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Introduction

Sian Davies and Katherine Barnes

Spring is well and truly in the air, and what better way to mark it than by digging into the Spring 2021 edition of 39 Essex Chambers' Newsletter.

This edition features Richard Harwood QC on the future of remote hearings for local authorities, John Pugh-Smith and Daniel Kozelko on the thorny issue of the public sector equality duty in relation to planning and environment decisions and Arianna Kelly on the implications of *R (SH) v Norfolk County Council [2020] EWHC 3436* (Admin), in which a local authority's charging policy was found to be contrary to Article 14 of the ECHR.

Arianna joined chambers in March 2021, along with Francesca Gardner and Eliza Sharron from Kings Chambers. We are delighted to welcome this talented trio to our public law group.

Enjoy the sunshine and the blossom, and we look forward to seeing (some of you at least) back in chambers soon.

Sian Davies and Katherine Barnes – Editors of the Local Government Newsletter.

From virtual to hybrid? The future of Council meetings

Richard Harwood QC

For years councillors have met in public, in buildings in or close to the council area, making the important decisions for their locality. The Covid pandemic brought an immediate threat to this process. The 'stay at home' mantra in what has subsequently become known as 'Lockdown 1' was particularly fierce, and fiercely complied with. Even where they needed personnel in buildings, businesses and other organisations were trying to adopt quickly to Covid-secure procedures.

The central and local government response was commendably swift.

Section 78 of the Coronavirus Act 2020 allowed the relevant national authority to make regulations providing for virtual meetings in local authorities, including the Greater London Authority, district, county and unitary councils, parish councils, national park authorities, conservation boards and school admissions appeal panels. The Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020 ("the 2020 Regulations") were made, coming into force on 4th April, only 12 days after the first lockdown had been announced.[1] Those authorised meetings to be held without all participants being in the same place, allowing remote access by video or audio means. Not only could councillors join in remotely, but the regulations allowed public speaking arrangements to be continued. It was an essential part of such meetings that the public were allowed to watch or listen to the proceedings remotely by a live feed. These procedures were very quickly adopted by local authorities and proved a great success. They avoided the severe democratic deficiencies which would have been associated with a wholesale transfer of decision making to officers or single executive members. But they also brought local decision-making to a far wider audience. Some local authorities had previously webcast meetings, but even so tended only to cover those in the council chamber, such as full council and sometimes planning committees. From April 2021 all council decision making and scrutiny meetings were not only broadcast live but usually put on local authority YouTube channels.

The Coronavirus Act allowed the virtual meetings regulations to apply only to meetings held before 7th May 2021. In March 2020 that seemed a safe distance away. Time however marches on, and measures against the pandemic are still not concluded. What then for virtual meetings?

On 25th March 2021 the Local Government Minister, Luke Hall MP, wrote to local authorities saying that the current provisions would not be extended. As lockdown 3 unwound, the Minister encouraged councils to continue broadcasting. He launched a consultation into what should happen next.

Many local government bodies were not happy. Several had been asking the government for months to extend the virtual meeting powers. The Local Government Association said the decision was 'extremely disappointing'. The professional bodies for council lawyers and committee administrators, Lawyers in Local Government, the Association of Democratic Services Officers had with Hertfordshire County Council made an application to the High Court for a declaration that councils already had the powers needed to hold online meetings.

Face to face council meetings can lawfully be held from 7th May. The new Health Protection

1 See *Virtual Local Authority Meetings* (Richard Harwood, 3rd April 2020) for a discussion of these provisions.

(Coronavirus, Restrictions) (Steps) (England) Regulations 2021 do not prohibit meetings indoors which are reasonably necessary for work or voluntary services, so council meetings can be held, with public attendance (see schedule 1, Part 1, exception 3 of the regulations). Indeed, essential meetings could always have been held.[2] The social distancing expected for Covid-secure meetings would though usually mean that full council meetings (so with all members) could not take place in the council chamber. Rooms normally used by parish councils might also be too small. New venues would have to be sought. Council meetings may therefore take place, and move towards normality. May 7th will not be the day the world stood still.

The approach to take, as the country comes out of lockdown, and into the future, is bound to be nuanced and subject to a range of opinion.

More than most organisations, local authorities benefit from face to face meetings with councillors and officers. Councils are unusual creatures. Senior decision making is put in the hands of elected members who are meant to be using their spare time, although leaders and some senior executive members may in reality be part or virtually full time. In the normal way of things, councillors are not in the council offices all the time or indeed meeting their fellow members. Relations between councillors and officers need to be developed and continued. The ability to have informal chats with officers and members at the fringes of meetings is vital to make authorities run effectively. Information which would not other be told, will be passed on. Other problems can be sorted out without fuss. Councillors will find they have more in common with the opposition than they might expect, often with a similar view of management issues and the demands of constituents.

Unlike most businesses and central government, councils are not organisations where the key people are working closely together on a day-to-day basis, nor are they a team assembled for a specific project, which will disband once it is completed. Instead councillors are brought together mainly for decision making. Politics is part of local government and political debates can be fierce. But it is better that they are conducted by people who help each other to the milk during tea breaks, than by keyboard warriors who see each other only through screens.

May 6th will see a Super Thursday of the elections which were due in 2021 and those delayed from 2020. There will be an influx of new councillors and continuing councillors are likely not to have seen each other face to face for over a year. Good governance really does require councillors to start meeting together and with officers face to face.

How then to take forward the benefits of virtual meetings whilst promoting local cohesion? Simply rolling forward the current provisions has the potential to embed a remote culture which is destructive of good local government. However there have been very real benefits from allowing virtual participation and observation.

One possibility is to allow hybrid meetings in which some councillors may attend remotely, provided that a certain proportion are physically present. This could accommodate councillors whose work, family or childcare arrangements might prevent them attending particular meetings in person, and may be more efficient for some of the longer unitary counties, such as Cornwall. It would though be a matter of management, particularly political management, to avoid individual councillors becoming semi-detached.

The law has never prevented speakers who are not members of the particular body from taking part remotely. So, for example, a councillor could speak at a cabinet meeting on a ward matter through a video link. Physical attendance would solely be concerned with the members of the cabinet themselves. Similarly, officers could attend remotely, which might be useful for an officer

2 See, for example, Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, reg 7(b).

with only a minor role on a single item. Where public speaking is allowed, that could also be done through a remote link, although speakers would usually prefer to be there in person.

Finally broadcast and subsequent playback of all meetings, whether in person or hybrid could be required. This will embed the greater public access and knowledge of local democracy which the last 12 months enforced experiment has brought.

Local government must not be remote from the people it serves. To do that it must not be remote from itself.

Equalities Impact Assessments for planning and environmental practitioners, and the pitfalls of not undertaking them conscientiously

John Pugh-Smith and Daniel Kozelko

Introduction

Insufficient Equalities Impact Assessments ("EqIAs"), as a stone that can fell a giant, are currently in the news. On 20 January 2021, in the case of *R (United Trade Action Group Ltd & Ors v Transport for London & Mayor of London* [2021] EWHC 72 (Admin) ("the *UTAG* case") the High Court upheld judicial review challenges brought by the London taxi trade against Transport for London's (TfL's) *Streetspace* Plan, its Guidance and a specific scheme on Bishopsgate (A10). Whilst TfL has stated that it will appeal, the judgment of Mrs Justice Lang is essential reading; for it highlights the fundamental problems that arise when proposals, not just street schemes, embrace issues that engage the requirements of Section 149 of the Equalities Act 2010 and the Public Sector Equality Duty ("PSED"). The *UTAG* case follows another recent High Court judgment in *R(Fraser) v Shropshire Council* [2021] EWHC 31 (Admin) on the same subject- matter though with a happier outcome. This article looks at the issue of EqIAs in the planning context, as well as both cases, and seeks to make some suggestions as to the resulting legal pitfalls can, hopefully, be prevented.

The PSED obligation

Local authorities are under a duty not to discriminate, as both service providers and exercisers of public function for purposes of the Equality Act 2010.[3] Disability discrimination, arises if, say, a disabled person is treated unfavourably because of something arising from their disability (irrespective of whether the treatment is because of particular prejudice towards the disabled). Indirect discrimination occurs when a neutral policy or practice puts people with a protected characteristic at a particular disadvantage compared to those who do not have it. As with disability discrimination but unlike direct discrimination, indirect discrimination is susceptible to a proportionality justification.

In addition to this substantive duty not to discriminate in the exercise of its functions, local authorities are subject to the public sector equality duty ("PSED"),[4] which imposes a procedural requirement when the authority exercises its functions, including those pertaining to meetings, to have due regard to three aims (or arms), namely, the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the 2010 Act.
- Advance equality of opportunity between people who share a protected characteristic and those who do not.
- Foster good relations between people who share a protected characteristic and those who do not, including tackling prejudice and promoting understanding.[5]

3 S.29(1) and (6) Equality Act 2010.
4 The general equality duty is set out in s.149 of the 2010 Act.
5 S.149(1) Equality Act 2010.

The 2010 Act explains that 'having due regard for advancing equality' involves:

- Removing or minimising disadvantages suffered by people due to their protected characteristics.
- Taking steps to meet the needs of people from protected groups where these are different from the needs of other people, including steps to take account of disabled persons' disabilities.
- Encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low.[6]

The Act also states that meeting different needs involves taking steps to take account of disabled people's disabilities. It describes fostering good relations as tackling prejudice and promoting understanding between people from different groups. It states that compliance with the duty may involve treating some people more favourably than others.[7]

Accordingly, Section 149 requires a local authority to have due regard to the need to, inter alia, eliminate discrimination and advance equality of opportunity between persons who share a protected characteristic and persons who do not share it. Section 149(3) provides specificity to advancing equality of opportunity, including minimising disadvantage suffered by that person, and encouraging them to participate in public life. In *R (Law Centres Federation Limited t/a Law Centres Network) v Lord Chancellor* [2018] EWHC 1588 (Admin), Mrs Justice Andrews considered the requirements of s.149 as follows:[8]

> *The duty is personal to the decision maker, who must consciously direct his or her mind to the obligations; the exercise is a matter of substance which must be undertaken with rigour, so that there is a proper and conscious focus on the statutory criteria and proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them. Whilst there is no obligation to carry out an EIA, if such an assessment is not carried out it may be more difficult to demonstrate compliance with the duty. On the other hand, the mere fact that an EIA has been carried out will not necessarily suffice to demonstrate compliance.*

As to the proper approach to be taken by the court in considering compliance with the duty, this was considered by Elias LJ in *R (Hurley) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201 (Admin) at para 78:

> *The concept of "due regard" requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors.*

By way of further judicial consideration, the case of *Bracking v Secretary of State* [2013] EWCA Civ 1345[9] now sets out the relevant principles, including:

- that the duty must be fulfilled before and at the time when a particular policy is being considered;
- that it must be "exercised in substance, with rigour, and with an open mind" (it is not a question of "ticking boxes);
- that the duty is non-delegable; that it is a continuing one; and
- that it involves a duty of inquiry.

6 S.149(3) and (4) Equality Act 2010

7 See further Equality and Human Right Commission website: https://www.equalityhumanrights.com/en/corporate-reporting/public-sector-equality-duty

8 Para. 96

9 Per McCombe LJ at para.26

The *Bracking* principles were approved by Lord Neuberger in *Hotack v Southwark LBC* [2015] UKSC 30, who added:

> *"75. As was made clear in a passage quoted in Bracking, the duty "must be exercised in substance, with rigour, and with an open mind" (per Aikens LJ in R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin), [2009] PTSR 1506, para 92. And, as Elias LJ said in* ***Hurley and Moore****, it is or the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that "there has been rigorous consideration of the duty". **Provided that there has been "a proper and conscientious focus on the statutory criteria**", he said that "the court cannot interfere … simply because it would have given greater weight to the equality implications of the decision"."* [Emphasis added]

However, a necessary gloss was subsequently added by the Court of Appeal in *R (Ward) v London Borough of Hillingdon* [2019] EWCA Civ 692, that even where express reference is made to the duty that is not, of itself, sufficient to demonstrate compliance. There, a failure to discharge the duty of inquiry led to a breach of the duty.[10]

In essence, an Equalities Impact Assessment ("EqIA") is the procedural exercise by which the PSED is assessed in the particular context in which it is engaged. Governmental guidance[11] describes the EqIA as *"a systematic and evidence-based tool, which enables us to consider the likely impact of work on different groups of people."* Accordingly, such assessments need to be based on good evidence which includes listening to the views of the people who are likely to be affected.

The Previous Planning Cases

In the planning context, and, given the judicial nuances set out above, we take up the timeline with *R. (Buckley) v Bath and North East Somerset Council* [2018] EWHC 1551 (Admin) There, BANES had granted outline planning permission for the redevelopment of a housing estate comprising the demolition of up to 542 homes and the provision of up to 700 new homes, resulting in the loss of 204 affordable houses. The developer was a registered social housing provider which owned the majority of the properties proposed to be demolished. The claimant, a long-term resident of the estate, sought judicial review of the decision Lewis J held that BANES had failed to comply with its s.149 duty. The fact that the application was for outline permission and that certain reserved matters were to be considered at a later stage in the process did not prevent the duty applying; that in deciding whether to grant the outline planning permission BANES had been obliged to have due regard to the impact of the demolition of existing homes and adapted dwellings on elderly and disabled residents but it had failed to do so .

In *R. (Lakenheath Parish Council) v Suffolk County Council* [2019] EWHC 978 (Admin) Permission had been granted for 220 new homes in the village, and there had been a resolution to grant permission for a lot more. As the new housing was going to increase, substantially, the demand for school places, the County Council had granted permission for a new school with 420 places. The Parish Council had opposed the application, arguing that it was not the best site for the school as the village was next to a USAF airfield, that although the noise level inside the school would meet the relevant guidance, overflying aircraft would cause the exterior areas to suffer noise above the recommended level and teaching there would be affected. Experts had carried out noise tests at the site. The planning officer had listed seven potential alternative sites for the school and gave reasons why in each case it was not as suitable as the subject site. Although the officer's report had not mentioned the PSED in terms. HHJ Gore QC (sitting as a Deputy High Court Judge) rejected the Parish Council's contention that the County Council had failed to have regard to the impact

10 See also *R (JM) v Isle of Wight Council* [2011] EWHC 2911 (Admin), in which Lang J. held that the council had not gathered sufficient information to enable it to discharge the PSED.

11 https://www.gov.uk/government/publications/equality-impact-assessments-2011

of its decision on children with disabilities. He held that the requirements of the PSED had been fulfilled in substance, and that the officer's report had shown consideration of the need to encourage participation in education by those with protected characteristics.

Nevertheless, an important reminder was given by Mr Justice Swift in the case of *R(Williams) v Caerphilly County BC* [2019] EWHC 1618 (Admin). The judicial review proceedings concerned CCBC's sporting and leisure strategy. At para. 36 he records that the requirement to have s.149 consideration for PSED is stronger than a standard "relevant considerations" which requires "focussed consideration". At para. 37 he goes on to hold:

> *"The public sector equality duty is directed to the decision-making process. The premise of the duty is that process is important because it is capable of affecting substantive outcomes. In the present case there is nothing that gives me sufficient confidence that compliance with the public sector equality duty would be without purpose."*

Accordingly, he upheld the challenge on this ground. The subsequent appeal [2020] EWCA Civ 296) by CCBC was dismissed but for other reasons.

The UTAG case

Five grounds of challenge were brought of which Ground 2[12] dealt with the PSED aspect .In her lengthy judgment Mrs Justice Lang reminded that there is no statutory duty to undertake an EqIA, though it is generally recognised as good practice, as it encourages a structured assessment to be made. The manner in which the duty is undertaken will depend upon the particular context, and the nature of the function which is being performed.[13] Here, she held that TfL had not had proper regard for the public sector equality duty (PSED). Although an EqIA had been completed for the Bishopsgate scheme, she found that:

> *…the EqIA did not meet the required standard of a "rigorous" and "conscientious" assessment, conducted with an open mind. The mitigation entries (save for impact 13), and the implementation/explanation entries were perfunctory or non-existent and failed to grapple with the serious negative impacts and high level of residual risks which emerged from the assessment. The residual risk assessment was inconsistent and irrationally understated the risks. Most worryingly of all, the EqIA read as if its purpose was to justify the decision already taken.*[14]

For the reasons set out above, the Judge concluded that the Mayor and TfL had not have proper regard to the PSED duty in making the Plan, the Guidance and the A10 Order. Furthermore, she held that the decision of the Mayor to pursue the Streetspace programme was irrational. Given the importance of this finding as well as the topicality of the subject-matter we quote the following passages:

266. *In my judgment, the flaws identified were symptomatic of an ill-considered response which sought to take advantage of the pandemic to push through, on an emergency basis without consultation, "radical changes", "plans to transform parts of central London into one of the largest car-free zones in any capital city in the world", and to "rapidly repurpose London's streets to serve an unprecedented demand for walking and cycling in a major new strategic shift" (Mayor's statements on 6 and 15 May 2020) …*

267. *The scale and ambition of the proposals, and the manner in which they were described, strongly suggest that the Mayor and TfL intended that these schemes would become permanent, once the temporary orders expired. However, there is no evidence to suggest that there will be a permanent pandemic requiring continuation of the extreme measures introduced by the Government in 2020.*

12 *"In making the Plan and Guidance and the A10 Order, TfL and the Mayor failed to have proper regard to the public sector equality duty, pursuant to section 149 of the Equalities Act 2010 ("the 2010 Act").*

13 Para. 185

14 Para. 193

274. *In my judgment, it was both unfair and irrational to introduce such extreme measures, if it was not necessary to do so, when they impacted so adversely on certain sections of the public. The impact on the elderly and disabled who rely heavily on the door-to-door service provided by taxis is described at paragraphs 130 – 136 above. See also the adverse impacts identified in the EqIA (paragraphs 189-192 above). Taxis are a form of public transport. Travellers may wish to travel by taxi for legitimate reasons. Taxis have been valued by the NHS and vulnerable groups during the pandemic because they are safer than trains, buses and private hire vehicles …*

275. *I conclude that the decision-making processes for the Plan, Guidance and A10 Order were seriously flawed, and the decisions were not a rational response to the issues which arose as a result of the COVID-19 pandemic.*

Accordingly, the Judge concluded that quashing orders rather than declarations were appropriate because of the nature and extent of the unlawfulness which she had identified, which affects not only taxi drivers, but also their passengers. She remarked that The Plan, the Guidance and the A10 Order all need to be re-considered and substantially amended in the light of her judgment. To reduce disruption, she directed that TfL and the Mayor could turn their minds to this task now, on a provisional basis, as there would be a stay and a delay whilst they pursue their appeal. If the appeal were unsuccessful, then they could apply for further time (if required) to finalise the proposed revised Plan, Guidance and Order before the quashing orders took effect.

The Shropshire case

This provides a useful example of the way in which the PSED should be approached in the context of development management decision-making. Paula Fraser challenged the lawfulness of two separate grants of planning permission by Shropshire Council to provide extra care residential development using a property known as Pauls Moss House. While she was not opposed to the principle of redevelopment of the site to provide such specialist accommodation. she believed the scheme failed to provide adequate open space for its intended residents. Despite the relative simplicity of this concern, there were than five grounds of challenge advanced against each decision, of which Ground 4 raised direct or indirect discrimination on grounds of age or disability in respect of open space, and, Ground 5 a failure to have due regard to the PSED under the 2010 Act. Dismissing both challenges, Mr James Strachan QC, sitting as a Deputy High Court Judge remarks in relation to Ground 5 as follows:

195. *Under this ground, the Claimant submits that the Council failed to carry out its PSED and the duty is not satisfied simply by stating that the duty has been applied, as it is a duty of substance rather than form. In summary, the Claimant submits the Council did not undertake any assessment of (a) the particular needs of people with protected characteristics of age and/or disability for a specific quantity of open space; or (b) the harm that would be caused by not providing that quantity.*

196. *The Defendant and Interested Party submitted that the PSED did not apply in respect of the prospective residents of the proposed scheme because they were not being considered on account of their age or disability, but as individuals with extra care needs. They further submitted that the PSED was considered in any event.*

197. *As for Ground 4, I have reached the firm conclusion that this ground of challenge must be rejected on the facts in light of the consideration of the PSED by the Defendant evidenced by OR3 and the Additional Representation document.*

198. *I do not accept the Defendant and Interested Party's submission that the PSED was simply not engaged at all here because the Defendant was considering a scheme for extra care, and residents were being considered as individuals with extra care needs rather than on account of their age and disability. The fact, for example, that eligibility for extra care residential accommodation includes a minimum age limit itself makes this a difficult submission to pursue. But more fundamentally, the statutory terms of the PSED do not limit its*

application in the way suggested. It is a duty which (amongst other things) required the Defendant to have regard to the need to advance quality of opportunity between older/disabled people and persons who do not have those protected characteristics, to foster good relations between persons who are disabled/older and persons who do not have those protected characteristics, and to encourage persons who share a relevant protected characteristic to participate in public life.

199. *...In any event, the PSED is a general duty that applies to the Defendant when carrying out its functions. It is not a duty which directs a particular outcome, but it is a duty which needs to be performed. I therefore reject the submission that the PSED was not engaged at all in the determination of the Third Application.*

200. *On the facts, however, I am satisfied that the duty was performed and performed in the way required by in accordance with the principles derived by the Claimant from Bracking (above), even though it was incorrect to suggest that it needed to be performed only out of "an abundance of caution". In paragraph 6.4.9 of OR3 the members were directed specifically to the terms of the duty itself. As I have already said, the analysis of the quality of the open space provided in fact identified benefits that are relevant to the considerations required under the PSED, such as fostering good relations and promoting integration in public life.*

Accordingly, a pragmatic and sensible outcome resulted even if Shropshire Council's approach to the PSED aspect of justifiably open to some though not fundamental criticism.

Conclusions

From this review we would suggest that the following key lessons can be derived. First, is the inherent danger when an authority becomes "obsessed" by a specific initiative to the exclusion of the general PSED obligation or its tokenist consideration. In *Buckley* it was the problem of displacement of residents. In *UTAG* it was the obsession with COVID-19 protection measures in a way which implied that nothing else needed to be considered because COVID-19 was such an existential threat; so why would anything else matter.

Secondly, is how the determining authority approaches the scheme itself and its PSED implications. In both the *Lakenheath* and *Shopshire* cases the judges were able to make robust, common sense findings because the PSED had been practically and demonstrably embraced, in contrast with *Williams* and *UTAG*. It is not a duty which directs a particular outcome. Rather, it is a duty which needs to be seen to have been performed.

Thirdly, is the importance of ensuring that EqIAs are an integral part of scheme development, no matter how pressing implementation timescales may be. Moreover, EqIAs should be genuinely used to inform the design process based on evidence-based consideration of impacts. This requires that all design decisions taken (and the reasons and evidence behind them) are documented contemporaneously, making it clear how the needs of all modes and users have been considered and how relevant policies have been taken into account.

Finally, legal advisers should be swift to ensure that officer reports sufficiently address how the PSED has been discharged in the particular circumstances. It is not a "tick-box" exercise or discharged simply because express reference has been s made to the duty. Rather, there must be material showing that the duty of inquiry has been fulfilled.

It is to be hoped that if these lessons are learned and applied then not only will the PSED have been discharged but also the quality of the decision-making process will beyond justifiable scrutiny.

Care Act charging policies and Article 14: Are all charging policies at risk after *R(SH) v Norfolk County Council*?

Arianna Kelly

Following the December 2020 judgment in *R(SH) v Norfolk County Council & SSHC* [2020] EWHC 3436 (Admin) – in which a claimant successfully challenged a change to Norfolk's non-residential care charging policy on Article 14 grounds – every local authority in England has received a letter from the charity CASCAIDr raising *'a concern about likely contravention of an enactment and various rules of law' in relation to their Care Act charging policies. CASCAIDr suggests that 'any charging policy that takes all income over and above the MIG [Minimum Income Guarantee] as available for care charges is now very likely to be unlawful, because the Guidance advises against it, and a very good reason is required to justify departure from that Guidance.'*

This article explores the *Norfolk* judgment, and what broader implications it may have on Care Act charging policies generally.

The Norfolk judgment

Mr Justice Griffiths considered a challenge by SH (with her mother acting as her litigation friend) to changes to Norfolk County Council's Care Act charging policy. Until July 2019, Norfolk had guaranteed that it would not make charges which reduced a person's income below £189/week for all age groups. A phased reduction of this figure was introduced:

a. From 22 July 2019, it was reduced to £165/week *"for working-age people (e.g. people between 18 and 64)"*;

b. From April 2020, it was to be reduced to £151.45/week *'for everyone aged 18 to State Retirement pension age'*; this figure was later adjusted to £154.02. It has not yet been introduced, due to concerns related to the pandemic.

c. From April 2021, it was to be reduced to £132.45 for anyone aged 18-24.

Norfolk had also previously disregarded the income obtained from the PIP daily living component; it proposed to stop doing so.

SH argued that the changes to the charging policy indirectly discriminated against her as a severely disabled person, and breached her rights under the HRA, ECHR and Equality Act 2010. She did **not** challenge the Care and Support (Charging and Assessment of Resources) Regulations 2014; only the local authority's policy to implement charging locally.

SH has never had paid employment, and there appeared to be no prospect of her obtaining it in the foreseeable future. SH was on the following benefits (for a total income of £282.05/week):

a. ESA, with the enhanced disability-related premium;

b. PIP, with the enhanced rate daily living component;

c. PIP mobility component at the higher rate.

The cost of her care plan exceeded the cost of her weekly benefits.

The proposed changes would have raised SH's care charges from £16.88/week (as they stood in April 2020), to £50.53/week by April 2021. SH was to be charged the maximum amount allowed by reference to the Minimum Income Guarantee (MIG) set in Regulation 7 of the Charging Regulations.

SH argued that this change in the Norfolk's policy constituted Article 14 discrimination against her as a severely disabled person. SH was unable to obtain income from employment, and was eligible for various higher-rate benefits; as a result, the changes to the charging policy left her considerably worse-off. By contrast, those who were not receiving higher-rate benefits or whose income derived primarily from employment

(and would thus be disregarded) would be either unaffected or significantly less affected by the proposed changes. SH argued that there was no lawful justification for this differential treatment, which she argued unlawfully discriminated against those with severe disabilities.

In considering the relevant legal framework, the court noted relevant guidance on 'discretion to charge', and that local authorities have a power rather than an obligation to charge under ss.14 and 17 Care Act 2014. The court emphasised paragraph 8.46 of the statutory guidance:

> *"8.46 Local authorities should consult people with care and support needs when deciding how to exercise this discretion. In doing this, local authorities should consider how to protect a person's income.* ***The government considers that it is inconsistent with promoting independent living to assume, without further consideration, that all of a person's income above the minimum income guarantee (MIG) is available to be taken in charges.***

The court applied the four-part test in considering whether Article 14 discrimination had occurred:

a. **Ambit:** The parties agreed that this claim was within the ambit of a convention right. It fell within Article 1 of Protocol 1 and Article 8 ECHR; the claims under the Equality Act were considered to rise and fall alongside the central claim of discrimination under Article 14, and were not considered closely.

b. **Status:** The court found that being 'severely disabled' was a relevant 'other status' for the purposes of considering discrimination. Norfolk accepted that not only 'disability,' but degrees of disability, could be relevant statuses. The court found that SH's 'severe disability' prevented her from working, and led to her receiving various enhanced-rate benefits.

c. **Analogous comparator:** The court considered the case of a less severely disabled person, who was either able to work, or would be receiving a lesser benefit entitlement. *'The way the Charging Policy is constructed means that, because her needs as a severely disabled person are higher than the needs of a less severely disabled person, the assessable proportion of her income is higher than theirs. Her needs-based benefits are awarded at higher rates (daily living PIP and ESA) and are fully assessed, and their earnings from employment or self-employment are not available to her and other severely disabled people, but are not assessed.'* Norfolk argued that there was no difference in the treatment of the groups, as the charging policy applied to all of them. However, the court considered that the real question was one of disproportionate impact between those individuals who are more or less severely disabled. Norfolk further argued that SH's higher needs meant that she incurred a higher level of disability-related expenditure (DRE), which would lead to a separate disregard. The court did not accept this argument, finding that DRE was hard to prove, and in any event, there was no requirement to spend the enhanced rate benefits on items which would be recognised as DRE.

d. **Justification:** Norfolk noted the serious funding issues in relation to social care which had led to the policy change, and stated the following aims as justification for the change to the policy:
    i) To apportion the Council's resources in a fair manner.
    ii) To encourage independence.
    iii) To have a sustainable charging regime.
    iv) To follow the statutory scheme.

    Norfolk had consulted on the proposed change, and consultation responses changes had been largely negative. The policy change was accompanied by supportive measures to assist people who had some capacity for remunerated work to find it, or to claim benefits to which they may have an entitlement. Norfolk's focus was on increasing the percentage of adults with learning disabilities in paid employment, as its rates were below the national average. There was no evidence that the Council had

considered the differential impact of the policy between the most severely disabled people and those for whom work may be realistic.

Two passages set out the key findings of the court:

> *'The way the Charging Policy is constructed means that, because her needs as a severely disabled person are higher than the needs of a less severely disabled person, the assessable proportion of her income is higher than theirs. Her needs-based benefits are awarded at higher rates (daily living PIP and ESA) and are fully assessed, and their earnings from employment or self-employment are not available to her and other severely disabled people, but are not assessed.'*
>
> *'It does not appear that any conscious decision was made to take a higher proportion of the income of the severely disabled (with higher assessable benefits due to their higher needs, and no access to non-assessable earnings), than the proportion taken from the less disabled (with lower assessable benefits, and access to earnings which would not be assessed).'*

The court found that *'the differential impact of the Charging Policy on the severely disabled is manifestly without reasonable foundation. If the same level of charges overall is raised, the Council's aims of funding and encouraging independence and making its charging regime sustainable will be met to the same extent. These aims do not justify the discrimination in this case or make it proportionate…There is no relationship between the aims identified and the specific discriminatory impact in issue at all. The discrimination is not proportionate to those aims. It is not reasonably linked to them.'* The court specifically noted the statutory guidance at paragraph 8.46, and its caution against including all assessable income. The court concluded that *'No real effort has been made in argument to justify the discriminatory impact of the Charging Policy on the severely disabled (as opposed to explaining the sums sought to be raised by the Policy overall) by reference to the Council's stated aims. That impact was a perverse and unintended outcome. The differential impact is not rationally connected to any of the aims relied upon.'*

Analysis

In considering what the broader effects of the Norfolk judgment may be to the charging policies of other local authorities, it is important to emphasise a few key points:

1) The Care Act charging framework (by way of statute, regulations and statutory guidance) defines the scope of local authority discretion to charge. Most benefits are 'assessable' income, and certain benefits and all income from employment is 'disregarded' income. A local authority has no discretion to make charges against disregarded income and the statutory disregards are beyond the reach of local authority policy. A local authority's only discretion is to offer further disregards of assessable income.

2) The broader context of the Minimum Income Guarantee (MIG) is also important. The purpose of the MIG, as set out in Annex C of the Statutory Guidance, is to:

a) *'ensure that a person's income is not reduced below a specified level after charges have been deducted.'*

b) To have a *'greater consistency between the charging framework* ***and established income protections under the income support rules.*** *We will keep this under review and seek to update the charging framework in line with the roll-out of Personal Independence Payments and updating/repeal of the income support rules.'*

c) *to promote independence and social inclusion and ensure that they have sufficient funds to meet basic needs such as purchasing food, utility costs or insurance. This* ***must*** *be after any housing costs such as rent and council tax net of any benefits provided to support these costs – and after any disability related expenditure.*

3) The MIG aligns the Care Act charging framework with existing income support rules; its intent is to ensure that people who require care and support are not left worse off than people without such needs in paying for the essentials in life, and have discretionary incomes to be spent on basic living items in line with anyone whose income derives from benefits. The MIG for those in the community, the Personal Expenses Allowance (PEA) for those in care homes, and the Disposable Income Allowance (DIA) for those on deferred payment agreements, all make reference to the concept of ensuring that a person has an absolute protected income for the purchase of items **unrelated** to disability.

The *Norfolk* judgment is about discrimination as to the **proportion** of income people are required to pay for their care due to whether their income derives from included or disregarded sources, and the overall amount of their benefit income over and above the MIG. The MIG (which relates only to assessable income, rather than disregarded income) is the same for any person subject to Care Act charges, and service users are left with the same absolute income from **assessable** sources. Two issues are play in the judgment's consideration of the differential impact in the change in Norfolk's policy:

a. Due to the higher assessable incomes of those entitled to higher-rate benefits, they will likely pay a higher percentage of their income, as the amount protected by the MIG represents a smaller proportion of that income;

b. Some individuals will have income which is not assessable, and therefore is not liable to being paid to the local authority. CASCAIDr's letter offers the example of two people with equal income and care plans of equal cost, with one person having income primarily from earnings and one from benefits. The person whose income is primarily from employment would be left with considerably more income than the person whose income derives from benefits.

There are a number of reasons to consider that the judgment may have a narrower application than is argued by CASCAIDr, which suggests that any policy assessing all income above the MIG is likely unlawful:

1) Norfolk had not historically charged the maximum amount allowable pursuant to the MIG and relevant disregards. It had offered an absolute protection for income higher than that set in the Charging Regulations, and had disregarded PIP. The Article 14 challenge – which looked heavily to the justification for these actions – arose **following** these changes revoking this more generous charging policy, not to a standing policy charging the maximum amount allowed under the Care Act framework.

2) The justification Norfolk was asked to provide related to why it had made a specific decision to raise further revenue via charges overwhelmingly on people who were 'severely disabled' and in receipt of higher-rate benefits, and not on other service users. On the facts of the case, Norfolk appeared not to have actually considered the impact of its decision, and the differential manner in which the changes to its charging policy would affect people based on their benefit incomes. The judgment did not find that differential treatment could never be justified – only that it was not justified on the facts of the case.

3) There are fundamental constraints on how a local authority can raise revenue by means of charges, over which the local authority has no discretion. In considering whether to raise additional revenue (including whether to do so primarily from people with higher-rate benefits), a local authority only has discretion to treat income from employment in an analogous manner to income received from benefits by disregarding all assessable income alongside disregarded income – effectively forgoing any form of income-based charging.

4) Further, care and support under the Care Act 2014 is, as a general matter, a means-tested service. State funding only partially finances

care. While s.14 creates a 'power' rather than a duty to charge, local authorities are, in reality, obliged to raise a substantial portion of funds for care by charging people out of their income and capital. It would appear to be extremely unlikely that local authorities could discharge Care Act responsibilities without assessing charges on income.

5) The judgment did not closely explore the differences in the nature of assessable and disregarded income; nor did it consider whether the correct 'analogous comparator' should in fact be a person whose income derives entirely from benefits but has no needs for care and support, rather than a person with care needs whose income derived largely from employment. Eligibility for higher-rate benefits is typically based on a person's level of need for care and support and the extra costs incurred as a result of those needs; people in receipt of higher-rate have greater assessable income because it is anticipated that they will need that income to ensure their needs are met.

6) The judgment heavily emphasises paragraph 8.46 of the statutory guidance, which states that the government *'considers that it is inconsistent with promoting independent living to assume, without further consideration, that all of a person's income above the minimum income guarantee (MIG) is available to be taken in charges'*. However, this passage is guidance not to charge the maximum amount 'without further consideration;' it is not a bar to making the maximum charge if that consideration has been given. The guidance also suggests that there are several ways in which a local authority could consider leaving people with greater 'disposable income' than what is required by the MIG:

> *local authorities have flexibility within this framework; for example, they may choose to disregard additional sources of income, set maximum charges, or charge a person a percentage of their disposable income.*

Conclusion

The Norfolk judgment is a significant one in introducing the concept of an Article 14-protected 'other status' for individuals on higher-rate benefits; any local authority considering its own charging policy will need to give the judgment careful consideration and be alive to how different groups may be affected be a putatively 'neutral' policy.

However, it is also a judgment which turns on the specific facts and circumstances before the court. The court's finding that Norfolk had not had appropriate justification in altering its charging policy in a manner which disproportionately impacted on people who were 'severely disabled' is not one which would necessarily be replicated simply by the existence of a long-standing policy levying the maximum charges, if statutory guidance had been followed, and decision-makers had appropriately considered the impacts of their actions and potential alternatives.

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