

CDC case law update – January 2021

This update is intended to provide general information about recent decisions of the courts and Upper Tribunal which are relevant to disabled children, young people, families and professionals. It cannot and does not provide advice in relation to individual cases, either for families or public bodies. Where legal issues arise, specialist legal advice should be taken in relation to the particular case.

R (SH through her litigation friend MH) v Norfolk County Council and Secretary of State for Health and Social Care [2020] EWHC 3436 (Admin)

The High Court held that changes to Norfolk County Council's adult social care charging policy discriminated against severely disabled people, contrary to Art. 14 read with Art. 1 of the First Protocol (A1P1) to the ECHR.

Case Overview

This case concerned a challenge to Norfolk County Council's adult social care Charging Policy on the grounds that it discriminated against severely disabled people, contrary to Art.14 ECHR.

SH has severe learning difficulties and physical disabilities associated with Down Syndrome. She is in receipt of Employment Support Allowance (ESA) (at the support group rate with the enhanced disability related premium) and Personal Independence Payment (PIP) (daily living and enhanced mobility components, both at the enhanced rate). SH has no income apart from state benefits; the only work she is able to do is unpaid work experience. The Council is under a duty (imposed by ss. 9 and 18 of the Care Act 2014) to provide support to SH. The Council, empowered by s. 14 of the Care Act, charges SH for this care, on a means-tested basis.

Norfolk County Council (NCC) had changed the basis on which it calculates the charges made to SH for this council provided care. Specifically, NCC had exercised its discretion to take into account SH's enhanced benefits (apart from the mobility component of PIP which, by law, the council cannot take into account) and reduced her Minimum Income Guarantee (MIG). These changes increased her charges, from £16.88 per week in July 2019 ultimately to £50.53 per week from April 2021.

SH was granted permission to apply for judicial review on the grounds that the Charging Policy discriminated against severely disabled people, contrary to Art.14 read with A1P1 and/or Art.8 ECHR.

There is a four-limbed approach to Art.14 claims (as outlined by Lady Black JSC in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59).

First, the circumstances must fall within the ambit of a Convention right. It was common ground that SH's income from benefits was 'property' and therefore fell within the ambit of A1P1, which protects against being deprived of possessions 'except in the public interest and subject to the conditions provided for by law'.

Second, there must have been a difference in treatment on the ground of one of the characteristics listed in Art.14 or 'other status'. The High Court highlighted that, for the purpose of Art.14, 'status' should be given a "generous meaning" (*R (Clift) v SSHD*). The status relied upon by SH was that she is 'severely disabled'. NCC argued that SH's proposed status of "severely disabled" was not precise enough. The Judge rejected this. The Judge held that the status could be defined precisely, in terms of eligibility for ESA and PIP daily living component at enhanced rates, both of which were assessable. The Judge concluded that being 'severely disabled' was 'no more imprecise than the category of "a severely disabled child in need of lengthy in-patient hospital treatment" recognised as an Article 14 status in *Mathieson* [the Supreme Court decision on access to disability benefits for children in hospital]'.

Third, there must have been a difference of treatment between two persons who are in an analogous situation. Here, the two groups of people were the severely disabled and everyone else receiving council services covered by the Charging Policy. The proportion of earnings that severely disabled people are required to pay under the Charging Policy is greater than that of less disabled people: less disabled people have lower levels of assessable benefit and may have earnings from employment or self-employment which will be disregarded.

NCC submitted that there is no difference in treatment because the Charging Policy is applied to both groups. However, the Judge stated that this "misses the point". Where the complaint is of disproportionate impact, the difference in treatment is not avoided by the fact that the same rules are applied to everyone. It is *because* applying the same rules to everyone has a disparate impact that the rules can be challenged under Art.14. This was similar to the concept of 'indirect discrimination' in domestic law under the Equality Act 2010.

NCC also argued that other recipients of care who are employed or self-employed were not in an 'analogous position' to SH and others in her position. However the Judge rejected this, on the basis that both groups were receiving Council services and being charged for them under the Charging Policy.

The Judge's conclusion on this third stage was as follows: '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 SH'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.'

Fourth, objective justification for the different treatment must be lacking. Whether there is objective justification depends on whether the rule which results in the difference in treatment is "a proportionate means of achieving a legitimate aim". The Judge emphasised that what must be justified is not the measure itself (here the Charging Policy) but the difference in treatment which it creates.

NCC put forward four aims: to apportion the Council's resources in a fair manner, to encourage independence, to have a sustainable charging regime, and to follow the statutory scheme. The Judge accepted that these were legitimate aims, although the first 'beg[ged] the question somewhat' because the case against NCC was that the impact of the CP is unfair. The presented justifications focused on NCC's financial situation. The Judge was sympathetic to the difficult position facing the Council but cited *Swift J in R (TP) v SSWP* that while saving public expenditure can be a legitimate aim, it will not of itself provide justification for differential treatment.

A particular focus of the Council was to support people with learning disabilities into paid employment. The Judge stated that it did not appear that the Council intended to 'rob Peter to pay Paul', by deliberately imposing greater burdens on the severely disabled who cannot work for money, in order to provide more support for the less disabled who can. However, NCC had not focused its attention on the differential impact, nor considered the alternative approach suggested in the Care Act Guidance of setting a maximum percentage of disposable income (over and above the MIG) which may be taken into account in charges. Para 8.47 of the Guidance stated that this approach should be considered.

The Judge noted that the changes were not introduced lightly and that additional mitigating measures were introduced, such as slower phasing in. However, the Judge emphasised that approaching the matter conscientiously is not the same as providing a reasonable justification for discriminatory impact. It did not appear that a conscious decision was made to take a higher proportion of the income of the severely disabled: the outcome was overlooked. The discriminatory impact on the severely disabled was perverse and unintended, and no real effort had been made to justify it.

The differential impact on SH was serious. Further, it directly contradicted one of the stated aims, namely to encourage independence: SH will have less money for independent activity. The Judge therefore concluded that the aims did not justify the discrimination nor make it proportionate. The objectives were not sufficiently important to justify discriminating against the most severely disabled as compared with the less severely disabled. The differential impact was not rationally connected to the aims. A

less intrusive measure was suggested in the Guidance but not considered. The discriminatory effect was therefore 'irrational, unnecessary, and wholly out of proportion'.

Consequently, the Judge held that the differential impact of the Charging Policy on the severely disabled was manifestly without reasonable foundation and therefore breached Art.14.

The Judge indicated he was minded to set aside NCC's decisions to charge SH pursuant to the Charging Policy and to require the Council to amend and/or withdraw the Charging Policy to remove the discriminatory impact. However the parties were invited to seek to agree an order to give effect to the judgment.

What this means for children, young people and families

This case highlights how changes made by local authorities have had a disproportionate impact on disabled people with the highest support needs, who are perhaps least able to challenge local authority charging policies.

This important decision confirms that local authorities cannot charge disabled young people for social care in a way that disadvantages particular groups without objective justification. This will have a significant impact on the lives of disabled people and their families, in Norfolk and across local authorities with similar policies.

The judgment also has important implications for fairness in other social policy areas, as it will be equally impermissible and unlawful for public bodies to adopt policies which negatively impact on particular groups of disabled people, unless this impact can be objectively justified.

Implications for local authorities and other public bodies

Following this judgment, Norfolk County Council will have to change its Charging Policy to ensure that it does not discriminate against disabled people with high support needs.

This case is likely to have implications well beyond Norfolk. Where a charging policy features similar elements to those challenged in Norfolk, the local authority should urgently review its policy and consider whether the differential impact of the policy was identified, whether any presented justifications were linked to and proportionate to that differential impact, and whether the alternative approach of applying a maximum percentage of disposable income to be taken into account in charges was considered. Any local authorities which retain similar charging policies after this judgment will risk being the subject of a successful application for judicial review.



Local authorities will also note that this judgment is evidence of the fact that discrimination challenges are more likely to succeed when the defendant public body cannot show that they have recognised the potential for differential impact on particular groups and addressed this in their decision making.