

Appendix B: Synopsis of the High Court judgement in SH v Norfolk County Council

1. In *SH, R (On the Application Of) v Norfolk County Council & Anor* [2020] EWHC 3436 Mr Justice Griffiths concluded that the application of the Council's charging policy was discriminatory in its outcome for severely disabled residents who are unable to work and so fell foul of Human Rights and Equality legislation. The application was made by SH a twenty-four-year-old severely disabled young woman who would never be in a position of having earnings from paid work.
2. The policy changes that Norfolk planned to phase in were not dissimilar to those operated by other councils, including Leicestershire County Council in that it followed the Care Act 2014, associated regulations and statutory guidance.
3. The Regulations require any earned income to be disregarded when calculating a person's contribution towards the cost of their care and support services, if any. This reflects a public policy decision to encourage and enable those who wish to stay in or take up employment to do so and was made at the time of drafting the regulations. Despite this disregard being required by law, the Regulations were not considered in the judgment. Some legal opinion considers this a failing and the case wrongly decided for this and other reasons.
4. Whatever legal opinion might be, until overturned by the courts the decision remains good law and local authority monitoring officers have been asked to review their charging policy for social care and support in force and to consider whether any changes should be made.
5. Although local authorities have a discretion in relation to most social security benefits as to whether or not they are fully taken into account, the combined effect of decisions made under Norfolk's charging policy unfortunately gave rise to an unintended and unforeseen consequence of risk of falling foul of discrimination and equality legislation.
6. Mr Justice Griffiths concluded that Norfolk had "exercised its discretion to charge SH the maximum permissible (disregarding only those elements it is required to disregard by law)" and that alongside proposing to apply only the statutory minimum income guarantee the combined effect meant that proportionately more of SH's income was taken into account when calculating her contribution. This caused SH to be at a disadvantage compared to other service users that Norfolk was unable to justify.
7. The judge found that SH was at a distinct disadvantage being severely disabled and unable to work as against her peers being charged for care services and who are also disabled but able to work. Not having earned income that could be disregarded SH found herself in the position of having proportionately more of her income taken into account than a working disabled person allowed to keep their earnings. The proposed application of the minimum statutory minimum income guarantee would aggravate the disadvantage that had arisen. The judge considered that this was discriminatory and put her on a less equal footing to other disabled people being charged for care services particularly as her need for care and support was likely to be greater by reason of the limitations of her disability.

8. Mr Justice Griffiths also considered that Norfolk had not demonstrated compliance with the government's guidance (paragraph 8.46 & 8.47) that a local authority should consider how to protect a person's income. "The government considers that it is inconsistent with promoting independent living to assume, without further consideration, that all of a person's income above the minimum income guarantee (MIG) is available to be taken in charges (paragraph 8.46) and "Local authorities should therefore consider whether it is appropriate to set a maximum percentage of disposable income (over and above the guaranteed minimum income) which may be taken into account in charges." (paragraph 8.47).
9. This reflects also the public sector equality duty of the County Council in the exercise of its functions under Section 149 of the Equality Act 2010 to have regard to eliminate discrimination victimisation, harassment etc, advance equality of opportunity between those who have a protected characteristic such as disability and those who do not and to foster good relations between those who have a protected characteristic and those who do not.
10. Norfolk County Council decided not to appeal the judgement but have made interim changes to its policy to mitigate the effects of unintended discrimination. These included disregarding the difference in the amount received under the Standard Rate and the Enhanced Rate of the Daily Living Component of Personal Independence Payment and not implementing the proposed reduction in the rate of minimum income guarantee.