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Case No: CO/1822/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2015

Before :

THE HON. MR JUSTICE BLAKE

Between :

THE QUEEN on the application of MARK LOGAN	**Claimant**
- and -	
LONDON BOROUGH OF HAVERING	**Defendant**

Karon Monaghan QC and David Lawson (instructed by **John Ford & Co.**) for the **Claimant**
Clive Sheldon QC, Ronnie Davis and Zoe Gannon (instructed by **Stephen Doye One Source**) for the **Defendant**

Hearing dates: 16-17 September 2015

Approved Judgment

Mr Justice Blake :

Introduction

1. In 2012 Parliament changed the law with respect to support from public funds for people whose income and capital was insufficient to pay council tax. In substance the amendments made to the Local Government Finance Act 1992 by the insertion of a new section 13A resulted in new arrangements for:-

   i) the reduction under s.13A (1)(a) of a person's liability to pay council tax to the extent required by a council tax scheme (the scheme) adopted by the billing authority (the relevant local authority);

   ii) the further reduction of such liability to such extent as the billing authority thinks fit (s.13A (1) (c));

   iii) a duty on the billing authority to make a scheme specifying reductions to persons considered to be in financial need or classes of persons to be considered in general in need (s.13A (2)).

2. Other legislative provisions and notably the Council Tax Reduction Schemes (Prescribed Requirements) (England) Regulations 2012 SI 2012 No 2885 (the Regulations), provided:

   i) in the event that the billing authority failed to make a scheme by 31 January for the financial year beginning in April, the terms of a default scheme would apply;

   ii) where the billing authority did make a scheme, its terms were a matter for the authority in question save that people of retirement age who had less than £16,000 in capital must be included in such a scheme (regulation 11) and where relevant earnings fell below the applicable amount, a 100% reduction in liability to pay council tax should apply to such people;

   iii) by Schedules 4 to 6 of the Regulations certain earnings, income other than earnings and capital amounts were to be disregarded;

   iv) by Schedule 7 of the Regulations procedural matters were to be included in the scheme, otherwise leaving the billing authority to decide the persons or classes of persons below retirement age who should fall within the scheme and the rate of reduction that should apply.

3. The present application is a challenge to the legality of the defendant's scheme and the means by which it was adopted. The claimant is a man of 55. He lives with his wife and adult son. He suffers from a multiplicity of health problems that make him disabled and is assessed to have enhanced disability under the statutory scheme. He is in receipt of Disability Living Allowance (DLA) of £139.79 per week that is made up of £82.30 for care and £57.45 for mobility; these are both at the highest rates available having regard to the extent of his needs.

4. It is common ground that he should, in addition, receive Employment and Support Allowance (ESA) of £147.25 per week made up of a personal married couples

allowance of £114.85 (the same rate as Job Seekers Allowance (JSA) to a couple without disability), and additional sums by way of support group premium, enhanced disability premium and carer's premium that would take the sum up to £208.50 but there is a deduction of £62.10 for the carer's allowance that is paid directly to the claimant's wife. The overall income to the claimant and his wife from DLA and ESA is thus £348.29 per week (disregarding for present purposes a discrepancy in actual receipts that the claimant was pursuing with the Job Centre at the time of his second statement). His combination of medical conditions means that he cannot undertake any employment, and as they are unlikely to improve he will never be able to do so. His wife is his registered carer. His son also suffered an accident that means he cannot work at present.

5. The defendant is the London Borough of Havering (Havering). It is the billing authority for the claimant's area. In the financial year 2014/2015 it had promoted a scheme where people with the claimant's level of income and disability received a reduction in council tax liability of 100%. All reductions in liability had to be funded by the billing authority itself. With central government imposing further cuts in the support grant paid to local authorities, Havering decided it had to review its scheme for the financial year 2015/16. Like any authority subject to these financial restraints, it had limited options to produce a balanced budget and assessed that it needed to bridge a budget gap of £60 million over four years, nearly one third of its annual running costs. It could raise the level of council tax and Havering decided to do this to the maximum threshold permitted without requiring a referendum to be held. A referendum is required if the billing authority imposes an increase in council tax of 2% or more. A referendum costs some £250,000 to hold. No referenda to increase council tax by more than 2% have ever been successful. Second, it could make cuts to some of the services it provided to residents and its costs in providing them. A number of such measures were identified. Third, it could increase its income by amending its scheme and, in particular, by replacing the previous 100% reduction for those eligible for support because of their lack of resources with an 85% reduction. This would require everyone otherwise eligible for support to pay 15% of their council tax liability subject to any further reduction pursuant to the section 13A (1)(c) discretion.

6. In 2014 Havering's cabinet decided to pursue the 85% option, having considered and rejected other measures, such as reducing the level of support to 75% or 80%, as some neighbouring London authorities had done. It was then required to consult with the Greater London Authority and its residents likely to be affected by the changes. No legal issues arise at this hearing from the terms of the consultation.

7. Following consultation, a report was prepared by officers to the cabinet setting out the case for the proposals under consideration, reminding the nine cabinet members of their public sector equality duty (PSED) under the Equality Act 2010. Attached to the report was an Equality Impact Assessment (EIA). Amongst other things, this set out how requiring people, whose low incomes from state benefits made them eligible for support, to pay 15% of their council tax liability from such income would have adverse effects on them.

8. The cabinet, duly equipped with this information, decided on 21 January 2015 to recommend that the full Council should take the decision to adopt the revised scheme. The minutes of the meeting recorded the financial context for the decision and the

outcome of the consultation to which only some 363 responses were received after 10,000 questionnaires had been sent out. They state:

> "The scheme itself had been designed to assist people on low incomes pay their council tax. Certain vulnerable groups faced barriers to work which resulted in less earning power and entitled them to claim CTS. An even distribution of the 15% reduction did not therefore disproportionately impact any specific single vulnerable group."

9. The full Council consists of 54 people including a number of distinct opposition groups. The report of the officers to Cabinet with the EIA attached was not circulated to every member of the Council. The nine members of Cabinet had received hard copies of the report as had the leaders of two other groups on the council and a leader of a third group received the report electronically as he had requested. The report was available on Havering's web site from 13 January 2015. All councillors are equipped with means of accessing such documentation electronically. On the same day that the report was placed on the website, an officer circulated an email to the cabinet members and alerted 20 others who had registered for electronic messaging to the posting.

10. In preparation for the cabinet meeting, Councillor Barrett, the leader of the one of the Residents' groups forming the governing coalition, had circulated the seven members of his group electronically providing a link to the cabinet report and asking for comments. In addition to the nine cabinet members, nine other council members attended the cabinet meeting. It would appear that at least 19 councillors had received the officers' report; others may have done, as at least 20 were alerted to its existence and availability electronically.

11. The full Council approved the recommendation of the cabinet without a division on 28 January 2015. The minutes of this meeting do little more than record this fact. There has been no extraneous evidence introduced in these proceedings as to the discussion on that occasion.

The challenge

12. The claimant became aware of the decision shortly after it was taken and by 18 February 2015 he had received a response to a Freedom of Information request. On 26 February his present solicitor wrote a pre-action letter. In March, the claimant was successful in his application for further reduction under the discretionary scheme (pursuant to s.13A (1)(c) of the Act) and on the facts he disclosed as to his household income and his needs, both general and specific to his disabilities, he was awarded enhanced 100% council tax support.

13. Judicial review proceedings were issued on 20 April 2015. At that stage the relief sought included both a declaration that the defendant's decision to adopt the scheme was unlawful and a quashing order requiring a fresh decision to be taken. The summary grounds filed in response, amongst other things, raised the issue of delay, prejudice to good administration and the contention that the proceedings were

academic in light of the 100% support given to the claimant and that a new scheme would have to be in place in January 2016. The claimant then abandoned any claim for relief other than for a declaration. Permission was refused by Mr Justice Parker on 10 May 2015, but was granted on renewal by Mr Justice Lewis on 23 June 2015 in respect of two of the three grounds set out in the claim form. Expedition was ordered and the case declared suitable for vacation business; although the judge directed a transcript of the hearing before him be expedited, none was available before me at the time of the hearing.

14. The principal ground on which permission was granted was that there had been a failure by the full Council to have due regard to the PSED pursuant to s.149 EA. The argument was based on the failure to provide every member of the council with the report to cabinet and the EIA attached to it. There was a supplementary criticism of the EIA itself.

15. Permission was also granted to challenge the scheme on the grounds that there was discrimination on the basis of disability and/or age contrary to Article 14 European Convention on Human Rights (ECHR) taken together with the right to enjoyment of possessions afforded under Article One of Protocol One (A1P1) of the Convention and indirect discrimination on the basis of disability contrary to the Equality Act. At the hearing Ms Monaghan QC for the claimant sought to amend the claim form and expand on the Equality Act challenge. I refused leave to do so, save in one respect permitting discrimination on the grounds of age as well as disability to be advanced; this latter amendment was not opposed. I concluded that it was far too late to make the other changes that were opposed.

Discussion

16. It is obvious that reducing council tax support by 15% for people whose low incomes and capital assets would otherwise make them eligible for 100% support has an adverse impact. This adverse impact would fall on the unemployed and impecunious generally, but those who had particular problems in accessing the labour market (such as single parents, the elderly, and the disabled) may face particular hardship in the reduction of their budgets without having any real prospect of coming off benefits and accessing the labour market.

17. There are in substance three stages to the defendant's 2015 scheme. First, there is an assessment of what earnings and capital should be taken into account when determining the 'applicable amount' in respect of any claimant. Second, premiums and allowances are adopted depending on marital status and other factors. A comparison is then made between actual available income and the applicable amount that the scheme deems is reasonable for someone in the tax payer's position to pay. If actual income is below the applicable amount then the maximum council tax support is available under the primary scheme; where actual income exceeds the applicable amount then a tax payer may be eligible for support on a reduced basis. Third, in any case of exceptional hardship, the tax payer could apply for a discretionary additional support.

18. In the claimant's case, his income as assessed under the scheme was less than the applicable amount; he was eligible for the maximum support under the scheme (85%). His full liability for council tax was £19.30 per week. An 85% council tax support

reduces liability to 15% or £2.89 per week. Although this is a small sum in absolute terms, I recognise that for those dependent on state benefits who have no other means of increasing their income because there is no possibility of future access to the labour market, even small sums have significance over time and add further costs to a budget that is already severely strained. The claimant has, of course, not had to pay this sum for the present financial year, but this is because of the exercise of discretion under the third stage. The extent to which this discretion can mitigate or justify a scheme that would otherwise be considered discriminatory is an issue in these proceedings.

19. The defendant points out that its scheme applies across the board to all economically disadvantaged groups. Disability is a broad concept and does not necessarily prevent access to the labour market; a significant percentage of people with some disability are still able to take employment. Further the circumstances and needs vary of even those with the most serious forms of disability: those whose disability is classified as either severe and/or enhanced disability depending on their domestic care arrangements. Some people may have significant extra costs directly related to disability by reason of special diet and the like, while others may not.

20. Central to Havering's arguments in adopting the scheme and resisting the present challenge is the fact that not all of a disabled person's income is taken into consideration at the first stage. There are a number of respects in which the actual receipts of a disabled person are different from a person or family without disability. In particular, DLA payments are not taken into account by Havering when assessing income, nor is an adult non-dependent's earning capacity where the disability is as severe as the claimant's; disabled people may also be awarded various premiums when the applicable amount is assessed.

21. In the claimant's case, although he has an adult son who lives at home, the son is unable to work and has no income that could be taken into account. Havering's scheme, however, means that where any council tax payer is disabled and in receipt of the care component of DLA, the earning capacity of an adult non-dependent is not taken into account even if they are in employment. This is a significant difference compared with families with no claimant with enhanced disability. Further comparing ESA for a disabled person with JSA for other unemployed people, it is apparent that the former is a larger payment than the latter.

22. The EIA that was before the Cabinet stated with respect to disability:

> "If the proposals are approved disabled people who are of working age will also be negatively affected. This is because they are disproportionately represented amongst working age claimants who will receive a reduction in Council Tax support. In addition, disabled people are less likely to have the same opportunities and access to work and employment that would improve their financial situation.
>
> Support is in place through the Council Tax Discretionary policy for those who suffer hardship as a result of these proposals to mitigate any negative impacts....

> The Council recognises the barriers disabled people face and seek to assist them by disregarding Disability Living Allowance and Attendance Allowance in the calculation of Council Tax Support....
>
> In addition to the above, the Council seeks to maximise Council Tax Support for the disabled people by increasing the applicable amount for them through premiums. Currently, there are premiums for severe disability, enhanced disability, and a disabled child rate. Such premiums are granted when Council Tax Support applicants receive a relevant disability related benefit granted and administered by the Department of Work and Pensions....
>
> Disabled people who are unable to work receive higher levels of state benefits and while based on the proposals they will be subject to a 15% liability reduction, *disabled working age claimants are likely to have a higher income* than other unemployed, working age claimants whose council tax support will also be reduced."
>
> (emphasis supplied)

23. Ms Monaghan submits that both DLA and the supplementary sums in the ESA are benefits provided because of disability and it would have been discriminatory on account of disability to have taken all such income into account when assessing eligibility for council tax support. Further, she contends that the words I have placed in italics in the EIA mislead decision makers as to the impact of the scheme on disabled people because this higher income is awarded because of the needs of disabled persons.

24. At the hearing, her oral submission particularly focused on age discrimination and the difference in treatment between a disabled person and a person of pensionable age. In summary she submits that a person of retirement age whose actual income is less than the applicable amount is entitled to support in the sum of 100% whereas under the primary scheme the claimant is only entitled to 85% support. The defendant explains that this is because the statutory scheme approved by Parliament requires such entitlement to be given to retired people. In promoting the legislation the government took the view that "in general pensioners cannot go back to work, and deserve dignity and security in their retirement".

25. The claimant submits that he is no less deserving of dignity and security, as he will never be able to go back to work. He is thus analogously situated with the retired and the difference in treatment with respect to them, cannot be justified. It is common ground in respect of justification that it is the discriminatory treatment that must be justified rather than the need to make savings. The claimant contends that the modest savings to the defendant cannot amount to such justification, given the differential impact on the severely disabled as compared with those above retirement age.

26. The defendant's evidence shows that the 15% reduction in the basic scheme will reduce council tax support for the disabled to £1,925,429 for 2249 claimants. This

amounts to a saving of £345,168 from disabled claimants, of which £212,745 comes from people who have severe or enhanced disability. Havering nevertheless contends that this is a significant sum in the context of is budget and enables it to continue to provide services, including services to the disabled, whilst keeping any increase in council tax below the 2% threshold.

Having due regard for the PSED

27. Section 149 Equality Act 2010 ('EA 2010') provides that:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to–
>
> a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> ...
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need–
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) ....
>
> (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
>
> ...
>
> (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act."

28. The learning on the application of this duty is summarised in the recent decision of the Court of Appeal in Bracking v Secretary of State for the Work and Pensions [2013] EWCA Civ 1345 [2014] EqLR 60. In this case, the court concluded, when reversing a decision of mine in the Administrative Court, that the evidence was insufficient to show that the Minister for the Disabled had due regard to the PSED when deciding in principle to wind up the Independent Living Fund following a detailed and legally sufficient consultation on the issue. From the eight general propositions set out by McCombe LJ at [26], the following have particular relevance here:

i) An important element in demonstrating the discharge of the duty that is considered integral to the fulfilment of the anti-discrimination aims of the legislation is the recording of the steps taken by the decision maker in seeking to meet the statutory requirement (Propositions 2 and 5).

ii) The relevant duty is on the decision maker personally, and cannot simply be discharged by matters within the knowledge of officers when making a report or filing evidence (propositions 3 and 5).

iii) The duty must be fulfilled at the time of policy formation and decision taking and not merely as a rearguard action following such decision; it is not a tick box exercise (Propositions 4 and 5).

iv) Due regard is not achieved by general regard to equality issues, but by conscientious consideration given to the statutory criteria (Propositions 6 and 8).

29. These points were reinforced by another decision of the Court of Appeal, given on the same day that judgment was handed down in Bracking, and also reversing a decision of the Administrative Court. In R (ota Hunt) v Somerset Council [2013] EWCA Civ 1320 [2014] LGR 1, members of the council only had only been provided with a summary of previous EIAs that had been prepared for the council's executive committee. The judge was satisfied that the reference in the summary to the full reports that were available elsewhere was sufficient to conclude that councillors had due regard to them. There would not have been due regard if the councillors only had read the summary. The Court of Appeal was not persuaded on the evidence that the full EIAs had been read by members. Rimer LJ giving the judgment of the court said:

> "83. For our part, and again with respect, we are unable to agree with the judge that the inference that he drew was one that was available on the evidence. We have no difficulty, nor was the contrary suggested, in accepting that if council members are provided with a particular set of materials for the purpose of a meeting, they can, absent positive evidence to the contrary effect, be taken to have read all such materials and also to have read any additional materials to which they were expressly referred and to which they were told they needed to have regard for the purposes of the meeting. If, for example, they had been told that a key document was too bulky and expensive to copy and circulate, but was available at a given website address, and they were further told in appropriate terms

> that this document was required reading for the purposes of the meeting, we consider that they must be taken to have accessed and read it.
>
> 84. In the present case, however, we do not interpret the language of Appendix 6 as indicating to the Council members any need or requirement to read the EIAs themselves. Whilst they were told how to access the EIAs, they were not told, either expressly or impliedly, that they must or should consider them before the meeting. The fact that they were summarised in Appendix 6 itself suggests that a reference to the documents themselves was not essential: why bother to summarise a document which must anyway be read in full? Moreover, the terms of paragraph 12 of the officers' report to members (see paragraph 46 above) also suggested that Appendix 6 told the Council members all they needed to know for PSED purposes.
>
> 85. If there were no more, we would not therefore be prepared to conclude that the members had read the relevant EIA. There was, however, a little more. First, Councillor Lake had read the EIAs in full before the meeting, and the judge concluded, therefore, that so also had 'all responsible councillors'. We are not sure what the word 'responsible' was thought to add: we presume the judge simply meant 'all councillors'. We do not, however, regard Councillor Lake's evidence about what he did as providing any indication as to what all the other councillors did or were likely to have done. Councillor Lake was in the special position that his portfolio of responsibilities included the Council's approach to equality related issues, and he explained in his evidence that he had received training in relation to decision making in compliance with PSED. It is, therefore, if we may say so, fairly obvious that he would have read the EIAs, and it would have been surprising if he had not. The range of his responsibilities shows why he would have had a special interest in them. The same cannot, however, be said of the Council members generally.

30. It is notable that in this case this conclusion was reached despite the fact that the minutes of the Council's meeting revealed that a member of staff with trade union responsibilities had circulated a memo and was given permission to address the meeting on the claimed deficiency of the EIA, so those present would have been alerted to it.

Conclusions

31. I have had the benefit of a considerable quantity of evidence on behalf of the defendants, very helpful skeleton arguments from both parties, and succinct but pertinent oral submissions. I have taken all this material into account even if not set out specifically elsewhere in this judgment.

32. I have reached the following conclusions :

i) The claimant's contentions with respect to discrimination on the grounds of age and/or disability fail both under Article 14 ECHR and under the Equality Act.

ii) The EIA was not defective as contended.

iii) There is insufficient evidence to support the conclusion that due regard was had to the EIA by those who took the decision.

iv) There is sufficient vindication of the public interest and the claimant's rights in this litigation for conclusion (iii) to be stated in a declaratory judgment and no other formal relief is needed.

33. I will now give reasons for these conclusions. I will deal with the substantive discrimination challenge first.

Discrimination contrary to Article 14 and AIP1

34. I have some doubts whether eligibility for council tax support is a possession for the purpose of A1P1 of the ECHR and accordingly whether any difference of treatment falls within the scope of Article 14 taken with other substantive Articles of the Convention. In R (Winder and others) v Sandwell Metropolitan Borough Council [2014] EWHC 2617 (Admin) [2015] PTSR 34 at [86] Hickinbottom J made the assumption in favour of the claimant that the support scheme is to be seen as an adjunct of a taxation measure that deprives someone of the possession of that portion of their income or resources they must spend on paying the tax. I will do the same but I am not persuaded that the defendant's scheme amounts to discrimination (that is an unjustified difference in treatment) on grounds of disability, severe disability or age.

35. First, this was a scheme that applied to all people of working age and whose income fell beneath the applicable amount; it was thus overtly neutral with respect to age or disability. Although retirement age is an age based criterion, it was not Havering's scheme that excluded pensioners from the 100% scheme but the primary legislation. The claimant has not challenged that legislation or complained that Parliament has acted incompatibly with the Convention in failing to also exclude severely disabled people below retirement age who cannot work. The discretion afforded to billing authorities to promote a scheme reducing council tax support is limited to people of working age. I do not accept that the prohibition on discrimination means that there is an implicit requirement that the billing authority must always exercise its discretion to treat certain classes who are subject to the discretionary scheme, in the same way as those who are statutorily excluded from it.

36. In any event, there is no direct or necessary corollary between age and disability and liability to pay council tax: some disabled people below retirement age are able to and do work and have resources to pay some or all of their council tax liability (see the observations of Maurice Kay LJ in AM (Somalia) v ECO [2009] EWCA Civ 634 at [29]). The claimant has summarised the employment statistics as revealing that 41% of disabled people between 16 and 64 are in employment and 12.8% unemployed. This contrasts with 73.3% and 5.6% of the same population without disability. I accept that disabled people are more likely to be unemployed than able bodied people and that unemployment generally may only be for short periods. Disability generally,

however, cannot be equated with those who are unemployable. Equally, people above retirement age may also continue to work and earn sufficient to pay the tax.

37. Second, whilst I recognise that the 2015 scheme has greater impact on disabled people under retirement age than others of a similar age, because more members of that class are likely to be unable to access employment that would result in earnings exceeding the applicable amount, I do not accept that there has been indirect discrimination on such grounds by the application of a single blanket rule to those whose situations are significantly different (see Thlimmenos v Greece [2000] 31 EHRR 411 at [44]). The fact that the scheme impacts on disabled people is expressly taken into account in the various disregards to income made and the premiums awarded in ascertaining the applicable amount. The different situation of the able bodied and disabled with respect to access to the labour market has thus already been acknowledged in calculating the 85% scheme.

38. In my judgment, there is a material contrast with the case of Burnip v Birmingham City Council [2012] EWCA Civ 629; [2012] LGR 954 where housing benefit was reduced for people who occupied premises with more rooms than the regulations assessed they needed. This had an adverse impact on disabled people who needed rooms for overnight carers to supply their needs, as the regulations made no provision for this. This was indeed a one size fits all policy that contravened the Thlimmenos principle. I recognise that in Burnip the Court of Appeal did not consider that eligibility for discretionary housing payments would cure the discriminatory effect of applying the same treatment to those who were differently situated. Nor did it conclude that it was legitimate to expect the shortfall to be paid by the disabled out of their remaining benefits that were designed to cover expenses other than for housing.

39. In my judgment, neither of these latter conclusions results in rules of law that make the present scheme unlawful. I do not read the Burnip decision as stating that it is *always* discriminatory to expect the disabled poor to meet ordinary living expenses out of benefits that are provided because they are disabled. Council tax liability is a general charge on living expenses in the same way as any other item of expenditure that the able bodied and disabled poor both have to make out of their subsistence budgets. ESA has similar purposes to JSA albeit with additional elements that along with DLA reflect the higher expenditure needs of disabled people.

40. Once it is recognised that different rules have been established for the disabled in calculating the applicable amount, I do not see why it constitutes either a difference in treatment or an unlawful failure to treat people differently who are situated differently, to expect that a modest percentage of council tax support will be absorbed in the subsistence budgets of the poor generally, even if the benefits forming that budget are provided because of eligibility through the disability gateway. Further in the light of the above and with the existence of a discretionary scheme to address exceptional hardship I consider that any indirect difference in treatment on the grounds of age or disability is justified; in particular maintaining the distinction in the statutory scheme of people above and below retirement age is justified.

The discretionary scheme

41. I recognise that it may be discriminatory to devise a scheme that treats the able-bodied and the disabled alike but seeks to justify the differential impact by reference to a

broad discretion to top up the level of support. I accept Ms Monaghan's submission that to award one group a right to exemption from liability and require another group to apply for the exercise of discretion, may itself constitute the discriminatory difference in treatment. However, the scheme has to be looked at as a whole. When done so, the discretion can be seen as an important part of the scheme and a further mitigating measure, in addition to income disregard and the premiums referred to above that are deployed in the calculation of the applicable amount. There is a rich appellate jurisprudence that either justifies the discriminatory impact of a bright line rule by reference to a discretion to mitigate, or castigates the absence of such a discretion as unlawful inflexibility. The authorities are reviewed in the recent Supreme Court decision in R (Tigere) v Secretary of State for Business Innovation and Skills [2015] UKSC 57 [2015] 1 WLR 3820.

42. In my judgment, in the present context, a discretionary fund to supplement the basic 15% scheme is apposite as the last stage in a fact based assessment of particular hardship. Some difference in treatment is already brought in at the first stage, as I have already noted. Further neither age, disability nor even severe disability will necessarily tell the decision maker about the minimum needs to be met from a subsistence budget. A scheme that exempted all those considered to be severely disabled would not necessarily address those with the most serious hardship. Where budgets are tight it is appropriate to ensure that that the greatest help is given to those who most need it. Household budgets and resources may vary in circumstances that can only be assessed on an individual examination of the budget.

43. I accept, therefore, that where a severely disabled claimant who is unlikely ever to be able to access the labour market before reaching retirement age, has basic needs that consume all state benefits and has no reasonable way of increasing his/her resources, there is a strong case for the exercise of further discretion to grant 100% council tax support. A failure to do so may be challenged as irrational or discriminatory, particularly where budgetary expenses relate to disability such as high cost foods or supplements. It is not, however, discretionary to assess need in general and have a discretionary scheme for the particular case.

44. I acknowledge that the discretion has been exercised in the claimant's favour only for this financial year. There is no guarantee that it will be given in any future year, although the tenor of the defendant's evidence suggests that there will be a light touch review for a change of circumstances and if there is no such change a favourable renewal might be anticipated. I further recognise that there are concerns about the transparency of the scheme and its being known to the public; the claimant is apparently its only beneficiary this year. This does not lead me to the conclusion that the scheme is unlawful as discriminatory. Any future challenge to a refusal would need to be examined in the circumstances then prevailing, depending on competing budgetary needs and the transparency of decision-making under any such scheme.

Discrimination contrary to the Equality Act

45. Much of the preceding analysis with respect to the Article 14 claim applies equally to the claimant's contentions under the statutory scheme. The claimant compares his circumstances with an unemployed able bodied person below retirement age and an impecunious person above retirement age.

46. Ms Monaghan submits that that the defendant cannot rely on the fact that certain benefits are not taken into account in assessing relevant income as that would be directly discriminatory as those benefits are provided because the claimant is disabled. For reasons already explained I do not accept that submission or the proposition that the decision in Burnip supports it. The claimant has a portfolio of benefits: some specifically addressing needs uniquely referable to his disability and some providing for the ordinary expenses of life. Disregarding certain benefits and certain other sources of income in the case of claimants with enhanced disability is to make an adjustment as between the claimant and an unemployed person without his disabilities.

47. Equally, for reasons already given I do not accept that the defendant was under a duty to treat the enhanced disabled unemployed who are under retirement age exactly the same as the retired with limited resources.

Due regard to the PSED

48. The PSED is a distinct duty given that the change of scheme will make people worse off if they are below retirement age and cannot enter the employment market for an indefinite period.

49. The claimant first challenges the EIA itself because the authors informed councillors that the disabled receive higher levels of benefits than the able bodied unemployed. As a bald statement of fact it is accurate; whilst it is true that the disabled may have greater needs not all those needs are directly related to an expense uniquely referable to the fact of disability. As a statement by way of comment on the degree of disadvantage the proposed policy would create specifically for the disabled, in my view, it needs to be read in the context of the scheme itself where not all the claimant's resources or additional resources fall to be assessed.

50. The claimant secondly submits that under the statutory scheme (s. 67(2)(aa) Local Government Finance Act 1972) it is the full council who must take the responsibility to adopting a scheme and not the cabinet. The full council cannot be assumed to be acquainted with the information in the possession of its officers. It was important that councillors, as opposed merely to cabinet members and leaders of groups within the council, be provided with the officers' report and the EIA attached, so each member personally could give the due regard to the PSED. It is not sufficient to provide such a report even to a majority of council members, as a minority of members with the relevant information about the duty and the impact of the scheme on protected classes may persuade the majority to take a different view. Here the evidence noted above does not indicate that all members or even a majority must have been sent the report in printed or electronic form.

51. The defendant recognised that the distribution of the EIA was a potential problem in this case. It has made inquiries of individual councillors as to what they had available when they made the decision. Not all councillors have replied and of those who did, some, or at least their group leaders on their behalf, have indicated that having re-read the report they conclude it would have made no difference.

52. Further, even if the court were to conclude that there has been no or insufficient due regard to the PSED no relief should be awarded because of the changes made to s.31

Senior Courts Act 1981 by s.84 Criminal Justice and Courts Act 2015 to applications for judicial review made after 13 April 2015. It is submitted that the court must refuse to grant relief since "it appears…to be highly likely that the outcome for the applicant would not have been substantially different if the conduct had not occurred".

53. I accept the claimant's submissions that on the information now available to this court due regard was not had by all members of the council or all who participated in the decision to adopt the revised scheme. The cases of Bracking and Hunt emphasise that due regard is not to be inferred, even where the decision maker was the Minister for the Disabled and where a local authority had heard specific debate on the adequacies of the EIA. There must be conscientious consideration of the impact of the proposals on the relevant groups, whether by diligent reading of the EIA or some other evidence based assessment. In my judgment, the EIA was adequate to enable members who read it to have due regard to the PSED, but there was insufficient evidence to indicate that the decision makers had accessed the EIA attached to the officers' report or had understood the importance of reading it in order to discharge their statutory obligation. It is not sufficient to assume that they could have done so and therefore would have done so. The procedure whereby the 2015 scheme was adopted was accordingly defective even though I have concluded that the scheme itself was not unlawful by reason of discrimination.

54. Ms. Monaghan submits that as the judicial review application succeeds in part the claimant should be awarded a declaration under s.31 (2) Senior Courts Act 1981 (SCA) as it is just and convenient to do so. There is no impediment to the grant of such relief under the new s.31 (2A) inserted by the Criminal Justice and Courts Act 2015 as the court cannot reach a decision on what the outcome would have been if due regard had occurred. The information that the defendant places before the court to the effect that some members now indicate that the EIA would have made no difference to their decision should not be afforded weight as the traditional scepticism of the courts to post decision evidence of this kind should attach to assessments made under s.31 (2A) SCA.

55. In my judgment, any consideration of whether the outcome was highly likely to have been substantially the same even if due regard had been had to the PSED should normally be based on material in existence at the time of the decision and not simply post-decision speculation by an individual decision maker. Any other course runs the risk of reducing the importance of compliance with duties of procedural fairness and statutory or other requirements that certain matters be taken into account and others disregarded. Indeed, it would undermine the efficacy of judicial review as an instrument to ensure that the rule of law applies to decision making by public authorities, by deterring claimants from bringing a case or the court from granting permission by a declaration by a decision maker who has failed to obey the law to the effect that obedience would have made no difference. Whatever else Parliament may have intended to achieve by this legislation, I cannot infer that it included so draconian a modification of constitutional principles. It may well be that the new provision was only intended to apply to somewhat trivial procedural failings that could be said to be incapable of making a material difference to the decision made. If recourse can be had to the drafting history and statements of sponsoring Ministers to assess the purpose of the legislation and the mischief to be cured there may be material support for such a conclusion. Such an approach is permissible without

impugning Parliamentary privilege where the issues of justification, proportionality and compatibility with European norms are engaged (see for example Age UK [2009] EWHC 2336 (Admin) at [42] to [59]).

56. I recognise that there is evidence at the time of the decision pointing to the proposition that due regard to the PSED by all decision takers would not have made a difference: there was a pressing economic case to increase revenue by reducing the scheme; the cabinet properly advised by its officers after considering all options supported the scheme without any evidence of dissent; there were no dissentient voices in the debate before the full council where the cabinet recommendation was adopted without a division; no council member has stated that he was unaware of the EIA and would have opposed the new scheme if s/he had been.

57. In the end, I do not propose to refuse relief on the basis of a conclusion that these indicators when taken alongside the other evidence before me made it 'highly unlikely' that the full Council would have done other than adopt the recommendation of the cabinet. This is because, for other reasons, I have concluded that it is not just and convenient for a formal declaration to be granted to the claimant in respect of this point.

58. At the conclusion of the hearing, I invited the parties to make submissions on whether the terms of s.31(2A) SCA 'any relief' precluded the court giving a declaratory judgment. The defendant was prepared to concede not in this case, whilst reserving the position for the future. I am satisfied that 'relief' in that section must be read alongside the definition of relief set out in s.31(1) that does not include a declaratory judgment and whatever the outcome of the 'highly likely' assessment, permission having been granted there are no restraints on the court delivering its judgment on the issue.

59. Such a course might not have been open, if the debate had been at the permission stage where s.31(3D) SCA precludes the grant of permission "if it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different." I do not rejoice in the prospect of having to make such assessments in cases like the present at the permission stage. It seems to me to have the potential for increasing the length, cost and complexity of the proceedings and bringing an unwelcome constraint on the court's flexible assessment of the interests of justice. In the absence of clear pointers at the time that the flaw was a technical one that made no difference, the court will inevitably be drawn into some degree of speculation or second guessing the decision of the public authority that has the institutional competence to make it.

60. However, I accept that the claimant has not made the present application promptly, albeit just within three months of the council's decision. The consultation leading to the decision was a matter of public knowledge. The claimant was aware of the decision shortly after it was made. Budget decisions come into force at the beginning of April and the challenge was not brought until 20 April nearly two months after the response to the FOI request. While I recognise that the claimant abandoned an application for a quashing order, where the delay would have caused particular prejudice, the focus of the application is the scheme adopted for 2015, rapidly becoming a matter of history. A fresh decision will need to be taken in 2016, and

conscientious consideration will need to be given to the impact on groups of people with protected characteristics including the severely disabled.

61. In 2015, and probably for the foreseeable future, the claimant has not been financially prejudiced by the scheme as he was awarded a full reduction in liability under the discretionary scheme. He will obtain no personal benefit from a declaration. Following the grant of permission, a useful public purpose has been achieved for the future, if the defendant accepts the conclusions in this judgment on the requirements to have due regard, but for the reasons I have given I do not consider it just and convenient to grant relief with the possibility of prolonging this litigation given the issues and the context.