

Briefing Paper

Birmingham Adult Social Care Case

May 2011

Introduction

On 21st April 2011, the families of four disabled residents from Birmingham won a landmark legal challenge against the City Council after a court ruled the authority's plans to cut its adult social care budget were unlawful. Final Judgment was given on 19th May 2011.

The disabled residents were told earlier this year by the Council that as from 1st April 2011, any needs which were not considered 'critical' would no longer be paid for, leaving them concerned that many of their essential care and support needs would be unmet.

Solicitors Irwin Mitchell and Public Law Solicitors acted for the claimants and engaged Doughty Street Chambers as barristers and Adrian Waite of 'AWICS' to act as an expert witness on finance.

Interim Judgment

Mr Justice Walker declared that Birmingham City Council's budget was unlawful in respect of adult social care. He declared by interim judgement that the Council needed to review the setting of its adult social care budget.

Polly Sweeney, Solicitor at the Birmingham office of Irwin Mitchell who acted on behalf of one of the claimants, a 65 year old lady with severe learning disabilities, said:

"We are delighted with the Court's decision and very relieved. These individuals and families rely heavily on this care and it would have represented a huge backward step if the funding was removed.

"This case has national significance. Proposals to cut mandatory duties and tighten eligibility for social care are the major issues in the social care sector. This is about saving front line services for vulnerable and disabled people. It is a very significant outcome and with Birmingham City Council being the United Kingdom's largest local authority; it's very likely that the result will set a precedent for other cases. Other councils up and down the country seeking to target vulnerable groups through cost-cutting drives may be legally challenged."

Birmingham City Council had launched a consultation exercise as part of city-wide plans aimed at reducing the amount of money it spends on adult social care. The consultation ended on 2nd March 2011 and the plans were approved by the Council at two separate meetings on 1st and 14th March 2011. The Conservative led local authority had proposed the cuts as part of a plan to save £212million across the City. £51million was to have come from adult social care and a substantial part of this was to have come from restricting eligibility for care.

It was thought that up to 5,000 disabled people in Birmingham would have been denied all or part of their social care packages currently provided by the Council under the plans.

The case was brought on the grounds that the Council's proposals did not promote equality under the Disability Discrimination Act 1995. It was also argued that the consultation process failed to meet legal requirements in a number of areas – particularly its lack of clarity in relation to which groups would be affected, and what the options for those people who would have their care package removed would be.

Full Judgment

The full judgment was handed down on 19th May 2011.

It is thought that the decision will open the door to similar cases across England and Wales.

Handing down his full judgement at the Royal Courts of Justice, Mr Justice Walker declared that both Birmingham City Council's budget setting and decision to change its eligibility policy, were unlawful on the grounds that they did not promote equality under Section 49A of the Disability Discrimination Act 1995 and their attempts at consultation were flawed.

Assessing whether the Council had complied with its legal duties Mr Justice Walker explained:

"The consultation had not involved any attempt to look at the practical detail of what the move to 'critical only' would entail.

"There was no analysis of how and to what extent any mitigation measures would be effective in addressing adverse impacts. In particular, there was no consideration of the extent to which alternative resources in the community would be available for those with substantial needs, and no other steps to mitigate the impact on disabled people were identified."

"Failure to comply with section 49A inevitably carries with it a conclusion that the consultation was inadequate. Just as the decision making process failed to address the right questions, the same is true of the consultation process."

"In my view there remained considerable scope for confusion on the part of those to whom the consultation had been addressed."

The judge also said that the council needed to address:

"Whether the impact on the disabled... was so serious that an alternative which was not so draconian should be identified and funded to the extent necessary by savings elsewhere"

Polly Sweeney, Solicitor at the Birmingham office of Irwin Mitchell who acted on behalf of one of the claimants said:

"The judge described the move to a critical-only policy as 'potentially devastating' and found that, both when setting its budget and changing its eligibility policy, the Council had failed to give proper consideration to the impact on disabled people, and failed to undertake adequate consultation on its proposals.

"This is a hugely important victory not just for the four individuals involved in this case, but also for the thousands of other people affected across Birmingham. These people and their families rely heavily on this care and it would have represented a huge backward step if the funding was removed.

“This case has national significance too. Birmingham City Council is the United Kingdom’s largest local authority and it’s very likely that this outcome will set a precedent for other cases in other parts of the United Kingdom where Councils may be targeting vulnerable groups through cost-cutting drives.”

Karen Ashton, a solicitor with ‘Public Law Solicitors’ represented the other families and welcomed the High Court ruling saying it gave disabled people a voice in law. She said the council’s proposed policy would have had ‘devastating’ results an added:

“In cash-strapped times such as these, the public sector must do more to avoid the consequences of cuts falling on those who are least able to bear them... With consequences of this kind, then councils must look if savings can be made elsewhere.”

She also told ‘Public Finance’ that the judgment was not about ‘a technical exercise of consultation’, adding:

“The problem with the decision [to change care classifications] was that they didn’t get to grips with the extent of the impact on disabled people. If the impact is so severe, is that compatible with the need to support equality for disabled people? And if not should they be finding these savings elsewhere?”

She also said that the judgment should be examined by councils considering similar changes.

The successful application for a judicial review means that Birmingham City Council is forced to make a new decision. It is open to the Council now to retake its decision but it must continue providing services for those with ‘critical’ and ‘substantial’ needs in the meantime. The council will need to find the funds within the budget already set to continue to fund for the ‘substantial’ care needs of disabled and older people.

The ruling has made it clear that local authorities must abide by existing disability laws to eliminate discrimination – especially section 49a of the Disability Discrimination Act 1995. This includes taking account of people’s disabilities, even where that involves treating disabled people more favourably than others. All public bodies have a duty to follow the disability discrimination law, even though this places ‘significant and onerous’ obligations on local authorities.

Specific Financial Issues

Adrian Waite of ‘AWICS’ was commissioned to address some specific financial issues as an expert witness on finance. The Executive Summary of his report addressed them as follows:

1. The Comprehensive Spending Review leaves local authorities, including Birmingham City Council, in the following position:
 - Funding from central government through general grants and specific grants is being reduced in 2011/12 and throughout the period of the Comprehensive Spending Review (2011 to 2015).
 - Most specific grants are being abolished and ring-fencing removed so that it is up to local authorities to determine where they allocate their resources and where they make economies.
 - Councils are being offered an additional grant, equal in value to a 2.5% increase in Council Tax, if they freeze their Council Tax.

- Councils are obliged to identify their priorities and identify those services where they consider it is appropriate to make economies.
2. The Council carried out a consultation on the budget in general and a consultation on the budget for adult social care and their proposals for reorganising the service. The data used in the consultations agrees with the data provided by Communities & Local Government. I consider that there was scope for the Council to invite consultees to comment on a wider range of options as part of the consultation.
 3. I have been asked whether any items in the Council budgets are ring fenced and so unable to be moved across to other areas of spending. The Council will receive £136million in ring-fenced grants in 2011/12. However, it will also receive £1,024million in Revenue Support Grant, Non-Domestic Rates and Council Tax that it is free to decide how to allocate between the various services. It will also receive income from fees and charges. There is therefore significant scope within the Council's budgets to reallocate money between services and to make choices about where reductions in expenditure will be made.
 4. Appendix 5B describes the funding that the Council expects to receive from the Primary Care Trusts in 2011/12 and 2012/13. The data within the appendix agrees with the data in the Operating Framework for the National Health Service in England 2011/12. These payments are made under section 256 of the National Health Service Act 2006. This act allows these payments to be made to support a potentially wide range of activities.
 5. I have been asked whether the cuts could have been avoided given the levels of government grants award to the Council for this and the next spending periods; the financial reserves held by the Council; ending of 'ring fenced' services and greater financial flexibility this entails. I conclude that the Council could not have avoided making reductions in expenditure following the 2011/12 local government finance settlement but that it did have considerable flexibility in determining how and where to make reductions in its expenditure. I conclude that it could have avoided making the specific reductions in adult social care budgets that it did if it had decided to make savings in other budgets or if it had taken a different approach to financial reserves, Council Tax or fees and charges. I also consider that the Council's process for determining the level of savings in each service did not reflect best practice in that it was neither corporate nor strategic and did not compare the case for making savings in each directorate in a comprehensive way.
 6. While the 'front loading' of reductions in government grants made it inevitable that savings would be concentrated in 2011/12, the Council could have delayed making savings in adult social care by bringing forward savings in other areas.
 7. The Council has considered two alternatives for the use of the monies from the Health service and appears to have reflected their decision in their budget. However, the Council does not appear to have referred to these options in the consultation.

A copy of the report is available on request from Adrian.waite@awics.co.uk.

In his judgement, Lord Justice Walker made specific reference to the financial issues as follows:

“As to the Council’s practical ability to take action, I was provided with extensive material on local government finance and a report of Mr. Adrian Waite, an independent financial consultant commissioned by the claimants. I do not need to set this out. However, the Council’s evidence acknowledged that if adult social care had been given priority over other areas the money could have been found to continue the current eligibility criteria.

“The claimants submitted that the minimum required for due regard (under section 49 of the Disability Discrimination Act) was to consider whether savings could have been found in other areas to prevent the need to reduce spending on adult social care. Far from providing an analysis of this, said the claimants, the papers going to members did not include the relevant Equality Impact Needs Assessment.

“In its evidence, the Council acknowledged that financial constraints played a part in the proposal to move to ‘critical only’. That fact of itself involves no breach of section 49a. Authorities must seek value for money and must balance the interests of local taxpayers with those of service recipients. However, the stance of the Council in the present proceedings has involved an assertion that the position already reached in Birmingham meant that there was no more room for manoeuvre... It may be that this belief underlay Council officers’ approach to the decisions to be taken on 1st and 14th March. The material prepared for consideration on those dates did not consider the possibility that this belief might not be right.

Thus I conclude that there was a failure in the material prepared for consideration on 1st and 14th March (meetings of the Full Council and the Cabinet respectively) to address the questions which arose when considering whether the impact on the disabled of the move to ‘critical only’ was so serious that an alternative which was not so draconian should be identified and funded to the extent necessary by savings elsewhere. In reaching this conclusion I should not be taken to make any personal criticism of officers of the Council. By way of comment only – for it is not necessary to my decision – I observe that council officers were, as Mr. Arden submitted, working under pressure of time and resources.”

Reaction of Birmingham City Council

Birmingham City Council said it welcomed the greater clarity of its duties with regard to the Disability Discrimination Act 1995. Peter Hay, the council's strategic director of adults and communities, said:

“We welcome the judgement, which has given us greater clarity with regard to the Disability Discrimination Act,, and we will now need to re-run the consultation and make decisions about adult social care consistent with the need to analyse the potential impact on disabled people and our compliance with the equality principles set out in law. In the meantime, people will continue to receive services to meet needs that have been assessed as substantial and critical.

“A report will be brought back to our cabinet members to enable them to decide how the council will meet adult social care needs in the future.

“The original dilemma between reducing services in different areas remains. There is no new money as a result of the judgement and hard choices about meeting growing needs with fewer resources will have to be made by local authorities.

“As this judgement clearly acknowledges, councils can only control spending by setting eligibility criteria. We will now have to review our criteria and sadly other aspects of our new offer will have to be withdrawn so that we consider all resources that are available to the council. We are particularly saddened that our agreement to spend £10million in supporting people with substantial needs in community and voluntary services will cease whilst we review our options.”

“It is important to point out that Mr Justice Walker has said that we were considerate and thoughtful of disabled people, in making our new offer that our consultation was extensive but that it needed to be fully informed by impact assessment. There are broader issues for all councils which will need to be considered as a result of this judgement.”

“On the Disability Discrimination Act and impact assessment, we recognise the need both for further action and to build broader understanding of the impact of the choices we will make across the council, and particularly with people who use services and their carers.”

Councillor Anderson, Cabinet member for Adults and Communities, said:

“We will look at the implications of all parts of the judgement and provide regular updates for service users, staff, councillors and MPs, with scrutiny playing a key role. I and my cabinet colleagues will look at the proposals brought forward in due course and fully consider them in compliance with this important judgement.”

The Council will revise its plans and re-run the public consultation. In the meantime it will continue to provide support services to disabled people with substantial needs.

Other Reactions to the Judgment

In a statement, the public sector trade union - Unison said:

“The council should rightly be condemned for defending the indefensible. Thousands of vulnerable people in the city would have been put at risk if it were not for the intervention of the courts.”

Kari Gerstheimer, Head of Legal Services at Deafblind charity Sense was quoted on the Guardian website as saying that:

“We think it is a really big win for disabled people and we are absolutely delighted by the judge’s decision. The judgment said the council failed to consider the impact on disabled people and it sends out an important message even in the time of cuts. We hope this makes councils really think about the choices they make in a civilised society and they should not be cutting services for disabled people with the greatest need. Disabled people are the hardest hit by the cuts and its really unfair that to get out of financial difficulty we are placing the burden on disabled people.”

Stephen Hocking, a public law partner at Beachcroft solicitors was quoted in ‘Public Finance’ as saying that:

“There can be little excuse for any local authority to have got its budget proposals so badly wrong... It cannot be over-stressed: setting any budget, re-organising any service, always involves considering equality duties. There are often complex questions of balancing the needs of one group against another, in a limited timescale. Cutting corners or not taking this seriously enough can only lead to being taken to court.”

He added that the Council's duties had 'been clear for some years', adding that it was 'very concerning' that the United Kingdom's largest local authority 'cannot get this right'.

The Position elsewhere

The judgment is being studied carefully in other parts of England.

In Lancashire, Support group Disability Equality North West has already launched a legal challenge against Lancashire County Council's economies in the adult social care budget.

Lancashire County Council's cuts to adult social care are not as deep as those that were proposed by Birmingham City Council. The Council approved a £179million three-year package of economies, including closing children's homes and respite centres for children with disabilities. However, only those adults assessed as having 'moderate' needs will miss out on council-funded care as part of the proposals. Those with 'substantial' needs will continue to receive care.

Solicitor Mathieu Culverhouse of Irwin Mitchell, who is representing the Lancashire challenge, was quoted in the Lancashire Evening Post as saying:

"The Birmingham case is very significant and although the dust has yet to settle, it is pretty clear that it will help our case in Lancashire. We were always confident that we had a good case and this ruling will only help our case. What the Birmingham case does is give clarification of the duty of local authorities."

A spokesman for Lancashire County Council was quoted as saying:

"We are looking carefully at the Birmingham judgement. Whilst there are some clear differences between their case and the claims brought against us, we will consider any implications it may have for us."

In West Sussex the Liberal Democrat group called on the Conservative-led County Council to cease its defence of the Judicial Review initiated by the 'Don't Cut Us Out' Campaign.

Dr James Walsh, Deputy Group Leader, said:

"The Birmingham judgment, on grounds very similar to the West Sussex petition presented to Councillors' last week, stated that disabled individuals were not sufficiently considered in the application of the cuts, means that West Sussex should stop wasting £100,000 of taxpayers' money in defending the indefensible."

"It should heed the judgement of the court, and cease its current implementation of the social services cuts, and have a thorough review of its consultation process, and of its decision to withdraw social services and grants from 4,000 vulnerable people across West Sussex."

"The three Bishops for West Sussex, together with 20,000 people signing the petition, cannot all be wrong or misguided. The policy of the County Council is ill-conceived, rushed, and will probably turn out to be more expensive in the medium to long-term."

The Social Care System and how it is financed

Adult social care is available to the elderly and younger adults with disabilities based on an assessment of the person's needs and means.

There is currently a threshold of £23,250. If a person has savings that exceed this figure they pay for support they receive for personal services such as washing, dressing and eating. Where a person needs residential care the value of any house they own is taken into account.

There are four thresholds of need - low, moderate, substantial and critical. These are defined in guidance issued by the Department for Health, but it is up to councils to decide which thresholds they are able to provide support to, taking account of their resources.

For example, Department of Health guidance defines substantial needs as:

- There is, or will be only partial choice or 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.

Increasing numbers of elderly and disabled people have been placing pressure on local authority adult social care services for some time. Currently six million people are assessed as needing social care. This number is expected to increase to 7.6million by 2030.

Currently more than three quarters of local authorities only allow access to help when a person's needs are judged substantial or critical, which means that if a person does not need help throughout the day then they do not get any state help.

Across the United Kingdom there are 122 councils, including Birmingham, that currently only provide care to people with either substantial or critical care needs.

In October 2010 the government announced the Comprehensive Spending Review. This review set government budgets for all services from 2011 to 2015 including Formula Grant and specific grants for local authorities.

The funding for local government at national level was reduced as shown in the table below:

Local Government	2010/11	2011/12	2012/13	2013/14	2014/15
	£billion	£billion	£billion	£billion	£billion
Resource Departmental Expenditure Limit	28.5	26.1	24.4	24.2	22.9
Capital Departmental Expenditure Limit	0.0	0.0	0.0	0.0	0.0
Total Departmental Expenditure Limit	28.5	26.1	24.4	24.2	22.9
Departmental Annual Managed Expenditure	0.5	0.5	0.5	0.5	0.5
Total	29.0	26.6	24.9	24.7	23.4
Variation %		-8.3	-6.4	-0.8	-5.3

Source: Comprehensive Spending Review

In addition to the reduction in funding, the Local Government settlement included:

- Significant devolution of financial control to councils, by removing ring fencing around all revenue grants except simplified schools grants and a new public health grant, the number of separate core grants simplified from over ninety to fewer than ten, and more than £4billion of grants rolled into formula grant.
- Funding in all four years of the Spending Review to enable local authorities to freeze their council tax in 2011/12.
- An additional £1billion a year for Personal Social Services grant that is rolled into local government formula grant as part of an overall £2billion a year of additional funding to support social care by 2014/15.

In December 2010 the government published the provisional Formula Grant Settlement that included the levels of Formula Grant and specific grants for individual local authorities. The final settlement was published in January 2011.

Councils are therefore in a position where, with the exception of expenditure that is funded through specific grants, they can choose where to spend their revenues and where to make economies. In the context of the 2010 Comprehensive Spending Review there is a need for Councils to identify their priorities and identify those services where they consider it is appropriate to make economies.

While the government has made more resources available for personal social services this money is not ring-fenced and Councils have seen their total resources reduce. Many authorities have therefore sought economies in their adult social care budgets often by restricting eligibility to social care to only those with substantial or critical needs.

Birmingham City Council was not alone in making economies in its adult social care service in 2011/12. According to the Association of Directors of Adult Social Services, councils across England intend to reduce spending on social care by £1billion in the coming year.

As most councils already only provide support to people with substantial or critical needs, if they wish to make economies by restricting eligibility their only option is to restrict support to only those with critical needs. This would lead to disabled people with substantial needs, who are currently receiving support from the local authority, facing the termination of those services.

This, in turn, raises questions about the rights of disabled people that are enshrined in legislation. Local authorities have a duty to provide adult social care services and it is considered by many that a need to make economies is not sufficient justification for withdrawing services from disabled people to which they may be considered to be entitled, especially without carrying out an effective consultation.

A combination of the ageing population and reductions in funding for local government are therefore making it difficult for local authorities to sustain their adult social care services.

In the final months of the Labour government last year, ministers outlined plans to reform the system by introducing a compulsory levy on everyone to pay for services. However, these proposals were put on hold by the coalition government that announced an independent commission on how social care should be funded. This is due to report in the summer of 2011 with a white paper expected by the end of the year.

England, Wales and Northern Ireland have similar systems. In Scotland, however, the Scottish government provides free personal care, but in recent years has started tightening the eligibility criteria.

Conclusions

This Birmingham Adult Social Care case is significant for a number of reasons:

- It underlines the importance of the Disability Discrimination Act 1995 – especially section 49a. Councils must take care to promote equality for disabled people in considering policies and funding options that affect disabled people.
- It underlines the fact that any reorganisation of a service or setting of a budget involves considering equalities duties through an effective Equality Impact Needs Assessment.
- It establishes that local authorities cannot ignore the rights of disabled people when they make changes or economies in adult social care services and that they must carry out.
- It establishes that the setting of local authority budgets is not just a financial process but one that needs to be strategic and comprehensive and needs to take account of the rights of individuals who are affected such as disabled people. In making economies, Councils need to demonstrate that they have considered and consulted on all options.

Many authorities have restricted eligibility for adult social care as part of a package of economies in their 2011/12 budgets. Birmingham City Council is not alone in facing a legal challenge to their adult social care budget and may not be alone in being found to have acted unlawfully.

Adrian Waite
May 2011

About 'AWICS'

'AWICS' provides a full range of management consultancy and training services, principally to those who are involved in public services including social housing.

Our mission statement is 'Independence, Integrity, Value'. We therefore provide management consultancy and training from an independent standpoint that is designed to help the client to achieve their objectives. We are passionate about working with the utmost integrity. We believe that we offer the best value for money that is available today!

And we publish the popular free e-newsletters for public services and housing – the 'Public Services News' and the 'AWICS Housing News'. We are big enough to make a difference – but are small enough to care!