Neutral Citation Number: [2020] EWCA Civ 502

Case No: C1/2019/1914

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Swift

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/04/2020

Before:

LORD JUSTICE BEAN
LORD JUSTICE NEWEY
and
LORD JUSTICE SINGH

- -

Between:

The Queen (on the application of Kirstine Drexler, by her father and litigation friend, Stefan Drexler)	**Appellant**
- and -	
Leicestershire County Council	**Respondent**

- -
- -

Jenni Richards QC and Ciar McAndrew (instructed by **Irwin Mitchell**) for the **Appellant**
Peter Oldham QC and Zoe Gannon (instructed by **Legal Services, Leicestershire County Council**) for the **Respondent**

Hearing dates: 20-21 February 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 a.m. on Tuesday, 7 April 2020.

Lord Justice Singh:

Introduction

1. The Appellant appeals against the order of Swift J of 19 July 2019, by which he dismissed the Appellant's challenge to the Respondent's decision, taken by its Cabinet on 9 March 2018, to amend its Special Educational Needs ("SEN") Home to School/College Transport Policy for the 2019/2020 academic year ("the SEN Policy"). Limited permission to appeal was granted by Males LJ on 14 November 2019.

Factual Background

2. The hearing before this Court took place before the coronavirus pandemic changed life in this country, for example resulting in the closure of schools. I will therefore summarise the factual background as it was at the time of the hearing.

3. The Appellant was born on 2 June 2002 and is severely disabled. She attends a school for pupils with special educational needs. The school is some 13 miles away from her home. At present the Respondent (Leicestershire County Council or "the Council") provides her with home to school transport in a mini-bus for an annual contributory charge of £660 as hers is a non-low income family. The Appellant is taken to and from school in a minibus, which also transports other children.

4. The Appellant's journey to school is a 26-mile round trip: depending on traffic, the journey takes between 30 and 45 minutes each way. In addition it takes about 10 minutes at each end of the journey to load or unload the Appellant, and to settle her. In evidence which is before the Court her father explains that looking after his daughter is tiring, and is a full time commitment. He is her primary carer. His wife works full-time. For now, he uses the time while his daughter is at school and travelling to and from school, to complete all other household tasks he has to do, both for the Appellant and her two siblings. This time provides a form of respite for him. In the event that the Council-provided transport is withdrawn, he will spend up to three hours each day taking his daughter to and from school.

5. The Appellant challenges the Respondent's decision, taken by its Cabinet at a meeting on 9 March 2018. At that meeting, the Respondent's Cabinet considered a report prepared by its Director of Environment and Transport. That report proposed revisions both to the Respondent's Mainstream Home to School Transport Policy and to the SEN Policy. The Cabinet resolved to accept the changes proposed, to come into effect from the beginning of the 2019-2020 academic year. The Respondent subsequently (after the hearing before the High Court had taken place but before judgment was given by Swift J) decided to delay implementation of the revisions to the policies until the beginning of the 2020-2021 academic year.

6. The SEN Policy governs the way in which the Respondent provides home to school transport for children and young people ("CYP") with SEN. Para. 3.1 of the SEN Policy states:

> "The assistance provided by the [Respondent] will be provided in the most cost effective and appropriate way whilst meeting the child's assessed needs. It may be provided in a number of ways, including taxi, bus and public transport, PTB (Personal Transport budget) and concessionary travel passes as appropriate. Independent travel training may also be provided. All eligibility and travel assistance arrangements will be reviewed annually and at times of transition e.g. moving from primary to secondary education; to ensure that the basis for entitlement continues and the method of travel assistance remains appropriate."

7. The SEN Policy entitles pupils aged 5-16 to free home to school transport if they attend the school designated by the Respondent as appropriate to meet their needs (or some nearer school) and the home to school distance exceeds a set threshold: see the SEN Policy, paras. 3.2-3.3. Students aged 19 or over who attend a further education college or free-standing sixth form college are also entitled to free home to school transport if the Respondent deems transport to be necessary to facilitate attendance at the relevant institution: see the SEN Policy, para. 9.3.

8. In respect of CYP such as the Appellant, who attend school, have SEN and are aged between 16 and 18 years old, the SEN Policy states that the Respondent has a discretionary power to provide transport assistance: see the SEN Policy, para. 8. Under the previous version of the SEN Policy, the Respondent commonly exercised that discretion by providing actual home to school transport to the Appellant and other pupils in her cohort. Under the revised version of the SEN Policy, however, the transport previously provided by the Respondent will, save in exceptional cases, be replaced by money payments known as Personal Transport Budgets ("PTBs"): see the SEN Policy, para. 8.3. In most cases the amount of the PTB will be insufficient to cover the cost of providing the actual transport currently provided: see the judgment of Swift J, at paras. 36 and 63.

9. Appendix 1 to the revised SEN Policy takes the form of a list of Frequently Asked Questions. In this section it is noted that Council-provided taxis, buses and minibuses will, save in exceptional cases, cease to be provided, and will be replaced by PTBs.

10. Under the present arrangements, the transport provided to CYP such as the Appellant is not provided free of charge. Save for children of low-income families, the Council makes a charge of £660 per annum. The £660 charge will continue to apply under the new policy: it will apply in exceptional cases where the Respondent provides transport and will also apply when a PTB is provided, in that the Council will reduce the PTB payment by £660.

11. Applications for home to school transport assistance under the revised SEN Policy were invited to be made by 31 March 2019. The Appellant applied to the Respondent for transport assistance and, on her application form, the Appellant's father contended that her case was exceptional, so that she should continue to receive actual transport rather than a PTB. In a decision letter dated 31 May 2019 the Respondent determined that the Appellant's case was not exceptional and therefore she would be granted a

PTB when the revised SEN policy comes into effect. As mentioned above, the Respondent has decided to delay implementation of the revisions to the SEN Policy until the beginning of the 2020-2021 academic year.

Material provisions of the Human Rights Act 1998

12. Section 6(1) of the Human Rights Act 1998 ("HRA") makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. Subsection (2) provides that subsection (1) does not apply to an act if (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions. It was common ground in the present appeal that there is no relevant legislation within the meaning of subsection (2).

13. The relevant Convention rights are set out in Sch. 1 to the HRA. The Appellant relies upon the equality provision in Article 14, read with the right to respect for private and family life in Article 8 and the right to education in Article 2 of the First Protocol ("A2P1"). The first sentence of A2P1 provides:

> "No person shall be denied the right to education."

14. Although age is not one of the express grounds mentioned in Article 14, it is common ground before this Court that it is an "other status" and therefore in principle falls within Article 14.

Relevant education legislation

15. Section 8 of the Education Act 1996 ("the 1996 Act") defines a person of "compulsory school age" as a person who attains the age of 5 until the age of 16. That is an over-simplification of the statutory definition but will suffice for present purposes.

16. Section 2(2) of the 1996 Act defines "secondary education" to mean both (a) full time education suitable to the requirements of pupils of compulsory school age and also (b) full time education suitable to the requirements of pupils who are over compulsory school age but under the age of 19, which is provided at a school at which education within the meaning of para. (a) is also provided.

17. Under section 14 of the 1996 Act, a local authority in England has a duty to secure that sufficient schools for providing, amongst other things, education that is secondary education by virtue of section 2(2)(a) are available for their area. It is important to appreciate that that provision refers only to para. (a) of section 2(2).

18. In contrast, section 15ZA provides that a local authority in England must secure that enough suitable education and training is provided to meet the reasonable needs of persons in its area who are over compulsory school age but under the age of 19. Further, section 15ZC provides that a local authority in England must encourage participation in education and training by persons in its area who are within section 15ZA(1)(a) or (b); and must also encourage employers to participate in the provision of education and training for such persons. These provisions were added by the Apprenticeships, Skills, Children and Learning Act 2009.

19. Section 444 of the 1996 Act provides, in subsection (1), that if a child of compulsory school age who is a registered pupil at a school fails to attend regularly at the school, his parent is guilty of an offence. Subsection (3B) provides that the child shall not be taken to have failed to attend regularly at the school if the parent proves that (a) the local authority had a duty to make travel arrangements in relation to the child under section 508B(1) for the purpose of facilitating the child's attendance at the school and has failed to discharge that duty, or (b) the local authority has a duty to make travel arrangements in relation to the child by virtue of subsection (2)(c) of section 508E (School Travel Schemes) for the purpose of facilitating the child's attendance at the school and has failed to discharge that duty.

20. Section 508B of the 1996 Act needs to be set out more fully and, so far as material, provides:

> "(1) A local authority in England must make, in the case of an eligible child in the authority's area to whom subsection (2) applies, such travel arrangements as they consider necessary in order to secure that suitable home to school travel arrangements, for the purpose of facilitating the child's attendance at the relevant educational establishment in relation to him, are made and provided free of charge in relation to the child.
>
> (2) This subsection applies to an eligible child if–
>
> (a) no travel arrangements relating to travel in either direction between his home and the relevant educational establishment in relation to him, or in both directions, are provided free of charge in relation to him by any person who is not the authority, or
>
> (b) such travel arrangements are provided free of charge in relation to him by any person who is not the authority but those arrangements, taken together with any other such travel arrangements which are so provided, do not provide suitable home to school travel arrangements for the purpose of facilitating his attendance at the relevant educational establishment in relation to him.
>
> (3) 'Home to school travel arrangements', in relation to an eligible child, are travel arrangements relating to travel in both

> directions between the child's home and the relevant educational establishment in question in relation to that child.
>
> (4) 'Travel arrangements', in relation to an eligible child, are travel arrangements of any description and include–
>
> (a) arrangements for the provision of transport, and
>
> (b) any of the following arrangements only if they are made with the consent of a parent of the child–
>
> (i) arrangements for the provision of one or more persons to escort the child (whether alone or together with other children) when travelling to or from the relevant educational establishment in relation to the child;
>
> (ii) arrangements for the payment of the whole or any part of a person's reasonable travelling expenses;
>
> (iii) arrangements for the payment of allowances in respect of the use of particular modes of travel.
>
> (5) 'Travel arrangements', in relation to an eligible child, include travel arrangements of any description made by any parent of the child only if those arrangements are made by the parent voluntarily.
>
> …
>
> (9) Schedule 35B has effect for the purposes of defining 'eligible child' for the purposes of this section.
>
> …"

21. As will be apparent, section 508B(9) cross-refers to Sch. 35B for the purpose of defining "eligible child" in this context. Para. 1 of Sch. 35B provides that an "eligible child" means a child who falls within any of paras. 2-7 or 9-13 of that Schedule. Of relevance to the present case is para. 2, which provides that a child falls within that paragraph if he is of compulsory school age and is a child with special educational needs or a disabled child. Since a person in the Appellant's position, who is over the age of 16, is not of compulsory school age, the provisions of section 508B do not therefore apply, even though she is disabled and does have special educational needs.

22. In relation to the 16-18 age group (sixth form age), the relevant statutory provisions are to be found in section 509AA of the 1996 Act, which, so far as material, provides:

> "(1) A local authority in England shall prepare for each academic year a transport policy statement complying with the requirements of this section.

(2) The statement shall specify the arrangements for the provision of transport or otherwise that the authority consider it necessary to make for facilitating the attendance of persons of sixth form age receiving education or training—

(a) at schools,

(b) at any institution maintained or assisted by the authority which provides further education or higher education (or both),

(c) at any institution within the further education sector,

(ca) at any 16 to 19 Academy, or

(d) at any establishment (not falling within paragraph (b) (c) or (ca)) at which the authority secures the provision of education or training under section 15ZA(1) .

(3) The statement shall specify the arrangements that the authority consider it necessary to make for the provision of financial assistance in respect of the reasonable travelling expenses of persons of sixth form age receiving education or training at any establishment such as is mentioned in subsection (2).

…

(7) The authority shall—

(a) publish the statement, in a manner which they consider appropriate, on or before 31st May in the year in which the academic year in question begins, and

(b) make, and secure that effect is given to, any arrangements specified under subsections (2) and (3).

(8) Nothing in this section prevents a local authority from making, at any time in an academic year, arrangements—

(a) which are not specified in the transport policy statement published by the authority for that year, but

(b) which they have come to consider necessary for the purposes mentioned in subsections (2) and (3).

…"

21. Section 509AB of the 1996 Act deals more specifically with disabled persons who are of sixth form age and, so far as material, provides:

> "(1) A statement prepared under section 509AA shall state to what extent arrangements specified in accordance with subsection (2) of that section include arrangements for facilitating the attendance at establishments such as are mentioned in that subsection of disabled persons and persons with learning difficulties or disabilities.
>
> (2) A statement prepared under that section shall—
>
> (a) specify arrangements for persons receiving full-time education or training at establishments other than schools maintained by the local authority which are no less favourable than the arrangements specified for pupils of the same age attending such schools, and
>
> (b) specify arrangements for persons with learning difficulties or disabilities receiving education or training at establishments other than schools maintained by the authority which are no less favourable than the arrangements specified for pupils of the same age with learning difficulties or disabilities attending such schools.
>
> …"

23. It will be seen therefore that section 509AA of the 1996 Act requires a local authority to prepare, for each academic year, a transport policy statement complying with the requirements of that section. The statement shall specify the arrangements for the provision of transport or otherwise that the authority considers it necessary to make for facilitating the attendance of persons of sixth form age receiving education or training at relevant institutions.

24. When section 508B is contrasted with section 509AA, it is clear that the decision which Parliament has made in enacting the primary legislation concerned is that transport itself need not be provided to those who are in the 16-18 age group, even if they have special educational needs.

25. Section 2 of the Education and Skills Act 2008 ("the 2008 Act") provides that a person to whom that part of the Act applies, that is young persons aged 16-18, must:

(a) be participating in appropriate full time education or training;

(b) be participating in training in accordance with a contract of apprenticeship or an apprenticeship agreement; or

(c) both

(i) be in full time occupation and

(ii) participate in sufficient relevant training or education in each relevant period.

26. Section 4(1) of the 2008 Act provides that "appropriate full time education or training" means full time education or training which is suitable for the person, having regard, among other things, to any special educational needs which the person may have.

27. Section 10 of the 2008 Act provides that a local authority in England must ensure that its functions are exercised (so far as they are capable of being so exercised) so as to promote the effective participation in education or training of persons belonging to its area to whom that part of the Act applies with a view to ensuring that those persons fulfil the duty imposed by section 2.

28. Section 68 of the 2008 Act provides, in subsection (1), that a local authority in England must make available to young persons and relevant young adults for whom it is responsible such services as it considers appropriate to encourage, enable or assist the effective participation of those persons in education or training.

29. Section 12 of the 2008 Act provides that a local authority in England must make arrangements to enable it to establish (so far as it is possible to do so) the identities of persons belonging to its area to whom that part of the Act applies but who are failing to fulfil the duty imposed by section 2.

30. The 2008 Act then goes on to make provision for enforcement of the duty imposed by section 2, by a system of notification of non-compliance to be served by a local authority, with the possibility of an appeal and potentially leading to the imposition of criminal sanctions: see sections 45-60. Very importantly, however, it should be noted that those provisions have not been brought into force. Section 51, if it were brought into force, would make it an offence for a person to whom an attendance notice has been given to fail, without reasonable excuse, to comply with the requirements of such a notice. As things stand there is therefore nothing corresponding to the offence which can be committed by the parent of a child under section 444 of the 1996 Act.

31. Submissions for the Appellant also placed reliance on section 42 of the Children and Families Act 2014 (the "2014 Act"). This applies where a local authority maintains an education, health and care ("EHC") plan for a child or young person. An EHC plan means a plan within section 37(2): see the interpretation section, section 83(1). Section 42(2) provides that the local authority must secure the specified special educational provision for the child or young person.

32. I do not consider that section 42 takes matters further in the present appeal. It is common ground that there can sometimes be cases in which an EHC plan includes transport as a specific provision which must be made. However, that is not the case here. On the facts of the present case, the Respondent has put in place an EHC plan in respect of the Appellant (issued on 19 August 2016) but that plan does not include transport as either one of her needs or as part of the special educational provision to be made for her.

The judgment of Swift J

33. In the High Court, the Appellant challenged the revised SEN Policy on the basis that it:

    i) unlawfully discriminates, on grounds of age, between CYP with SEN aged 16-18 such as the Appellant, and pupils and students with SEN who are aged 5-16 or 19+, contrary to Article 14 ECHR read with Article 8 and/or A2P1;

    ii) unlawfully discriminates, on grounds of disability, against disabled CYP aged 16-18 when compared to non-disabled CYP of the same age, again contrary to Article 14 read with Article 8 and/or A2P1; and

    iii) had been adopted contrary to the public sector equality duty ("the PSED") in section 149 of the Equality Act 2010 ("the EA 2010").

34. It is only the first of those grounds which is still relevant on this appeal, as permission to appeal was refused by Males LJ in relation to the other grounds. Swift J addressed that ground at paras. 30-48 of his judgment.

35. Before Swift J the Respondent submitted that the availability of home to school transport did not fall within the ambit of A2P1, with the consequence that there was no scope for the Appellant to assert an Article 14 claim by reference to A2P1: the Judge considered this issue at paras. 23-28 of his judgment. He considered that there was a clear link between the provision of home to school transport and the right arising from the first sentence of Article 2: "No person shall be denied the right to education." It was said by the Judge that, where free school transport is provided, it must be provided in a manner that is free of unlawful discrimination contrary to Article 14. In addition, it was said by Swift J, at para. 29 of his judgment, that the presence or absence of Council-provided home to school transport would directly impinge upon the Appellant's family life, so that its provision fell within the ambit of Article 8.

36. With regard to age discrimination, Swift J held that the Respondent's transport policies did treat pupils aged 5 to 16 more favourably than those aged 16 to 18. Furthermore, he was satisfied that, for the purposes of Article 14, a difference based on age is a difference based on an "other status". The question then arose as to whether there was an objective and reasonable justification for this difference in treatment.

37. At para. 38, Swift J directed himself that the test for justification for a difference of treatment is the well-known four-fold test set out in *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 39; [2014] AC 700: see in particular paras. 20 (Lord Sumption JSC) and 74 (Lord Reed JSC). Swift J posed the four questions which need to be addressed as follows: (1) is the difference in pursuit of a sufficiently important objective? (2) is there a rational connection between the difference and the objective? (3) could a less intrusive measure have been used without unacceptably compromising the objective? (4) having regard to all these matters and to the severity of the consequences is the difference of treatment such that a fair balance has been struck? That last question is a reference to the well-established principle in the European Court of Human Rights

that throughout the Convention there is a need to strike a fair balance between the rights of the individual and the general interests of the community.

38. After the hearing had taken place before Swift J but before he gave judgment, the Supreme Court handed down its judgment in *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21; [2019] 1 WLR 3289. In that case, having considered earlier decisions of the Supreme Court, Lord Wilson JSC said, at para. 65:

> "… at any rate in relation to the Government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question is whether it is manifestly without reasonable foundation. Let there be no future doubt about it."

39. Written submissions were made by the parties about that judgment and Swift J was able to take account of them at para. 39 of his judgment. He said, on the authority of that decision, that the approach to the level of review to be applied when addressing the fourth question (fair balance) was the "manifestly without reasonable foundation" approach. Applying that approach, at para. 40, Swift J held that the difference in treatment did strike a fair balance between the interests of the 16 to 18 age group and the general interest reflected in the provisions of the 1996 Act requiring home to school transport to be provided for pupils of compulsory school age.

40. The second part of the age discrimination challenge before Swift J compared the position of pupils aged 16 to 18, with that of pupils aged 19+. He held that such difference as might exist was justified by reference to the obligation imposed on the local authority by section 508F(4) of the 1996 Act, which governs provision of transport for adult learners, excluding those of sixth form age, and provides that, if such transport is provided, it must be free of charge.

Grounds of Appeal

41. The Appellant was granted permission to appeal on Ground 1 only but that ground has three parts to it. The Appellant submits that:

> "The learned Judge erred in:
>
> (a) Applying the 'manifestly without reasonable foundation' standard when assessing whether the age discrimination arising from the Defendant's SEN Policy is justified (judgment, §39).
>
> (b) Finding that such age discrimination was justified, to any standard, solely by reference to the objective of compliance by the Defendant with its legal obligations under the Education Act 1996, to the exclusion of other relevant statutory provisions (judgment, §40).

> (c) Concluding that such age discrimination was justified notwithstanding the existence of numerous flaws in the SEN Policy which clearly demonstrate the Policy to be unreasonable and unjustified (judgment, §59-63)."

Submissions for the Appellant

42. We heard submissions on behalf of the Appellant from Ms Jenni Richards QC. She submits, under para. (a) of Ground 1, that the decision of the Supreme Court in *DA*, which holds that the relevant test is the manifestly without reasonable foundation test, and on which Swift J relied, is distinguishable on the basis that it was concerned with a challenge to a decision relating to a welfare benefit.

43. Under para. (b) of Ground 1, Ms Richards submits that any assessment of justification of the less favourable treatment of the 16-18 cohort which arises from the SEN Policy cannot solely rely on selective provisions of the 1996 Act, but rather must take account of:

    i) Part 1 of the 2008 Act;

    ii) Sections 42 and 83 of the 2014 Act;

    iii) Section 15ZA of the 1996 Act.

44. Under para. (c) of Ground 1 the existence of flaws in the SEN Policy is highlighted by the Appellant. It is submitted that Swift J erred as (i) it was open to him to consider the flaws as part of the assessment of justification in relation to age discrimination and such matters are clearly relevant to the questions of whether the revisions to the SEN Policy had a reasonable foundation, are proportionate in the strict sense, or strike a fair balance; or (ii) he was wrong to hold that the age discrimination could be justified notwithstanding the serious flaws which come close to rendering the SEN Policy irrational in key respects.

Submissions for the Respondent

45. We heard submissions on behalf of the Respondent from Mr Peter Oldham QC. Under para. (a) of Ground 1, he submits that Swift J was correct to apply the manifestly without reasonable foundation test in accordance with the authorities. He submits that that test is not confined to cases about welfare benefits.

46. Under para. (b) of Ground 1 Mr Oldham submits that Swift J was correct to decide that the legislation imposes on local authorities different transport obligations for three age groups (the 5-16 age group; the 16-18 age group and the 19+ group) in the 1996 Act. Further and in any event, even if local authorities could use different powers to provide transport, that difference remains, and is relevant to the determination of the fourth question asked in accordance with *Bank Mellat* (fair balance).

47. With regard to para. (c) of Ground 1, Mr Oldham submits that Swift J adequately considered the criticisms of information provided to parents. In addition, Swift J was entitled to dismiss the claim notwithstanding those criticisms. He decided that the Respondent had justified the discriminatory effect despite those criticisms and mentioned them only so that the Respondent could take them into account as he considered that they should give it "pause": see para. 63 of his judgment. This, submits Mr Oldham, is unsurprising. It will often be possible to say that an administrative policy may be improved, and often that it is a blunt instrument; but that does not mean that the balance struck by the policy is manifestly without reasonable foundation.

48. The Respondent also invites the Court to uphold Swift J's decision on the following additional or alternative grounds:

    i) If Swift J should have applied a more intrusive test than the manifestly without reasonable foundation one, the outcome would have been the same.

    ii) If Swift J failed to consider the statutory framework, the outcome would have been the same had he done so.

    iii) The facts fell outside the scope or ambit of A2P1 and Article 8 and the Judge was wrong to hold otherwise.

49. In addition, the Respondent's Notice raised a number of other alleged errors in Swift J's judgment, which included:

    i) That he was wrong to find that the Appellant was in a position analogous to that of a person who was of compulsory school age, and/or a person over the age of 18. The judgment does not deal with the issue but the judge rejected the Respondent's case on the point.

    ii) Swift J was wrong to criticise the 16-18 SEN policy as being insufficiently informative.

    iii) Swift J was wrong to decide that the claim could succeed where the Appellant's entitlement under the SEN policy had not been determined. An attack on the 16-18 SEN policy as a whole should have been determined by reference to authority establishing that the issue is whether the policy leads inevitably to an unlawful outcome, alternatively involves an unacceptably high risk of an unlawful outcome. The application of this test would have resulted in the claim failing.

50. These further alleged errors raised were not addressed either in the Respondent's skeleton argument or at the hearing before us, so I will say no more about them.

Ground 1(a)

51. As I have mentioned the Judge applied the recent decision of the Supreme Court in *DA* and said that the standard of review was the test of whether the impugned measure was "manifestly without reasonable foundation". Ms Richards submits that he was

wrong to do so. She submits that *DA* was concerned only with welfare benefits and is not of general application in all cases involving matters of social and economic policy. She submits that therefore the conventional proportionality test remains the appropriate standard to apply, by reference to the well-known fourfold test set out in cases such as *Bank Mellat*.

52. I do not accept that submission but, in any event, it seems to me that it does not make any material difference to the outcome of this case. Even if the standard of review is different from the manifestly without reasonable foundation test, and is the conventional proportionality test, it is clear from authorities decided by the House of Lords and Supreme Court that a suitable margin of judgement must be afforded to the decision-maker in a context such as the present.

53. There are three important principles which have potential relevance in this case. They may be related to each other but they should be kept distinct, at least for the purposes of analysis.

54. The first principle is the "margin of appreciation". Strictly speaking this is only a principle of international law and has no direct relevance in domestic law. It is a doctrine which is used by the European Court of Human Rights to respect the fact that the Council of Europe has 47 Member States, with many different cultures, traditions and legal systems. The European Court of Human Rights respects the fact that national institutions will often be better placed to make an assessment of whether, for example, a fair balance has been struck between the rights of the individual and the general interests of the community, since they have a closer understanding of conditions in their own country than an international court does or could have. The European Court of Human Rights has frequently said that the scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background: see e.g. *Fretté v France* (2002) 38 EHRR 438, at para. 40, which was cited by Lord Bingham of Cornhill in *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, at para. 39. As Lord Bingham also observed in that paragraph, a similar approach is to be found in domestic authority: see e.g. *R v Director of Public Prosecutions, ex p. Kebilene* [2000] 2 AC 326, at 381 in the opinion of Lord Hope of Craighead.

55. The second relevant principle is that not all grounds of discrimination are treated in the same way under Article 14. It is recognised in the jurisprudence both of the European Court of Human Rights and in domestic courts under the HRA that certain grounds of discrimination are "suspect", in particular race, sex, nationality and sexual orientation. These will therefore call for more stringent scrutiny than other grounds of discrimination. In the terminology used by the European Court of Human Rights, "very weighty reasons" will usually be required to justify what would otherwise be discrimination on such grounds: see e.g. *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] 1 AC 173, at paras. 15-17 in the opinion of Lord Hoffmann; and paras. 55-60 in the opinion of Lord Walker of Gestingthorpe. Lord Walker in particular drew on the terminology of "suspect" grounds which is to be derived from American jurisprudence on the Fourteenth Amendment to the US Constitution (the "equal protection" clause).

56. The third relevant principle is that the courts recognise that they are not well placed to question the judgement made by either the executive or the legislature in relation to

matters of public expenditure. This is both on the ground of relative institutional competence and on the ground of democratic legitimacy. The allocation of scarce or finite public resources is inherently a matter which calls for political judgement. This does not mean that the courts have no role to play but it does mean that they must tread with caution, affording appropriate weight and respect to the judgement formed by the executive or the legislature.

57. At the hearing in this appeal we were taken by the parties to a large number of authorities. It is important, however, not to lose sight of the fundamental principles which I have sought to outline earlier.

58. It is also important to bear in mind that, while this Court is bound by decisions of the Supreme Court and normally bound by its own decisions, care needs to be taken to ascertain precisely what was the *ratio* of an earlier case in order to see whether this Court is bound by it.

59. On behalf of the Appellant Ms Richards submits that the "manifestly without reasonable foundation" test is confined, on binding authority, to cases concerned with discrimination in the context of welfare benefits only. In that category can be placed the decisions of the Supreme Court in *Humphreys v HMRC* [2012] UKSC 18; [2012] 1 WLR 1545; *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449; *R (MA) v Secretary of State for Work and Pensions* [2016] UKSC 58; [2016] 1 WLR 4550; and *DA* itself.

60. That line of authority was in turn based on the decision of the Grand Chamber of the European Court of Human Rights in *Stec v United Kingdom* (2006) 43 EHRR 47. In that case, after referring to the concept of the "margin of appreciation" which is afforded to Contracting States in the application of the Convention, the Court said, at para. 52:

> "The scope of this margin will vary according to the circumstances, the subject-matter and the background. As a general rule, *very weighty reasons* would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is *'manifestly without reasonable foundation'*." (Emphasis added)

61. In support of those propositions the Court cited, at footnotes 30-31, two of its earlier decisions: *James v United Kingdom* (1986) 8 EHRR 123, at para. 46; and *National and Provincial Building Society v United Kingdom* (1998) 25 EHRR 127, at para. 80.

62. It is important to appreciate that the passages cited from those judgments were not about Article 14. They were about the right to peaceful enjoyment of possessions (in substance the right to private property) in Article 1 of the First Protocol ("A1P1"). It is also important to note that those cases were not concerned with welfare benefits but general measures of social and economic policy. *James* concerned the compatibility of the Leasehold Reform Act 1967 with A1P1. Article 14 was considered by the Court at paras. 75-77 of its judgment but the passage to which the Court referred in *Stec* (para. 46) is to be found in the part of the judgment which considered A1P1. Similarly, *National and Provincial Building Society* concerned changes in tax legislation. Although in that case there was consideration of Article 14, at paras. 84-91 of the judgment, the passage to which the Court referred in *Stec* (para. 80) is in the part of the judgment where the Court was considering A1P1 and not Article 14.

63. The test of "manifestly without reasonable foundation" was originally devised therefore in the context of interference by the state with property rights and was not concerned at that time with the principle of equal treatment under Article 14. Still less was it a test devised to deal only with cases about welfare benefits.

64. Ms Richards drew our attention to three decisions of the Supreme Court in which, she submits, that Court has rejected the "manifestly without reasonable foundation" test in Article 14 cases outside the context of welfare benefits. I will consider each case in turn.

65. The first decision is *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32; [2020] AC 1, in which it was held that the unavailability of civil partnerships to opposite sex couples who do not wish to marry, whereas they are available to same sex couples, was incompatible with Article 14. That, however, was a case concerned with a "suspect" ground of discrimination, namely sexual orientation. As Lord Kerr of Tonaghmore JSC observed at para. 32: "The margin of discretion available to the Government and Parliament in this instance, if it exists at all, must be commensurately narrow". Further, that was not a case involving the allocation of scarce financial resources.

66. The second case is *Gilham v Ministry of Justice* [2019] UKSC 44; [2019] 1 WLR 5905. In that case it was held that the fact that judges would not be able to claim protection under "whistleblower" legislation on the conventional definition of the word "worker" was incompatible with Article 14 and therefore an expanded meaning had to be given to that term in accordance with the strong obligation of interpretation in section 3 of the HRA.

67. Ms Richards relies in particular on the following observation of Lady Hale PSC, at para. 34:

> "…while it is well-established that the courts will not hold a difference in treatment in the field of socio-economic policy unjustifiable unless it is 'manifestly without reasonable foundation', *the cases in which that test - or something like it - has been applied are all cases relating to the welfare benefits system*… This case is not in that category, *but rather in the category of social or employment policy, where the courts have not always adopted that test*…" (emphasis added).

68. That case, however, concerned a situation in which the Supreme Court could discern no legitimate aim for the difference of treatment which was under challenge at all: see para. 36. Moreover, it was not a case concerned with the allocation of scarce financial resources. It does not therefore establish that the "manifestly without reasonable foundation" test cannot apply outside the context of welfare benefits.

69. The third case, which is closest, submits Ms Richards, to the present case, is *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; [2015] 1 WLR 3820. That was a case which arose in the context of education and specifically in the context of the student loan scheme for tertiary education. That scheme was held to be discriminatory on grounds of immigration status. Two members of the Court (Lords Sumption and Reed JJSC) dissented. They considered that the "manifestly without reasonable foundation test" was indeed applicable in that context: see paras. 74-79. The difficulty in ascertaining the *ratio* of the case is that the majority was divided. The principal judgment was given by Lady Hale JSC, with whom Lord Kerr JSC agreed. She rejected the "manifestly without reasonable foundation" test: see paras. 27-32. However, Lord Hughes JSC, who formed the third member of the majority of the Court, expressly declined to decide whether the applicable test was the "manifestly without reasonable foundation test" or some less stringent test: see para. 58. Furthermore, I would note that even Lady Hale accepted, at para. 32, that, since the context was one "concerned with the distribution of finite resources at some cost to the taxpayer", the court "must treat the judgments of the Secretary of State, as primary decision-maker, with appropriate respect."

70. In my view, therefore, there is no binding decision of the Supreme Court which requires this Court to hold that the "manifestly without reasonable foundation" test is inapplicable outside the context of welfare benefits.

71. In contrast, there are decisions of this Court which clearly have applied that test outside that context. One example is *R (Turley) v Wandsworth LBC* [2017] EWCA Civ 189; [2017] HLR 21, which concerned social housing. In giving the main judgment, Underhill LJ said, at para. 25, that he could see "no difference between access to social housing and access to welfare benefits. Both represent public resources – in the case of social housing a particularly scarce resource – the conditions for access to which must be pre-eminently a matter for political judgment." I respectfully agree and can see no relevant difference from the present context either. The underlying principle is not confined to "welfare benefits" but arises from the fact that certain decisions concern the allocation of scarce public resources.

72. Another example is *Simawi v Hackney LBC* [2019] EWCA Civ 1770, which also concerned public housing: see paras. 55-65 (Lewison LJ). I would accept that that passage was strictly *obiter* as it was not necessary to dispose of the appeal: see para. 55. Nevertheless, it is a recent consideration of the issue by this Court and expressly considered the decisions of the Supreme Court in *DA* and *Gilham* but concluded that the manifestly without reasonable foundation approach was not confined to welfare benefit cases.

73. A third case is *Langford v Secretary of State for Defence* [2019] EWCA Civ 1271; [2019] Pens. LR 21, which concerned the armed forces pension scheme but it has to

be acknowledged that this again was *obiter*, as the Court proceeded on the assumption that the applicable test was the manifestly without reasonable foundation one: see para. 54 (McCombe LJ).

74. Ms Richards also placed great reliance on the decision of the European Court of Human Rights in *Ponomaryov v Bulgaria* (2014) 59 EHRR 20. In that case the Court found there to be a violation of Article 14 read with A2P1 in circumstances where the applicants were charged fees for secondary education whereas children who were Bulgarian nationals or permanent residents were entitled to such education free of charge. I would note that, at para. 59, the Court was careful to say that it was not laying down any general principles, as it was considering "the very specific circumstances of this case"; and that therefore the Court would "have regard primarily to the applicants' personal situation." In my view, the case is also distinguishable from the present context because it concerned discrimination on a suspect ground (nationality) or something close to it (permanent residence) and because the Court's reasoning was clearly influenced by the societal interest in the integration of minorities: see paras. 52 and 57. Finally, I would note that, at para. 52, the Court again reiterated its frequent refrain that "states are usually afforded a wide margin of appreciation when it comes to general measures of economic or social strategy".

75. I would therefore conclude that, in the present case, Swift J did not err in applying the manifestly without reasonable foundation test.

76. Furthermore, and in any event, in my view, the crucial point is not so much whether the "manifestly without reasonable foundation" test is the applicable test; it is rather how the conventional proportionality test, even if that is the applicable test, should be applied given that the context is one in which a public authority is required to allocate finite resources and to choose priorities when it comes to setting its budget; and is also a context in which the ground of discrimination is not one of the "suspect" grounds. In this context, it seems to me that there is no material difference between application of the conventional proportionality test, giving appropriate weight and respect to the judgement of the executive or legislature, and the "manifestly without reasonable foundation" test.

77. Even if the correct test to be applied is not the one of manifestly without reasonable foundation, I have reached the clear conclusion that the Respondent was entitled to adopt the policy which it did and that it did not act unlawfully in breach of Article 14. In particular, I am convinced that the policy fell within the margin of judgement which is afforded to it even applying the conventional proportionality test. I bear in mind the following particular features of this case.

78. First, age is not a "suspect" ground of discrimination, such as race or sex.

79. Secondly, this is an area in which the Respondent had to make difficult choices, in straitened financial circumstances, as to its priorities for public expenditure. It is better placed than the Court can ever be to know the needs of its local area and its residents. If cuts cannot be made to the budget in one context, they are likely to be necessary in some other context and will affect other people, who are not before the Court. Even if no cuts had to be made elsewhere, the gap in public finances would have to be filled in some other way, typically by raising taxes or borrowing, even assuming that those options are available. These methods all have consequences for

other people. Sometimes this is called a "polycentric" issue, to use the word made famous by Prof. Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harv. LR 353. This point goes to the relative institutional competence of the Respondent as compared with the Court. Furthermore, the Respondent has a democratic legitimacy which the Court does not. I do not accept the submission made by Ms Richards that only Parliament is entitled to respect on this ground. It seems to me that an elected local authority is also entitled to appropriate respect on the ground of democratic legitimacy.

80. Thirdly, the Respondent was seeking to "track" the distinction which is made in primary legislation itself by Parliament as to the crucial importance of age once a person is above 16. That was not an end of the matter. As Mr Oldham fairly accepted at the hearing before this Court, the Respondent retained a discretion and had to exercise that discretion in accordance with its obligations in the HRA. There can be circumstances in which an apparent discretion in effect becomes a duty because to exercise the discretion the other way would contravene obligations in the HRA.

81. Nevertheless, in my view, the Respondent was entitled to take into account the difference in the statutory regime which applies to children under the age of 16, who are of "compulsory school age", and those above 16. Although there are obligations to take part in some form of activity if not education for those who are aged 16-18, very importantly the sanction which Parliament has sought fit to impose in the former case is a potential criminal liability on the part of a child's parents: see section 444(1) of the Education Act 1996. In that context it is important to note that a potential defence is made available by the legislation to those parents who are able to argue that appropriate school transport was not provided by a local authority to their child: see section 444(3B) of the 1996 Act.

82. Fourthly, it is important to recall that the Respondent's policy admits of the possibility of exceptions to be made in case of real need. We were informed, and there is evidence before this Court, that some seven exceptions have indeed been made to the policy, even though its implementation was deferred by one year.

83. Finally, the policy envisages a system of appeals.

84. All of these factors, in my view, lead to the conclusion that the policy cannot be regarded as being unlawful under Article 14. It did have a legitimate aim (the saving of public money) – see *R (TP) v Secretary of State for Work and Pensions* [2020] EWCA Civ 37, at paras. 170-173 in the judgment of the Court, summarising the authorities on the relevance of cost when seeking to justify alleged discrimination – and the means chosen to achieve that aim complied with the principle of proportionality. This is not a case, such as might be envisaged hypothetically, where (for example) a cash-strapped local authority decided to adopt a policy under which school transport would continue to be provided for some people based on a wholly irrelevant ground such as sending boys by taxi to school but not girls.

Ground 1(b)

85. Ms Richards submits that Swift J erred in finding that the difference in treatment on grounds of age was justified by reference to compliance with the 1996 Act, to the exclusion of other relevant statutory provisions. She referred us to various other statutory provisions which, it is submitted, "largely erode" the distinction between CYP aged 16-18 and younger children. I have set out a summary of the relevant legislation earlier. It includes the following:

    i) Part 1 of the 2008 Act, which applies to CYP not of compulsory school age who have not yet reached 18 and do not have a level 3 qualification;

    ii) provisions of the 2014 Act applicable to persons over compulsory school age but under 25; and

    iii) provisions within the 1996 Act itself which erode the boundary between the comparator groups, for example section 15ZA.

86. Insofar as the complaint made on behalf of the Appellant under Ground 1(b) in this appeal is that the Judge failed to take account of all the relevant statutory provisions, I would reject that submission. It is clear from paras. 41-42 of his judgment that the Judge did take account of the relevant statutory provisions.

87. As I understood her submission, Ms Richards submits that, nevertheless, the Judge was wrong to rely on the different statutory framework for people who are under the age of 16 in order to arrive at an objective justification for discrimination under Article 14. I would reject that submission also. It is crucial, in my view, to appreciate that Parliament has decided that there are some persons who are of compulsory school age: those who are between 5 and 16. There are special provisions in relation to them, including the potential commission of criminal offences by their parents if they do not attend school: see section 444 of the 1996 Act. That provision is of interest because it closely matches the provisions relating to school transport. One potential defence which is available to parents is where school transport should have been provided but was not available: see subsection (3B).

88. In contrast, section 2 of the 2008 Act is exhortatory only. It is significant that provisions in it, which would impose sanctions, have never been brought into force to date: see sections 45-60.

89. I would accept Mr Oldham's submission that to require a local authority, through the gateway of Article 14, to go behind the policy decision which has clearly been taken by Parliament in primary legislation would be requiring a step too far.

90. At the hearing before this Court Ms Richards fairly conceded that, if she could not succeed in her argument based on the alleged discrimination as between the 5-16 age group and the 16-18 age group, she was not likely to fare any better with her argument that there was unlawful discrimination as between the 16-18 age group and the 19+ age group, for which specific provision is made in section 508F of the 1996 Act.

91. Section 508F applies in essence to adult learners, i.e. those who are aged 19+. Subsection (1) requires a local authority in England to "make such arrangements for the provision of transport and otherwise as they consider necessary, or as the Secretary of State may direct". Any transport provided under subsection (1) must be provided free of charge: see subsection (4).

92. As Mr Oldham pointed out to us, that section – like section 508B – is significantly different from the requirement of section 509AA, which applies to the 16-18 age group, and which only requires a local authority to prepare a "transport policy statement". Section 509AA does not require the provision of any transport, although such provision may be included in the arrangements which are specified in the policy statement.

Ground 1(c)

93. On behalf of the Appellant Ms Richards complains under Ground 1(c) of the appeal that, although (at paras. 60-63 of his judgment) the Judge accepted a number of detailed criticisms of the Respondent's policy, he did not go on to conclude that this led to a lack of objective justification for the purpose of Article 14. She highlighted criticisms of the SEN Policy which Swift J noted "…ought to give the Council pause for thought" (para. 63). These included the mileage rate in the Respondent's "Ready Reckoner", which was said to be arbitrary and entirely impressionistic (para. 60); and the lack of information in the SEN policy as to which matters might produce PTBs that were either higher or lower than the amounts in the Ready Reckoner (para. 62). The Judge said nevertheless that these matters did not affect his conclusion on the grounds of challenge pursued in the claim, which he had already rejected earlier (para. 63).

94. As Ms Richards fairly accepts, permission to bring the original claim for judicial review on grounds of irrationality was refused: see the order of Andrews J dated 21 February 2019. She therefore accepts that she cannot directly rely on alleged irrationality in aspects of the policy.

95. Nevertheless, Ms Richards submits that, since the Respondents' own case is that one of the reasons why the policy is objectively justified is that it includes "safety valves", the criticisms which the Judge made were relevant to whether those safety valves were such as to render the policy objectively justified under Article 14.

96. I would reject that submission. In my view, the Judge was entitled to reach the conclusion which he did overall as to the objective justification of the policy under Article 14. He clearly had in mind the specific criticisms which he made, albeit in another section of his judgment at paras. 60-63, but this did not lead him to conclude that the policy lacked objective justification under Article 14. In my view that analysis was not only one that was available to him; it is the correct one. This is for all the reasons which I have set out earlier when addressing Ground 1(a) of the appeal.

Conclusion

97. For the reasons I have given I would reject all three parts of the only ground of appeal which is before this Court.

98. For those reasons it is unnecessary to consider the additional or alternative grounds relied upon in the Respondent's Notice save in so far as I have addressed the submission (which I accept) that, even if the correct test in this context was not the manifestly without reasonable foundation test, the outcome would have been no different. In particular, I do not think it necessary or appropriate in this appeal to consider Mr Oldham's submission that the present case did not fall within the ambit of A2P1 or Article 8 at all. Those issues may call for detailed consideration in other cases in which resolution of them is necessary for the outcome; that is not so in this appeal.

99. Finally, I would like to say only this. One has a natural sympathy for the Appellant and her family but this appeal concerns a challenge to a policy and not to the decision taken on the facts of an individual case. For the reasons I have given there is no basis in law for that policy to be overturned by the courts and therefore the appeal must be dismissed.

Lord Justice Newey:

100. I agree.

Lord Justice Bean:

101. I also agree.