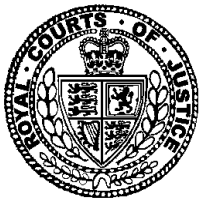

Neutral Citation Number: [2024] EWHC 701 (Admin)

Case No: AC-2023-BHM-000095

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street, Birmingham, B4 6DS

Date: 26/03/2024

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE

- -

Between :

The King **on the application of** **YVR** **(a protected party, by his litigation friend YUL)**	**Claimant**
- and -	
BIRMINGHAM CITY COUNCIL	**Defendant**

- -
- -

Mr Dan Squires KC & Mr Aidan Wills (instructed by **Central England Law Centre**) for the **Claimant**
Ms Joanne Clement KC & Mr John Bethell (instructed by **Birmingham City Council Legal Department**) for the **Defendant**

Hearing dates: 28th & 29th February 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 26 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

THE HON. MRS JUSTICE COLLINS RICE DBE

Mrs Justice Collins Rice :

Introduction

1. This claim is brought, on his behalf, by the mother of a severely disabled, active young man with, as I have read, a big smile. They have been anonymised by court order in these proceedings because he is so vulnerable. I shall refer to him as the Claimant.

2. The Claimant is in his mid-twenties. He lives at home with his parents and siblings. That is what they all consider best. He is profoundly autistic, he has epilepsy, and he has severe learning disabilities and other mental ill-health diagnoses. He is non-verbal, and can exhibit challenging behaviours. His mother's written evidence, which I have read carefully, is eloquent testimony to her long labour of love in providing the happiest life and best opportunities she can for her son. Her own personal care for him is a crucial part of the support and enabling on which he relies.

3. Their local authority, Birmingham City Council ('the Council') provides a lot of care and support for him too. It is required to by law. The family is glad of this help and the huge contribution it makes to the Claimant's daily life.

4. This case is all about how the Council charges the Claimant for what it provides. The Claimant does not so much complain of the calculation of his own bill, at any rate in these proceedings; he challenges the whole policy under which the Council charges for the provision of adult social care in the community to individuals like himself. He says it treats unfairly and discriminates against people who, like him, are so disabled they cannot, and will never be able to, do any paid work.

5. Birmingham City Council is said to be one of the largest local authorities in Europe. As is well known, it is in the most severe of financial predicaments. Its budget management is currently subject to emergency central government intervention and oversight. As at the time of hearing the Claimant's challenge, at the end of the financial year 2023/24, the Council had effectively declared itself bankrupt, was looking to make a drastic £300m of cuts, and had been granted exceptional government permission to increase council tax by a total of 21% over the next two years.

The Claimant's situation

(a) Assessing and meeting adult social care needs

6. Local authorities have a duty, under section 18 of the Care Act 2014, to meet an adult's needs for care and support – except where they are already being met by a carer – if those needs meet certain 'eligibility criteria'.

7. These 'eligibility criteria' are explained in section 13 of the Act, and in regulations made under it. They relate to a person's assessed physical or mental impairment, and their inability, by reason of that impairment, to achieve certain 'outcomes'.

8. The assessment of an individual's needs is kept under review. In the Claimant's most recent assessment (September 2023), he was assessed as being unable, by reason of his disabilities, to achieve the following outcomes: (a) managing his own daily nutrition,

(b) maintaining personal hygiene, (c) managing toileting, (d) dressing himself, (e) 'making use of his home safely' – he cannot be left alone and unattended anywhere at home, (f) maintaining a habitable home environment. These are his 'eligible needs'.

9. To the extent that these needs are not met by his mother and family, they must be, and are, met by the Council. The Claimant attends a Council day centre all day on weekdays, where he receives one-to-one support. He is provided with one-to-one support from a Council carer at home for a set number of additional hours per week (increased at his last review from 10 to 30, as his mother was herself starting to struggle to keep up with his needs).

10. As well as meeting his eligible needs, the day centre and the Claimant's personal carer enable the Claimant to keep calm, to maintain a routine, and to stay fully occupied, all of which is important for his wellbeing and helps manage his challenging behaviours. They also enable him to enjoy physical and social activities which make a big contribution to his quality of life. They enable him to communicate, to go to the park, to enjoy walking and swimming, to negotiate roads and shops, and to eat out on a weekend day at a favourite café where he and the staff know each other.

(b) The benefits system

11. The Claimant is unable to earn any income of his own. He has no other independent means. He is reliant on the state benefits system. That is what it is there for.

12. His ordinary, basic living needs are provided for by the Universal Credit standard allowance, which is means-tested. This is intended to pay for his food and clothes and his everyday personal expenses. He is also entitled to the Universal Credit 'limited capability for work-related activity' allowance ('LCWRA'). This is paid to individuals like the Claimant who, by reason of their disability, are likely to have general higher living costs than others (for example, in his case needing a frequent supply of fresh clothes), but who at the same time cannot supplement their benefits income by earning.

13. The Claimant is also entitled to the Personal Independence Payment ('PIP'). This is a non-means-tested benefit. There are two parts to it. The daily living part is intended to provide for the cost of getting help with everyday activities if an individual needs that help. Activities under this heading include preparing food, personal hygiene, dressing, reading, communicating, and socialising. The mobility part is intended to provide for the cost of getting help with physically moving around, leaving the home, following a route and travelling.

14. The level of these benefits is set nationally and assessed by the relevant Government agency. As can be seen, the LCWRA and the PIP are directed to the cost of meeting some of the Claimant's particular needs arising from his disability, including some of those the Council is required by law to meet. The mechanism which connects up the funding stream provided for disabled individuals by the benefits system, with the provision of care to them by the local authority, is section 14 of the Care Act 2014.

(c) The power to charge for the provision of adult social care in the community

15. Section 14 gives local authorities the power to charge an adult for meeting their 'eligible needs' – and most, if not all, do so. (Some services – such as the provision of

disability aids and adaptations – must be provided free of charge: section 3 of the Act.) If authorities are going to charge, they must make an assessment of the individual's financial resources (section 17). Section 78 of the Act requires local authorities to '*act under the general guidance of the Secretary of State*' in the exercise of charging functions.

16. By section 14(7) of the Act, the authority may not make a charge if the income of the individual would, after deduction of the amount of the charge, fall below an amount to be specified in regulations. In other words, authorities cannot charge at all unless an individual's income is over a certain amount, and that amount is then protected from being taken in charges. This is the 'minimum income guaranteed amount' ('MIG'). The way the MIG is worked out is set out in Regulation 7 of the Care and Support (Charging and Assessment of Resources) Regulations 2014. It is a relatively complex mechanism. It varies from individual to individual, and depends on factors relating to age and family circumstances. It also factors in disability at two levels, depending on severity of disability: at each level, a disabled individual is allocated an enhanced MIG.

17. The Regulations also make important provision about how an individual's income is to be assessed in the first place. In particular, they specify certain income that *cannot* be taken into account for these purposes. For example:

    i) Earnings derived from employment cannot be taken into account (Regulation 14). This reflects a general legislative policy to protect earned income and to maximise the incentive to work where possible, not least because of the contribution it can make to an individual's wellbeing.

    ii) By paragraph 4(1) of Schedule 1 to the Regulations: '*where a local authority takes into account in the calculation of income any disability benefits the adult receives, any disability-related expenditure incurred by the adult*' is deducted from the income calculation. Disability benefits are defined to include the PIP. Regulation 4 is known as the 'disability-related expenditure', or DRE, disregard.

    iii) The mobility component of the PIP cannot be taken into account (paragraph 8 of Schedule 1).

18. What all this means for the Claimant is that his *income* may, as a matter of statute law, be assessed for charging purposes by *including* all of his Universal Credit standard allowance and LCWRA, and the daily living element of the PIP (minus the DRE disregard). His personal MIG is then calculated, taking into account his age, the fact that he is single and childless, and the level of his disability. Above that guaranteed minimum income figure, his income is potentially recoverable by the Council in charges for meeting his eligible needs. Unsurprisingly, in the Claimant's case, the cost to the Council of meeting his needs – including providing the day centre activities and the one-to-one carer hours – vastly exceeds the amount of his unprotected income available to be recovered by it in charges.

The Council's choices

(a) Exercising the power to charge

19. The power to charge under section 14 of the Care Act is just that, a discretionary power. The Council has taken the usual course of exercising it, to make charges to contribute to the cost of meeting adult social care needs. As we have seen, its freedom to use that power is restricted by the way the Regulations control (a) the calculation of income and (b) the protected MIG. Otherwise, it is a power to be exercised according to ordinary public law principles.

20. The Regulations expressly confer, or confirm, a relevant and specific power in the case of adults with needs for care and support in the community. A local authority *may*, in calculating the individual's income for the purposes of the financial assessment it must make before charging them, '*disregard such other sums the adult may receive as the authority considers appropriate*' (Regulation 15(2)). That underlines that the Council can charge less, but not more, than the statutory scheme sets out.

21. It is the Council's exercise of – or failure to exercise – these powers which is the focus of the present challenge.

(b) Government guidance

22. As will be recalled, the Council is subject to a legal duty to act '*under the general guidance*' of the Secretary of State in exercising these functions. The Government has issued, and maintains, relevant statutory guidance. The most recent version was published on 5th October 2023. It says this, by way of general introduction to the exercise of the power to charge, and explanation of how the statutory scheme works:

> The overarching principle is that people should only be required to pay what they can afford. People will be entitled to financial support based on a means-test and some will be entitled to free care. The framework is therefore based on the following principles that local authorities should take into account when making decisions on charging. The principles are that the approach to charging for care and support needs should:
>
> - ensure that people are not charged more than it is reasonably practicable for them to pay
> - be comprehensive, to reduce variation in the way people are assessed and charged
> - be clear and transparent, so people know what they will be charged
> - promote wellbeing, social inclusion, and support the vision of personalisation, independence, choice and control
> - support carers to look after their own health and wellbeing and to care effectively and safely

- be person-focused, reflecting the variety of care and caring journeys and the variety of options available to meet their needs

- apply the charging rules equally so those with similar needs or services are treated the same and minimise anomalies between different care settings

- encourage and enable those who wish to stay in or take up employment, education or training or plan for the future costs of meeting their needs to do so

- be sustainable for local authorities in the long term.

23. The guidance states that its intent is to support local authorities to assess what a person can afford to contribute towards their care costs, and that they '*should also consider how to use their discretion to support the principles of care and support charging*'. In particular, local authorities should not use their discretion in a way which would lead to two people '*with similar needs, and receiving similar types of care and support*' being charged differently. They should consider how to protect a person's income.

24. The guidance states that:

> 8.46 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.
>
> 8.47 Local authorities should therefore consider whether it is appropriate to set a maximum percentage of disposable income (over and above the guaranteed minimum income) which may be taken into account in charges.
>
> 8.48 Local authorities should also consider whether it is appropriate to set a maximum charge, for example these might be set as a maximum percentage of care home charges in a local area. This could help ensure that people are encouraged to remain in their own homes, promoting individual wellbeing and independence.

25. The guidance acknowledges that local authorities may take most of the benefits people receive into account. But they must ensure that *in addition to* the MIG, people retain enough of their benefits to pay for things to meet those needs *not* being met by the local authority. In particular, where disability-related benefits are taken into account, the local authority should allow the person to keep enough benefit to pay for '*necessary disability-related expenditure to meet any needs which are not being met by the local authority*'. An individual's care plan is a good starting point for what is '*necessary disability-related expenditure*' but flexibility is needed. Consideration should not be limited to what is necessary for care and support – for example above-average heating costs should be considered.

26. About the MIG, the guidance explains that its purpose is '*to promote independence and social inclusion and ensure that [individuals] have sufficient funds to meet basic needs such as purchasing food, utility costs or insurance. This* ***must*** *be after … any disability related expenditure*'. Local authorities' discretion to set a higher than statutory MIG should be considered with a view to '*greater consistency between the charging framework and established income protections under the income support rules*'.

(c) The Council's charging policy

27. The Council issued a '*Charging for care and support policy document*' on 1st April 2016. Contemporary documents indicated it was adopted on the basis of a consultation exercise, policy recommendations, and a public sector equality duty impact assessment (although that assessment has not been tracked down in the Council's records). The documents also confirm that adoption of the policy was intended to produce an increase in the Council's revenue from these charges, but that all the revenue raised in this way was being applied to pay for adult social care (or at any rate to reduce the gap between the cost of that care to the taxpayer and the amount the Council was raising in charges).

28. The Council's up-to-date policy document sets out the statutory framework and the 'principles' from the Government's guidance. Under a heading of 'income', it specifically references the relevant parts of the government guidance; it states that its approach is to consider as income *all* the benefits an individual receives *except* to the extent excluded by the statutory scheme. But it also states that it will ensure that, *in addition to* the MIG and to the benefits excluded, an individual retains enough to pay (on receipt of proof) for certain specified outgoings. These include 'disability related expenditure', which in turn is defined to include '*costs of any specialist items needed to meet the person's disability needs*'.

29. Of these, a non-exclusive list of examples is provided, as follows:

> (i) Day or night care which is not being arranged by the local authority
>
> (ii) Specialist washing powders or laundry
>
> (iii) Additional costs of special dietary needs due to illness or disability
>
> (iv) Special clothing or footwear, for example where this needs to be specially made; or additional wear and tear to clothing and footwear caused by disability
>
> (v) Additional costs of bedding, for example, because of incontinence
>
> (vi) Any heating costs, or metered costs of water, above the average levels for the area and housing type
>
> (vii) Reasonable costs of basic garden maintenance, cleaning or domestic help, if necessitated by the individual's disability and not met by social services

> (viii) Purchase, maintenance and repair of disability-related equipment; reasonable hire costs of equipment may be included, if due to waiting for supply of equipment from the local council
>
> (ix) Personal assistance costs, including any household or other necessary costs arising for the person by the individual's disability and not met by social services
>
> (x) Internet access in some circumstances for example for blind and partially sighted people
>
> (xi) Other transport costs necessitated by illness or disability, including costs of transport to day centres, over and above the mobility component of … PIP, if in payment and available for these costs, unless Birmingham City Council offer the provision of transport to a day centre but this is unreasonably not being used
>
> Any other reasonable items or expenditure which are needed because of the person's illness or disability.

30. The Council has applied its charging policy to the Claimant. In his case, the outcome has been that it has charged him the maximum amount envisaged by the statutory scheme. It has taken all of his benefits except those excluded by the scheme or protected by his personal MIG. It considers this to be consistent with the law, the Government guidance and its own policy.

(d) The Norfolk case and the Council's policy review

31. On 18th December 2020, judgment was handed down by the High Court in the case of *R (SH) v Norfolk County Council [2020] EWHC 3436 (Admin)*. In that case, a local authority had made a change to its adult social care charging policy, as it applied to severely disabled people. It had previously been using its discretion to set a MIG well above what had been required by the statutory scheme, and to exclude the whole of the PIP in its calculation of income. But it changed its policy by way of a phased reduction to the statutory minimum – in effect to reach the policy position already reached in Birmingham, and to charge the maximum permitted by the scheme.

32. Norfolk's policy was challenged by a young woman with severe learning difficulties and physical disabilities caused by Down's syndrome, who was in receipt of care. The High Court held the new policy to have unlawfully discriminated against the Claimant, because it resulted in a higher *proportion* of her income being taken in charges than that of recipients of social care who were less severely disabled, not permanently excluded from the workplace, able to earn and earning. The Court held that discriminatory effect to have been unnecessary, irrational and disproportionate.

33. Ms Clement KC, Leading Counsel for the Council in the present case, told me that the *Norfolk* judgment had caused national 'consternation' among local authorities, not only because of its potential financial impact but also because local authorities were said to be at a loss to understand how, consistently with the statutory scheme, they could eliminate the objectionable discriminatory effect identified in *Norfolk* (and indeed what

exactly it had been about Norfolk's *previous* policy that had protected it from the same objection). I am told that no local authority is known to have confidently solved this conundrum since. I say 'I am told' this because I do not have evidence about it either way. And of course it is Birmingham's position I have to focus on in this case.

34. In any event, Birmingham City Council did review its policy in the light of ***Norfolk***. It did so by way of a process including three decision points over a period between 2021 and the beginning of 2023. The contemporaneous records indicate a developing analysis that included the question of whether the fact that Norfolk had *changed* its policy might be a relevant point of difference. Reviewers noted that the National Association of Financial Assessment Officers (NAFAO) was taking a nationwide look at the impact of ***Norfolk***, and that benchmarking Birmingham's policy against others' would need to be part of a longer-term review. They noted that a further equality impact assessment might be needed if it was going to change its own policy.

35. The Council's post-***Norfolk*** review process identified a limited number of options available to it to increase the *proportion of income* a severely disabled individual unable to work could be enabled to keep. It could increase the MIG above the statutory minimum. It could disregard more of the PIP. It could, in other words, adopt a policy rather like the one Norfolk County Council had *previously* been pursuing. But either or both of these measures would impact the social care budget to the tune of millions. And neither could be said confidently to eliminate the differential impact criticised in ***Norfolk***. A third option – not to charge at all – was not easy to reconcile with the clear, detailed statutory power to do so, and with the Council's wider financial duties. The fourth option was, in terms, to await the outcome of this litigation, and to use it to challenge the logic of the ***Norfolk*** decision or at any rate its application to Birmingham's and the present Claimant's specific situations. And that is where we are today. The Council's latest version of its policy includes something more than previous versions in the way of explanation and transparency. But its essential mechanism remains unchanged since 2016.

(e) The Council's financial crisis

36. The backdrop to the policy review was the Council's descent into unprecedented financial crisis. The Council, like other local authorities, is required by law to set a balanced budget. The financial plan it published in January 2023, setting out its proposed 2023/24 budget, included a very bleak prognosis as to its likely ability to do so. It identified a likely budget gap at that point of around £80m. The causes it identified were various. There was a significant impact from historic equal pay claims totalling more than £1bn. National government austerity measures and wider economic circumstances were being blamed to a degree. But the relentless rise in demand for adult social care was identified as a major unfunded pressure. Spend on adult social care was the Council's largest single area of net expenditure, at around 43%.

37. On 5th September 2023, the Council issued a notice under section 114 of the Local Government Finance Act 1988. This was described to me as the 'nuclear option', an effective declaration of bankruptcy or inability to balance the budget. The projected deficit now stood at £87m. The consequence was a decision to impose radical spending controls and the cessation of all non-essential expenditure. But that was not projected to solve the problem in-year.

38. Central Government intervened at this point and sent in commissioners to oversee the Council. The commissioners reported on 27th February 2024 (the day before the hearing of the present challenge) to the effect that the Council was '*in an extremely serious financial position as a result of the past decisions it has taken…*'. It stated that '*while this situation was brought about initially due to the scale of the potential Equal Pay liabilities the Council faces, this budget highlights wider and significant financial pressures and a fundamental structural collapse of the 2023/24 General Fund budget*'. It confirmed that the Council had been provided with £1.255bn in exceptional financial support – a loan from central Government to be paid back through asset sales. It identified a '*narrow path*' to financial sustainability dependent on making revenue savings of £293m over the following two financial years. The power (obligation) to increase council tax charges, at the same time as reducing services, was confirmed. The Council was instructed to pursue that two-year plan. '*There are no other choices available.*'

The Claimant's challenge to the Council

(a) The decision challenged

39. By his claim form dated 26th April 2023, the Claimant applied for judicial review of the Council's '*decision to introduce the 2023 Charging Policy without removing or revising the aspects of the policy which give rise to discrimination*'.

40. This decision was the third iteration of the post-*Norfolk* review process. The Council's substantive position, it will be recalled, remained as embodied in the Council's 2016 charging policy, as lightly amended to improve its transparency, and in the documentation of early 2023 recording the basis on which the decision was taken not otherwise to change it but to adopt the present litigation strategy with a view to testing its legal obligations.

(b) The grounds of challenge

41. By permission of Lang J dated 1st August 2023, the Claimant has permission to bring a challenge on the following grounds:

> Ground 1: The Council's charging policy contravenes Article 14 of the European Convention on Human Rights, taken with Article 1 of Protocol 1 to the Convention, because it discriminates against those who are severely disabled and cannot work by reason of their disability, as compared to disabled people who are able to work.
>
> Ground 2: The charging policy indirectly discriminates contrary to the Equality Act 2010.
>
> Ground 3: In formulating and maintaining the charging policy, the Council has breached the Public Sector Equality Duty set out in the Equality Act 2010, section 149.

The outline legal framework

(a) Article 14 ECHR

42. Article 14 of the ECHR provides:

> **Prohibition of Discrimination**
>
> The enjoyment of the rights and freedoms 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 origin, association with a national minority, property, birth or other status.

43. Art.14 requires the question of discrimination to be considered through the lens of the exercise of (other) rights and freedoms protected in the Convention. It is, as a result, a preliminary question in any Art.14 case whether a claim 'falls within the ambit' of Art.14. Here, the underlying right relied on is that protected by Article 1 of Protocol 1 to the Convention – the (qualified) right not to be deprived of peaceful enjoyment of one's possessions (benefit income, in this case). The parties agree that the Claimant's challenge to the Council's charging policy, and its impact on his income, 'falls within the ambit' of his Convention rights. That accords with the caselaw.

44. It is uncontroversial between the parties that an Art.14 challenge then needs to consider a further three questions: (a) can a claimant show he has been treated differently, in the exercise of the relevant underlying right, from another individual in an analogous situation? If so, (b) is the difference of treatment on the ground of one of the characteristics listed in Art.14, or 'other status'? If so, (c) is there an objective justification for that difference in treatment? (*R (Stott) v Secretary of State for Justice [2020] AC 51* at [8]; *In re McLaughlin [2018] 1 WLR 4250* at [15] – both decisions of the UK Supreme Court).

45. Although the Council had originally contested the matter, Ms Clement KC accepted before me that, on the Court of Appeal authority in *Jwanczuk v SSWP [2023] EWCA Civ 1156* (see [52]-[64]), being 'severely disabled so as to be unable to work' is a characteristic capable of objective determination and hence able to qualify as an 'other status' for the purposes of Art.14. I consider the implications of that in more detail below.

46. Whether a claimant has been treated differently from someone else in an analogous situation on the ground of an 'other status' of this nature is a factual and evaluative question, sometimes but not always requiring to be evidenced, and on the approach to which the caselaw provides guidance, again considered in more detail below.

47. If all other criteria are satisfied, the final question on an Art.14 challenge is whether the difference in treatment is objectively justified. Again, it is uncontroversial between the parties that the test here is whether a difference in treatment has an objective and reasonable justification, in light of the legitimacy of the aim of the measure complained of, and its proportionality as a means of achieving that aim (see the formulation in the judgment of Lord Reed JSC in *R (SG) v SSWP [2015] PTSR 471* at [13]).

48. The approach recommended by Lord Reed JSC in *Bank Mellat v HM Treasury (no.2) [2014] AC 700* at [74] to questions of proportionality is to answer four questions:

(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right;

(2) whether the measure is rationally connected to the objective;

(3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective;

(4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

(b) Unlawful discrimination contrary to the Equality Act 2010

49. The Claimant in this case mounts a second ground of challenge, to the effect that the Council in formulating and applying its charging policy is in breach of its duty under sections 19 and 29 of the Equality Act 2020 not to discriminate in the exercise of public functions. The parties, however, agree that this ground substantially overlaps with the Art.14 challenge, and that the two grounds are likely to succeed or fail on substantially the same basis. In argument before me, the parties concentrated on the Art.14 challenge, and I do the same in this judgment.

(c) Breach of the Public Sector Equality Duty

50. The Claimant's third ground of challenge is to the Council's compliance with its duty under section 149 of the Equality Act 2010. Section 149 provides as follows:

> **Public sector equality duty**
>
> (1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> (2) …
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to—

(a) a breach of an equality clause or rule;

(b) a breach of a non-discrimination rule.

(9) …

51. The Court of Appeal gave guidance on the correct approach to the PSED in *R (Bridges) v Chief Constable of South Wales Police [2020] 1 WLR 5037* at [175] as follows:

> (1) The PSED must be fulfilled before and at the time when a particular policy is being considered.
>
> (2) The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.
>
> (3) The duty is non-delegable.
>
> (4) The duty is a continuing one.
>
> (5) If the relevant material is not available, there will be a duty to acquire it …
>
> (6) Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality goals and the desirability of promoting them, then it is for the decision-maker to decide how much weight should be given to the various factors informing the decision.

Analysis

52. The outline position of the parties can be briefly summarised.

53. The Claimant says the Council has not properly considered, or exercised, its discretion to take less in charges than the statutory mechanism automatically restricts. Its maximalist approach produces a situation in which a bigger slice of the Claimant's income is taken in charges compared to someone less disabled than him, or disabled in a different way, who is not permanently excluded from the workforce and who can supplement their income with earnings. He says there is no justification for that, other than maximising revenue. And the caselaw makes clear that just saving money is not a good reason capable of justifying discrimination. This case is squarely on all fours, says the Claimant, with *Norfolk* and should produce the same outcome. The Council should have followed *Norfolk*.

54. The Council says it has, carefully and demonstrably, considered its discretionary options. But treating differently people who earn from people who do not, is part of the fundamental structure of the statutory scheme. That scheme – the benefits system, the assessment and provision of care, and the charging mechanism that connects them up – has to be considered as a whole, and it is a system bounded by concepts of *need*. Looked at in that way, there is no relevant difference of treatment. Even if there is, it

pursues legitimate and justifiable aims in a proportionate way, consistently with the statutory scheme and its underlying social policy. The analysis in *Norfolk* missed out some important factors. In any event, the Council's present budgetary imperatives take its financial situation far beyond the considerations of 'just saving money': it *must* weigh the interests of its taxpayers overwhelmingly in the balance at the present time, and there is support in the caselaw for so doing.

55. The following analysis proceeds stepwise (mindful of the authorities' warning not to do so excessively mechanically) to consider the sequential components of the Art.14 test. The circumstances of the present case and those of the *Norfolk* case are sufficiently close to require detailed and respectful attention to precisely how the outcome in that case was reached. So I consider the *Norfolk* analysis at each stage in parallel. The Council's critique of that case, and the Claimant's response to it, sometimes requires me to do so at a level of granularity not recorded in the *Norfolk* judgment.

(a) The implications of the Claimant's 'other status'

56. The claimant's 'other status' was disputed in *Norfolk*, and the analysis in that judgment reached a conclusion that her status was '*a severely disabled person*'. The claimant's case there had been that (a) she had high care needs, as evidenced by her entitlement to disability related benefits at higher rates and (b) she had '*significant barriers to work*', again as evidenced by her entitlement to what is now the LCWRA. The judgment reviews the caselaw on 'other status' and its warning that the discrimination itself cannot be used to define the 'other status' – they are separate tests. It notes the precedents in the decided cases for 'other status' definitions including '*a severely disabled child in need of lengthy in-patient hospital treatment*', and '*the spouse of a deceased who was severely disabled so that she was unable to work and therefore unable to pay Class 1 or Class 2 National Insurance contributions*'. But the status determined in *Norfolk* itself was in the end a simpler one.

57. The *Norfolk* case was decided before *Jwanczuk*. It was also decided before *MOC v SSWP [2022] EWCA Civ 1*, where the Secretary of State had conceded the relevant status of '*being a severely disabled adult in need of lengthy in-patient hospital treatment*', and in which the Court of Appeal was at pains to emphasise the importance of specificity in identifying the precise status relied on because it affected the nature of the potentially relevant evidence in an Art.14 case (at [61]). The Court of Appeal's analysis in *Jwanczuk* in particular repays careful reading on the issue of accurately identifying status. It focuses with some precision on the cluster of concepts involved when 'severe disability' and 'inability to work' are tied together in a causal relationship in an 'other status' proposition.

58. Both are to a degree evaluative matters. 'Severe disability' is an obvious spectrum issue, and 'inability to work' is not necessarily as binary as it might appear. But the evaluative character of each of these components is not a barrier to their *each* being objectively determinable. Interestingly, when tied together causally, the Court in *Jwanczuk* was reluctant to think about the precise identification of status in terms such as '*disability plus*', or the inability to work as being a signifier along the spectrum of severity of disability. A person may be 'very' severely disabled and yet able to work. Instead, the Court's focus was on '*inability to work*' (by reason of severe disability) as the key signifier. That is a slightly, but discernibly, different emphasis from that reached in *Norfolk*.

59. In the present case, '*inability to work by reason of severe disability*' seems to be a fair, accurate and precise summary of the parties' agreed position on the Claimant's status – the class to which he belongs for the purposes of Art. 14 – and consistent with *Jwanczuk*. And there is no doubt whatever, on the facts, that he does belong in that class. He cannot, and will never be able to, work, because of his profound disability. That is an objectively verifiable factual reality, and not disputed. It is not a status borrowed from the classifications of the benefits scheme. It is the other way around. The benefits scheme recognises the underlying factual reality. In other cases, whether someone is 'unable to work by reason of severe disability' – that is, whether they fall within that category – may be more difficult to evaluate on the facts. But it is entirely straightforward and obvious in the present Claimant's case.

60. The Claimant's status is distinctive in other ways too. Not only is he *permanently* unable to work by reason of severe disability, he has been so since before adulthood. He has no other source of financial income apart from the benefits system. He does, however, have the advantages of living at home with a supportive and caring family, who meet some of his needs.

(b) Discrimination

61. Mr Squires KC, Leading Counsel for the Claimant, says the Council's policy is discriminatory in either or both of two ways. First, he says it is indirectly discriminatory because it places those of his 'status group' – people excluded from the workplace by disability – at a disadvantage compared to those who are not. And second, in reliance on the Strasbourg case of *Thlimmenos v Greece (2001) 31 EHRR 411*, he says there is discrimination in the Council's failure to treat their special situation specially.

62. Mr Squires KC says the Claimant's case is directly analogous to that of the claimant in *Norfolk*, and relies on the court's analysis in that case:

> [66] The difference in treatment relied on by [the claimant] is that the Charging Policy has a disparate impact on severely disabled people like [the claimant] compared with its impact on others. The proportion of earnings that she and other severely disabled people with high care needs and significant barriers to work are required to pay under the charging policy is greater than the proportion of earnings that people who are disabled but not severely disabled are required to pay. Less disabled people will have lower levels of assessable benefit … and … may have earnings from employment or self-employment which will be entirely disregarded from their assessments. 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 … and are fully assessed, and their earnings from employment are not available to her and other severely disabled people, but are not assessed.
>
> [67] The two persons, or two groups of people, in the case are, on the one hand, the severely disabled (with high needs

> which result in higher assessable benefits and no access to earnings from employment) and, on the other hand, everyone else receiving Council services covered by the Charging Policy.
>
> …
>
> [71] It is no answer to say that [the claimant] has not provided detailed statistical evidence of the differential treatment or disproportionate impact: *Burnip v Birmingham City Council [2013] PTSR 117* at para 13. [The claimant] argues that it is obvious from her own case how the Charging Policy affects her disproportionately compared with those who, being less severely disabled, have lower levels of assessable benefits or who have earnings. I agree with that.
>
> …
>
> [73] The situation of the severely disabled (with high needs-based assessable benefits and no earning capacity) and everyone else being charged under the Charging Policy is analogous because they are all receiving Council services covered by the Charging Policy. Their treatment is different because the Charging Policy means that a higher proportion of [the claimant's] earnings (and of other severely disabled people in the same position) is assessed than theirs, and the result is that she is charged proportionately more than they are.
>
> [74] I conclude, therefore, that there has been a difference of treatment between two persons in an analogous situation.

63. The Council says, however, that whereas it may be 'obvious' – indeed, axiomatic – that people who do not work will be charged a greater proportion of their income than those who do, it is far from obvious that that is an effect of the charging policy. On the contrary, says the Council, that is the effect of Regulation 14 of the 2014 Regulations. The mandatory earnings disregard sets earned income outside the boundary within which the Council has any choices to make. In doing so, it does not differentiate between (a) those who can work and earn, but do not, and (b) those who cannot work or earn. It is that feature of the legislation, says the Council, which produces the result complained of, and not any of its own policy decisions. Couching the complaint in terms of a charge being a '*proportion*' of total income adds nothing to the bare effect of the Regulation – namely that earned income is disregarded for the purposes of making the underlying financial assessment. It is a straightforward statement of the obvious that anyone with earned income at a level higher than the benefits system provides will have a higher total income, and it is simple maths that the maximum charge for care, all else being equal, will be a lower proportion of that higher sum.

64. The Council also says it is far from obvious that the *proportion* of income taken in charges is *in fact* higher in the case of a person with high assessed needs and enhanced benefits than in the case of a person with lower assessed needs and lower benefits. On the contrary, says the Council, while higher needs may result in higher benefits (LCWRA, maximum PIP), they also produce higher disregards (the mobility PIP,

higher DRE disregard) *and* a higher MIG. And in any event, earned income will be disregarded, but other income, such as pension or investment income, may not be. So charging as a proportion of total income is not determined by the status of being unable to work as a result of severe disability at all. It is a multifactorial and sophisticated calculus which is sensitive to difference and need. And I do not have *evidence* before me of how it plays out to the Claimant's disadvantage. The real complaint, once again, comes back to the intrinsically privileged status of earned income.

65. In addition, says the Council, individuals like the present Claimant, who are severely disabled, economically inactive and wholly benefits-dependent, are likely to have needs which are being met at a cost which disproportionately exceeds the maximum recoverable amount in any event. To put it another way, they are receiving far more than any other group *in kind* – that is, in the way of adult social care which is not, and cannot be, charged for at all. Charging as a proportion of *income*, if relevant, has to be seen in the context of charging as a proportion of *cost*.

66. Reflecting on all of this, the features of the present case which, in my view, make the question of whether people unable to work by reason of severe disability are discriminated against by the Council's charging policy non-obvious – indeed difficult – to articulate, and to answer by reference to the facts, are as follows: (a) the problem of distinguishing between the effects of the legislation (which is not challenged) and the Council's policy (which is), (b) the problem of making comparisons in a complex, multifactorial computation, involving interdependent permutations of need, care provision, income (earned and otherwise), cost and charging, without controlling for all other variables than the ones chosen, and in particular (c) the reliance on a measure of *proportion* between a selected few of those factors – benefits + earned income on the one hand, and charging for the provision of adult social care on the other – without a clear articulation of the relevance of that particular measure to the choices available to and made by the Council.

67. To start with, the provision in the Regulations for an earnings disregard undoubtedly does deliberately privilege earned income. Those permanently unable to earn have no access to that privilege. Its underlying policy of incentivising paid work has no rational application to them. But the interplay of the statutory schemes for (a) local government assessing their care needs, (b) national government providing benefit income taking those needs into account and providing funds to meet them, (c) local government meeting their care needs and (d) local government charging for (some of) that provision, addresses their particular situation in a lot of other interrelated ways. The real questions raised by the present challenge seem to be whether, *within the framework of the statutory scheme taken as a whole*, the Council's charging policy can properly be said to treat people of the Claimant's status group less favourably than any other group receiving and being charged for adult social care.

68. Evidence of an indirect discriminatory effect *caused by the charging policy* is elusive in the present challenge. The relevance of charge as a *proportion of total income* to the Council's choices is not explained and not self-evident. Indeed, a significant amount of the Claimant's factual case appears directed towards different metrics – something like his total (or percentage) net *disposable* income after (a) his personal expenses and (b) his care needs are accounted for, or alternatively the *affordability* of the charges levied. Affordability and the protection of (net disposable) income are recognisable as relevant considerations from the Government guidance and the Council's policy

statement, but '*proportion*' of total income is not. These would of course be different metrics from the one identified in *Norfolk*. And in a discrimination challenge of this sort, they do require an evidential basis.

69. It appears, for example, that the parties have been in historical dispute over the calculation of the Claimant's DRE disregard – what counts as disability-related expenditure that should be netted off from his income before assessment for charging, and what he should be expected to pay for himself out of his residual benefits. That *in itself* is not a matter before me in these proceedings. In any event, as a matter of evidence, the items of discrete expenditure put forward as examples of what the Claimant must meet out of his own residual resources – café meals, swimming pool entrance, confectionery – are not said or evidenced either to fall within a framework of 'eligible need' or, in practice, to be unaffordable. And none of his personal living or assessed needs are said to be going unmet – including his disability-related needs for routine, social stimulation and interaction, and a high level of activity. A discrimination case based on 'disposable' income or affordability is not clearly identified or developed by reference to the Claimant's own situation or by comparison with others' – other than of course to restate that the Claimant's horizons are bounded by the benefits system, that if he could earn he could expect to be better off, and that if the Council charged less he would keep more.

70. Evidence from the Claimant's solicitor instead proposes two comparator exercises, but in each case the comparator is an individual with earned income, subject to the statutory disregard. It is plain that the comparator keeps a greater proportion of his income, not least because he keeps all of his earned income. It is not plain that that is because of the Council's charging policy.

71. The Court in the *Norfolk* case directed itself on the question of discriminatory effect by reference to the guidance of the Supreme Court in *AL (Serbia) v SSHD [2008] 1 WLR 1434* (per Baroness Hale JSC) as follows:

> [24] … the classic Strasbourg statements of the law do not place any emphasis on the identification of an exact comparator. They ask whether 'differences in otherwise similar situations justify a different treatment'. Lord Nicholls put it this way in *R (Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173* at para 3: 'the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to that question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.
>
> [25] Nevertheless, as the very helpful analysis of the Strasbourg case law on article 14, carried out on behalf of Mr

> AL shows, in only a handful of cases has the court found that the persons with whom the complainant wishes to compare himself are not in a relevantly similar or analogous position (around 4.5%). This bears out the observation of Professor David Feldman, in *Civil Liberties and Human Rights in England and Wales*, 2nd ed (2002), p144, quoted by Lord Walker in the *Carson* case at para 65: '*The way the court approaches it is not to look for identity of position between different cases, but to ask whether the applicant and the people who are treated differently are in 'analogous' situations. This will to some extend depend on whether there is an objective and reasonable justification for the difference in treatment, which overlaps with the question about the acceptability of the ground and the justifiability of the difference in treatment. This is why, as van Dijk and van Hoof observe … "in most instances of the Strasbourg case law … the comparability test is glossed over, and the emphasis is (almost) completely on the justification test".*'

72. Having so directed itself, the Court in the *Norfolk* case identified a '*disparate impact on severely disabled people like [the claimant] compared with its impact on others*'. The comparison made, however, was with those with earned income, actual or prospective, from employment or self-employment. They are indeed treated differently, but by law. (In real life in the present Council's area, there is only a tiny handful of severely disabled individuals with realisable capability for earning. For them, earning may itself be a high-cost or high-investment activity. About their income, and in particular their *disposable* income, I have no evidence.)

73. Indeed, it is people *with* earned income who are treated differently from everyone else receiving adult social care services. Earners are treated differently from *all* those with other kinds of private income, and *all* those with state benefits income only, *whether or not* they are (permanently or otherwise) excluded from the workforce. In relation to the latter, detailed statutory controls linking benefits entitlements to protections for income make bespoke restrictions by law on the power to charge *all* disabled people. Within the remaining scope of that power, I have no comparator evidence that the present Council's policy discriminates between those unable to work by reason of severe disability on the one hand, and on the other hand those who are disabled, are not unable to work, *but who have no earned income* (that is, leaving aside the difference inherent in the scheme). It is not ability or inability to work, but the receipt of earned income which produces disparity of treatment. And that is the inevitable effect of the Regulations. So I am struggling to identify, by logic or evidence, any relevant analogue *in the exercise of the Council's powers* in comparison to whom the Claimant is treated less favourably or has a less favourable outcome.

74. That is a different analysis from the one undertaken in *Norfolk* and which was considered too obvious to need evidence. The difficulty with reading across the *Norfolk* analysis is that the Court there does not seem to have been provided with a comprehensive account of how the charging system operates – either on its own terms or as the mechanism for connecting up the benefits system and the system for assessing and meeting care needs. The implications of the statutory controls on assessable income and the operation of the MIG are not fully addressed, and that may have led to

assumptions about outcomes for whole classes of people that are not intuitive (much less obvious) outcomes of the underlying statutory system understood as a whole, or demonstrated in evidence or worked examples. And the relevance of the metric of charge as a proportion of total (including earned) income to identifying whether a charging policy is discriminatory is nowhere explained and not obvious at all.

75. I take very seriously, however, the need for extreme caution before contemplating disposing of an Art.14 challenge on grounds such as these. The difficulty of locating a clear analogue remains problematic, because without clear identification of a properly comparable difference, it is hard to be confident of correctly analysing any proposed justification for the decision producing the difference. So in these circumstances, and putting the Claimant's case both in its essence and at its highest, I proceed on the basis that it is his ***Thlimmenos*** challenge to the exercise of the Council's powers which is at the heart of his complaint.

76. The ECtHR in ***Thlimmenos*** held that:

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

On that basis, the Claimant's challenge can be considered in the terms that the problem is precisely the Council's *failure* to treat differently (a) people who are *unable* to work by reason of severe disability and (b) people who are severely disabled, in receipt of care, *are able to* work, but have no earned income. The former are permanently excluded from the earnings disregard but the latter are not. They are otherwise in an analogous situation, *and* are treated the same by the charging policy. The challenge is that they should not be.

77. Looked at in that way, this is a challenge which essentially relies on identifying a 'problem' in the statutory scheme, and a missed opportunity for the Council to address it. The 'problem' in the scheme is a statable failure to treat people who can work differently from people who, because of severe disability, cannot. It is an arguable 'failure' because that default situation is arguably irrational and unfair. Its arguable irrationality is that it is an incentivisation system applied to individuals who cannot be incentivised to do that which they are incapable of doing. Its arguable unfairness is the unmitigated financial privilege accorded to earners over those who are excluded from any possible access to that privilege by reason of severe disability.

78. That is not itself an asymmetry of the Council's making. But local authorities have powers under the charging regime to do something about it. The power under Regulation 15(2) is specific and commodious. Government guidance encourages the protection of income and discourages an unconsidered default assumption that all unprotected benefit income is available to be taken in charges. That would not, it says, be consistent with the principles of promoting social inclusion, independence, choice and control. The guidance positively encourages consideration of a protected 'disposable income' uplift to the MIG (which already includes a 25% 'buffer' in the calculation). Its headline principle is affordability. So, the argument goes, the Council's policy of refusing to use its charging power in this way, so as to relieve those

who cannot work (or perhaps even just those who are permanently excluded from the workplace *and* who have no income other than benefits) from the unmitigated consequences of the statutory privileging of earned income, can properly be called discriminatory for the purposes of an Art.14 challenge. The Council could, but has deliberately chosen not to, address a systemic and discriminatory problem with the statutory default; as a result, the problem is unmitigated and discrimination thereby results, or persists.

79. Put that way, this is a discrimination challenge where the discrimination can fairly be called 'obvious', which is capable of clear articulation in accordance with the authorities, which proceeds directly from the Claimant's 'other status' in comparison to all other recipients of social care, which captures what I understand to be the essence of the present case (and indeed the *Norfolk* case), and to which the Council's proposed justification was appositely addressed. It is to that justification that I therefore turn next.

(c) Justification

80. Justification is said by the Claimant to be the heart of the matter before me. A preliminary issue arises as to what it is that falls to be justified. In the *Norfolk* case the Court, in reliance on the guidance of the House of Lords in *A v SSHD [2005] 2 AC 68* (per Lord Bingham at [68]), proceeded on the basis that what fell to be justified was not the charging policy in issue but the difference in treatment between one person or group and another. That formulation was criticised by Ms Clement KC in the present case as having been overtaken by the more recent jurisprudence, to the effect that what has to be justified is the (neutral) measure as a whole. But in any event, here the question can be more simply put: can the Council justify not exercising its power to address the systemic disadvantage, caused by the earnings disregard in Regulation 14, to those who are (permanently) excluded from earning by reason of severe disability?

81. That question is not necessarily simple in content, however. It cannot avoid engaging with the issue which, it was reported to me, local authorities contemplating the *Norfolk* decision found so rebarbative – complete parity or elimination of discrimination is an elusive concept in this space, and, short of that, how much mitigation is enough?

82. At the same time, it is surely possible to clear some of the unnecessary complexity out of the way. In the first place, when identifying the 'legitimate aim' pursued by a policy of defaulting to the bare statutory machinery, it cannot sensibly be contended that 'incentivising work', or even 'protecting *earned* income' will qualify. In other contexts, those certainly can be legitimate aims (see, for example *R (JS) v SSWP [2015] 1 WLR 1449* at [65]). But with our Claimant and his 'other status' cohort, the former is inapplicable and the latter fully accounted for by Regulation 14. If the challenge is to a failure to make compensatory provision for those excluded from the workforce by severe disability, then restatement of the aims of the Regulation will not do. Having said that, I did not hear in the Claimant's case any proposition that *equalisation*, or the elimination of the earnings privilege, was being suggested. If it had been, then the aim of maintaining a differential between earners and non-earners might have come in to play. But as it is, the challenge is to the failure to make *any* special provision to acknowledge the special circumstances of individuals such as the Claimant.

83. In *Norfolk* itself, the aims identified by the local authority, and accepted as legitimate by the Court (at [89]), were apportioning public resources fairly, encouraging independence, maintaining a sustainable charging regime and following the statutory scheme. In the present case, the Council's statement of the legitimate aim being pursued is simpler and much more fundamental. It is not just to operate a charging policy which is '*sustainable for local authorities in the long term*', as the guidance puts it. In its current budgetary crisis, and constrained as it is *at present* to implement emergency financial measures, it is the *imperative* to cut spending and maximise revenue so as to balance the budget.

84. Care is needed with an aim of this sort. It must avoid circularity: it is not an answer to a challenge of unlawful discrimination to say it is cheaper to discriminate than not to. The authorities speak with one voice on that fundamental point, not least in the equal pay context. But at the same time, both as a matter of principle and as a matter of practice, this is a context-sensitive issue. Lord Reed JSC put it this way in *JS*:

> [63]… It was argued on behalf of the appellants that savings in public expenditure could never constitute a legitimate aim of measures which had a discriminatory effect, but that submission is inconsistent with the approach adopted by the European Court of Human Rights …. It is also inconsistent with the acceptance of the economic well-being of the country as a legitimate aim of interference with Convention rights under … [Article 1 of Protocol 1]. An interpretation of the Convention which permitted the economic well-being of the country to constitute a legitimate aim in relation to interferences with the substantive Convention rights, but not as a legitimate aim in relation to the ancillary obligation to secure the enjoyment of those rights without discrimination, would lack coherence.
>
> [64] … I would observe that acceptance that savings in public expenditure can constitute a legitimate aim for the purposes of article 14 does not entail that that aim will in itself constitute a justification for discriminatory treatment. As I have explained, the question whether a discriminatory measure is justifiable depends not only on its having a legitimate aim but also on there being a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

85. Here, I have no hesitation in accepting that the Council's declared aim of getting itself back on track towards a balanced budget is a 'legitimate aim' of considerable importance. It is much more fundamental than a proposition about saving money. It is a proposition about disaster recovery, and one which *does* engage 'the economic well-being of the country': national Government and national finances are involved in regularising the Council's position over the coming two years. In *Bank Mellat* terms, the objective of the Council's non-interventionist charging policy *at present* – and it is its most recent maintenance of that position which is under challenge – is to make a substantial contribution to the programme of radical savings to which it is constrained, and I am satisfied that is a measure of 'sufficient importance' to be at least *capable* of justifying its laissez-faire 'discriminatory' impact. And the rational connection between the objective and the policy is plain from the very substantial proportion of the

Council's total spend which is accounted for by funding including charging for adult social care to the statutory maximum.

86. The next question is 'whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective'. This takes us to the nub of the difficult ***Norfolk*** question (how much mitigation is enough?) and, in my view, also goes a considerable way to answering it. The benchmark is 'unacceptable compromise' and the question envisages identifying and evaluating the range of choices available on a scale of intrusiveness. In ***Norfolk*** itself, the Court appears to have proceeded on the basis that the local authority had other choices for raising the '*same level of charges overall*' and for making its charging regime sustainable '*to the same extent*'. There were '*other ways of achieving the same balance between cost and revenue*'. But this is surely an entirely fact-sensitive evaluation. The choices available to one local authority may not be available to another. The evidence from the Council in the present case is that it has nowhere else to go to achieve the same balance, and that indeed is the plain logic of defaulting to the statutory maximum take. It cannot enable those who cannot work to be charged less for having their care needs met without either reducing further an already insufficient adult social care budget, or subsidising the adult social care budget from somewhere else external to it. But in reality there is nowhere else. All the Council's other heads of revenue and expenditure are fully accounted for. '*There are no other choices.*'

87. The answer to any 'consternation' of local authorities considering whether, and if so how, to charge people excluded from the workforce by disability less for their care than the scheme allows, is that, on ordinary public law principles, the power to do so has to be exercised for the purposes for which it was created. That has to be tailored to the local context and kept under review, and guidance on how to do so has been provided. It does not need to be exercised by reference to some unattainable ideal of equalisation, but a *default* to doing nothing on an *unconsidered* basis is plainly inconsistent with the guidance. Local authorities need to think about their options in between, and in doing so be aware of the particular circumstances of those excluded from the workplace, in some cases permanently so, by reason of severe disability and without any income other than their benefits. It is not necessarily an onerous duty: the guidance confirms it is in the nature of a duty *to consider*. That is anyway a necessary and ordinary part of the responsible stewarding of statutory powers and public money.

88. Some local authorities may have more choices about 'less intrusive measures' than others. Apparently Norfolk was, at least historically, in a relatively favourable position in that regard. I am satisfied, on the evidence of recent history before me in the present case, that Birmingham is not.

89. The final step in considering justification is to stand back and consider '*whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter*'.

90. The *severity* of the impact of the Council's current 'do nothing' strategy on the Claimant is, as I have said, not set out evidentially with any real clarity. Outside of a discrimination claim, that should not come as a surprise. The statutory scheme of local authorities' duties to assess and meet adult social care needs, of national benefits entitlements, and of controls on the power to charge, displays a coherent and integrated

structure which contains at many points checks and balances to safeguard and protect individuals with severe disabilities, no earning power and no private income. That is as it should be.

91. The Claimant's eligible social care needs have been identified and assessed, and are being met. They are being more than met – the 'eligible needs' themselves are in basic enough subsistence terms, but they are being met in ways which give the Claimant a substantial dividend in terms of quality of life and social interaction, occupation and activities, personal attention, communication and mobility. He is provided with benefit income at personally calibrated levels which are addressed to his enhanced needs and expenses, and which are intended in specific ways to be used for exactly the purposes for which they are being used – to pay for those enhanced needs to be met and those expenses to be covered. His income is otherwise protected from charges in ways which are tailored to his situation. It is his *relative* position which is challenged in these proceedings, not his *absolute* position; as I have said, no clear or evidenced case on comparative 'affordability' or 'sufficiency of disposable income' is made in this claim.

92. The Claimant does not have the possibilities of an earner. He does not have the hope of those possibilities. And it is undoubtedly possible to imagine more for him by way of alleviating the effects of his disabilities and improving his life, that money could buy. His mother is well placed to imagine things for him. Her evidence, for example, mentions the possibility of a holiday or more ambitious trips (although his social worker sounds a note of caution about his ability to cope with those sorts of changes to the routine which is so important for him). Local authorities should exercise their imaginations also. But the case for *severity* of impact is not articulated, or apparent on the present facts, to any clear degree.

93. On the other side of the balance is not just the financial imperative of getting a proud city with an international reputation back on its feet again in simple budgetary and public interest terms. There is the immediate imperative of delivering the radical spending cuts, asset sales and service restrictions in a way which is as fair as possible to *all* of the Council's taxpayers and service users. That is a political decision at macro level in which, within the '*narrow path*' to which the Council is constrained by national government intervention on a public interest basis, the Council must be afforded a degree of latitude. The sacrifices that are being demanded of everyone in the city are unprecedented. Nothing outside of any other statutory minima is off-limits. The Council's decision in these circumstances is that, the *needs* of its most vulnerable service users in the position of the present Claimant having been sufficiently safeguarded by detailed statutory minima, other measures addressed to mitigating their exclusion from the workplace must take their place for the time being along with the sacrifices demanded of all its citizens. That cannot fairly be regarded as *disproportionate* to the point where the courts should be expected to intervene to force a different outcome.

94. In *SC*, Lord Reed JSC held as follows (at [158]):

> *a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally*

> *be respected unless it is manifestly without reasonable foundation.*

The present case concerns the Council's political and administrative judgments of social and economic policy in the field of welfare benefits, in exceptional financial circumstances the effects of which are being felt across the city and at national level. Its position is not manifestly without reasonable foundation. It falls to be respected.

(d) Procedure and PSED

95. Mr Squires KC raises a number of objections to the *manner* in which the decision under challenge – the most recent iteration of the charging policy – was taken. He says, for example, that it was in the nature of a *failure* to take any decision, because the operative decision remained that of the original 2016 policy. He suggests it was taken at the wrong level in the Council: it was not referred to the Council Cabinet. And in particular, he objects that there is insufficient evidence there has *ever* been a proper PSED assessment made of it – either when the policy was originally formulated or in the iteration under challenge.

96. Apart from the PSED point, the Claimant does not have permission to mount a generalised procedural challenge to the decision in question. Mr Squires KC aims his critique accordingly at the *quality* of the decision-making with a view to engaging the indications in the decided authorities that, at the final stage of the *Bank Mellat* analysis, considerably less deference is due where decisions are not demonstrably taken at, for example, the highest political level or to the highest documented standards of anxious scrutiny.

97. This is not a case which turns on fine gradations of due deference, for all the reasons given. On the specifics, it is plain enough from the contemporary documentation that the Council made an effective decision in 2023, chosen from among a number of stated options, and that indeed is the decision the Claimant has elected to challenge. As he puts it, he asked the Council '*to review its policy to alleviate its discriminatory impact on him*'; and the Council did review the policy but did not alter its impact. No systematic analysis of any potential ineffectiveness of that decision was pleaded or put to me, and the substantive challenge indeed proceeded on the basis of its effectiveness.

98. But the key point is that the decision itself formed one part of the overall budgetary decision – which was made at full Council Cabinet level – about the Council's strategy for financial recovery over the next two years. That was a decision overseen from top to bottom by national Government commissioners. To that decision, as I have said, proper respect for the democratic process is due.

99. So far as the PSED is concerned, as already noted, there is some contemporary reference to an exercise having been duly completed in 2016 (but the assessment has not been produced). There is also a reference in the context of the recent iterative review process to a standalone exercise being likely to be necessary if a *change* to the policy were in contemplation – because, clearly, there would be direct implications for the overall social care budget and for the Council's budget as a whole. It would also appear that that observation had some link to the so-called 'difficult question' post-*Norfolk* of how much adjustment to the *relative* position of the Claimant would be *enough* to be lawful and compliant with that decision.

100. What is very apparent, however, in relation to the post-*Norfolk* review process, is that it was wholly and expressly focused on precisely the equality/discrimination issues raised by that judgment – and by the present litigation. The judgment itself was at the heart of the review. It was addressed by reference to legal, policy and financial analysis of that judgment. It was, in other words, a more than usually intense and comprehensive inquiry into exactly the issue of which the Claimant complains. Options were considered in relation to that very issue. Reasons were offered for rejecting all but one, as not being required or sustainable within the relevant legal and financial framework.

101. I am unpersuaded that, on the basis that the substance of the decision challenged was justified, I have been given a sufficient basis for regarding it as nevertheless vitiated by reason of procedural failure including in relation to the PSED, or that failure to discharge the PSED in a way relevant to this claim is made out on the facts here. The Council considered the substantive aspects of the PSED relevant to this challenge with real focus and anxiety. That was so even given the overwhelming nature of its financial predicament. It cannot in all the circumstances fairly be criticised for not thinking more imaginatively or in any more structured way about doing something else. And if ever there were a case for accepting an argument that no further degree of procedural rigour would in any event have produced a different outcome it is surely the present one.

102. The Council's situation was exceptional. Other local authorities, of course, are in different circumstances.

Decision

103. This claim for judicial review is dismissed.