

# **R (on the application of Chavda and others) v Harrow London Borough Council**

[2007] EWHC 3064 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

20 DECEMBER 2007

**JUDGE MACKIE QC (Sitting as a Judge of The High Court)**

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN  
(SUBJECT TO EDITORIAL CORRECTIONS)

1. This is a challenge to the decision of the Defendant taken on 25 July 2007 to restrict adult care services to people with critical needs only. It is brought by three local residents who receive community care services. Some 500 other people will apparently be affected by the decision in dispute.

2. Permission to bring this claim was granted, unopposed by the Defendant, by Mr Justice Stanley Burnton on 4 September 2007. The Claimants bring their claim on five grounds (although the fifth is largely a rolling up of the first four). Each side has submitted an admirable skeleton argument more than 40 pages long for a one day case. I will in this judgment deal only with those matters raised which are necessary for my decision.

## **Community care - legislation and guidance**

3. The basic legal framework for community care services is as follows. Section 47(1) of the NHS and Community Care Act 1990 ("NHSCCA 1990") states that;

"Where it appears to a Local Authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such services, the Authority

(a) shall carry out an assessment of his needs for those services; and

(b) having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of any such services."

4. The full list of statutory provisions under which community care services are provided is contained in section 46(3) NHSCCA. Included in this list is the community care service to disabled persons provided to the Claimants under s2(1) Chronically Sick and Disabled Persons

Act 1970 ("CSDPA") which reads;

"where a local authority having functions under section 29 of the National Assistance Act 1948 are satisfied in the case of any person to whom that section applies who is ordinarily resident in their area that it is necessary in order to meet the needs of that person for that authority to make arrangements for all or any of the following matters, namely:-

(a) the provision of practical assistance for that person in his home;

(b) the provision for that person of, or assistance to that person in obtaining, wireless, television, library or similar recreational facilities

(c) the provision for that person of lectures, games, outings or other recreational facilities outside his home or assistance to that person in taking advantage of educational facilities available to him;

(d) the provision for that person of facilities for, or assistance in, travelling to and from his home for the purpose of participating in any services provided under arrangements made by the authority under the said section 29 or, with the approval of the authority, in any services provided otherwise than as aforesaid which are similar to services which could be provided under such arrangements;

(e) the provision of assistance for that person in arranging for the carrying out of any works of adaptation in his home or the provision of any additional facilities designed to secure his greater safety, comfort or convenience;

(f) facilitating the taking of holidays by that person, whether at holiday homes or otherwise and whether provided under arrangements made by the authority or otherwise;

(g) the provision of meals for that person whether in his home or elsewhere;

(h) the provision for that person of or assistance to that person in obtaining, a telephone and any special equipment necessary to enable him to use a telephone,

then, ... it shall be the duty of that authority to make those arrangements in exercise of their functions...."

5. When carrying out assessments of need and making service provision decisions the Defendant has a duty to act under national guidance - *Fair Access to Care Services* ("FACS") - issued by the Secretary of State (the Department of Health) under section 7(1) Local Authorities Social Services Act 1970 ("LASSA 1970"). FACS distinguishes between four levels of need, in order to assist local authorities to determine whether people are eligible to receive adult social care services. Those people are the individuals with disabilities, impairments and difficulties described in paragraph 14 of FACS. Those levels are (in decreasing order of severity): critical, substantial, moderate, and low. Although all local authorities are required to apply the criteria for assessing "presenting needs", FACS describes how different local authorities might reach different conclusions as to what level of needs will attract services as "eligible" needs.

6. According to FACS (paragraph 16), a person's needs are "critical" when life is, or will be, threatened; and/or significant health problems have developed or will develop; and/or there is, or will be, little or no choice and control over vital aspects of the immediate environment; and/or serious abuse or neglect has occurred or will occur; and/or there is, or will be, an inability to carry out vital personal care or domestic routines; and/or vital involvement in work, education or learning cannot or will not be sustained; and/or vital social support systems and relationships cannot or will not be sustained; and/or vital family and other social roles and responsibilities cannot or will not be undertaken.

7. According to the guidance, a person's needs are "substantial" when there is, or will be, only partial choice and control over the immediate environment; and/or abuse or neglect has occurred or will occur; and/or there is, or will be, an inability to carry out the majority of personal care or domestic routines; and/or involvement in many aspects of work, education or learning cannot or will not be sustained; and/or the majority of social support systems and relationships cannot or will not be sustained; and/or the majority of family and other social roles and responsibilities cannot or will not be undertaken.

8. In setting eligibility criteria councils have to take account of their resources, local expectations and local costs. Councils should take account of agreements with the NHS and other agencies (paragraph 18) and consult users, carers and others (paragraph 20). Paragraph 12 of FACS guidance has a specific reference to human rights and discrimination law. When drawing up eligibility criteria for adult social care, councils should have regard to the Sex Discrimination Act 1975, the Disability Discrimination Act 1995, the Human Rights Act 1998, and the Race Relations (Amendment) Act 2000. Paragraphs 28 to 41 of FACS set out with reference to other publications general but detailed principles of assessment. Paragraphs 42 to 46 outline how eligibility for an individual should be determined following assessment.

9. There is also practice guidance issued by the Department of Health on 6 March 2003, entitled "Implementation questions and answers" which provides local authorities with further assistance. Part 3 of the questions and answers deal with eligibility criteria, for example, the

answer to Q 3.2 states that although it is up to a council to determine the bands it will include in its eligibility criteria, it should nevertheless assure itself that key local user groups or communities will not be unfairly disadvantaged by the proposed criteria. The questions and answers make other points on which the parties rely. It is pointed out that each council must make its own decision in light of local resources and circumstances as to which bands from the eligibility framework it will include in its criteria and councils are urged to exercise common-sense when approaching the application of words as "critical" which the guidance suggests may be subjective. The guidance states that while councils should not delete or amend the current wording of the eligibility framework they may add additional risk factors as extra bullet points within a band as the Defendant proposes to do in this case.

### **Factual background**

10. The first Claimant Ms Chavda has mental health and back problems and is assessed as having substantial needs. These have to a degree been met by access to a work centre for those recovering from serious mental illness. The second Claimant Mrs Fitzpatrick is an 81 year old widow who lives alone and has been housebound for the last two years with various illnesses and disabilities. Her needs are assessed as critical. These have been met by, amongst other things, carer support. The third Claimant Mr Maos suffers from depression, anxiety and phobias. He is assessed as having a critical need in relation to harm or danger to himself and others and a substantial need as regards retaining his independence, occupational activity and social contacts. These needs have been addressed by courses and attendance at a centre. The Claimants are among some 3,500 current users of the Defendant's services.

11. The Defendant is not a wealthy authority and its reserves are the lowest in any of the outer London boroughs. The February 2007 budget shows a prospective shortfall of £6.7 million in 2008/9 and £7.5 million for 2009/10. The Defendant has raised Council Tax by 4.9% and made wide-ranging cuts. It was proposed that these should lead to savings for the 2007/8 budget of some £16 million. The Defendant emphasises that it has to fund not only that part of the social services budget in issue in this case but social services as a whole as well as its other functions. What the Defendant describes as its costs pressure has been running at some £2 million per year in the social care budget alone. There have been substantial overspends over the last three years attributed by the Defendant to various factors including growing demand, increasingly complex need and the "shunting" of costs by the Primary Care Trust ("PCT") onto the Defendant and the withdrawal by the PCT of joint funding arrangements. In 2003, following the guidance in FACS the Defendant set eligibility criteria for adult care services in accordance with the critical and substantial bands.

12. On 14 December 2006 the Defendant's Cabinet, having considered the financial director's report on the revenue budget, authorised consultation about amending policy to provide services only to those facing critical needs. Without amendment to the policy there would be additional pressure in social care of £2 million. The proposed change had the stated purpose of ensuring that the

Council's limited resources were directed towards the most vulnerable members of the community. The change was stated to be subject to statutory consultation. There was pre-consultation with various interested bodies at this formative stage between January and March 2007. A draft consultation document was produced which included two proposals for consultation. The first option was to "keep the policy as now to meet assessed needs as substantial and 'critical' and the second was "to meet only 'critical' band assessed needs ...". That draft consultation document was approved by the Cabinet on 15 March. What happened next is the subject of witness statement evidence, not challenged by the Claimants, from Councillor Mote, the Leader of the Council, from Councillor Ashton, the Deputy Leader, and from Councillor Silver, the Portfolio Holder for Adult Services. Councillor Ashton felt that "two equal options of Critical, and Critical and Substantial, was misleading" since the finances meant that something would have to be done. Councillor Mote felt that it was wrong to give two choices when in truth there was only one, to adopt the proposal or not. If the proposal were rejected the status quo would continue. At a Portfolio Holder Decision Meeting on 22 March it was agreed to consult only on one option to "meet only critical band assessed needs and to stop paying for any assessed needs at substantial band or below". The reason given for this was "to respond to concerns expressed by a senior Councillor and to allow the planned consultation to proceed". The paper at that meeting explained that a senior Councillor (a reference to Councillor Mote), "expressed concern about consulting the public on the option of leaving the access criteria where they are, given that it was very unlikely that this option would be adopted". In his evidence Councillor Mote emphasises that he did not believe at that stage that he knew what decision the Cabinet would make in due course or what it would think after the consultation results were in. He says he had at that time an opinion about the dreadful state of the Council's finances and was pessimistic about the options which the Cabinet would have later when considering eligibility criteria. Views were expressed at the meeting that stakeholders who had been involved in the pre-consultation had asked for the status quo option to be consulted on and that it should be retained.

13. A consultation process then ensued. No criticism is made of its scale or extent as opposed to the change in the options identified for consultation. The document was sent to some 7,000 relevant users and organisations and a variety of meetings and other consultations took place. There is evidence from Councillor Ashton and Councillor Silver about the process and the involvement of Councillors in it. Councillor Ashton says that until a Conservative group meeting on 16 July not even a provisional view had been taken on the proposal.

14. An Equalities Impact Assessment was carried out with the consultation process to ascertain whether the proposals would be more likely to affect particular groups of service users. While there was a mixed response some respondents were concerned that there would be a differential impact on groups described as Age, Race, Disability and Carers.

15. A substantial report on the issue was prepared for the Cabinet meeting on 25 July. It ran to nine pages with some thirty pages of appendices. This lucidly outlined the background, resources costs and

risks, the proposals and a variety of budget management and planning issues. Enclosures to the report included an analysis of responses to consultation, the equality impact assessment and an illustration of what the proposal would mean if implemented. Criticism is made of what the report says about the consultation process but the matter is addressed in some detail. The report states that "the vast majority of Respondents were opposed to the current change" and nine principle criticisms or "messages" are highlighted. Against that, criticism is made of the fact that each message is met in the report with an italicised answer.

16. The report also laid out ways in which any harshness resulting from the decision, if taken, might be mitigated;

"If Cabinet wish to proceed with the proposal to meet only needs that fall within the 'Critical' FACS band, the following actions could be put in place to address the concerns expressed in the consultation about increased risk:

- "No reductions to packages of care can be implemented until a personal review meeting has taken place. One month's notice of any change could be given;
- To assess as 'Critical' any individual whose level of risk would be expected to reach that level within 12 weeks (currently 4-6 weeks), if their non-critical needs were not responded to – this represents a two-three fold increase;
- To assess as 'Critical' anyone at risk of abuse under the Council's Safeguarding Policy. The council regards this as an extremely important matter;
- To assess as 'Critical' anyone who would have to change their accommodation status as a result of unmet need;
- To establish a formal monitoring group to determine if any of the potential concerns materialise. The group would consider appropriate measures required to reduce differential impact for any group".

Mr Cragg for the Claimant criticizes in his skeleton argument the omission from the report of a letter from the PCT formally responding to consultation and setting out in detail its opinion that the proposed change would have a detrimental effect on the well being of many Harrow residents. The letter suggests that the consultation has been presented as though the change to the eligibility criteria was the only available option. Mr Cragg emphasises the importance of the views of the PCT given its statutory partnership with the Defendant. Mr McCarthy QC points out that the views expressed by the PCT were similar to those put forward by a local hospital and that Councillor Silver who had been present at a public meeting of the PCT on 5 June was able to relay those concerns when the matter was

considered on 25 July. Although the points made by the PCT may well have been made by others the fact that the PCT had made them was something which, at least in retrospect, should have been drawn to the meeting's attention. I recognise however that this is a question of judgement as one sees from the witness statement of Mr Gillett of the Defendant who describes the decision taken by his colleague Mr Singh.

17. The Cabinet meeting of 25 July was chaired by Councillor Ashton. Councillor Mote points out that any comments he made on 22 March would not have affected the July decision because he was not present and took no part in the deliberations. The minute of the meeting shows that various questions were posed and answered and representations considered. These included a question, in general terms, about disability discrimination raised by a representative of the Harrow branch of the Multiple Sclerosis Society. The Council decided to adopt the proposal. Implementation would be another matter. There is evidence from Ms Furness Smith, at the time Director of Community Care, about measures in place to handle individual assessment and implementation. No plan for implementing the policy change was put in place because this would normally not take place before a formal decision. The evidence is that Councillors expected issues relating to individual decisions to be in accordance with procedures put in place to protect the vulnerable. The Defendant emphasises that these proceedings have frozen the implementation process and thus the formulation of detailed plans for it. The current Director of People Policy and Performance Mr Najsarek states in evidence that the Defendant's plan for implementation and operation of procedures will address questions of individual assessment, discretion and human rights.

### **Further evidence**

18. The Claimants rely on witness statements from Deven Pillay, Chief Executive of Harrow Mencap who expresses concern about the devastating effect of this change on service users and their carers, about what he sees as steps by the Defendant to implement the decision in effect in advance by operating a waiting list for those with substantial needs and who regrets the change in consultation wording. Janet Smith, the Chief Executive of MIND in Harrow says that as many as 300 people with mental health problems will be affected by the new policy and she expresses other concerns. So does Ms Avani Modasia Chief Executive of Age Concern in Harrow. Ms Ann Freeman, the Co-ordinator of the Harrow Re-think Support Group expresses concerns about the consultation process given the efforts to get things right in the pre-consultation process by arriving at two clear options.

19. In addition to the witnesses for the Defendant whom I have already mentioned there were statements from Ms Barrett, Corporate Director of Finance, Mr Michael Howes, Service Manager and Miss Bernie Flaherty, Divisional Director

### **Grounds for challenge**

20. The Claimants challenge the decision of 25 July 2007 on the

following 5 grounds:

- The consultation process prior to the decision made was flawed and unlawful;
- The decision-making process failed to take the Human Rights Act 1998 into account;
- The decision-making process did not comply with the Defendant's Disability Equality Duty pursuant to s49A Disability Discrimination Act 1995;
- By excluding large numbers of persons with substantial needs (subject only to an assessment process to ascertain that their needs have not changed) the Defendant has fettered its discretion to consider whether to provide community care services individually to each service user, including these Claimants;
- The decision to exclude those with substantial needs is in itself irrational, unreasonable, and disproportionate in all the circumstances of the case.

**Was the consultation process prior to the decision flawed and unlawful?**

21. Mr Cragg's submissions start with the well-known principles set out in *R v North and East Devon HA ex parte Coughlan* [2001 QB 213 para. 108] "To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for consideration and proposals to allow those consulted to give intelligent consideration and intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken". *R v Brent London Borough Council ex parte Gunning* 1985 84 LGR 168.

22. The Claimants say that the Defendant did not have an open mind at a formative stage at the time it consulted on this proposal as is clear from the report for the meeting on 22 March 2007. References to consultation could not have amounted to much if it was "very unlikely" that the status quo could be maintained. It is also submitted that the Defendant could not have "conscientiously" considered the responses as is evident from its failure to put forward the letter from the PCT to the decision-takers. That is clear also from the decision of the Defendant, when summarising the key messages from the consultation in the report, to accompany them with italicised reasons why they should carry little weight.

23. Mr McCarthy submits that the Defendant complied with consultation requirements. Case law does not require that council members should approach each issue with a blank mind or that a

body entering into a consultation cannot have an initial preference or pre-disposition towards a particular option. On the evidence Councillor Mote's expressed views, if open to criticism, could not have influenced or determined the Cabinet decision on 25 July as he was not there and did not participate in discussions and similarly was absent from the earlier Conservative Group Meeting. The evidence of the other Councillors and officers is that the members carefully weighed all the options. The product of consultation was made available and there is no legal obligation for every single individual who makes a representation to be identified and have his or her views put over. The only reason the letter from the PCT was not put before Councillors was that an officer, Mr Singh, had been of the view that the main points in it were already contained in the analysis put to the Cabinet. The Cabinet were explicitly reminded that it was open to them not to take a decision to proceed but that if they did so compensating savings from other council services would need to be identified. The report for the meeting stated "if a decision is made not to proceed on the basis of the FACS proposal set out in the consultation document the budget pressure could only be contained by identifying compensating savings from other council services".

24. The Defendant properly points out, as regards both this and the other grounds relied upon by the Claimants, that the balance between costs and other budget matters on the one hand and the impact of decisions on its broader priorities and position as a public service provider on the other hand is a matter which is particularly within the Council's own competence to assess, as case law makes clear. Decisions involving a balance of competing claims on the public purse and the allocation of economic resources are, it is well established, complex matters best addressed by democratically represented Councillors not judges.

25. I do not accept that the consultation process was unlawful. No criticism is made of the initial consultation proposal or of the extent of the process. In some circumstances an indication such as that from Councillor Mote that it was "very unlikely" that the status quo could be maintained might be important evidence to show that consultation was carried out after, in reality, a decision had already been taken. But that indication has to be seen with the rest of the evidence from Councillors and officers, none of which is specifically challenged that no decision had been reached until 25 July. It is relevant that the meeting on 25 July had been postponed for a week to allow more time for consideration of any public statements and questions and that the witnesses say that the matter remained open at the meeting of the Conservative Group. While Councillor Mote's choice of expression was unfortunate and the change to the questions was frustrating for those involved in the process of devising them, there was some truth in his view that there was only one decision to take, namely whether or not to adopt the proposal. This was not a case where competing options were available to achieve the same end. Moreover Councillor Mote appears to have been detached from the consultation and discussion leading up to the taking of the decision on 25 July. In those circumstances and given the volume of evidence to show that the proposals were still at a formative stage when consultation was undertaken I reject that criticism.

26. There would have been support for the Claimants' submission had there been signs that the consultation was inadequate. But the process was a thorough one. There is also the valid criticism that the views of the PCT were not drawn to the decision-takers' attention but the reason for this was an officer's opinion, in retrospect perhaps mistaken, that the views of the PCT would not add significantly to the new material. The decision to put italicised responses to the principle criticisms of the proposal in the report for the meeting has to be seen in the light first of the extensive nature of the consultation, secondly the full report of it presented to the meeting and thirdly the fact that the report highlighted these criticisms having made it clear that the consultation indicated that there was very considerable opposition to the proposal. Examining these points not just one by one but looked at as a whole the process of consultation leading up to the decision was, as I see it, lawful.

**Did the decision-making process fail to take the Human Rights Act 1998 into account?**

27. The Claimants submit that the Defendant has a positive duty to take reasonable action to prevent a person for whom it is responsible from being subjected to inhuman or degrading treatment (Article 3 ECHR) and similarly to ensure respect for private home and family life (Article 8 ECHR). That is a specific responsibility as the guidance in paragraph 12 of FACS makes clear. Mr Craqq draws attention to core human rights engaged in this case which in the case of the disabled people in need of services is particularly that of dignity. He cites as authority *Botta v Italy* [1998] 26 EHRR 241 and *R (A, B, X, Y) v East Sussex County Council (No 2)* [2003] EWHC 167 (Admin). In the latter case Munby J observed that "changes in social standards demand better provision for the disabled if their human dignity is not to be impaired".

28. The Claimants argue that the issue of human rights needs to be considered before a policy is adopted. Reliance is placed on *R (Madden) v Bury MBC* [2002] EWHC 1882 (Admin). In that case Richards J, as he then was, was concerned with a decision whether to close care homes and the question of whether Article 8 was engaged and whether there needed to be a consideration of the human rights issue before individual assessments took place and as part of the decision-making process. The Judge held in effect that the failure of reports to draw the relevant requirements of the Human Rights Act to the attention of decision-taking was a "further and independent reason for upholding the decision to be unlawful".

29. The Defendant submits that these arguments are misconceived. It submits that the human rights dimension has three stages. First the point of setting the eligibility criteria, secondly when the council formulates an implementation plan and necessary procedures and thirdly when an individual decision is made. It is only at the third stage that the decision-maker and the court can assess the human rights consequences of any proposed course of conduct and carry out an assessment of any balancing exercise. It follows that any claim brought on human rights grounds is premature before the third stage is reached. Even at that point any interference with Article 8 rights which can be identified will also need to be one which cannot be justified in accordance with the provisions of Article 8 (2) where a

series of cases (for example *R Dudley v East Sussex County Council* (2003) (D) 296) has emphasised the significance of resources when there are competing claims on the public purse. In short there is no threatened breach at present and later consequences can only be assessed after implementation steps and community care decisions are in place. Such claims are in any event unlikely to succeed. Finally Mr McCarthy submits that submissions based on *Madden* cannot stand given the decisions of the House of Lords in *R (SB) v Governors of Denbigh High School* 2006, UKHL 15, 2007 1 AC 100 and in *Belfast City Council v Miss Behavin' Limited* 2007 UKHL 10 2997 1 WLR 1420 (paragraphs 12-15, 27-29, 31, 44-47, 88-91). In the latter decision Baroness Hale referred to similar conclusions of the House in its earlier decision of *Wilson v First County Trust (No 2)* 2004 1 AC 816 and *R (Williamson) v Secretary of State for Education and Employment* 2005 2 AC 246.

30. The speeches in those two cases, particular those of Lord Bingham in *Denbigh* and of Lord Hoffmann in *Belfast* emphasise that the relevant question is not whether a local authority had properly considered whether an applicant's Convention rights would be violated but whether there has in fact been a violation of those rights. As Lord Bingham put it ( 115-116) " Lord Hoffmann pointed out (Paragraph 15) that even in cases where the issue is whether "a procedural impropriety may be a denial of a Convention right the question is still whether there has actually been a violation and not whether the decision-maker properly considered the question of whether his rights would be violated or not". These cases illustrate that Mr McCarthy is clearly right and that questions of violation of Convention rights arise not when the Council takes its decision but when an applicant contends for a violation. Indeed there is as yet not enough material to inform an assessment of the issue. So at this point there can be nothing in the claimants' ECHR claims.

31. It follows that the ECHR issue is premature and as Lord Hoffmann put it in *Denbigh* at para 68 "the most that can be said is that the way in which the school approached the problem may have helped to persuade a Judge that its answer fell within the area of judgement accorded to it by the law".

**Did the decision-making process comply with the Defendant's Disability Equality Duty under Section 49A Disability Discrimination Act 1995?**

32. Section 49A provides:-

**49A General duty**

Every public authority shall in carrying out its functions have due regard to –

(a) the need to eliminate discrimination that is unlawful under this Act;

(b) the need to eliminate harassment of disabled persons that is related to their disabilities;

(c) the need to promote equality of opportunity between disabled persons and other persons;

(d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons;

(e) the need to promote positive attitudes towards disabled persons; and

(f) the need to encourage participation by disabled persons in public life.

33. The Disability Rights Commission ("DRC") has produced a statutory code of practice "The Duty to Promote Disability Equality" which must be taken into account by public authorities and the courts but does not have the force of law. The foreword to the Code explains that the imposition of the duty should end the discrimination which currently can occur when institutions fail to take into account the impact upon disabled people when developing services or policies. Mr Cragg relies upon numerous provisions in the Code which I do not set out in this judgment. Thus paragraph 1.10 emphasises that equality for disabled people may mean treating them more favourably and 1.113 requires public authorities to adopt a proactive approach. Paragraph 2.34 considers "due regard" and its meaning that requires public authorities to do more than simply give consideration to disability equality. The Code encourages a full impact assessment. Once an impact assessment has been carried out public authorities will need to consider changes to reflect its findings.

34. It is common ground that the Council has carried out an assessment following the procedure in its Comprehensive Equality Scheme. A summary accompanied the report for the 25 July meeting dealing in turn with age, race, disability and carers. Under "disability" the service user group consists of some 3,500 people grouped into "physical disability, frailty and sensory impairment" - 67.3%, "mental health" - 23.5% "Learning Disability" - 8.9% and "other vulnerable people" - 0.3%. The summary deals with disability on pages 8 and 9 with five bullet points. It observes that users with a less severe disability are less likely to meet critical criteria and may have their services withdrawn. Another bullet point states "a potential conflict with the DDA 1995. A change in criteria could be seen as limiting access for some people to services".

35. Mr Cragg relies also upon guidance from the DRC aimed at "social care organisations" emphasising the fundamental role of social care services in securing equality for and also the participation of disabled people. This guidance contains advice to assist social care services in taking account of the needs of disabled people.

36. Against that background the Claimants contend that the

Defendant has when adopting these procedures failed to consider its duties under the Act and the Code. The disability equality duty ("DED") is mentioned in none of the documents produced by the Defendant. That absence is striking given the requirements of the DED for a proactive approach. There was no effort proactively to seek the views of the disabled or to refer to the duty in the planning stages of the consultation. There was no mention of the DED either at the Cabinet meeting on 15 March or at the portfolio holder meeting on 22 March. The Defendant did conduct an "equality impact assessment" before 25 July and referred to it in the report to the meeting. That assessment addressed different groups of service users and found that there was a risk of impact and that it should be monitored in future but it did not address the DED. The Claimants say that Section 49A required the assessment to have explicit regard to promotion of equality of disabled people. The report did not mention what measures could be taken to avoid disadvantage to the disabled. The DED was mentioned on 25 July in an oral question but the answer simply referred back to the equality impact assessment already carried out. Mr Cragg says that the failure to carry out a proper and explicit disability impact assessment is unlawful given that this was a policy change which had direct impact on hundreds of disabled people. Mr Cragg goes further and says that it is also unlawful for the council to have reached the decision at all because observance of the duties in Section 49A would necessarily have prevented a reduction in services to disabled people for the sake of such a modest saving to the budget.

37. The Claimants also rely upon *Eisai v National Institute of Clinical Excellence* [2007] EWHC 1941 (Admin) Dobbs J observed in relation to duties under Section 49 "I take the view that the approach of the Appeal Panel was flawed, in that no proper consideration was given to NICE's duties as a public authority to promote equal opportunities and to have due regard to the need to eliminate discrimination. It was unreasonable and unlawful to overlook that responsibility". Mr Cragg submits that that approach is consistent with that set out Arden 1...1 in *Secretary of State for Defence v Elias* [2006] EWCA Civ 1293 as follows "it is the clear purpose of Section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of antidiscrimination legislation. It is not possible to take the view that the Secretary of State's non-compliance with that provision was not a very important matter. In the context of the wider objectives of anti-discrimination legislation, Section 71 has a significant role to play. I express the hope that those in government will note this point for the future".

38. The Defendant submits that the general duty which it acknowledges to exist is, as paragraph 2.3 of the Code points out, not "absolute but it does require authorities in respect of all their functions to give due regard to disability equality". The Defendant emphasises that it is subject to the general duty but not to specific ones. The Defendant submits that the Council took steps to comply through its detailed and comprehensive pre-consultation exercise in which organisations representing the interests of the disabled are

almost exclusively involved, in a series of public meetings which groups representing the disabled attended, through a comprehensive impact assessment to ascertain the differential impact and through a series of mitigating measures to ameliorate impact on service users many of whom are people with a disability. The Council's commitment in the implementation of the decision on 25 July 2007 to adhere to FACS meant by implication that it was continuing to discharge its Section 49A general duty.

39. The Defendant points out that the guidance is not binding and that it is not alleged that the Council has failed to follow that guidance in so far as it relates to the general duty. The Claimants' submissions also ignore the existence of the Comprehensive Equality Scheme which Harrow had updated as recently as June 2007. *Eisai* is distinguishable because it deals with the finding of direct discrimination in circumstances where the Defendant had given no consideration whatsoever to the issue. The Defendant points out that *Elias* can also be distinguished on its facts. The Defendant correctly points out that the Cabinet was specifically reminded that other options might be considered and this was implicit in the whole budgetary process.

40. The effect of the decision was to deprive those in substantial as opposed to critical need, many of whom are disabled, of a service of which they were, by definition, in need. In its extensive process of consultation the Council had regard to the position of disabled users in the ways I have mentioned. I recognise that in the indirect respects which Mr McCarthy identifies the importance of these matters may have been drawn to the attention of the decision-takers on or before 25 July. I recognise that the general duty on the Council under Section 49A is only to have "due regard" to the listed considerations (but as I have mentioned the Code states that this requires more than simply giving consideration to the issue of disability). These are important duties nonetheless including the need to promote equality of opportunity and to take account of disabilities even where that involves treating the disabled more favourably than others. There is no evidence that this legal duty and its implications were drawn to the attention of the decision-takers who should have been informed not just of the disabled as an issue but of the particular obligations which the law imposes. It was not enough to refer obliquely in the attached summary to "potential conflict with the DDA"- this would not give a busy councillor any idea of the serious duties imposed upon the Council by the Act. The Council could not weigh matters properly in the balance without being aware of what its duties were. I recognise that the authorities relied upon by Mr Cragg are all distinguishable on their facts and some relate to different statutes. This is however a discrimination statute like any other and the considerations identified by Arden LJ in *Elias* seem to me to be important and relevant. It is important that Councillors should be aware of the special duties the Council owes to the disabled before they take decisions. It is not enough to accept that the Council has a good disability record and assume that somehow the message would have got across. An important reason why the laws of discrimination have moved from derision to acceptance to respect over the last three decades has been the recognition of the importance not only of respecting rights but also of doing so visibly and clearly by recording the fact. These considerations lead me to

conclude that if the relevance of the important duties imposed by the Act had been adequately drawn to the attention of the decision-makers there would have been a written record of it. (I borrow this observation from a similar one expressed by Stanley Burnton J in *R Bapio Action Limited v Secretary of State for Health* [2007] EWHC 199.) It follows that in my judgment the decision was unlawful on this Disability Discrimination Act ground and that to this extent Ground 3 succeeds

**Has the Defendant fettered its discretion to consider whether to provide community care services individually to each users?**

41. The Claimants contend that the Defendant is fettering its discretion and/or acting unlawfully or unreasonably by in effect preventing itself from providing care services for an adult whose needs are substantial but not critical. Thus two of the Claimants Mr Maos and Ms Chavda automatically lose the services they currently receive without consideration being given to their particular cases.

42. The Defendant submits that this approach overlooks the assessment and service provision process which, as the evidence indicates, will be adopted as the implementation steps are put in place. Once an implementation plan is in place it would be open to any aggrieved individual user to make a complaint or operate the other statutory remedies available under the Local Authorities Social Services Act 1970.

43. There is, as I see it, nothing in this point. The Defendant operates within the FAGS guidance. It has freedom to operate within the FACS bands consistently with the guidance. Any step to restrict the range of service users will by its very nature limit the council's ability to assist them. But there is nothing unlawful about that and individual users have a statutory complaints system to seek redress for grievances.

**Is the decision to exclude those with substantial needs in itself irrational, unreasonable and/or disproportionate in all the circumstances?**

44. The Claimants submit that a decision which removes services from hundreds of vulnerable people is a drastic step and that there is a point at which resource availability ceases to be a legitimate reason for doing this. Ultimately the fact that there will be a cost pressure over coming years cannot justify a policy which will remove the applicants from services they need. Criticism is made of the Defendant for concentrating too much on the question of saving resources and too little on the human rights and disability rights of those affected by the reduction of services.

45. This ground was not much pressed at the hearing. I do not therefore rehearse the competing arguments. If there is a point at which resource ceases to be relevant, as the Claimants allege, it will not be reached in this case. Ultimately, the weighing of resources and the demand for services are matters for the members acting within their democratic mandate. I agree with Mr McCarthy that this ground can add nothing.

## **Conclusions**

46. I therefore conclude that the decision taken on 25 July 2007 was unlawful in the sense that it was taken without the decision-makers having had sufficiently drawn to their attention the seriousness and extent of the duties which the Defendant owed under the Disability Discrimination Act 2005. The other grounds fail. I will consider questions of remedy and other matters when handing down this judgment. I shall be grateful if counsel will let me have a list of errors of the usual kind a draft order agreed so far as possible and a note of what further relief they seek and why.

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