[2018] EWHC (Admin)2103

Case No: CO/1760/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Bristol Civil Justice Centre

Date: 03/08/2018

Before :

HIS HONOUR JUDGE COTTER Q.C.

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Between :

The Queen on the application of **(1) KE** **(2) IE** **(3) CH**	**Claimants**
- and -	
BRISTOL CITY COUNCIL	**Defendant**

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- -

Jenni Richards Q.C. and Stephen Broach (instructed by Simpson Millar LLP) for the Claimants
Peter Oldham Q.C. (instructed by Bristol City Council Legal Department) for the Defendant

Hearing dates: 24th July 2018

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APPROVED JUDGMENT

His Honour Judge Cotter Q.C. :

Introduction

1. The Claimants seek permission to challenge the decision of the Defendant made on 20 February 2018 to set a schools' budget which included a reduction in expenditure of approximately £5 million in the high needs block budget (the sums set aside for provision for those with special educational needs ; "SEN"). They seek relief confined to declaratory relief and an order quashing the budget allocation for special educational needs.

2. By order of His Honour Judge Jarman QC of 1st June 2018 the matter was listed as a rolled up hearing with a time estimate of one day (the parties had requested two days), which provided a challenge for both advocates to tailor their submission to the limited time available. I was greatly assisted by their lucid written and oral arguments.

3. The first claimant KE is the mother of the second claimant IE, a nine year old child and a year five pupil at P School (who acts by KE as her litigation friend). IE has significant learning difficulties, physical disabilities and a diagnosis of autism. As a result she has an education and health care plan (EHCP). The first claimant is in the process of appealing the EHCP; as a result IE is likely to move to a special school for year six.

4. KE is very concerned about the impact of funding cuts on the ability of the Defendant to fund the kind of early intervention services which might have prevented IE needing (expensive) specialist provision of this kind and might also have prevented the deterioration in her mental health which she has experienced. Furthermore the Defendant's funding reductions may call into question the funding for IE's out-of-county placement in future.

5. The third claimant, CH, is also a child who proceeds by her mother and litigation friend; TH. He is nine years old, has been diagnosed with ambivalent attachment disorder and encopresis, and is currently attending at one of the Defendant's pupil referral units (a "PRU") having moved there in February 2018. The proposal is that the budget for PRUs be reduced by £150,000 as part of the overall High Needs Block budget reduction in issue in this claim. At the time of TH's second statement (29th June 2018) CH had been at the PRU for approximately four months, despite TH having been told that the longest he would stay there would be for a twelve week assessment period. CH's EHC needs assessment has still not been completed by the Defendant.

6. It was argued in the summary grounds and skeleton argument that the Claimants did not have adequate standing; but this was not pursued at the hearing.

7. It is the Claimants' case that the Defendant is seeking to implement a significant reduction in expenditure under the high needs block budget which will affect vulnerable children who possess a range of protected characteristics under the

Equality Act 2010. Further, the decision in relation to the deduction was made without consultation in breach of duties set out under the Equality Act 2010 and the Children and Families Act 2014. Specifically, consultation was required to discharge the 'duty of inquiry' inherent in section 149 of the 2010 Act and was also mandated by section 27 of the Children and Families Act 2014. Further, the decision also breached the provisions of the Children Act 2004 and the common law duty of fairness. It is said that the Defendant proceeded to make these cuts without assessing or consulting in relation to the needs of children with special educational needs or undertaking any equality impact assessment. As a result the Defendant cannot therefore know if it is proper to make any cuts at all or how to adequately mitigate against the likely adverse impacts of any cut to the funding.

8. As for specific grounds it is the Claimants' case that in setting a budget which included a funding reduction for the High Needs Block budget, the Defendant:

    i. Failed to consult on this issue, when it was required to do so;

    ii. Breached the public sector equality duty ('PSED') in section 149 of the Equality Act 2010;

    iii. Breached section 11 of the Children Act 2004;

    iv. Breached section 27 of the Children and Families Act 2014; and

    v. Breached the common law requirement to act reasonably, to take into account all relevant considerations, and to ask and answer the right questions (the duty of sufficient inquiry).

9. The Claimants seek an order quashing the high needs block budget and for the Defendant to reconsider the funding allocated to this area within the parameters of available funds (for example by allocating additional unrestricted reserves). They do not seek an order quashing the entire budget which would affect the council tax calculation.

10. It is the Defendant's case that no decision has yet been taken such that the Defendant is in breach of any duties relied upon. The duties, if applicable at all, fall to be taken into account at a later stage when service provision proposals are developed/determined within the funding envelope. Indeed the full council has no power to decide details of service provision, these being matters for the executive. There remains flexibility as to how the services will be delivered and the Defendant intends to fully comply with the applicable duties at the appropriate point i.e. before service provision decisions are made. The claim is therefore without merit and/or premature.

11. It is also the Defendant's case that even if there was fault on the part of the Defendant it is highly likely that the outcome of the claim would not have been substantially different; see s 31(2A) and (3D) Senior Courts Act 1981 so that permission or, if it granted relief, should be refused, also that there is alternative remedy (a right of appeal under s51 Children and Families Act 2014) and, in any event, that the claim was not filed promptly.

12. The parties' arguments have focussed upon a point of principle upon which the parties disagree; whether the setting of a budget by a full council engages the duties to consult and other duties advanced by the Claimants or whether such duties only engage at the later state of executive decision making when service provision decisions are made.

Evidence

13. The Claimants' evidence consisted of a witness statement from Mr Daniel Rosenberg, the Claimants' solicitor, setting out the steps taken to bring the claim promptly before the court, two statements by the first claimant KE and two statements by the third Claimant's litigation friend and mother TH.

14. On behalf of the Defendant there were statements from David Tully, the interim finance business partner, Denise Murray, chief financial officer and Ms Williams-Jones the principal manager for the SEN Directorate ("SEND") and inclusion services.

15. I also had the benefit of two comprehensive skeleton arguments (and two lever arch files of authorities).

Facts

16. The Local Government Finance Act 1992 does not refer to a budget at all, let alone the requirement to set one. Instead it imposes a duty to set a "council tax requirement" ("CTR") for billing authorities. By section 31A(4) the CTR must be set at a rate such that the Local Authority's expenditure is not greater than its resources. Hence the need for what is commonly called a budget: see also regulation 4(11) of the Local Authorities (Functions and Responsibilities) (England) Regulations 2000.

17. The Defendant is required by statute to set "a budget" through its full council. Its executive (the Mayor and Cabinet) cannot do so and there is a separation of powers under the provisions of the Local Authorities (Functions and Responsibilities) (England) Regulations 2000. It is important to recognise the distinction between the Council and the Cabinet. The latter is a different decision-maker, exercising different functions and taking different decisions from those of the Council. The Cabinet cannot incur expenditure in excess of the aggregate of the entire budget. Also, it may not incur expenditure in excess of heads of expenditure specified in the budget (see **R (Buck)-v-Doncaster MBC** [2013] EWCA Civ 1190 at paragraph 20).

18. There are a number of stages before an education budget, which forms part of the overall budget, is set. At the head of the process lies the allocation of a grant from central government to the Defendant. By reason of regulations 9 and 10 of the Schools Forum (England) Regulations 2012 the Defendant must then consult with the Schools Forum (which comprises a number of head teachers and school governors) in

respect of its funding proposals. However, regulation 8 of the School and Early Years Finance (England) Regulations 2018 provides for a Schools Forum to have very limited powers of approval, irrelevant to this case.

19. The proposed education budget is then considered by the executive as part of its proposals to the full council in respect of an overall budget for the year. Eventually, the full council sets a budget having regard to the executive's proposals.

20. Over recent years the Defendant's special educational needs budget had fallen into a significant operating deficit. I received no evidence as to the reasons for this.

21. By the summer of 2017 a three year high needs action plan was under development to tackle that deficit. It is clear that detailed consideration of funding reductions to high needs education provision was taking place well before the precise detail of national funding was known and a resourcing paper was produced for a meeting on 13th November 2107. The plan took detailed shape such that a full report was available for a meeting with the Schools Forum on 16th January 2018 when the Defendant consulted heads of special schools about its deficit reduction plan. Table 1 of that report showed a cumulative forecast deficit of £6.1 million. Section 4 set out the deficit recovery plan, with table 2 showing the £5.1 million savings measures for 2018/19 about which the Claimants came to complain. So a "worked up" deficit recovery plan was discussed on 16th January 2018 but the perceived need to reduce funding had been identified and considered in detail long before that date.

22. Over the past few years many local authorities have launched public consultations relating to a number of their services. This has often been due to a substantial cut in funding from central government creating a need to identify savings. Difficult choices have been outlined and the public given an option to express an opinion.

23. By 2017 the Defendant calculated a budget gap of £108 million over the following five years and as a result it carried out a public consultation from 6 November 2017 to 17 December 2017 with a booklet entitled " *'Tough Times, High Hopes; Corporate Strategy and Budget Consultation 2018-23',* concerning aspects of its budget. It stated that there were tough choices to be made and that the impact of spending less would be felt. Proposals, with figures, were made in relation to areas such as children's social care. However, there was no express reference to cuts to funding for children with SEN. This was despite the fact that the high needs action plan was under active consideration. As a result the issue of the potential impact of any cuts to funding for services for children and young people with SEN was not the subject of public input or covered in the subsequent very comprehensive (110 page) consultation report which was placed before members when the budget was set on 20 February 2018.

24. The Defendant also produced a draft corporate strategy in November 2017. Under the title " Improved educational equality and attainment" it was acknowledged that ;

> "Achievement gaps for disadvantaged children in the city are unacceptably high and are widening. Children.. with special educational needs.. are not achieving their potential or the basic level of qualifications that will enable them to access further education or secure employment" and

> " We will work in partnership with local, regional and national bodies …special schools.. to ensure future success"

There was no more detail of how, if at all, the unacceptably high and widening achievement gap for children with special educational needs was to be addressed.

25. The consultation closed on 17th December 2017. On 19th December 2017 the Defendant was notified of its dedicated schools grant from national government.

26. Detailed budget reduction proposals were then put before the Schools Forum on 16th January 2018. Specific items of funding reduction were set out against forecast commitments for 2018/19 at appendix A 4.2 of the report leading to a total of £5,102,000 in "mitigating actions", including that

    a. the special educational needs top ups for maintained schools in Bristol be reduced by £767,000
    b. special educational needs top ups for the special schools in Bristol be reduced by £1,166,000
    c. funding for Bristol's pupil referral unit be reduced by £150,000.

27. In terms of mitigating the impact of proposals on children with special educational needs in the schools two options were mentioned which the Schools Forum was asked to approve (it was not asked to approve the budget reductions);

    a. the transfer of £2 million from the skills block funding to the high needs block
    b. to allocate £0.7 million of the general fund to the high needs block.

    The proposals were the subject of a vote and carried 11-4 with the cabinet member for education and skills indicating that she would take comments made at the meeting, including concerns that the schools were under great pressure, to the Cabinet.

28. The matter then progressed to Cabinet. The Claimants believe that the cabinet member probably did not pass on any comments of concern or criticisms about the general proposals made by members of the Schools Forum to the Cabinet when it met on 23 January 2018 and considered the relevant budget proposals. The Claimants also say that the cabinet member erroneously suggested that the recommendations had been 'endorsed by the Schools Forum' when in fact the Forum had only been asked to approve measures which purported to mitigate the impact of the proposed budget reductions. These matters are not accepted.

29. At the Cabinet meeting the Mayor noted that no statements or questions had been received on this issue, and stated that

> "it is incredible work to bring so many in the city with you on this…. Really gives authenticity and integrity to the position we are putting forward. No statements of questions received on this item so I just like to note that because consultation impact assessment will be undertaken the specific proposals as they develop if they needed. And now hand back (to the councillor).. to take decision which I support"

30. It is the Claimants' case that with only limited approval given by School Forum and no further consultation or equality impact assessment the plan plainly did not have sufficient integrity or authenticity.

31. At a full council meeting on the 20th of February 2018 the recommendation of the Cabinet was accepted and approved; as a result

    a. the school budget was set at £341.3 million for the financial year 2018/19
    b. high needs block budget sitting within the school budget was set at £50.95 million for the financial year 2018/19 which represented a reduction of over £5 million (in line with the proposals in the report to the Council).

32. The report to Council made clear that future consultation would only relate to

    > 'a new proposal or specific implementation of an existing proposal' (para 18.6.).

    It was said that consultees would have the opportunity to

    > 'discuss with the City the details of how exactly the proposed savings could be made within the approved cash limits'.

33. The report expressly recognised (section 21) that the budget setting decision

    > 'might imply that the service will reduce or even cease',

    noting;

    > 'that is not the same as the actual decision to reduce the service or cease it'.

34. It was also asserted that

    > 'Individual Equalities Impact Assessments...have been completed for those proposals...where it is felt that proposed savings could have an adverse impact on a particular group of individuals' (para 20.2)

    Significantly there was no such impact assessments in relation to the reduction in high needs block funding.

35. The report also deals with the Defendant's reserve position (sections 16 and 17) with non-earmarked reserves estimated to be £20 million.

36. Although the Claimants' challenge is to the decision of 20th February 2018 given Mr Oldham Q.C.'s submissions it is also necessary to briefly refer to the evidence as to what has subsequently transpired. Significantly, the high needs deficit has been reduced to £2m; so the high needs block has received extra money. It is also said that some service provision proposals (decisions taken by the executive) identified in the cabinet report will have no impact on people with special educational needs and others are still at the preliminary stage. In progress since the setting of the budget, and where appropriate Mr Oldham Q.C. submitted the Defendant had complied with

the duties upon it, and there has been no challenge to any of those further steps. In essence he relies upon the fact that it is an evolving picture.

37. Ms Richards Q.C. submitted such matters were of limited if any relevance to the grounds of challenge to the decision made on 20th February 2018. The picture currently looked somewhat rosier; but there was still to be a very substantial cut to the SEN budget.

Relevant duties

38. Before turning to the individual grounds, it is first necessary to consider the existence and extent of any relevant duties upon the Defendant before setting any budget.

39. It is the Claimants' case that there was a duty to consult prior to setting the high needs block budget arising from two relevant statutory provisions; the Equality Act 2010 and the Children and Families Act 2014 and also under the common law. The Claimants also rely upon breaches of the duties under these statutes and the section 11 Children Act 2004 as freestanding grounds.

40. I turn to the relevant statutes

Section 149(1) of the Equality 2010

41. The first statutory duty relied upon is Section 149(1) of the Equality 2010 Act; the public sector equality duty.

> (1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

42. So the section requires a public authority in the exercise of its functions to have due regard to the three needs listed in section 149(1)(a), (b) and (c). Section 149(3) explains what having due regard to need (b) entails. Section 149(4) explains further, by reference to section 149(3)(b), that taking steps to meet the needs of disabled people that are different from the needs of people who are not disabled includes, in particular, steps to take account of their disabilities. Section 149(7) sets out the relevant protected characteristics. They include age and disability.

43. Section 149, and the specific equality duties imposed by earlier legislation, have been the subject of many decisions. The aim of these duties is to bring equality issues into

the mainstream of policy consideration. The courts have on a number of occasions emphasised the importance of full compliance with these PSEDs as an essential preliminary to public decision making.

44. The duty is to have 'due' regard to the listed equality needs. 'Due regard' is such regard as is appropriate in all the circumstances. Dyson LJ (as he then was) said in **R (Baker) v Secretary of State for Communities and Local Government** [2008] EWCA Civ 141; at paragraph 31,

> "In my judgment, it is important to emphasise that the section 71(1) duty [one of the equality duties which was replaced by section 149] is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to have due regard to the need to achieve these goals. The distinction is vital. Thus the inspector did not have a duty to promote equality of opportunity between the applicants and persons who were members of different racial groups; her duty was to have due regard to the need to promote such equality of opportunity. She had to take that need into account, and in deciding how much weight to accord to the need, she had to have due regard to it. What is due regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing."

45. Dyson LJ said, at paragraph 37, that the question was whether the duty had been complied with in substance. Just as the repetition of a mantra referring to the provision did not of itself show that section 71 had been complied with, so a failure to refer to the provision did not show that the duty was not discharged. This approach was approved by the House of Lords in **R v (McDonald) v Kensington and Chelsea Royal London Borough Council [2011] UKSC 33** per Lord Brown at paragraphs 23 and 24.

46. In R (**Bracking) -v-SSWP [2013] EWCA Civ1345** Lord Justice McCombe said at paragraph 60

> 'In the end, drawing together the principles and the rival arguments, it seems to me that section 149 imposes a heavy burden on public authorities, in discharging the PSED and in ensuring that there is the evidence available, if necessary, to demonstrate their discharge. It seems to me to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude'

47. Ms Richards Q.C. contends that section 149 imposes on public authorities, by necessary implication, a duty of reasonable inquiry that can frequently extend to consultation. She relies upon the decision of the Divisional Court in **R (Hurley) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin)** and in particular paragraph 89

> [89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Employment*

v Tameside Metropolitan Borough Council [1977] AC 1014, [1976] 3 All ER 665, 75 LGR 190 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in *Brown* (para 85):

". . . the public authority concerned will, in our view, have to have due regard to the *need* to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration."

[90] I respectfully agree. But none of this is necessary if the public body properly considers that it can exercise its duty with the material it has. Moreover, it seems to me misleading to say that there was no consultation or inquiry in this case. There was very extensive consultation by the Browne panel and this engaged closely with the position of the poorer students, many of whom will be from ethnic minorities and disabled students. This was not legislation passed in a vacuum with no appreciation of the likely effects on protected groups. If the question were whether there had been adequate consultation about the effects of the proposals on the lower socio-economic groups, the only conceivable answer in my view would be that there had been.

48. Ms Richards Q.C. submitted that consultation was required in this case to discharge the duty of inquiry. The Defendant has not identified any other source of information which was before members when the budget was approved which would have informed them of the potential equality implications of this significant reduction in funding for SEND services. In these circumstances the PSED required consultation in order that members could pay the required 'due regard' to the specified needs

49. Mr Oldham Q.C. submitted that when Lord Justice Elias stated that he agreed, it was with the passage from the Judgment of Aikens LJ in Brown and not Counsel's submission that if the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required. Mr Oldham Q.C. does not accept that the duty of inquiry frequently requires consultation and submits that, if a duty applied, it would not do so here.

50. The steps needed to comply with the duty do vary considerably with differing contexts. In **R (DAT and BNM) -v-West Berkshire Council** [2016] EWHC 1876; Mrs Justice Laing stated at paragraph 41

The practical question, or questions, posed by section 149 in relation to a particular decision will depend on the nature of the decision and on the circumstances in which it is made. It is clear from the authorities that the fundamental requirement imposed by section 149 is that a decision maker, having taking reasonable steps to inquire into the issues, must understand the impact, or likely impact, of the decision on those of the listed equality needs which are potentially affected by the decision. On appropriate facts, this may require no more than an understanding of the practical impact on the people with protected characteristics who are affected by the decision (see, for example, paragraph 91 of *R (MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13; [2014] PTSR 614, and paragraph 92, 'In my view it was clear that, in conducting this process,

the Secretary of State did have due regard to his statutory duties. It was obvious that he was aware of the serious impact of the bedroom criteria would have on disabled people'). Further, where an impact is obvious, as a matter of common sense, but its extent is inherently difficult to predict, there may be 'nothing wrong in making a reasonable judgment and then monitoring the outcome with a view to making any adjustments that may seem necessary: the section 149 duty is ongoing' (per Underhill LJ at paragraph 121 of *R (Unison) v Lord Chancellor (No 3)* [2015] EWCA Civ 935; [2016] 1 CMLR 25.

51. The requirements of the PSED were succinctly summarised recently **in R (Law Centres Federation) v Lord Chancellor** [2018] EWHC 1588 (Admin) at [96]-[97]:

> '96 The relevant principles relating to the exercise of the PSED are adumbrated by McCombe LJ in Bracking v Secretary of State for Work and Pensions [2013] EWCA Civ 1345 at [25]-[26] and were endorsed by Lord Neuberger in Hotak v Southwark LBC [2016] UKSC 30 [2016] AC 811 at [73]. The duty is personal to the decision maker, who must consciously direct his or her mind to the obligations; the exercise is a matter of substance which must be undertaken with rigour, so that there is a proper and conscious focus on the statutory criteria and proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them. Whilst there is no obligation to carry out an EIA, if such an assessment is not carried out it may be more difficult to demonstrate compliance with the duty. On the other hand, the mere fact that an EIA has been carried out will not necessarily suffice to demonstrate compliance.
>
> 97 As to the proper approach to be taken by the court, a useful and elegant summary is to be found in the earlier judgment of Elias LJ in R(Hurley) v Secretary of State for Business Innovation and Skills [2012] EWHC 201 (Admin) at [78], a passage that was expressly approved in Bracking . As he concluded:
>
> > "the concept of "due regard" requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria… the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognize the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors."'

52. So drawing these matters together, consideration of the issue of whether there has been due regard to the listed equality needs requires analysis of substance not form. There is, by implication, a duty of inquiry upon any decision maker who must take reasonable steps to inquire into the issues, so that the impact, or likely impact, of the decision upon those of the listed equality needs who are potentially affected by the decision, can be understood. On appropriate facts, this may require no more than an understanding of the practical impact on the people with protected characteristics who are affected by the decision; so there is little hard evidence about likely effects (see paragraph 121 of **R (Unison) v Lord Chancellor)**. However, it may require much more, including consultation. Context is everything.

Section 27 Children and Families Act

53. Turning to the second statutory duty relied upon by the Claimants, section 27 Children and Families Act, this states

> 27Duty to keep education and care provision under review
>
> (1)A local authority in England must keep under review—
>
> (a)the educational provision, training provision and social care provision made in its area for children and young people who have special educational needs or a disability, and
>
> (b)the educational provision, training provision and social care provision made outside its area for—
>
> (i)children and young people for whom it is responsible who have special educational needs, and
>
> (ii)children and young people in its area who have a disability.
>
> (2)The authority must consider the extent to which the provision referred to in subsection (1)(a) and (b) is sufficient to meet the educational needs, training needs and social care needs of the children and young people concerned.
>
> (3)In exercising its functions under this section, the authority must consult—
>
> (a)children and young people in its area with special educational needs, and the parents of children in its area with special educational needs;
>
> (b)children and young people in its area who have a disability, and the parents of children in its area who have a disability;
>
> (c)the governing bodies of maintained schools and maintained nursery schools in its area;

54. Ms Richards Q.C. submitted that the requirements to keep provision for children and young people with special educational needs under review and to consider the sufficiency of this provision were plainly engaged by the decision to reduce the special needs budget. Such a reduction in expenditure falls within the scope of 'educational provision' and/or 'training provision'. As a result, the Defendant was obliged to consult with children, young people and parents and did not do so. She relied upon the conclusion of Mrs Justice Laing in **R (DAT and BNM) -v-West Berkshire Council** [2016] EWHC 1876 at paragraph 30 that, despite her misgivings about the practical consequences of the wide ranging consultation required, section 27 ;

> 'must bite, where, as here, a local authority makes a decision which will necessarily affect the scope of the provision referred to in section 27'.

55. Ms Richards Q.C. submitted that if the Claimants are correct that the budget setting decision engaged the section 27 duty, then the Defendant was obviously in breach of this duty.

56. In relation to the duty to consult the Claimants also rely upon the common law requirements of procedural fairness which, it is argued, mandated consultation before a benefit is withdrawn.

Section 11 Children Act 2004

57. Section 11 of the Children Act 2004 is as follows

> 11Arrangements to safeguard and promote welfare
>
> (1)This section applies to each of the following—
>
> (a)a local authority in England;
>
> ……
> (2)Each person and body to whom this section applies must make arrangements for ensuring that—
>
> (a)their functions are discharged having regard to the need to safeguard and promote the welfare of children; and
>
> (b)any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need.

58. In **Nzolameso v Westminster CC** [2015] UKSC 22, Lady Hale made it clear that the section 11 duty applies to both the setting of policies and their implementation in particular cases. Ms Richards Q.C. submitted that the decision as to the level of funding to allocate to the High Needs Block budget therefore engages section 11(2). Lady Hale more recently emphasised that the section 11 duty requires that the welfare of the child be 'actively promoted': (**R (HC) v Secretary of State for Work and Pensions** [2017] UKSC 73 at [46]

59. I now turn to the individual grounds.

Ground one; A failure to consult

60. The Claimants' case that is that the decision to set a budget, plainly an essential function of a local authority, carried before it a duty to consult by reason of the duty of inquiry under the public sector equality duty, section 27 of the 2014 Act and also the common law duty to consult. The Defendant had the opportunity, but did not consult on proposed savings with those directly impacted by the budget namely children with special education needs, their carers or others before determining to reduce expenditure in this area. Whilst subsequent decisions will be taken by the executive as to how to implement any reduction in spending, any challenge to a such decision giving effect to a budgetary reduction alleging insufficient funds had been

allocated will said to be too late if the reduction to the budget itself has not been challenged.

61. The budget included a reduction in expenditure of £5 million (10%) in the high needs block budget. The anticipated expenditure reductions to achieve this savings included three specific elements;

    a. the special educational needs top ups for maintained skills in Bristol were reduced by £767,000
    b. special educational needs top ups for the special schools in Bristol were reduced by £1,166,000
    c. funding for Bristol's pupil referral unit were reduced by £150,000

62. It is the Claimantss case that it was open to the Defendant to allocate additional unrestricted funding to avoid all or, at least some, of the cuts to special educational needs provision. The Defendant holds unrestricted reserves which are higher than the minimum level required and although £0.7million was allocated to the high need block from a general funds transfer in respect of PFI costs; further funds could have been so allocated. So a reduction was not a fait accompli given the level of grant from central government.

63. Ms Richards Q.C. submitted that it is, and was, relevant that the Defendant has the highest rates of fixed term exclusions from both primary and secondary schools in England and an increasing attainment gap had been acknowledged. As a result there was a strong argument that provision of special needs educational support has been inadequate, that increased and not decreased funds were necessary and that further cuts would inevitably cause further worsening of the position. Indeed one of the stated risks identified for the Schools Forum meeting in relation to the Defendant's budgeting was

> *'Continued increase in primary permanent exclusions and continued high use of secondary AP (Alternative Provision)'.*

Other risks include

> *'Increase in the number of statutory assessment requests and related impact on performance against statutory timescales*' and
> *'Increase in parental mediations and appeals where [EHC plans] are not agreed'.*

She submitted that the Defendant's decision risks pushing more children and young people on to statutory plans and consequently generating more costly and time consuming disputes with families over the contents of these plans: such being potential consequences if SEND provision is made later rather than earlier. Also that there are risks to

> *'[f]inancial stability of special schools and subsequent impact upon level and quality of provision to children and families'*

and of

'Reductions in funding to services supporting children and families with SEND, resultant loss of confidence and poorer outcomes for children in specific circumstances'.

Although these very concerning risks were identified for the Schools Forum there is no evidence to suggest or indicate that they were taken into account when Members set the budget on 20 February 2018. She submitted that this is exactly the type of issue the duty to inquire is designed to identify. Generalised knowledge that there must be some impact if a service is reduced could not in these circumstances satisfy the duty to inquire and consult on these matters

64. It is the Defendant's case that any express or implied statutory or common law duty to consult prior to closure of services does not arise when a budget is set but only when the authority makes proposals for how the budget is spent. Mr Oldham Q.C. submitted that this was a complete answer to the Claimants' case in relation to consultation.

65. The report to Cabinet on 23rd January 2018 stated :

> "Once detailed proposals are developed, consideration will need to be given to undertaking detailed Equality impact assessments and consultation before final decisions are made.*"*.

Mr Oldham Q.C. submitted that this was clearly the right approach. As long as there is flexibility in the manner in which the sums in the budget envelope are spent it will not be unlawful to set a budget envelope without consultation. If consultation is required it can take place before the decision as to how to implement the policies within the envelope. He also submitted that the Claimants had no grounds based on the common law to argue they would be consulted about any reduction in budget for the high need block in the Defendant's schools budget. He mainly relied upon three decisions; **R (Fawcett)-v-Chancellor [2010] EWHC 3522** , **R (JG)-v-Lancashire CC** [2011] BLGR 909 and **R (A and C) v Oxfordshire [2017]** 20 CCLR 539, affirmed by the Court of Appeal [2016] EWCA Civ 1235 (no transcript available), and argued that the reasoning in these cases was determinative of the issue in the present case.

66. Ms Richards Q.C. submitted that reliance upon these three cases was misplaced and they were distinguishable on their facts. She argued that they did not provide the Defendant with any assistance in resisting the Claimants' consultation challenge, indeed, quite the opposite ; they demonstrated that local authorities can and do consult with affected parties before making decisions in relation to high level finance.

67. Given the respective submissions it is necessary to consider these three cases in a little detail.

68. **R (Fawcett)-v-Chancellor [2010] EWHC 3522** is a judgment by Mr Justice Ouseley upon an oral renewal of application for permission to apply for judicial review. The subject of the challenge was the 2010 UK budget in its entirety; the argument advanced being that there had been failures to comply with various duties under the Sex Discrimination Act 1975 and in particular the duty under section 76 A ;

the general duty to have due regard to the need to eliminate unlawful discrimination and to promote equality . It was said that the Chancellor, Treasury and HMRC should have carried out a gender equality impact assessment pre-budget.

69. It was not disputed by the Defendants that section 76A was broad enough to apply to government action such as the preparation and presentation of a budget including public expenditure limits. Rather they argued, as Mr Oldham Q.C. does here, that it was appropriate and legitimate to comply with the duty at a later stage and to consider the impact in relation to various specific items within the budget i.e. rather than on an overall basis. The Claimants' argument was that this approach would ignore the cumulative impact.

70. Ouseley J was of the view that if analysis of gender equality impacts could be adequately undertaken by subsequent consideration of line items the duty would not be breached at the budget stage. He considered that the varied nature of the budget and the implementing measures taken with the timetable made an overview particularly difficult. It was his view that if a duty applied to individual items they could be readily dealt with separately when "clearly defined" and it was perfectly sensible for (central) government to wait until a policy has been adequately formulated, or clearly defined, for there to be a clear basis upon which there could be a gender equality impact assessment. In his view the point at which that was reached was a question of rationality and plainly government would fail in its duty if, by the time the policy is sufficiently formulated as to be fit for assessment, no assessment is carried out.

71. As for any subsequent assessment Ouseley J also accepted the Defendants' argument that it would be no answer to an issue subsequently arising that sufficient funds had not been allocated within the national budget envelope as, firstly, the door to increase funds was not irretrievably closed and, secondly, that there was considerable scope for the reallocation within a departmental budget.

72. Given the decision challenged in the present case is to a defined reduction to a specific element within an education budget (which cannot subsequently be increased by the executive) sitting within a Local Authority budget it is not easy to see how the judgment in **Fawcett** supports, without more, Mr Oldham Q.C.'s argument that the stage had not been reached in this case when the duty to assess had arisen. I do not accept that it is proper to simply cascade Ouseley J's analysis down from the national budget to a specific and defined element within a local authority budget. The question at what point a duty applies is clearly fact specific. There is very considerable difference between a challenge to elements of the national budget and a £5million reduction to a specific element within an education budget which has been already been the subject of detailed proposals.

73. It is also significant in my view that in **Fawcett** there were two categories (indexation of benefits and the public sector pay freeze) within the budget where the government admitted that it had not, but ought to have, carried out a gender equality impact at an earlier stage than it did. As the assessments had subsequently been carried out the Judge considered the matter to now be academic. Again I do not see how this supports Mr Oldham Q.C.'s submission in this case that the stage when the duty to assess impact arises has not been reached ; rather it my view it undermines it as the

concession in **Fawcett** was that items were sufficiently well defined even at this macro stage for the duty in question to have been engaged.

74. In **JG and MB -v-Lancashire County Council** [2011] EWHC 2295 Mr Justice Kenneth Parker considered a challenge by two disabled adults to two decisions, one of which was that of the full council on 17th February 2011 when it adopted revenue budget proposals fixing, inter alia, a finite sum within which all adult social care services should be provided. It was the Claimants' case that the Council had failed in its duty under section 49A of the Disability Discrimination Act 1995 to have due regard to the need to take steps to promote equality of opportunity for disabled people.

75. Given funding constraints there had been an initial consultation on service priorities (Living in Lancashire; Budget Consultation 2010) with results in December 2010. The results indicated which service areas residents believed should be budget priorities. Following this consultation, the Cabinet recommended cash limits including for adult social care. Prior to the decision of the Council under challenge, the Cabinet resolved to approve, for the purposes of consultation, a series of budget proposals to achieve necessary savings. Further and specific consultation then commenced with a paper published entitled "*Making Difficult Decisions about Funding Adult Social Care.. A consultation on how care services can be funded in future in the face of budget pressure*". The Cabinet also resolved that the cabinet member for adult social care be authorised to consider responses to that consultation and its proposals (amongst other things) to increase charges for adult social care and raise the eligibility threshold.

76. Before the end date of that consultation (which ran to 28th February), on 17th February 2011 the Council adopted revenue budget proposals for the next three years fixing, amongst other matters, a finite sum within which all adult social care services should be provided. However the budget did not constitute approval of any proposals being considered by the cabinet member and, in my view importantly, was described by Kenneth Parker J as a "preliminary" and not a final decision about what policies would be or "even what sum of money would, in fact, be saved under each of the service proposals". It was made clear that if, in light of the results of the "Difficult Decisions" consultation, the cabinet member did not consider that it was appropriate to introduce any or all of the proposed changes it was open to him to consider if savings could be found elsewhere either within the budget for social care or from other services across the authority. A very different picture to that in the present case.

77. As Kenneth Parker J stated (paragraph 17)

> " it was always, therefore, intended that decisions relating to adult social care would be taken after 17th February 2011".

So the decision as to whether there should be *any* budget reduction in social care was to be taken after consideration of the results of a focussed consultation and was of a very markedly different nature and extent to that under challenge in the current case as there was flexibility specifically enshrined to avoid cuts and to gain necessary funds from outside the relevant element of the budget i.e. from wholly different services. So the view of Kenneth Parker J, that it was open to the Council to take the

"preliminary" decision, which did not commit it to implementation of any specific policy within the budget framework until after full and detailed assessment of the impact, was in respect of a decision of a different nature and in different circumstances from that challenged in this case.

78. In **R (A, B and C)-v-Oxfordshire County Council** [2016] EWHC 2419, the Defendant Council set an annual budget for the next year, 2016/17, on 16th February 2016. It also approved a "medium term financial plan" ("MTFP") which was a rolling plan said to be

> " indicative as to the budget which would be available for the discharge of executive functions in future years".

79. In setting the budget the Council did not follow a recommendation by its Cabinet to reduce annual expenditure by the Children, Education and Families Directorate by £2million ; budgeting instead for a lesser reduction of £0.8m. The effect of this was to defer cuts set out within an earlier iteration of the MTFP agreed by the Council in February 2015 which set out stepped reductions in spending resulting in spending being reduced by £6 million by 2018/19. In September 2015 the Director of Children's services had suggested that the figure should be increased to an £8million reduction and there had then been consultation upon proposals as to how this could be achieved.

80. The effect of the Council not reducing the budget by the amount proposed in the MTFP was then considered by the Cabinet (which had the results on the consultation) on 23rd February 2016. The Claimants argued that when the Cabinet considered the responses to the consultation it erroneously proceeded on the basis that the £6 million cut agreed in February 2015 was set in stone i.e. was "a given". Alternatively, if the approval of the MTFP by the Council on 16th February 2016 was a "firm decision" (see paragraph 19) then it was unlawful as there had not been consultation and/or discharge of the public sector equality duty.

81. Mr Justice Langstaff found as a fact that the Cabinet had no belief that the reduction set out in the MTFP was set in stone, rather it was a flexible plan that could be adjusted. He also found that, as the decision of the Cabinet could not be challenged on the grounds of a failure to consult or apply the public sector equality duty, the claim must fail on its facts.

82. The Judge then went on to consider, obiter, what he would have held if he had found that

> "the cabinet had considered that the budget was set in stone";

(see paragraph 45).

83. I must confess to doubt as to the use of the word budget as opposed to MTFP. It was in respect of the latter that the issue was whether it was set in stone or not. It was the latter that caused the funding issues about which the Claimants complained. A budget is a very different beast. Mr Oldham Q.C. who appeared for the authority, as he does here, is recorded as submitting.

> ".. there is a difference in function between the council when setting a budget and approving a MTFP and a cabinet or executive of a local authority making operational decisions within the scope of the funding envelope provided for the budget once set".

84. In my view this submission conflated two wholly separate decisions first, the setting of a budget in line with the statutory requirements and second, the setting of a (rolling) MTFP which is only "indicative" as to the budget which would be available for the discharge of executive functions in future years. It appears to me that the flexibility of the executive in relation to the implementation of latter is very different to that in relation to a budget and that must reflect back upon the duties upon the Council when setting it.

85. Langstaff J stated

> "as to whether the full council paid due regard to the public sector equality duty this must be determined both in relation to the decision taken, and an understanding of its consequences, together with evidence of that which led to it taking the decision in question".

I respectfully agree.

86. After consideration of the history of assessments and consultation (see paragraphs 50-52), and noting that the Council chose not to follow the recommended deduction but a significantly smaller one, Mr Justice Langstaff concluded

> " It is beyond argument, therefore, that Council had not only the benefits of a history of community impact assessments, knew of its obligations in respect of the PSED, and had specific aspects of the effect of its decision upon vulnerable groups emphasised before it, but that it reflected much of that material in its decision making. Its obligation was to pay due regard to the PSED. I am satisfied on this material that council, when exercising the broad function of setting a budget rather than determining the precise from that the provision of children's centres was to take, did so".

So the learned Judge proceeded on the basis that there was a duty to pay due regard to the PSED when exercising the "broad function of setting a budget". However, on the facts before him, including consideration of the precise decision taken, that duty had been complied with in substance and after "real debate". This paragraph does not support Mr Oldham Q.C.'s submissions; quite the reverse.

87. I note that Langstaff J was also of the view that the budget would not have been unlawful because the detailed consultation responses were not before the councillors as it was the function of the cabinet to consider the responses to the consultation and to consider then "properly and lawfully" and there was sufficient flexibility within the funding envelope. He concluded.

> "Accordingly, had it been necessary to do so I would have found no breach of the law even if the cabinet had impermissibly regarded the budget as a given it representing a funding envelope".

88. However, as I have already set out, I do not understand whether the Judge actually meant to refer in this regard to the budget or the MTFP given that it was the latter in respect of which the allegation was that it was taken "as given". I am not alone in my confusion as the headnote states; "The MTFP is a funding envelope with flexibility in it …". As I have stated there is very considerable difference between the flexibility the executive has in relation to a MTFP (the central issue in the case) and that which it has in relation to a budget. Given that this finding was obiter and accompanied by a finding that there was a duty to pay due regard to the PSED when exercising the broad function of setting a budget I do not feel it necessary to go further. In my view this was again a case that very much turned on its facts; facts materially different to the present case.

89. As a result of this analysis it is my view that the cases of **Fawcett-v-Chancellor & others** , **R(JG)-v- Lancashire** and **R (A,B and C)-v- Oxfordshire** ,when carefully considered in context, singularly or in combination, are very far from determinative as Mr Oldham Q.C. submits. In my judgment they do not support his main proposition that no duty arises to consider consultation under and by reason of the PSED or section 27 of the 2014 Act upon a local authority when setting a budget. Rather they establish that it is the nature, extent and impact of the specific decisions to be taken by the Council in the budget setting exercise (in fact an exercise in setting the council tax rate) which are determinative of whether a duty arises or whether it only arises at a later stage.

90. Careful consideration of the factual context is necessary in any public law challenge. It is always necessary to carefully examine the precise nature and extent of a decision and the surrounding circumstances. If the budget decision under challenge is sufficiently far removed from a final decision affecting the provision of an element of a service, then there is nothing wrong in principle in not undertaking a detailed assessment of the impact until specific policies have been formulated. The distance may be because the budget is sufficiently high level or, as in the case of a MTFP, not set in stone. Indeed, when setting a high level national budget it would often (but not invariably) be difficult to compile a sufficiently detailed consultation document or undertake a focussed impact assessment (although as conceded in **Fawcett** it may be both possible and necessary for certain elements). Also if, as in the **JG and MB-v-Lancashire** case, the door remains open, following the future result of a targeted consultation, to avoid any cut and thus any reduction in services at all, and/or to gain funding from another service, again there is nothing wrong in principle in not undertaking a detailed assessment of the impact until the result and impact of the consultation is known. However, due regard under the PSED (and if necessary consultation), consultation under section 27 of the 2014 Act and regard under section 11 of the 2004 Act must be essential preliminaries to any significant, sufficiently focussed, and in financial terms apparently rigid, decision to impose a reduction in spending, even if taken as part of the setting of "a budget".

91. So what of the decision here? It was a decision to cut funding to a specified area within the education budget. It followed on from detailed consideration of historic overspend which identified how the savings could be achieved. In my judgment this was indeed a significant, sufficiently focussed and in financial terms apparently rigid decision to engage the duties to which I have referred. There was no problem with the detail of likely impact being not available or the decision being somehow too distant

from the actual affect upon the services provided to children with special needs to make inquiry into likely impact and/or consultation meaningless or even difficult. It was a decision to cut the extent of services to a defined group who were, on the Defendant's own analysis, struggling with the extent of current provision.

92. As Lord Justice Elias observed in **Bracking** at paragraph 74 ;

> " Any government, particularly in a time of austerity, is obliged to take invidious decisions which may exceptionally bear harshly on some of the most disadvantaged in society. The PSED does not curb government's powers to take such decisions, but it does require government to confront the anticipated consequences in a conscientious and deliberate way in so far as they impact upon the equality objectives for those with the characteristics identified in s 149(7) of the Equality Act 2010"

93. Indeed, it was stated within the report to the Council, under the rubric of "Public Sector Equality Duties" that

> 'Individual Equalities Impact Assessments...have been completed for those proposals...where it is felt that proposed savings could have an adverse impact on a particular group of individuals' (para 20.2)

This was an acknowledgment of the need to undertake appropriate enquiry into the potential impact of budget reductions in some areas. However, there was no such impact assessment in relation to the high needs block funding reductions.

94. I am also satisfied that the Defendant had adequate time and sufficiently well formed proposals, to consult well prior to the end date in March for the setting of a budget.

95. The setting of the budget is a decision of first order importance for a public authority; hence its statutory footing. As the Master of the Rolls stated in **R(Buck)-v-Doncaster**

> "The budgetary process is geared to avoiding any budget deficit by ensuring that the revenue expenditure will not be exceeded".

96. As a result, any responsible public authority will inevitably strive to limit its expenditure to budgeted amounts to the greatest possible extent (indeed, this was acknowledged in the report to Council when the budget was set) and as result the public have an expectation and understanding that, unlike a MTFP, the funding limits in a budget are set in stone. The public will also expect that any challenge at a later stage to an inadequate level of funding for an element of a service provided by the Defendant (e.g. funding for pupil referral units) will be likely to be met, at the very least in part, with the response that a decision has been taken as to available funding for the service as a whole, which cannot be revisited. In my judgment legitimate public expectation is that the time to influence and challenge a proposed reduction to the funding of a specified element, such as special educational need provision, within a departmental budget is if, and when, it is considered by the Council as part of the process of setting a budget and not at some later stage when a reduction can be viewed as a fait accompli.

97. As the allocation of the general funds was made by the Council at the meeting on 20 February 2018 it was open to members at that meeting to allocate more funds to the

high needs budget and a consequentially reduced allocation in other service areas. As Mr Tully makes clear, the general fund of a local authority simply *'represents money that can be used for expenditure on services'*. Appropriate consultation would have enabled and informed consideration of whether the situation of children and young people with SEND required the Defendant to ensure priority funding.

98. Mr Tully explained that

> *'*The overall principle which the Council is seeking to follow is the principle that, if possible, the DSG (Dedicated Schools Grant) should pay for Schools Budget responsibilities.

However, as Ms Richards Q.C. correctly points out, this a simply a principle which the Defendant has chosen to follow i.e. a political choice and not a statutory requirement. As a consequence, it could be abandoned or varied, most pertinently in light of the results of appropriate consultation.

99. There was no reason why the consultation exercise actually undertaken could not have addressed this issue in principle e.g. whether it was appropriate to reduce expenditure in this area, or whether alternative savings ought to be found. The Defendant consulted in relation to a number of other aspects of its budget (for example, changes to eligibility for care and support for children and families and cuts to funding for neighbourhood action). As Ms Richards Q.C. correctly submitted the absence of consultation prevented families such as the Claimants from highlighting their concerns as to the inadequacy of current provision in this area and related outcomes, for example the highest rate of fixed term school exclusions in the country and the widening achievement gap, which would point to a problem requiring greater investment in SEND services rather than a reduction in funding.

100. For these reasons I reject Mr Oldham Q.C.'s submission that consultation would have been "inchoate" and/or meaningless.

101. I note that the report expressly recognised that the budget setting decision *'might imply that the service will reduce or even cease'*, noting that *'that is not the same as the actual decision to reduce the service or cease it'*. However, this is not a qualification that comes anywhere close to dislodging appropriate duties and placing them further down the decision tree. In my judgment the position would have been more accurately described by stating that due to the decision to reduce overall funding it was axiomatically the case that some elements of service would reduce or even cease. Exactly how those savings would be achieved had not yet been decided, but if the savings were to be achieved, the Defendant inevitably had to withdraw some existing benefits from children with SEND. It is implausible to suggest otherwise i.e. that the required savings can be made without at least some reduction in or alteration to frontline services. Indeed detailed savings proposals were in place for the support from mainstream schools, special schools and the pupil referral unit.

102. I note the evidence in the statement of Mr Tully and that of Ms Emilie William- Jones, the purpose of which is described as being *"to update the court as to progress made in relation to the measures that are being proposed to bring high needs spending within the funding envelope agreed for 2018-2019"* . However, this is

evidence of matters which post-date the decision under challenge, and is therefore, strictly speaking, immaterial to the issues of principle raised by this claim. It is no part of the court's task to review the progress made since the decision.

103. Given my findings that this was a significant, sufficiently focussed and rigid decision to engage the duties to which I have referred, and also that meaningful consultation was possible, the next question is whether as a result the duties identified were breached by a failure to consult or otherwise.

104. Turning first to PSED, having due regard to the need to advance quality of opportunity involves, inter alia, having due regard in particular to the need to remove or minimise disadvantages suffered by persons who share a relevant protected characteristic, to take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it, and to encourage persons who share a relevant protected characteristic to participate in public life or in any other activity where participation by such persons is disproportionately low. In this context, participation in public life embraces participation in a mainstream educational environment and such participation for children with disabilities is disproportionately low. Coupled with the high numbers of exclusions and of children in special schools, these are factors which, to quote Ms Richards Q.C. "cried out for consideration as part of the Defendant's decision-making process".

105. In my view this is a case where the Defendant was under a duty to acquire further information, including through consultation, in order to comply with the PSED, yet did not do so. Members were referred to the duty in brief terms at sections 20 and 21 of the report before them, but duty requires substance, and not form, in its consideration. Also, general regard to issues of equality is not the same as having specific regard by way of conscious approach to the statutory criteria. Here the members were engaged in policy choices in respect of which regard to the PSED was particularly important. Due regard to the specified needs may have led to a decision that it was not appropriate to reduce funding at all.

106. The Defendant has not identified any other source of information, beyond a general appreciation that there would be some impact, which was before members when the budget was approved and which would have informed them of the potential equality implications of this significant reduction in funding for SEND services. In these circumstances, a fortiori the worrying fact that the rate of pupil exclusion is the highest in the country and there is a widening attainment gap, the PSED duty required the members to have further information as to adequately understand the likely impact of the proposals, including through consultation. Without such information they could not and did not pay the required 'due regard' to the specified needs including the need to advance equality of opportunity. So in short as there was no consultation and inadequate inquiry there was a failure to comply with the PSED.

107. In my judgment consultation was also mandated by section 27 of the Children and Families Act 2014.

108. Sub-section 3 provides that

> 'In exercising its functions under this section, the authority must consult- (a) children and young people in its area with special educational needs, and the parents of children in its area with special educational needs.

At first blush the requirements to keep provision for children and young people with SEND under review and to consider the sufficiency of this provision were plainly engaged by the Council's decision as to the reduction in the high needs block budget and the Defendant was obliged, and was in a position, to consult children, young people and parents, but did not do so. However, Mr Oldham Q.C. submitted that Mrs Justice Laing was "plainly wrong" in in **R (DAT and BNM -v-West Berkshire** to hold that s 27 applies whenever decisions are taken which affects the scope of provision referred to in that section, so it should not be followed. He said the learned Judge was wrong for the following reasons:-

i. Section 27 is what is says it is: a duty to keep matters under review. That is different from a duty to take certain matters into account at every point a Local Authority takes a decision bearing on the very wide matters within the scope of the section ;

ii. Section 27 would be of enormous breadth if Mrs Justice Laing were right ;

iii. Compliance would be "unworkable" if the duty required consultation with a very large number of persons at point of engagement (s 27(3)) and by the cross-application of s 116B of the Local Government and Public Involvement in Health Act 2007 (s 27(4)).

109. Given Mr Oldham Q.C.'s criticisms of the judgment it is necessary to set out the relevant passage in **R (DAT and BNM -v-West Berkshire** in full.

> 30. Section 27(1)(a) of the 2014 Act imposes a duty on a local authority to keep under review, among other things, its social care provision for children with disabilities. Section 27(2) requires it to consider the extent to which that provision is sufficient to meet the social care needs of the young people concerned. Section 27(3) of the 2014 Act imposes a duty on a local authority to consult with a wide range of local bodies when it exercises the functions imposed by section 27. I have not been referred to any statutory guidance or other material which explains the purpose of these duties, or the frequency with which they are expected to be exercised. In the absence of such material, and despite my misgivings about the practical consequences of a such a view, I am driven to the conclusion that they must bite, where, as here, a local authority makes a decision which will necessarily affect the scope of the provision referred to in section 27.

110. Like Mrs Justice Laing, I was taken to no statutory guidance or other material which explains the purpose of these duties, or the frequency with which they are expected to be exercised, and no authority which circumscribed what I agree is at first blush is a wide-ranging duty of consultation.

111. It is not necessary, even where it appropriate, for me to suggest principles by way of guidance for the practical application of the section. I, like Mrs Justice Laing, have to consider the application of the section to the facts before me.

112. In my judgment Mr Oldham Q.C.'s analysis can properly be turned on its head and given that the section must have some utility the starting point taken that the Defendant was, by statute, under a duty to review educational provision for children and young people who have special educational need and, specifically, to consider the extent to which it is sufficient. So some review was necessary. The frequency and adequacy of any system of review is not a matter in issue in this case ; rather whether a specific proposal triggered a duty to consult.

113. In my judgment a potential decision to significantly reduce provision (which axiomatically follows from a decision to significantly reduce the budget) plainly brings into question, and therefore requires consideration of, the adequacy of what would be the remaining provision especially if, as here, there are concerns about whether the current system is adequately helping those with special needs (which must flow from having the worst exclusion rate in the county and the Defendant's own analysis that children with special educational needs were "not achieving their potential or the basic level of qualifications that will enable them to access further education or secure employment"). If there is a clear issue requiring review as to the future adequacy of provision then, in exercising its functions of review, an authority is mandated to consult with children and young people in its area with special educational needs, and the parents of children in its area with special educational needs. Rhetorically, if the duty does not arise in such circumstances when would it arise? I am wholly unpersuaded on the facts before me (and given the consultation undertaken and also the additional requirement to consult the Schools Forum in any event) that consultation with relevant children and their parents would have been of "enormous breadth" or unworkable.

114. So for the reasons set out above, subject to the Defendants' other arguments to which I shall shortly turn, ground one succeeds.

115. I need say no more about breach of the substantive requirements of the PSED and section 27 of the 2014 Act. However, for the sake of completeness I will also briefly consider the Claimants' argument as to the common law duty to consult and grounds based on breach of section 11 of the 2004 Act and irrationality, before considering the other elements of the defence.

Common law duty to consult

116. I start with the common law duty to consult.

117. Most commonly a public authority's duty to consult those interested before taking a decision is generated, as I have already set out in detail, by statute. However, it can also be generated by the duty cast by the common law upon a public authority to act fairly.

118. In this case it is said that fairness demanded consultation because the Defendant would inevitably be withdrawing an existing benefit from children with special educational needs, and fairness requires consultation before a benefit is withdrawn (see generally **R (LH) -v-Shropshire Council** [2014] EWCA Civ 404 per Longmore LJ at paragraph 21).

119. In **R (Moseley)-v-LB of Harringey** [2014] UKSC 56) Lords Wilson and Kerr endorsed the statement by Lord Justice Simon Brown in **Ex p Baker** [1995] 1 All ER 73, 91 that

> "the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit".

and their Lordships stated at paragraph 24 ;

> "Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In *R (Osborn) v Parole Board* [2014] AC 1115, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed JSC in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement "is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested": para 67. Second, it avoids "the sense of injustice which the person who is the subject of the decision will otherwise feel": para 68. Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not: "Yes or no, should we close this particular care home, this particular school etc?" It was: "Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our borough, should we make one in the terms which we here propose?"

120. Ms Richards Q.C. also argued that the Defendant had consulted, and had plans to consult, in relation to a number of other aspects of its budget ; for example changes to eligibility the care and support for children and families and cuts to funding for neighbourhood action. This demonstrated that the Defendant impliedly accepted a duty to consult those affected by withdrawal of benefit.

121. Mr Oldham Q.C. submitted in response that there was no question of any abuse or change of rights on 20th February 2018. He referred to the Judgment of Lord Justice Laws in **R (Bhatt Murphy) -v-The Independent Assessor [2008] EWCA Civ 755** at [49].

> "I apprehend that the secondary case of legitimate expectation will not often be established. Where there has been no assurance either of consultation (the

> paradigm case of procedural expectation) or as to the continuance of the policy (substantive expectation), there will generally be nothing in the case save a decision by the authority in question to effect a change in its approach to one or more of its functions. And generally, there can be no objection to that, for it involves no abuse of power. Here is Lord Woolf again in *ex parte Coughlan* (para 66) "In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process." Accordingly for this secondary case of procedural expectation to run, the impact of the authority's past conduct on potentially affected persons must, again, be pressing and focussed. One would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit: not necessarily for ever, but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult."

122. Mr Oldham Q.C. also submitted that Parliament had expressly made very limited provision for consultation in relation to the setting of the budget by the Council in the Local Government Finance Act 1992 section 65 (duty to consult non-domestic rate payers before setting a budget), and this negatives any wider duty.

123. Taking Mr Oldham Q.C.'s second point first I do not accept that the existence of a limited statutory requirement can oust a common duty to act fairly; particularly when the aim of that requirement is far removed from the issue potentially giving rise to the duty. Further there are statutory duties to which I referred at some length which give rise to duties to consult.

124. I also do not accept that the Claimants, and other children with special educational needs (an identifiable set of individuals) who were receiving specific educational provision because of that need, did not have substantial grounds of belief that the existing level of provision, deemed necessary to satisfy a clear need of assistance, would continue without prior consultation in respect of any substantial reduction to it. This was an element of the provision of education services by the Defendant and the statutory duties requiring such provision provide a base for that expectation. Those receiving the services and their families could expect to have an opportunity to explain from an informed standpoint why cuts to the service must be avoided and to be treated the same as other specified groups who would necessarily feel the adverse impact of reduced funding. The decision not to consult contrasts sharply with the steps taken in relation to those receiving care and support for children and families.

125. As a cross-check when standing back and asking a simple, broadbrush and impressionistic test; was this fair? ; the decision not to consult this group when funding was to be cut by such a significant sum with inevitable impact upon the provision of frontline services was unfair. More nuanced analysis in light of binding authority as to the duty to consult does not change the answer. Accordingly I find that the Defendant was also in breach of the common law duty to consult.

Breach of section 11

126. Mr Oldham Q.C. submitted that it was 'unrealistic' to say that members may have been unaware of the effect on children's welfare of a decision of this nature. Further, that

i. Section 11 does not require children's welfare to "be the paramount or even of primary consideration": per Baroness Hale in **Nzolameso** at para 28;

ii. Section 11 has its "sharpest focus" in the case of a decision which directly affects a particular child or children who need protection: **R (Castle) v Metropolitan Police Commissioner** [2012] 1 All ER 953, para 51.

iii. That the duty will frequently be discharged through the public authority's observance of other duties which take into account children's interests. Thus in **R (SB) v NHS England** [2018] PTSR 576, s 11 was held (para 98) not to compel the NHS to take a child's welfare into account "in any wider sense" beyond that to which it was already taken into account in its policy for exceptional treatment funding. In **R (Juttla) v Hertfordshire Valleys Clinical Commissioning Group** [2018] EWHC 267 at para 44, s 11 was held to add nothing to the equality impact assessment already undertaken; and in **Castle** the Court said:-

> "53 … We regard it as unlikely that in the general performance of police work circumstances will arise in which an officer's actions could be rendered unlawful because he failed to have regard to the statutory need."

127. Mr Oldham Q.C. also submitted that given that the entire high needs budget is specifically provided so as to assist children with special education needs, and given that the Council could not take service provision decisions, it is entirely unrealistic in any event to contend that on 20th February 2018 members did not have regard to their welfare.

128. Whilst the points made by Mr Oldham Q.C. at (i)-(iii) above have general application I have only to consider the impact of the section upon the current facts. In my judgment consideration should have been given to the impact of the reduction in funding upon on a limited, defined and identifiable group; those with special educational needs. There was no other impact assessment to stand in the stead of, or alongside, the need to have regard to promote the welfare of these children. Also, that there was provision for those with special educational needs did not prevent the duty biting when a decision was taken which [was to impact significantly and negatively upon that provision.

129. There is no evidence, from the extensive paperwork evidencing the Defendant's decision-making process, that members of the Council had any regard to

the need to safeguard and promote the welfare of children, still less "actively promote" children's welfare, when making the decision to proceed with the proposed savings. Indeed, the decision-making process appears to be driven entirely from the standpoint of ensuring a balanced budget by 2020/21. In my judgment it is simply not good enough for compliance with section 11 to say "they must have done"; consideration is not self proving. As Baroness Hale made clear in **Nzolameso** at [37], it is for the local authority to demonstrate compliance with the duty. There is no evidence of such compliance here.

130. Accordingly I find that that there was a breach of section 11.

Irrationality

131. Finally, the Claimants argue that the decision of the Council was irrational because members failed to consider relevant considerations and/or failed to ask the right questions. Put another way, it was not reasonable, in the public law sense, for the Defendant to take its decision without having a sufficient understanding and awareness of the implications of the decision.

132. The relevant considerations were set out as

(i) The impact on local schools. The Claimants' case being that there was no evidence that the members gave any consideration to the impact on the schools in its area of the funding reduction for services for children and young people with special educational needs; and

(ii) The fact of the acknowledgment in the Defendant's draft Corporate Strategy 2018-2023 p17, that achievement gaps for disadvantaged children in the city are "*unacceptably high and are widening'* and that children with special educational needs are '*not achieving their potential or the basic level of qualifications that will enable them to access further education or secure employment'*. So there was recognition in the strategy of an underlying state of affairs which was not factored into the decision-making process.

133. Ms Richards Q.C. submitted that rational decision making required members to consider whether the special educational needs budget ought to be protected from any cuts (whether by cuts being made to other service areas or otherwise), and there is no evidence of any such consideration.

134. Mr Oldham Q.C. submitted that this ground should fail as "some measure of reality needs to be injected". The material before members, when they set the budget, clearly did take the corporate strategy into account. Further there is no inconsistency between the general aspirations set out within the strategy and planning to reduce deficit funding.

135. The problem with consideration of a rationality ground which is not at the heart of a claim, but follows specific grounds alleging a failure to consider relevant

information (or the consideration of irrelevant information) is that the Court's findings on the specific grounds must interact with, or feed into, consideration of the ground. Quite often in judicial review grounds are not mutually exclusive rather they have blurred edges and/or overlap and this final ground provides a clear example as it is a claim that a failure to adequately gain information so as be able to take relevant considerations into account, established as failure under other grounds, is said to have led to an irrational decision. If the level of inquiry leading up to a decision is found to be inadequate i.e. that the decision maker was bound to gain additional information but did not do so, it will usually be very difficult indeed to see how the decision does not inevitably also fall on rationality grounds as a result. So it is with the first of the material considerations referred to by Ms Richards Q.C. ; it is based on the failures established elsewhere in the grounds.

136. In my Judgment, if it is established that there was a failure to take material considerations or necessary information into account, which, objectively, is likely to have had significant weight/effect within the decision making process, then a prima facie case of irrationality is made out without more. Here it cannot be said that the members rationally concluded that compliance with the PSED was not required (and there is no evidence that they reached any such conclusion). Establishing irrationality can no longer remain the daunting task it often is, if it has been established that the decision maker has erred in a significant way as occurred here. Accordingly, although it is academic this ground also succeeds.

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137. However, these findings are subject to the Defendant's others ground of defence to which I now turn.

No substantial difference

138. Mr Oldham Q.C. submitted that the outcome for the Claimants was highly likely not to have been substantially different absent the flaws in the decision making so permission and/or relief should not be granted ; see generally the Senior Courts Act 1981 sections 31(2A) and 31(3C).

139. The provisions of the Senior Courts Act 1981 on which Mr Oldham Q.C. relies require the Court to look backwards to the situation at the date of the decision under challenge. The Claimants rely on and adopt the observations of Mr Justice Jay in **R. (on the application of Skipton Properties Ltd) v Craven DC** [2017] EWHC 534 (Admin) at §§97-8 in relation to section 31(2A):

> *"*97 … This is a backward-looking provision. However, and contrary to Mr Bedford's arguments, the 'conduct complained of' here is the various omissions I have listed (the failure to consult, assess and submit for examination), not the decision to adopt. 'The conduct complained of' can only be a reference to the legal errors (in the Anisminic sense) which have given rise to the claim.
>
> 98 Had the defendant not perpetrated these errors, by omission, I simply could not say what the outcome would have been, still less that it would highly likely have been the same."

140. I accept Ms Richards Q.C.'s submission that great caution must be exercised by the Court in second guessing, according to a high standard of probability and on an entirely hypothetical basis, what the outcome would have been if the conduct complained of had not occurred. As Megarry J stated in **John v Rees** [1970] Ch 345, 402

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of…of fixed and unalterable determinations that, by discussion, suffered a change…"

141. More recently Singh J (as he then was) stated in R **(Midcounties Cooperative Ltd) v Forest of Dean DC** [2017] EWHC 2056

> "It is not for this Court generally speaking to anticipate what the outcome would be if a planning authority directs itself correctly according to law

142. In the present case the Court is in no position to say what the outcome would have been absent the flaws in the decision making. Following consultation the decision might well have been different and full funding *might* have been allocated. The picture would then be very different.

143. I see no merit in this argument.

Alternative remedy

144. Mr Oldham Q.C. also relied upon the availability of an alternative remedy; that there is a right of appeal under section 51 of the Children and Families Act 2014 against a failure to assess for SENs or against the education contents of an ECHP.

145. I agree with Ms Richards Q.C. that this argument misses the point. The Claimants are not challenging the specific provision, or lack of provision, made in their individual cases. Their challenge is to the decision to reduce the amount of funding available. At the time of any individual challenge this would be a fait accompli and any grounds for challenge necessarily circumscribed. Taking the position of the third Claimant, he is currently in a Pupil Referral Unit which, given the decision taken as to budget and the recommendations made, faces a potential reduction in funds. If in due course that came to pass and he was adversely affected by a proposal for a significantly restricted regime he would have no challenge on the basis that SEN provision should not have had its income reduced. That ship would have sailed.

146. I see no merit in the argument based on alternative remedies.

Promptness

147. It is particularly important that challenges to budget decisions are taken quickly for obvious reasons. The challenge is to the decision of the Defendant on the 20th February 2018. This claim was filed on 30th April 2018 so was well within three months. However, Mr Oldham Q.C. submitted there was delay under whether under s 31 SCA 1981 or CPR 54.5. He pointed to the fact is that the hearing was at the end of the fourth month of the new financial year and that a great deal of work had already gone into progressing spending plans under the budget head challenged. Many different organisations and people are affected by those decisions. He also relied on the fact that the Claimants had not sought interim relief to prevent this work or any other matter in relation to the budget. Accordingly, he submitted that permission and/or relief should be refused, whether on the ground of undue delay under s 31(6), or by reason of CPR 54.5 (claim not prompt).

148. The Claimants are children and a parent who have no legal knowledge and expertise. Their solicitors act for them via legal aid funding, which as the Defendant properly acknowledges creates delay. The prompt steps taken by the Claimants' solicitors at every stage are evidenced in the statement of Mr Rosenberg who is their solicitor. As for the failure to seek interim relief, the relief sought does not interfere with the Defendant's overall budget or Council Tax calculation and the Claimants' grounds and statement of facts referred at paragraph 30 to the need to have the matter heard as promptly as possible. In my judgment having regard to these factors it would be wrong to refuse leave or relief on the basis of delay or lack of promptness.

Conclusion on merits

149. For the reasons set out above I grant permission on all grounds and the claim succeeds.

Remedy

150. The relief sought by the Claimants (alongside declaratory relief) is a quashing order in relation to the High Needs Block budget allocation. In my judgment this form of relief is proportionate, as it requires the Defendant to reconsider its funding allocation in this area in the light of the resources available at the material time, without disturbing other aspects of the budget or in particular the Council Tax calculation and without the Court telling the Defendant how its resources should be expended.

151. Mr Oldham Q.C. submitted that given developments in terms of the budget after 20th February 2018 , which has meant a smaller reduction that required i.e. a much better than expected position, and that the Defendant is plainly aware of the need to consult and assess equality impacts in developing service provision changes, it is inappropriate to grant any relief. I do not agree. The obvious flaw in his submission is that a significant reduction to the SEN budget remains in place, even with the better outcome. I am not satisfied that had the Defendant acted lawfully there would necessarily have been any reduction at all.

152. I make an order with the appropriate declaration and quashing the high needs budget allocation.

153. I leave Counsel to consider this judgment and, if possible, to draw up an agreed order. In default of agreement the court should be notified of what issues remain and what is proposed as regards their resolution (e.g. written submissions, telephone hearing or further attended hearing).