



Neutral Citation Number: [2011] EWHC 2911 (Admin)

CO/4899/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2011

Before:

THE HONOURABLE MRS JUSTICE LANG DBE

Between:

THE QUEEN

Claimants

**(on the application of JM and NT, by their litigation
friends)**

- and -

ISLE OF WIGHT COUNCIL

Defendant

David Wolfe and Elizabeth Prochaska (instructed by Irwin Mitchell) for the Claimants
James Goudie QC and Edward Capewell (instructed by Helen Miles, Isle of Wight Council)
for the Defendant

Hearing dates: 25th-26th October 2011

Approved Judgment

Mrs Justice Lang:

Introduction

1. The Claimants are two severely disabled adults who are in receipt of community care services from the Defendant, the social services authority in the Isle of Wight.
2. The Claimants seek judicial review of the Defendant's decision, in February 2011, to restrict the eligibility threshold for adult social care, as part of a budget plan designed to reduce the Defendant's overall expenditure. They contend that the Defendant acted unlawfully by:
 - a) failing to comply with the requirements of the statutory guidance governing the provision of adult social care;
 - b) failing to comply with the public sector equality duty in the Disability Discrimination Act 1995, s.49A;
3. Initially permission to apply for judicial review was refused on the papers, on grounds of delay and lack of standing, but it was granted following an oral hearing on 8 September 2011.

The Facts

(a) NT and JM

4. NT is 32 years old. He is autistic and he has learning disabilities. Since 2000 he has lived in residential accommodation provided by the Defendant during the week, but he returns home to his mother every weekend. His care plan specifies Band 2 long term residential accommodation for persons with learning disabilities, to meet his care needs in a safe, structured environment.
5. Although he can attend to some basic needs, he requires support with domestic tasks, shopping and taking medication. He is unable to identify risk and is unaware how his actions or behaviour can impact on others. He attends college half a day a week and requires support in travelling to and from college. He is highly vulnerable and anxious and he has communication difficulties, and so needs to be supported by people who understand his way of communicating.
6. His mother is naturally worried about the future, when she can no longer support him to the extent she does now. She considers that his social life and access to activities are already extremely limited. She is concerned that if his care support were to be reduced or withdrawn, he would become significantly socially isolated and his quality of life would suffer.
7. JM is aged 32. He is severely autistic and has a brain injury acquired at birth. He lives with his parents who are retired and devote their lives to his care. He needs support with all areas of his daily life, his personal care and in order to engage in activities and access the community. He is almost completely unable to express himself verbally and is unable to read or write. He needs supervision throughout the day and would be extremely vulnerable if left unattended. He is easily distressed and needs emotional support to remain calm.

8. The Council makes direct payments for his care. Since 2006, the Council has provided 1:1 support for seven hours a day, 5 days a week. During these hours JM will engage in activities with his carers, for example, listening to music, swimming, walking. His parents, who are in their 60's, care for him the rest of the time, but it is hard work and they are finding it increasingly difficult to manage as they get older. The Council also provides 42 nights per year respite at Westminster House, a centre operated by the Council.

(b) The Council's eligibility criteria

9. In May 2004, the Council's Social Services and Housing Directorate published guidance on its eligibility criteria for adult social care, which remained operative until it was revised with effect from April 2011. It stated:

“The revised eligibility criteria are intended to ensure that the limited resources available are used to help those most in need whilst containing expenditure within the strictly cash limited budgets....

Effectively expenditure will only be incurred where people are at high risk or in danger of becoming a high risk....

Expenditure will only normally be incurred on the provision of direct personal care and support to users or carers in priority categories 1 and 2, immediate and high risk.”

10. The attached “Eligibility Criteria for Adult Services Division” explained that the Council had set the local eligibility criteria in line with the ‘Fair Access to Care Services’ (‘FACS’) criteria. There were four categories (or ‘bands’, as described in FACS):

Category 1 – Immediate Risk/Crisis

Category 2 – Substantial High Risk

Category 3 – Moderate Risk

Category 4 – Low Risk

Only Categories 1 and 2 were eligible for the provision of services.

11. The Council adopted the risk factors set out in the FACS guidance, save that it added an additional risk factor to Category 2, namely:

“the criteria for Category 3 are met but the likelihood is that if no services are provided the situation would deteriorate within 2 to 3 months so that there would be a critical or substantial risk.”

12. The Council assessed NT's needs in February 2010. The overview assessment was that he was in the ‘Critical’ band of the Council's eligibility criteria. His needs were assessed using an internal scoring system, according to the amount of ‘help’ required. Regrettably the scoring did not correspond to the Council's eligibility criteria, and did not comply with the FACS guidance. Therefore it was not possible to see how many

of his risks had been assessed as 'Critical'. In some respects, he was assessed as requiring 'low level help', which probably means that the risks associated with these needs were not assessed as 'Critical'.

13. According to Mrs Wixey, who is employed as Head of Commissioning Adult Social Care by the Council, NT has been assessed as 'Critical' for the past 11 years and he is unlikely to improve. He has not yet been re-assessed under the revised criteria.
14. Counsel for the Defendant explained at the hearing that it was the Council's practice to describe its service users according to their highest assessed eligibility criterion, as a convenient shorthand label. So a user would be described as 'Critical' if he or she had at least one risk factor in the 'Critical' band, even if his or her other risk factors were 'Substantial', 'Moderate' or 'Low'. However, only the risks identified as 'Critical' or 'Substantial' would be met by the Council.
15. According to Mrs Wixey, JM has been classed as 'Critical' ever since moving to the Isle of Wight in 2000. He was re-assessed in March 2011, under the new eligibility criteria. All his risks were assessed as 'Critical', with the exception of Mobility, for which he had no needs. I was not shown his earlier assessments, under the previous eligibility criteria.

(c) The proposal to change the eligibility thresholds

16. The Council's evidence was that it was facing challenging financial circumstances because of a reduction in central funding. In order to deliver a balanced budget for 2011/12, the Council needed to achieve substantial savings.
17. In the context of adult social care, the financial pressures were particularly acute because of the high proportion of older people moving to the Island to retire. The current and projected population profile of the Island showed ever increasing adult social care costs with no comparable increase in central government funding. The Council's spend, per head of population, on adult social care was significantly higher than the average spend by other local authorities.
18. On 7 September 2010 a letter was sent to all users of the Council's adult social care services informing them that a report would shortly be going to the Council's Cabinet, and then to the full Council, which would set out proposed changes to the provision of adult social care. The letter made clear that consultation would take place before any decisions were taken, and that an equality impact assessment would also be undertaken. The proposals were:

“Raise the eligibility threshold in line with FACS (Fair Access to Care Services) criteria used to determine who the council provides adult social care services to, so that those with the greatest needs are assured of support while those at greatest risk are also provided with targeted support in those areas in which they are most vulnerable.”

“Revise the council's charging policy so that ... people aged over 80 years would be assessed on the same basis as those aged under 80 years.”

“Revise the council’s charging policy so that all people are assessed to contribute on the basis of the overall value of their allocated personal budget rather than how they are choosing to spend it.”

19. On 14 September 2010, the Cabinet met and considered a ‘Second Budget Review’ report from Mr David Pugh, Leader of the Council, which proposed a range of potential savings as part of its ongoing financial strategy. These included the proposed changes to adult social care provision set out in the letter of 7 September 2010 and a proposal to cease the learning disabilities services provided at Westminster House.
20. The specific proposals for adult social services were contained in Appendix 3 to the report. The change in eligibility thresholds was estimated to provide a full year saving of £1.5 million. The report advised that any changes to the thresholds “must be on the basis of adequate consultation.” It also stated:

“2. Impact

Change the eligibility threshold in line with FACS (Fair Access to Care Services) criteria used to determine who the council provides adult social care services to so that those with the greatest needs are assured of support while those at greatest risk are also provided with targeted support in those areas in which they are most vulnerable. [Full year saving of £1.5m]

2.1 The proposal is to change the threshold at which the Eligibility Criteria is applied and provide full funding support to only Critical cases and provide targeted support to those cases at risk of becoming critical as opposed to the current policy of fully funding both Substantial and Critical cases.

2.2 All cases will need to be reassessed prior to implementation. There are currently 1,654 Substantial cases of which 865 cases have actual costs recorded with a total funding value of £7.3m per year.

2.3 In moving to critical after individual reassessment the support required by the most vulnerable will be fully provided and funded. In addition those cases that are reassessed below critical will be assessed and supported to prevent them moving into the critical category.

2.4 In order to determine the actual cost impact of the proposed funding change to Critical, reassessments of all Substantial cases will need to be completed. This will involve the reassessment of 856 service users that have been identified as Substantial in the latest Swift Report.

2.5 At this stage £1.5m has been assumed as the net saving with nearly £6m being invested in supporting substantial cases.

This will be refined once the assessments are completed. Implementation would be from 1st April 2011.”

21. Based on this report, the Cabinet decided to recommend that the full Council authorise officers to undertake the necessary consultation and impact assessments on the adult social care proposals.
22. At its meeting on 22nd September 2010 the full Council accepted the Cabinet’s recommendation and the consultation took place across a period of 90 days from 15 October 2010 to 14 January 2011.

(d) The Cabinet meeting on 8 February 2011

23. On 8 February 2011 the Cabinet met to consider the 2011/12 budget. Seven voting Members were present, together with a number of non-voting Members. They considered the results of the consultation on adult social care and an EIA specifically in relation to the adult care proposals. The report to Cabinet set out the statutory framework for the public sector equality duties.
24. Councillor Mazillius, Cabinet Member for Adult Social Care, Housing and Community Wellbeing, addressed Cabinet on the results of the Consultation and the EIA. He emphasised the substantial investment - £6.3 m – which the Council would still be making for people with ‘Substantial’ needs.
25. The Cabinet’s decision was recorded in the following terms:

“That the following be agreed by Cabinet:

1. Consider the results of the consultation exercise for adult social care services set out in Appendix 12 and the related Equality Impact Assessment and agree the Council’s policy on:

- a) The eligibility criteria for access to adult care services be changed from 1 April 2011 so that the council will continue to meet fully the needs of all people who have been assessed as critical while for those people who are assessed as having needs defined as substantial it will only meet those areas of need that place them at greatest risk of not being able to remain at home and be safe.”

(e) The Council meeting on 23 February 2011

26. On 23 February 2011 the Council met to set the budget for 2011/12 and the Medium Term Financial Strategy to 2014/15. Members had before them the same information on the proposed changes to adult social care as had Cabinet on 8 February 2011 – the report, the consultation report and the EIA – together with information on proposed changes to other areas of the Council’s functions.
27. Prior to the meeting, the Leader had emailed Members of the majority Conservative Group on the Council urging them to read the papers in full. At the meeting he

informed Members that adult social care remained one of the biggest areas of spend, requiring increased investment because of demographic factors and the need to protect the vulnerable, and that despite the proposed savings, there would be a net increase in expenditure on adult social care next year.

28. The Council voted in favour of the Medium-Term Financial Plan proposed by Cabinet, together with the schedule of savings, which included the raising of the eligibility threshold for adult social care.

(f) Announcement of the Council's decision

29. On 10 March 2011, Mr Anderson, Director for Community Wellbeing and Social Care, wrote to JM's father informing him that the Council, at its meeting on 23 February 2011, had approved the proposals in the consultation document which would now form the basis of new eligibility criteria. He said:

“The eligibility criteria for access to adult care services will be changed from 1 April 2011 to include:

- all high risk needs of people who have been assessed as critical and
- those areas of substantial need that place people at greatest risk of not being able to remain at home and be safe.”

30. The Council's new policy document is still in draft form. In the version I saw, dated May 2011, the policy is set out as follows:

“Putting People First

The FACS guidance was superseded in 2010 by a new guidance document entitled “Prioritising need in the context of Putting People First: A whole system approach to eligibility for social care Guidance on Eligibility Criteria for Adult Social Care, England 2010”. *Putting People First* refers to Government's agenda to promote choice and control for people accessing social care, alongside the provision of preventative services and services that are available to everyone in a community.

This updated guidance therefore encourages Councils to look to develop preventative services to help avoid rising levels of need at a later stage. In addition, early interventions can improve general community well-being and social inclusion...

Who is eligible?

The Council took the decision (in 2003) that people in the Critical and Substantial categories would be eligible for services. People assessed as Moderate or Low are signposted to other sources of information, advice and support. The Council has considered this policy in light of the updated guidance

published in 2010 and alongside current financial constraints. The proposal put forward was that from 1 April 2011, the council would continue to meet fully the needs of all people who have been assessed as critical. For those people who are assessed to have needs defined as substantial the Council would only meet those areas of need that place them at the greatest risk of not being able to remain at home and be safe.

This decision was agreed at Cabinet on 8 February 2011 and ratified at Full Council on 23 February 2011.”

(g) Reassessment

31. A risk assessment tool was produced to enable care managers to assess users adequately and fairly, called an ‘Eligibility Review Risk Assessment Management Plan Note’. This will be discussed in detail later.
32. Councillor Mazillius discussed the reassessments with the Director of Community Well-Being and Social Care and indicated that if there was any doubt about whether or not a user should be assessed as ‘Critical’, the Council should seek to maintain the status quo in terms of providing support for that person and assess accordingly. In the event, approximately 75% of those in the ‘Substantial’ category were reassessed as ‘Critical’. Thus the savings proposed to be achieved have not been achieved.
33. Mrs Wixey said that, as at 1 April 2010, 1000 users were identified who were categorised as ‘Substantial’ and who needed to be re-assessed. By the date of the reassessments, only 708 remained to be considered. The other 292 had dropped out mainly because of the new charging policy. Others no longer required a service, or had moved away, or died, or gone into residential care.
34. Of the 708 users who were reassessed:
 - 461 continued to receive services from the Council as before;
 - 47 users had their services increased as additional needs were identified;
 - 46 users had their services reduced;
 - 155 had services withdrawn.
35. Of those who had their services reduced or withdrawn:
 - 139 withdrawals were a result of the new charging policy;
 - 18 users no longer wished to receive Council services;
 - 11 users had improved and so the level of support was reduced accordingly;
 - 22 users had services reduced because of the new eligibility policy;
 - 10 users had services withdrawn entirely because of the new eligibility policy.
36. Therefore only 32 users have experienced a reduction or withdrawal of services as a result of the revised policy. Over a full year, the estimated saving is £54,627.45.

37. However, the revised policy will also be applied to new users. I was not provided with any estimate of potential savings in future years, in respect of prospective users of Council services.

The framework for the provision of adult social care

(a) Legislation

38. The legislative framework was helpfully summarised by Rix LJ in *R (McDonald) v Kensington and Chelsea RLBC* [2010] EWCA Civ 1109, [2011] LGR 2464, at [28]-[34]:

“28. The statutory framework is to be found in provisions of the National Health Service and Community Care Act 1990 (“NHSCCA 1990”), the Chronically Sick and Disabled Persons Act 1970 (“CSDPA 1970”), and the National Assistance Act 1948 (“NAA 1948”).

29. Section 47 of NHSCCA 1990 imposes a statutory duty on local authorities to assess those who appear to be in need of community care services. It requires “an assessment of his needs” and then a decision “having regards to the results of that assessment...whether his needs call for the provision by them of any such services”. Subject to any directions given by the Secretary of State as to the manner in which an assessment is to be carried out or the form it is to take, it shall be carried out and take such form as the local authority consider appropriate.

30. Section 29 of NAA 1948 places a duty on local authorities to “make arrangements” for promoting the welfare of (among others) persons who are substantially and permanently handicapped by illness or injury.

31. Section 2(1)(a) of CSDPA 1970 extends the provision of welfare services required by section 29 of the 1948 Act to “the provision of practical assistance for that person in his home”, where that is necessary to meet the needs of that person.

32. Thus these Acts require a local authority to assess needs, then to decide by reference to such an assessment whether the provision of relevant services are called for, and then to make arrangements for the provision of the services which have been decided upon as being called for. It is unnecessary to set out these well-known provisions verbatim...

33. Section 7(1) of the Local Authority Social Services Act 1970 (“LASSA 1970”) authorises the Department of Health to issue guidance to local authorities which the authorities are bound to follow unless they can provide clear and adequate reasons for not doing so (*R v Islington London Borough Council ex parte Rixon* (1998) 1 CCLR 119). The Department has issued such guidance in *Fair Access to Care Services*..

34. Relevant jurisprudence has determined the extent to which a local authority is entitled in the assessment of needs and the provision of services to meet such needs to have regard to resources. It is entitled to have regard to them in assessing needs (*R v Gloucestershire County Council ex parte Barry* (1997) 95 LGR 638) and in choosing between different means of meeting the assessed need (*R v Kirklees MBC ex parte Daykin* (1998) 1 CCLR 512). Subject to that, however, a need, once assessed, has to be met by the provision of services...”

39. In *R v Gloucestershire County Council ex parte Barry* [1997] AC 584 the House of Lords considered the statutory scheme for provision of services under the Chronically Sick and Disabled Persons Act 1970 ('CSDPA 1970') and held that the local authority was entitled to take costs and financial resources into account, together with other relevant factors, in determining eligibility criteria. According to Lord Nicholls, "depending upon the authority's financial position, so the eligibility criteria, setting out the degree of disability which must exist before help will be provided ... may properly be more or less stringent" (at 605E).
40. In *Savva v Royal Borough of Kensington and Chelsea* [2010] EWCA Civ 1209; (2011) 14 CCLR 75; [2011] PTSR 761 Maurice Kay LJ said:

"7. It is axiomatic that local authorities do not have a bottomless pit of funds at their disposal. It is permissible for them to take account of the relative severity of individuals' needs and the availability of resources when determining whether it is necessary to make arrangements to meet an individual's needs. However, once a local authority has decided that it is necessary to make such arrangements, it has an absolute duty to provide the individual with the services or the personal budget with which to meet the assessed needs: see *R v Gloucestershire County Council ex parte Barry* [1997] AC 584"

41. As Baroness Hale explained in her dissenting judgment in *R (McDonald) v Kensington and Chelsea RLBC* [2011] UKSC 33; [2011] PTSR 1266:

"71 The subsequent Guidance on Adult Social Care, *Fair Access to Care Services, Guidance on Eligibility Criteria for Adult Social Care* (2003) ... distinguished between a person's "presenting needs" and her "eligible needs": paragraph 2. The presenting needs were those which the client actually had. The eligible needs were those which the authority were prepared to meet. This depended upon whether they were assessed as being "critical", "substantial", "moderate" or "low": paragraph 16. The authority could decide which categories of need they would meet. This was designed to achieve a good degree of consistency within authorities as to the needs which would be met."

(b) Guidance

42. The current guidance, which was issued by the Secretary of State for Health in 2010, pursuant to section 7(1) LASSA 1970, is *Prioritising Need in the context of Putting People First: A whole system approach for eligibility for social care* ("Prioritising Need"). It builds on the *Fair Access to Care Services* ("FACS") guidance.
43. Paragraph 1 of the Executive summary states:

“The Fair Access to Care Services (FACS) framework was introduced in 2003 to address inconsistencies across the country about who gets support, in order to provide a fairer and more transparent system for the allocation of social care services. The principle behind FACS was that there should be one single process to determine eligibility for social care support, based on risks to independence over time. Its aim was to provide a framework to enable councils to stratify need for social care support in a way that is fair and proportionate to the impact it will have on individuals and the wider community, taking into account local budgetary considerations. Despite significant developments in social care policy since 2003, in this respect the original principles guiding the FACS framework still very much hold firm.”

44. I set out in Appendix 1 to this judgment relevant extracts from *Prioritising Need* on setting eligibility criteria.
45. *Prioritising Need* re-stated the same eligibility criteria and much of the same guidance which had been previously been introduced by *FACS* in 2003, expressly stating that “the original principles guiding the *FACS* framework still very much hold firm.” Indeed, the Defendant referred to the *FACS* criteria in its own documents. Therefore I was invited to have regard to the *FACS* guidance too, following the example of Walker J. in *R (W, M and others) v Birmingham CC* [2011] EWHC 1147 (Admin), (2011) 14 CCLR 516, at [15]. I found the *FACS Practice Guidance Implementation Questions and Answers* (“*FACS Practice Guidance*”), published by the Department of Health on 6 March 2003, helpful in clarifying aspects of the eligibility criteria scheme common to both *FACS* and *Prioritising Need*. Presumably as the scheme was new in 2003, the Department felt it necessary to provide more explanation on implementation than it did when it published *Prioritising Need* in 2010. The scheme is undoubtedly abstruse at first sight. However, I accept the Defendant’s point that the only formal guidance currently in force is *Prioritising Need*, and I did not treat the *FACS* guidance as binding on the Council. It was merely a guide to understanding how the eligibility criteria were intended to be implemented in 2003, under the previous guidance. I set out relevant extracts from the *FACS Practice Guidance* in Appendix 2 to this judgment.

(c) Case law on the guidance

46. The guidance has been considered by the courts on a number of occasions, in the context of challenges to changes to eligibility criteria.
47. In *Chavda v Harrow* [2007] EWHC 3064 (Admin); [2008] LGR 657, HHJ Mackie quashed Harrow’s decision to restrict eligibility in its area to ‘critical’ needs only.
48. In *JG and MB v Lancashire County Council* [2011] EWHC 2295 (Admin) Kenneth Parker J held that the council’s decision to reduce funding for adult social care by setting its eligibility criteria at substantial and critical needs was not unlawful. He held that the council’s approval of its overall budget was not a final decision to cut funding, which would be equality impact assessed at a later stage. By the time the

decision on the *FACS* criteria was taken the council had undertaken a comprehensive equality impact assessment.

49. In *R (W, M and others) v Birmingham CC* [2011] EWHC 1147 (Admin), (2011) 14 CCLR 516, Walker J considered Birmingham's decision to restrict eligibility for adult social care to only those individuals with 'critical' needs. He took into account the FACS guidance. Walker J noted that a move to funding 'critical' only needs was 'potentially devastating' (at [183]). He held that both the council's budget and the resulting cuts to adult social care were unlawful on the basis that due regard had not been shown to the Disability Equality Duty. He further held that the consultation process undertaken by the council had been inadequate: the council had initially suggested that only critical 'personal care' needs would be met, and had failed to provide adequate explanation of its proposed savings. There was therefore 'considerable scope for confusion' amongst consultees (at [189]).

Unlawful Criteria

50. The Claimants submitted that the eligibility criteria adopted by the Council were unlawful because they were in breach of the *Prioritising Need* guidance, which was founded on the principles in the *FACS* guidance. The alleged unlawful departures from the guidance were:

- a) Impermissible band-splitting, by adopting a 'hierarchy of needs' within bands; and
- b) Impermissible band-splitting, on the basis of how likely and how frequently a need may arise.

51. The legal principles on departures from guidance were not in dispute. In *R v Islington London Borough Council ex parte Rixon* (1998) 1 CCLR 119, Sedley LJ said:

"... in my view Parliament by s 7(1) has required local authorities to follow the path charted by the Secretary of State's guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course.

For the reasons which I have given, if this statutory guidance is to be departed from it must be with good reason, articulated in the course of some identifiable decision-making process ... In the absence of any such considered decision, the deviation from the statutory guidance is in my judgment a breach of the law;"

52. Where reasons for departure from statutory guidance have been articulated, the court should take the course described by Lord Bingham in *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 189, at [21]:

"It is guidance which any hospital should consider with great care, and from which it should depart only if it has cogent reasons for doing so. ... In reviewing any challenge to a

departure from the Code, the court should scrutinise the reasons given by the hospital for departure with the intensity which the importance and sensitivity of the subject matter requires.”

53. The Claimants submitted there was nothing in the present case to suggest that the Defendant considered itself to be departing for some good reason from the guidance. On the contrary, it considered itself to be acting in accordance with the guidance. Certainly, it did not state itself to be departing (as it would have needed to do). Much less did it articulate any good or cogent reason for doing so.
54. The Defendant submitted that there had not been any departure from the guidance. Both the form and substance of the criteria adopted by the Council were consistent with *Prioritising Need* which was the only document giving rise to legal obligations. *Prioritising Need* was not “generally couched in mandatory language” and councils were not obliged to pay “slavish or rigid adherence” to it. It allowed and promoted flexibility in its application at a local level.

(a) The Council’s Criteria

55. The Council adopted differing wording to describe its revised policy at different stages of the process, which Mr Wolfe for the Claimants described as Versions 1, 2, 3, 4 and 5. These are set out below, with the relevant parts underlined.
56. Mr Goudie, for the Defendant, accused Mr Wolfe of pedantry as he dissected insignificant differences in wording, and he insisted that the Council’s policy had not altered at any stage. In particular, the *Eligibility Review Risk Assessment Plan* was merely a tool for use by Council staff, designed to ensure proper implementation of the policy decided by the Cabinet at its meeting on 8 February. It did not alter the Cabinet policy made on 8 February.
57. Version 1 was set out in the letter of 7 September 2010 to all users; the report to Cabinet, and its decision, on 14 September 2010; the report to Council, and its decision, on 22 September 2010. It read:

“Change (the word ‘raise’ was used in the letter of 7.9.11) the eligibility threshold in line with *FACS* (Fair Access to Care Services) criteria used to determine who the council provides adult social care services to so that those with the greatest needs are assured of support while those at greatest risk are also provided with targeted support in those areas in which they are most vulnerable.”

58. Version 2 was set out in the report to Cabinet of 14 September 2011, as an amplification of Version 1:

“2.1 The proposal is to change the threshold at which the Eligibility Criteria is applied and provide full funding support to only Critical cases and provide targeted support to those cases at risk of becoming critical as opposed to the current policy of fully funding both Substantial and Critical cases.”

59. Version 3 was set out in the consultation documents; the recommendation to and decision by Cabinet on 8 February 2011; the recommendation to Council on 23 February 2011 which was approved as part of the budget plan, and the draft Eligibility Policy of May 2011:

“The eligibility criteria for access to adult care services be changed from 1 April 2011 so that the council will continue to meet fully the needs of all people who have been assessed as critical while for those people who are assessed as having needs defined as substantial it will only meet those areas of need that place them at greatest risk of not being able to remain at home and be safe.”

60. Version 4 was set out in the letter of notification of the Council decision to users on 10 March 2011:

“The eligibility criteria for access to adult care services will be changed from 1 April 2011 to include:

- all high risk needs of people who have been assessed as critical and
- those areas of substantial need that place people at greatest risk of not being able to remain at home and be safe.”

61. Version 5 was set out in the risk assessment tool, headed *Eligibility Review Risk Assessment Management Plan Note*. According to Mrs Wixey’s witness statement, it was prepared after the Cabinet decision of 8 February 2011. According to the Defendant’s letter of 13 October 2011, it was produced between December 2010 and March 2011. Regrettably, it was not provided to the Claimants until shortly before the hearing in October 2011.

62. The Eligibility Review stated:

“*Under Fairer Access to Care Services (FAC)* the government identified four categories of need: critical, substantial, moderate and low. The threshold for services on the Isle of Wight allows for the following:

- i) **Critical** - all high risk needs to be considered
- ii) **Substantial** – needs to be considered where, if they were not met, they would put someone at a high risk of becoming critical
- iii) **Moderate and Low** - to receive information and advice.”

(b) Impermissible band-splitting, by adopting a ‘hierarchy of needs’ within bands

(i) Submissions

63. The Claimants criticised the revised policy (Version 3) which provided that the Council:

“will continue to meet fully the needs of all people who have been assessed as critical while for those people who are assessed as having needs defined as substantial it will only meet

those areas of need that place them at greatest risk of not being able to remain at home and be safe.”

64. The Claimants submitted that it prioritised risks relating to ‘not being able to remain at home’ and to ‘be safe’ at the expense of other areas of need. It appeared to exclude other risks which fell within the ‘Substantial’ band, such as involvement in work, education or learning; social support systems and relationships and other social roles and responsibilities. By creating a ‘hierarchy of needs’, the Council had made the error which the guidance expressly warned against.

65. The Defendant’s response was that the Defendant was not proposing in any sense to operate a hierarchy of needs. It was perfectly clear from the *Eligibility Review* that all areas of life – personal care, practical aspects of daily living, mobility etc – were treated as equally important.

(ii) **Conclusions**

66. *Prioritising Need* required Councils to use the eligibility criteria set out in paragraph 54 to draw up their own eligibility criteria: see paragraphs 44 and 52. This was mandatory, not discretionary.

67. Paragraph 1 explained that *FACS* was introduced “to address inconsistencies across the country about who gets support, in order to provide a fairer and more transparent system for the allocation of social care services. The principle behind *FACS* was that there should be one single process to determine eligibility”.

68. This principle was developed in more detail in the *FACS Practice Guidance* at Question 3.1 which explained that “[t]he eligibility framework is not merely a guide, and councils should not vary the wording... Whereas councils should not delete or amend the current wording, they may add additional risk factors as extra bullet points within a band. If doing so, councils should ensure the additional points reflect the spirit of the guidance and clearly relate to the key factors of independence – autonomy, health and safety, management of daily routines and involvement in family and wider life.”

69. Within each band there was a range of different types of risks. At first sight, some of these risks might appear more important than others. However, *Prioritising Needs* explained, at paragraph 61, that risks to independence and well-being related to all areas of life, and that (with the exception of life-threatening circumstances or where there were serious safeguarding concerns), “there is no hierarchy of needs”.

70. This principle was developed in more detail in the *FACS Practice Guidance* in response to Questions 3.3 and 3.4. Question 3.3 stated “[t]here is no hierarchy of needs and related risks within an eligibility band, with the exception of life threatening circumstances in the critical band. For example, critical risks to independence ... should be given equal weight.”

71. The ‘*Impact Assessment of the revision of the Fair Access to Care Services (FACS) Guidance*’, dated 25 February 2010 confirmed this principle:

“The revised guidance proposes that councils take an approach which both considers and promotes human rights. It proposes

that amongst other outcomes, any consideration of an individual's needs should include the right to dignity and respect, quality of life and freedom from discrimination. Councils should be aware that an evaluation of "risks to independence and well being" using the eligibility criteria should relate to all areas of life, and that with the exception of life-threatening circumstances, there is no hierarchy of needs."

72. The Claimants' evidence demonstrated that the Council's revised eligibility criteria could impact adversely on users. Mr Stephen Lowe of Age UK said:

"The concern would be that the Council's intention is that if it is possible for a person to live safely at home then regardless of the impact on a person's quality of life, ability to have contact with others, or to live with dignity, they will not receive services where they are assessed as being substantial needs.

Age UK therefore regards this case as being of national significance as the council's approach, depending on how it is implemented, has the potential to undermine personalisation and to enable a return to an era when councils could approach the provision of care with the intention of merely 'warehousing' older people in their own homes, with care being regarded sufficient if it merely kept the person safe."

73. Mr Mark Milton of the National Autistic Society referred to the passage in *Prioritising Need* (paragraph 64) emphasising the importance of councils identifying and meeting the 'hidden needs' of people with autism and he has expressed his concern that the effect of the Council's revised eligibility criteria may be "devastating for vulnerable individuals'. He said:

"Our concern is that if it is possible for a person to live safely at home then regardless of the impact on a person's quality of life, ability to have contact with others or to live with dignity, they will not receive services even though they have been assessed as having substantial needs.

Yet the impact on an adult with ASD who is unable to access the support needed to access the community can be devastating, resulting in isolation, social exclusion and ... the development of mental health problems."

74. I conclude that the wording of Version 3, which was the revised policy decided by Cabinet on 8 February 2011, did express a 'hierarchy of needs' prioritising the risk factors of not being able to remain at home and to be safe, ahead of other risk factors within the 'Substantial' band. It restricted eligibility in a way which was not to be found in *Prioritising Need or FACS*, thus undermining the aims of consistency and transparency. I consider that this was in breach of *Prioritising Need* and the FACS principles.

75. The Council's witnesses, Mr Anderson and Mrs Wixey were, in my view, correct to say that the 'hierarchy of needs' complained of by the Claimants was not reflected on the face of the *Eligibility Review* document (version 5). It included all the eligibility criteria, and there was nothing to indicate that priority is going to be given to risk factors connected to remaining at home and being safe. However, as Mr Goudie has pointed out, the '*Eligibility Review*' is not a policy document; it is merely a tool for staff to implement the policy. It could not lawfully alter the eligibility criteria previously adopted.

76. As matters currently stand, the unlawful 'hierarchy of needs' appeared in the Cabinet decision of 8 February 2011, on the basis of which Council approved the expenditure allocation and budget plan on 23 February 2011. The same formulation then appeared in the draft policy dated May 2011. I consider that the formulation of the revised eligibility criteria needs to be formally amended by the Council to comply with the guidance.

(c) Impermissible band-splitting, on the basis of how likely and how frequently a need may arise.

(i) Submissions

77. The Claimants submitted that the eligibility criteria in the *Eligibility Review* were in breach of the guidance because they split the 'Critical' and 'Substantial' bands on the basis of how likely it was that a risk might arise, and how frequently it might do so. The Claimants submitted that there was no basis for this approach in the guidance and it was entirely inconsistent with the overall structure and approach which the guidance promoted.

78. Mr Goudie submitted that the approach taken by the Council was entirely consistent with the guidance. He referred to the evidence of Mr Anderson in support of the submission that the Council was not proposing to split eligibility bands, but was in fact embracing the focus in *Prioritising Need* on early intervention and preventative work, referred to in paragraphs 4, 33 – 35 . Mr Anderson said:

“Those who meet the assessment of Critical will have their assessed needs fully met. For those who do not meet the Critical assessment, a targeted approach is to be taken, balancing the risks these individuals face and focusing on the highest risk area.”

“..the assessment tool has been devised to ensure that our targeted work for those assessed as not meeting the Critical threshold intervenes in such a way that it prevents, wherever possible, an individual reaching or meeting the Critical threshold.”

79. Mr Goudie also referred to the evidence of Mrs Wixey who explained how the eligibility criteria were applied, once the presenting needs had been assessed:

“there is a judgment taken by the Care Manager and the individual, of which of the prioritised needs meet the threshold set by the Council i.e. those that are Critical. In stages two and

three it is important to identify which of an individual's presenting needs sit directly below the Critical threshold... This assessment is based on the likelihood of a particular need occurring within certain timescales and the consequent likely impact to that individual. If a need falls within a red area on the risk assessment tool, it is deemed to place the individual at high risk and will therefore continue to be met by the Council."

(ii) Conclusions

80. As a starting point, Mr Wolfe correctly emphasised that the bands in the eligibility framework describe "the seriousness of risks to independence and well-being or other consequences if needs are not met" (paragraph 54). I accept that on a proper reading of the guidance, it was these risks which were to be assessed as 'Critical', 'Substantial', 'Moderate' or 'Low', not the needs of the user.

81. I also accept Mr Wolfe's submission that, although the Council referred to users as 'Critical' or 'Substantial' according to their highest level of assessed risk, as described in paragraph 14 of my judgment, the guidance required individual risk factors to be assessed. Thus, a user described by the Council as 'Critical' might have risks in several different bands, some of which would not be met if they were below the eligibility threshold. During the hearing Mr Goudie confirmed that the Council did operate the eligibility criteria in accordance with the guidance by assessing risks separately, despite the overall 'label' given to users for the convenience of Council staff.

82. **'Critical' Risks.** Although the Council's revised eligibility criteria (Version 3) was that:

"the council will continue to meet fully the needs of all people who have been assessed as critical"

the *Eligibility Review* did not give effect to this decision. A user with a risk assessed as 'Critical' would not reach the eligibility threshold (coloured red on the document) if the risk was assessed as 'Remote', defined as:

"Likely to happen no more than twice a year and/or less than 10% chance of happening and/or will happen after 6 months."

Thus, a very serious risk, even a potentially life-threatening risk, could fall outside the eligibility criteria if it was only likely to occur twice a year or not for at least 6 months.

83. I consider that this was contrary to *Prioritising Need* and the principles in *FACS*, for these reasons:

a) The *Eligibility Review* superimposed its own additional eligibility criteria - how likely and how frequently a risk might arise - over and above the eligibility framework in *Prioritising Need* and *FACS*, based on the frequency and likelihood of a Critical risk occurring. This was impermissible. Councils were required to apply the eligibility framework as set out in the guidance to ensure consistency and transparency among all councils: see paragraphs 1, 44 and 52 of *Prioritising Need* and *FACS Practice Guidance* Q 3.1.

- b) In the guidance, the different bands in the eligibility framework were based on the *severity* of risks, whether or not they were immediate, long-term or fluctuating. Paragraph 63 of *Prioritising Need* required Councils to ensure that a person's needs were considered over a period of time, rather than at a single point, so that the needs of people who have fluctuating and/or long terms conditions were properly taken into account. This Council's restrictive criteria on frequency of risk, and risk likely to arise in the future, downgraded the needs of users with fluctuating and/or long-term conditions.
- c) Paragraph 55 of *Prioritising Need* required councils to prioritise 'Critical' risks ahead of 'Substantial' risks; 'Substantial' risks ahead of 'Moderate' risks etc. However, the *Eligibility Review* prioritised some 'Substantial' risks rated as 'Very Likely' or 'Likely' ahead of 'Remote' Critical risks.

84. **'Substantial' risks.** The introduction to the *Eligibility Review* stated:

"Substantial - needs to be considered where, if they were not met, they would put someone at a high risk of becoming critical."

85. In principle, I consider that this approach was in accordance with the guidance. It reflected the philosophy of prevention and early intervention recommended in *Prioritising Need*. The measures for prevention and well-being, at paragraphs 33 – 40 were mainly directed at strategies which fell outside setting criteria for eligible needs, but in paragraph 35 the guidance advised Councils to avoid using eligibility criteria to restrict support to those with the very highest needs, since a strong preventative approach and early intervention could avoid rising levels of need and costs at a later stage.

86. The *FACS Practice Guidance*, at Q3.10, gave explicit guidance to Councils on how they might legitimately divide the 'Moderate' band into risks of greater or lesser importance, and only include the greater risks within their eligibility criteria, if they could not afford to fund all the risks.

87. The Council appeared to have applied this guidance in its May 2003 eligibility criteria, when it added an additional eligibility criterion to the 'Substantial' band which read:

"the criteria for Category 3 [*i.e. Moderate Risk*] are met but the likelihood is that if no services are provided the situation would deteriorate within 2 to 3 months so that there would be a critical or substantial risk."

88. However, the *Eligibility Review* adopted a different mechanism for achieving its stated objective, and in doing so, departed from the eligibility framework in the guidance. It provided for the assessment of needs leading to 'Substantial' risks. It then further categorised a user's 'Substantial' risks into four categories:

- "Very Likely: Could happen on a daily basis
and/or with a 75%+ chance of happening
and/or will happen immediately or within 72 hours.
- Likely: Could happen on a weekly basis
and/or with a 40% - 75% chance of happening

- Unlikely: Likely to happen on a monthly basis
and/or with a 10% - 40% chance of happening
and/or will happen between 6 weeks and 6 months
- Remote: Unlikely to happen no more than twice a year
and/or less than 10% chance of happening
and/or will happen after 6 months”

Only those users with ‘Substantial’ risks which were in the ‘Very Likely’ or ‘Likely’ categories would have their needs met.

89. Instead of focusing on the severity of the needs, and the risks, the Review introduced specific new criteria based upon frequency, likelihood and immediacy of risk, which were not part of the eligibility framework in the guidance, and would have the effect of restricting eligibility according to considerations not mandated by the guidance. This was contrary to the instruction to local authorities to use the eligibility criteria set out in the guidance to ensure consistency and transparency between different authorities.
90. As described above, in relation to ‘Critical’ risks, adoption of these criteria would have the effect of downgrading fluctuating and/or long term and/or future risks, contrary to the guidance, in paragraphs 57, 62 - 64.
91. Determining how likely, frequently and immediately ‘Substantial’ risks might arise is a different exercise from assessing the risk that a ‘Substantial’ risk might deteriorate into a ‘Critical’ risk. The Council unintentionally breached the guidance by adopting an over-elaborate set of additional criteria.

Failure to discharge the Disability Equality Duty

(a) Statutory framework

92. Section 49A of the Disability Discrimination Act 1995 (“DDA 1995”) provides:
“General duty
(1) 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.”
93. The DDA 1995 remained in force until 6 April 2011, when it was replaced by the new public sector equality duty in s.149, Equality Act 2010.

94. The statutory code of practice *The Duty to Promote Disability Equality* explained that having ‘due regard’ ‘required more than simply giving consideration to disability equality’ (at [2.34]). It set out the steps that would assist a public authority to meet the general due regard duty (at [2.45]). These included conducting an impact assessment and ‘gathering and analysing evidence’. In respect of the latter, the Code stated (at [2.50]) ‘authorities will require evidence in order to assess the impact of their activities on disabled people’.

(b) Case law

95. There has been extensive case law on the statutory equality duty, in the fields of race, sex and disability. I summarise the relevant principles below.

96. When carrying out their functions, public authorities must have ‘due regard’ to six ‘needs’ identified in the section. Each ‘need’ represents a particular goal, which if achieved, would further the overall goal of the disability legislation. But the authority is not under a duty to achieve those goals, namely, to eliminate discrimination or promote equality of opportunity. It is a duty to have due regard to the need to achieve those goals; *R (Baker) v Secretary of State for Communities and Local Government* [2008] LGR 239; [2008] EWCA Civ 141; [2009] PTSR 809, at [31]. When considering sub-paragraph (d), the duty is to have due regard to “the need to take steps to take account of disabled persons' disabilities”: *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin); [2009] PTSR 1506 at [84].

97. “Due regard” is the “regard that is appropriate in all the circumstances” *Baker*, at [31]. The authority must give “proper regard” to all the goals in s.49A in the context of the function it is exercising and, at the same time, pay regard to any countervailing factors which, in the context of the function being exercised it is proper and reasonable for the authority to consider. The weight to be given to the countervailing factors is a matter for the public authority rather than the court unless the assessment is unreasonable or irrational. *Baker*, at [31]; *Brown* at [82].

98. The test whether a decision maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking, and the duty must be performed with “vigour and an open mind”: *R (Domb) v Hammersmith and Fulham London Borough Council* [2009] EWCA Civ 941, [2009] LGR 843, at [52]; “rigour and an open mind” *Brown* at [92].

99. General awareness of the duty does not amount to the necessary due regard, being a “substantial rigorous and open-minded approach”; *R (Boyejo) v Barnet LBC* [2009] EWHC 3261 (Admin); (2010) 13 CCLR 72 at [58], [59] and [63].

100. In a case where the decision may affect large numbers of vulnerable people, many of whom fall within one or more of the protected groups, the due regard necessary is very high: *R (Hajrula) v London Councils* [2011] EWHC 448 (Admin) at [69].

101. The duty ‘complements’ specific statutory schemes which may exist to benefit disabled people: *Pieretti v Enfield London Borough Council* [2010] EWCA Civ 1104; [2011] PTSR 565 at [27]-[28].

102. “Due regard” must be given “before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question”: *Brown* at [91]. Due regard to the duty must be an “essential preliminary” to any important policy decision, not a “rearguard action following a concluded decision”: *R (BAPIO Action Ltd) v SSHD* [2007] EWCA Civ 1139 at [3]. Consideration of the duty

must be an “integral part of the formation of a proposed policy, not justification for its adoption”: *R (Kaur and others) v Ealing LBC* [2008] EWHC 2062 (Admin) at [24].

103. If a risk of adverse impact is identified, consideration should be given to measures to avoid that impact before fixing on a particular solution; *Kaur and others* at [44], *R (Rahman) v Birmingham City Council* [2011] EWHC 944 (Admin) at [35] (sub-para 8); *Domb* at [62]
104. The question of whether ‘due regard’ has been paid is for the Court itself to review – the Court should not merely consider whether there was no regard to the duty at all, or whether the decision was *Wednesbury* unreasonable; *Boyejo* at [56]-[57], *R (Meany) v Harlow District Council* [2009] EWHC 559 (Admin) at [72].
105. It is good practice for the public authority to make express reference to the statutory duty and the code *Baker* at [38]; *Brown* at [93]. But where the public authority is discharging statutory duties in respect of disabled persons, it may be “entirely superfluous” to make express reference to s.49A and absurd to infer from an omission to do so a failure to have regard to the duty: *R (McDonald) v Kensington and Chelsea RLBC* [2011] UKSC 33; [2011] PTSR 1266, at [24]. The question in every case is whether the decision maker has *in substance* had due regard to the relevant statutory need. Just as the use of a mantra referring to the statutory provision does not of itself show that the duty has been performed, so too a failure to refer expressly to the statute does not of itself show that the duty has not been performed; *Baker* at [37]. The question is one of substance, not form: *McDonald* at [24].
106. The public authority must have due regard to the need to take steps to gather relevant information to enable it to perform its duty under s.49A(1)(d): *Brown* at [85]
107. There is no statutory duty to carry out an equality impact assessment *Brown* at [89], *Domb* at [52]. At the most, s.49A imposes a duty to consider undertaking an assessment, along with other means of gathering information about the impact on disabled people: *Brown* at [89].
108. Mr Goudie disputed the assertion in Mr Wolfe’s skeleton argument, based on *R (Rahman) v Birmingham City Council* [2011] EWHC 944 (Admin), at [35], that s.49A included an obligation to consult. Both parties declined my invitation to address me on this issue, on the basis that it was sufficient for the purposes of this case that the Council had consulted voluntarily.

(c) Submissions

109. The Claimants submitted that when the Council made its decision on 23 February 2011, it did not have the necessary information about the potential impact of the proposed change in eligibility criteria. Both the EIA and its consultation were flawed. In the absence of the necessary information, it could not comply with the duty to give due regard to the objectives in s.49A DDA 1995. Furthermore, the criteria which were subsequently introduced in the *Eligibility Review* differed significantly from the proposals before Council on 23 February, and they had never been the subject of the scrutiny required by s.49A DDA 1995.
110. The Defendant submitted that the decisions taken by the Council on 8 and 23 February were high-level decisions which could not descend into a detailed examination of the impact of the proposed changes on individual users. The impact of the changes would only become apparent once re-assessments were carried out, and the duty under s.49A DDA 1995 would apply at that stage too. The Defendant refuted the criticisms of the

EIA and the consultation, arguing that they were evidence that the Council had taken reasonable and proportionate steps to consider the impact of the proposals. The Defendant submitted that the *Eligibility Review* was merely a risk assessment tool designed to implement the changes already agreed by Council; it did not make any changes to the Council's policy.

(d) Conclusions

111. The Council had to have due regard to the s.49A DDA 1995 duty when making its Cabinet decision on 8 February 2011, as Cabinet had responsibility for deciding policy in respect of Adult Social Care provision. The Council also had to have due regard to the s.49A DDA 1995 duty when it made its budget plan at the meeting on 23 February 2011. Council was responsible for deciding the allocation of funds to Adult Social Care and it approved the savings recommended by Cabinet, including savings achieved by imposing more stringent eligibility criteria.
112. The Council's need to balance its budget, when faced with insufficient financial resources, was the 'countervailing factor' which the Council had to weigh in the balance, when having "due regard" to the adverse impact which more stringent eligibility criteria might have on disabled users of Adult Social Care services.
113. Mr Pugh, Leader of the Council and Cabinet Member responsible for Resources, explained in his evidence that the Council had been forced to make expenditure cuts in a wide range of services because of reductions in central funding, and the need to balance its budget. There was a particular problem with the escalating cost of Adult Social Care, which was significantly above average per head of population, because of the high proportion of retirees moving to the Island. Put simply, the Council could no longer afford to maintain its projected level of spending on adult social care into the medium term. Difficult choices had to be made.
114. Mr Anderson said, at paragraph 4 of his witness statement:

"In terms of the Council's overall finances, the Council needed to find gross savings of £20.558m in 2011/12 to deliver a balanced budget. This included grant loss of £11.4m, and additional costs to be funded of £10.8m, offset by £2.1m health transfer funding, £5.4 of the overall £10.8 additional costs referred to was in relation to Adult Social Care. This is made up of £3.2m to cover the base budget problem indicated by the year and overspend in 2010/11, and a further £2.2m was provided for demographic growth to fund the projected extra demand that would fall on Adult Social Care as a result of the increase in the demand for service arising from an increasing population of older people and other vulnerable adults. To offset this increased investment, savings from a change in eligibility criteria and from charges to the charging policy totalling £2.5m were implemented. The savings of £2.5m represent some 10% of the total gross savings required by the Council as a whole across all its services."

Thus, the Council was increasing its expenditure on Adult Social Care at the same time as it was making savings by reducing services to users.

Consultation

115. Paragraph 45 of *Prioritising Need* requires Councils to consult service users, carers and appropriate local agencies and organisations about their choice of eligibility criteria. It also requires Councils to make eligibility criteria readily available. The *FACS Practice Guidance* at Q3.2 explains the obligation to consult in more detail.

116. Mr Pugh properly advised the Cabinet that it would be necessary to carry out a public consultation and an EIA, in accordance with Council policy, before making any changes to the eligibility criteria.
117. It was common ground that the consultation had to be carried out in accordance with the principles in *R v Brent LBC ex parte Gunning* (1985) 84 LGR 168, re-stated by the Court of Appeal in *R v North East Devon Health Authority ex parte Coughlan* [2001] QB 213.:
- “..whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an 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..”
118. I consider that the consultation document provided insufficient information to enable those consulted “to give intelligent consideration and an intelligent response”, applying the *Gunning* criteria. It described the proposals which went to Cabinet on 8 February and the Council on 23 February (Version 3). Unfortunately it did not provide any detail about the numbers of users whose support would be reduced, not even giving the figures which were provided in the report to Cabinet on 14 September 2010 (see paragraph 20 above). It did not give any detail about the costs and potential savings. Nor did it explain what types of services would or would not be included under the revised criteria. Consultees, including the parents of the Claimants, were left uncertain as to what impact the revised criteria would have on the assistance they received from the Council. Neither of the Claimants had been provided with an assessment applying the *FACS* eligibility criteria; these assessments had been carried out by the Council but the results were not shared with users. Therefore they did not know whether their risks, based upon their needs, had been assessed as ‘Critical’ or ‘Substantial’. Finally, there was no consultation in relation to the revised criteria adopted in the *Eligibility Review* (version 5) which was used as the basis for re-assessment of users in 2011.
119. Lack of adequate consultation was not pleaded as a freestanding ground for judicial review in this case. Consultation only fell to be considered as part of the discharge of the s.49A DDA 1995 duty. Looked at from this perspective, the flaw was that the consultation responses did not, and could not, fully reflect the experiences and views of users and their carers, because they were not provided with the information they required to make an informed response. Council Members were therefore deprived of important information as to the potential impact of the proposed changes, which meant that they had insufficient information when they were discharging their s.49A DDA 1995 duties.

Equality Impact Assessment

120. Although there was no statutory obligation to conduct an EIA, the Council relied upon its EIA as evidence in support of its case that it had due regard to the s.49A DDA 1995 objectives when making its decisions. The Court was therefore obliged to scrutinise the content of the EIA.
121. In *R (W) v Birmingham City Council* [2011] EWHC 1147 (Admin), the Court accepted the proposition, agreed by the parties, at [151] that:

“xiv Impact assessments must contain sufficient information to enable a public authority to show it has paid due regard to the duty and identify methods for mitigating or avoiding adverse impact;”

122. I accepted Mr Wolfe’s submission that there were a number of flaws in the EIA:

- a) the EIA contained no evidence-based information about the specific impact on disabled people of the proposals;
- b) the EIA did not explain the nature of the ‘Substantial’ needs that would be excluded from funding by the revised eligibility criteria;
- c) the EIA did not explain what the detriment would be to disabled people;
- d) the EIA did not state how many disabled people would be detrimentally affected;
- e) the suggestions in the EIA for mitigating the effects of the proposal were accordingly made without a proper understanding of the potential detriment.

123. The Council did not comply with its own guidance on EIAs which required an evidence-based assessment. The guidance stated that the EIA should contain ‘information about service users’ and should identify ‘quantitative and qualitative data or any consultation information available that will enable the impact assessment to be undertaken’. If, on the basis of this evidence a negative impact was identified, staff were advised to ‘consider measures to mitigate any adverse impact and better achieve the promotion of equality of opportunity’.

124. References in the ‘summary report’, which followed the EIA, to ‘signposting to other sources of support’ and ‘regular reassessment of processes and policies’ were too vague and generalised. They were similar in nature to the assertions which Walker J found to be insufficient to demonstrate due regard to the duty in Birmingham’s decision to move to ‘critical only’ eligibility in *R (W) v Birmingham City Council*, at [177].

125. Finally, the EIA was conducted in respect of version 3 of the Council’s proposals for revised criteria. No EIA was conducted in respect of the significantly different proposals in the *Eligibility Review* (version 5) which were actually used to re-assess users following the implementation of the new Council policy.

126. Thus, although the EIA was provided to Members, it did not provide the analysis and the information which Members of the Council needed in order to discharge adequately their s.49A DDA 1995 duty.

Additional information on the impact of the revised criteria

127. Neither the consultation report nor the EIA provided adequate detail about the proposals and their likely impact on disabled users. Unfortunately, the reports to Cabinet and Council did not make good those omissions. They were in very general terms, focussing mainly on the funding aspects.

128. The report to Cabinet on 8 February 2011 and to Council on 23 February 2011 stated:

“The Council’s proposal on which it consulted was to raise the eligibility threshold for the provision of adult social care services to clients re-assessed as “critical” while for those people assessed as “substantial” it would only meet those areas of need that placed people at greatest risk of not being able to remain at

home and be safe. It was calculated that this proposal would save the Council a projected £1.6m in a full year and a projected £1m in 2011/12.

The main concern expressed by the 273 respondents to the consultation (which represented the views of 500 people), was that the Council ensured that there was sufficient investment remaining to support the areas of risk for people in the substantial category and that this approach did not represent a false economy as the Council withdrew support for people who as a consequence then slipped into the critical band.

It is the view of the Director for Community Wellbeing and Social Care that the tools that have been devised for assessing risk and the training that has been given to staff should ensure that the concern expressed above is not realised. In addition the proposal does not withdraw all of the current funding for people in the substantial band where £7.5 million will be spent in the current year. The projected reduction of £1 million in 2011-2012 would still leave £6.3 million for investment for people in that band.

The Cabinet essentially has three options available to it, which can be summarised as follows:

1. Proceed with the proposal as consulted upon;
2. Reduce further the level of investment in preventative services for people within the substantial band;
3. Leave the eligibility threshold as it is currently so that the full care and support needs of people within the substantial band are met.

The Director for Community Wellbeing and Social Care's advice to Cabinet is that option 2 described above would probably result in the concerns that were voiced about there being insufficient investment to prevent people slipping into the critical band being realised. The consequences of implementing the policy as proposed would need to be carefully monitored and a more cautious approach as encompassed in option 1 is recommended at this time.

With regards to option 3, while on the face of it would be a potentially more desirable option, this would mean that an alternative source for the £1m savings identified in 2011/12, rising to £1.6m in 2012/13, would have to be found. With the financial pressures that adult social care in particular (and the Council in general) is already facing this would be a significant challenge. Therefore on balance the recommendation is that Cabinet agrees to option 1 which is the proposal that was consulted upon as set out in the paragraph below.

As from 1 April 2011 the Council will continue to meet fully the needs of all people who have been assessed as having critical needs while for those people who are assessed as having needs defined as substantial it will only meet those areas of need that place them at greatest risk of not being able to remain at home and be safe."

129. This report was supplemented by a speech to Cabinet by Mr Mazillius and to Council by Mr Pugh. I was provided with transcripts of the relevant passages and did not consider that they added much further information.
130. Mr Goudie submitted that the detail of the impact of the revised criteria could not be made available to Members because it would not be known until after re-assessment.

Only a ‘high-level’ policy decision could be made at this stage. I disagree. In my view, it was not possible for Members to weigh in the balance the adverse impact on disabled users if they were not told in practical terms what the adverse impact was likely to be.

131. I observe from the *FACS Practice Guidance at Q3.9* that the Department of Health has in the past recommended a much more structured approach for Councils deciding which bands of the eligibility framework to include in their eligibility criteria:

- a) estimating the number of adults currently receiving services, and who potentially might be referred to it;
- b) categorising those individuals within the eligibility framework;
- c) estimating the kinds of services typically required to meet the needs arising in each band;
- d) costing the service provision in each band.

This seems to me to be a commonsense approach. Of course, the Council was not required to follow this Practice Guidance. But I note that the Department of Health apparently did not share Mr Goudie’s view that such a degree of detail could not be provided in advance of making the decision on eligibility criteria.

132. If a more detailed analysis of the proposal had been made in advance, Members could have been given a more accurate estimate of the likely costs savings. Members were told the savings were estimated at £1m in 2011/12 and £1.6m in a full year. Following re-assessment, the estimated saving is £54,627.45 in a full year.

133. The problem caused by the lack of detail about the proposals was exacerbated by the vagueness of the proposals themselves. In February 2011, the Cabinet and the Council were considering version 3:

“The eligibility criteria for access to adult care services be changed from 1 April 2011 so that the council will continue to meet fully the needs of all people who have been assessed as critical while for those people who are assessed as having needs defined as substantial it will only meet those areas of need that place them at greatest risk of not being able to remain at home and be safe.”

134. The meaning of the new criteria of “being able to remain at home” and “be safe” was not spelt out to Cabinet or Council. They would not have known which risks would be included, and which would be excluded. Nor were they reminded of the eligibility framework in *Prioritising Need* which set out a range of other types of risks which did not appear to fall within the proposed criteria of “being able to remain at home” and “be safe”. If they had been referred to the relevant passages of *Prioritising Need* they could have paid “due regard” to the potential adverse impact upon disabled people of excluding these risks.

135. I also consider that Members who had not had close dealing with the Council’s adult social care team would not have appreciated that, under the eligibility framework, specific risks were assessed, not people. This had two important practical consequences.

- a) the statement that “the council will continue to meet fully the needs of all people who have been assessed as critical” was potentially misleading. What it meant was that the Council would continue to meet fully all needs giving rise to eligible risks assessed as ‘Critical’, which might mean that an individual user would have some needs met, but not others which had been assessed as giving rise to a lower level of risk.
- b) the statement that “for those people who are assessed as having needs defined as substantial it will only meet those areas of need that place them at greatest risk of not being able to remain at home and be safe” appeared to mean that there was a group of users categorised as ‘Substantial’ whose needs relating to ‘being able to remain at home’ and ‘be safe’ would be met. This was not in fact the position. Users who were described as ‘Substantial’ by the Council would only have some of their needs met i.e. those that gave rise to risks which were ‘Substantial’ (as well as being connected to remaining at home and being safe), not those risks which had been assessed as ‘Moderate’ or ‘Low’ (whether or not they were connected to remaining at home and being safe).

136. In its report on the results of the consultation exercise, dated 28 January 2011, the Transformation Manager recommended that the Council should mitigate the concerns of those consulted by inter alia:

“Ensuring a consistent and fair application of the revised eligibility criteria through the use of a user-friendly risk-based assessment tool which workers will be trained to apply in a consistent, fair and correct manner.”

137. However, Members were not informed that this risk-based assessment tool would:

- a) depart in significant ways from the revised eligibility criteria presented to them (i.e. version 3); and
- b) introduce new eligibility criteria which they had never considered (i.e. version 5).

I refer to my earlier analysis under the heading ‘Unlawful Criteria’ to the effect of the criteria introduced in the *Eligibility Review* (version 5).

138. I conclude that the reports to Cabinet and Council did not provide Members with sufficient information to discharge their duty under s.49A DDA 1995

139. Where, as here, a council was considering provision for the disabled, it was self-evident that it would have the needs of the disabled in mind. However, I endorse the observation of Walker J in *R (W) v Birmingham City Council*, when he said, at [179]:

“I readily accept that throughout the process the Council was giving consideration to how to address the needs of the disabled. In that sense its decisions taken in relation to adult social care were decisions which were relevant to its performance of the s.49A duty. That is not the same thing, however, as doing what s.49A seeks to ensure: namely to consider the impact of a proposed decision and ask whether a decision with that potential impact would be consistent with the need to pay due regard to the principles of disability equality ..”

140. For the reasons set out above, the Council did not conduct the rigorous analysis and consideration required in order to satisfy the 'due regard' duty under s.49A DDA 1995, principally because it did not gather the information required to do so properly.

APPENDIX 1

'Prioritising Need in the context of Putting People First: A whole system approach for eligibility for social care' (extracts)

“44. Councils should use the eligibility framework set out below to specify their eligibility criteria. In setting their eligibility criteria, councils should take account of their own resources, local expectations, and local costs....

45. Although final decisions remain with councils, to promote greater clarity and transparency, they should consult service users, carers and appropriate local agencies and organisations about their eligibility criteria and how information about the criteria is presented and made available. Eligibility criteria should be made readily available and accessible to service users, their carers, the public more generally, and other relevant bodies.

46. Councils should review their eligibility criteria in line with their usual budget cycles. Such reviews may be brought forward if there are major or unexpected changes, including those with significant resource consequences. However, councils should be mindful of the evidence cited above which suggests that raising eligibility thresholds without a parallel investment in preventative strategies may lead to increasing demand for services in the longer term.

Interpretation

47. In this guidance, the issue and support needs that are identified when individuals approach, or are referred to, councils seeking social care support are defined as **'presenting needs'**. Those presenting needs for which a council will provide help because they fall within the council's eligibility criteria, are defined as **'eligible needs'**. Eligibility criteria therefore describe the full range of eligible needs that will be met by councils, taking their resources into account...

Determining eligibility in respect of individuals

52. ...Councils should use the eligibility criteria framework set out below to draw up their own eligibility criteria. These should then be used to identify the needs which call for the provision of services (eligible needs), according to the risks to independence and well-being both in the immediate and longer-term. These eligible needs should also be recorded and agreed wherever possible, by the individual or their representatives.

53. Once eligible needs are identified, councils should take steps to meet those needs in a way that supports the individual's aspirations and the outcomes that they want to achieve. (Support may also be provided to meet other presenting needs as a consequence of, or to facilitate, eligible needs being met.)

54. The eligibility framework is graded into four bands, which describe the seriousness of the risk to independence and well-being or other consequences if needs are not addressed. The four bands are as follows:

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.

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.

Moderate – when

- there is, or will be, an inability to carry out several personal care or domestic routines; and/or
- involvement in several aspects of work, education or learning cannot or will not be sustained; and/or
- several social support systems and relationships cannot or will not be sustained; and/or
- several family and other social roles and responsibilities cannot or will not be undertaken.

Low - when

- there is, or will be, an inability to carry out one or two personal care or domestic routines; and/or
- involvement in one or two aspects of work, education or learning cannot or will not be sustained; and/or
- one or two social support systems and relationships cannot or will not be sustained; and/or
- one or two family and other social roles and responsibilities cannot or will not be undertaken.

55. In constructing and using their eligibility criteria, and also in determining eligibility for individuals, councils should prioritise needs that have immediate and longer-term critical consequences for independence and well-being ahead of needs with substantial consequences. Similarly, needs that have substantial consequences should be placed before needs with moderate consequences and so on.

57. The evaluation of a person's need should take full account of how needs and risks might change over time and the likely outcome if help were not to be provided. This should include consideration of the impact upon the person of changes in the circumstances of any

carer(s). Assessment is often most effective when conducted as an iterative and ongoing process rather than a one-off event.

58. Councils should also consider that people at all levels of need, regardless of whether or not they have eligible needs or fund their own care, may be able, with the right type of tailored intervention, to reduce or even eliminate their dependency on social care support. Support plans should be constructed with such outcomes in mind, focusing on what people will be able to achieve with the right help, rather than simply putting arrangements in place to stop things from getting any worse. Councils may therefore wish to consider broadening the range of support planning services on offer to target people who may not currently be eligible for services.

Applying eligibility criteria fairly and consistently

60. In particular councils should consider whether the individual's needs prevent the following outcomes from being achieved:

- a) Exercising choice and control;
- b) Health and well-being, including mental and emotional as well as physical health and well-being;
- c) Personal dignity and respect;
- d) Quality of life;
- e) Freedom from discrimination;
- f) Making a positive contribution;
- g) Economic well-being; and
- h) Freedom from harm, abuse and neglect, taking wider issues of housing and community safety into account.

61. Councils should be aware that the risks to independence and well-being relate to all areas of life, and that with the exception of life-threatening circumstances or where there are serious safeguarding concerns, there is no hierarchy of needs.

62. Councils should not assume that low-level needs will always be equated with low-level services or that complex or critical needs will always require complex, costly services in response. Someone with relatively low needs may still need more complex intervention in the short term to counter the immediate risks to their independence and/or well-being. On the other hand, it may be that an individual's independence and/or well-being is at immediate risk but that a simple one-off intervention, such as the provision of the right piece of equipment, could provide them with sufficient support to get back on track.

63. Councils should ensure that a person's needs are considered over a period of time, rather than at a single point, so that the needs of people who have fluctuating and/or long-term conditions are properly taken into account. Before final decisions are taken about longer-term needs for support, councils should always consider whether a period of re-ablement or intermediate care should be made available, in order to maximise what people can do for themselves before further assessment of needs is undertaken. This should also minimise the risk of premature decisions being taken about people's long-term needs. If there is a health element to a re-ablement package, such services might be funded by the NHS or, alternatively, jointly with councils.

64. In addition to people with long-term or fluctuating conditions, councils should be aware that there are other groups whose disabilities are such that they are at risk of being overlooked in the assessment of eligible need. Such groups might include people who have very specific communication needs, or blind and partially sighted people who may be disadvantaged by

assessors who are unaware of the impact of loss of vision... Others with “hidden” needs might include people with autism, whose support needs may not be as immediately apparent or easily understood as those of other client groups. For example, it is known that many people with autism or Asperger syndrome have been refused assessment or access to support because their IQ is “too high” – i.e. because they do not have a learning disability. This is not acceptable. The Government is committed to publishing a new national strategy for autism by the end of March 2010, in recognition of the need for better understanding of the needs of people with autism and to support the development of high quality services tailored to their individual requirements. “

APPENDIX 2

‘FACS Practice Guidance Implementation Questions and Answers’ (extracts)

“The eligibility framework

Q3.1

Is the eligibility framework in paragraph 16 of the guidance to be used as a guidance to local eligibility criteria or should it be strictly followed word for word?

A (amended)

The eligibility framework is not merely a guide, and councils should not vary the wording. Once a council decides where to draw the line, subject to the resources it has allocated to adult social care, it should use the exact wording of the bands given in paragraph 16 of the FACS policy guidance to describe the risks from which eligible needs will be identified and met. Whereas councils should not delete or amend the current wording, they may add additional risk factors as extra bullet points within a band. If doing so, councils should ensure the additional points reflect the spirit of the guidance and clearly relate to the key factors of independence – autonomy, health and safety, management of daily routines and involvement in family and wider life.

Q3.2 (new)

If councils have to use the eligibility framework word for word, what is there to consult about?

A

Although it is up to a council to determine the bands it will include in its eligibility criteria, it should nevertheless assure itself and that the key local user groups or communities will not be unfairly disadvantaged by the proposed criteria. It should consult widely on this point....Some councils may wish to add to, or exemplify, the risk factors of the eligibility criteria. They should consult about such amendments.

Those who should be consulted on the above matters include service users, carers, local agencies ..., local voluntary organisations and local community groups....

Q.3.3

Within each of the eligibility bands – critical, substantial, moderate and low – there appears to be a hierarchy of needs with the first mentioned being more important than the last. Is this the case?

A

No. There is no hierarchy of needs and related risks within an eligibility band, with the exception of life threatening circumstances in the critical band. For example, critical risks to independence faced by:

- an older person who is unable to perform vital personal care tasks including washing and bathing herself
- a younger disabled person who is facing significant obstacles in taking up the education and training that is fundamental to his independence and well-being, or
- a single mother, with children who are often looked after by her own mother, but whose morale is severely compromised because mental health difficulties make it impossible at times for her to fulfil her parental role, which in turn exacerbates her mental health problems

should be given equal weight.

Q3.4

In each of the bands there is mention of involvement in work, education or learning, social support systems and relationships and family and other social roles and responsibilities. How can these issues be as important as health and safety, abuse, and an inability to carry out daily routines.

A

For some individuals, threats to their safety, abuse they are suffering or problems they experience with personal care will be paramount. For others, problems in accessing work and education, difficulties in social support and relationships, and difficulties in playing a full part in family and wider community life can be just as important. All these factors, considered independently, can have profoundly negative effects on well-being and independence, and should not be discounted by agencies and professions. Consideration should also be given to how these factors, if not tackled, can also interact with the effect that their overall impact on an individual's independence and physical and mental needs may be increased as a result."

Q3.8

Paragraph 16 gives an eligibility framework. What is the difference between the eligibility framework and a council's eligibility criteria?

A

The eligibility framework comprises four bands of potential eligibility. If a council determines that it only has resources sufficient to meet needs and risks falling into the critical and substantial band, the council's eligibility criteria simply comprise the critical and substantial bands. In other words, a council's eligibility criteria comprises the bands from the framework that represent the needs the council will meet, having taken its resources into account.

Q3.9

How do councils go about deciding which bands of the eligibility framework to include in their eligibility criteria?

A

At the risk of over-simplification, the following theoretical process answers this question. For any given planning period, and observant of its statutory duties under community care legislation .. a council should estimate the numbers of adults currently receiving services, and who potentially may be referred to it. The council should attempt to categorise those individuals' needs into the four bands of the eligibility framework. The council should then estimate the kinds of services that typically would be required to meet the needs arising in each band, including immediate needs and developing needs. It should cost this service provision with respect of prices typically faced when commissioning and purchasing services. (A council should also reflect on the longer-term costs of not meeting low level needs that would considerably worsen for the lack of timely help.) The council should then add up the costs of meeting needs falling into each eligibility band. Starting with the critical band, if the estimated costs of providing services to individuals with needs in this band equals the resources locally available to adult social care, then the council's eligibility framework would simply comprise the critical band. If a council's resources could cover the cost of services for individuals whose needs fall within the critical or substantial bands, then the council's eligibility criteria should comprise the critical and substantial bands; and so on.

Q3.10

What do councils do if it appears to them that, for example, they have the resources to meet needs in both the critical and substantial bands, and can extend into the moderate band, without being able to meet all needs that would fall into the moderate band.

A (amended)

Different approaches may be taken. For example, the council could separate the moderate band into two sub-bands. These may be termed, say, "moderate-greater" and "moderate-lesser". In doing the separation the council should regard each of the four elements of the band as having equal weight, and split each element up into risk of greater or lesser importance. The cost of meeting the greater risks should be equal to the resources that are left over once needs falling into the critical and substantial bands are met. The council's eligibility criteria comprise the critical and substantial bands and the "moderate-greater" sub-band.

Q.3.12 (new)

What counts as an eligible need? Is the person or the need that is eligible for help?

A

The question and answer lie at the heart of how FACS-based eligibility criteria, and related assessments and evaluations of risk, should work. The key paragraph from the policy guidance is paragraph 42 which spells out the logic of how to go from the assessment to a determination of eligibility. Basically, paragraph 42 says that presenting needs should be explored and evaluated against risk to independence.

Once needs and risk are identified, the risks are then banded as critical, substantial, moderate or low. For an individual, different sets of needs can pose different risks and hence be banded differently. The individual's risk, and the band(s) they fall into, are then compared to the council's eligibility criteria. The final sentence of paragraph 42 then says that through identifying the risks that fall within its eligibility criteria, councils should identify eligible needs.

This final sentence reflects the policy intention that councils should identify the needs, which give rise to the eligible risks, which if addressed will ameliorate, contain or reduce the risks.”