandatory for a Primary Care Trust to act in accordance with the criteria published under Direction 2. Direction 4 is also relevant. Direction 4 created a regime by which decisions relating to continuing care could be the subject of a review. In simple terms Direction 4 created review panels which would be independent of the Strategic Health Authority but which would make recommendations to the Authority upon cases where there was a dispute about whether or not CHC should be afforded to a patient. Direction 4.(7) reads: -

“Having taken account of any advice from a Review Panel, the Strategic Health Authority must give notice in writing of its decision and the reasons for it to the applicant and, as the case may be, the Primary Care Trust or NHS trust whose decision has been the subject of review.....”

19. During the course of argument both Mr Weir and Mr McCarthy QC placed reliance upon a decision of Charles J in *R (Maureen Grogan) v Bexley NHS Care Trust and Others* [2006] EWHC 44 (Admin).

20. In *Grogan* the Claimant had been assessed by the Defendant as a person who did not qualify for CHC. The Claimant sought to challenge the decision of the Defendant on the basis that its assessment was flawed because it had based its assessment on eligibility criteria which, themselves, were flawed. In paragraph 3 of his Judgment Charles J recorded that there was agreement that the overall question for his determination was whether in carrying out its assessment the Defendant had taken a lawful approach in, and by applying, its criteria. Later in his judgment he recorded that the Claimant's case was that in applying its eligibility criteria to decide whether the Claimant did not qualify for CHC the Defendant had acted unlawfully because it did not apply the primary health need approach – a short hand form of describing the test laid down and set out above in *Coughlan*.

21. Charles J, effectively, accepted the Claimant's contention. He did so because he considered that the eligibility criteria relied upon by the Defendant were legally flawed in the manner advanced by the Claimant.

22. The significance of the judgment in Charles J to the instant case (apart from its elucidation of general principles) is that he was considering eligibility criteria which, in some respects, were similar to the eligibility criteria which were published by the Defendant in the instant case. I will return to passages in the judgment of Charles J in due course.

23. As I indicated in paragraph 17 above the Department of Health issued a Circular in June 2001. Under the heading “Action” Health Authorities were asked to work very closely with local councils to:-

- ensure that continuing NHS Healthcare policies comply with this guidance.
- agree joint continuing health and social care eligibility criteria with local councils, setting out their respective responsibilities for meeting continuing health and social care needs.....
- ensure that review and complaints procedures are in line with this guidance.....

24. The Circular contained detailed guidance on concepts such as CHC, eligibility criteria and review panels and complaints procedures. It is unnecessary for me to detail the guidance. It suffices that I say that such guidance as was published in relation to the decision and effect of *Coughlan* accurately reflected what the Court had said.

25. Just as the Department of Health had issued guidance in the light of the judgment of *Coughlan* so in or about March 2006 it published a document entitled "NHS CONTINUING HEALTHCARE: ACTION FOLLOWING THE GROGAN JUDGMENT." The following parts of this document should be noted. Under the heading "Action" the following appears:-

- “3. SHAs in consultation with PCTs and where appropriate, local authorities, should review their local eligibility criteria for NHS Continuing Healthcare and satisfy themselves that their eligibility criteria, and the way in which they are applied locally, are in line with the Grogan Judgment and this guidance, taking any further legal advice, necessary for this purpose.

5. Where SHAs, PCTs or local authorities identify a need to revise their eligibility criteria or local procedures in light of the judgment, they should make arrangements to do so. They should also consider whether there are service users who should be re-assessed in consequence and if so, the local partner should decide the steps to take to achieve this.

8. SHAs should copy this Circular to their Continuing Care Review Panel Chair for internal information.”

There then followed a detailed appraisal of the key points of the judgment in *Grogan*. One of the points so identified was:-

- “h). the Criteria drawn up by the SHA [in *Grogan*] were found to lack the necessary guidance on the tests to be applied in deciding whether the person's health needs qualified them for NHS Continuing Healthcare. In particular, there was no express reference to:
 - (i) the “Primary Health Need Approach”; and
 - (ii) the incidental or ancillary etc “test” set out in the *Coughlan* judgment concerning what services a local authority could lawfully provide in connection with the provision of accommodation”

It is also necessary to quote from paragraphs 13 and 14 of the guidance. That reads:-

“A primary health need signifies that the individual's overall care needs are such thatthe responsibility for those needs cannot be met by the Local Authority and so must be the responsibility of the NHS, if anyone. In other words, there will be a primary health need if the nursing or other health services required by the individual are more than incidental or ancillary to the provision of accommodation which a Local Authority is under a duty to provide, and are of a nature beyond that which an Authority whose primary responsibility is for social services could be expected to provideas part of a social services package. This issue can only be addressed by assessing the totality of the relevant needs and answering the question as to whether the nature and degree of the nursing care alone or together with other factors means that the Local Authority cannot lawfully provide it in its totality, and therefore, if it is to be provided its provision falls on the NHS.

14. An assessment of an individual's relevant needs for the purposes of considering his eligibility for fully-funded NHS Continuing Healthcare involves the totality of his relevant needs. Those needs include, but are not limited to, his actual need for nursing care, including nursing care required from a registered nurse.”

THE DEFENDANT'S ELIGIBILITY CRITERIA

26. The predecessor authority of the Defendant published eligibility criteria for continuing healthcare on 1 April

2004. The document records that the eligibility criteria had been agreed by all NHS organisations and local authorities within the Defendant's predecessor's area and it also records that the document accorded with the policy guidance, legislation and the decision in *Coughlan*. For the avoidance of doubt I should say the eligibility criteria published on 1 April 2004 replaced a previous document which had been published much closer in time to the decision in *Coughlan*.

27. It is, of course, necessary to read the whole of the document in order to understand, fully, its provisions. Nonetheless, certain extracts should be set out in this judgment. Under the heading "*What is Continuing Health Care?*" the document provides:-

- “5. This describes the situation where, following a thorough assessment of needs, a person's overall health needs are judged to be so great that the NHS will manage and pay for all the care they need. An NHS professional will supervise the agreed care plan which can be provided in any setting, for example, the person's own home, a hospice, a care home or a hospital. In this situation, no charges are made for care services that are arranged as part of a care plan.
6. The eligibility conditions are set out in the boxed sections of this document. We have included other text to explain the context.”

There follows in the document the heading "*What are the eligibility conditions?*" Under this heading the following extracts are of particular importance to the issues before me:-

“7. A person will qualify if:

- their overall health needs mean that they may need continuing care; and
- any of the following conditions applies.”

Condition 1 is phrased as follows:-

“A person's health needs are so complex, intense or unpredictable (or any combination of these) that they need regular supervision by an NHS professional.”

There follows an explanation for this condition which is as follows:-

“These health needs require more intense or specialist care than that provided through primary care services or by a registered nurse in a care home. They need supervision from an NHS professional. The need for supervision by a GP or registered nurse is not in itself a good enough reason to qualify.”

Condition 5 reads:-

“Where a person's assessed health care needs are more significant than their need for personal care, accommodation and meals.”

The explanation of this condition provides:-

“In these circumstances, a person is likely to need a significant level of nursing and healthcare. It is likely to include people whose nursing or other healthcare needs are greater than normally provided for through funded nursing care (for someone living in a care home) or the district nursing service (for someone living in the community). This condition includes anyone whose health needs are more than incidental to their need for social care services.”

28. On 2 May 2006 the Defendant's predecessor authority published a document entitled Continuing Healthcare Policy. It was intended to be “Supplementary Guidance” as a consequence of the decision of Charles J in *Grogan* and the further guidance which followed from the Department of Health. Under the heading “Key Issues” the following appears:-

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“It is important to take account of what the Judge and the Department of Health said and ensure that in the application of the eligibility criteria the following issues are clearly and explicitly addressed in the decision and the reasons given.

- The ultimate objective is to ensure that those with a Primary Health Care need are fully funded by the NHS. Decision makers must therefore explicitly consider whether those whose cases are being considered have a Primary Health Care need.

This is particular relevant to the application of condition 5 in the Criteria but may also be relevant in considering the other conditions.....”

29. Under the heading “The Primary Health Care Needs Test” the document went on:-

“The Primary Health Care needs test is intended to involve a consideration of the whole of the care needs of the individual, is the primary need a health need. Although the Judge in Grogan did not elaborate on this, the Department of Health have in their recent guidance sought to expand upon it. Paragraph 13 of that guidance emphasises that the Primary Health Care needs test goes wider than merely nursing care and must take into account the totality of the care needs. This will therefore include individuals whose nursing needs may be relatively low but who have material other health care needs such as for psychological input or other therapeutic interventions which when the care package is used as a whole make it clear that this is not a package the local authority could have purchased. The guidance should not be read as implying that if any part of the care package could not be purchased by the local authority then the whole must be purchased by the NHS. In fact, the appropriate test is to consider whether the whole scale of the health care need is such that it is no longer appropriate to regard this as beyond what a local authority should be commissioning. If the scale of the healthcare needs is such that it remains appropriate for the local authority to commission there may still be elements of the package which health need to provide over and above the RNCC.”

30. Finally I should record that under the heading “NHS Supervision” the Supplementary Guidance states:-

“Care should also be taken in connection with the application of the requirement for NHS supervision in conditions (1) and (2). Clearly if this is present the individual will qualify. However, if it is not present, you should still ask the question, is there a Primary Health Care need and is on balance this a primary health care package or a social care one.”

DISCUSSION

31. At the heart of Mr Weir's submission to me is the proposition that the review panel faithfully or loyally applied the eligibility criteria which had been published by the Defendant's predecessor. In so doing, however, it acted unlawfully since the eligibility criteria themselves were unlawful. In summary the criteria were said to be unlawful since they did not properly reflect the decisions in *Coughlan* and *Grogan* and the guidance published by the Department of Health.

32. It is suggested that the eligibility criteria upon which the review panel focused were conditions 1 and 5 and, submits Mr Weir, those conditions were and are unlawful. He explains why in his written Skeleton Argument. In relation to condition 1, he submits that it provides no more than an indication to the decision-maker that as an aid to determining eligibility the decision-maker should pay attention to the nature or complexity or its intensity or unpredictability of the individual's healthcare needs (and any combination of these needs). He rightly points to the fact that the qualification that such needs should require regular supervision by a member of the NHS multi-disciplinary team was recognised by the Defendant's predecessor as not being determinative – see the terms of the Supplementary Guidance quoted above. Mr Weir submits, however, that whilst it is appropriate for the decision-maker to have regard to the nature, complexity, intensity and/or unpredictability of an individual needs, more guidance than that is required as to the test to be applied in determining whether such qualitative and quantitative factors found a conclusion that a person is eligible for CHC. In support of this analysis Mr Weir relies, in particular, on a passage in the judgment of Charles J in *Grogan*.

33. Before setting out the specific passage upon which Mr Weir relies it is necessary, in my judgment, to make reference to the eligibility criteria which were under consideration in *Grogan*. The published criteria specified that patients would fall into one of three categories described as:

- Category 1: Continuing NHS healthcare fully funded by the NHS
- Category 2: Continuing health and social care giving rise to both social services and NHS responsibilities.
- Category 3: Social care provided by the Local Authority.”

Category 1 was described in the following terms:

Category 2 was described in the following terms:

“Continuing health and social care describes the package of care that involves services from both the NHS and Local Authorities. Local Authorities are legally obliged to undertake financial assessments of people needing care in a care home and to charge individuals accordingly. Charges may also be made for some services provided in the home.

For patients entering care homes with nursing, the Registered Nursing Care Contribution (RNCC) will be considered once it has been established that an individual is not entitled to Continuing NHS Health Care fully funded by the NHS. The RNCC is NHS funded nursing care. The NHS funds registered nursing care in accordance with the three RNCC bands (see below) and also continence products. This arrangement has been made available to patients, who fund their own care home with nursing placements from October 2001 and will be available for other care homes with nursing patients from April 2003.”

34. Section 4 of the document under consideration by Charles J was entitled “*Eligibility Criteria for Older People who are Physically Frail*.” For the sake of brevity I do not set out what then followed. Any person interested can obtain that information from the judgment in *Grogan* itself (see paragraph 88 of that judgment).

35. Having set out the relevant parts of the published criteria Charles J expressed himself in the following terms:-

“90. As it appears from these passages the criteria contains no express reference to

- (i) the Primary Health Need Approach,
- (ii) the test set out in *Coughlan* as to what a local authority can lawfully provide,
- (iii) to the test or approach to be applied by the decision-maker by reference to the Guidance, or the *Coughlan* case (in what it decides and records) or otherwise.

91. In my judgment the Criteria gives effectively no guidance as to the test to be applied in determining whether the qualitative and quantitative factors referred to in it found a conclusion that the person fall within category 1 or category 2. The decision-maker is effectively left adrift on a sea of factors without guidance as to the test or tests he should apply to assess and weigh (in the words of the Criteria) the nature or complexity or intensity or unpredictability and the impact of an individual's health needs in determining the category into which the relevant persons falls.”

Having reached that conclusion the Learned Judge continued: -

“94. In my view by failing to give any effective guidance as to the test to be applied in making the required value judgment the Criteria is fatally flawed and it cannot be said from it what test the decision-maker is to apply

and thus whether, as the Care Trust assert, it indicates that (a) the decision-makers are to apply the Primary Health Need Approach as described and advanced by the S/S and the Care trust in argument or (b) that this is the approach the decision-makers did apply because they have had regard to and applied the guidance given by the Criteria.”

Not surprisingly, Mr Weir places considerable emphasis on the sentence:

“The decision-maker is effectively left adrift on a sea of factors without guidance as to the test or tests he should apply to assess and weigh (the words of the Criteria) the nature or complexity or intensity or unpredictability and the impact of an individual's health needs in determining the category into which the relevant person falls.”

In effect, Mr Weir submits that those sentiments are equally applicable to condition 1 as drafted in the instant case.

36. Mr Weir submits that condition 5 is self evidently flawed. He submits that its natural meaning requires the decision-maker to engage in some kind of comparative exercise so as to ascertain whether healthcare needs are more significant than the need for personal care, accommodation and meals. That, submits Mr Weir, is simply not the test which *Coughlan*, *Grogan* and National Guidance demands should be applied. The explanation which accompanies the condition, according to Mr Weir, does nothing to alter the natural meaning of the words of the condition.

37. The eligibility criteria relied upon by the Defendant must, of course, be read as a whole. Conditions 1 and 5 cannot be read in isolation and without reference to the remainder of the document. Further, in my judgment the published criteria must be understood and applied in the light of the Supplementary Guidance which was issued by the Defendant. In short the two documents must be looked together so as to ascertain the criteria which the Defendant intended should be applied.

38. Before considering the two documents together, I should briefly record why it was that the supplementary guidance was issued. The explanation is to be found in paragraphs 11 to 20 of the Witness Statement dated 14 April 2008 of Mr Stephen Thorpe. It is unnecessary to set out the details of those paragraphs in this judgment. It suffices that I say that the Guidance was issued to reflect what has been said in *Grogan* and for the reasons given by Mr Thorpe it was thought that advice by way of supplementary guidance was more efficacious in the circumstances then prevailing than any attempt to re-write the published criteria.

39. It is not suggested, in these proceedings, that the Defendant was not entitled, legally, to issue the supplementary guidance. As I have said, it seems clear that the published criteria were intended to be read in the context of the supplementary guidance and, further, this was fully understood by all relevant decision-makers.

40. The following are obviously very important aspects of the Supplementary Guidance. Firstly, the Supplementary Guidance states, in terms, that the ultimate objective for the decision-maker is to ensure that those with a primary healthcare need are fully funded by the NHS. Secondly, and closely allied to the first point, is the fact that the Guidance sets out clearly and explicitly the content of the Primary Healthcare Needs Test. The decision-maker has to consider the whole of the care needs of the individual; in effect he must ask himself the question is the primary need a health need.

41. In the light of the foregoing it is clear, in my judgment, that any decision-maker seeking to apply the published criteria of the Defendant would know that he or she had to apply the Primary Healthcare Needs Test. Further, in my judgment, that test is accurately summarised in the Supplementary Guidance. I repeat that it is in this context that the decision-maker would be considering the previously published criteria.

42. In fact, I have reached the conclusion that the combined effect of paragraph 5 and the opening phraseology of paragraph 7 of the published criteria, on their own and without reference to the Supplementary Guidance, probably conveyed sufficiently to a decision-maker the need to apply the Primary Health Care Needs Test in determining whether or not someone was eligible for CHC. However, when those passages of the published criteria are read in the context of the Supplementary Guidance that need becomes obvious.

43. That, of course, does not determine, conclusively, the case in the Defendant's favour, for if, in reality, the wording of conditions 1 and 5 are such that the decision maker is deflected away from applying the Primary Health Care Needs Test the published criteria would still be unlawful. However, in interpreting the words of the conditions, it follows from the views expressed by me in the paragraphs immediately preceding that they must be read in the context that the decision-maker's task is to apply the Primary Health Care Needs Test and that these conditions are tools to assist in applying such a test.

44. That being so, this case is different from *Grogan*. In *Grogan*, to repeat, Charles J decided that the published criteria did not sufficiently identify the Primary Health Care Needs Test. It was in that context that he held that the phrase "the nature or complexity or intensity or unpredictability of an individual's health needs" was insufficient guidance. Had there been an identification of the Primary Health Care Needs Test and an exposition of its content in *Grogan* I doubt whether Charles J would have considered the criteria before him to have been unlawful.

45. I am not persuaded that condition 1 when read in the context of the document in which that condition appears and the Supplementary Guidance can be regarded as a criterion for eligibility for CHC which is so imprecise or lacking in guidance in its terms so as to become unlawful.

46. I turn to condition 5. I understand the basis for Mr Weir's submission but I cannot accede to it given my finding that this condition (as all others) must be read in the context I have identified. This is especially so when the decision-maker is reminded in the Supplementary Guidance that the ultimate objective is to ensure that those with a primary health care need are fully funded by the NHS and that this concept is particularly relevant to the application of condition 5.

47. In his submissions about the meaning of condition 5 Mr Weir attaches considerable significance to the phraseology of the decision letter sent on behalf of the Defendant to the Claimant's solicitors on 16 April 2007. He submits that the decision letter makes it quite clear that the review panel judged the Claimant's case against the eligibility criteria and that one of the criteria considered was condition 5. The letter of 16 April 2007 continues:-

"To test Mr Green's eligibility under condition 5, the panel reviewed the balance of health care needs against her personal care needs."

Thereafter it set out almost in tabular form what were described as health care needs and personal needs and then concludes:-

"From this analysis, the panel concluded that Mr Green's health care needs were not more significant than her need for personal care, accommodation and meals during the claim period, so that she was not eligible for CHC funding under condition 5."

48. Mr Weir submits that this demonstrates a wrong approach on the part of the Defendant and one which can only have arisen because condition 5 called upon the review panel (and hence, the Defendant) to undertake such an exercise as is described in the decision letter.

49. I begin with the words of the condition. I do not necessarily see a tension between the words of the condition and the Primary Health Care Needs Test. In making a judgment about whether or not the needs of a patient are, in reality, health care needs I see no reason why the decision-maker cannot be asked to evaluate whether the established or assessed health needs are more significant than the personal care or accommodation needs. Nor do I see any tension between the explanation for the condition and the Primary Health Care Needs Test. In particular the last sentence of the explanation should be noted:-

"This condition includes anyone whose health needs are more than incidental to their need for social care services."

That phraseology resonates, very much, with the thrust of the judgment in *Coughlan*.

50. It may very well be that a review panel, when applying condition 5, should avoid the rather formalistic or formulaic approach which is set out in the decision letter of 16 April 2007. In fact, however, there is scant if any evidence which suggest that the review panel actually did approach condition 5 in a purely formalistic way. The notes of the hearing disclose no such approach. The letter of 16 April 2007 sent by the Chair of the review panel to the Defendant discloses no such approach. Rather, in my judgment, when one reads the notes of the review panel and the letter of its Chair to the Defendant one is left with the clear impression that the review panel was consciously and conscientiously applying the Primary Health Care Needs Test.

51. Accordingly, in my judgment, I do not consider that the decision letter of 16 April 2007 lends support for the view that the wording of condition 5 demanded that the review panel misapplied the Primary Health Care Needs Test.

52. In the light of the foregoing I have reached the clear conclusion that the Defendant's published criteria, when properly interpreted, were and are not unlawful.

53. There remains the possibility, of course, that either the Review Panel or the Defendant itself acted unlawfully in its approach to the application of condition 5. In the notes of the hearing there is nothing to suggest that the Review Panel was misdirecting itself upon the proper interpretation of condition 5. In the letter from its Chair to the Defendant dated 16 April 2007 the thrust of what the Chair wrote appears to focus more upon condition 1. It is to be observed, also, that the review panel was invited, specifically, by the Claimant's solicitors to apply the Defendant's criteria (including condition 5) in the light of the Primary Healthcare Needs Test.

54. In documents which are close in time to the review panel's recommendation the focus upon condition 5 emerges only in the letter which the Defendant sent to the Claimant's Solicitor. How that came to be the case is not explained in any contemporary document. It is obviously possible that the Defendant of its own volition embarked upon a consideration of condition 5 by reference to the information which it had available to it but that would be a surprising conclusion.

55. In fact, of course, there is evidence as to how it came to be that the Defendant dealt in detail with condition 5 in the decision letter. The Chair of the review panel, Mr Potter, has made a witness statement dated 15 April 2008 and in paragraph 29 he says:-

“The Panel did produce a list of what it considered to be health needs and social needs. This was because we have found that this is helpful to show a rough division of needs for illustration purposes only. The primary health needs test was very general (even with the benefit of the case law and guidance) and part of the Panel's task was to make a specific case by case decision which was appropriate to each service user. We, therefore, use the illustrative list to assist with the detailed assessment of how the persons need should weighed and categorised.”

56. There was a debate before me as to the extent to which Mr Potter's witness Statement was (a) admissible and/or (b) if admissible, evidence upon which it was proper for me to rely in reaching a conclusion about how the review panel approached condition 5. The consensus appears to be that the evidence is admissible, in the strict sense, but there was a debate about the circumstances if any, in which it would be proper for me to rely upon it.

57. In part, paragraph 29 of Mr Potter's witness statement simply explains how it came to be that a part of the decision letter of 16 April 2007 contains the information which it does about health needs and social needs. It helps to solve what would otherwise be a mystery. I do not consider that I am precluded by any of the authorities which were cited to me from relying upon the part of Mr Potter's evidence which asserts and accepts that the review panel did produce a list of health needs and social needs.

58. What is more difficult is whether it is also appropriate for me to rely upon the explanation given by Mr Potter as to why the lists were compiled and what use was made of them. In order to answer that question it is appropriate to consider two of the authorities cited to me. In *R v Westminster City Council ex parte Ermakov* [1996] 2 AER 302 the Court of Appeal considered the circumstances in which it was appropriate to admit and rely upon evidence adduced

for the purpose of explaining or adding to the reasons for a decision made by a decision-maker such as the review panel in this case. The leading judgment of the Court was given by Hutchinson LJ and, in truth, it is necessary to read the whole of his judgment so as to understand the basis for it. However it seems to me that my consideration of the instant case can be informed by a short citation. At page 315 letter H Hutchinson LJ said: -

“The Court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in *ex p Graham*, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lack in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction.”

59. In *R(Leung) v The Imperial College of Science, Technology and Medicine* [2002] EWHC 1358 (Admin) Silber J applied the principles laid down in *Ermakov* and also considered other first instance judgments which had applied and elucidated those principles. Having done so Silber J held that there was an over-arching factor to be considered in all cases of this type namely whether it would be just in all the circumstances to admit the evidence tendered for consideration.

60. It seems to me that Mr Potter's evidence as to how the review panel treated the list of health needs and social needs is no more than an elucidation of the decision letter in this case. The decision letter, in this context, is dealing with how a particular criterion was interpreted and applied in this case. Mr Potter's evidence does not seek to contradict what is written in the decision letter. It is much more akin, in my judgment, to elucidation. Further, in my judgment, it would be extraordinary if a Court was prepared to receive evidence which showed that the review panel did compile lists of health needs and social needs (when receiving such evidence was necessary in order to plug an apparent evidential lacuna about the decision making process) but yet refused to countenance receiving an explanation as to how the lists were treated by the decision making body. While I accept that such an approach is possible in strict logic it does not seem to me to be fruitful in a case of this type.

61. In summary, therefore, I have reached the conclusion that Mr Potter's evidence should be admitted and relied on by me to explain (a) how it was that the decision letter of 16 April 2007 made reference to lists of health needs and social needs but also (b) to explain why those list were compiled and the significance attached to them by the review panel.

62. In the light of Mr Potter's evidence and, accepting it as I do, there is no basis to conclude that the review panel unlawfully departed from the Primary Healthcare Needs Test when applying the Defendant's eligibility criteria.

63. It follows that I consider that this claim must fail.

64. If the parties can agree upon the appropriate order for costs consequent upon this decision, they should file a draft Minute of Order which includes an appropriate provision about costs. If they cannot agree about costs they should file short written submissions by 4.00pm 24 October 2008 and then I will determine what the appropriate Order should be. If the Claimant wishes to seek my permission to appeal that can also be done in writing and, again, I would ask that any observations upon that issue be received from the parties by 4.00pm 24 October 2008. I intend that judgment should be handed down early next week but the precise date will depend upon my own sitting arrangements.

65. I should like to record my gratitude for the helpful details submissions of Counsel in this case.