Neutral Citation Number: [2022] EWHC 2908 (Admin)

Case No: CO/794/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 November 2022

Before:

HUGH SOUTHEY KC
(sitting as a Deputy Judge of the High Court)

- -

Between:

THE KING **on the application of**	**Claimant**
ALI GULREZ **(by his mother and litigation friend,** **TASNEEM GULREZ)**	
- and -	
THE LONDON BOROUGH OF REDBRIDGE	**Defendant**

- -
- -

Alice Irving (instructed by **Sinclairslaw**) for the **Claimant**
Owusu Abebrese (inhouse counsel) for the **Defendant**

Hearing dates: 8 November 2022

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Approved Judgment

This judgment was handed down remotely at 10.30 am on 18 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Hugh Southey KC (sitting as a Deputy Judge of the High Court):

Introduction

1. This is a challenge to an alleged unlawful refusal of an application for a Disabled Facilities Grant ('a DFG'). In this case the DFG is sought, at least in part, in order to fund the installation of a stairlift.

2. I have had helpful submissions from counsel on both sides, for which I am grateful. I also appreciate the work undertaken by the solicitors representing the parties. The efforts of the parties have assisted me greatly.

Factual background

3. The claim form states that:

> *The Claimant … is 33 years old. He has profound and multiple disabilities, including congenital spastic quadriplegia, cerebral palsy affecting all four limbs, severe global developmental delay, cortical visual and sensory impairments, epilepsy, oropharyngeal dysphagia, keratoconus, sleep disorder, and emotional and behavioural difficulties. The Claimant is registered as blind.*
>
> *The Claimant is a full-time wheelchair user. He is reliant on others for all his basic selfcare needs. He is doubly incontinent and uses pads day and night. He requires assistance with feeding, dressing, and bathing. He is unable to reliably communicate his needs either verbally or non-verbally. When anxious, he demonstrates this with loud vocalisations, shouting, screaming, and rocking. When frustrated that his needs are not being met, the Claimant can bite himself, bang his head, poke his eyes, and punch himself.* ([2] – [3])
>
> I did not understand the Defendant to dispute this description of the Claimant.

4. The Claimant was at material times in receipt of an intensive continuing health care package from the Barking and Dagenham, Havering and Redbridge Clinical Commissioning Group ('the CCG'). Has now been replaced by the NHS North East London Integrated Care Board. I have not found it necessary to consider the details of this package for the purposes of this judgment. The Claimant employs NJ Case Management to manage his personal budget and care package.

5. The Claimant resides with his parents in a 4 bedroom semi-detached house. His bedroom and bathroom are both on the first floor. The doorways have been widened to accommodate his wheelchair, and there are ceiling hoist and tracks to enable him to transfer around.

6. A through floor lift operates between a corner of the kitchen diner and into the Claimant's room, so that he is able to move around between the rooms easily. The first through floor lift was installed in 1997 and was replaced in 2015. The current through floor lift was installed in September 2022. The adaptations which have taken place have always been carried out and funded by the Defendant.

7. On 5 July 2021 an OT, Zoe Berry, visited the property. That visit appears to have followed a request for a DFG. That application had been made in light of difficulties that had been experienced with the through floor lift. The Claimant 's case is that a lift failure can leave him stuck on the ground floor and unable to access his bedroom and bathroom. One failure occurred between 21 and 22 December 2020. On this occasion a manual transfer was required. That was apparently very distressing to the Claimant and his parents. More importantly, the manual transfer is said to have been dangerous. The Defendant does not appear to dispute that there are significant problems if the lift breaks down. It also does not appear to dispute the need for a contingency plan.

8. Ms Berry made recommendations in a report dated 23 August 2021. The report states that OT input had been sought to identify suitable replacement options for current adaptations 'which are not working effectively to meet [the Claimant's] needs.' The particular concern was said to have been that the through floor lift was breaking down. Because it took time to repair, the Claimant was denied access to essential facilities both within the home and the community. It was said that, among other things, that there was a need for 'a suitable backup [to be] identified'.

9. The report of Ms Berry noted that the lift was working at the time of the visit. However, it was said that the Claimant's parents were anxious about transferring the Claimant should there be an issue with the lift. It was said that there had been previous difficulties. In particular, it was noted that there was a risk of injury when the Claimant was carried downstairs. The OT noted that the issue might be that the lift was out of warranty so that repairs had become the responsibility of the Claimant. The report suggested that those issues could be overcome with either a servicing agreement provided by the current lift provider or a replacement lift being installed also with a servicing agreement. The report noted that a stairlift could be provided to enable the Claimant to have full access to services in the event that a lift breaks down. The report ruled out an evacuation chair as a backup. No other backup was identified. The report considered the suitability of a stairlift and concluded it was accepted as an 'emergency solution'.

10. It is implicit in this report that it is important that the Claimant move between floors. That is because there would have been no need to consider backups if that were not the case. The Defendant does not appear to dispute that it is important that the Claimant moves between floors.

11. On 27 August 2021 the OT report was sent to the Defendant's Home Improvement Team by the CCG.

12. On 15 September 2021 a meeting was held with the Claimant's parents and their legal representative, NJ Case Management and representatives from the CCG. It was concluded that Donna Hurley, Business Manager from the CCG, would arrange a meeting with the Defendant's Home Improvement Team to discuss the OT's recommendation for a stair lift.

13. On 24 September 2021, an email was received from Kalpana Singaravelou, Senior Practitioner OT in the Defendant's Home Improvement Team. This stated:

I have discussed with my manager regarding contingence (Stairlift) and the suggestion is that the TFL warranty/service agreement with 24/7 call out would be the contingence

plan. Hence, stair lift recommendation as a contingence will not be progressed via DFG.

14. On 27 September 2021, a case manager from NJ Case Management ('the case manager') responded to Ms Singaravelou asking for, among other matters, clarification of the reasons why the stair lift could not be installed.

15. On 30 September 2021, Ms Singaravelou called the case manager and explained that the DFG 'only covers' one piece of equipment. Therefore, a new stairlift could not be funded in addition to a new through floor lift. Further, she stated that the service plan for the through floor lift would be sufficient as a contingency plan.

16. Following further correspondence, on 6 October 2021 the case manager emailed the CCG and the Defendant asking if the stairlift could be funded by a DFG instead of a new through floor lift. That proposal was contingent on the existing through floor lift being declared as being in working order. It was said that a callout plan for the through floor lift was not a sufficient contingency as there was no guarantee that the lift could be fixed immediately. For this reason a stairlift was recommended by the OT. This was reiterated in an email to Ms Singaravelou on 7 October 2021.

17. On 11 October 2021, a response was received from Themis Skouros, the Defendant's Group Manager for Environmental Health. This stated:

The client cannot have both a through floor lift and a stairlift as a contingency. The contingency is the warranty.

18. The case manager responded on 11 October 2021, again asking if the DFG could cover the stairlift instead of the through floor lift and reiterating that a warranty was insufficient contingency as the lift may not be fixed immediately.

19. On 19 October 2021, a further response was received from Mr Skouros stating:

From a grant perspective the OT recommendation is not reasonable or practicable, there is also an associated risk with using a stairlift because of the manual handling required. Whilst the through floor lift is working it has got to an age where the best option would be to replace the lift. I understand the family have had some issues with the Wessex lifts, given this we would look at alternative supplier/installer and ensure an adequate cover warrant is in place to mitigate the need for a 'back up option'.

20. On 21 October Mr Skouros wrote stating that:

The role of the OT in the DFG assessment is to determine what is necessary and appropriate, and the role of the Home Improvement team is to determine what is reasonable and practicable. In order to marry the two objectives together to come to an agreement on away forward we have panel meetings for complex cases.

Rather than having this dialogue on email where we seem to be going around in circles can I suggest I arrange a panel meeting to discuss the points you have raised which will enable you to provide able the necessary feed back to the family.

21. The meeting proposed by Mr Skouros was convened on 12 November 2021 and was attended by Mr Skouros, Ms Singaravelou and another Defendant OT, representatives

from the CCG and representatives from NJ Case Management. Ms Barry, the CCG commissioned OT who had recommended the stairlift, was not present. Nor were the Claimant's parents. Notes taken of the meeting by NJ Case Management record:

i) The Home Improvement Team confirm that the DFG could cover only 1 major piece of equipment.

ii) The Home Improvement Team decision to refuse the stairlift was based on safety issues regarding manual moving and handling. It was pointed out that 10 years ago the installation of a stair lift was considered but was ruled out due to risk. A through floor lift was instead installed.

iii) The Home Improvement Team stated that if the through floor lift breaks down, the solution will be the emergency callout service. With a new lift in place, the possibility of circumstances in which it could not be fixed immediately would be reduced.

22. On 17 November 2021, the case manager from NJ Case Management wrote to the Defendant, raising concerns about the Claimant's parents not being invited to the meeting and asking for any evidence relied upon to contradict Ms Barry's opinion that a stairlift would be necessary and appropriate for emergency use.

23. On 25 November 2021, a response was received from Nicola Flintham, the Defendant's Senior Home Improvement Officer. She stated that a meeting with the family could be held, but this would not be to review Ms Barry's recommendations.

24. On 24 December 2021, the Claimant's solicitors sent a letter alleging that the decision by the Defendant's Home Improvement Team not to progress a DFG application in relation to the stairlift was unlawful.

25. On 11 January 2022, Mr Skouros replied by email. He stated:

i) Contrary to what had previously been stated, there was no limit to the number of adaptations or pieces of equipment that could be granted on a single DFG application, although the maximum for any DFG was £30,000. In oral argument it was submitted that what earlier e-mails had referred to was a practice that there could not be grants for 2 items covering the same function. I will return later to the issue of the practice/policy of the Defendant.

ii) It was also said that it was not in dispute that the OT recommendation identified what was necessary and appropriate.

iii) The meeting on 12 November 2021 was to explain the Home Improvement Team's decision. It was not a multi-disciplinary team meeting.

iv) As to the reasons for refusing the stairlift, the e-mail stated that:

I can confirm that Zoe Barry the Occupational Therapist commissioned by the CCG made a necessary and appropriate recommendation option to install a stairlift to mitigate against the potential break down of the existing through floor lift. The Home Improvement Team having reviewed the referral and considered that the most reasonable and practicable option to negate the need for another

> *major adaptation would be to replace the existing through floor lift in its entirety as it is now over 10 years old … In the event of a breakdown the backup option would be a 5 year 24/7 warranty to cover for faults / repairs, parts and servicing … Clarification was raised as to the suitability of using a stairlift as a backup option to access the first floor… It must be noted that the OT necessary and appropriate recommendation is not in dispute. The complete replacement of the existing through floor lift with the necessary warranty cover would negate the need for a backup option.*

26. In oral argument it was said by the Defendant that this e-mail dated 11 January 2022 set out the key reasoning of the council.

27. A formal pre-action protocol letter was sent by the Claimant's solicitors on 20 January 2022.

28. The Defendant responded to the pre-action letter on 8 February 2022 stating:

> *As the Authority does in all cases, we have considered what the Occupational Therapist (OT) has recommended as necessary and appropriate to meet Mr Gulrez's needs… We have considered what is reasonable and practicable for meeting the identified needs within the home having regard to what adaptations present the best solution with the least risk to Mr Gulrez and his family and what is the best value option for the public purse.*
>
> *This authority does not provide stair lifts as contingencies, should there be issues with the new through floor lift, the Warranty and 24/7 call out service is in place to ensure that the through floor lift will be repaired as soon as possible. If this is not possible CCG OT will ensure support and assistance to the service user until such time the through floor lift is fixed.*
>
> It is pointed out that no details have been provided of the support from the OT.

29. On 10 February 2022, the Claimant's solicitors sent a further letter asking the Defendant to reconsider.

30. On 17 February 2022, the Defendant confirmed that its position remained unchanged.

31. Further reasons for the decision challenged have been provided in the course of this application for judicial review.

32. The detailed grounds appear to state that the Defendant will not fund 2 adaptations where 'the identifies [sic] need' can be met by 1. It is also said that the DFG only 'covers 1 adaptation as part of a contingency plan'. These submissions seem to reflect the submissions made orally about the practice and/or policy of the Defendant. I will return to the submissions of the Defendant regarding its policy/practice later.

33. The summary grounds are broadly similar to the detailed grounds. One significant difference is that it is said in the detailed grounds that:

> … *the care package which is in place will become operative if there is a breakdown* [42].

In contrast the summary grounds state:

If the new lift was to break down for any reason, the Adult Social Care Team would look to support the family with any temporary measures needed whilst the lift was being repaired. The nature of these temporary measures would be agreed with the family [13].

I am told that the care package is provided by the CCG while the Adult Social Care Team is a reference to the Defendant's social services department.

34. The through floor lift was replaced in September 2022.

35. The Claimant points out that the Defendant does not argue that the lift will not break down or that it can always be repaired immediately. That means that there is a risk that there will be a repeat of what happened in December 2021 (and on other occasions) as the Claimant may be left without a lift.

The Housing Grants, Construction and Regeneration Act 1996

36. Section 1(1)(c)(i) of the Housing Grants, Construction and Regeneration Act 1996 ('the 1996 Act') provides, so far is material, that:

Grants are available from local housing authorities in accordance with this Chapter towards the cost of works required for—

(c) the provision of facilities for disabled persons —

(i) in dwellings …

37. Section 23 of the 1996 Act provides, so far as is material, that:

(1) The purposes for which an application for a grant must be approved, subject to the provisions of this Chapter, are the following—

(a) facilitating access by the disabled occupant to and from—

(i) the dwelling …

(b) making—

(i) the dwelling …

safe for the disabled occupant and other persons residing with him;

(c) facilitating access by the disabled occupant to a room used or usable as the principal family room;

(d) facilitating access by the disabled occupant to, or providing for the disabled occupant, a room used or usable for sleeping;

(e) facilitating access by the disabled occupant to, or providing for the disabled occupant, a room in which there is a lavatory, or facilitating the use by the disabled occupant of such a facility;

(f) facilitating access by the disabled occupant to, or providing for the disabled occupant, a room in which there is a bath or shower (or both), or facilitating the use by the disabled occupant of such a facility; [Emphasis added]

38. Section 24 of the 1996 Act provides, so far as is material, that:

(1) The local housing authority shall approve an application for a grant for purposes within section 23(1), subject to the following provisions. …

(3) A local housing authority shall not approve an application for a . . . grant unless they are satisfied—

(a) that the relevant works are necessary and appropriate to meet the needs of the disabled occupant, and

(b) that it is reasonable and practicable to carry out the relevant works having regard to the age and condition of—

(i) the dwelling …

39. Section 33 of the 1996 Act enables a maximum grant to be specified. Regulation 2 of the Disabled Facilities Grants (Maximum Amounts and Additional Purposes) (England) Order 2008 92008/1189) specifies £30,000 as the maximum amount of a DFG.

40. In *R (B) v Calderdale Metropolitan Borough Council* [2004] 1 WLR 2017 the Court of Appeal held that:

… one straightforward guideline is that section 23(1) and section 24(3) should be applied sequentially. ... Section 23(1) is a gateway provision. Section 24(3) is a control for those applications which get through the gateway. [29]

41. In this case there is no dispute that the requirements of section 23(1) are met. However, the objectives of section 23(1) are important when considering the arguments in the case.

42. In *Calderdale* the Court of Appeal endorsed the findings of the 1st instance judge holding that:

Paragraph (b) [of section 23(1)] *… requires the purpose of the relevant works to make the premises not 'safer' but 'safe'.* ([17] and [18])

The Court of Appeal went on to hold that:

Given that no works will ever be able to make premises completely safe for the disabled person and those he lives with, do they simply have to be designed to make the premises safer than they are, or is there some threshold of safety that has to be surmounted? In my judgment there is a threshold, but it is plainly not one of complete safety. Adopting the vocabulary of the circular, I would hold that to come within section 23(1)(b) the proposed works must be such as to minimise the material risk, that is to say to reduce it so far as is reasonably practicable, assuming that it cannot be eliminated. [24]

43. There has been consideration of the approach that should be adopted to the requirement in section 24(3)(b) of the 1996 Act that works must be reasonable and practicable.

44. In *R (McKeown) v Islington London Borough Council* [2020] PTSR 1319 Hugh Mercer QC, sitting as a Deputy Judge of the High Court, noted that:

> *… the mindset of the decision-making authority must not be to search for grounds to refuse the grant but, in good faith, to limit its examination to the relevant matters set out in section 24 in determining whether it is satisfied as to the relevant matters.* [56]

45. In *R v Birmingham City Council ex p Mohammed* [1999] 1 WLR 33 Dyson J held that:

> *Another pointer as to what Parliament intended is to be found in section 24(3)(b) and (4). These provisions were inserted to make it clear that, even if the relevant works were necessary and appropriate to meet the needs of the disabled occupant, the authority was neither obliged nor entitled to approve an application for a D.F.G., unless it was reasonable and practicable to carry out the work, having regard to the age and condition of the dwelling or building, and unless, in the case of a dwelling, the authority had taken into account whether the dwelling was fit for human habitation. No doubt, the reason for these conditions was an appreciation of the fact that it was not a sensible use of resources to make a D.F.G. to improve an old, dilapidated building, or a dwelling which was not fit for human habitation.* (at 37G)

46. In *McKeown* Hugh Mercer QC held that:

> *… the statutory test does not, in my judgment, permit the decision-maker to test "reasonable and practicable" by reference to the general suitability of different aspects of the dwelling for the disabled person's general needs. To do so would be indirectly to widen very significantly the "needs" being referred to in section 24(3)(a) and, in effect, to modify the statutory scheme. Whether there is wheelchair access to a toilet, space for a shower chair or wheelchair accessibility to the kitchen are not, in my judgment, within the meaning of the term "condition" in section 24(3)(b). Nor can it be said that the lack of suitability in various respects of a person's home excludes such a person from access to a grant in order to facilitate the basic need of accessing/exiting the home. It follows that, in my judgment, the second to fifth numbered considerations in the Decision are not relevant considerations.* [36]

47. It appears to me that the judgments of Dyson J and Hugh Mercer QC demonstrate that (contrary to the submissions of the Defendant) section 24(3)(b) of the 1996 Act should be interpreted narrowly. In particular, it is only matters relating to the age and condition of the building that should be considered when determining whether works are reasonable and practicable. That is not surprising. Section 24(3)(a) permits consideration to be given to whether adaptations are appropriate. That will allow a broader range of factors to be considered. The purpose of section 24(3)(b) is simply to require consideration to be given to whether the age and condition of the building in question makes a DFG a waste of public funds.

48. In *ex p Mohammed* Dyson J held that:

> *… subject to certain express limitations, local housing authorities are obliged to approve D.F.G.s within section 23(1) purposes whatever the resource implications of doing so may be.* (at p42D)

49. At first instance in *Calderdale* [2003] EWHC 1832 (Admin) Stanley Burnton J held that:

> *To take a straightforward example, if a physically disabled person is unable to negotiate stairs, and therefore unable to get to or from his first floor bedroom without assistance, and he applies for a grant for the installation of a lift to enable him to get to and from his bedroom, paragraph (d) of section 23(1) applies. If, however, the relevant works involve the installation at great expense of a lift shaft and lift cage, and the required access can be provided at significantly less expense by installing a stair lift, the local authority may lawfully conclude that it is not satisfied that the more expensive works are necessary and appropriate to meet the needs of the disabled person. Similarly, if the local authority concludes that the proposed works will not be effective to provide the necessary access (for example, because one or more stairs have to be negotiated in order to reach the lift cage), it will not be satisfied that the works are appropriate. Again, safety measures that go beyond the necessary and appropriate will be liable to fail the test under section 24(3) although their purpose falls within section 23(1)(b) of the Act.* [26]

> The Claimant accepts that this demonstrates that a local authority can choose the cheaper of 2 alternative options.

Policy and Guidance

50. It appears to me that policy and guidance is of limited value when interpreting the 1996 Act. That is because statutory construction is a matter for the court to determine applying normal rules. However, I note the relevant guidance because it appears to me to be consistent with the conclusions that I have reached regarding the meaning of the 1996 Act.

51. At the material time, *Home Adaptations for Disabled People, A Detailed Guide to Related Legislation, Guidance and Good Practice* provided that:

> *… housing authorities need to have regard to a number of factors in deciding whether it is reasonable and practicable to carry out the relevant adaptation works. Each case will present its own problems which need to be resolved in reaching decisions on grant approval but the following are issues which commonly arise in the processing of grant applications:*
>
> *(a) the architectural and structural characteristics of the dwelling may render certain types of adaptation inappropriate;*
>
> *(b) the feasibility of carrying out adaptations to properties with narrow doorways, halls, stairways and passages which might make wheelchair use in and around the dwelling difficult; or with difficult or limited access e.g. steep flights of steps making access for wheelchair use difficult and therefore making continued occupation of the dwelling open to question;*

(c) conservation considerations and planning constraints may prevent certain types of adaptation being carried out; and

(d) the impact on other occupants of proposed works which will reduce or limit the existing facilities or amenities in the dwelling. [43]

52. On 28 March 2022, the Department for Levelling Up, Housing and Communities published *Disabled Facilities Grant (DFG) delivery: Guidance for local authorities in England.* This replaced the earlier guidance. It states that:

B84. Where the relevant works have been judged to be necessary and appropriate, the housing authority then has to consider whether it is reasonable and practicable to carry out the works having "regard to the age and condition" of the property. The reason for this test is that it may not be a good use of resources to award a DFG to adapt an old, run-down building.

B85. Each application should be considered on its own merits but where a home is in serious disrepair or beyond economic repair then a housing authority may consider that the relevant works are not reasonable and practicable. In these cases, it would be good practice for local authorities to provide information and advice to the applicant on their housing options.

B86. Other issues, such as whether the property is otherwise suitable for the disabled person are not relevant considerations.

53. I am not sure that these 2 guidance documents are entirely legally accurate. In particular, the earlier document suggests a wider range of factors may be considered than is suggested in the case law cited above. However, both documents suggest that it is necessary to focus on factors relating to the building in issue when considering whether works are reasonable and practicable.

Equality Act

54. Section 19 of the Equality Act 2010 ('the 2010 Act') provides, so far as is material, that:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are— … disability;

55. Section 6(1) of the 2010 Act provides that:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

56. The statutory guidance issued by the Equality and Human Rights Commission entitled *Services, public functions and associations* ('EHRC guidance') states that:

There is no need for a person to establish a medically diagnosed cause for their impairment. What it is important to consider is the effect of the impairment, not the cause.

57. Section 6(3) of the 2010 Act provides that:

In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

58. In *Roads v Central Trains Ltd* [2004] EWCA Civ 1541 Sedley LJ considered the Disability Discrimination Act 1995 and held that:

… section 21 sets out a duty resting on service providers. They cannot be expected to anticipate the needs of every individual who may use their service, but what they are required to think about and provide for are features which may impede persons with particular kinds of disability - impaired vision, impaired mobility and so on. [21]

59. The judgment in *Roads* was applied by Blake J in *R (Lunt) v Liverpool City Council* [2010] RTR 5 to hold that:

There must be a class of persons rather than mere problems encountered by a single individual [60]

He then went on conclude that it was no answer to a claim to discrimination against wheelchair users to say that some wheelchair users could access the service in issue. Contrary to the submissions of the Claimant that does not, however, mean that he concluded that users of a particular size of wheelchair had a particular disability within the meaning of section 6(3) of the 2010 Act. What he concluded was that the fact that some wheelchair users were not disadvantaged did not mean that other wheelchair users could not claim disadvantage as wheelchair users [60]. He did, however, comment that:

… the distinction between types of wheelchairs was not the issue in [Roads] *… and such an approach would be contrary to the whole tenor and purpose of the Act.* [57]

60. Section 29 of the 2010 Act provides that it is unlawful to discriminate in relation to the provision of services and in the exercise of other public functions. As a consequence, there appears to be no dispute that section 19 applies to the award of DFGs. The issue is whether there was unlawful discrimination applying the test in section 19.

Arguments of the parties

61. The Claimant was granted permission by Clare Padley (sitting as a Deputy Judge of the High Court) to rely on amended grounds. These argue that:

    i) The Defendant has acted unlawfully and/or irrationally. In particular, it is argued that the Defendant has applied the wrong test when determining whether the provision of a stairlift is reasonable and practicable.

    ii) The Defendant acted unlawfully and/or fettered its discretion and/or discriminated against the Claimant by either adopting a policy of not providing stair lifts as a contingency and/or only agreeing to fund 1 piece of equipment.

    iii) The Defendant has taken account of irrelevant considerations namely the cost to the public purse.

62. The Defendant argues that the 2 core recommendations are that either a servicing agreement could be provided by the current lift provider or a replacement lift could be installed. It argues that the suggestion of a backup stairlift:

    … *would in actual effect mean that the Defendant was being asked by the family to make two adaptations and requiring the Defendant to exceed the identified need of the Claimant.* (Defendant's skeleton argument at [13]).

63. The Defendant argues that it is not acting unlawfully or unreasonably in refusing to fund a stairlift.

Conclusions

64. The following principles are clear and apparently not in dispute:

    i) The ultimate decision as to whether to award the Claimant a DFG is for the Defendant and not the Court or any OT.

    ii) Consistent with the point just made, the Defendant is not bound by Ms Barry's recommendations.

    iii) The issue for the Court is whether the Defendant acted unlawfully when concluding that there was no duty to provide a DFG for a stairlift.

65. The 1st stage in assessing whether there is a duty to provide a DFG is to determine whether section 23(1) of the 1996 Act applies (*B*). There is no dispute that it does.

66. It also appears to have been accepted in the e-mail from Mr Skouros dated 11 January 2022 that the stairlift is necessary and appropriate. Consistent with this, it was accepted by the Defendant during oral argument that the stairlift is necessary and appropriate. That means that there is no dispute that the test in section 24(3)(a) of the 1996 Act is

met. As a consequence, the issue is whether the Defendant lawfully concluded that the stairlift is not reasonable and practicable so that the test in section 24(3)(b) of the 1996 Act is not met.

67. It appears to me that it makes sense to consider the grounds in a different order to that advanced by the Claimant in light of the submissions of the Defendant.

68. In oral submissions, the Defendant placed significant weight on a policy or practice that was said to have been applied when determining whether the installation of a stairlift was reasonable and practicable. That was said to have justified the decision in question. It is a matter of concern that the policy does not appear to have been published. That appears to have led to some uncertainty about its terms. For example, it has clearly been said at times that the Defendant will not fund 2 adaptations. However, there has been no challenge to the unpublished nature of the policy. Further, in written submissions filed after the hearing the Defendant stated that:

The Defendant's position … is that it may fund more than one adaptation but not where the adaptation is to be used as a contingency for example in this instance two lifts which would be able to carry out the same function. In these circumstances another option would be found such as in this case 24/7 warranty, which it is submitted is a safe option and within ss23 and 24.

I will proceed on the basis that this is the policy that was applied in this case. The evidence appears to be consistent with this policy having been applied.

69. It appears to me that the policy identified by the Defendant in its written submissions as a basis for concluding that that works are not reasonable and practicable is unlawful. I have reached that conclusion for the following reasons:

i) The Court of Appeal was clear in *Calderdale* that a key objective of section 23(1)(b) of the 1996 Act was that DFGs are intended to make a dwelling as safe as reasonably practicable. There is no obvious reason why a backup cannot provide additional safety. In a case like this case, there are apparent risks when the primary item of equipment fails. A service contract can limit the periods of failure but there is no suggestion that it eliminates them. During the meeting on 12 November 2021 it was apparently said that replacing the through floor lift will merely reduce the circumstances in which the through floor lift is not repaired immediately. A backup may further reduce the risk associated with failure. As a consequence, a policy of not funding backups potentially undermines the statutory objective of making a property as safe as reasonably practicable.

ii) The policy has nothing to do with the age and condition of the property where works will be carried out. The Defendant argued that it took decisions in this case in full knowledge of the age and condition of the property in issue. That may be correct but it does not mean that there was compliance with the terms of section 24(3)(b) of the 1996 Act. The judgments in *ex p Mohammed* and *McKeown* demonstrate that it is not enough to merely have regard to the age and condition of a property. The age and condition of a property are the only factors to be considered when determining whether work is reasonable and practicable.

iii) The e-mail of the 11 January 2022 caused the Defendant to focus on 'the most reasonable and practicable option'. That appears to me to be a flawed approach. Where 2 adaptations are sought it is necessary to consider whether each meets the tests in sections 23 and 24 of the 1996 Act.

iv) It might be argued that requiring funding for back ups imposes an excessive financial burden on local authorities. However, the £30,000 cap on DFGs provides a degree of protection for local authorities. If that is not enough, it is for Parliament to amend the 1996 Act.

70. The application of the policy appears to have been at the heart of the Defendant's decision making and resulted in illegality. However, it appears to me that there are other flaws in that decision making that amount to illegality (albeit those flaws may well have flowed from the policy). In particular:

i) The meeting conducted on 12 November 2021 relied on safety issues in relation to a stairlift as a reason for refusing to provide a DFG. In particular, it was pointed out that 10 years ago the installation of a stair lift was considered but was ruled out due to risk. A through floor lift was instead installed. It appears to me, however, that this reasoning misses the key point. Nobody was suggesting a stairlift as an alternative to a through floor lift. It was recommended by Ms Berry as a backup. As already noted, an objective of a DFG is to make a dwelling as safe as reasonably practicable. As a consequence, the issue was whether the stairlift was safer than simply having a warranty as a back up. It was not whether the stairlift was safer than a through floor lift. That is either irrational or a failure to exercise powers in accordance with the relevant statutory objective.

ii) Linked to the point just made, there appears to have been a failure to assess the risks associated with periods when the through floor lift has failed. That is demonstrated by the lack of clarity as to what should happen if the through floor lift fails. As noted above, the summary grounds and detailed grounds appear to be inconsistent about the steps that should be taken where there is a failure. It appears to me that it is very difficult to assess whether a backup will reduce risk if there is no clear understanding of alternative steps that should be taken to assess risk. This is material as there appears to be no dispute that there is a risk of the through floor lift failing. Of course the policy considered above means that it is not surprising that there was a failure to properly consider the extent to which a backup will reduce risk. It made the reduction of risk irrelevant.

71. I do not accept that the Defendant has fettered its discretion. This case is not really about discretion. There is a duty to provide a DFG if statutory criteria are met. A local authority has a judgment to make as to whether those criteria are met. In reaching that judgment the local authority has to apply the law correctly. That decision making process does not amount to a discretion. The real question is whether the application of the policy results in illegality. I have already concluded that it does.

72. I have concluded that there is no indirect discrimination contrary to the 2010 Act. My reasons for that conclusion are as follows:

i) The first issue to consider is whether the Defendant has applied a policy that they also apply to people who do not share a protected characteristic with the

Claimant. That means that it is necessary to consider what the characteristic is. It is plainly not disability because it is only those who are disabled who can apply for a DFG. The first stage of the decision making process is whether section 23(1) applies (*Calderdale*). That requires an applicant to demonstrate disability. It is only after that stage that the policy is applied. So the policy only applies after disability has been established. However, that is no answer to this claim. Section 6(3)(a) makes it clear that a characteristic can be a 'particular disability'.

ii) The Claimant in reply sought to argue that the group of people in issue with a particular disability is wheelchair users who are non-load bearing and have a profound intellectual disability. It was also suggested that it might be relevant that there was incontinence. I accept that a particular disability may be defined by the impairment experienced by a group. Section 6(1) of the 2010 Act and the EHRC guidance make it clear that the focus must be on the impairment rather than upon a medical diagnosis when deciding whether someone is disabled. I accept that the group identified by the Claimant is identified by a particular combination of impairments. If wheelchair users and people with impaired vision have a particular disability (as Sedley LJ held in *Roads* and Blake J held in *Lunt*) that must be because they have shared impairments. The group identified by the Claimant also has shared impairments. That means that the group has particular disabilities.

iii) It is then necessary to consider whether there is disadvantage compared with persons with whom the Claimant does not suffer disadvantage. That must require me to consider the position of other people with a disability who are part of the Claimant's group. Those without a disability cannot suffer disadvantage as they are not eligible for a DFG. The problem that I have had with the Claimant's claim is that it appears to me that I have no way of knowing whether the group in issue suffers a particular disadvantage when compared with others with a disability. The Claimant's need for a backup in this case arises as a result of a range of factors. They include matters such as the fact that his home is spread over 2 floors and the fact that key facilities such as the bathroom are only on 1 floor. An alternative layout of the home might make a backup unnecessary. That demonstrates that I have no way of knowing how common it is for people in the Claimant's group to need a backup. Others may avoid the need for a backup. I also have no way of knowing how common it is for people outside of the group to need a backup. That means that I cannot be satisfied that those within the group in issue has suffered particular disadvantage. Those within the group are denied a backup as a consequence of the policy but so are those outside the group. I have no way of knowing whether the policy is more likely to apply to the group in question.

73. Finally, the Claimant argues that the Defendant unlawfully relied on the expense of the stairlift as a reason for refusing it. I am unclear to what extent this factor was relied on. It appears to me that, although the reasoning of the Defendant is not clear, the primary reason for refusing funding is the application of the policy. To the extent that expense was relied upon, it was on the basis that there was consideration of the best value option because the policy prevented it funding 2 options. Consideration of best value can potentially be a legitimate approach (*Calderdale*). The problem in this case is that what

was in issue was that the policy prevented the Defendant recognising that there were not 2 alternatives. What should have been considered was whether there was a legal obligation to provide a backup. The approach to that was unlawful for the reasons already identified. I don't see how the references to the public purse result in further illegality.

74. For the reasons set out above, it appears to me that the decision challenged was unlawful. As a consequence it should be quashed. The claim form seeks a mandatory order. A mandatory order is unusual in public law because public authorities can be expected to comply with the law (e.g. *Craig v Her Majesty's Advocate* [2022] 1 WLR 1270 at [46]). I have no reason to believe that the Defendant will not take a fresh decision that seeks to respect this judgment once it is quashed. As a consequence, I refuse to make a mandatory order. My rejection of the claim under the 2010 Act also means that there is no basis for me to award damages.

Further remarks regarding order

75. Having considered the written submissions of the parties regarding the order, I have decided to make the order proposed by the Claimant (save that I have corrected the name used for the Defendant's counsel). I am satisfied that I can adopt normal practice and reach a conclusion regarding the order without needing to hear oral submissions.

76. I am satisfied that there is no need for the order to record the grounds upon which the claim succeeded. I believe that that is clear from this judgment.

77. It appears to me that the Claimant is entitled to his costs. As has made clear in earlier authority, it is unusual for a claimant to succeed with every argument (e.g. *HLB Kidsons (A Firm) v Lloyd's Underwriters (Costs)* [2007] EWHC 2699 (Comm) at [11]). Having heard argument in this case, I very much doubt whether any significant time or cost would have been saved had the Claimant restricted himself to successful arguments. I also think that it is relevant that the Defendant's reasons were not entirely clear. That is likely to have increased cost.

78. For the avoidance of doubt, I took no account of the fact that the Claimant is in receipt of public funding. It would have been wrong in principle to take any account of public funding (*R (Gourlay) v Parole Board* [2020] 1 WLR 5344 at [47]).