

R (Bracking) and Others v Secretary of State for the Department of Work and Pensions

Intervener: Equality & Human Rights Commission

The legal challenge to the Government decision to close the Independent Living Fund

This claim for judicial review was brought by five disabled claimants to challenge the decision of the DWP to close the Independent Living Fund in 2015.

The ILF is a body of the DWP and funded by it, but under the management of independent trustees. Since it was created in 1988 it has helped many thousands of disabled people to move out of institutional care and live independent lives. The ILF provides a ring-fenced budget specifically for the independent living needs of the most severely disabled people in the UK, enabling them to live in the community, to work, and to play an active part in their community as full citizens. It enables disabled people to control the way they use the funds and it currently provides support to some 19,000 people, including the claimants.

The ILF system was set up in recognition of the fact that people with high support needs are at high risk of social exclusion and face particular barriers to maintaining independent living and working, and that their needs in this regard were not adequately addressed by council provision with its primary focus on meeting basic needs. To be eligible, people must already receive a substantial care package from local authority social services, but ILF funding provides a top-up for those with high support needs, which ILF users report can mean the difference between basic survival and having a real life. The system provides national consistency for this group of people, and is 'portable' between different areas should users need to move, ensuring that they are protected from variations in council care provision based on local funding considerations and competing priorities.

In 2010 ILF Trustees were forced to temporarily close the Fund to new applicants because the DWP had reduced the amount of funding provided. The DWP subsequently announced that it intended to keep the Fund permanently closed to new applicants, and on 18 December 2012 announced its decision to close the Fund completely in 2015, leaving all those who would previously have been eligible to rely solely on local authority adult care services. This is at a time when the funding for councils is being dramatically reduced and many authorities are cutting services for disabled people. It was this decision-making process that was the subject of the legal challenge.

Prior to the December 2012 decision the DWP carried out a consultation on the closure proposal. It did not consult on any other options. The consultation ran from July to October 2012. The consultation paper proposed that ILF funding responsibilities would be 'devolved' to local authorities after 2015 so that the people currently receiving ILF support would, in future, be assessed and supported by social services departments and only receive funding for care from them. However, it did not say how much funding would be 'devolved' or if the funding would be ring-fenced, to ensure that it was spent on supporting those people whom

the ILF was set up to protect, or even on care provision at all. The DWP said that it could not assess the impact on disabled people until after the consultation had ended.

Under the Equality Act 2010 public bodies, including government departments, must have “due regard” to certain equality principles when they make decisions and develop policies. This is the “public sector equality duty” and it applies when decisions and policies are likely to affect a group of people with a protected characteristic. Disability is a protected characteristic. The public sector equality duty in the Equality Act builds on and develops previous anti-discrimination legislation including the Disability Discrimination Act. Under this duty, public bodies must have due regard to the need to eliminate discrimination and advance equality of opportunity for disabled people. The Equality Act goes on to specify three distinct elements involved in having due regard to the need to advance equality of opportunity:-

- the need to remove or minimize disadvantages suffered by disabled people,
- the need to take steps to meet the needs arising from their disabilities, and
- the need to encourage disabled people to participate in public life and other activities where their participation is disproportionately low.

The Act makes clear that public bodies must give due regard to each of these factors in all that they do.

In order to be in a position to give due regard to the relevant considerations, the DWP needed to take steps to find out how the proposal would affect ILF users and other disabled people. Consultation can be one part of the process of gathering information but is not necessarily enough on its own. Because of how important the ILF has been in the lives of so many severely disabled adults, the claimants argued that there was a very strong duty on the DWP to find out full information about the likely impact, including asking the right questions and keeping an open mind. The DWP also needed to gather information to enable it to consider whether the purpose of the proposal justified the likely impact, and to consider whether there were alternatives that could avoid or mitigate the adverse impact. The claimants’ case was that the DWP had acted unlawfully in failing to gather the right information for the Minister to consider, and also in the way that the decision was ultimately made in light of the information that was available from the consultation and other sources.

The claimants also argued that as part of her task in considering the factors required by the public sector equality duty, the Minister failed to take account of provisions within the UN Convention on the Rights of Persons with Disabilities (UNCRPD). This was ratified by the UK in June 2009 and includes a number of important provisions which must be taken into account in all Government decision-making that has a particular impact on disabled people. It includes Article 19 which contains the right for disabled people:



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‘to live in the community with choices equal to others ... [and] to choose their place of residence ... on an equal basis with others and ... not [to be] obliged to live in a particular living arrangement.’

In announcing the closure decision in December 2012, the Government made clear that whatever funding may be ‘devolved’ to local authorities would not be ring-fenced.¹

The Equalities and Human Rights Commission intervened in the case to advise the court on how the public sector equality duty should have been discharged by the DWP. Their submissions also explained how this should have been informed by Article 19 and other provisions of the UNCRPD, in order for the Government to meet its international obligations under the Convention.

The matter came before the High Court in March 2013 and was considered by Mr Justice Blake, who upheld the Government’s decision, accepting its arguments that it had carried out a lawful consultation and applied the equality duties properly in making the decision.

The claimants sought and obtained permission to appeal and the case was considered at a hearing in October 2013 before three Court of Appeal judges, Lords Justice Elias, McCombe and Kitchin. The court heard argument for one and a half days and decided that Mr Justice Blake had been wrong to conclude that the Minister had complied with the public sector equality duty: they held that the decision was therefore unlawful, quashed it and allowed the appeal.

A written copy of the judgment is available on the websites of the solicitors instructed: Deighton Pierce Glynn at www.deightonpierceglyn.co.uk and Scott-Moncrieff & Associates at www.scomo.com.

The Court found that the Minister was not properly briefed on the nature of the public sector equality duty in relation to disabled people and there was no evidence that she had applied it consciously, in substance, with rigour and with an open mind as the law requires. The Court did not accept that the consultation process was so flawed as to be unlawful in itself, but the Minister had not read the full responses and the summary given to her by officials:-

¹ In the Government’s published response to the consultation it was stated that “in their response to the consultation, most local authorities said they would be strongly opposed to a ring fence around this funding” but this was completely untrue. Not one of the local authority responses obtained by the Claimants under the Freedom of Information Act expressed opposition to ring fencing; 33 out of 80 were in favour of ring-fencing or suggested it should be considered and several authorities expressing qualified support indicated that their position depended on whether the funding would be ring fenced. The rest made no comment about ring fencing.

'did not give to her an adequate flavour of the responses received indicating that independent living might well be put seriously in peril for a large number of people'. (leading judgment of Lord Justice McCombe)

The Court emphasised the very specific requirements of the duty that the Minister had failed to properly consider: the focus on the need to advance equality of opportunity, the need to minimise disadvantage and the need to encourage independent living and participation in public life and other activities. The judgment made clear that, irrespective of austerity or *'other pressing circumstances of whatever magnitude'*, Parliament intended each of these considerations need to be *'placed at the centre of formulation of policy by all public authorities ... an integral part of the mechanisms of government'*.

Other than a recommendation by an official in a briefing note that the Minister should read the Equality Impact Assessment and Impact Assessment documents in order to *'comply with our public sector equality duty'* and *'ensure we do not increase the likelihood of a successful claim'*, Lord Justice McCombe held that:

'...there is nothing to identify a focus upon the precise provisions of the Act that seemed to the Minister and her officials to be engaged, what precise impact was envisaged to persons potentially affected and what conclusion was reached in the light of those matters... this was not enough'.

The Court also agreed that there was no evidence that the Minister had in any way considered the Government's obligations under Article 19 and other provisions the UNCRPD as they informed the public sector equality duty.

It remains to be seen whether the Government will seek to revisit the idea of closing the ILF; however it confirmed in the course of proceedings that any preparatory steps were at an early stage and could be reversed if necessary. Any fresh decision would require the Government to go back to the drawing board, properly assess the impact the decision will have on the lives of ILF users with regard to the factors in the equality duty, and consider whether it is justified or a less damaging alternative is possible. As Elias says, the duty does not prevent the Government from taking difficult decisions like this but it does mean that they have to confront the consequences of such a decision and he makes reference to

'the inevitable and considerable adverse effect which the closure of the fund will have, particularly on those who will as a consequence lose the ability to live independently'.

Paris L'Amour, one of the claimants, has described the judgment as *'an amazing breakthrough and an incredible outcome'*. However the claimants are not just seeking to preserve the ILF for the existing users but are calling on the Government to recognise the vital and effective role the ILF plays, and to restore the previous level of funding so that ILF can be re-opened to applications from all those in need of this support.



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The judgment is of major importance for all disabled people and will force the Government to think again about how it funds care for severely disabled people so they can maintain their independence throughout their lives.

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