IN THE MATTER OF:

CHARGING POLICIES AND IMPLICATIONS OF SH V NORFOLK COUNTY COUNCIL

ADVICE

I. INTRODUCTION

1. We are asked to advise CASCAIDr on the implications of the recent judgment in *SH v Norfolk County Council* [2020] EWHC 3436 (Admin) (***"SH"***). In particular, we are asked to advise on:

    a. The implications for other councils of the judgment, including what they may now be obliged to do;
    b. Restitution claims for individuals who have been charged under similar policies to Norfolk;
    c. The impact of the legal aid charge on potential claimants;
    d. The role of Monitoring Officers regarding allegations of likely public law illegality;
    e. The status of the Minimum Income Guarantee ("MIG") buffer;
    f. The obligations of client finance departments undertaking the role of Appointee or Deputy; and
    g. Wider strategic challenges, including in relation to the structure, content and application of disability-related expenditure ("DRE") policies.

2. The purpose of this advice is to assist CASCAIDr's main aims of:

    a. Identifying councils who operate similar policies to Norfolk and encouraging changes to be made;

b. Assisting councils who have been making efforts to avoid discrimination to consider alternative approaches or policies which operate less unfairly;
c. Considering ways in which disability-related expenditure ("DRE") policies could be challenged;
d. Focussing on restitution for those charged under potentially discriminatory policies;
e. Considering fiduciary duties and the level of proactivity required for good public sector governance; and
f. Considering the effect of the statutory legal aid charge on people who may wish to bring further claims and the impact on receipt of benefits if restitution is made.

II. SUMMARY OF ADVICE

3. In our view, the effect of *SH* is that councils with similar charging policies to Norfolk may be unlawfully discriminating against individuals like SH (see further below at [33]). In particular, policies which: (a) reduce the MIG to the statutory minimum; (b) choose not to disregard certain disability benefits; (c) have poorly functioning DRE schemes; and (d) do not consider alternative approaches, are likely to be discriminating against severely disabled people (see below at [35]). There may also be other categories of claimants who are in a worse position than those in SH's cohort, such as severely disabled individuals under 25 who are in receipt of SDP (see [36]-[38]).

4. While other councils' policies will not be automatically unlawful, local authorities will need to consider the judgment in *SH* in order to discharge the Public Sector Equality Duty ("PSED") (see [43]-[46]) and to avoid breaching their duties under the Human Rights Act 1998 (HRA). Failure to engage with those raising this matter could amount to maladministration ([41]).

5. There is no single solution to how councils can ensure that their policies are non-discriminatory [48]. Options include increasing the level of the MIG for

affected individuals and disregarding disability related income from the income calculation, and are considered in further detail below (at [50]-[55]).

6. There may be scope for a wider strategic challenge to policies like Norfolk's (see [89]), as well other policy-specific challenges which might be brought by other individuals as SH did. There are also potential challenges in respect of DRE policies which have unlawful exclusionary rules or which operate unfairly in practice (see [56]-[62]).

7. If other local authorities' policies are also found to be (or accepted to be) unlawful, then councils should repay the charges which were unlawfully levied, as Norfolk has done. Failing that, consequential claims for repayment of the monies would follow. (see [63]-[71]).

8. In our view, the potential requirement for other legally aided claimants to pay the statutory legal aid charge should not cause difficulties in practice, but we encourage legal aid providers to advise their clients of any potential risks (see [72]-[75]).

9. We consider that Monitoring Officers could have an important role to play in ensuring that local authorities act on the decision in *SH* where appropriate (see [76]-[83]).

10. Finally, our view is that the "*MIG buffer*"[1] is no longer expressly included in the calculations in the Charging Regulations,, but we do not think this affects the analysis as to what local authorities are required to do in respect of their own charging policies (see [84]-[88]).

III. LEGAL FRAMEWORK

11. Sections 14 and 17 of the Care Act 2014 ("CA 2014")[2] provide the legal basis

[1] That is, the element of the MIG for charging purposes that used to be described as a 25% buffer.
[2] There is an overarching duty in section 1 of the Care Act 2014 ("CA 2014") to promote the social and economic well-being of individuals.

for charging an adult for non-residential care. Section 14 CA 2014 provides that a local authority "*may"* charge a person when arranging to meet their care and support needs. Section 17 CA 2014 requires local authorities to assess an adult's financial resources before charging them.

12. The *Care and Support (Charging and Assessment of Resources) Regulations 2014* (SI 2014/2572) ("the Charging Regulations") specify the services that can attract a charge and the way that financial assessments should be undertaken. Regulation 7 specifies the minimum income guaranteed ("MIG") amount for adults and carers whose needs are being met otherwise than by the provision of accommodation in a care home. The MIG is the aggregate of the amounts set out in regulation 7(1) which apply to the adult in question, depending on their particular circumstances.

13. Part 4 of the Charging Regulations sets out the correct approach to calculating income for the purposes of the financial assessment. The key parts for present purposes are:

    a. Regulation 14 excludes earnings derived from employment as an employed earner or a self-employed earner in the income calculation; i.e. they are not taken into account in determining whether a person will be charged for care.
    b. Regulation 15 provides for other sums which must be disregarded which are set out in Part 1 of Schedule 1. This includes "*housing-related costs*" (paragraph 2(3)), disability-related expenditure (where a local authority takes into account any disability benefits in the calculation of income, where permitted under the regulations) (paragraph 4), and the mobility component of any disability living allowance or PIP (paragraph 8).
    c. However, it is <u>not</u> mandatory to include any other particular benefits, including the Enhanced Rate of the PIP Care Component. Regulation 15(2) provides that "*a local authority may in carrying out the calculation of the adult or carer's income for the purposes of the financial assessment, disregard such other sums the adult or carer may receive as the authority considers appropriate*". This is therefore at the local

authority's discretion in terms of the design of its policy (subject, as explained in detail below, to any other legal requirements such as human rights law). .

14. The *Care and Support Statutory Guidance* ("the Guidance") issued pursuant to section 78 CA 2014 provides further guidance for local authorities regarding their charging policies. Councils are obliged to "*act under*" this general guidance: s 78(1). Paragraph 8.4 provides that "*In all cases, a local authority has the discretion to choose whether or not to charge under section 14 of the Care Act following a person's needs assessment. Where it decides to charge, it* ***must*** *follow the Care and Support (Charging and Assessment of Resources) regulations and have regard to the guidance*." In fact, s 78 means that councils must follow the statutory guidance unless there is a demonstrable good reason for departing from it.[3]

15. Paragraph 8.21 provides that "*to help encourage people to remain in or take up employment, with the benefits this has for a person's well-being, earnings from current employment must be disregarded when working out how much they can pay*".

16. There is no presumption that local authorities will charge, and local authorities should exercise their discretion (paragraph 8.41). Paragraph 8.42 states that, after charging, a person must (due to Regulation 14) be left with the MIG and "*where a person receives benefits to meet their disability needs that do not meet the eligibility criteria for local authority care and support, the charging arrangements should ensure that they keep enough money to cover the costs of meeting these disability-related costs*".

17. The Guidance also makes clear that a local authority cannot simply adopt the MIG without further consideration (emphasis added):

[3] *R v Islington LBC ex p Rixon* [1998] 1 CCLR 119

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

8.47 Local authorities should therefore consider whether it is appropriate to set a maximum percentage of disposable income (over and above the guaranteed minimum income) which may be taken into account in charges."

18. Paragraph 14 of Annex C provides that:

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

IV. *SH*: DECISION AND IMPACT

19. In *SH*, the claimant challenged Norfolk's application of its Charging Policy, which was produced pursuant to the legal framework outlined above.

(a) Background to the claim

20. SH is a 24-year-old woman with Down Syndrome. She has never been able to work and will not be able to do so in the foreseeable future [8]. Her income[4]

[4] NB – we are asked why SH did not qualify for SDP if she was living alone: the answer is that she was living with her mother, not alone.

consists of [12]:

a. ESA at the support group rate with the enhanced disability premium.
b. PIP daily living component at the enhanced rate.
c. PIP mobility component at the higher rate.

21. Her total income in July 2019 was £277.30, rising to £282.05 in April 2020 [13].

22. Under the Council's new policy, SH was initially charged for care (including day services, respite care and a personal assistant) at a rate £16.88 per week. This increased to £20.58 in April 2020 and was to become £50.53 when the next phase was introduced [16]. SH challenged the first decision to apply those charges to her which was taken on 27 January 2020.

23. The key parts of Norfolk's Charging Policy (introduced on 22 July 2019) were as follows:

a. Norfolk reduced the Minimum Income Guarantee from £189 to £165 (for working age people) from 22 July 2019, to £154.02 from April 2020 (for working age people), to £132.45 for anyone aged 18-24 from April 2021 [33].
b. Norfolk exercised its discretion to charge SH the maximum permissible, disregarding only those elements it is required to disregard by law, in particular by taking into account her PIP (daily living component), which it did not do before [36] (save for the £28.95 which is explained further at [54(c)]).

24. SH argued that the Charging Policy discriminated against severely disabled people contrary to Article 14 read with Article 1 of Protocol 1 and/or Article 8 of the European Convention on Human Rights [40].

(b) The judgment

25. The "*other status*" relied on by SH was that she is "*severely disabled*" [51]. The judge considered that to be exactly the sort of personal characteristic which has always been recognised as protected from unjustified discrimination under Article 14 [58]. That "*other status*" was ascertainable by reference to her entitlement to ESA at the support group rate with the enhanced disability premium, and to her entitlement to the PIP daily living component at the enhanced rate, by virtue of her "*severely limited ability to carry out daily living activities*" [62].

26. There was a difference in treatment between, on the one hand, the severely disabled (with needs which result in higher assessable benefits and no realistic prospect of accessing earnings from employment or self-employment) and, on the other hand, everyone else receiving Council services covered by the Charging Policy [67]. Their treatment was different because the Charging Policy meant that a higher proportion of SH's earnings (i.e. income) (and of other severely disabled people in the same position) was assessed as available to be charged than theirs, and the result was that she was charged proportionately more than they are [73].

27. There was no need for SH to provide detailed statistical evidence of differential treatment; the impact of her Charging Policy was obvious from her own case [71].

28. The judge rejected the suggestion that DREs allowed her to benefit from a disregard in the same way as those with earnings have them disregarded [72]. DREs are not at all coterminous with the higher rate of PIP and they are harder to prove and claim than the blanket disregard of outside earnings for those able to get them [72]. Neither the evidence nor the Charging Policy suggested to the judge that the DRE regime reduced to any significant extent, let alone eliminated, what would otherwise be differential treatment [72].

29. The Council relied on the following aims to justify the effect of the Charging Policy on SH as not being manifestly without reasonable foundation [81]:

a. To apportion the Council's resources in a fair manner.
b. To encourage independence.
c. To have a sustainable charging regime.
d. To follow the statutory scheme.

30. The Council's evidence of consideration of the disparate impact on SH's cohort was lacking. The Court found that there was no evidence that the Council had considered this differential impact [85] or the alternative approach of setting a "*maximum percentage of disposable income*" over and above the minimum income guarantee (as the Guidance required the Council to consider) [86]. The outcome for SH was overlooked and not considered or consciously justified at all [88]. None of the proposed mitigations structurally addressed the discriminatory impact [88].

31. No real effort was made in the proceedings to justify the discriminatory impact of the Charging Policy on the severely disabled (as opposed to explaining the sums sought to be raised by the Policy overall) by reference to the Council's stated aims [92]. The impact directly contradicted the stated aim of encouraging independence because SH would have less money for a personal assistant or other independent activity [92].

32. A less intrusive measure, namely the alternative approach above, had not been considered and there could be other ways of achieving the same balance between cost and revenue [92].

V. OTHER COUNCILS' POLICIES

33. The starting point is that the judgment in *SH* indicates that councils who have similar charging policies to Norfolk may be unlawfully discriminating against individuals in SH's cohort. It does not mean that other similar policies will be automatically unlawful. The orders in the Norfolk case apply only to *its* policy and do not have an automatic impact on other policies, no matter how similar they might be. The outcome was based on the facts of SH's case and the evidence of the Council's policy and consideration in that case. However, that

does not mean that the decision is not likely to be very helpful, and potentially determinative, in any challenge (or proposed challenge) to another council's policy. In our view, it could form the basis of a challenge to a similar policy for someone in a similar position to SH. That challenge could be by way of judicial review, but we expect that many councils, on reviewing the judgment, will independently review and potentially change their policies.

34. The case is not authority for the general propositions that: (i) any council charging on all income above the MIG is necessarily acting unlawfully; or (ii) that a council is necessarily discriminating only because it has not taken paragraph 8.47 of the Guidance into account[5]. It was the combination of these factors and their impacts on SH and those like her, and other factors mentioned above, which rendered Norfolk's policy discriminatory. However, as explained above, if a council has a similar policy and has similarly failed to engage with the Guidance and/or consider the potentially discriminatory impact of the policy, then it is highly likely that it is also acting unlawfully in the same way as Norfolk was. Notably, we are instructed that no local authority corresponding with our client has identified that it considered the particular discriminatory aspect that led to the decision in this case.

(a) Which policies might also be discriminatory?

35. In our view, policies which have all or at least some of the following features are at risk of being found to be discriminatory following *SH*:

    a. A reduction of the MIG to the minimum stipulated in the Charging Regulations (particularly where there is little or no staged introduction of the changes).

[5] If they have failed to take the guidance into account despite it being mandatory to act under it (s 78(1)), then this would be a public law error in itself, which may or may not be actionable in a JR depending on the decision under challenge and the point in time at which it is brought. However, the point here is that if the policy is not discriminatory in substance then the failure to have considered the guidance does not make it so, but it may (as in SH) be a strong indicator of a discriminatory approach, coupled with other factors.

b. The inclusion of benefits, such as the daily living component of PIP, which could be disregarded in the exercise of the council's discretion.
c. Poorly functioning DRE schemes.
d. Failures to consider alternative approaches, such as those contained in paragraph 8.46-7 of the Guidance; and/or thus a related failure to assess or understand the discriminatory impact, and therefore to be able to justify it.

(b) Who is being discriminated against?

36. That there exists a category of severely disabled people who have "*other status*" for the purpose of councils' charging policies is clear in light of the judge's findings. The contrary would be unarguable (and the judge's conclusion was supported by a line of previous authority). It is likely that there will be similar cohorts of people within other local authority areas, even if those are small in number. This category was found in *SH* to include those with:

    a. High levels of need (which could be evidenced by receiving the Enhanced Rate of the Daily Living Component of PIP), and;
    b. Unable to work or to have limited prospects of working in the near future (which could be evidenced by being in the Support Group of ESA).

37. CASCAIDr has also pointed out that there are certain categories of individuals who are treated less favourably even than SH was. For example, "*severely disabled individuals under 25 years old who live alone*" may be a particularly harshly affected category. They are usually in receipt of the Severe Disability Premium ("SDP") (because they live alone) in addition to income-related benefits, which means they are more likely to have an income which exceeds the MIG, and their MIG is even lower because of their age bracket. In our view, this is also likely to be an "*other status*" for the purposes of Article 14 ECHR for the reasons given by the judge in *SH*. The additional characteristics of age and living status are easily identifiable. In particular, different categories of SDP recipients were found to have an "other status" and to be being discriminated against in *TP, AR, SXC v SSWP* [2020] EWCA 37. SDP entitlement flows from

having particular additional care needs arising from disabled people living alone without a carer.

38. Any individual falling into this proposed category could choose either to simply follow *SH* and rely on the fact that they fall within the "*severely disabled people*" category, or to go further and rely on additional identifiable characteristics. As to age, it may be that there are additional reasons a local authority could put forward for why a difference in treatment on this ground could be justified; and a "bright line"[6] rule based on age alone may itself be relatively easy to justify under Article 14 (see *Reynolds v SSWP* [2006] AC 173) if the needs of the younger cohort are significantly different. However, this is not the case viz. receipt of SDP for the reasons touched on above.

39. Overall, *SH* makes it very difficult for councils to argue that policies which are very similar to Norfolk's do not "*treat people differently*". In particular, it will not be open to a council to argue that there is no difference in treatment because the Charging Policy is applied to everyone who is charged (see [68] of the judgment).

(c) What are other councils obliged to do?

40. We are asked to consider how proactive local authorities need to be in considering whether their policies are unlawfully discriminatory or otherwise unlawful. In particular, we are asked to consider whether it is maladministration for councils, and their officers[7] not proactively to explain why their policy is not unlawful. The critical point to make here is that local authorities are public authorities and thus required to comply with their obligations under the HRA as well as under the Equality Act 2010, as well as their other legal obligations (e.g. under the Care Act) and general public law principles. As to the specific finding in *SH*, if a council's policy gives rise to differential treatment in respect of severely disabled people (or other cohorts) as the Court has found to be the

[6] i.e. a clearly defined rule with no room for discretion
[7] such as heads of service, finance leads, monitoring officers.

case in Norfolk, a council is obliged to acknowledge and assess this impact, and then to consider whether it can be justified and proportionate (bearing in mind the outcome in *SH*). If not, then they would be acting unlawfully under s 6 of the HRA (for similar reasons as in SH) in continuing to apply it, and it must therefore be changed.

41. In our view, a local authority's complete failure to respond to or engage with communications on this issue (whether from individuals, corporate appointees or interested groups) could be categorised as "*maladministration*" within the meaning of section 26(1) of the Local Government Act 1974. There is no specific definition of maladministration but it can include cases where a public body has taken, or has failed to take, action. It is also necessary to demonstrate that "*personal injustice*" has been caused to the complainant. Any such claim to the Local Government and Social Care Ombudsman ("LGSCO") could be supported by evidence that there are vulnerable clients, such as those who are mentally impaired or need protection from abuse, who would be unable to investigate the matter themselves. We would expect that councils adopting good practice would proactively seek to address these issues and repay any charges found to have been unlawfully levied under a discriminatory policy, in line with the various legal obligations which require them to do so, and as Norfolk has done. CASCAIDr have pointed out that a similar proactive restitutionary exercise was undertaken following findings of illegality under s 117 of the Mental Health Act 1983.

42. For those, like CASCAIDr, who are keen to draw this potential illegality to the attention of other councils, a good first step is to write to local authorities' Monitoring Officers, who have a statutory duty to report to the council where it appears to him or her that the authority has done, or is about to do, anything which would be likely to contravene the law or which would constitute maladministration (see further detail below at [95]-[103]). CASCAIDr have already taken this step in a letter dated 22 January 2021. Where this has not been effective, a next step may be to use the Freedom of Information Act to elicit further information about the steps taken since the decision in SH and/or

whether an updated EIA has been undertaken since that decision (see further below).

43. Pursuant to section 149 Equality Act 2010, local authorities have an ongoing obligation, the Public Sector Equality Duty ("PSED"), in the exercise of their functions to 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.

44. The PSED requires public authorities to have an adequate evidence base for their decision-making. The Court of Appeal held that "*the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration*" (*Bracking v SSWP* [2013] EWCA Civ 1345, McCombe LJ at [26]).

45. Public authorities should in any event be considering issues which come to light through existing sources, such as through court or tribunal cases or engagement of equality groups (Equality and Human Rights Commission's Technical Guidance on the PSED, para 5.22).

46. We understand that the decision in *SH* has been drawn to the attention of local authorities, by campaign groups and recently by CASCAIDr's letter of 22 January 2021. Such correspondence should have triggered a review of their own policies pursuant to their obligation to discharge the PSED and their obligations under the HRA. Any failure to do so may well be subject to challenge by way of judicial review of not only the policy but also the failure to comply with

the PSED. Councils should therefore consider whether their policies discriminate against severely disabled people, or any other groups with protected characteristics. We do not think that councils could simply rely on the view that the decision in *SH* is wrong. It was not challenged by way of appeal. It is thus good law. It seems to us highly unlikely that a different Administrative Court judge would depart from such a recent decision if directly on point (even if not strictly bound by it), and absent some major distinguishing factor. Those instructing us have suggested that one reason it is being asserted that the decision is wrong is that the difficulties in fact arise from regulation 14 and the wider scheme, or that the judge misunderstood the regulations. The former argument was rejected provisionally at the permission stage by Lewis J when the claim against the Secretary of State was dismissed. Further, the Council's reliance as part of its justification on the fact that it was simply following the statutory scheme was rejected after full argument (see [81] and [89-90]). Therefore, at this stage, we consider that the law is clear. The judgment is thorough in terms of the regulations and we cannot see that the judge has misunderstood any aspect of them.

47. In our view, in many cases the most effective way to challenge a local authority's failure to engage with the implications of *SH* is likely to be by challenging charges levied under the specific policy by way of judicial review (and by robust pre-action correspondence in the first instance).

(d) How could the discrimination be addressed?

48. The judgment was not prescriptive about what action needed to be taken by Norfolk to address the discrimination. The judge granted the relief sought, namely i) an order setting aside the decision to charge SH pursuant to the Charging Policy and ii) an order requiring Norfolk to amend and/or withdraw the Charging Policy to remove the discriminatory impact [95]. He did not specify the way in which the policy could be changed to eliminate its discriminatory impact. In the same way, there is not necessarily a "*right answer*" in terms of what other councils would need to do.

49. However, it is instructive to understand how Norfolk has responded. It has responded by increasing the MIG (to £165 for over 18s) and appears to have introduced some form of disregard for PIP (although we have not yet seen the final policy on this). In particular it has recalculated all its charges retrospectively since the introduction of the unlawful policy and notified people that they are entitled to a refund.

50. In our view, ways of reducing the discriminatory impact of such policies include:

    a. Exercising the discretion to increase the MIG for affected individuals, in a rational way which is related to their overall income.
    b. Introducing disregards for elements that councils have a discretion to include in the MIG. For example, the daily living component of PIP could be disregarded, or other similar benefits, such as the SDP.
    c. Requiring a (significant) percentage of an individual's disability benefits to be protected.
    d. Applying a maximum percentage of <u>disposable</u> income, after mandatory disregards and DREs have been excluded, in line with paragraph 8.47 of the Guidance.
    e. Consulting those affected and introducing mitigation measures to achieve a fairer overall scheme (though this is not likely to be sufficient on its own).

51. We do not consider that the <u>only</u> way to eliminate discrimination is to disregard the enhanced daily living rate of PIP, but it is likely to be an effective way of reducing the disproportionate impact of charges on the most severely disabled people. Councils may wish to consider whether the amount they ultimately deduct from the chargeable income of the most severely disabled people should mean that the proportion of the overall income paid by them in charges is not significantly greater than for those on the lowest rates of disability premium.

52. However, in assessing and introducing any of the above changes, a council will need to demonstrate that it has considered whether any new approach actually

addresses (i.e removes) the discriminatory impact and is rationally connected to the aims relied on.

53. In our view, simply considering the Guidance and acknowledging that there may be discrimination will be not enough. The differential impact would need to be justified or removed. We are asked to consider whether a council could justify a prima facie discriminatory policy simply by consulting on it, considering other options including the balancing of interests, but ultimately doing nothing to change the policy. In our view, that is not likely to be enough to demonstrate that the policy is objectively justified, assuming that the situation is on all fours with *SH*. A substantive discriminatory finding was made, not just a procedural failure to consider the issue. While it was undoubtedly an important part of the judge's reasoning in *SH* that the discriminatory impact of the policy had not even been considered, it would be difficult in practice to justify the same differential impact identified in *SH,* particularly where councils will be able to identify approaches which remove or minimise this impact.

54. In our view the following measures alone or together are not likely to eliminate the discriminatory impact of a policy:

    a. Phasing in reductions over time. While this may mitigate the immediate impact of a charging policy, the ultimate changes will still need to be justified. In *SH*, the changes were phased but nonetheless found to be unlawful.
    b. Having good DRE policies in place. In our view, it is unlikely that a well-functioning DRE scheme alone could be seen as mitigating the discriminatory impact of a policy like Norfolk's. SH had DREs of £14.27 per week disregarded from the calculation of her income. Norfolk relied on its "*more generous approach*" to DREs as part of its justification (see [88]). As the judge made clear, "*DRE is not at all coterminous with the higher rate of PIP*" [72]. It is likely that anyone in a similar position to SH will also have much of their need "*met by the council services themselves, none of which is carved out as disability related expenditure*" [72]. In any event, from our understanding of DRE schemes

(including how they operated in SH's case and the evidence from wider stakeholders of how they often operate), they are ordinarily "*harder to prove and claim than the blanket disregard of outside earnings for those able to get them*" [72]. However, the strength and scope of any DRE policy will be relevant to the overall picture and the councils' ability to justify their approach.

c. Disregarding historic DLA rate. In *SH*, one of the quirks of the Charging Policy was that a small amount of the PIP daily living rate was disregarded in line with the amount of DLA Higher Rate Care Component (for night time care) until 22 July 2019 (paragraph 9.21 of the Charging Policy), which was historically disregarded. We have been asked to consider whether disregarding that small amount of PIP (approximately £28.95 at the time, which was reduced to £19.95 in 2019) could mitigate the discriminatory impact of the rest of the policy. In our view, that limited disregard would be insufficient and it was not considered to be a sufficiently mitigating feature in *SH*. We understand that some local authorities argue that this "night time care" disregard is effectively a DRE and is a mitigating feature. We consider that to be unconvincing, and the point went nowhere in *SH* itself. We understand that Norfolk is refunding its clients on the basis that the full disregard should have been reinstated for those that need care at night, and that the MIG is increased.

55. If a council decides to reimburse charges taken under an existing policy, we do not think it would be appropriate for those reimbursements themselves to affect a person's income for the purposes of charging under the policy. They should be treated as ex gratia payments and discretion should be exercised not to include repayments in relevant calculations. However, it is possible that any such reimbursements may affect DWP benefits entitlements. This issue is outside the scope of the current advice and we therefore suggest that any potentially affected individual takes benefits advice in respect of how recovering overpaid charges might affect their own benefit entitlement.

VI. CHALLENGES TO DRE POLICIES

56. We are also asked to consider whether various DRE policies and practices could be unlawful or discriminatory.

57. Paragraph 4 of Part 1, Schedule 1 to the Charging Regulations requires DREs to be disregarded from the calculation of income, stating that DREs include "*payment for any community alarm system, costs of any privately arranged care services required including respite care, and the costs of any specialist items needed to meet the adult's disability*".

58. The Care and Support Statutory Guidance provides a list of things that should be included in the assessment of DRE (paragraph 40), noting that "*this list is not intended to be exhaustive and any reasonable additional costs directly related to a person's disability should be included*". The Guidance suggests that DREs should be interpreted broadly and not limited in arbitrary ways. Paragraph 41 says:

> "The care plan may be a good starting point for considering what is necessary disability-related expenditure. However, flexibility is needed. What is disability-related expenditure should not be limited to what is necessary for care and support. For example, above average heating costs should be considered" (emphasis added).

59. In our view, the language of the Regulations and Guidance suggests that a standard disregard/allowance for DREs would not be appropriate, without the option of additional claims being made on top of the standard amount. It is clearly envisaged that individual circumstances will be taken into account, by considering an individual's care plan and because "*reasonable additional costs directly related to a person's disability*" should be included. It is undoubtedly important for local authorities to ensure that adequate information and advice is provided to users regarding how the DREs work to ensure that the system is accessible and functions appropriately.

60. If councils do have a standard amount, it would be good practice for the council to make clear what that is said to cover, so that additional claims are not excluded on the basis that they have already been covered.

61. In our view, it may be unlawful, depending on the exact circumstances, for councils to have policies which do the following:

    a. Never allowing the consumption cost of universally accessible leisure activities, or arbitrarily limiting the number of activities that can be funded. Such activities may well be fundamentally important for the wellbeing of a disabled person, including in terms of increasing their independence. Such activities may also be mentioned in an individual's care plan (which, per the Guidance, local authorities should consider). consider.
    b. Refusing to cover any transport costs. The Guidance makes clear that DREs can include "*other transport costs necessitated by illness or disability, including costs of transport to day centres, over and above the mobility component of DLA or PIP*" (paragraph 40(c)(xii)). To have a blanket policy refusing to allow for such costs would, in our view, be unlawful. Similarly, we do not consider that it would be acceptable to set an arbitrary limit on the number of journeys that can be included as DREs.
    c. Refusing to cover anything which might be a "*health need*". The Guidance envisages specialist items needed for an individual's "*medical condition*" (paragraph 40(c)(vii)). A blanket refusal to consider any item which relates to a health need appears unlawful on the face of the Guidance. Similarly, policies which assume that such items can be obtained for free, where that is not in practice the case, are also likely to be unlawful.

62. However, we understand that problems are created not just by the DRE policies themselves but also by the way policies operate in practice. Many DRE schemes operate ineffectively, are not clearly explained to individuals and their

families/carers, and present a significant administrative burden to those trying to claim them.

VII. RESTITUTION CLAIMS

63. If a policy is found to be unlawful, there may be various ways in which an individual can achieve financial redress i.e. repayment of the unlawful charges levied under the policy. In *SH,* the council repaid the charges to SH and others in consequence of the relief granted in the judicial review. An alternative may be a claim for pecuniary damages for a breach of Art 14 ECHR under s 7 HRA to achieve just satisfaction for the effect of the discriminatory policy. It is, in our view, very unlikely in practice that councils will accept that their policies were historically discriminatory, even if they decide to change them going forward.

64. We are asked in particular to advise on restitution which is a remedy that can be obtained in public or private law proceedings. CPR 54.3(2) provides that a claim for judicial review may include a claim for damages, restitution or the recovery of a sum due. Section 31(4) of the Supreme Court Act provides that restitution may be awarded if: (a) the application includes a claim for such an award arising from any matter to which the application relates; and (b) the court is satisfied that such an award would have been made if the claim had been made in an action begun by the applicant at the time of making the application.

65. Anyone wishing to challenge an unlawful policy by way of judicial review may do so within the time limit for bringing a judicial review. In SH's case, she brought the claim within 3 months of the first decision to charge her under Norfolk's Charging Policy. In our view, it is also arguable that being charged under a potentially unlawful policy could amount to a "*continuing breach*" (although the court in *SH* did not decide, and did not need to decide, the point).

66. Restitution may be awarded where there is any finding of public law illegality, where the requirements of restitution are also satisfied (that is, e.g., "*money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority*" *Woolwich Equitable Building*

Society v Inland Revenue Commissioners [1993] AC 70 (177E/F)). In *Deutsche Morgan Grenfell Group plc v Inland Revenue and another* [2006] UKHL 49, Lord Hope considered that the *Woolwich* exception covered all statutory charges that were the subject of an ultra vires demand [48]-[49].

67. In *Surrey CC v NHS Lincolnshire Clinical Commissioning Group* [2020] EWHC, the local authority succeeded in a private law claim for restitution against the CCG in respect of the NHS continuing health care ("CHC") costs for a young adult that were paid for by the local authority. The court found that Lincolnshire Primary Care Trust (the CCG's predecessor) which had unlawfully refused to accept responsibility for commissioning the NHS CHC, had been unjustly enriched by its actions at the expense of the LA which had paid for the young adult's care for several years while the dispute was resolved. The Court considered the case to be an extension of the *Woolwich* principle, as the CCG had not made any demand for payment from Surrey [97]. Surrey had only found itself with statutory responsibility for JD's care because of the PCT's unlawful decision that it was not responsible, when it was highly likely that the PCT would have been responsible had it not acted unlawfully [115].

68. In this context, if a court finds that a council's policy was unlawful, then it is clearly arguable that the money was unlawfully demanded and the local authority has been unjustly enriched. This means, in effect, that the discriminatory policy under which charges were claimed can be treated as void ab initio. It follows that repayment of charges made under such a charging policy can be achieved either through the public law proceedings or in subsequent private law proceedings.

69. In *R (CP) v North East Lincolnshire Council* [2019] EWCA Civ 1614, a council was ordered to compensate the claimant for money she was liable to payafter it refused to fund a portion of her placement at a charitable establishment pursuant to its obligations under the Care Act 2014. The Court of Appeal overturned the judge's refusal to award compensation, holding that any breach of a statutory duty is unlawful, and the claimant should be compensated for any monetary shortfall for the period in which funding was not provided [82]. That

was in accordance with normal public law principles of legal accountability of public bodies [83]. The claimant was found to be asserting an orthodox public law right to be paid monies due to her under the Care Act and which the council had unlawfully failed or refused to pay [89].

70. However, it may not follow straightforwardly that an individual will be able to reclaim all the charges they have been required to pay. If, for example, a policy has changed over time, then restitution could only be claimed in respect of the version of the policy that is challenged. There will also be a limitation period of 6 years in respect of which claims could be made. As charging pursuant to the Care Act has been permitted since 2015, individuals who were charged at the outset may wish to consider bringing claims promptly.

71. Finally, it is worth noting that a defendant to a claim by a public body for debt can raise a public law point as a defence. This means that individuals who are in current debt in respect of charges made under similar policies to Norfolk's could raise the lawfulness of the policy as a defence to defeat the debt claim.

VIII. OTHER MATTERS

(a) Possible impact of legal aid charge

72. We are asked to consider the potential requirement for other legally aided claimants to pay the statutory charge legal aid charge in relation to the legal aid granted in the successful judicial review proceedings in the event that they are awarded restitution and/or damages. That would impact upon the amount which they could retain from any repaid monies.

73. In our view this problem could be avoided if the claim proceeds in the same way that SH's did. She did not specifically claim "*restitution*" or compensation for the charges she had already paid. In fact, she simply sought orders requiring the decision to charge to be set aside, declaring that the policy was unlawful and requiring Norfolk to reconsider it. When Norfolk did so, it decided to repay SH for the charges she had previously incurred. This meant that she did not

have to go on to issue a separate claim for repayment. Faced with a decision like that in *SH*, we would expect that other councils in similar positions would do the same.

74. It would also be open to claimants to seek a waiver pursuant to Regulation 9 of the Civil Legal Aid (Statutory Charge) Regulations 2013 on the basis that the claim was of "*significant wider public interest*". In a case like SH's, there would be other identifiable "*claimants or potential claimants who might benefit from the proceedings*" (Reg 9(1)(b)). While there is no guarantee that a waiver would be granted, we think there would be a decent argument.

75. Finally, it is important to remember that a successful claimant could significantly decrease future charges he or she will have to pay. Therefore, even if a statutory charge reduced a "*restitutionary*" award or HRA damages award, there is likely to still be an important financial incentive to bringing the claim.

(b) Role of the Monitoring Officer

76. We are also asked to advise as to the role the that Monitoring Officers ("MO") should regarding play regarding allegations of public law illegality.

77. A MO is an officer, appointed under section 5 of the Local Government and Housing Act 1989, who is required to report to the council where it appears to him or her that the authority has done, or is about to do, anything which would be likely to contravene the law or which would constitute maladministration. Section 5(2) says:

> "Subject to subsection (2B), it shall be the duty of a relevant authority's monitoring officer, if it at any time appears to him that any proposal, decision or omission by the authority, by any committee, or sub-committee of the authority, by any person holding any office or employment under the authority or by any joint committee on which the authority are represented constitutes, has given rise to or is likely to or would give rise to—
>
> (a) a contravention by the authority, by any committee, or sub-committee of the authority, by any person holding any office or

> employment under the authority or by any such joint committee of any enactment or rule of law; or
> (aa) any such maladministration or failure as is mentioned in Part 3 of the Local Government Act 1974 (Local Commissioners), or
> …
> to prepare a report to the authority with respect to that proposal, decision or omission."

78. Section 5(7) provides that "*the duties of a relevant authority's monitoring officer under this section shall be performed by him personally or, where he is unable to act owing to absence or illness, personally by such member of his staff as he has for the time being nominated as his deputy for the purposes of this section*".

79. On the face of the statute, section 5(2) requires MOs to consider any potential unlawfulness and make a decision as to whether there has been a (likely) contravention of any enactment or rule of law. There is no need for unlawfulness to be proven for the obligation to arise: the duty applies as soon as it "*appears*" to the MO that something "*has given rise, is likely to or would give rise to*". As the duty is non-delegable, it would not, in our view, be satisfactory for a MO to simply refer a query to the complaints officer or, for example, the Head of Adults' Services or the Charging Department. The role of MO is plainly intended to be more robust, in terms of compliance with the law, than might usually be expected from someone dealing with an ordinary complaint. We would expect the duty to be discharged within a reasonable period of time, in accordance with public law principles.

80. There are very few cases citing section 5 of the Local Government and Housing Act 1989, and none of them are relevant to a potential challenge to a MO's failure to engage with his responsibilities. This is likely to be because, in any given case, the real mischief is whatever was being complained about to the MO in the first place.

81. However, this does not mean that there is no scope for a challenge to a MO's failure to engage with his or her obligations. There could be a potential claim for breach of statutory duty if there is a flagrant breach by a MO, which could include a complete failure to engage with the reasons why he or she may reject

the suggestion that there has been no likely contravention of the law. We consider that it would be very difficult to bring such a claim in circumstances where the MO has simply said that they are taking advice. Any remedy is likely to be limited to ordering the MO to comply with his or her duties, which, in effect, simply means considering the matter.

82. The section 5(2) function is conceptually distinct from the MO's reporting role in the case of any prior finding of the Local Government Ombudsman (within Part III of the Local Government Act 1984). In principle, there is no reason why a complaint could not be made to the LGO in respect of a MO's failure to comply with his or her section 5(2) obligations.

83. In our view, the MO should continue to be used as a helpful tool for individuals seeking to challenge potentially unlawful matters, and for charities and groups working in the public interest (such as peer-support groups, family carers' groups and charities) who may not have standing in respect of the underlying issue, or adequate resources.

(c) MIG buffer

84. Historically, guidance on the calculation of the MIG required a buffer of 25% to be added on to "*basic*" levels of income support according to age, level of disability and other factors (see e.g. "*Fairer Charging Policies for Home Care and other non-residential Social Services*", November 2001). The calculation of the MIG rates was amended in April 2015 by regulation 7 of the Care and Support (Charging and Assessment of Resources) Regulations 2014. The reference to the 25% buffer was deleted from the March 2016 version of the Charging Guidance "*to ensure that [the MIG] remains consistent with the requirements in the regulations, concerning the level of MIG, from April 2016 onwards*".

85. There is a reference to the 25% buffer in footnote one of Regulation 7, which is at the end of Regulation 7(1)(a):

> "(1) Subject to paragraph (8), the amount specified for each week for the purposes of section 14(7) of the Act ("the minimum income guaranteed amount") in relation to the adult concerned specified in paragraph (2), (3), (4), (5), (6) or, as the case may be, (7) is the aggregate of—
>
> (a) the amount specified in relation to that adult in that paragraph (footnote one: "*A buffer of 25% has been added to each specified amount and the applicable premium*")
>
> …
>
> (c) any applicable premium under paragraphs (4) to (7)."

86. The footnote states that the 25% buffer is (or is at least said to be) included in the calculations. However, it is clear from our instructions that the buffer is no longer 25% for those in receipt of pension credit, because (unlike the Income Support rates) there have been some increases in rates. The additional premiums for disabilities and for carers under Income Support, and the guaranteed element of Pension Credit, have increased each year. However, the MIG has not increased since 2016. The assertion that a buffer of 25% has been added (in the Regulations) is therefore no longer correct in respect of those sums. The MIG was increased in the 2015 circular, but this change was not reflected in the Regulations. In effect, every year that there are increases in premium rates, and if the MIG does not have the same incremental increases, the 25% buffer is chipped away. Each year the premiums increase, the difference between the income and MIG decreases. Whether this is deliberate or not, the effect is that the 25% buffer is being eroded over time, to the detriment of disabled people.

87. It appears that the impact of the increases at different rates has been overlooked. In our view, this may be a factor worth raising in any future claim. The lack of increase in the buffer is likely to disproportionately impact people with disabilities because the premiums no longer have a 25% buffer, whereas (for example) the buffer for the income support of a single person remains at 25%.

88. We do not, however, think that this changes the analysis of whether an individual council's charging policy is lawful. The councils have to follow the

regulations and statutory guidance, and will have done so if they use the MIG in the Regulations without adding in their own 25% buffer. If councils choose to add in a buffer of their own, then their approach may well be more generous than that required by the Regulations. However, the overall discriminatory impact would still need to be taken into account. We do not consider that including a buffer that is (for example) in line with the latest circular would be sufficient to mitigate the discriminatory impact of a policy.

IX. CONCLUSION

89. Finally, there may be scope for wider strategic challenges to policies like Norfolk's either via a group of claimants bringing a joint claim against a number of other local authorities, or in respect of the lawfulness of the regulations and/or guidance as against the Secretary of State.

90. Please do not hesitate to contact us if we can be of any further assistance.

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Matrix
22 April 2021