JUDGMENT : MR JUSTICE HOOPER: Administrative Court. 22nd August 2003.

2. The claimant is now 35 years old and suffers from Asperger's Syndrome, an autistic spectrum disorder ("ASD"). He challenges a decision taken by the defendant on 28th March 2003. The thrust of that decision was that, in the view of the defendant, the claimant did not need residential care and his needs could be met in a supported housing placement. In the words of the letter: *"The Trust believes that you should be enabled to live as independently and autonomously as possible, having regard to your needs. The Trust accepts that you require a significant amount of support, but considers that your needs will best be met by you living in an enabling environment which gives you the opportunity to access mainstream activities."*

   The defendant suggested two different units, one called Chy-an-Ross in Redruth, and another in Helston, both in Cornwall. Although the Trust would have preferred that the claimant be returned to Somerset, the claimant had made it clear that he preferred to remain in Cornwall. Since 28th March, Chy-an-Ross has been selected by the defendant out of the two possible units.

3. Neither of the two units are acceptable to the claimant's mother, who wants the claimant to go into residential accommodation at a place called Goonhavern, an establishment run by Spectrum, a charity which leases to the claimant a remote cottage in Cornwall, called Hillside, where the claimant currently lives. In the letter the defendant also wrote: *"The Trust has responsibilities towards a large number of service users and accordingly it has also had regard to the relative costs of the placements at Helston/Redruth and at Goonhavern. The placement at Goonhavern would cost £860 per week; a supported housing placement at Helston or Redruth would have no immediate cost to health or social services, as you would be able to access income support, housing benefit and any other benefits you may be entitled to. We are, however, committed to purchasing any extra supports, skills or training for staff you may require to ensure we address the requirements of Dr Williams and Dr Shah's reports. This would be in addition to the support you would get by virtue of your tenancy in the two respective housing options. However, whilst this factor has played a part in the Trust's decision-making process, it remains the Trust's view in any event that the option of supported living in Helston or Redruth is in your best interest."*

4. At the beginning of the hearing I asked Miss Richards, who appears for the defendant, to describe for me Chy-an-Ross. Later during the hearing further details were given about it and I have incorporated those into this description. The accommodation at Redruth consists of a large house owned by a private individual, who also owns a residential care home nearby. She has experience of working with people suffering from Asperger's Syndrome. The house is a large one with a garden. It accommodates six individuals, two persons on each floor. All six are tenants. They each have a bedroom with hand washing facilities, and may lease the property either furnished or unfurnished. There are access points for both television and hi-fi. On each floor there is a bathroom shared by the two residents on that floor. On the ground floor there is a kitchen and open plan living room. The residents may do their own cooking, or have meals cooked for them. Of the other current residents, one has Asperger's Syndrome, one has mild learning disabilities and two have depression. There is a minimum of one member of staff on duty from 7am to 11pm, the actual number of staff depending on the individual needs of the residents. There is a minimum of one person on duty at night who sleeps in the house. Being tenants, the residents receive housing benefit with which to pay the rent. The staff are provided by the local authority under a scheme for supporting people in the community. The claimant would be entitled to income support and disability living allowance which would give him some £400 per month.

5. I asked Miss Carrington to describe the home at Goonhavern. She told me that it consists of two properties, one housing four persons and another housing two persons close to each other. It is into the latter that the claimant would be placed if sent there. The two would each have a bedroom and bathroom with a shared kitchen and shared living room. The claimant would not be a tenant and would receive, so I am told, about £16 per week. The claimant would have his own individual carer for some 55 hours per week. Outside the 55 hours, there is a residential member of staff on duty. Meals would be provided for him, although he could prepare his own snacks. All the other residents are on the ASD and have similar needs to the claimant.

6. Both Chy-an-Ross and Goonhavern provide a range of activities.

7. The descriptions which I have just given provide a broad outline of the difference between a supported housing placement and residential care. As to the amount of one-to-one care which would be provided to the claimant by the defendant at Chy-an-Ross, the defendant made it clear during the hearing that for the foreseeable future it would be a minimum of 28 hours a week, with 35 hours a week during the initial period whilst the required amount of one-to-one care is being determined. At the end of that initial period the amount of care required could go up or down from 35 hours, but would in no circumstances go below 28 hours for the foreseeable future.

8. The claimant was diagnosed as suffering from Asperger's Syndrome in 1997, at a time when he was living with his parents in a remote cottage near Minehead, and had been so doing for some ten years. Following the diagnosis the claimant moved to Hillside Cottage, owned, as I say, by Spectrum, and the cost of which was financed by the defendant. When the claimant moved to Hillside it was anticipated that there would be another person living in the house as a resident. That did happen but only for a very short period. Since then the claimant has been alone. He continues to live there now until this matter is resolved. The charity takes the various benefits and gives the claimant some £30 per week for his expenses. Hillside is in a small and remote country lane and about 200 yards away from the nearest other cottage. The claimant enjoys one-to-one care for 55 hours a week, and outside those hours is left entirely on his own in the cottage. On Saturday, for example, he enjoys the benefits of a carer from 10am to 3pm, I was told, and the carer arrives on Sunday at 11am. It follows that he is left alone for some 18 hours. However, there is evidence to suggest that he has never wandered from the cottage whilst unsupervised. Dr Shah a, if not the, leading expert in ASD, and who was instructed on behalf of the claimant to produce a report, described the set up at Hillside Cottage as "... not conducive to his needs. It is too isolated and Jorge has to be left by himself for long periods at nights and other times which are not covered by the rota. Due to his Asperger's Syndrome and passivity and episodes of breakdown, Jorge is not likely to be able to use the telephone to ask for help/support from staff if they are not on site."

9. There is agreement that the claimant cannot continue to live at Hillside Cottage. Spectrum also run Goonhavern, and there would thus be some continuity of care if the claimant was placed at Goonhavern rather than at Chy-an-Ross.

10. There is general agreement between the parties as to the claimant's condition. The two substantial differences relate to "catatonia" and the claimant's ability to make decisions. The claimant is able to attend to his toilet-ing needs independently. He has the physical and cognitive ability to carry out the necessary tasks in connection with his personal hygiene, but, *"due to his passivity, he needs constant prompting."* Staff have to stand outside the bathroom and take him through a series of tasks using verbal prompts and reminders. Left to his own devices it is unlikely that he would attend to his own personal hygiene needs adequately. The claimant has the mechanical skills to dress and undress himself but needs supervision, prompting and encouragement both to dress appropriately and to change his clothes regularly. The claimant is able to feed himself and prepare simple meals, such as omelettes, beans on toast and sandwiches. He needs, however, to be organised to eat healthily and at structured times. On one occasion he left a pan on the Aga and it burnt dry. Left to his own devices, he binges on cereals and sugary unhealthy foods.

11. The claimant is able to use and understand verbal language. However, he does not initiate conversation and is not able to participate freely in a two-way conversation. He gives only the minimum information in response to a question and has the tendency to say "yes" without understanding the implications of the question. He tends to take things literally and may misunderstand qualitative information during communication, and may also miss the implications of verbal communication. His non-verbal communication can sometimes be inappropriate. Although he appears "normally sociable" he is naïve and indiscriminate in his social reaction and over trusting of strangers. During his breakdown periods his social interaction breaks down totally. He becomes withdrawn, prefers to be solitary and is unresponsive to other people's attempts to engage him. He is not able to make or attend dental or medical appointments without support, and although he does have the ability to read and write, he does not read his own mail or act upon it. Left to his own

devices, and due to his passivity and lack of motivation, he does very little spontaneously. He tends to watch television and may listen to music or sit and do nothing for long periods. On the other hand, he is able to participate in structured activities with staff present and prompting, such as swimming, walking, snooker and he has attended an evening class. His IQ is in the average range with an "uneven cognitive profile". When he suffers a breakdown, he becomes totally withdrawn and cut off from others, unable to participate in any activity without prompting. He withdraws to his room and lies on his bed for long periods, is very unresponsive, lacks drive, becomes irritable and less tolerant of staff. The claimant exhibits no aggressive behaviour towards others. In the words of Dr Shah: *"Jorge's 'breakdown' episodes are monitored and charted by staff at Spectrum. There has been an overall improvement in that the episodes are less frequent and also do not last as long as previously. The improvement is probably due to a number of factors: medication, structure, staff presence, supervision and programme of activities."*

There have been episodes when he has wandered around the house naked even though female staff has been on duty. However, it is not thought to be due to any underlying sexual motivation, but merely a characteristic of his bizarre impulsive behaviour. The claimant needs thorough and effective proactive risk management and a high degree of support from staff. Not supported at this level, so Dr Shah writes, or in the absence of good risk management and staff supervision, the claimant would be unable to carry out the basic routines of daily living and be at risk in various ways.

12. I turn to the two substantial differences between Dr Shah and Dr Williams. Dr Shah says that the claimant is at risk of developing severe catatonia associated with ASD*: "This is characterised by total breakdown of motivation and of carrying out willed voluntary actions."*

Dr Williams does not believe that the claimant's behaviour is indicative of catatonia. The other difference between Dr Shah and Dr Williams relates to the claimant's capacity to participate in the decision-making process. In the words of Dr Shah, the claimant is unable to make any major informed decision about the level of support he needs and about the type of establishment that would meet his needs. Once the major decisions had been taken on his behalf then, according to Dr Shah, the claimant can be involved in giving his "preference about possible dichotomous choices".

13. The claimant's mother and the claimant's solicitor have effectively prevented the defendant from communicating with the claimant on a one-to-one basis. Attempts by the defendant to consult the claimant personally have been prevented. Dr Williams takes a different view. He states that the claimant is capable of making informed choices and is increasingly exercising his choice in a more age appropriate and normative manner. In the opinion of Dr Williams, the claimant is capable of making informed decisions about his future, taking into account his wishes and preferences. Given the position taken by the claimant's mother and by the claimant's solicitor, the Trust did not have the benefit of the claimant's own personal views about his future.

14. There is also agreement that staff must be trained and fully aware how best to meet the needs of people with Asperger's Syndrome in order to help the claimant lead as full a life as possible. The claimant's mother has confidence that that will be done by Spectrum at Goonhavern, but does not have the confidence that it would be done at Chy-an-Ross.

15. I now turn to the various reports and reviews to which I have been referred. On 12th January 1999 Mr Forsey reviewed the position. Mr Forsey is a Community Psychiatric Nurse employed by the defendant and who has had significant responsibility for the claimant over the last few years. He wrote, on that date, that it was agreed that the claimant needs his level of care and input maintained and not reduced. Sometime later he wrote that the claimant was *"functioning at his optimum level and that to reduce the level of input would be detrimental and also increase the level of risk to his welfare."* On 9th April Mr Forsey again wrote that he thought the level of care could not be reduced. A few months later he was noting no significant changes and stating that Jorge had reached his "optimum potential" and was incapable of more independent living. Mr Forsey recommended no change in the present care package. He wrote: *"It is now quite clear that Jorge requires much more input than was envisaged, Jorge's independent functioning is at its optimum, any changes in provision would be detrimental to his functioning and well-being."*

In January 2000 he wrote that Jorge was at his optimum functioning level, and a few months later he wrote that the ability to increase the claimant's living independently is remote.

16. On 12th November 2001 Spectrum prepared a report on the claimant. The report refers to medication which was being given to the claimant both for depression and to help anxiety. The report goes on: *"Since taking his medication staff have seen a remarkable improvement in Jorge and have started to see sides to Jorge that they had never seen before."*

The report said that Hillside was very isolated and that it would be more beneficial for the claimant to be in a more centrally located house, closer to town, beach et cetera. Having set out Jorge's condition, the report went on to say that the claimant needs a safe and structured environment that is supportive and that protects him from possible exploitation and abuse. He has a high level of vulnerability due to the risk of self-harm by neglect and due to ritualistic and obsessive behaviour and low motivation. According to the author of the report, the claimant needs a property that meets the specified criteria under the Registered Homes Act 1984. Having set out what was thought to be needed to develop "independent living skills", the author in the conclusion wrote: *"... it is now thought more appropriate to move Jorge into a residential service which will allow him to be appropriately supported at times exceeding the 55 hours he currently receives."*

The report reads on: *"Within a structured and fully supported environment Jorge would benefit from receiving consistently high level of staff support and supervision enabling him to enjoy a wider range of appropriate activities and opportunities and with a significant reduction in risk. In this type of service, he would be positively supported to enable him to lead a fulfilled life and to meet some of his personal aim/objectives."*

The author then states that Spectrum was prepared to offer *"an individually tailored residential service in Cornwall."*

17. Spectrum's proposals were put before the Trust's residential panel in November 2001. The panel is not the decision-maker (contrary to what was said in a letter written by the defendant's solicitors to the claimant's solicitor). It makes a recommendation to the Trust. It is clear from the papers that the panel's primary task is to determine the kind of accommodation that is required, whether residential, supported living or other. It does not make recommendations about the necessary levels of support or the precise accommodation, albeit of course the necessary level of support has to be taken into account in deciding what kind of accommodation is appropriate.

18. The panel members said that they knew of other service users with equivalent or more extensive needs who were living successfully in supported housing in the community and felt that a move to residential care might not be justified in the claimant's case. It recommended the Trust to carry out its own assessment and explore local options. Following that panel meeting, Spectrum served notice to terminate the claimant's place at Hillside. Following an assessment of the claimant's needs by Mr Forsey and Miss Pat O'Connell, the panel met again in February 2002. Mr Forsey explained that it was felt that the claimant's needs could be met within a supported housing environment. The panel agreed, and considered that supported housing would be the best way of meeting the claimant's long-term needs. In February 2002 an independent advocate from Mencap visited the claimant and reported her view that Spectrum was not "*enabling*" the claimant but "*doing for him*."

19. By the time of the panel meeting in February 2002, the claimant's mother had instructed a solicitor and judicial review proceedings were being threatened. Rather than take a final decision, the Trust decided to seek an independent assessment of the claimant's needs and instructed Dr Williams, a Consultant Clinical Psychologist, recommended by the National Autistic Society. I turn to the report prepared by Dr Williams, part of which I have already referred to in setting out the evidence relating to catatonia and the claimant's ability to make decisions.

20. In his letter of instruction Dr Williams was asked for an independent assessment of:
"(1) Mr Bannister's capacity to participate in the decision making process
(2) his current strengths and deficits
(3) his needs for specialised therapy
(4) the degree of support required regarding accommodation and activities of daily living, and

(5) what risk factors can be identified and how should they be addressed."

21. Dr Williams was told that Spectrum were recommending a residential placement, but that in the view of the defendant's staff arrangements should be made to maintain an independent lifestyle but with support and with greater ability for local community involvement.

22. Dr Williams prepared a final report dated 8th September 2002.

23. At the time Dr Williams prepared the report, the Trust had in mind a move to Taunton. That was subsequently abandoned when the claimant made it clear he did not want to move out of Cornwall. Dr Williams identified the specific risks of being vulnerable to exploitation, being not reliable in adhering to his prescribed medication and incompleteness in his personal and domestic competence. In paragraph 26 Dr Williams wrote that vulnerability or overspending is not a risk unique to the claimant or to individuals with Asperger's Syndrome, but that the risk can be minimised by regular review of the claimant. As to medication, he wrote: *"Medication adherence can be established by developing regular habits of morning and evening taking of his tablets with monitoring by support staff working on the day rota and should be manageable within a supported living situation. As Mr Bannister is currently showing improvement associated with his new medication regime, it is important that this is attended to in his continuing care plan."*

24. As to the incident involving leaving a pan on the floor, the doctor noticed that it was a single incident and that no significant damage had in fact occurred. He attached no particular importance to the occasion when the claimant was still undressed when support staff arrived.

25. In paragraph 27 he set out the requirements for any future placement for the claimant, including staff training, giving Mr Bannister the right to make decisions and, with robust arrangements, to maintain prescribed medication. There should also be "access to integrated mainstream community resources". Dr Williams went on: *"[He] should have supported living accommodation with 24 hour staff availability - initially 8 hours day cover with 16 hours on-call cover - this should be kept under periodic review in discussion with Mr Bannister in the light of his changing needs and developing independence."*

This of course was being written at a time before Redruth had been identified and, as I have said, the defendant is going to provide substantially more cover than that suggested by Dr Williams.

26. Also in paragraph 27 Dr Williams said that the accommodation should be shared with, at the most, three other residents. Redruth has six residents. Although this is relied upon by those representing the claimant, a decision to place the claimant at Chy-an-Ross, with six people in the building rather than three, is not irrational, in my view.

27. An attached report dealt with the claimant's "independent skill repertoire" in 16 domains. High figures were achieved by the claimant in many of the ordinary areas of day-to-day life. As far as communication is concerned, he was given a score of 100 per cent, and in co-operation, 90 per cent. Social relationships, independent domestic skills, daytime activity and cooking skills received a score of 40 per cent or less. Educational skills received a score of 92 per cent, and for the use of equipment, such as vacuum cleaners, he achieved a score of 60 per cent. The lowest score was for the use of public amenities, namely 13 per cent.

28. On 10th September 2002 the panel met to consider the level of support necessary to meet the claimant's current and future needs so that he could be moved from Hillside. Mrs Bannister was there, as also a solicitor acting for the claimant and two solicitors acting for the defendant. Mr Bannister had been invited to attend the meeting but through his legal representative had declined to do so. The panel agreed with Mrs Bannister that the claimant's needs would best be met living closer to community facilities and with people of similar needs to himself. The panel agreed that the staff should have experience or training in supporting individuals with Aspergers and that Mr Bannister should have access to 24-hour support. The report continues as follows: *"However, the panel was unanimous in agreeing that Mr Bannister's needs would best be met in a supported housing environment rather than a residential care setting. The panel's reasons were as follows:-*

"1. Mr Bannister would have the option to build on the skills he has learned in a safe supported environment.

2. A flexible package of support could be provided, which could be increased or decreased, as his individual needs change.

3. The risks identified by Dr Williams, Mr Forsey and Mrs Bannister could be managed in a supported housing environment.

4. Mr Bannister does not have personal care needs that require residential accommodation.

5. Supported housing can provide 24 hour on call support if required.

6. The panel recommended that the options for supported accommodation can be explored."

29. On 6th September Mr Forsey produced a note which set out the various options, their advantages and disadvantages. That reads as follows:

"***Conclusions from Needs Assessment***

Options for Care

1. To stay at the current accommodation, Hillside,

Advantages:

o Jorge remains in Cornwall

o Continues to live in known surroundings and known care team

o Independence maintained

o Jorge likes living, to a degree, where he is

Disadvantages:

o Spectrum (supplies) feel risks not adequately covered

o Isolation and aloneness

o Lack of social stimulation

o No local amenities

2. Move to a more supervised setting (Residential Care)

Advantages:

o Risks Spectrum feel covered

o Staff constantly available though not awake at night

o In a group living - peer support situation

Disadvantages:

o Remove independence

o Minimise personal space

o Reduces need to be self-responsible

o Not a forward move to independence

o Does not teach self-reliance

o Little opportunity to develop living skills/life skills

o Does not automatically eliminate risks

o <u>All</u> decisions made with someone

o Fosters dependence

3. Move to Supported Living

Advantages:

o Enhances living skills

o Maximises potential

o Integrates into local community

o Access to all primary care facilities

o Risks could be covered while taking some

o Access to all 'normal' facilities

o No opportunity to engender dependence

o Progressive with 'move-on' opportunities if appropriate

Disadvantages:

o Not staffed 24 hours a day - Dr Williams' report says not necessary

o Limited opportunities to find appropriate setting."

As to both of these disadvantages of supported living, there will be a member of staff on duty 24 hours a day at Chy-an-Ross, and the Trust believes that Redruth, found after this note was prepared, is an appropriate setting.

30. On 27th September 2002 the defendant wrote to the claimant telling him that the panel felt that he should not move into a residential setting but should be offered support in his own flat or house. The letter then set out the reasons of the panel. The claimant was told that Tim Forsey and another member of the staff would look at options for supported living both in Cornwall and Somerset.

31. On 11th November 2002 the solicitors for the claimant expressed their view that the panel's decision was fundamentally flawed and told the defendant that a report from Dr Shah should be available soon. In fact, it became available in mid-January. On the same day, by another letter, the claimant's solicitor expressed the view to the defendant that it was a complete waste of the claimant's time to view the property.

32. In December the defendant told the claimant that it had been decided to offer him a place at Chy-an-Ross.

33. On 14 January 2002 Dr Shah's report was forwarded to the Trust. I have already set out portions from the report or summarised it. I now turn to Dr Shah's recommendations. In paragraph 4.8 Dr Shah wrote that the claimant *"needs to be in a 24 hour staffed residential setting with a small group of other clients with compatible needs."* Dr Shah wrote that the claimant needs external prompting and support from staff and that this would be easier to provide more effectively and continuously in a house which is staffed 24 hours. *"If staff are on-site, they can give verbal prompts to Jorge to encourage independence without having to provide constant 1:1 support."* Dr Shah wrote: *"Jorge needs to be within a residential service which is specifically for people with autistic spectrum disorders. He needs to be in a service where staff are trained and experienced in working with people with autistic spectrum disorders."*

The report then set out various reasons why it was necessary for Jorge to be in residential accommodation. In paragraph j of 4.8, Dr Shah made a point, stressed during the hearing and agreed by both parties, that it is important to avoid insecurity.

34. On 16th January solicitors for the claimant wrote to the defendant stating that the claimant or his representatives should be given every opportunity to address the reconvened panel and *"in particular with regard to the perceived inadequacies of Dr Williams' report."* A reference was made in that letter and earlier letters to the issue of a complaint and appeal process and there was also a suggestion that there should be ADR. A document produced by the defendant and referring to complaints was sent to the claimant's solicitor on 23rd January 2003. It states that if a person is not satisfied with a manner in which a complaint has been handled, then "*you have the right to ask for an independent review."*

35. On 18th January judicial review proceedings were issued, the challenged decision being that said to be contained in a letter dated 3rd January 2003 in which the Trust had confirmed that a move to Redruth was proposed for 20th January 2003.

36. On 21st January 2003 the defendant sent to the Chairman of the residential panel a copy of Dr Shah's report and also a copy of Dr Williams' response to that report. The defendant asked the panel to "reconsider your original panel decision in the light of these reports, taking into account factors identified in the enclosed briefing note prepared by" the Trust solicitors. In the briefing note the solicitors summarised briefly Dr Shah's report and her view that the claimant needed to be in a 24-hour staffed residential setting with a small group of other clients with similar needs. The panel was told that Dr Williams did not believe that the claimant's behaviour was indicative of catatonia.

37. In paragraph 6 the briefing note reads: *"Spectrum has emphasised that Jorge would be at risk if he was on his own for significant periods of the day. This may be a significant factor, distinguishing residential care from supported living, and the Panel should consider the extent to which this risk is relevant and how it may be managed and the Trust will be providing individual support."*

38. In a memorandum dated 4th February Sherrie Hitchin, the Service Manager, sent comments to the panel. She said it was hard to disagree with the needs of Mr Bannister as described by Dr Shah. She

agrees with various other points taken by Dr Shah. The note continues: *"The question of where best Mr Bannister's needs can be met hinges on whether his needs are of a personal care nature requiring hands-on personal care as provided in a residential care or prompting, supervision and encouraging and monitoring as provided in a supported housing environment.*

From the description of Mr Bannister's needs it does not appear that he requires hands-on physical care for his personal needs which could only be provided in residential care. However, my personal experience of people in residential facilities catering for people with Aspergers Syndrome is that few do require this. What has generally prompted a placement in this type of resource is the need for 24-hour care/support due to risk factors indicating high risk to self or others.

Certainly Mr Bannister does not appear to me to fit the criteria strictly defined for residential care since the emergence of 'supporting people'. I do however agree with all of Dr Williams' list of needs and believe that any future placement should be sought which can provide a high level of daily support to Mr Bannister from staff with knowledge and expertise of Aspergers Syndrome and where he is living with other adults of a similar intellectual ability."

The note then refers to the support that would be needed and the need for a review, particularly if he were to become catatonic. In her last paragraph she wrote: *"I still feel he does not require residential care, but (and I know this is not for the panel to have a view on) I have a sense it is going to be hard to find a placement for him with all the other requirements, under supported accommodation."*

39. On 27th January solicitors for the claimant again asked for a chance to put their case to the panel. On 5th February 2003 Brenda McAuley wrote to the Chair of the review panel*: "... the key to Mr Bannister's placement is the issue of prompting and supporting, versus hands-on care. It would appear that Mr Bannister responds well to prompts, support and monitoring and I am unsure if residential placement may in fact prevent him from continuing to have the degree of independence which he enjoys at present.*

I therefore feel that any placement for Mr Bannister should enable him to enjoy independence while providing encouragement, support and monitoring. "

She ended by saying that if these things could be met under supported accommodation, then she felt that this would be beneficial.

40. On 5th February the panel met. The claimant's solicitors were not invited to attend. In the second paragraph of the report of the meeting, the panel said that they had carefully read Dr Shah's report and all agreed that Mr Bannister does not meet the criteria for residential care and that his needs could be best met in an appropriate supporting people establishment.

41. Criticism is made of that paragraph by Miss Carrington. It is submitted that the panel misunderstood the criteria for residential care and concentrated on the physical condition rather than also the mental condition. In my judgment this criticism is misplaced. What is said there fits in with the view of Sherrie Hitchin that the claimant's personal care needs were not such as to require residential care. What is clear from the reasoning of the panel is that whilst not excluding residential care, they reached the conclusion that the claimant's requirements *"could be provided in a supported people environment"*. It is further said that a reference to the Spectrum property misdescribed the property. That does not seem to me to take the case any further. In the last but one paragraph, the panel wrote: *"We are unaware of the range of supporting people accommodation in Cornwall. However, we all have knowledge of the range of supporting people accommodation in Somerset. There are two units which offer 24 hour support with 35 1:1 support for each tenant, either of these with appropriate training for staff, with input from Somerset Partnership Community staff could meet Mr Bannister's needs on the information that we have been provided."*

As to the issue of catatonia, the panel referred in its letter to a point made by Mark Addison, a Counselling Psychologist. In a note dated 30th January, commenting on Dr Shah's assessment, Mr Addison pointed out that 24 hour on-site cover is not exclusive to residential care and can be provided through supported living. He questions Dr Shah's understanding of the supported living model. In paragraph 4 he wrote: *"Dr Shah has suggested that Mr Bannister's 'breakdown behaviour' may be indicative that he is at risk of developing catatonia. Dr Williams does not support this view. In view of the fact that Dr*

Shah has produced one of the key research papers on catatonia in Autistic Spectrum Disorders ... she may be best qualified to make this prediction in the absence of a generally accepted standardised diagnostic criteria.

Regardless of whether Mr Bannister's breakdown is indicative of catatonia or not, there is no known cause (or cure) for the condition, and presumably it could manifest itself in either supported living or residential setting.

Dr Shah proposes that a structured programme of daily activities ... will reduce the risk of catatonia. Once again, there is no reason why a structured programme could not be incorporated within a supported living package."

Dr Williams took a similar view.

42. It was against this background that the defendant made the challenged decision on 28th March 2003.

43. In May 2003 the defendant produced a transitional care plan to enable the claimant, in its view, to transfer successfully from living at Hillside to Chy-an-Ross.

44. In June 2003 the application for judicial review was amended to challenge 28th March decision *"that the claimant did not require residential accommodation and/or that such accommodation was not suitable for him."* The amended claim form attacked the fairness of the proceedings, relying on the failure to allow the claimant to be represented at the meeting of the panel in February. The form complained that the panel's decision was flawed because it misunderstood the nature of the residential care proposed by Spectrum and had not sought clarification. The application of criteria for residential care was flawed in that it implied an unduly restricted reproach to such care and/or because it failed to have regard to Jorge's need for medication. The defendant failed to cost the support at Redruth, and neither the panel nor the defendant had regard to the fact that it was likely that Spectrum could arrange continuity of care and thereby minimising the need for change. It was also submitted that the premises were inherently unsuitable as they contained six persons not four. A complaint was also made about the alleged failure to activate the complaints procedure.

45. During the course of the hearing I asked Miss Carrington if it was her case that the only rational decision that a decision-maker could reach was that the claimant had to have residential accommodation at Spectrum. She said that it was not the claimant's case that the defendant had to choose Spectrum. She also said that it was not the claimant's case that the only rational provision was to place the claimant in residential care, although Miss Carrington was not entirely consistent in her approach to this matter. It is submitted, however, that it was irrational to choose supported living accommodation unless all the necessary safeguards referred to by Dr Shah were in place. She particularly challenged the defendant's "decision" to provide no less than 28 hours one-to-one support. She submitted that there was no evidence which would justify the reduction from the current 55 hours to a figure of not less than 28 hours. She placed particular weight on the reports prior to the Spectrum report and that report, the effect of which was that the claimant needed no less care than then being provided and that he had reached his optimum level. She submitted that the panel and the defendant had allowed themselves to be diverted from the issue as to the amount of support to be required to the issue of whether or not the support should be provided in residential accommodation or supported living accommodation.

46. Miss Richards pointed to the references in the reports to an improvement with medication and support, and submitted that the Trust was entitled to take the view that the earlier reports, prior to the Spectrum report, were unduly pessimistic (my words not hers).

47. Miss Carrington also submitted that there was at the least a doubt whether housing benefit would be available if substantial support was given, that the Trust should have considered this point which, if valid, would have undermined their financial model. Miss Richards pointed out, and I agree, that housing benefit is often given when there is significant support, and it seems inconceivable that housing benefit would not be payable. Indeed the claimant is now receiving housing benefit whilst at Hillside. There is no merit in this point in my view.

48. I have no doubt at all that the defendant's decision that the claimant's needs could be met in supported living accommodation with, amongst other things, "a significant amount of support" cannot be described as irrational. I find no merit in Miss Carrington's attack during the course of the

hearing on the concentration on the issue between residential accommodation and supported living. The dispute between the claimant's mother and the Trust had related primarily to whether the claimant should be provided with residential accommodation with Spectrum or, as the Trust wanted, supported living accommodation. The Trust was entitled to prefer the evidence of Dr Williams over Dr Shah about catatonia. In any event, the Trust was entitled to conclude that the kind of structured programme necessary to reduce or identify catatonia could be incorporated within a supported living package, the point made by Mr Addison.

49. During the hearing the defendant, through counsel, in effect amplified what was meant by a significant amount of support. It stated that the claimant would receive no less than 28 hours one-to-one support for the foreseeable future (a figure described as generous by Dr Williams). The irrationality challenge was then concentrated on the issue of the number of hours. Miss Carrington submitted that there was no evidence to support any reduction from 55 hours, and relied on the evidence of Dr Shah and the views expressed for example by Mr Forsey in 1999 and 2000, and in the Spectrum Report of November 2001, to which I have referred. After a compromise offered by the defendant had been refused, the claimant sought an adjournment to enable further evidence to be obtained to challenge the 28 hour figure. On 23rd May the claimant's solicitor had asked for a copy of the most recent care plan and any other documentation "showing how it is intended to make the provisions suggested, including the 24 hour cover, the high-level of structured activity (suggested to be akin to 35 hours one-to-one support)..." The reference to 35 hours is a reference to what was contained in the panel's report following its meeting of 5th February 2003. I refused the application for an adjournment and gave reasons for that refusal. Having regard to what I am satisfied is the rational decision to provide the claimant with the independence afforded by supported living accommodation, in my judgment a choice of a figure of not less than 28 hours a week for the foreseeable future, with a possible review upwards, if experience shows that more is required, is rational bearing in mind the existence of 24 hours support, something which the claimant has not enjoyed since his move five years ago to Hillside.

50. At the heart of this case is the Trust's belief that the kind of independence which the claimant will enjoy at Redruth is in his best interest. It would be impossible in my view to categorise that belief as irrational. The Trust was quite entitled to choose supported living over residential accommodation, with all that that entailed. The attack on the irrationality of the decision fails.

51. I turn briefly to two procedural points, and a point made in reliance upon Article 8. All that the panel was doing at its February meeting was considering Dr Shah's report against the background of the earlier recommendation and decision. It seems to me that fairness did not require the Trust to permit representation at that panel hearing. Having now considered this matter for more than a day, I have no doubt that, in any event, the panel would have reached the same conclusion.

52. As to the allegation about the failure to evoke the complaints procedure, the Trust took the view that the complaints procedure was not likely to be an effective mechanism for the resolution of this dispute. I agree. On 3rd July the claimant's solicitor did make a formal complaint, and on 10th July, when asked for the details, the defendant's solicitor responded by reference to the papers in the judicial review application. In my view the Trust was entitled to reach the conclusion that given that the grounds of complaint are identical to the grounds of challenge in these proceedings, it is entitled to defer consideration of the complaint pending the outcome of these proceedings. Furthermore, it is difficult to see how the investigation of the complaints could be other than an investigation into procedures. No officer investigating the complaint could substitute his decision for that of the Trust, and indeed this court probably has greater powers than any such officer would have.

53. Although Miss Carrington relied on Article 8, it seems to me that it adds nothing to the facts of this case. The claimant has to leave Hillside and new accommodation has to be provided. Whilst it is true that there may be more continuity of care at Spectrum than at Redruth, and although it is of course possible that the supported living accommodation may turn out to be unsuitable, that does not render the claim of the Trust either irrational or in breach of Article 8.

54. Mention has been made of the desirability of ADR in this kind of case. From what I have seen about the history of this case, and from what I have observed during the course of this hearing, in my judgment ADR could not have resolved the fundamental difficulties between the parties.

55. In my judgment, this application for judicial review fails.

56. **MISS RICHARDS**: My Lord, I simply ask for an order dismissing the application for judicial review and an order that the claimant pay the defendant's costs, but in the usual form for a claimant in receipt of CSL funding?

57. **MR JUSTICE HOOPER**: Yes. Do you object to either of those, Miss Carrington?

58. **MISS CARRINGTON**: Well, my Lord, the order dismissing the application is entirely appropriate and that is the order that should be made. I obviously have an application for permission to appeal. This is a man who is----

59. **MR JUSTICE HOOPER**: Do you object to the second part of the application?

60. **MISS CARRINGTON**: My Lord, I do object to the second part of application. It is my case that the Trust has had to be forced to carry out procedural steps, which your Lordship has outlined in his judgment, at each and every stage. In those circumstances, although you have dismissed the application, my submission is that there should certainly not be an order that the costs of the Trust be paid by the claimant. In fact, in my submission, it should be the other way round, but I leave it at that.

61. So far as the case is concerned, I do make an application for permission to appeal. I have to apply to your Lordship. The welfare of the claimant is at stake here. I am not going to rehearse the issues surrounding the notification on 9th August of 28 hours as being the appropriate level of care, but if I could ask your Lordship to note, for the sake of shortness, that those are incorporated in my application for permission.

62. In addition, I apply on the basis that there is a real prospect of success, although your Lordship's point of view is that we obviously have the complaints procedure and the fact there was no need for the claimant's to be represented or heard at the hearing of the panel on 5th February. Nonetheless, I say, based on **Cowel and Murray**(?), ***[Cowl v Plymouth]*** *sic* and based on procedural fairness, that there is a point of law there which bears a real prospect of success. My Lord, those are my applications.

62. **MR JUSTICE HOOPER**: Thank you very much. No, I refuse permission to appeal and I make the order for costs that the defendant seeks. Thank you very much.

MISS G CARRINGTON (instructed by Follett Stock Sols, Truro, Cornwall TR1 1QH) appeared on behalf of the CLAIMANT
MISS J RICHARDS (instructed by Bevan Ashford, 35 Colston Ave, Bristol BS1 4TT) appeared on behalf of the DEFENDANT