This case concerned the provision made for those with disabilities, in the April 2011 budget of Birmingham City Council (the Council). The applicants were four disabled people living in Birmingham. An earlier hearing had dealt with the Council’s Business Plan and its Adult Social Care policy. This application dealt with the Council’s Budget allocation for disabled assistance for 2011/2012.

The Business Plan and Adult Social Care Policy had indicated a change in the eligibility criteria which determined, in relation to a particular need or needs, whether the Council would provide specific support to meet the need or needs in question. National guidance provided for needs to be assessed so as to place them into one of four bands of increasing severity – low, moderate, substantial or critical. Prior to 2011/12 the Council had provided support to meet those needs which were assessed to be either substantial or critical. The decisions under challenge approved a prospective change under which individual budgets would be funded only to meet those needs which were assessed to be critical. The plaintiffs argued this prospective change was unlawful as a result of:

i) a failure by the Council to have due regard to the disability equality duty pursuant to the Disability Discrimination Act 1995 at section 49A;

ii) a failure by the Council to ‘ask itself the right questions’ in the Tameside sense – a reference to what was said by Lord Diplock in Secretary of State for Education and Science v Tameside MBC [1977] AC 1014 at 1065B; and

iii) the consultations leading to these decisions (a) failing to comply with the common law standard for consultations established by the courts and (b) breaching the procedural requirements of Article 8 of the European Convention on Human Rights.

All four individual applicants were described by His Honour as ‘severely disabled’. The National Health Service and Community Care Act 1990 (NHSCCA) had introduced the concept of care in the community. The basic legal framework for community care services is set out in section 47(1) of NHSCCA which states:

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

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

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

Councils are required to take into account their resources, local expectations and local costs. However, when carrying out assessments of need and making service provision decisions, local authorities also have a duty to act under national guidance. In February 2010, a new national guidance, Prioritising Care, replaced the 2007 guidance, Fair Access to Care Services (FACS). In addition, the Disability Rights Commission (DRC) had produced a statutory code of practice The Duty to Promote Disability Equality which does not have the force of law but had also to be taken into account by public authorities and the courts.

Between 2007 and 2010, the issues of prioritising care, encouraging choice and investing in prevention and well-being came to the forefront of the caring for the disabled agenda. These were ‘to produce better outcomes for people at lower overall cost’. For the Birmingham City
Council, this became a proposal to remove care services for disabled people with ‘substantial’ needs.

The Council’s business plan, including its 2011/2012 budget, was due to be decided upon at a meeting of the full Council on 1 March 2011. The proposed business plan was set out in a document entitled ‘Council Business Plan 2011+’. The main issue in this document was that the Council had to reduce its annual expenditure by over £300m within the next three to four years, owing to severe cut-backs in public services generally because of the parlous state of the overall UK budget and financial system. The motion seeking that the Business Plan 2011+ be approved set out the revenue budget calculations which were proposed. After allowing for income and use of financial reserves, the budget requirement for 2011/12 was identified as £1,023,492,720. Of this, £691,205,843 would be met from redistributed non-domestic rates and Revenue Support Grant. The balance of £332,286,877 would need to be recovered by way of council tax. This would result in a basic amount of Council Tax for City Council services for the financial year commencing 1 April 2011 being set at £1,113,667.

The meeting of 1 March approved the Business Plan and Budget with only minor amendments. The result of this Budget was that at least 11,000 individuals would be affected by the cuts in care provision and about 3,500 of those would have no care package whatsoever. The Budget also removed £2.4 million from packages supporting people with mental health difficulties and learning difficulties, with that figure rising to £6.3 million by 2014/15.

His Honour observed that there was substantial case law on section 49A of the Disability Discrimination Act 1995 (DDA 1995). His Honour said:

It was common ground that, taken together with the Code of Practice and relevant guidance, its effect was accurately summarised [as follows]:

**To what decisions does the duty apply?**

i. The duty applies to all decisions taken by public bodies, including policy decisions and decisions on individual cases;

ii. The duty ‘complements’ specific statutory schemes which may exist to benefit disabled people;

iii. The disability equality duty is at its most important when decisions are taken which directly affect disabled people;

iv. The duty requires public authorities to take action to tackle the consequences of past decisions which failed to give due regard to disability equality;

v. The duty requires the circumstances of the full range of disabled people to be taken into account and may require certain groups of disabled people to be prioritised, for example on the basis that they experience the greatest degree of exclusion;

**What does the duty entail?**

vi. The equality duties impose ‘significant and onerous’ obligations on public bodies in the context of cuts to public services;

vii. ‘Due regard’ means specific regard by way of conscious approach to the specified needs;

viii. Due regard requires analysis of the relevant material with the specific statutory considerations in mind;

ix. General awareness of the duty does not amount to the necessary due regard, being a ‘substantial rigorous and open-minded approach’;
x. 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;

xi. The duty (and in particular DDA 1995 s 49A(1)(d)) may require positive steps to be taken if the circumstances require it to address disadvantage to disabled people;

xii. Thus, if changing a function or proposed policy would lead to significant benefits to disabled people, the need for such a change will carry added weight when balanced against other considerations;

xiii. Similarly, if a risk of adverse impact is identified, consideration must be given to measures to avoid that impact before fixing on a particular solution;

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;

When must ‘due regard’ be given to the duty?

xv. 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;

xvi. As such due regard to the duty must be an essential preliminary to any important policy decision, not a rearguard action following a concluded decision;

xvii. Put another way, consideration of the duty must be an integral part of the formation of a proposed policy, not justification for its adoption;

xviii. The duty is continuing and is engaged at all stages of a decision-making process, meaning that further consideration to the duty may be required where new information comes to light;

Who needs to pay ‘due regard’?

xix. The duty is non-delegable and is owed by primary decision-makers;

xx. Decision-makers must be properly informed of the nature and extent of the duty at the time relevant decisions are taken;

xxi. In particular, decision-makers need rigorous and accurate advice and analysis from officers, not ‘Panglossian’ statements of what officers think members want to hear;

What is the role of the Court?

xxii. The Court must review whether ‘due regard’ has been paid, not merely consider whether the absence of due regard was Wednesbury unreasonable.

His Honour went on to consider whether section 49A of the DDA 1995 had been complied with. The issues he considered were:

(1) the consideration given by the Council for the purposes of section 49A to the proposal that substantial needs should no longer be eligible needs, and instead eligibility would arise only for those needs which were assessed to fall into the critical band.

(2) consideration for the purposes of section 49A of other aspects of the proposed changes to the provision of adult social care;

(3) general administrative law principles of illegality as a ground of challenge;

(4) alleged failures of consultation; and

(5) human rights considerations.
After a detailed consideration of grounds (1) and (2), and a brief discussion of grounds (3) and (4), His Honour held that the challenge to the Council’s decision to cut back care to the disabled should succeed. He said:

Thus I conclude that there was a failure...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...working under pressure of time and resources...for them disability discrimination – or the promotion of disability equality – was not, discretely, a major feature, because virtually the whole of their work was directed towards combating its effects and seeking to advance those who suffer from it. The combination of these factors, I believe, may well have led them to lose sight of what section 49A required in the context of something as potentially devastating as a move to 'critical only'.

His Honour added that this decision was based on only grounds 1 to 4 (above), and that relevant articles of the European Convention on Human Rights did not add anything of substance to the heads of challenge already advanced.

The case may be viewed at: http://www.bailii.org/ew/cases/EWHC/Admin/2011/1147.html

Implications of this case

Ordinarily courts do not interfere in decisions by councils about prioritisation of resources. in this case, His Honour said that 'the role of the court is to assess whether the Council has complied with its duty to pay "due regard" to the matters identified in [section 49A]', and not to make a decision about the application of resources. Nevertheless, that is the effect of this decision, because, in a situation where £300 million still needs to be saved, it requires the Council to prioritise budget allocations to the needs of the disabled at the expense of other services offered by the Council.