Neutral Citation Number: [2019] EWHC 1934 (Admin)

Case No: CO/2268/2018

QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING AT BIRMINGHAM CIVIL JUSTICE CENTRE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/07/2019

Before:

MR JUSTICE SWIFT

- -

Between:

THE QUEEN

(on application of)

Kirstine Drexler
(By her litigation friend Mr. Stefan Drexler) **Claimant**

- V -

LEICESTERSHIRE COUNTY COUNCIL **Defendant**

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- -

STEPHEN BROACH and CIAR McANDREW (instructed by **Irwin Mitchell Solicitors**) for the **Claimant**
PETER OLDHAM QC and ZOE GANNON (instructed by **Legal Services Leicestershire County Council**) for the **Defendant**

Hearing dates: 3rd and 4th April 2019

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Approved Judgment

Mr. Justice Swift:

A. Introduction

1. The Claimant is 17 years old and severely disabled. She attends a special school for pupils with special educational needs. The school is some 13 miles away from her home. At present, Leicestershire Council ("the Council") provides her with free home to school transport. The Claimant is taken to and from school in a minibus, which also transports other children.

2. The Claimant challenges the Council's decision, taken by its Cabinet on 9 March 2018. At that meeting, the Council's Cabinet considered a report prepared by its Director of Environment and Transport. That report proposed revisions both to the Council's Mainstream Home to School Transport Policy, and to the Council's Special Educational Needs Transport Policy. The Cabinet resolved to accept the changes proposed, to come into effect from the beginning of the 2019-2020 academic year. Following the hearing of this claim the Council decided to delay implementation of the revisions to the policies until the beginning of the 2020-2021 academic year.

(1) The Council's new home to school transport policies

3. The two policies, as they will be applied from that time may be summarised as follows. Under the Council's Mainstream Home to School/College Transport Policy ("the Mainstream Policy") the Council will provide free home to school transport for primary school pupils attending a mainstream school who live 2 miles or more from their nearest school, and for secondary pupils who live 3 miles or more from their nearest school. The "nearest school" condition is important since it rules out free home to school transport for pupils who attend schools other than the nearest school (because of parental preference for a different school). Some further conditions apply, and some additional provision is made for children of low-income families, but those matters are not material for the purposes of the points in issue in this case. For sixth-form pupils in mainstream schools who are in full-time education, and who started a sixth-form course when aged between 16 – 18 years old, and who live more than 3 miles away from the school or college they attend, the Council will not provide transport, but will provide an annual grant of £150 if either: (a) the pupil is from a qualifying low-income family, or (b) the travel time from home to school is more than 75 minutes by public transport. The grant is by way of a contribution to the cost of home to school transport; it will not meet the annual cost of travel.

4. The policy for pupils with special educational needs ("the SEN Policy") is stated to be "supplementary" to the Mainstream Policy. Paragraph 1.4 of the SEN Policy is as follows.

> "This policy explains how the [Council] assists with home to school travel arrangements for pupils with qualifying SEN/disabilities/other mobility needs whether the pupil's school place is in a mainstream school, unit attached to a mainstream school or a special school and whether it is within the statutory walking distance or further away from home."

Paragraph 3.1 of the SEN Policy provides

> "The assistance provided by the [Council] will be provided in the most cost effective and appropriate way whilst meeting the child's assessed needs. It may be provided in a number of ways, including taxi, bus, and public transport, PTB (Personal Transport budget) and concessionary travel passes as appropriate. Independent travel training may also be provided. All eligibility and travel assistance arrangements will be reviewed annually and at times of transition e.g. moving from primary to secondary education; to ensure that the basis for entitlement continues and the method of travel assistance remains appropriate."

Paragraphs 3.2 and 3.3 respectively, set out the provision for primary school pupils, and secondary school pupils, who have Statements of Special Educational Needs made under the provisions of the Education Act 1996, or Education Health and Care Plans made under the provisions of the Children and Families Act 2014 ("EHCPs"). For each group, "travel assistance" will be provided if the pupil attends the school designated by the Council as appropriate to meet the needs of the pupil (or some nearer school), and the home to school distance is more than 2 miles in the case of a primary school pupil, or 3 miles in the case of a secondary school pupil. The travel assistance comprises the provision of free home to school transport. What is done to secure this is determined, from case to case, in accordance with paragraph 3.1 of the SEN Policy. For pupils falling outside paragraph 3.2 and 3.3, the Council retains a residual discretion to provide something in terms of assistance: see paragraphs 3.4 and 3.5 of the SEN Policy.

5. Paragraph 9.3 of the SEN Policy addresses pupils aged over 19 who are in education at a further education ("FE") College or a free-standing sixth-form college. For this group the policy provides that the Council will provide home to school transport, free of charge *"if the Council deems transport to be necessary to facilitate attendance"* at the college.

6. The part of the SEN Policy primarily in issue in this litigation is the part concerning pupils at school aged between 16 and 19 years old. Paragraph 8 of the SEN Policy states that the Council may, as a matter of discretion provide *"travel assistance"*, and that the exercise of that discretion depends on the provisions in Section 3 of the SEN Policy. In the course of the hearing I asked for clarification: which parts of Section 3 of the SEN Policy were material for this purpose? Specifically, did paragraph 3.1 apply, such that the discretion would always be exercised in such a manner as to meet a child's *"assessed travel needs"* whether by money payment or by provision of transport in kind? The answer given was that the reference to Section 3 brought into account only the home to school travelling distances at paragraph 3.3 and the residual discretion at paragraph 3.4. Thus, the intention behind paragraph 8.1 is not that a child's *"assessed travel needs"* should be met by the Council (whether by Council-provided transport, or money payment). Paragraph 8.3 of the SEN Policy states that if travel assistance is provided, it will be in the form of a Personal Transport Budget – i.e. a money payment – not provision of actual transport, save that the paragraph goes on to state *"there may be some exceptions [which will] be considered on a case by case basis – see Appendix 1"*.

7. Appendix 1 to the SEN Policy takes the form of a list of Frequently Asked Questions. Three material points arise from this list of questions and answers. *First*, Council-provided taxis, buses and minibuses will, save in exceptional cases, cease to be provided, and will be replaced by money payments – the Personal Transport Budgets ("PTBs"). *Second*, a parent can ask the Council to continue to provide transport. Yet it is clear that such requests will only be granted in very rare instances. The material part of the answer to this FAQ is as follows.

> "The offer and type of Post 16 transport remains at the discretion of the Council, but we will take into consideration individual circumstances and the needs of your child (including a consideration of your application form, the EHCP and any current transport risk assessment that the Council has undertaken). Bearing in mind that the Council is aware that all of the children that are affected by these changes have varying degrees of SEN, some examples that the Council would **not** ordinarily see as exceptional (in their own right):
>
> - Single parent families
> - Parent(s) that work – see below for further information on this
> - Having other children to look after and/or at other schools
> - Living in a rural area with or without access to public transport
> - Parents/students unable to drive or having access to a car
> - Students in wheelchairs
>
> It will be for parents to demonstrate why they believe that Council-provided transport is the only viable option for their child – the Council will consider any exceptional circumstances advised for individuals on a case by case basis.
>
> You can't use your PTB to buy back transport services through the Council, as the Council plans to maximise the usage of seats on taxis and fleet buses to those students that it must provide those services to.
>
> You can only query your transport offer once you have been officially notified of this … If you still believe that the council has not applied its policy correctly, then there is a separate appeals procedure. You **cannot** appeal against the provision of a PTB just because you disagree with the policy."

Third, in respect of the level of the PTB, the FAQ and the answer to it, is this.

> **"What if I feel that my PTB does not cover the costs of getting my child to school/college?**
>
> We expect that in the vast majority of cases the PTB will cover your costs and remember that it can be used in a number of other ways, not just to drive your child directly e.g. paying someone else to take your child, paying for childcare for other children while you take your child to school/college, 'pooling' of PTBs with other parents to car share. Some students may also be eligible for a government bursary to 'top-

> up' the PTB (see below). Ultimately, as Post 16 transport is discretionary it is recognised that a small number of parents may also need to 'top-up' the PTB themselves if they are not transporting their own children or sharing transport."

8. For pupils such as the Claimant the most important impact of the new SEN Policy is the move from the provision of the transport (for example, a place in a bus, minibus or taxi), to a policy which, save for exceptional cases, will provide only for PTB payments.

9. Under the present arrangements, the transport provided to pupils such as the Claimant is not provided free of charge. Save for children of low-income families, the Council makes a charge of £660 per annum. For sake of completeness I note that the £660 annual charge will not disappear under the new policy. It will continue to apply in an exceptional case where the Council provides transport. It will also apply notionally when a PTB is provided, in that the Council will reduce the PTB payment by £660. The charge will be discounted by 50% for low income families.

10. In some of the Council's documents the £660 charge is described as *"full cost recovery"*. However, it is clear from the witness statements made by Tony Kirk, the Council's Head of Service, Transport Operations, that the £660 charge is no more than a contribution to the actual cost to the Council of the home to school transport provision. This point is also apparent from the Officer's Report considered by the Council's Cabinet in March 2018. That explained that the charges proposed, including the move from transport provision to PTBs would help address the shortfall in the Council's Medium-Term Financial Strategy, which covers the four-year period to 2021 – 2022. The changes to the SEN transport arrangements were expected to secure savings of £800,000 per annum.

11. Before the decision to adopt the new home to school transport policies, the Council already had in place voluntary PTB arrangements. PTBs are available across-the-board, to all pupils eligible to receive home to school transport, if their parents chose to opt-in. PTBs are set annually, subject to the possibility of review in the event of a material change in circumstances. The Council's PTB Information Sheet for parents of SEN children ("the Information Sheet") describes a PTB as *"a payment designed to help you get your child to school"*. It goes on to state that *"the amount of PTB payment you will receive will be determined by your child's age, number of days travelling and by the distance from your child's home address to their school"*. In his evidence, Mr Kirk confirms that the Information Sheet document set out the basis on which PTB payments would be made for the academic year 2019 to 2020. A further important document is the Council's document headed *"Personal Transport Budget – Indicative Award Calculator"* which includes a ready reckoner table ("the Ready Reckoner document"). This document, by reference to a child's age and distance from school, states the amounts payable by way of PTB. In his evidence, Mr Kirk emphasised that the Ready Reckoner document figures are indicative, and that an award in an actual case may be higher or lower depending on the information provided by the parent when applying for a PTB.

(2) The Claimant's application for travel assistance

12. Applications to the Council for home to school transport assistance need to be made by 31 March in the preceding academic year. The application form explains that a PTB is the Council's *"standard offer of transport assistance for ALL post 16 students"*. However, the application form includes space for a parent to say why he believes *"a PTB is unsuitable for you and/or your child"*.

13. The Claimant is severely disabled. She suffers from a rare medical condition, Pyruvate Dehydrogenase Deficiency. This has resulted in global development delay, and learning difficulties, and long-standing respiratory problems. Her cognitive age is comparable to that of a child of 18 months to 2 years old. Her communication is largely non-verbal; she uses some Makaton signing. The Claimant requires constant care which requires either input or supervision 24 hours a day. She requires feeding every two hours. The Claimant uses a wheelchair with a specialist base to support her posture and maintain alignment. She cannot use the wheelchair independently. When in it, she requires constant adult supervision.

14. The Claimant attends a special school. The journey to school is a 26-mile round trip; depending on traffic, the journey takes between 30 and 45 minutes each way. At the moment, she travels to school on a minibus provided by the Council. The bus is wheelchair accessible and seats up to 4 children. Her father explains that in addition to the travelling time, it takes 10 or so minutes at each end of the journey to load or unload the Claimant, and to settle her. The Claimant's father explains that looking after his daughter is tiring, and a full-time commitment. He is her primary carer. His wife works full-time. For now, he uses the time while his daughter is at school and travelling to and from school, to complete all other household tasks he has to do, both for the Claimant and her two siblings. This time also provides a form of respite for him. In the event the Council-provided transport is withdrawn, he will spend up to 3 hours each day taking his daughter to and from school.

15. At the time of the hearing, the Claimant had made an application for transport assistance but the application had not been determined. On his application form, the Claimant's father contended that there were exceptional circumstances which meant that the Council should continue to provide home to school transport for the Claimant as at present, rather than a PTB. The claim to be an exceptional case rested on the following matters: that the Claimant's disabilities were such that she required a driver and an escort; that if the present place on a bus was not provided, the Claimant's parents would be unable to employ a driver or escort; that it would be unfair to require the Claimant's parents to drive her to and from school given that otherwise the Claimant requires constant care; that there was no public bus route that could provide an alternative to the present minibus; and that if the Council transport was withdrawn it was unlikely that the Claimant's parents would be able to arrange a ride-share as they did not live close to other children who attend the school the Claimant goes to. The letter pointed out that the cost of a taxi which was wheelchair accessible, with driver and escort was likely to be in the region of £18,000 per annum. A PTB in line with the figures in the ready reckoner would fall a long way short of meeting that cost. In addition, the Claimant's father pointed out that the existing bus journey was an important part of the Claimant's

day. She enjoys the journey to and from school because she looks forward to seeing the other children on the bus.

16. The Council's decision, in a letter dated 31 May 2019, was that the Claimant's circumstances did not make out an exceptional case. The letter stated that this might be *"due to you providing insufficient information"*, but did not indicate what the insufficiency might be. The letter stated that a PTB would be provided. The amount to be paid was not stated, the letter stated, *"the Council will contact you again over the summer to confirm the exact figure"*. On 4 June 2019, the Claimant's father wrote to the Council saying that he wished to appeal the decision, and asked for the reasons for it. The Council replied by letter on 10 June 2019. The Council explained that it determined applications by asking whether the child concerned *"... could only access school via council provided transport rather than a PTB"* (which I assume means the same as the *"only viable option"* test, referred to in the FAQs at Appendix 1 to the SEN Policy – see above at paragraph 7). The letter enclosed a copy of brief notes made by the officers who had taken the decision. From those notes it appears that the material matters were (a) that the Claimant's parents do not both work; and (b) that the Claimant's father has a mobility vehicle which can be used to take the Claimant to and from school.

(3) The grounds of challenge

17. The Claimant's challenge is directed to the part of the Council's new SEN Policy that will apply to pupils aged 16 to 18, who attend school – i.e., the policy, save in exceptional cases, to provide PTBs rather than transport. The exceptionality condition is very narrow. This is apparent both on the face of the SEN Policy and the related documents I have referred to above, and from the decision on the Claimant's own application for travel assistance. Exceptional cases will be rare: only where the Council is satisfied that Council-provided transport is the only viable means by which a child can get to school. The Claimant contrasts this with the present policy, under which home to school transport is provided by the Council subject to the annual charge of £660.

18. There are three grounds of challenge. *First*, a claim of age discrimination that the SEN Policy unlawfully discriminates between, on the one hand pupils aged 5 to 16 and students aged 19+, and on the other hand pupils aged 16 to 18. Free home to school transport is provided to pupils aged 5 to 16 if the conditions at paragraph 3.2 and 3.3 of the Policy are met, and to students aged 19 or over *"if the Council deems transport to be necessary to facilitate attendance"* (see paragraph 9.3 of the SEN Policy). The provision for those aged 16 to 18 is materially different – transport is provided only exceptionally, in other cases a PTB is provided. This claim is made under the Human Rights Act 1998. The Claimant relies on ECHR Article 8 and/or Article 2 of the First Protocol, read together with ECHR Article 14.

19. The *second* claim, also under the Human Rights Act, is a claim of indirect discrimination on grounds of disability. The Claimant relies on ECHR Article 8 and/or Article 2 of the First Protocol, read together with ECHR Article 14, and on the principle in *Thlimmenos v Greece* (2000) 31 EHRR 41, applied in *Burnip v Birmingham City Council* [2013] PTSR 117. The Claimant contends that the SEN policy discriminates on grounds of disability, because travel assistance for children aged 16 to 18 under the SEN Policy is insufficiently different to the annual grants paid to pupils aged 16 to 18 under the Mainstream Policy.

20. The Claimants' *third* ground of challenge is that the Council's decision to adopt the new SEN Policy was taken without compliance with the public-sector equality *"due regard"* requirements under section 149 of the Equality Act 2010. The Council did undertake an equality impact assessment of the proposed revised policy. That assessment provides evidence of the Council's compliance with the section 149(1) obligation. The Claimant contends that so far as concerns the obligation to have due regard to the need (a) to eliminate unlawful discrimination on the grounds of disability, and (b) to advance equality of opportunity for disabled persons, the equality impact assessment document only evidences the Council's failure to have the required due regard.

B. Decision

(1) Are the Claimant's discrimination claims premature?

21. The Council's first response to the Claimant's discrimination claims is that they have been brought prematurely because the specific impact of the new SEN Policy on the Claimant is not yet known. At the time of the hearing, the Council had not reached a decision on the Claimant's application for travel assistance. Even though the outcome of that application is now known in so far as the Council has decided not to provide transport for the Claimant for the forthcoming academic year, the Council has yet to reach a decision on the amount to be paid to the Claimant as her PTB.

22. The Council relies on a number of authorities. The first is the judgment of the Court of Appeal in *R(H) v Ealing LBC* [2018] PTSR 541. But I cannot see that any issue determined there is in point in the present case. The claim in *H* (under the Equality Act 2010) was that a housing allocation policy was indirectly discriminatory because it reserved a proportion of available properties for *"working households"* and *"model tenants"*. The local authority accepted that each condition was a provision criterion or practice ("PCP") for the purposes of section 19 of the 2010 Act, but contended that whether or not there was discriminatory impact required consideration not just of the effect of the PCP on persons having the relevant protected characteristic, but rather the overall effect of the allocation policy on such persons. That submission failed (see per Etherton MR at paragraphs 56-60). Next, the Council relies on the judgment in *R(Adath Yisroel Burial Society) v Inner North London Coroner* [2018] 3 WLR 1354. One point in that case was whether it was appropriate to permit a challenge based on the Equality Act 2010 to go by way of judicial review, or whether the complaint ought to have been made in County Court proceedings. Although the court accepted that the challenge in that case could in principle have been brought in the County Court, it permitted the judicial review claim to proceed. There is no read-across from the decision on that point to anything in the present case. Perhaps it would be open to the Claimant once she has been told the amount the amount of her PTB to challenge that outcome by a claim brought in the County Court or the High Court. But that is not the claim the Claimant wishes to bring. In these proceedings the Claimant challenges the policy itself. She is entitled to do that, and is entitled to contend that the SEN Policy is inconsistent with her Convention rights. When deciding the merits of the claim it is right that I should take account of the elements of flexibility within the policy – the reservation that transport will be provided in exceptional cases; the extent to which the amount of a PTB might be higher (or lower) than the amount specified in the ready reckoner document, and so on. But on the facts of this case the possible range of those

"moving parts" is not such as to render it impossible to assess the legality of the policy against the Claimant's discrimination claims. Lastly on this point, the Council relies on the judgment of Beatson J in *Birmingham Care Consortium v Birmingham City Council* [2011] EWHC 2656 (Admin). That case concerned a very different set of circumstances, where a claimant challenged a local authority which was in the process of taking a decision contending that because the process was being conducted on an incorrect premise, the court should rule on the legality of the process before any final decision was taken. The court declined to do so. Beatson J stated as follows, at paragraph 31.

> "In considering other cases where the court may intervene before the administrative process is concluded, I note that those very often involve situations where there is a clearly identified and discrete question of law. That was so in the *Alconbury* case, on which Miss Robertson relied. Essentially, in this case the challenge is either, leaving aside consultation, a failure to take into account a relevant consideration, or all relevant considerations, other than cost, or a rationality challenge. On either basis it is likely to a challenge, the resolution of which will be very fact sensitive. I consider that, absent a clear and discrete sharp question of law, because it is likely to be fact sensitive, a challenge now would be premature."

In the present case, so far as concerns a formulation of the SEN Policy, the administrative process came to an end with the decision of the Council's Cabinet on 9 March 2018. Since the Claimant's challenge is to the SEN Policy I do not consider it to be premature.

(2) Do the discrimination claims fall within the scope of Article 2 Protocol 1?

23. Article 2, Protocol 1 provides the following rights.

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".

The Council relies on the limited extent of the rights provided and contends that the availability of home to school transport does not fall within the ambit of those rights with the consequence that there is no scope, on the facts of this case, for the Claimant to assert an Article 14 claim by reference to Article 2 of Protocol 1.

24. The extent of the ambit of a Convention right is a matter of assessment. In *M v Secretary of State for Work and Pensions* [2006] 2 AC 91 Lord Bingham, Lord Nicholls and Lord Walker expressed views that were variations on a single theme. Lord Bingham described the notion in terms of the closeness of the connection between the situation in hand and the *"core values"* which the Convention right was intended to protect (speech at paragraph 4). Lord Nicholls put the matter in terms of whether the disadvantage asserted *"comprises one of the ways a state gives effect to a Convention right ("one of*

the modalities' of the exercise of a right guaranteed")". He also stated that the more *"seriously and directly the discriminatory provision or conduct impinges upon the values underlying the particular substantive right, the more readily it will be regarded as within the ambit of that right, and vice versa"*. (Speech at paragraphs 16 and 14, respectively). Lord Walker agreed that there was no simple bright-line test by which the ambit of a Convention right could be identified. He stated that a *"tenuous connection"* with a Convention right is not enough and made the point that the extent of the connection required could differ depending on which Convention right was in issue. At paragraph 61 he stated as follows

> "Some Convention rights have a reasonably well-defined ambit (or scope). Article 11 (freedom of assembly and association) is one example. In *National Union of Belgian Police v Belgium* 1 EHRR 578 the Belgian Government failed to consult a municipal police union about legislation affecting public sector employment rights. The union's direct claim under article 11 failed, but article 14 was engaged (though on the particular facts the article 14 claim also failed). Another example is article 2 of the First Protocol (headed "Right to education," but commencing in a negative manner, "No person shall be denied the right to education"). This article sets an undemanding standard, but its ambit is one in which discrimination is particularly likely to occur, and so it is a field in which claimants are more likely to succeed under article 14 than under the substantive article. The well-known case of *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155 (in which proportionately fewer grammar school places were available for girls than for boys) was decided under domestic law years before the commencement of the 1998 Act, but in Convention terms it would have been a classic example of discrimination amounting to a breach under article 14, although there was no breach under the substantive article (since there is no general right to grammar school education). The *Belgian Linguistic* Case 1 EHRR 252 provides (on the fifth question, paras 26 - 32) an early example under the Convention, although the facts were complicated and the discrimination was on the grounds of language rather than gender. As I shall seek to demonstrate, article 8 is very different because of its much wider and much less well-defined ambit."

Thus, for an Article 14 claim to arise there is no requirement for the substantive Article to be infringed (a point recently restated by Baroness Hale in *In Re McLaughin* [2018] 1 WLR 4250, at paragraph 20).

25. The Council relies on the judgments in *R(R) v Leeds City Council* [2005] EWHC 2495 (Admin) and *R (Diocese of Menevia) v City and County of Swansea Council* [2015] PTSR 1507, as authority for the proposition that home to school transport arrangements do not fall within the ambit of Article 2, Protocol 1. In the *Leeds* case a council declined to provide free home to school transport to the claimants because they attended schools which were not the nearest available to their homes. The main round of challenge was that the refusal was *Wednesbury* unreasonable. That challenge failed. A Human Rights Act claim was also made in reliance on Article 8, Article 9 (the claimants attended faith

schools), Article 2, Protocol 1, and Article 14. As to the claims based on the latter two provisions, Wilkie J said this,

> "45. The Defendant contends that this Article is neither engaged nor infringed. It contends that the provision is concerned with access to the educational institutions which the state makes available and places no greater obligation on the state than to acknowledge or take into account religious convictions. In the present case there is no suggestion that the Defendant has sought to deny the Claimants access to any of the educational institutions which are within its control. Nor has it failed to respect the right of the Claimants' parents to ensure such education and teaching in conformity with their religious convictions. The right has been taken into account by the Defendant and the parents of the Claimants have exercised it in that they have sent their children to Jewish schools in Manchester. In my judgment the Defendant's contention is correct. This Article is not engaged, but even if it were, for the reasons already set out in respect of the *Wednesbury* challenge, the decision in question falls within the terms of the explicit reservation entered by the UK to this particular Article and so the Claimant has no claim in this respect.
>
> **Article 14**
>
> 46. Article 14 provides:
>
> The enjoyment of the rights of freedom set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origins, association with a national minority, property, birth or other status."
>
> 47. The Claimant says that as the facts of this claim fall within the ambit of Articles 8, 9 and Article 2 of Protocol 1 it is contended that Article 14 is engaged. In my judgment, for the reasons set out above, none of these provisions are engaged and accordingly Article 14 is not engaged either."

The reservation referred is in respect of the second sentence of Article 2, Protocol 1 and is that the United Kingdom accepts the principle confirmed in the second sentence *"only in so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure"*.

26. In the *Swansea* case a local authority had a home to school transport policy similar to the one in *Leeds*, and pupils at faith schools received free transport only if they both met specified distance criteria and there was no suitable alternative school (which could include a non-faith school) within the prescribed walking distance. Part of the challenge

was a claim of indirect discrimination based on Article 2, Protocol 1 and Article 14. Having been referred to the Leeds case Wyn Williams J stated as follows

> "87. Miss Rose QC submits that the Leeds City Council case can be distinguished since there is evidence before me which suggests that if the amended policy is implemented children will be precluded from attending faith schools of their choice by reason of the inability of their parents to pay for transportation. Obviously, it is not open to me to doubt the possibility that this may occur in relation to some children but, in any event, I do not regard this as a true distinguishing feature. The obligation under Article 2 First Protocol is to respect the right of the parent to ensure education in accordance with his/her religious aims. It does not seem to me that this obligation extends to subsiding and/or paying the whole cost for transportation between home and school.
>
> 88. At one point in her oral submissions Miss Rose QC came close to submitting that I should decline to follow the *Leeds City Council* case on the basis that Wilkie J's judgment in relation to Article 2 of the First Protocol and Article 14 of the Convention was wrong. I am not bound, strictly, by the judgment of Wilkie J but I should follow it unless I consider it to be wrong. Far from believing it to be wrong, I accept his reasoning."

27. Up to a point, the reasoning in these cases does not apply to the circumstances before me. In each case it was the second sentence of Article 2, Protocol 1 that was primarily in issue. In each case the claimants attended faith schools and each judge referred expressly to the United Kingdom's reservation in respect of the second sentence. The present case has nothing to do with second sentence of Article 2, Protocol 1.

28. The more difficult matter is the conclusion reached Wilkie J in the context of the claim based only on Article 2, Protocol 1, that the Article *"was not engaged"*, a conclusion which he restated when deciding the Article 14 claim, clearly meaning that he did not consider the provision of transport was within the ambit of Article 2, Protocol 1. If the matter is looked at apart from the reliance in the *Leeds* case on the second sentence of Article 2, I cannot see any explanation why the situation in that case was not within the ambit of Article 2, Protocol 1. The core value protected by the first sentence of Article 2, Protocol 1 is a right of access to such education provision as a state may have made. Whether the matter is put in terms of the strength of connection between that and access to transport arrangements made by a local authority, or in terms of whether such transport arrangements are one of the modalities giving effect to the right of access, I have formed a clear conclusion that school transport arrangements are capable of falling within the ambit of Article 2, Protocol 1 and that the Council's policy in issue in this case does fall within the ambit of that right. There can be no question but that Article 2 of Protocol 1 does not require a local authority to provide free home to school transport, but if free provision is made I cannot see how it fails to fall within the ambit of the right in the first sentence of Article 2, such that where free school transport is provided it must be provided in a manner that is free of unlawful discrimination contrary to Article 14. There is a clear link between the provision of home to school transport and the right arising from the first sentence of Article 2. There is no requirement to provide home to school transport, but once such provision is made it falls within the

ambit of the right and as such it becomes a matter to which the Article 14 non-discrimination requirements attach.

29. I deal with the Claimant's reliance on Article 8 more briefly. Notwithstanding the Council's submissions I am satisfied that the circumstances relied on by the Claimant in this case do fall within the ambit of Article 8. I place particular reliance on the evidence of the Claimant's father as to her circumstances, the benefits for her family (in particular for her father), and hence for the quality of her family life, deriving from the present transport arrangements, and the additional burdens that will fall on the family if that transport is withdrawn. In this case the presence or absence of Council-provided home to school transport will directly impinge upon the Claimant's family life, and its provision falls within the ambit of Article 8.

(3) The age discrimination claim

30. The Claimant compares the transport provision for pupils such as herself who are in school and aged 16 – 18, (a) with the transport provision for pupils of statutory school age; and (b) with the transport provided to pupils aged 18+ at FE Colleges under paragraph 9.3 of the Mainstream Policy.

31. As to the former group (and for sake of convenience, putting the matter generally), both the Mainstream Policy and the SEN Policy provide for free home to school transport for pupils if they attend a school beyond statutory walking distance from their homes (see Mainstream Policy at paragraph 2; and the SEN Policy at paragraphs 3.2 and 3.3.) Further provision for free transport is made for certain disabled children who live closer than statutory walking distance (see the SEN Policy at paragraph 3.4). The provision for the 4 to 16 age group reflects, and in certain respects improves upon, the statutory requirements arising from Chapter 11 of Part IX of the Education Act 1996. The provisions of that Part of the 1996 Act require local authorities to make *"travel arrangements"* in order *"to secure suitable home to school travel arrangements"* for *"eligible children"*. The practical effect of the statutory provisions is a requirement to provide free transport for categories of *"eligible children"*. Those categories are set out in Schedule 35B to the 1996 Act, and include (a) children living within walking distance of the school attended if by reason of disability or other matter affecting mobility they cannot reasonably be expected to walk to school (paragraph 2.5); (b) children living further than walking distance from school where the local authority has made no suitable arrangements for the child to be at his school nearer to home (paragraphs 6 to 7); and (c) children who are entitled to receive free school meals, or who are the children of parents in receipt of the maximum rate of Working Tax Credit (see paragraphs 9 to 14). Walking distance is defined by section 444(5) of the 1996 Act as two miles for children aged less than 8, and three miles for children aged 8 to 16. In each case the distance is measured by *"the nearest available route"*.

32. The provision for those such as the Claimant, who are in school and aged 16 to 18 is less favourable. There is no general provision for free home to school transport. The Mainstream Policy provides that pupils aged 16 – 18 can obtain annual grants of £150.00 but only if they live more than three miles away from the school attended and (a) are from a low-income family; or (b) live more than 75 minutes travelling time from school using public transport (see paragraph 3.2 of the Mainstream Policy). The SEN Policy provides *"travel assistance"* in the form of a PTB, save in exceptional circumstances

where the Council will provide transport. As explained above, the scope of exceptional circumstances is very narrow, only extending to situations where the Council is satisfied that a child could *"only access school via Council provided transport rather than a PTB"*. As to the PTB, I accept that the Claimant's submission that the likely value of a PTB will not cover the cost of replacement provision for the transport presently provided by the Council for the Claimant, and for that reason will not provide an equivalent to the free home to school transport provided to pupils within statutory school age.

33. The value of the PTB has been the subject of evidence as regards how close it is likely to be to the actual cost of transport. I have referred above to the Council's PTB Information Sheet, the Ready Reckoner document, the PTB Application Form, and the FAQ at Appendix 1 to the SEN Policy. The Information Sheet states the following under the heading *"calculation of the PTB amount"*.

> "The amount of PTB payment that you will receive will be determined by your child's age, number of days travelling and by the distance from your child's home address to their school.
>
> For fairness and consistency, all PTB distance calculations will be measured using the same measuring software that is used by the Council for assessing your child's eligibility for transport assistance.
>
> A Ready Reckoner calculator is available on the PTB website to provide you with an approximate indication of how much PTB you may receive ..."

The Application Form describes the PTB as a payment *"...to help you get your child to school"*, whereas in an Appendix 1 to the SEN Policy it is stated that the Council expects *"...that in the vast majority of cases the PTB will cover your costs ..."*.

34. The Ready Reckoner document specifies *"indicative amounts"* by reference to the home to school travelling distance. In his third witness statement, Mr Kirk explains that the figures in the Ready Reckoner document are based on a mileage rate of 78p per mile for children aged 5 to 16, and a rate of 70p per mile for those aged 16 or more. These rates were set for the purposes of a PTB pilot scheme which ran in the 2016-2017 academic year. Mr Kirk explains that he arrived at these figures following discussion with others in the Council's Transport Operations Service. The figures are not informed by any specific information as to the possible cost of transporting a disabled child (which could vary significantly depending on the specific transport needs of any particular child) but are, as Mr Kirk points out, more generous than the 44p per mile rate paid to parents to cover the cost of fuel when a child has been excluded from Council–provided transport because of bad behaviour, and more generous than the 45p per mile *"approved amount"* allowed by HMRC to employers who make mileage allowance payments to employees who use their own cars in the course of their employer's business. In further support of the reasonableness of these rates, Mr Kirk points to the level of voluntary take up of PTBs to date. After the pilot scheme in 2016-2017, PTBs were made available to all children within the scope of the SEN Policy, as an option for each child. As at April 2019 11% of those within the scope of the SEN Policy had opted for a PTB (210 out of 1864 pupils).

35. Set against this is evidence from the Claimant's father, and from the parents of other disabled children with special educational needs who presently have the benefit of Council–provided home to school transport. All are faced with the prospect of being provided with a PTB with effect from the beginning of the new academic year. All make the point that the cost to them of securing alternative transport will be significantly greater than the indicative payment shown on the Ready Reckoner document.

36. Mr Kirk's evidence emphasises that the figures in the Ready Reckoner document are "indicative". He refers to one instance where a PTB of over £6000.00 was made available to a post-16 age pupil, but provides no information as to whether, and if so to what extent, or why, that PTB exceeded the amount obtained by application of the Ready Reckoner document. Given that the main driver for the Cabinet's decision on 9 March 2018 was the need to make savings, and that the saving estimated to arise from the move to PTBs was in the region of £800,000 per annum, it is a fair assumption that the value of the PTBs will be less than the cost of alternative arrangements for home to school transport. In some instances, if the transport needs of the child are modest, the difference between the value of the PTB and cost of transport might be small; in other instances, the Claimant's circumstances being an example, the difference may be substantial. Overall, I am satisfied that the Council's transport policies do treat pupils aged 5 to 16 more favourably than those aged 16 to 18.

37. I am also satisfied that for the purposes of Article 14, a difference based on age is a difference based on "*other status"*. In its skeleton argument the Council submitted to the contrary, contending that its case was supported by the judgment of Ouseley J in *C v Secretary of State for Work and Pensions* [2018] 1 WLR 5425. It did not pursue this submission at the hearing, and was right not to do so. Following the judgment of the Supreme Court in *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250 it is clear that while the reach of *"other status"* is not limitless (such that the need to establish status as a separate requirement has not yet reached the vanishing point suggested by Henderson LJ in *Stevenson v Secretary of State for Work and Pensions* [2017] EWCA 2123 at paragraph 41), *"other status"* is broad, and certainly includes innate characteristics and personal characteristics which a person cannot or should not be expected to change. A person's age falls within that class.

38. Is there an objective and reasonable justification for this difference in treatment? The parties agree that the structure for the answer to this question is provided by the four questions identified by Lord Sumption in his judgment in *Bank Mellat v HM Treasury* [2014] AC 700: (1) is the difference in pursuit of a sufficiently important objective; (2) is there a rational connection between the difference and the objective; (3) could a less intrusive measure have been used without unacceptably compromising the objective; (4) having regard to all these matters and to the severity of the consequences is the difference of treatment such that a fair balance has been struck (see per Lord Sumption at paragraph 20; and especially on question 3, per Lord Reed at paragraphs 70 to 71 and 75 to 76).

39. The approach to the level of review to be applied at the fair balance stage has recently been considered by the Supreme Court in *R(DA) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289. In that case, a challenge to a cap imposed on entitlement to welfare benefits, the majority of the members of the court concluded that whether or

not the interference with Convention rights alleged were justified was to be assessed by asking whether the measure imposed was manifestly without foundation; see per Lord Wilson at paragraphs 65 to 66; Lord Carnwath at paragraphs 113 and 116; per Lord Hodge at paragraph 125; and per Baroness Hale at paragraphs 132 to 133. That judgment was handed down after the hearing in this case and I have had the benefit of written submissions from the parties on it. The Council submitted that the standard applied by the Supreme Court in *DA* is the standard that should be applied in this case. The Claimant disagrees, contending that it is significant first that the context for the judgment in *DA* (and also for the earlier judgment in *R(MA) v Secretary of State for Work and Pensions* [2016] 1 WLR 4550) was a challenge to a decision on welfare benefits; and second that the challenge in this case is directed to a policy adopted by the Council not a central Government decision. I do not consider either of these points to be a relevant point of distinction. The driving force behind the manifestly without reasonable foundation approach is the institutional limit to the court's role when the decision challenged is a decision that sets out general rules on a matter of social and economic policy. That principle applies with equal force to the decision in issue in this case even though it is not a decision about welfare benefits and not a decision taken by central Government. The SEN Policy in issue in this case comprises decisions taken by the Council on how, to what extent, and in what circumstances, the finite resources available to it should be used to provide home to school transport. As Mr Kirk pointed out, that money comes from the Council's Transport Fund raised from Council Tax and Business Rates. The Council is directly accountable to local voters on such decisions. Local democracy is as important as any other.

40. I consider the difference in treatment between pupils aged 16 to 18 and those of compulsory school age is justified. The additional benefit available under the Council's policies to the compulsory school age group reflects the statutory obligations in respect of provision of home to school transport owed to that group under the provisions of the Education Act 1996. The Council's policy of providing free transport to pupils of statutory school age pursues a legitimate objective; there is a rational connection between the objective and the policy; and the difference in treatment under the SEN Policy is the minimum necessary to achieve the objective of compliance with the home to school transport obligations under the 1996 Act. I consider, applying the manifestly without reasonable foundation approach, that the difference in treatment strikes a fair balance between the interests of the 16 to 18 age group and the general interest represented by the provisions in the 1996 Act for requiring a home to school transport for pupils of statutory school age.

41. The Claimant contends that any significance that might otherwise attach to the provisions of the 1996 Act vanishes when regard is had to other material statutory provisions. She points to the provisions of Part 1 of the Education and Skills Act 2008 which applies to those, like the Claimant, not of school age who have not reached 18 years old and do not have a *"level 3 qualification"* (i.e. two 'A' Levels, or a qualification prescribed by the Secretary of State as equivalent). Section 2 of 2008 Act requires such persons to *"participate in appropriate full-time education"* or in training (as further defined by section 4 of the 2008 Act), or be in an apprenticeship, or in a full-time occupation and participate in training. By section 10 of 2008 Act

> "A local authority in England must ensure that its functions are (so far as they are capable of being so exercised) exercised so as to promote

> the effective participation in education or training of persons belonging to its area to whom this Part applies with a view to ensuring that those persons fulfil the duty imposed by section 2."

The Claimant also relies on provisions in the Children and Families Act 2014 about EHCPs. The Claimant's EHCP specifies the education provision she needs and identifies the special school that the Claimant should attend. By section 42 of the 2014 Act a local authority must secure the special educational provision specified in an EHCP for a young person. A young person is defined as a person over compulsory school age but under 25 years old.

42. I do not consider that these matters affect the outcome of this part of the claim. The Council's legal obligations under the 1996 Act in respect of children of compulsory school age are materially different both from the obligation on it under section 10 of the 2008 Act, and its obligation under section 42 of the 2014 Act. The obligation under the 2008 Act, to exercise functions to promote effective participation in education or training, does not give rise to obligations similar to those under Part 11 of Chapter IX of the 1996 Act. The obligation under section 42 of the 2014 Act does not focus on an obligation to provide transport. The focus is on securing the special educational provision that has been assessed as being required.

43. The second part of the age discrimination claim compares the position of pupils aged 16 to 18, with that of pupils aged 18+. The latter group benefits from the provision made in the last sentence of paragraph 9.3 of the SEN Policy - that free transport will be provided where *"the Council deems transport to be necessary to facilitate attendance ..."* ("the paragraph 9.3 provision"). (For the purposes of this part of the age of discrimination claim no part of the mainstream policy is in issue. The only provision under that policy for post 16 students is the £150 annual grant payment referred to above.)

44. Two points arise. The first is the extent of the difference in between the two groups. For those like the Claimant, transport (rather than a PTB) is provided, subject to a charge of £660.00 per annum, if the Council concludes that the pupil can *"... only access a school by Council provided transport rather than a PTB"* (see above at paragraph 16). There was no evidence as to the practical operation of the paragraph 9.3 provision. As a matter of language both provisions set a high bar for when the Council will provide transport. In practice, there may well be no discernible difference between the requirement that transport is *"necessary to facilitate attendance"* and the requirement that Council-provided transport be the only way the pupil could attend school. If there is a practical difference it will be small. The only other distinction is the £660.00 annual charge made by the Council under the SEN Policy when transport is provided to pupils at school aged between 16 to 18. The fact that the difference in treatment is small, and in practice maybe no more than the £660.00 annual charge, is relevant to justification.

45. The existence of the paragraph 9.3 provision is explained by section 508F of the Education Act 1996 which is in the following terms.

> **"508F Local authorities in England: provision of transport etc for adult learners**
>
> (1) A local authority in England must make such arrangements for the provision of transport and otherwise as they consider necessary, or as the Secretary of State may direct, for the purposes mentioned in subsections (2) and (3).
>
> (2) The first purpose is to facilitate the attendance of adults receiving education at institutions—
>
> > (a) maintained or assisted by the authority and providing further or higher education (or both), or
> > (b) within the further education sector.
>
> (3) The second purpose is to facilitate the attendance of relevant young adults receiving education or training at institutions outside both the further and higher education sectors, but only in cases where the local authority have secured for the adults in question—
>
> > (a) the provision of education or training at the institution in question, and
> > (b) the provision of boarding accommodation under section 514A.
>
> (4) Any transport provided under subsection (1) must be provided free of charge.
>
> (5) In considering what arrangements it is necessary to make under subsection (1) in relation to relevant young adults, a local authority must have regard to what they are required to do under section 15ZA (1) in relation to those persons.
>
> (6) In considering whether they are required by subsection (1) to make arrangements in relation to a particular adult, a local authority must have regard (among other things) to the age of the adult and the nature of the route, or alternative routes, which the adult could reasonably be expected to take.
>
> (7) Arrangements made under subsection (1) by virtue of subsection (3) to facilitate full-time education or training at an institution outside both the further and higher education sectors must be no less favourable than the arrangements made for relevant young adults of the same age for whom the authority secure the provision of education at another institution.

> (8) A local authority in England may pay all or part of the reasonable travelling expenses of an adult—
>
> > (a) receiving education or training at an institution mentioned in subsection (2) or (3), and
> > (b) for whose transport no arrangements are made under subsection (1).
>
> (9) In this section—
>
> *"adult"* means a person who is neither a child nor a person of sixth form age,
> *"sixth form age"* is to be construed in accordance with section 509AC (1), and
> *"relevant young adult"* means an adult for whom an EHC plan is maintained."

Thus, although there is no absolute obligation to provide home to college transport for a "relevant young adult", if a local authority considers transport necessary to facilitate attendance, the transport must be provided free of charge.

46. Section 508F of the 1996 Act was inserted into that Act by section 57 of the Apprenticeships, Skills, Children and Learning Act of 2009, in place of section 509 of the 1996 Act, which was repealed. Section 509 contained a similar obligation on local authorities to make arrangements *"as they consider necessary"* to facilitate the attendance of *"persons not of sixth form age"* at schools, FE colleges or colleges of higher education. By section 509(2) such provision was required to be free of charge. As originally enacted, section 509 did not exclude persons of sixth form age. That restriction was introduced by the Education Act 2002, which also inserted section 509AA of the 1996 Act, which concerns persons of sixth-form age: see generally section 199 of and Schedule 19 to the Education Act 2002. The Explanatory Notes for those revisions state as follows

> **"Section 199 and Schedule 19: Transport for persons over compulsory school age**
>
> 386. These provisions are designed to give effect to improved planning, coherence and publicity of local transport policies for pupils of sixth form age.
>
> 387. The amendments give LEAs a co-ordinating role in developing policies with key partners to provide effective and efficient transport arrangements for post 16 students. Every LEA will draw up and publish a policy statement setting out the provision of, or support for, transport for students of 16-19 or those completing courses started whilst 16-19. The new section 509AB of the EA 96 contains new criteria that must be considered in devising policies. These are that: no student is prevented from attending FE because of a lack of services or support, choice, costs and the need to travel beyond local LEA boundaries. The policy statement will include

> provision and support made by schools and FE colleges in the local area. Section 509AA (8) makes it clear that LEAs can make transport arrangements over and above those set out in the policy statement and so allows the LEA and its partners flexibility to respond to changing or unforeseen circumstances where particular cases occur that are not contained in their policy statement. Section 509AA (9) provides that the Secretary of State or the NAW can direct an LEA to make arrangements for transport which are not in the statement. Section 509AC contains definitions."

47. Although there is no specific explanation of the reason for the distinction drawn between children of sixth-form age and adult learners, the Explanatory Notes confirm what was apparent from the face of the then section 509(2) as amended (now section 508F of the 1996 Act), that the intention was to address situations in which, absent transport, a student enrolled on an FE course would be unable to attend. This confirms the view I have set out above, that in this case the difference of treatment may comprise only the £660.00 annual charge. That charge is not payable by all, see paragraph 8.2 of the SEN Policy which allows a 50% reduction for the children of low-income families.

48. My conclusion is that such difference as may exist between the 16 to 18 group and those within the scope of the paragraph 9.3 provision is justified by reference to the obligation imposed on the Council by section 508F (4) of the Education Act 1996.

(4) The disability discrimination claim

49. The Claimant compares the treatment afforded to her under the SEN Policy with the provision in the Mainstream Policy for pupils in schools aged 16 to 18.

50. Under the SEN Policy pupils who live more than 3 miles away from the school they attend are provided with a PTB, or with Council-provided transport if that is the only means of access. There is an annual charge of £660.00, reduced by 50% for children of low-income families. Under the Mainstream Policy pupils living more than 3 miles from school receive an annual grant of £150.00 but only if they are children of low-income families, or if using public transport, their travelling time from home to school is more than 75 minutes each way. There is then, a clear difference of treatment as between the two groups. Under the material part of the Mainstream Policy there is no possibility that the Council will provide transport. The money payments under the Mainstream Policy are made in more limited circumstances, and when grants are available the amount paid is likely to be significantly less than the amounts available as PTBs provided under the SEN Policy (based on the indicative rates in the Council's Ready Reckoner document).

51. The Claimant recognises all these matters, but contends that the differences do not sufficiently reflect the different needs of able-bodied pupils and disabled pupils. She contends that this lack of sufficient difference is – absent justification – a form of discrimination. She relies on the principle in *Thlimmenos v Greece* [2000] 31 EHRR 41. In that case the applicant had been convicted of insubordination after refusing to enlist in the army because of his religious beliefs. He complained that a law preventing all convicted felons from being chartered accountants failed to distinguish between persons

convicted on grounds of their religious beliefs and those convicted on other grounds, and for that reason was in breach of ECHR Article 9 read together with Article 14. The applications succeeded. At paragraph 44 of its judgment the Court stated

> "… the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without a reasonable and objective justification fail to treat differently persons whose situations are significantly different"

and at paragraph 47 concluded,

> "The Court considers as a matter of principle, States have a legitimate interest to exclude some offenders from the profession of chartered accountant. However, the Court also considers that, unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession. Excluding the applicant on the ground that he was an unfit person was not, therefore, justified".

Thus, the court recognised that claims of indirect discrimination lay within Article 14. This aspect of Article 14 is well-recognised in English law, see *Burnip* (above) per Morris Kay LJ paragraphs 14 to 18; and *R(DA) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289 per Lord Wilson at paragraphs 40 to 45, and per Lord Carnwath at paragraphs 103 to 109. Lord Wilson put the matter in terms of whether *"similar"* treatment was afforded to groups that were *"relevantly different"* such that absent justification, should have been treated differently.

52. The Claimant's case is a variation on the principle in *Thlimmenos*. In that case a single rule applied to all: that any felony conviction, regardless of the circumstances that gave rise to commission of the offence, resulted in disqualification. In this case, the Claimant accepts that the policies make different provision for the two groups, and that the provision under the SEN Policy is better. However, the Claimant contends that the SEN Policy is unlawful because the better provision made insufficiently reflects the different positions of those within the SEN Policy (i.e. *"pupils with SEN, disabilities and mobility needs"* see policy at paragraph 1.1) and those within the Mainstream Policy (all other pupils).

53. The starting point for a *Thlimmenos*-type claim does not need to be the existence of a rigid rule that is applied to each of the relevant comparator groups. It is notable that section 19 of the Equality Act 2010 describes situations of indirect discrimination by reference to the application of a *"provision, criterion or practice"*. This encourages a wider rather than narrower approach to which situations fall within the scope of the prohibition against indirect discrimination. Nevertheless, if a claim of indirect discrimination is to exist, there must be some form of sufficiently similar treatment. Indirect discrimination looks to equality of result; it seeks to level the playing field where an application of apparently neutral criteria results in an adverse impact on persons who share one or other of the characteristics (including the *"other status"* characteristic) protected by Article 14; it does this by requiring the apparently neutral

criteria to be justified. This was the approach taken by the Strasbourg Court in *Thlimmenos*, which concluded that the rule that disqualified all those with a felony conviction was not justified. It was the approach taken by the Court of Appeal in *Burnip*; and it was the approach taken by the Supreme Court in *DA*. What was in issue in *Burnip* was the legality of applying both to disabled and able-bodied persons the definition of "occupier" in regulation 13D of the Housing Benefit Regulations 2006. Maurice Kay LJ described the *Thlimmenos*-type claim as a "*failure to treat differently persons whose situations are significantly different"* (see judgment at paragraph 18). In *DA*, Lord Wilson's view was to the effect that the focus of the justification had to be why regulation 75A of 2006 Regulations applied to the claimants in that litigation (see at paragraph 54). Lord Wilson's description of the complaint in *DA* was the same as that used by Maurice Kay LJ in *Burnip*: that it was a complaint about treating persons *"... similarly to those whose situation is relevantly different, with the result that they should have been treated differently"*.

54. Discrimination claims should not be hamstrung by unnecessary conditions which divert the focus from assessing whether the reasons for measures that result in different treatment can be justified. For example, in *Burnip*, the Court of Appeal rejected the submission that a *Thlimmenos*-type claim (i.e., a claim of indirect discrimination) could not exist if recognising the claim would impose some form of positive obligation on a public authority, saying that any such matter might be material to the justification question, but ought not be a prior limitation to the existence of a claim. However, a requirement for similarity of treatment as the starting point for the claim is not an unnecessary limitation on the existence of a claim of indirect discrimination. In an indirect discrimination claim, the reason for similarity in treatment is thing that needs to be justified. Thus, the condition requiring similarity of treatment is the thing that captures the essence of the complaint.

55. A requirement only for similarity means that some degree of disparity of treatment must be tolerated, and will not of itself rule out the existence of an indirect discrimination claim. Yet, a degree of rigour must be applied if the integrity of the claim is to be maintained. If the difference of treatment between the comparator groups is significant and material, the wrong that an indirect discrimination principle exists to address will not be present; rather, the complaint will be a complaint about a lack of positive discrimination.

56. In this case, the Claimant recognises the provisions in the Mainstream Policy and the SEN Policy are different, but contends that her complaint still falls within the scope of a *Thlimmenos*-type claim, and that there is discrimination because the difference in treatment does not adequately reflect the difference in circumstances of pupils within the Mainstream Policy and those within the SEN Policy. My first reaction was that this was sufficient to bring the present case within the class of *Thlimmenos* claims. On reflection, I have concluded that this case does not disclose such a claim on grounds of the Claimant's disability. When the policies are considered overall, there is no sufficient similarity in the treatment afforded to the comparator groups so as to permit sensible consideration of a claim of indirect discrimination. Under the Mainstream Policy free home to school transport is not provided at all for 16 to 18 years old. Under the SEN Policy transport is provided, albeit in exceptional cases (and it is apparent from the decision made in the Claimant's case that the class of exceptional cases will be small). The availability of money payments is also materially different. Grants under the

Mainstream Policy are available in very restricted circumstances; where they are available what is paid is a low, fixed amount. Under the SEN Policy, PTBs are available to all who live more than 3 miles from school (those who live closer may also apply). Even assuming the amount paid will be in accordance with the Council's Ready Reckoner document, it will be more than the grant under the Mainstream Policy.

57. My conclusion is that the differences of approach to each of the comparator groups means that it is not possible to identify any consistent practice applied across the groups, which affects the groups differently, and can be the subject of a justification inquiry. It could be contended that there is a consistent practice to the extent that, where payment is made, the payment is arbitrary in the sense that it is not set by reference to any estimate of the likely actual cost of transport. However, describing the practice in that way characterises it at a level of generality that is so high as to be artificial. Moreover, even if the practice were described in that way, the justification inquiry would be redirected to whether it was lawful for the Council (faced as it is with severe financial constraints) to adopt a policy of making payments that fall short of meeting the actual cost of transport.

58. Further, I do not consider that the discrimination claim recognised in *Thlimmenos* goes beyond claims that are recognisably claims of indirect discrimination. Contrary to the Claimant's submission, neither the judgment in *Thlimmenos*, nor the judgment in *Burnip* gives rise to any free-standing *"... positive obligation to make provision to cater for ... significant difference"*. In *Burnip*, Maurice Kay LJ used those words, but in a context where the complaint was about the impact of a rule (the notion of "occupier" defined at regulation 13D of the 2006 Regulations) as it was applied to disabled and able-bodied persons, respectively. The Strasbourg Court does not use the label of indirect discrimination to describe *Thlimmenos*-type claims. Instead, it speaks in terms of Article 14 *"... not [prohibiting] Member States from treating groups differently in order to correct "factual inequalities" between them"*, and recognises that in some circumstances a failure to attempt to correct inequality through different treatment may amount to a breach of Article 14 (see, for example, *Stec v United Kingdom* (2006) 43 EHRR 47 at paragraph 51). Yet these statements describe situations where the claim is recognisably a claim of indirect discrimination – where a single practice is applied to the disadvantage of a protected group, or where a state is able to justify applying a different rule to such a group to protect it from disadvantage that would otherwise arise. In the present case, the contention is that although the transport provision under the SEN Policy for pupils in the position of the Claimant is better than the provision under the Mainstream Policy, that difference is not sufficient to recognise the specific needs of disabled pupils. That is an argument for a form of positive discrimination, but it does not disclose a discrimination claim either under the Human Rights Act, or otherwise. For these reasons, the claim of unlawful discrimination on grounds of disability under the Human Rights Act fails.

59. In my view, the criticisms that the Claimant makes of the SEN Policy as it will apply to her (with effect from the beginning of the 2020-2021 academic year) more naturally stand as an argument that the SEN policy is unlawful at common law, either for failure to have regard to relevant considerations (the likely travel needs of disabled pupils), or because (for that or for other reasons) the policy is irrational.

60. In his submissions for the Claimant, Mr Broach made various points. *First*, that the mileage rate, one of the two bases for the Council's Ready Reckoner document is arbitrary in the sense that it is not set by reference to the likely per mile costs of home to school transport of a pupil within the SEN Policy. Mr Kirks' evidence suggests the selected mileage rate is entirely impressionistic. *Second*, the arbitrariness that stems from the mileage rate is perpetuated by the Ready Reckoner document which determines the PTB by applying the mileage rate to the home to school travelling distance. So calculated, the PTB will bear little relation to the cost of the transport needs of any particular pupil, since those needs may vary significantly, and that is not accounted for at all in the Council's policy (save for the exceptional case where absent Council-provided transport the child could not attend school at all). The simple fact that a child has special educational needs, or is disabled, does not itself determine the level of need of that child when it comes to provision of home to school transport. At one end of the spectrum there are children like the Claimant who do have very significant transport needs, for example for adapted vehicles, experienced escorts, and so on. But there are likely to be many more children within the scope of the SEN Policy whose needs in this regard will be significantly less. This spectrum of travel needs presents problems for a policy such as the SEN Policy which focuses on a generic level of provision by relying almost entirely on generically calculated payments.

61. *Third* he submitted, the two aspects of the SEN Policy which allow for adjustment from case to case are insufficiently formulated to remedy either of the first two difficulties. The first adjustment is the possibility that the Council will provide transport. But it is clear that this will apply only in truly exceptional instances, where it is the only viable option for getting the pupil to school. The second possibility for adjustment is evidenced by the Council's assertion that the figures in the Ready Reckoner document are indicative only. However, there is nothing in the SEN Policy that explains either adequately or really at all, what sort of considerations might result in a PTB above (or below) the indicative level, or the significance that would attach, in money terms, to those matters. Mr Broach's overall submission was that when assessing the legality of the parts of the SEN Policy that apply to pupils like the Claimant, little weight can be attached to the possibility that pupils might receive substantially more than a PTB in the amount specified in the Ready Reckoner document. In my view, there is real force in this point. Mr Kirk's evidence is that the amounts produced by applying the Ready Reckoner document must be reasonable because they were used in the PTB Pilot Scheme, and in the subsequent voluntary scheme which has run since the 2017/2018 academic year which has been taken up by some parents. However, the take up rate has been relatively low: 201 children overall (11%), and only 37 children in the 16 to 18 years age bracket (13%). More importantly, there is no evidence as to the level of transport needs of those who have to date opted for PTBs. I do not consider that the self-selecting sample of those who have chosen to take up PTBs provides any rationally reliable basis for the conclusion that the per mile rates in the Ready Reckoner document are reasonable. Mr Kirk also refers to some instances where the amount of a PTB is at face value, significant, perhaps about the level set out in the Ready Reckoner. But as I have explained above, no significant information about those cases has been provided that provides any insight as to how final PTB amounts are reached and what matters are relevant.

62. The lack of information in the SEN Policy as to which matters, in what circumstances might produce PTBs either higher or lower than the amounts in the Ready Reckoner

document, is astonishing. Some clue is perhaps provided by the PTB application form. Section 5 of the application form asks for a range of information about the pupil's mobility. It is referred to as information *"which will help [the Council] assess eligibility for a personal transport budget"*. It is perhaps reasonable to assume that account will be taken of it when setting the amount of the PTB. But that is not said, and there is no attempt to explain how the information might feed in to the Council's calculation of the PTB. Applicants, such as the Claimant's father, are simply left to guess. The Claimant's experience of the PTB application process does not provide any assistance because although the Council decided that it would provide her with a PTB (when it still intended to introduce the revised policy for the 2019-2020 academic year), it did not state the amount of the PTB, and the correspondence I have seen gives no clue as to the approach that would have been taken to reach the final amount of that PTB.

63. These matters do not affect my conclusion on the grounds of challenge pursued in this claim, which I have addressed above. But they ought to give the Council pause for thought. It is not in dispute that Council faces acute financial difficulties. It is apparent from the information provided to the Council's Cabinet for the purposes of the March 2018 decision that the revisions to the Mainstream Policy and the SEN Policy were part of the Council's response to that serious position. As I see it, the move to PTBs in the revised SEN Policy seeks to shift some part of the burden of meeting the cost of home to school transport from the Council to parents. While moving the cost burden is not an inherently unlawful objective, the SEN Policy lacks coherence because the information given to parents about PTBs avoids stating this uncomfortable truth. For example, the FAQ at Appendix 1 to the SEN Policy says that the Council's expectation is *"that in the vast majority of cases the PTB will cover your costs…"*, yet it is clear to me that that can only assume that the parent transports the child to school in his own vehicle, so that the cost being met by the PTB is the cost to the parent of using his car for that purpose. That is the only way to make sense of the comments that follow about parents pooling PTBs, and making car-share arrangements with other parents. For like reason, what the policy says about the calculation of PTBs is deeply unsatisfactory: although the figures in the Ready Reckoner document are described as "indicative", the absence of information about the circumstances in which different amounts might be made available, and the matters the Council will consider to the relevant to the level of a PTB (other than the mileage rate and the home to school distance) strongly suggests that the rates in the Ready Reckoner document are not indicative, but prescriptive. Since the Council has now decided to delay implementation of the new approach to PTBs until the beginning of the 2020-2021 academic year revisions to the SEN Policy, I hope it will take the opportunity to reconsider these matters.

(5) Did the Council fail to comply with the obligation under section 149(1) of the Equality Act 2010?

64. The final ground of challenge is failure to comply with the public sector equality duty. The Claimant contends that it is apparent from the Council's *"Equality and Human Rights Impact Assessment"* document that the Council prepared, that the Council did not address the section 149(1) requirements logically. The Claimant contends that the document evidences a lack of analysis and a generally superficial approach. Specifically, the Claimant contends that when taking his decision, the Council's Cabinet did not recognise that if Council-provided transport was withdrawn it would disadvantage

disabled children such as the Claimant, by denying them the benefit of social interaction on shared school to home transport.

65. I have been referred to a number of well-known authorities on the section 149(1) obligation, and the approach to be taken by the court when asked to determine whether a public authority has complied with its due regard obligation under that section. In particular my attention was drawn to *R(Hurley) v Secretary of State for Business Innovation and Skills* [2012] HRLR 13 per Elias LJ at paragraph 78; *R(Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 per McCombe LJ at paragraph 26; *R(Unison) v Lord Chancellor* [2016] ICR 1 per Underhill LJ at paragraph 116; and *Powell v Dacorum Borough Council* [2019] EWCA Civ 23 per McCombe LJ at paragraph 44. Whether or not a public authority has complied with the obligation to have due regard to the section 149(1) criteria is a question for the court, but the approach to compliance is not one-size-fits-all. In all instances, there must be evidence that demonstrates to the satisfaction of the court that the public authority took its decision with the statutory criteria properly in mind. The question for the court is whether the public authority has had *"due regard"* to those criteria, as they applied to the decision in hand. The standard that a court should require is not a standard of exhaustive consideration. Although whether there has been compliance with the section 149(1) duty is a question for the court, the court will not necessarily substitute its own view for that of the public authority, as a matter of course, on all matters. It will substitute its own view where it is apparent that the public authority has approached compliance with the section 149(1) obligation on a footing that is demonstrably false, or in a manner which is obviously lacking. But where the issue for the public authority was in the nature of an assessment of the potential consequences of the decision in hand, the approach required of the court is different. In his judgment in the *Unison* case, Underhill LJ described what is required of the court as follows (at paragraph 116).

> "…to the extent that views are expressed on matters requiring assessment or evaluation the Court should go no further in its review than to identify whether the essential questions have been conscientiously considered and that any conclusions reached are not irrational. Inessential errors or missed judgments cannot constitute evidence of the breach of the duty".

66. In the present case the primary evidence on the section 149(1) issue is the Council's *"Equality and Human Rights Impact Assessment"* document. This is a pro-forma document. It was in the papers provided to the Council's Cabinet for its 9 March 2018 meeting. In the course of submissions, I was also referred to the Report prepared for that meeting by the Director of Environment and Transport. The Report does refer to some of the points identified in the EHRIA, but does not, I think, take any of those matters any further. The EHRIA document is in three parts. Section One is titled *"Defining the Policy"*. It contains a detailed description of the proposed policy changes. It sets out the context for the proposals and the considerations that have caused the proposals to be formulated. It also identifies the categories and numbers of pupils likely to be affected by the proposals. The second part of the form comprises a screening exercise to decide whether a full assessment of the proposal is necessary. Section Three is the assessment report. This part of the document draws heavily on the responses to a consultation exercise on the proposals, conducted by the Council between September and December 2017. The responses are used as the premise to identify possible adverse

impacts of the proposed new policy. This information is categorised, including by reference to the impact on disabled pupils and their families. This part of the document also includes a section headed *"Mitigating and Assessing the Impact"*.

67. The EHRIA is not a perfect document. In places it is a little confusing, because it tries to cover two materially different exercises: one being the analysis and consideration required by section 149(1) of the 2010 Act; the other being consideration of whether or not the substance of the proposals is likely to be compliant with the Council's substantive obligations under section 6 of the Human Rights Act. In some places the questions posed in the document could, for section 149(1) purposes, be put more directly. For example, in respect of the criterion at section 149(1)(b) of the 2010 Act, *"the need to advance equality of opportunity"*, it would be more direct to pose questions such as "will the measure advance equality of opportunity?" "if so how?" "if not, why not". As it stands, the way which the questions are formulated tends to promote a lack of clarity in the answer. However, although there are criticisms that can be made, I do not consider they are sufficiently material to warrant the conclusion of the Council failed to comply with its section 149(1) obligation. I do not accept that the Claimant's criticism that the document is *Panglossian*. Taking as an example the section 149(1)(b) criterion to advance equality of opportunity, the analysis does recognise a potential adverse impact both for disabled pupils and for their families; it recognises the cost burden that may shift onto those families; and it recognises the risk that without Council-provided transport, some pupils may not be able to attend school. Possible mitigating steps are also suggested (matters which are relevant to what is stated at section 149(3) of the 2010 Act). I accept that the Claimant has been able to point to some matters which might have been identified as possible adverse impacts arising from the proposals, which are not mentioned: for example, that withdrawal of Council transport would remove the benefits to pupils from social interaction on shared transport from home to school. But the fact that the Claimant can point to such matters is not of itself, proof of a failure to comply with the section 149(1) obligation. Looking at the EHRIA document overall, I consider it provides sufficient evidence that the Council did comply with the public sector equality duty.

C. Conclusion

68. For the reasons set out above, this application for judicial review is dismissed.