Neutral Citation Number: [2020] EWHC 3436 (Admin)

Case No: CO/1640/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 December 2020

Before :

MR JUSTICE GRIFFITHS

- -

Between :

THE QUEEN on the application of SH
(acting through her mother and litigation friend MH)

Claimant

- and –

(1) NORFOLK COUNTY COUNCIL
(2) SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Defendant

- -
- -

Zoe Leventhal and Emma Foubister (instructed by **Leigh Day**) for the **Claimant**
Jonathan Auburn and Zoe Gannon (instructed by **NP Law**) for the **First Defendant**
The Second Defendant not present or represented

Hearing date: 2 & 3 December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 2.00 pm on 18 December 2020. Para 4 amended under CPR 40.12 on 19 January 2021.

MR JUSTICE GRIFFITHS :

1. This is a claim for judicial review by the Claimant ("SH") acting through her mother and litigation friend ("MH") challenging the decision of the First Defendant, Norfolk County Council ("the Council"), to change the basis on which it calculates the charges made to her for Council-provided care. The change has substantially increased those charges.

2. SH claims that this decision indirectly discriminates against her as a severely disabled person in breach of her rights under the Human Rights Act 1998, the European Convention on Human Rights and the Equality Act 2010.

The parties and the proceedings

3. By order of Lewis J on 29 June 2020, the identities of SH and her mother MH are not to be disclosed. This is to protect the interests of SH, who is a young woman with particular needs from Down Syndrome.

4. The Secretary of State for Health and Social Care (the Second Defendant) filed an Acknowledgment of Service opposing the claim. On 29 June 2020, Lewis J refused permission on the one ground of challenge relating to the Secretary of State (namely a challenge to regulation 14 of the Care and Support (Charging and Assessment of Resources) Regulations 2014). Therefore, the Secretary of State has taken no part in the hearing before me.

5. Counsel for SH and Counsel for the Council, assisted by juniors and solicitors, have presented the arguments on both sides with admirable clarity, precision and rigour. I am grateful to them.

The Claimant and her finances

6. SH is a 24-year old woman shown by the evidence to have a lovely sense of humour, and a caring and generous nature. She has empathy, is generous to a fault, likes to make people laugh and be happy, and looks out for the good in everyone. At the beginning of a judgment in which she has to remain anonymous, and which is about to enter a thicket of legal and financial complexity, I am glad to start with that. Her wonderful personal qualities are the most important things about her. Those who know her know that. I, who have not seen her, know that too.

7. As a result of Down Syndrome, SH has severe learning difficulties. She also has pernicious anaemia, physical disabilities associated with Down Syndrome, and a compromised immune system.

8. Because of her disabilities, she has never been able to earn money and it is clear from the evidence that there is no prospect of her doing so in the foreseeable future. There is a dispute about what the more distant future might hold. I should also say that not being able to earn money is not the same as not being able to work; and she has in 2020 (after several years of planning) been given a funded personal assistant to help her access (unpaid) work experience, leading (so far) to one placement in a public house on a single occasion, helping a waitress (with support) to fold serviettes for one hour (reduced from two hours, which proved too much for her).

9. She has been placed by her day-services provider on a pathway entitled "Promoting independence" which (according to the literature, exhibited as MH3/1) is to:

> "● support individuals to experience a wide range of opportunities to enable them to learn and develop and build on their existing social skills, daily living skills, confidence and self-esteem.
>
> ● create a clear pathway to access mainstream social, leisure, educational activities and other opportunities in the wider community
>
> ● Learn new skills and build on existing skills
>
> ● Have access to a range of educational opportunities
>
> ● Have real choice and control over their life
>
> ● Be empowered to be independent
>
> ● Participate in volunteering
>
> ● Possible move on to Pathway 3"

It is therefore distinguished from (while not ruling out a possible move to) Pathway 3, which is "to create a clear pathway to enable an individual to access and move into paid employment".

10. SH's sole carer is her 68-year old mother MH who is a state pensioner (after a career as head of mathematics at a private secondary school which had no pension plan). MH has worked tirelessly to do everything she can for SH, and to access whatever SH is entitled to in order to enable SH to live her best life. This has not just been a question of benefits, but also particular programmes and experiences.

11. For money, and things that only money can buy, SH has to depend on the benefit and welfare system.

12. Her income consists of the following:-

    i) Employment Support Allowance ("ESA") at the support group rate with the enhanced disability related premium.

       ESA is an income replacement benefit. SH receives ESA at this rate because she has been assessed (as it is put in the Council's evidence, Baldwin 1 para 33) as not having capability to work due to her disability or illness. The impact of her physical and mental conditions is such that she is not required to engage in work-related activity as a condition of receiving her ESA: Regulation 34 of the Employment Support Allowance Regulations 2008.

    ii) Personal Independence Payment ("PIP") daily living component at the enhanced rate.

PIP is a benefit to fund the additional costs of disability in daily life. SH receives the enhanced rate because she has been assessed as having "severely limited ability to carry out daily living activities": Regulation 5(3)(b) of the Social Security (Personal Independence Payment) Regulations 2013.

iii) Personal Independence Payment mobility component at the higher rate.

13. These state benefits combined to give SH a total income (in July 2019) of £277.30 per week, rising slightly (in April 2020) to £282.05 per week. I will call this her "income from state benefits". She has no income apart from her income from state benefits.

14. The Council is also required to give her support because of her disabilities. The Council does this in accordance with the Council's Care and Support Plan for SH. Much of this is delivered by her mother, MH, as referred to in the Plan. However, in addition, the following support is provided by the Council:

i) Two days weekly in day services.

ii) 12 nights respite care away from home every year, including transport.

iii) Personal Assistant ("PA") support weekly, to support with employment and community access; to provide two overnight stays in SH's home per month; and for an additional 7 daytime hours between each night.

The Council provides its services (which I will call "the Council services") partly by direct payments.

15. The Council services to SH (including direct payments) cost the Council £18,537.28 per annum (at February 2020 rates). Dividing by 52 weeks produces an average weekly cost to the Council of £356.49.

16. The Council charges SH for the Council services on a means-tested basis and it is the change in their charging policy which is challenged in this action.

i) In July 2019, the charge to SH for non-residential Council services was £16.88 per week.

ii) Since April 2020 (during the phasing-in of higher charges), the charge to SH has been £20.58 per week.

iii) At the end of a phasing-in period (from a date yet to be determined, as there has been a pause in phasing during the COVID19 pandemic), the charge to SH will be £50.53 per week at current rates.

These charges (which I will call "the Council charges") come out of SH's income from state benefits. Since her income from state benefits is just £282.05 per week, an increase from £16.88 to £50.53 per week is significant.

The statutory regime

The Care Act 2014

17. The Council's duty to provide services for SH's care and support is imposed by section 9 and section 18 of the Care Act 2014 ("the Care Act").

18. The Council's power to charge SH for the Council services comes from section 14 of the Care Act, which also provides for regulations "about the exercise of the power".

19. Section 14(7) of the Care Act provides that the Council cannot levy charges which would cause SH's remaining income to fall below a certain amount specified in regulations, commonly referred to as the Minimum Income Guarantee ("MIG").

20. Section 17 of the Care Act provides that, when the Council is going to charge for the Council services:

> "…it must assess –
>
> (a) the level of the adult's financial resources, and
>
> (b) the amount (if any) which the adult would be likely to be able to pay towards the cost of meeting the needs for care and support."

21. Section 78 of the Care Act provides that the Council must act under guidance issued by the Secretary of State.

The Regulations

22. The regulations made under the Care Act are the Care and Support (Charging and Assessment of Resources) Regulations 2014 ("the Regulations").

23. The MIG (minimum income guarantee) is set by Regulation 7. In SH's case, the MIG is £151.45 per week. This reflects her age, and her entitlement to an enhanced disability premium.

24. Apart from the limit set by the MIG, the Regulations impose other important constraints on the Council's power to charge for the Council services. When assessing the charge (that is, when means-testing the person to be charged, in order to set the level of charge), the Council is prohibited from taking into account various items, including:

    i) Earnings from employment or self-employment (Regulation 14).

    ii) Housing-related costs (Regulation 15(1) and Schedule 1 para 2).

    iii) The mobility element of PIP (but not the daily living element of PIP) (Regulation 15(1) and Schedule 1 para 8).

    iv) Any disability related expenditure ("DRE") paid for with disability benefits (Regulation 15(1) and Schedule 1 para 4).

25. Otherwise, Regulation 15(2) gives the Council a discretion about what it will or will not take into account when means-testing the person to be charged for Council services:

> "…a local authority may in carrying out the calculation of the adult or carer's income for the purposes of the financial assessment, disregard such other sums the adult or carer may receive as the authority considers appropriate."

The Guidance

26. The Secretary of State has issued *Care and Support Statutory Guidance* ("the Guidance").

27. The Council "must act" in accordance with the Guidance (section 78 of the Care Act).

28. The Guidance emphasises that "In all cases, a local authority has the discretion to choose whether or not to charge…" (para 8.4). This is repeated in para 8.41:

> "This guidance does not make any presumption that local authorities will charge for care and support provided outside care homes, but enables them to continue to allow discretion."

29. The Guidance explains that the statutory disregard of earnings from employment and self-employment is "to help encourage people to remain in or take up employment, with the benefits this has for a person's well-being" (para 8.21).

30. As well as the compulsory disregards I have already mentioned, the Guidance imposes the following additional constraints on the Council's discretion to charge:

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

31. Annex C to the Guidance (Treatment of Income) says, as para 14:

> "Local authorities may take most of the benefits people receive into account. Those they must disregard are listed below. However, they need to ensure that in addition to the minimum guaranteed income or personal expenses allowance – details of which are set out below – people retain enough of their benefits to pay for things to meet those needs not being met by the local authority."

The Council's charging policy

32. The charging policy of the Council which is challenged in these proceedings is the Norfolk County Council Adult Social Services Non-Residential Charging Policy April 2019 ("the Charging Policy"). The Charging Policy has been updated but the changes are immaterial. The Charging Policy introduced two changes which have made SH poorer.

33. Previously, the Council applied a minimum income guarantee which was well in excess of the Care Act prescribed MIG. Until July 2019, the Council guaranteed that it would not make charges which reduced income below £189.00 per week for all age groups (Charging Policy para 8.1). Under the Charging Policy, a phased reduction in this Council's minimum income guarantee was introduced, as follows (para 8.1):-

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

    ii) From April 2020, it was to be reduced to £151.45 per week "for everyone aged 18 to State Retirement Pension age". This figure was later adjusted to £154.02 per week, to reflect an average 1.7% increase in welfare benefits. The April 2020 date has been postponed to a date yet to be advised, as a result of the COVID19 pandemic.

    iii) From April 2021, it will be reduced to £132.45 for anyone aged 18-24.

34. The Charging Policy says that the purpose of the Council's minimum income guarantee:

> "…is to promote independence and social inclusion and ensure that the cared for person has sufficient funds to meet basic needs such as purchasing food, utility costs or insurance." (para 8.2).

35. Secondly, para 9.3 of the Charging Policy provides:

> "Income will always be taken into account unless it is disregarded under the regulations."

36. Thus, the Council has exercised its discretion to charge SH the maximum permissible (disregarding only those elements it is required to disregard by law), and, at the same time, has lowered the overall cap on her charges by reducing the Council's minimum income guarantee.

37. Counsel for SH contrasts this decision with the sentence in para 8.46 of the Guidance I have already quoted above: "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."

38. The Council's approach of limiting impact by reference to a (reduced) minimum income guarantee may also be contrasted with the Guidance's suggested approach (in para 8.47, also quoted above) which is "to set a maximum percentage of disposable

income (over and above the guaranteed minimum income) which may be taken into account in charges."

39. As I have explained in para 12 above, SH's income consists entirely of ESA and PIP. Apart from the mobility component of her PIP, which the Council is prohibited from taking into account by law (para 24 above), the Council now takes account of all of this income when setting the Council charges for the Council services. No complaint is made of the Council taking into account her income replacement benefit (ESA) but SH does challenge the Council taking into account her PIP (daily living component), which it did not do before. It is this, combined with the reduction in the Council's minimum income guarantee, which is causing the Council's charges to increase so much in her case. Like the reduction of the Council's minimum income guarantee, the account taken of her PIP (daily living component) is being phased in (para 9.21).

The law governing the Claimant's claim

40. The two Grounds on which Lewis J granted SH permission to apply for judicial review are:

    i) Ground 1: The Charging Policy discriminates against severely disabled people, contrary to Article 14 read with Article 1 of Protocol 1 and/or Article 8 of the European Convention on Human Rights.

    ii) Ground 2: The Charging Policy indirectly discriminates against adults with Down Syndrome, contrary to section 19 and 29 of the Equality Act 2010.

41. In argument, SH's Counsel acknowledged that, if she succeeds on Ground 1, she does not need to succeed, also, on Ground 2; and that, if she fails on Ground 1, she will also fail on Ground 2, because of the overlap in the issues raised by both. Similarly, the Council's Counsel acknowledged that, if the Council fails on Ground 1, it will not be able to succeed on Ground 2. Therefore, all the argument has been focussed on Ground 1 (although Ground 2 was not abandoned), because that will be decisive either way.

42. Section 6 of the Human Rights Act 1998 makes it "unlawful for a public authority to act in a way which is incompatible with a Convention right."

43. Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1") provides in para 1:-

> "**Protection of property**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law…"

44. Article 14 of the Convention 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."

45. The parties agree that SH's claim falls within the ambit of A1P1. A claim in relation to a social security or welfare benefit can be a claim in relation to possessions within the ambit of A1P1: cf *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311, HL and *Stec v United Kingdom* (2005) 41 EHRR SE 295, ECHR. This has made it unnecessary for SH to rely, in the alternative, on Article 8 of the Convention (right to respect for private and family life).

46. The Court's approach to Article 14 claims was recently considered by the Supreme Court in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59; [2020] AC 51 where Lady Black JSC said at para 8:

> "In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements.
>
> First, the circumstances must fall within the ambit of a Convention right.
>
> Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or "other status".
>
> Thirdly, the claimant and the person who has been treated differently must be in analogous situations.
>
> Fourthly, objective justification for the different treatment will be lacking.
>
> It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations. Lord Nicholls of Birkenhead captured the point at para 3 of *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173. He observed that once the first two elements are satisfied:
>
> > "…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 this 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." "

47. Lady Black's four elements were re-presented and re-ordered as four questions in the slightly later judgment of Lady Hale in the case of *In re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250 at para 15:

> "As is now well known, [Article 14] raises four questions, although these are not rigidly compartmentalised:
>
> (1) Do the circumstances "fall within the ambit" of one or more of the Convention rights?
>
> (2) Has there been a difference of treatment between two persons who are in an analogous situation?
>
> (3) Is that difference of treatment on the ground of one of the characteristics listed or "other status"?
>
> (4) Is there an objective justification for that difference in treatment?"

48. Given the facts and the arguments presented to me in this case, I think it is preferable to answer Lady Hale's four questions in Lady Black's original order, which places the question of status before the question of analogous situation. This is also the order adopted by Counsel for SH in her submissions, and in the Council's skeleton argument.

(1) Ambit: Do the circumstances "fall within the ambit" of one or more of the Convention rights?

49. It is common ground that the reduction in the Council's minimum income guarantee and its inclusion of SH's daily living PIP in the assessment of her ability to pay the Council charges falls within the ambit of A1P1.

50. The Council argues that the exclusion of employed and self-employed earnings from the assessment of charges (an exclusion mandated by Regulation 14) is not within the ambit of A1P1. However, SH is not challenging the Regulations. She relies on the exclusion of employed and self-employed earnings as part of the background, as I will explain in due course.

(2) Status: Has there been a difference of treatment on the ground of one of the characteristics listed in A1P1 or "other status"?

51. The status relied upon by SH under Ground 1 is that she is "severely disabled". She argues that, as a severely disabled person:-

    i) She has high care needs, which are reflected in higher income from state benefits. In particular, she has been assessed as being so severely disabled that she is entitled (a) to the support group rate of ESA with enhanced disability related premium and (b) to PIP daily living component at the enhanced rate

(para 12 above). Because of this, her income from state benefits (which is her only income) is higher, and therefore more likely to exceed the Council's minimum income guarantee (even more so now that the level of minimum income guarantee is being reduced), and by a greater amount, than would be the case for a less disabled person. Neither her ESA or her PIP daily living component are disregarded by the Council when assessing her payments under the Charging Policy.

ii) She has significant barriers to work. This is reflected in the fact that she has been assessed as entitled to ESA without being required to engage in work-related activity (let alone work) under Regulation 34 of the ESA Regulations (para 12 (i) above). This means that she cannot have earnings from employment or self-employment. A less severely disabled person, who may have access to earnings from employment or self-employment, has those earnings entirely disregarded under the Council's Charging Policy (because that is mandated by Regulation 14: see para 24(i) above).

52. SH maintains, and the Council disputes, that being "severely disabled" in this way is a status within the meaning of Article 14, which prohibits 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." SH argues that being a "severely disabled person" is an "other status" for these purposes.

53. "Status" for the purpose of Article 14 should be given "a generous meaning": per Lord Neuberger in *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311 at paras 42-43, endorsing the phrase of Lord Hope in *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484 at para 48.

54. The case of *Clift* later went to the European Court of Human Rights which said in *Clift v United Kingdom* [2010] ECHR 1106 at para 60 (with selection and emphasis applied when quoted by Lord Wilson in *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250 at para 22):

> "The question whether there is a difference of treatment based on a personal *or identifiable* characteristic… is… to be assessed taking into consideration all of the circumstances of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective…"

55. This was part of a move away from an earlier analysis which linked "other status" to personal characteristics (an analysis whose origins were discussed by Lord Neuberger in *RJM* at para 36). Lord Walker of Gestingthorpe loosened what might have been a "personal characteristics" straitjacket by his use of a "concentric circles" analogy which was endorsed by Lord Wilson in *Mathieson* at para 21. Lord Walker said in *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311 at para 5 (with the agreement of Lord Neuberger at para 41):

> "The other point on which I would comment is the expression "personal characteristics" used by the European Court of

> Human Rights in *Kjeldsen, Busk, Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, and repeated in some later cases. "Personal characteristics" is not a precise expression and to my mind a binary approach to its meaning is unhelpful. "Personal characteristics" are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual's personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate (depending on a person's family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts); but all are regarded as important to the development of an individual's personality (they reflect, it might be said, important values protected by articles 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within article 14 (Lord Neuberger instances military status, residence or domicile, and past employment in the KGB). Like him, I would include homelessness as falling within that range, whether or not it is regarded as a matter of choice (it is often the culmination of a series of misfortunes that overwhelm an individual so that he or she can no longer cope). The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify."

56. Citing the passage from *Clift v UK* which I have quoted above, Lord Wilson said in *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250 at para 22: "It is clear that, if the alleged discrimination falls within the scope of a Convention right, the ECtHR is reluctant to conclude that nevertheless the applicant has no relevant status, with the result that the inquiry into discrimination cannot proceed."

57. However, there are limits to "other status" and one of them is that the discrimination complained of cannot be used to define the "other status" which makes it actionable: *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484 per Lord Bingham at para 28; *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311 per Lord Neuberger at para 46. That is what Ouseley J has referred to as "the illegitimate bootstraps argument": *C v Secretary of State for Work and Pensions* [2018] 1 WLR 5425 at para 90; discussed further by Ouseley J at paras 120-121.

58. Being "severely disabled" seems to me to be exactly the sort of "personal characteristic" which has always been recognised as protected from unjustified discrimination under Article 14.

59. The precedents also appear to support SH's argument that being "severely disabled" gives her an "other status" sufficient to allow her to claim a breach of Article 14 Convention rights.

i) In *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250 the Claimant was found by all but one of the Justices of the Supreme Court to have Article 14 status as "a severely disabled child in need of lengthy in-patient hospital treatment" when she brought an action based on differential treatment between those (like her) who were in-patients in an NHS hospital for more than 84 days and therefore had their disability living allowance suspended (per Baroness Hale of Richmond DPSC, Lord Clarke of Stone-cum-Ebony, Lord Wilson and Lord Reed JJSC).

ii) In *Burnip v Birmingham City Council* [2013] PTSR 117; [2012] EWCA Civ 629 the Claimant had Article 14 status as a "severely disabled" person (para 13) and consequently had a Convention right not to be discriminated against in relation to housing benefit.

iii) In *O'Donnell v Department for Communities* [2020] NICA 36, being "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", with the result that he could not claim Bereavement Support Payment, was held to be "other status" for the purposes of Article 14 (paras 87 and 89 in the judgment of the Court of Appeal in Northern Ireland).

60. The Council accepts that, not only disability, but degrees of disability can be "other status" for the purposes of Article 14. However, it objects that SH's proposed status of "severely disabled" is not precise enough for Article 14 protection.

61. I agree that the "other status" has to be ascertainable in order for it to be protected, and that it cannot be ascertainable only by reference to the discrimination allegedly suffered, because that would be to fall into the "illegitimate bootstraps argument" referred to by Ouselely J in *C v Secretary of State for Work and Pensions*.

62. However, the level of disability relied upon by SH to make her "severely disabled" for the purposes of this claim can be associated with her entitlement to Employment Support Allowance at the support group rate with the enhanced disability related premium, and to her entitlement to the PIP daily living component at the enhanced rate, by virtue of her "severely limited ability to carry out daily living activities". Both of these are capable of assessment, and both of them have been assessed, because the enhanced benefits required her to be so assessed (see para 12 above). This is 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*.

63. I am therefore satisfied that the status relied upon by SH as a severely disabled person is a "status" within the mearing of A1P1.

(3) Differential treatment: Has there been a difference of treatment between two persons who are in an analogous situation?

64. In *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434, Lady Hale said at paras 24-25:

> "…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), p 144, 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 extent depend on whether there is an objective and reasonable justification for the difference in treatment, which overlaps with the questions 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'."

65. Although this suggests a close relationship between the third question I am considering (differential treatment), and the fourth question (justification), they are separate questions.

66. The difference in treatment relied upon by SH is that the Charging Policy has a disparate impact on severely disabled people like SH 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 (they will not be paid daily living PIP at the enhanced rate) and (unlike SH and other severely disabled people, who are entitled to ESA at the support group rate because they are not capable of paid work) 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 (daily living PIP and ESA) and are fully assessed, and their earnings from employment or self-employment are not available to her and other severely disabled people, but are not assessed.

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 or self-employment) and, on the other hand, everyone else receiving Council services covered by the Charging Policy.

68. The Council submits that there is no difference in treatment because the Charging Policy is applied to all of them. That, I think, misses the point. In a case, such as this one, where the complaint is disproportionate impact (similar to the concept of indirect discrimination in domestic law under the Equality Act 2010), 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 need for justification arises. It is for that reason that the rules can be challenged under Article 14. If the problem is in the way the rules work, a person with Article 14 status cannot be deprived of a right to challenge the rules by an assertion that the same rules apply to everyone.

69. The Council argues that other recipients of care who are employed or self-employed are not in an analogous position. Since they are receiving Council services and being charged for them under the Charging Policy, I have decided that they are.

70. Per Maurice Kay LJ in *Burnip v Birmingham City Council* [2013] PTSR 117; [2012] EWCA Civ 629 at para 11:

> "That Article 14 embraces a form of discrimination akin to indirect discrimination in domestic law is well-known. Thus, in *DH v Czech Republic* (2008) 47 EHRR 3, the Strasbourg Court stated (at paragraph 175):
>
> > "… a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group."
>
> The submission here is that, whilst the statutory criteria provided for an able-bodied person to be given HB which would be an adequate contribution towards his accommodation needs, they failed to make equivalent provision in relation to the severely disabled, whose needs are more costly."

71. It is no answer to say that SH has not provided detailed statistical evidence of the differential treatment or disproportionate impact: *Burnip* at para 13. SH 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 benefit or who have earnings. I agree with that.

72. The Council suggests that SH's higher need will mean she incurs a higher level of disability related expenditure ("DRE") and that, since this will necessarily be paid for with her disability benefits, it will be disregarded under Regulation 15(1) and Schedule 1 para 4 of the Regulations, therefore allowing her to benefit from disregard in the same way as those with earnings have them disregarded. However, under the Charging Policy, DRE is not at all coterminous with the higher rate of PIP, and is harder to prove and claim than the blanket disregard of outside earnings for those able to get them. Also, much of SH's higher need, and of those like her, is met by the Council services themselves, none of which is carved out as disability related expenditure: on the contrary, the Charging Policy requires her to pay for it with every penny of the assessable income she has. Neither the evidence nor the Charging Policy suggests to me that the DRE regime reduces to any significant extent, let alone eliminates, what would otherwise be differential treatment.

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 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.

74. I conclude, therefore, that there has been a difference of treatment between two persons in an analogous situation.

(4) Justification: Is there an objective justification for the difference in treatment?

75. The final question is whether the difference in treatment is objectively justified.

Law

76. Per Lord Reed in *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 at para 13, it is necessary:

> "…to consider whether the difference in treatment has an objective and reasonable justification, in the light of the aim of the measure and its proportionality as a means of achieving that aim. For example, a rule requiring that employees should be capable of heavy lifting will exclude a higher number of women than men, because of differences in the average bodily strength of the sexes. Whether that difference in treatment has an objective and reasonable justification will depend on whether the rule which results in the difference in treatment has a legitimate aim and is a proportionate means of realising that aim".

77. The test of "a proportionate means of achieving a legitimate aim", which is not part of the wording of the Convention (although it is part of the wording of the Equality Act 2010), is now a settled formula for approaching the question of justification: *R (Stott) v Secretary of State for Justice* [2020] AC 51 per Lady Hale at para 207. It is traced through the jurisprudence of Aristotle, St Thomas Aquinas, Blackstone, the European Court of Human Rights and the European Court of Justice by Lord Reed in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at paras 68-74 and, in para 74, Lord Reed distils from earlier cases a test for justification which asks the following 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, and
>
> (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."

78. Lord Reed, in paras 75-76 of his judgment, warns against the courts substituting judicial opinions for legislative ones as to where the line should be drawn. A substantial margin of appreciation is, therefore, granted to the decision-making body. Per Lord Wilson in *R(DA) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289 at 59:

> "I now accept that the weight of authority in our court mandates inquiry into the justification of the adverse effects of rules for entitlement to welfare benefits by reference to whether they are manifestly without reasonable foundation."

79. The "manifestly without reasonable foundation" test is accepted by both parties as applying to this case, although there is a debate about other types of case: *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] HLR 30 per Hickinbottom LJ at paras 127-141.

80. What falls to be justified, however, is not the measure itself (the Charging Policy) but the difference in treatment which it creates: "What has to be justified is not the measure in issue but the difference in treatment between one person or group and another." *A v Secretary of State for the Home Department* [2005] 2 AC 68, per Lord Bingham at para 68. This is also agreed between the parties.

Facts

81. Defending the effect of the Charging Policy on SH, the Council puts forward four aims, which it says can, taken together, serve as justification which is not manifestly without reasonable foundation.

    i) To apportion the Council's resources in a fair manner.

    ii) To encourage independence.

    iii) To have a sustainable charging regime.

    iv) To follow the statutory scheme.

82. In demonstrating its aims, and justifying the impact of its changes to the Charging Policy on SH, the Council has made the following points.

83. The Council, which is required to balance its books, faced an adult social care funding shortfall of almost £39 million over the three years 2019-2022. Demand was rising and funding was declining. This led to the decision to reduce the Council's minimum income guarantee, following a period of consultation, to be phased in over three years. It also led to the phased inclusion (over two years) of the daily living component of PIP when calculating the Council charges. The response to the consultation was mostly negative, both as to the reduction in the Council's minimum income guarantee and as to taking into account the enhanced rate of the daily living component of PIP when assessing charges. Some respondents asked for help to find work, help with claiming benefits and help with managing money. Various mitigating measures were approved, but (apart from phased introduction) they did not mitigate the differential impact complained of in these proceedings, because they concentrated on supporting people who had some capacity for remunerated work (unlike SH and other severely disabled people) or who had difficulties in budgeting or claiming benefits which she does not have and which do not appear particularly correlated to the most severely disabled.

84. It is plain from the Council's documents that a particular focus for the Council was increasing the percentage of adults with learning disabilities in paid employment, which was found to be below national averages. It does not appear that the Council intended, or specifically decided, that it should rob Peter to pay Paul, in the sense of 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, it did identify overall savings of £5 million from the changes, from which it would spend £1 million on measures increasing access to employment for those (unlike SH) who were not too severely disabled to achieve it, including, not only employment, but voluntary work and training. The Council argues that some of this might benefit SH too, for example in her ambition to undertake at least supported work, in addition to the 1 hour of serviette folding she has already done.

85. None of the consultation, discussion and decision-making records that I was taken through (including briefing papers, meeting minutes and an Equality Impact Assessment) suggested that the Council focussed its attention on the differential impact on the most severely disabled which is now complained of. It was recognised that there would be an impact on some people (see, for example, pp 16-18 of the Equality Impact Assessment) but the differential impact on the most severely

disabled, with higher levels of benefit to be taken into account and no access to earnings from employment or self-employment, as compared with those with lower need (and so lower assessable benefits), and earnings from employment or self-employment (which by law would not be taken into account), was not a point identified or discussed.

86. Nor does the Council ever seem to have considered the alternative approach to increasing the level of Council charges specifically suggested by the Secretary of State's Guidance (para 30 above); namely, instead of taking into account "all of a person's income above the minimum income guarantee", setting "a maximum percentage of disposable income", over and above the minimum income guarantee, "which may be taken into account in charges". This was an approach which para 8.47 of the Guidance said the Council "should" consider.

87. The documents do show a concern to balance the books, to refocus on supporting people with learning disabilities into employment, to increase charging as a means of making the services sustainable, and to mitigate impact by phasing in and by a variety of support measures such as improved and increased information and advice services. They also support the submission that the Council decided to move closer to the maximum charging permitted by law as a means of achieving these aims. These were policy and political decisions, and (for example) a motion not to reduce the Council's minimum income guarantee and to look for alternative proposals was moved and defeated at a committee meeting on 14 January 2019.

88. It is clear that the changes in the Charging Policy were not introduced lightly and that additional mitigating measures were introduced (notably, slower phasing in and a more generous approach to DREs) after its original adoption. However, approaching the matter conscientiously is not the same as providing a reasonable foundation for justifying the discriminatory impact which has been identified. It does not appear that any conscious decision was made to take a higher proportion of the income of the severely disabled (with higher assessable benefits due to their higher needs, and no access to non-assessable earnings), than the proportion taken from the less disabled (with lower assessable benefits, and access to earnings which would not be assessed). This outcome was overlooked and not considered or consciously justified at all. It appears to have been a consequence that was unintended and unforeseen. None of the additional mitigations have structurally addressed that discriminatory impact. There is an appeals process, but the Council is defending SH's claim and there is no proposal to alter the differential impact on her or on others like her.

89. Turning to the four aims identified by the Council as justifying the discriminatory impact, they are (i) to apportion the Council's resources in a fair manner; (ii) to encourage independence; (iii) to have a sustainable charging regime and (iv) to follow the statutory scheme. I accept that these are legitimate aims.

90. However, (i) appears to me to beg the question somewhat; because the case against the Council is that the impact of the Charging Policy is unfair. Per Swift J in *R (TP) v Secretary of State for Work and Pensions* [2019] PTSR 2123 para 53 "Saving public expenditure can be a legitimate aim but will not of itself provide justification for differential treatment unless there is, in the case in hand, a reasonable relationship of proportionality between the aim sought to be achieved, and the means chosen to pursue it (i.e. the measure under challenge)"; approved on the basis of other citations

from authority on appeal to the Court of Appeal at *R (TP and AR) v Secretary of State for Work and Pensions* [2020] EWCA Civ 37 at paras 170-172. (iv) also is an imperfect fit, because the Guidance specifically warned against making decisions based only on what the statutory scheme permitted (para 30 above).

91. It does seem to me that the differential impact of the Charging Policy on the severely disabled is manifestly without reasonable foundation. If the same level of charges overall is raised, the Council's aims of funding and encouraging independence and making its charging regime sustainable will be met to the same extent. These aims do not justify the discrimination in this case or make it proportionate. The Guidance warns against the approach adopted by the Council (of assuming that all of the legally assessable income was available to be taken in charges). It also suggests an alternative, which could be used to raise the same amount of revenue (applying a maximum percentage of disposable income to be taken into account in charges). There is no relationship between the aims identified and the specific discriminatory impact in issue at all. The discrimination is not proportionate to those aims. It is not reasonably linked to them.

92. No real effort has been made in argument to justify the discriminatory impact of the Charging Policy on the severely disabled (as opposed to explaining the sums sought to be raised by the Policy overall) by reference to the Council's stated aims. That impact was a perverse and unintended outcome. The differential impact is not rationally connected to any of the aims relied upon. A less intrusive measure was suggested by para 8.47 of the Guidance, which was not considered at all. There may also be other ways of achieving the same balance between cost and revenue. The severity of the differential impact on SH and those like her is serious, as demonstrated by the figures in para 16 above. There is nothing she can do to limit it. It directly contradicts one of the Council's stated aims, to encourage independence. She will have less money for independent activity, such as social activity. Any reduction in her use of Council services will directly impact her independence, for example by reducing her use of the personal assistant.

93. Testing whether the Council's case on justification is manifestly without reasonable foundation against the four questions in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at para 74 (para 77 above), I answer as follows. The objectives identified are not sufficiently important to justify discriminating against the most severely disabled as compared with the less severely disabled in order to advance it. The discriminatory impact is not rationally connected to the objective at all. A less intrusive measure was suggested by the Guidance but was not considered. Balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objectives, the discriminatory effect is irrational, unnecessary, and wholly out of proportion.

94. The Claimant's claim therefore succeeds, and I will grant relief.

95. The relief claimed in the Statement of Facts and Grounds is (a) An order setting aside the First Defendant's decision(s) to charge the Claimant pursuant to the Charging Policy; (b) An order requiring the First Defendant to amend and/or withdraw the Charging Policy to remove the discriminatory impact; (c) An order requiring the First Defendant to retake the 17 February 2020 decision, having regard to the PSED; (d) A declaration that regulation 14 of the Charging Regulations constitutes discrimination

against the Claimant as a severely disabled person contrary to Article 14 ECHR read with A1 P1 and/or Art 8; (e) Any other relief as the court sees fit; and (f) Costs. Subject to any practical considerations, the relief claimed in paras (a) and (b), and a declaration that the Claimant's Article 14 and A1P1 rights are breached by the Charging Policy, appear to me to be appropriate. Para (c) has fallen away because permission was not given to argue the Public Sector Equality Duty ground.

96. I will invite Counsel to agree an order dealing with relief and, so far as possible, all consequential matters, including costs.