

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

Manchester Civil Justice Centre
Manchester M60 9DJ

Date: 02/09/2011

Before :

MR JUSTICE KENNETH PARKER

Between :

JG and MB
- and -
Lancashire County Council

Claimants

Defendant

Ian Wise QC and Stephen Broach (instructed by **Irwin Mitchell LLP Solicitors**) for the
Claimants
Sam Grodzinski QC and Janet Kentridge (instructed by **Lancashire County Council**) for
the **Defendant**

Hearing dates: 20 and 21 July 2011

Judgment

Mr Justice Kenneth Parker :

1. This is an application for judicial review brought by two disabled women, JG and MB aged 65 and 73 respectively, against Lancashire County Council (“the Council”). The background to the application is as follows. The Council, in common with many, if not all, local authorities in England and Wales has recently faced unprecedented financial pressures, driven primarily by the very significant cuts following the Government’s 2010 Comprehensive Spending Review (“CSR”) and the consequent reduction in the Council’s annual “formula grant” from the Department of Communities and Local Government.
2. The Council has been expected to reduce its spending by 26 per cent over the coming four years, entailing a reduction of £71.6 million for 2011/12 alone. In response to these unprecedented financial pressures the Council has sought to achieve savings across all of its directorates, including adult and community services, children and young people services, and environmental services. As part of its decision-making processes a range of detailed and wide-ranging consultations have been carried out to ascertain the views of its population in relation to the policies challenged in the present case and on wider issues, such as whether the Council should raise its levels of council tax.

3. The focus of the Claimants' challenge are decisions by the Council relating to the provision of adult social care services. First, the Claimants challenge the decision taken by the full Council on 17 February 2011 to approve revenue budget proposals for the three financial years 2011/12 to 2013/14 which had been recommended to the Council by its Cabinet on 3 February 2011. The Claimants allege that in approving the budget the Council failed in its duty under Section 49A of the Disability Discrimination Act 1995 ("DDA") to have "due regard" to the need to take steps to promote equality of opportunity for disabled people and the need to take account of disabled persons' disabilities, even where that involved treating such persons more favourably than others.
4. Secondly, the Claimants challenge the decisions taken by the Council's Cabinet Member for Adult and Community Services on 31 March 2011 to approve two particular policies, being two of the "service policy proposals" included in the budget referred to above, again on the ground that the Council failed in its "due regard" duty under Section 49A DDA.
5. The two policies in question were as follows:
 - i) A policy to raise the eligibility threshold for adults accessing social care services under the Fair Access to Care Services Scheme (the relevant statutory guidance on eligibility for social care issued by the Secretary of State for Health under section 7(1) of the Local Authority Social Services Act 1970), so that services would now be provided to meet a person's needs only if those needs were categorised as "substantial" or "critical" under that Scheme rather than simply "moderate".
 - ii) A policy to change how the Council charge for social care services received by adults living at home.

The Factual Background

6. Statements in support of the Claimants' application were filed by the National Autistic Society and SENSE, two leading national disability charities, and by Disability Equality North-West, a local charity run by and for disabled people.
7. The Council filed statements from Stephen Gross, Director of Commissioning for Adult and Community Services, Jeffrey Pogson, Head of the Combined Finance Team for Adult and Community Services and Gillian Kilpatrick, County Treasurer. The following description of the factual background draws upon that evidence.
8. In November 2010 the County Treasurer's department estimated the level of savings that the Council needed to make over the following three years in response to the Government's 2010-11 CSR at £186 million. Of this it was proposed that some £55 million should be made by "below the line" savings, i.e savings achieved by finding efficiencies and without impacting on frontline services. Thus it was estimated that the Council might need to find up to a further £131 million from services-related saving.
9. The Government published the Local Government Finance Settlement on 10 December 2010. The impact of the settlement together with a review of costs was to reduce the level of savings needed over the following three years from £187 million to £179.1

million. Although this exacted marginally less pressure, it still represented a reduction of 25 per cent to the Council's 2010/11 "non-schools" budget. 50 per cent of the "non-schools" expenditure was incurred for the purposes of adult and children's social care: of that 40 per cent was spent on adult social care. It is not immediately obvious how the Council could achieve a 25 per cent reduction in the "non-schools" budget without affecting expenditure on a sector that comprised two fifths of that budget.

10. The processes for setting the Council's budget are lengthy and start many months in advance of the formal decision taken by the Full Council to set its budget and council tax precept. That decision for 2011/12 was taken on 17 February 2011. A difficult finance settlement had been expected for some time and a significant amount of financial planning had already been done before the CSR was announced. At an early stage there was an initial consultation on service priorities through a survey of over 4000 residents - *Living in Lancashire: Budget Consultation 2010*. The purpose of the consultation was to obtain a broad-based view from a representative cross-section of the county's population. The results of this survey, published in December 2010, provided an indication of the service areas that residents believed should be budget priorities for the coming years and an understanding of what residents perceived to be an acceptable level of increase in council tax for 2011/12. Four out of five respondents felt that the Council should make no increase in council tax, which accorded with the mandate of the political majority in the Council and with government policy.
11. In relation to council tax, the funding received by the Council from Central Government included a "council tax freeze grant" equivalent to a 2½ per cent council tax increase. In accordance with the Central Government policy of encouraging council tax restraint by local authorities this grant was provided on condition that the Council agreed not to implement a council tax increase. If the Council were to choose to increase council tax then the grant would be withdrawn. That meant that council tax would have to be raised by more than 2½ per cent before the Council received any additional funding. *The Living in Lancashire* consultation response indicated that only 10 per cent of respondents would support an increase in council tax of more than 3 per cent.
12. The Council therefore appreciated that, without a significant council tax increase, reductions in administrative costs alone would be insufficient to achieve the necessary savings. The Council undertook, in addition to its *Living in Lancashire Consultation*, a number of other consultations as to how it might address the funding of adult social care services. On 6 December 2010 the Council published a consultation paper *Making Difficult Decisions About Funding Adult Social Care Services in Lancashire: A consultation on how care services can be funded in future in the face of budget pressure*. The options under consideration were, in broad terms:
 - i) Raising charges people were asked to pay for services.
 - ii) Reviewing and possibly reducing the fees that the Council pays for care services.
 - iii) Raising the FACS eligibility threshold from 'moderate' to 'substantial', thus reducing the number of adults eligible for social care support.
13. This consultation ran for a 12 week period to 28 February 2011. The consultation document was sent to 2000 service users and was also made available online.

14. On 6 January 2011 the Council's Cabinet resolved to approve, for the purposes of consultation, a series of budget proposals designed to achieve a savings requirement of £179.1 million for the three financial years 2011/12 to 2013/14. The proposals included:
 - i) A council tax freeze in 2011/12 and maximum council tax increases in 2012/13 and 2013/14 of 2½ per cent.
 - ii) Proposed reductions in management and administration costs which were to be achieved without any impact on services, which would reduce costs by £31.2 million in 2011/12, a further £15 million in 2012/13 and a further £9.1 million in 2013/14. These below the line savings were identified in Annex 1 to the Resolutions.
 - iii) Service efficiencies which would also reduce costs by £3.350 million in 2011/12, a further £6.61 million in 2012/13 and a further £2 million in 2013/14. These service efficiencies were identified in Annex 2 to the Resolutions.
 - iv) Proposals, expressly stated to be for consultation, for service reductions of £34.654 million in 2011/12 with an impact of £30.892 million in 2012/13 and £31.476 million in 2013/14. These were set out in Annex 3 to the Resolutions.
 - v) Proposals, again stated to be for consultation, for increasing charging totalling £4.5 million in 2011/12 with an impact of £1.73 million in 2012/13 and £1.1 million in 2013/14. These were set out in Annex 4 to the Resolutions.
15. The Cabinet Resolutions stated that the budget proposals would be made available to the Overview and Scrutiny Committee for the purpose of consultation and that in addition consultation would be carried out with: 12 Lancashire District Councils; Blackpool and Blackburn with Darwen Councils; Trade Unions; the Youth Council; and business representatives. The response to the consultation was reported to the Cabinet on 3 February 2011. The Cabinet recommended cash limits for the following three financial years for each of the various directorates including Adult and Community Services. The Cabinet also resolved that the Cabinet Member for Adult and Community Services be authorised to consider the responses to the ongoing *Making Difficult Decisions* consultation which was due to end on 28 February, and to determine the future provision of adult social care services for the following three financial years in light of the consultation responses.
16. On 17 February the Full Council adopted the revenue budget proposals. The Full Council's decision was to fix a revenue budget limit for, among other matters, adult social care, that is, a finite cash sum within which all adult social care services should be provided. The decision did not as such constitute approval for any of the particular budget proposals which were to be the subject of further consideration by the Cabinet Member for Adult and Community Services as explained earlier. It was intended that the Cabinet Member would take decisions as to whether and if so, how, to implement the various budget proposals on 30 March 2011, once there had been time to consider the various consultation responses.
17. The 12 week consultation period for the *Making Difficult Decisions* consultation extended beyond the date when the Full Council was required to set its budget and

council tax precept. It was always, therefore, intended that decisions relating to adult social care would be taken after 17 February 2011. Moreover it was made clear that if the Cabinet Member for Adult and Community Service did not consider that it was appropriate to introduce any or all of the proposed changes to adult social care provision within that revenue cash limit agreed by the Full Council, then it was open to him to consider if savings could be found elsewhere, whether this be within the budget for adult social care, from other services within the Adult and Community Services Directorate or from services across the County Council. This was reflected in the reports to the Cabinet Member dated 31 March 2011.

18. A total of 722 responses to the *Making Difficult Decisions* consultation were in due course received and considered. In addition four major cross-county events were held with the public and partner agencies and feedback was also given in meetings with the Council's consultation team. Following the consultation a detailed report setting out the results was prepared entitled *Making Difficult Decisions about Funding Adult Social Care Services in Lancashire – Final Consultation Report*.

The FACS Policy

19. The *Making Difficult Decisions – Final Consultation Report* referred to above summarised the concerns that had been expressed in the consultation about raising the eligibility threshold. The report also appended bullet point summaries of the wide range of views that had been expressed at various events held during the consultation period about the range of policies under consideration, including on the proposed FACS policy. Examples of concerns about the FACS policy included people becoming at risk of neglect and of becoming socially isolated, about the particular impact on those with learning difficulties, about the reassessment processes that would be undertaken.
20. The Council's officials also prepared, in addition to the main consultation report, an individual report on the proposed FACS policy which was accompanied by an equality impact assessment. The FACS report explained that national guidance relating to FACS eligibility criteria required councils to prioritise their support in a hierarchical way. Under FACS there are four bands of need: low; moderate; substantial; and critical. The relevant guidance required each Council to identify, according to local needs and resources, which level it regarded as the threshold above which service would be provided. Those assessed as having needs with critical consequences for their independence and/or safety should be supported ahead of those with needs that have substantial consequences and so on.
21. The FACS eligibility framework was based on the impact of needs on factors that were key to maintaining an individual's independence over time. The framework was graded into four bands which describe the seriousness of the risk to independence or other consequences if needs were not addressed. The report then explained the four relevant bands. The report then set out the FACS proposal, a mitigation plan and the financial impact. Given the nature of the challenge in these proceedings, these sections should be quoted in full:

“Proposal

One of the outcomes of the consultation was that a clear, although not overwhelming, majority of people confirmed the

view that FACS should not be raised from moderate to substantial. The Equality Impact Assessment confirms that if the decision is made numbers of vulnerable people will lose formal social care support and hardship might therefore be caused to some people with moderate needs.

However, acknowledging the difficulties for some individuals that will result from raising the eligibility criteria, the following considerations are also relevant:

- The Council is committed to protecting those who are most vulnerable and therefore securing budget savings as proposed makes it more likely that the most vulnerable, i.e., those with substantial and critical needs will be protected now and in the future.
- The FACS proposal was part of a pattern of savings, and to not take the option of raising eligibility criteria would mean that further financial pressure would be put on the funding of other parts of the care system or indeed other Council services. Raising the FACS eligibility criteria focuses savings on those with moderate needs, protecting those with substantial and critical needs. Making arrangements to make additional savings on staffing levels or fees or charges might meet budget requirements but would be much more difficult to focus so as to ensure that people with substantial or critical needs are protected.
- If the change is agreed, it is proposed to implement measures to mitigate the impact as set out below.

Mitigation Plan

The implementation of this change will be handled with utmost care. First of all a review plan is in place and review team is being put in place to undertake individual reviews of the 3900 people currently receiving a service, assessed as having moderate needs. The review plan envisages:

- Reviews of all people who are receiving a service and whose assessed needs are regarded as moderate over a period of 12 months. Staff will be appropriately skilled and trained and will also have had refresher training on the FACS guidance to ensure up to date understanding of the criteria.
- Each review will be undertaken face to face, including health and other professionals where relevant, include the offer of a carer's assessment and will take the needs and wishes of the service user into account.

- Risk assessments, in relation especially to the potential for increased isolation and potential for harassment or depression will be at the heart of the review process.
- An advocate will be offered in each case and the complaints process will be explained in detail. In addition the telephone number of the LINK and or other local citizen representative groups will be made available to the service users. Staff undertaking the reviews will be briefed about these arrangements.

A number of mitigating actions will be offered to those people who after review are regarded as having moderate needs whose services will therefore cease. These will include:

- A tailored personal welfare benefits check by the Welfare Rights Service. If additional benefits are achieved this might be used to pay for services.
- Advice about the availability of community and sensory equipment and how to source that.
- Advice about getting fire safety checks and smoke alarms fitted.
- Advice from trading standards about securing their homes and being aware of and alert for rogue traders.
- Information about carers groups and the several supports and services for carers.
- Information about Dial-a-bus style services available in the locality.
- An offer of an interview with a Help Direct Adviser who might be able to advise on, among other things:
 - Friendly visiting services
 - Local clubs and societies
 - Local help with gardening
 - Local companies or voluntary organisations which offer help with domestic tasks such as shopping and cleaning or laundry
 - Information about local supermarkets which either deliver food or offer transport to their door and help with their shopping in store.

Help Direct in fact can signpost to a huge range of help and support tailored to individuals' needs. All the offers above will be made available in an information pack and will be available on the LCC web site. Discussions are also in hand with District Councils to ensure that people regarded as having moderate needs have available:

- Advice about appropriate insulation for their home and support for heating.
- Advice if necessary about alternative accommodation.
- Advice about the availability and cost of pendant alarms.

By putting this plan into place it is anticipated that the consequences for those people regarded as having moderate needs will be mitigated. However there will be constant watch over the consequences, as well as an open door to the community to express any concerns. Should consequences be severe the County Council undertake to review the way this is implemented bearing in mind that the budget savings have to be achieved.

At its meeting held on 17 February 2011 the Full Council resolved:

“That, in relation to the level of savings required for Adult Social Care provision, the Cabinet Member for Adult and Community Services, following consultation with the Leader, the County Treasurer, and the Executive Director for Adult and Community Services, be authorised to:

a. consider the responses to the ongoing consultation, ‘Making Difficult Decisions about Funding Adult Social Care Services in Lancashire’, due to end on 28 February 2011;

b. determine the future provision of Adult Social Care Services for 2011/12 – 1013/14 in the light of the consultation responses at a) above and within the Revenue Budget limits agreed by the Full council on 17 February 2011.”

The revised proposals set out in the report have been considered and are supported by the Leader, the County Treasurer and the Executive Director for Adult and Community Services.”

22. Under “Legal Implications” the FACS report stated, among other things:

“The impact on service users that may arise if the recommendation is implemented must therefore be considered, in particular the impact on service users currently assessed as “moderate” who, following re-assessment, remain in that

banding and would therefore no longer be entitled to receive services, must be specifically considered.

Regard must also be had to the Council's duty to promote disability equality under s.49A of the Disability Discrimination Act 1995, including consideration of the Equality Impact assessment attached at Appendix A to this report. The Cabinet Member must consider the potential impact of the proposed changes on disabled people and whether the need to identify financial savings outweighs this potential impact.

...

As part of the consideration of these issues the Cabinet Member is entitled to have regard to the mitigation measures proposed in the Report which are intended to minimise the impact on any service user who would be adversely affected by the decision.

If after taking all relevant considerations into account the Cabinet Member concludes that it is not appropriate to introduce any or all of the proposed changes to adult social care provision within the Revenue Cash Limit agreed by the Full Council then the Full Council can be requested to re-visit the Revenue Budget to consider whether savings can and should be found elsewhere within the budget."

23. The Equality Impact Assessment at *Table 1 – Number of people with a current FACS banding who had reviewable services during the year ending 11/02/2011* set out the numbers assessed as having moderate needs, the percentage assessed as having moderate needs and the percentage of each identified group of the total assessed as moderate. The service user groups were broken down between older people, people with a physical disability, people with a learning disability, people with mental health problems and others.
24. It was noted that about 3900 people were in the moderate banding and in receipt of on-going service. It was also noted that following reassessment of their needs that figure was likely to reduce for a number of reasons. First, the health and circumstances of those previously assessed as moderate would be likely to have changed since their last assessment. Secondly, if a service was to be withdrawn following the proposal then the potential impact of having no formal services might become a more significant factor, bringing the relevant people within the substantial criteria. Anecdotal evidence from other authorities suggested that reassessment would lead to significant numbers being brought from the moderate to substantial category. The potential effect on service groups was specifically identified under the heading "Disability". The following was noted:

"Disability: By definition virtually all those people receiving a social care service have a disability. It is however those with moderate disabilities who are most likely to be affected by FACS changes. As can be seen from the table above older people with a disability receiving a service are likely to be most affected,

followed by those with mental health problems and those with a physical disability. The numbers of people with a learning disability likely to be affected by any FACS banding change are likely to be both small and proportionately low. However, following conversations with carers and officers working with people with a learning disability, it has been identified that removal of services for people with moderate needs would potentially have a more comprehensively devastating impact on these groups than the removal of services from older people.

Similarly, according to Action for Blind People and other groups in Lancashire representing the interests of people with a visual impairment, they perceive that people with a visual impairment are assessed as having 'moderate' needs, because they have 'one' disability, when, in fact, that disability affects their entire lives and should perhaps be assessed at a higher level. The FACS criteria do not make any reference to the numbers of disabilities a person has, but considers the risks to their independence. Ensuring that appropriately trained social care workers undertake all the reviews/reassessments of people with 'moderate' needs should ensure that these fears are allayed."

25. In this context it is also important to understand that the FACS policy report and equality impact assessment were not simply placed before the Cabinet Member for Adult and Community Services for the first time just before he was about to approve the FACS policy. Mr Gross, the Council's Acting Executive Director for Adult and Community Services, with over 30 years experience in social care, held a series of meetings with the Cabinet Member to discuss the proposals under the FACS policy and their implications. Meetings were held on 20 December 2010, 24 January, 28 January, 14 February, 24 February, 3 March and 23 March 2011. The Cabinet Member was well aware of the practical impact of the proposed policy and the extent to which the proposed mitigating measures would ameliorate the impact of the withdrawal of social care services from those who remained assessed as having moderate needs. As Mr Gross explained in his statement, at paragraphs 64-66:

"64. The question as to how people whose needs were assessed as moderate would cope following the withdrawal of services from them, what mitigating measures would be put in place and whether or not they were likely to be adequate, and thus the practical impact of the proposed policy, was an important aspect of my briefing sessions on the proposed FACS Policy with the Cabinet Member. My briefing sessions with him identified the alternatives that would be available for those who may no longer receive a formal service and I explained the range of universal services and services available in the community and from the voluntary sector, including those that would be charged for.

65. The Cabinet Member is a longstanding politician and will often have been contacted by people who put their personal stories to him and he has a strong sense of what the loss of a service means. We spoke about how real people would manage

their day to day lives under the new FACS Policy. The Cabinet Member was clear about what mitigation and alternatives were possible and the extent to which they would ameliorate the position of people who remained assessed as having “moderate” needs. The advice I gave in our discussions was that the impact of a change in eligibility criteria would in most cases be made up for by the alternatives/mitigating measures in place, and that even where this was not so (so that some hardship could be said to follow), the impact would not leave people at risk of neglect, ill-health or significant social isolation.

66. The Cabinet Member was also clear that if someone lost a service and as a consequence could not cope (either in terms of their physical or emotional health) then they would be referred back for a further assessment. Indeed, he was well aware that the needs of older people in particular can change very quickly and with it the level of support they require to remain safe. To illustrate the point, last year we carried out over 13,000 unscheduled reviews following a change in circumstances.”

26. In the event, the decision to approve the FACS policy was made on 31 March 2010 by the Cabinet Member. At that time it was understood that the Council was bringing the position in Lancashire into line with that of 72 per cent of local authorities in England and Wales. A recent survey indicates that 82 per cent of local authorities have set their FACS eligibility criteria at “substantial” and above. The FACS policy of the Council, therefore, is now in line with that of the overwhelming majority of local authorities in England and Wales.

The Charging Policy

27. The charging proposals were originally set out in a report placed before the Cabinet Member on 24 January 2011. This report sought the authority of the Cabinet Member to consult further with service users and other affected parties (carers, advocacy, and other stakeholder groups, and staff) on the proposals outlined in the report.
28. In summary the proposals meant that customers would be charged on the basis of recovery of the full cost of the service received subject to their ability to pay. For example, charges for day care would range from £30.75 to £53.80, rather than the current charge of £5 per day. Charges for home care would range from £11.96 to £13.15 per hour, rather than the current charge of £11 per hour. Where two carers were required then both would be charged for, rather than the current charge which was based on one carer. Charges for the supply of home delivered meals would rise from £3.25 to around £4.05. The current maximum charges of £60 per week for assessed customers and £595 per week for maximum cost payers would be abolished. For those people with savings below the threshold of £23250, the proportion of their disposable income that they would be asked to contribute would be increased from 60 per cent to 85 per cent. All customers, subject to a financial assessment, whose income was less than 25 per cent above the income support levels would continue to receive services free of charge.

29. Standard allowances would be introduced for disability related expenditure to replace the current system which was based on actual cost. Customers would be charged for a service commissioned but not taken up unless seven days advance notice was provided. Adjustments to charges for notified non take-up of service would be actioned once each year instead of four-weekly under the current arrangements. Increases in charges for existing customers would be limited to £50 per week in any one year.
30. An impact assessment accompanied the report. In particular, the financial impact was carefully considered. The impact was assessed in relation to various categories of service users, for example, those who paid no charges or who were exempt from charges, those who paid the maximum charges, those who were assessed to pay based on their net disposable income, those who were assessed to pay based on their net disposable income but were not capped or receiving day care only, those customers who were assessed to pay on their net disposable income with a charge currently capped at £60 per week, and those customers who were assessed based on net disposable income receiving only day care services.
31. It was also noted that the measures, particularly the removal of caps and subsidies, would have a significant impact on a number of service users. It was suggested and recommended in Department of Health guidelines that transitional protection measures should be offered to phase in the impact of such increased charges over a period of time. It was therefore proposed that the maximum increase in the contribution sought from any existing service user was limited to £50 per week in a financial year. This protection could be offered on an open-ended basis or for a fixed number of years and reviewed annually beyond that period in exceptional circumstances.
32. To assist a reader of the impact assessment a number of illustrative examples of impact on service users were provided in the impact assessment.
33. The report of 24 January 2011 gave only a partial view of one stage of the planning, briefing, consultation, reporting and assessment exercise undertaken in relation to the charging proposals. These are described in further detail in Mr Pogson's statement, and they include a series of detailed briefing meetings with the Cabinet Member and other elected members of the Council. There was a specific consultation relating to the proposed charging policy called *Changing Charges*. This ran from 1 February to 4 March 2011 and it overlapped with the broader *Making Difficult Decisions* consultation referred to earlier. Several potential options in relation to charging for services were consulted on and this provided a wide range of views from consultees.
34. A report analysing the 348 responses to the *Changing Charges* consultation was prepared which summarised the key findings. This document was included in the pack of documents appended to the report to the Cabinet Member on the charging policy dated 31 March 2011. Also appended was a general impact assessment summarising the likely effect of the policy on service users. In the light of the responses to the consultation exercise it was proposed that the revised non-residential care charging policy that was agreed in principle on 24 January should be approved but subject to a number of changes. A maximum charge of £625 per week was set for 2011/12 and £655 per week for 2012/13 which limited the contribution sought from customers towards the cost of their care package.

35. Transitional protection would be offered such that each year no service user was subjected to an increase in charge of more than £30 per week for their existing care package. The transitional protection would be offered for two years following the introduction of the revised policy and continuation after that time would be subject to a review of its cost effectiveness and necessity.
36. There would be an appeals process available to customers who felt that the charging policy did not treat them equitably. The impact assessment attached to the report again examined in detail the financial impact of the proposed changes and also summarised the protection measures that would be put in place and assessed the impact of those measures. There was also a specific equality impact assessment in relation to the proposal to introduce a revised charging policy for non-residential adult social care services.
37. In the introduction to the EIA it was noted that the only people eligible for social care services were those who were assessed by the authority as having needs which met the eligibility criteria set by the authority. Those services were not a universally available service and so were qualitatively different in nature to universal services because the only people using the service were, by nature and definition, assessed as in need and therefore disadvantaged in comparison to the majority of society.
38. The EIA analysed the effect of the proposal. It was stated that the impact of the proposals was that those customers who currently made no contribution towards the cost of their services would continue to receive them free of charge. Those customers who were assessed on the basis of their net disposable income would sustain an increase in their charge but the majority of these customers would still benefit from some level of subsidy from the County Council. The largest impact would be on those customers with significant savings, over £23,250, who would be required to meet the full cost of their services in future. Customers who were currently paying maximum charges would be offered a financial assessment and might possibly be moved onto a charge based on their net disposable income.
39. The EIA considered the potential effect on service user groups, including the disabled. Under the category of “disabled” it was noted that virtually all those people receiving a social care service had a disability. However the proposed changes to the charging policy had the greatest impact on those people who had acquired savings or had higher levels of income and certainly above income support levels.
40. In general, people with severe and life-limiting disabilities were less likely to be earning or acquiring savings. The average contribution made by an older person towards the cost of their non-residential care services was over three times greater than an adult of working age with a disability, reflecting the greater incidence of income and saving in this group. Consequently the number of people with disabilities and learning disabilities affected by any revisions to the charging policy were likely to be both small and proportionally low. However, both the current and proposed charging policies linked charges to the cost of services provided and those with the greatest level of disability and therefore need tended to require the more expensive packages of care. Consequently within the group of those with access to savings or higher levels of income the charging policy would impact most on those with a greater level of disability.

41. The EIA stated that all service users would be offered a financial assessment to ensure that they could afford to meet the charges that were being set. Furthermore, existing service users who would be subject to the highest increases in charges would receive transitional protection to phase in those increases over potentially a number of years. The report, as with the FACS policy report, expressly referred to the Section 49A DDA duty.
42. The new charging policy was also approved by the Cabinet Member for Adult and Community Services on 31 March 2011.

The Relevant Legal Principles

43. In relation to the statutory duties under Section 49A DDA, the leading guidance as to the relevant principles has been given by the Court of Appeal in *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141 at paras 31-40 and by the Divisional Court in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) at paras 79-96. A number of principles emerge as follows:
 - i) The statutory duty under Section 49A DDA is not one to achieve a particular substantive result (whether to promote equality or otherwise) but to have “due regard” to the need to achieve these goals. Due regard is regard that “is appropriate in all the circumstances” (*Baker* at para 31 by Dyson LJ (as he then was)).
 - ii) The public authority must also pay regard to any countervailing factors which, in the context of the function being exercised, it is proper and reasonable for the public authority to consider. The weight to be given to the countervailing factors is a matter for the public authority, not the court, unless the assessment by the public authority is unreasonable or irrational (*Baker* at para 34, *Brown* at para 82).
 - iii) A failure to make explicit reference to the statute does not show that the duty has not been performed (*Brown* at para 93). It is immaterial whether or not the decision-maker was even aware of the duty provided that in substance he had due regard to the matters specified in it (*Baker* at paras 36, 37, 40 and 46).
 - iv) There is no obligation in the DDA to carry out a formal EIA (*Brown* at para 89) although such an EIA is a helpful way of demonstrating that the statutory duty has been complied with.
44. Mr Ian Wise QC, who appeared on behalf of the Claimants, laid emphasis on a number of other propositions that can be derived from the case law as follows:
 - i) Due regard must be given “before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question” (*Brown* at para 91).
 - ii) Due regard to the duty must be “an essential preliminary” to any important policy decision not a “rearguard action following a concluded decision” (*R*

(*BAPIO Action Limited*) v SSHD [2007] EWCA Civ 1139 at para 3 by Sedley LJ).

- iii) Put another way, consideration of the duty must be “an integral part of the formulation of a proposed policy, not justification for its adoption” (*R (Kaur) and others v Ealing LBC* [2008] EWHC 2062 (Admin) at para 24 by Moses J (as he then was)).
 - iv) “Due regard” means specific regard by way of conscious approach to the specified needs (*R (Meany) v Harlow District Council* [2009] EWHC 559 (Admin) at para 74; *R (Boyejo) v Barnet LBC* [2009] EWHC 3261 (Admin) at para 58).
 - v) If a risk of adverse impact is identified consideration should be given to measures to avoid that impact before fixing on a particular solution (*Kaur* at para 44).
45. Mr Wise also relied heavily on the recent decision in *R (WM and others) v Birmingham City Council* [2011] EWHC 1147 (Admin). In that case Birmingham decided to restrict eligibility for adult social care only to those individuals with critical needs. Taking its decision, Birmingham produced several equality impact assessments which purported to show due regard to the disability equality duty. However, Walker J held that due regard had not in fact been shown and quashed the decision. The thrust of that decision was that although Birmingham City Council had been aware of the need to pay due regard it had not, in fact, sought to carry out an assessment of the practical impact on those whose needs in a particular respect fell into the substantial band but not into the critical band. Thus the Judge said:
- “I readily accept that throughout the process the Council was giving consideration to how to address the needs of the disabled. In that sense its decisions taken in relation to adult social care were decisions which were relevant to its performance of the Section 49A duty. That is not the same thing, however, as doing what Section 49A seeks to ensure, namely to consider the impact of a proposed decision and ask whether a decision with that potential impact would be consistent with the need to pay due regard to the principles of disability equality.” (para 179)
46. Similarly, in another recent judgment, *R (Rahman) v Birmingham City Council* [2011] EWHC 944 (Admin), Blake J found substantial defects in the equality impact needs assessment and held that the authority had not had due regard to its equality duties in cutting funding to legal advice services. He found that the EIA’s assessment of prejudice to service users was inadequate in its examination of the evidence and was in a number of respects driven by the hopes of the advantages to be derived from the new policy rather than on focussing on the assessment of the degree of disadvantage to existing users.

Grounds of Challenge

The Budget Decision of 17 February 2011

47. With regard to the decision of 17 February 2011, the Claimants' case is that in making that decision the Defendant did not pay due regard to the needs specified in DDA 1995, Section 49A, in particular the need to promote the equality of opportunity for disabled people and the need to treat disabled people more favourably if it were necessary so to do. In this context the real grievance of the Claimants is that, while the Defendant may have been conscious of its duty to have due regard to the relevant factors, it did not, at the time that the initial budget decision was taken, carry out a detailed assessment of the likely impact of the budget decision on the affected users of the relevant services.
48. However, in my view, in determining whether, at that stage, the Defendant was acting consistently with the relevant statutory duty, it is necessary to examine carefully the circumstances in which the relevant decision was being made and the precise nature of the decision being taken. For that purpose it is necessary to bear in mind the following points. First, as the evidence shows, it was clear to those involved in approving the budget that disabled people would be adversely affected by budget reductions to adult social services. The potential impact of the policy proposals on those affected (primarily disabled people) was specifically identified for further investigation, and as part of that investigation there was put in train the series of consultations to which reference has already been made.
49. Secondly, again as the evidence in this case clearly shows, the approval of the Council's overall budget on 17 February 2011 did not constitute a final decision about what the Council's policies would be or even about what sum of money would, in fact, be saved under each of the service proposals. On the contrary, it was obvious to the Council's Members that the individual proposals, including the two policies about which the Claimants complain, would be implemented only after due regard had been paid to the need to promote equality of opportunity and to take steps to take account of disabled person's disabilities. Thus, for example, in relation to the revised charging policy a further specific consultation was carried out by the Council from 1 February to 4 March 2011, that is, after the overall budget was approved. Several potential options in relation to charging for services were consulted on which produced a wide range of views from consultees following which the Council produced an EIA.
50. What, in fact, has happened in this case is that the decision-maker has taken a preliminary decision in relation to its budget, fully aware that the implementation of proposed policies would be likely to have an impact on the affected users, in particular, disabled persons, but not committing itself to the implementation of specific policies within the budget framework until it had carried out a full and detailed assessment of the likely impact. In my view, there is nothing wrong in principle with such an approach and nothing inconsistent with the duties under the DDA. I reject entirely, in the light of the detailed evidence relied upon by the Council, the hypothesis that the procedure was a cosmetic exercise, in which the Council was already committed to the implementation of specific policies at the time the budget framework was set, and was doing no more than going through the motions of setting out the consequences of a pre-determined course. The economic reality was that to meet imperative needs of reducing expenditure it would be extraordinarily difficult to avoid an adverse effect on adult social care. But there remained flexibility as to how any such effect on disabled persons

could be minimised and mitigated, and I am satisfied that the Council kept an open mind as to the precise policies that would be implemented.

51. That view of principle is reinforced by *R (Fawcett Society) v Chancellor of the Exchequer* [2010] EWHC 3522 (Admin). A challenge was brought against the national budget in which it was contended that the Chancellor of the Exchequer had failed to pay due regard in accordance with Section 76A of the Sex Discrimination Act 1975 which imposes similar duties to Section 49A DDA. In rejecting the challenge, Ousley J held that there was no obligation to carry out an equality impact assessment of the budget as a whole. Furthermore, as to the complaint concerning the impact of individual items within the budget the judge held:

“It is perfectly sensible for the Government to wait until policy has been adequately formulated for there to be a clear basis upon which its gender equality impact can be assessed. The point at which that is reached is, in my judgment, very much a question of rationality not of duty. It is not at issue but that the duty applies. The question is what is the point at which the Government would have breached the duty to have due regard if it does not carry out such an assessment. Plainly it would have failed in its duty if by the time the policy is formulated fit for assessment it is not carrying out that assessment. The judgment of whether it has reached that position is, in my judgment, a matter for rationality and there is no prospect of the Government’s assessment that it is sensible to wait being shown to being unlawful.”

52. By parity of reasoning, in my view it was sensible, and lawful, for the Defendant first to formulate its budget proposals and then, at the time of developing the policies that are now under challenge, to consider the specific impact of proposed policies that might be implemented within the budgetary framework.

The FACS Policy and the Charging Policy

53. The core of the Claimants’ challenge in this respect is that the assessment of impact carried out by the Defendant was inadequate. In my view there is simply no foundation for that allegation. It is sufficient to refer to the factual background set out above. By the time that the decision had been taken to change the FACS criteria for eligibility and to amend the charging policy the Defendant had carried out a detailed and comprehensive analysis of the probable impact on service users, in particular, disabled persons both those affected by the change in eligibility criteria and those affected by the charging policy. The EIAs, in particular, specifically identified the affected groups, including disabled persons, and gave specific analysis of the probable effects on those groups as a result of the proposed change in policies.
54. It is, furthermore, clear that the Defendant considered how the probable adverse affects might be mitigated. For example it was proposed that there should be a reassessment of all service users currently in the moderate band and there was an expectation, based on experience elsewhere and the Council’s own expertise, that a relatively large proportion of service users assessed as “moderate” would be reassessed to come into the higher band. Furthermore, users whose needs were assessed as being moderate

would have access to the Council's Help Direct signposting service in which the Council had invested significant resources over a period of years so as to ensure that it was able to refer members of the community with needs outside of the FACS eligibility criteria to appropriate services.

55. Those assessed as having moderate needs would also have access to the Council's Telecare Services which were being expanded. Those services consist of the continuous automatic and remote monitoring of real-time emergencies and lifestyle changes over time in order to manage the risks associated with independent living. There would be further investment in those services as well as in reablement services intended to promote independent living and help avoid the need for services arising in the first place.
56. The Claimants contend that these mitigating steps are simply inadequate. For example the Claimant alleged at a late stage that the Council had produced no evidence to show that it satisfied itself that there were in fact alternative providers of services for Help Direct to signpost onto. The Council responded to that allegation through a further witness statement from Mr Gross. He explained that the Council had contracts with four providers of Help Direct services, including Age UK, all of whom were required to review at least every three months the public wellbeing directory of all relevant services across the county. The information in the directory was closely monitored by the Council which thus had an accurate and up to date knowledge of the nature and extent of alternative sources of service provision throughout the county.
57. However, the important point in this context is that the challenge is not a *Wednesbury* challenge to the reasonableness of the Council's budget or the policies that it has adopted. The allegation is that it has failed to have due regard to the relevant factors under the DDA. Whether or not the mitigating steps were adequate was a matter for the Council to determine. The fact that the Council did direct its mind towards the question of what mitigating steps could be taken so as to lessen the impact of the relevant policies on affected users demonstrates that the Council did in fact have due regard to the matters specified in the DDA.
58. For these reasons I find that the Council complied with its duties under the DDA section 49A and dismiss this application for judicial review.
59. I wish also to add this observation. On 11 July, six working days before the hearing, the Claimant served nine new witness statements of 68 pages, together with a 70 page purported expert report from Adrian Waite, a public finances consultant. Much, if not all, of that evidence could have been filed to support the claim and did not constitute "reply" evidence. Furthermore, no permission had been sought or given for adducing this further evidence, a particularly serious omission, given that CPR 35.4 specifically requires the Court's permission to put in evidence an expert report. The Council naturally felt obliged to respond to this new material, especially to the criticisms made by Mr Waite of the Council's financial policies. I gained no real assistance from this further evidence, and also concluded that Mr Waite's criticisms were wholly misconceived, having regard to the Council's evidence in response. Whatever the outcome of this application, I was minded to disallow the Claimants' costs of this further evidence and to require the Claimants to pay the Council's costs of preparing and filing the further evidence that the Council reasonably believed was appropriate to deal with the Claimants' further material.