Neutral Citation Number: [2019] EWHC 1817 (Admin)

Case No: CO/1941/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2019

Before:

THE HONOURABLE MRS JUSTICE ANDREWS DBE

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Between:

THE QUEEN (on the application of L, an infant) by his mother and litigation friend, X	**Claimant**
- and -	
BUCKINGHAMSHIRE COUNTY COUNCIL	**Defendant**

- -

- -

Ms Fenella Morris QC and Mr Stephen Broach (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Mr James Goudie QC (instructed by **HB Public Law**) for the **Defendant**

Hearing dates: 2 and 3 July 2019

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Approved Judgment

Mrs Justice Andrews:

INTRODUCTION

1. This case concerns the lawfulness of a decision taken by the Cabinet of the Defendant ("the Council") at a meeting on 4 March 2019, to close 19 of its 35 existing children's centres, whilst ensuring their continuing use for early years and community benefit. The remaining 16 children's centres will be retained for early years provision, with the buildings also being made available for additional use to support families with children aged from 0-19 (or up to 25 for children with special educational needs or disabilities). These sites will be renamed "family centres" to reflect their wider support role.

2. The impugned decision ("the Decision") was taken following a 10-week consultation process which took place between 4 October 2018 and 13 December 2018 ("the Consultation"). It was made in accordance with the recommendations set out in an Officer's Report to Cabinet ("the Report") to which five documents were annexed: a Consultation Findings Report, the Council's Early Help Strategy, a Proposed Design for New Family Support Service, a Family Centre Site Locations Report, and an Equality Impact Assessment ("EIA").

3. The Consultation took place, and the Decision was taken in the context of the Council's "Early Help Review" ("the Review") and against a background of funding changes imposed by Central Government which placed a massive strain on public finances generally, and on the Council's finances in particular.

4. The provision of children's centres is one element in the Council's Early Help Strategy, which is about retaining and improving universal services within the confines of the Council's overall budget. In a guidance document issued by the Department for Education in July 2018, for inter-agency working to safeguard and promote the welfare of children (as envisaged by the Children Act 2004) entitled "Working Together to Safeguard Children", "*early help*" is defined as "*providing support as soon as a problem emerges….at any point in a child's life".* That guidance stipulates in paragraph 11 that the provision of early help services should form part of a continuum of support to respond to the different levels of need of individual children and families.

5. For the purposes of the Review, the Council defined the different types of interventions that families receive in Buckinghamshire according to four different levels of need. Level 1 covers children whose needs are met within universal services open to all families (such as children's centres); Level 2, children with additional support needs that can be supported by a single agency response and partnership working; Level 3, children with complex or multiple needs requiring a multi-agency coordinated response, with a lead professional; and Level 4, children with a high level of unmet and complex needs, or those in need of protection. In Buckinghamshire most children (around 85%) fall within Level 1.

6. At the time of the Review, most early help services in Buckinghamshire were focused on a particular age group, a single issue or one approach, which feedback from children and families captured nationally had shown was not the best approach to build resilience and improve outcomes. Consistently with the statutory guidance, the

Council considered that it was important that its early help services were not considered in isolation, but instead as a constituent, complimentary part of a whole system approach. To that end, it commissioned in-depth research into the prevalence, estimated need and current service profiles for early help services in the county, including children's centres.

7. Children's centres were acknowledged by the Council to be a key part of its early help services. They reached 33% of the total 0-4-year-old Buckinghamshire population in 2017/18, but only 5% of the families accessing children's centres had an identified need for support during that period. The research also revealed that many of the existing children's centre buildings were under-utilised and were not cost-effective to maintain.

8. Based on the results of the research, the Council concluded that its current early help services were not reaching those families who needed help most. Too many children were getting help too late. Only 15% of the families who were currently accessing the Council's early help services in 2017/18 had an identified need of support, compared to 31% of 0-19-year-olds who the Council estimated may be facing difficulties and benefit from early help services. To improve effectiveness, the Council wished to focus increased resource on supporting the more vulnerable children and their families through targeted provision, with a view to reducing the need for statutory social care. That is a policy decision which has not been criticised, and indeed it is difficult to see how it could be.

9. In its early help review options appraisal in September 2018, which helped it to decide on the nature and scope of the Consultation, the Council said that it knew it needed to change its services to have the most impact in helping families in need, at a time when it had less money than ever before. Of a total overall early help service expenditure of approximately £9.5 million, it had to make a reduction of £3.1 million, because it no longer received any Central Government revenue support grant. Having identified four options, including no change, it said it had ruled the initial option of no change out from further consideration, as the current service model was not meeting the needs of children and families effectively, and was non-viable within the reduced resources available. It carried out an appraisal of the three remaining options, formed a provisional view about them, and then went through the consultation process. Having done so, and having taken into consideration the results of the Consultation, it made the Decision, which was a variant of its preferred option, Option B.

10. The Council's purpose in deciding to restructure its early years provision in this way was to help the most vulnerable children in the county. The better integration and use of buildings for early years services (as well as other services) was with a view to maintaining the overall service and preserving outcomes. The options appraisal indicated that, whilst there will be fewer buildings serving as family centres, there will be longer opening hours, and more services will be offered at these buildings. As Mr Morgan, the Council's head of early help, pointed out in his witness statement, the provision of integrated early years support is not dependent upon physical buildings alone. The new integrated family service will also enable early years support through other routes than the 16 family centres, including a greater emphasis on working with partners such as early years providers and schools and outreach support in order to help those who do not access council buildings, for a variety of reasons.

11. The Claimant, a baby who was born in January 2019, is the youngest of five children; his siblings are aged between 4 and 12. His mother X is a single parent and the children's sole carer; she accesses services at one of the children's centres earmarked for closure, Millbrook, on an almost daily basis. It is easy for her to get there, as it is next to the school attended by her older children. She particularly values the "open access" approach at Millbrook, which means she can attend and obtain support and advice without booking ahead. She is concerned that under the new model, the provision of such drop-in advice will be significantly reduced. Moreover, whilst two of the retained centres are geographically closer to her home, they are more difficult for X to get to by public transport.

12. The Claimant challenges the decision on a number of inter-related grounds. It is contended that the Consultation was unlawful because it was unfair. It was not carried out at a formative stage, the Council having already made the decision in principle not to maintain the status quo, and there was an appearance of predetermination. The Council did not seek views on the "in principle" questions of whether any change in the way that children's centres are provided in the county would be appropriate, and specifically about whether any should be closed. Moreover, the Claimant contends that the Consultation failed to provide sufficient information to enable consultees to respond to it intelligently.

13. It is also alleged that the Council was in breach of section 5A of the Childcare Act 2006 ("the 2006 Act"), in that it failed to direct itself in accordance with its duty under that section ("the sufficiency duty") and by reference to the mandatory statutory guidance on the exercise of that duty, as it was obliged to do under s.3(6) of the 2006 Act. In oral argument Ms Morris QC, who appeared with Mr Broach for the Claimant, focused on this as her primary ground of complaint.

14. Finally, it is alleged that the Council was in breach of its statutory duties under section 1 of the 2006 Act and/or section 11 of the Children Act 2004, and the Public Sector Equality Duty under section 149 of the Equality Act 2010 ("PSED").

15. On behalf of the Council, Mr Goudie QC submitted that the challenge was misconceived. The consultation process was completely fair, and all the relevant statutory duties were properly complied with. Despite the attractive way in which Ms Morris articulated the case for the Claimant, for reasons that will appear, I have reached the conclusion that Mr Goudie is right, and both the Consultation and the Decision were lawful.

THE RELEVANT LEGAL BACKGROUND

16. Section 10 of the Children Act 2004 ("the 2004 Act") imposes an obligation on each local authority in England to make arrangements to promote co-operation between the local authority, its relevant partners, and any other persons or bodies who exercise functions or are engaged in activities relating to children in the local authority's area, as the authority considers appropriate. These arrangements are to be made with a view to improving the well-being of children in the authority's area.

17. Section 11 of the 2004 Act applies to various bodies and persons, including local authorities. S.11(2) provides that each such person and body must make arrangements for ensuring that their functions are discharged "*having regard to the need to*

safeguard and protect the welfare of children". In discharging that duty, they must have regard to any guidance given to them for the purpose by the Secretary of State (s.11(4)). The relevant guidance is the "Working Together to Safeguard Children" guidance referred to in paragraph 4 above.

18. The obligations under the 2004 Act concern children of all ages. The statutory obligations in the 2006 Act concern "*young children*", which is defined by s.19 as (essentially) meaning those aged between 0-5. Section 1 of the 2006 Act imposes on local authorities a general duty in relation to the well-being of young children, in these terms:

> *(1) An English local authority must –*
>
> *(a) improve the well-being of young children in their area, and*
>
> *(b) reduce inequalities between young children in their area in relation to the matters mentioned in subsection (2).*
>
> *(2) In this Act "well-being", in relation to children, means their well-being so far as relating to –*
>
> *(a) physical and mental health and emotional well-being;*
>
> *(b) protection from harm and neglect;*
>
> *(c) education, training and recreation;*
>
> *(d) the contribution made by them to society;*
>
> *(e) social and economic well-being.*

This list mirrors the types of well-being described in s.10(2) of the 2004 Act.

19. Section 3 of the 2006 Act sets out specific duties of local authorities in relation to early childhood services, which are defined in s.2 as including early years provision. S.3(2) provides that:

> *The authority must make arrangements to secure that early childhood services in their area are provided in an integrated manner which is calculated to –*
>
> (*a) facilitate access to those services, and*
>
> *(b) maximise the benefit of those services to parents, prospective parents and young children.*

S. 3(6) provides that:

> "*In discharging their duties under this section, an English local authority must have regard to any guidance given from time to time by the Secretary of State.*

The language is similar to that of s.11(4) of the 2004 Act.

20. Section 5A of the 2006 Act is entitled "*Arrangements for provision of children's centres*." It provides that:

> *(1) Arrangements made by an English Local Authority under section 3(2) must, so far as is reasonably practicable, include arrangements for sufficient provision of children's centres to meet local need.*
>
> (2) *"Local need" is the need of parents, prospective parents and young children in the authority's area."*

21. The discharge of the sufficiency duty therefore involves the Local Authority considering and assessing three things: the need for children's centres in their area; what provision would be enough to meet that need; and what number of children's centres it would be reasonably practicable for the Local Authority to provide, taking into account such matters as affordability, and practical considerations such as the availability of appropriate buildings, geographic location, and accessibility. Provided all three of these matters are taken into account, there is no obligation to consider them in any particular order.

22. A "children's centre" is defined in s.5A(4) as:

> "*a place, or a group of places –*
>
> *a) Which is managed by or on behalf of or under arrangements made with, an English local authority, with a view to securing that early childhood services in their area are made available in an integrated manner,*
>
> *b) Through which each of the early childhood services is made available, and*
>
> *c) At which activities for young children are provided, whether by way of early years provision or otherwise."*

23. Section 5D of the 2006 Act provides that:

> *An English local authority must secure that such consultation as they think appropriate is carried out –*
>
> *……*
>
> *(b) before any significant change is made in the services provided through a relevant children's centre;*
>
> *(c) before anything is done that would result in a relevant children's centre ceasing to be a children's centre…"*

24. In April 2013 the Government issued the "*Sure Start children's centres statutory guidance*" ("the Guidance") to which local authorities are obliged to have regard when carrying out their duties relating to children's centres under the 2006 Act. The Guidance states that it seeks to assist local authorities and partners by making clear:

- *what they **must** do because it is required by legislation;*
- *what they **should** do when fulfilling their statutory responsibilities; and*
- *what outcomes the Government is seeking to achieve.*

25. Chapter 2 of the Guidance, which begins at page 9, identifies as an outcome that "*Local Authorities have sufficient children's centres to meet the needs of young children and parents living in the area, particularly those in greatest need of support.*" It then sets out the sufficiency duty, and the various things that a local authority should do when fulfilling it. These include:

- *ensure that a network of children's centres is accessible to all families with young children in their area;*
- *ensure that children's centres and their services are within reasonable reach of all families with young children in urban and rural areas, taking into account distance and availability of transport;*
- *consider how best to ensure that the families who need services can be supported to access them;*
- *target children's centres services at young children and families in the area who are at risk of poor outcomes through, for example, effective outreach services, based on the analysis of local need;*
- *not close an existing children's centre site in any reorganisation of provision unless they can demonstrate that, where they decide to close a children's centre site, the outcomes for children, particularly the most disadvantaged, would not be adversely affected and will not compromise the duty to have sufficient children's centres to meet local need. The starting point should therefore be a presumption against the closure of children's centres.*
- *Take into account the views of local families and communities in deciding what is sufficient children's centre provision.*

[Emphasis added].

26. So far as the obligations to consult under s.5D of the 2006 Act are concerned, the Guidance provides that:

"*Local authorities **must** ensure there is consultation before:*

- *making a significant change to the range and nature of services provided through a children's centre and/or how they are delivered …*
- *closing a children's centre…*

Local authorities… should consult everyone who could be affected by the proposed changes, for example, local families, those who use the centres,

children's centre staff, advisory board members and service providers. Particular attention should be given to ensuring disadvantaged families and minority groups participate in consultations.

The consultation should explain how the local authority will continue to meet the needs of families with children under 5 as part of any reorganisation of services. It should also be clear how respondents' views can be made known and adequate time should be allowed for those wishing to respond. Decisions following consultation should be announced publicly. This should explain why decisions were taken.

[Emphasis added.]

27. On page 13 of the Guidance there is a section entitled "*Supporting families in greatest need of support*" which states that to reduce inequalities in outcomes among young children in their areas, local authorities should commission and support children's centres as part of their wider early intervention strategy and strategy for turning round the lives of troubled families (as this Council did). Local authorities should ensure that children's centres offer differentiated support to young children and their families according to their needs. To help fulfil their duty to reduce inequalities between young children in the area, local authorities should consider the role that children's centres can play by:

- providing inclusive universal services which welcome hard to reach families;
- hosting targeted and specialist services on-site where appropriate;
- considering the use of multiagency assessment and referral processes; and
- having children's centre outreach and family support staff work with other services to:
    - support families before, during and after specialist programmes and/or interventions;
    - provide opportunities to help families develop resilience to risk factors; and
    - promote child development.

28. Page 14 of the Guidance explains that children's centres use universal activities to bring in many of the families in need of extra support. As families build up confidence in relationships with staff and other service users, they often become more receptive to appropriate targeted activities.

29. The final relevant statutory duty is the PSED. S.149(1) of the Equality Act 2010 imposes an obligation on all public authorities in the exercise of their functions, to "*have due regard to*", inter alia, the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. Age is a protected characteristic, as indeed are pregnancy and maternity.

30. Under section 149(3) that means having due regard, in particular, to the need to:

    i) Remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

    ii) 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

    iii) Encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

31. As the Divisional Court recently observed in *R (Hollow) v Surrey County Council* [2019] EWHC 618 (Admin) at [80] what constitutes "due regard" will depend on the circumstances, particularly the stage that the decision-making process has reached, and the nature of the duty to have "due regard" is shaped by the function being exercised, not the other way round.

32. Whilst s.149(1) also obliges a public authority to have due regard to the need to eliminate discrimination, and other conduct rendered unlawful by the Equality Act, there is no obligation on a decision maker to focus on features of the equality duties that are not engaged by the decision: see *R(Hurley and Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin). Although reference was made to this aspect of the PSED in the Claimant's submissions, this case is not about a situation in which there is, or is perceived to be, unlawful discrimination, or a danger of such discrimination arising, where a need to give consideration as to how that should be addressed arises.

33. Whereas some of the other statutory duties engaged in this case are concerned with substantive outcomes, e.g. the duty to reduce inequalities in outcomes between young children in matters of well-being, under s.1(1)(b) of the 2006 Act, the PSED is concerned with *process*, not outcome. The relevant principles relating to its exercise are well established. They were adumbrated by McCombe LJ in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at [25]-[26] and endorsed by Lord Neuberger in *Hotak v Southwark LBC* [2016] UKSC 30 [2016] AC 811 at [73]. The duty must be exercised in substance, with rigour and with an open mind. The decision maker must be properly informed before taking the decision. That would normally entail making an assessment of the risk and extent of any likely adverse impact of the proposed decision on those with protected characteristics. However, the duty of inquiry on a decision maker under the PSED is no wider than the normal *Tameside* duty.

34. If there has been a proper and conscientious focus on the statutory criteria, the weight to be given to the equality implications of the decision is essentially a matter for the decision maker and the Court cannot interfere with the decision simply because it would have given greater weight to those implications than he did: see generally *Hurley and Moore* (above). The Court should only interfere where the decision maker's approach is unreasonable or perverse: Flaux J provided a useful summary of the relevant authorities in *R (SG and others) v Secretary of State for the Home Department* [2016] EWHC 2639 at [313]-[314] and [329].

35. Although the production of an EIA is not a mandatory requirement, if one is produced in appropriate form it is likely to be regarded as convincing evidence that the public authority has discharged the PSED when making the relevant decision.

THE CONSULTATION

36. The obligation on the Council under s.5D of the 2006 Act was to "*secure that such consultation as they think appropriate*" was carried out before any change was made in the services to be provided through a children's centre or before the closure of any such centre. That gave the Council a wide discretion as to what the consultation should comprise, subject only to the requirements of the Guidance. This stipulated who should be included among the consultees, and that any such consultation should make it clear how the needs of families with children under 5 would continue to be met under any proposed service reorganisation.

37. It is well established that in order to be lawful, a consultation process must be procedurally fair. That means that it must take place at a time when the proposals are still at a formative stage; the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response; and adequate time must be given for such consideration and response: see e.g. *R(Royal Brompton and Harefield HHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472 at [8]-[10]; *R(Moseley) v Haringey LBC* [2014] UKSC 56, [2014] 1 WLR 3947 per Lord Wilson at [24]-[25]. As Lord Reed pointed out in *Moseley* at [36], where the duty to consult arises under statute, the context of the duty can vary greatly from one statute to another, and a mechanistic approach to the requirements of consultation should therefore be avoided.

38. In *Moseley* at [26]. Lord Wilson recognised 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. I have borne that well in mind.

39. If it is alleged that a consultation process is unfair, clear unfairness must be shown. The error must be such that there can be no proper consultation and that "something has gone clearly and radically wrong": *Royal Brompton* at [13], approving the formulation by Sullivan J in *R(Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) at [62]-[63].

40. The Council was entitled to consult on the proposals which it had approved for consultation, rather than on something it did not propose: see *Bailey and others v London Borough of Brent* [2011] EWHC 2572 (Admin) at [90]. It is lawful for a proposer to indicate in the consultation document what his preferred option is; see Lord Wilson's judgment in *Moseley* at [27]-[28] and Lord Reed's at [41]. Fairness does not necessarily require the provision of information about options which have been rejected; if the duty to consult is a statutory duty, and the statute does not make it clear whether such information must be provided, the question will be whether in the particular context, the provision of such information is necessary in order for the consultees to express meaningful views on the proposal(s): see Lord Reed at [40].

41. The decision to undertake the Consultation followed a Report to Cabinet Member for Children's Services dated 20 September 2018 ("the Pre-consultation Report").

Paragraph 12 of that report stated that "*whilst the Council's preferred option is clear, no decisions have yet been taken. It is recommended that the Council seeks the views of the public on all options, including any other alternative ways that the service could be delivered and/or savings made*." Under the heading "*other options available, and their pros and cons*" specific reference is made to the options appraisal. The report continued, in paragraph 14:

"*As part of the consultation, respondents will be able to comment on other options, including maintaining the status quo; however it is appropriate that the Council provides clear information as to why this option is not deemed to be financially viable or to meet the key aims of the draft Early Help Strategy.*"

42. The consultation process undertaken by the Council is described in detail in the witness statement of Sara Turnbull, the Council's Head of Democratic Services. It was a very wide Consultation which included 3 public meetings. I have read the consultation document and the questionnaire which accompanied it, which was designed by the same research consultancy that had conducted the pre-consultation insight work.

43. The 3 options that were consulted upon comprised option A, retaining all 35 existing children's centre buildings but reducing their opening hours, with a corresponding 30%-35% reduction in services; option B, the creation of a network of 14 family centres with a programme of activities for families with 0-19-year-olds, (or up to 25 years old in the case of young persons with special educational needs or disabilities) and 3 of those centres providing extra services where families can drop in to access support 5 days a week; and option C, a family outreach model by which there would be no universal provision and no children's centres would be retained. Option B was therefore an intermediary model between the two extremes of keeping all children's centres (but reducing services across the board) and closing all children's centres (in order to provide the same services by different means). Each option was explained fairly, and the consultees were directed to sources of further detailed information about them.

44. In *Moseley*, the consultation process was found to be unfair because the consultation material conveyed a positively misleading impression that there were no possible alternative means of meeting the shortfall in Government funding other than by a reduction in relief from council tax, when in fact there were other options available, albeit not favoured by the local authority. In that specific context it was held that fairness demanded that "*brief reference should be made to other ways of absorbing the shortfall and to the reasons why (unlike 58% of local authorities in England) Haringey had concluded that they were unacceptable.*" [para 29]. This case was not similar to *Moseley,* because there was nothing misleading about the Consultation documents. As recommended in the Pre-consultation Report, the Council consulted on three different ways of delivering its services within the confines of its reduced resources and made it clear why it believed it could no longer afford to maintain the status quo.

45. I reject the Claimant's criticism that the Consultation document failed to give sufficient reasons to permit of intelligent consideration and response. It was clear from the introduction that the Council was consulting on proposed changes to early help services, and on 3 options, including what was described as the Council's

preferred option, option B. As Mr Goudie pointed out, children's centres were part of the early help provision and the fact that a Council is consulting on a wider strategic plan does not mean that it is not consulting on or addressing its individual elements. On page 3, the Council explained that it needed to identify £3.1 million worth of savings in its early help services overall, and why. On page 6, the Council stated that an option of "no change" was looked at, but ruled out from further consideration as it was not a sustainable way for it to keep providing its early help services to meet the needs of children and families effectively within the reduced budget available. That was a frank explanation of why it was not consulting specifically on "no change". It was not an indication of a closed mind.

46. Indeed, the way in which the Council approached the matter was very similar to the way in which Highways England lawfully carried out the consultation on a proposed new access route to the port of Liverpool in *R(Sefton Metropolitan Borough Council) v Highways England* [2018] EWHC 3059 (Admin): see the description by Kerr J at [76]-[77]. He concluded at [83] that it was difficult to sustain an argument that fairness required time and public money to be spent on a proposal costing substantially more than the budget would bear. A local authority is obliged to balance its budget overall; and if the £3.1 million savings did not come out of the money earmarked for early help services, they would have to be made elsewhere. As will become apparent, the Council specifically asked consultees for suggestions as to how else those savings might be made, and for different ideas on how the services could be delivered within the confines of a reduced budget.

47. On page 11, the Council said that *depending on the outcome of the consultation* there may be buildings that are no longer used to provide family support services and went on to explain that these would include children's centres. It spelled out that under the preferred option B there are 4 types of sites where children's centres would no longer be used for Council early help services, and it identified those types of site. It informed consultees that it had set out principles for alternative uses of such buildings for the benefit of the community, explained what they were, and asked for views about that approach.

48. In the accompanying questionnaire:

Question 14 asked *which of the options presented* was the preferred option of the consultee.

Question 15a then asked: *do you have any suggestions for alternative ways that the Council could provide early help services not described in options A, B or C?*

Question 15b asked: *do you have any suggestions for alternative ways that the Council can deliver £3.1 million in savings per annum?*

Question 16 expressly referred to the fact that under options B and C some or all children's centre buildings would be closed as children's centres, but were proposed to be used for other activities, before asking for views on whether the buildings of any children's centre proposed for closure should continue to be used for community benefit.

Question 17 set out a list of all the currently open children's centres in Buckinghamshire and stated that under option B, 14 of these would be kept open with an extended widened role to provide support to all families with children aged 0-19. It indicated which specific centres the Council proposed to keep open, and asked the consultees which centre would be their top priority for keeping open, and which 4 others they would prioritise. At the end of that question the Council asked whether the consultee would prefer to use another location, and if so, to specify where.

Question 18 asked the consultees to provide any other relevant information they believed the Council could should consider; including their thoughts on how the different options might affect their family or others; any suggestions for alternative options; any reasons the Council should keep a particular children's centre open or why it should consider closing one; and anything else they would like to add.

49. In my judgment it would have been clear to any reasonable person reading the consultation documents that 2 of the 3 proposals being consulted on would involve the closure of some (or all) children's centres in Buckinghamshire and that the other proposal being consulted on would involve a significant reduction in the services provided by the 35 existing children's centres. It would also have been clear to the consultees how the Council proposed to meet the needs of all families with children under 5 as part of the overall restructuring. The retained children's centres would remain open to everyone with children in that age range; whilst Option C would involve delivering targeted resources to all families, but not through children's centres. Therefore, the requirements of section 5D and the Guidance were met.

50. Ms Morris submitted that the s.5D duty obliged the Council to consult on the "in principle" question *whether* to make changes to the existing provision of children's centres, and not just on *how* to make such changes. However, that is not what s.5D says. It gives the Council a wide discretion as to the nature and scope of the consultation, whilst making it clear that the consultation must take place before any changes are implemented. It does not need to consult before reaching a provisional decision that there should be some change. But even if Ms Morris' submission were right, the Council did not need to include maintaining the status quo as a specific option, in order to have included it within the Consultation. Consultees were given a fair opportunity to tell the Council that they wished to keep the status quo and that it should make its £3.1 million savings in some other way, and many of them did just that.

51. I do not accept that there was any predetermination here, or an appearance of predetermination due to the use of the phrase "ruled out"; or that the consultation took place other than at a formative stage. The only determination was as to the scope of the consultation, and no inference could be drawn that conscientious consideration would not be given to the responses from consultees at the critical stage, i.e. the time when the Decision came to be made. As Wilkie J observed in *Sardar and others v Watford Borough Council* [2006] EWHC 1590 |(Admin) at [29]:

"*the fact that a Council may have come to a provisional view or have a preferred option does not prevent a consultation exercise being conducted in good faith at a stage when the policy is still formative in the sense that no final decision has yet been made."*

52. The Council had been open and transparent about the impact on its financial situation of the withdrawal of the Central Government revenue support grant, and the need for it to save £3.1 million; it also indicated that it had ruled out consulting on a proposal to maintain the status quo (because that was not what it was proposing) and why. However, the questions in the questionnaire, particularly questions 15a, 15b and 18, made it clear that the Council was keeping an open mind. There were no restrictions on the comments to be made or their scope. There was no evidence that the Council was unwilling to reconsider its provisional view, if a strong enough case was made out. Indeed, the proof of its willingness to reconsider its proposals lies in the fact that in consequence of the responses to the Consultation, it decided to retain 16 rather than 14 of the children's centres, and to change some of those on the list that were originally earmarked either for closure or retention.

53. It was not until the meeting in March 2019 that the Cabinet ultimately decided to make a change to its policy and adopt a variant of Option B. The Consultation process was entirely fair, and its results were taken into account when the final Decision was made. This ground of challenge therefore fails.

BREACH OF THE SUFFICIENCY DUTY UNDER S.5A OF THE 2006 ACT

54. The criticism of the Decision for alleged breach of the sufficiency duty is premised on the absence of an express statement that the Council has had specific regard to the requirements of s.5A, or a passage that directly addressed the question whether the reduced number of children's centres under Option B meet the needs of parents, prospective parents and young children in Buckinghamshire for such centres (as opposed to their more general needs, though the latter plainly inform the former).

55. Ms Morris submitted that despite the express references to the sufficiency duty and the Guidance in the Pre-consultation Report and in the Report, nowhere in the documents is there anything to say that the Council had identified need at this (or any) level or assessed sufficiency. This was a precise and distinct statutory obligation which could not be submerged in passages in the documents relating to the discharge of other duties. The decision maker had to direct its mind to that which it was obliged to do, and the Council's preoccupation with early help meant that it did not go far enough. Ms Morris suggested that because children's centres are open to all, and not reserved for young children with additional needs, by specifically focusing on the laudable aim of improving the provision of services for more vulnerable children of all ages, the Council lost sight of, and therefore failed to assess the local need of <u>all families with children aged 0-5.</u> The Members of its Cabinet were not given the help which they needed in the materials provided to them before the Decision was taken, to direct their minds to the three elements of s.5A.

56. That submission somewhat glosses over the fact that the Guidance itself requires local authorities, in discharging the sufficiency duty, to focus on the provision of services to families in greatest need of support, especially when they have it in mind to effect closures. In any event, the paper on the proposed design for New Family Support Service, which accompanied the Report, states that "*a key aspect of the development of the new Family Support Service is to improve access to support for people whose needs can be met by a universal service, as well as those with greater or more complex needs*." Thus, the Council was concerned to provide a service for all families,

including those with children under 5, as well as targeted services designed to help those whose needs were at levels 2-4.

57. In her oral submissions Ms Morris pointed to the existence of Option C as a strong indication that the Council had not directed its mind to the sufficiency duty, because Option C involved closing all children's centres. Whilst "children's centres" are defined in the Act as places (or groups of places), and the "local need" appears to be defined as a need for such places rather than a need for the services provided there, it would be theoretically possible for a local authority to conclude that there was less need, (or even no need at all) in its area for such places because the needs of families with young children were being, or could be sufficiently met by other means. In any event, I do not accept that it can be inferred from the breadth of the Consultation and the range of options considered that the Council had somehow overlooked its statutory duty under s.5A at the critical time, when it came to consider whether to adopt its proposed Early Help Strategy. Option C was not on the table at the time the Decision was made; what was under consideration was a variant of Option B.

58. It is a matter for the local authority concerned to assess and decide what would be sufficient provision of children's centres to meet local needs, and what is reasonably practicable to achieve this provision. Neither the 2006 Act nor the Guidance specify any methodology to be adopted. It was plainly sensible for the Council to have one Consultation on the proposed revision of its overall Early Help Strategy, of which children's centres were one important component. As children's centres provide both universal and targeted services, the assessment methodology adopted by the Council covered both. The research carried out prior to the Consultation was in-depth and comprehensive; the Consultation itself was well-structured and wide-ranging, and provided more data which would help the Council to assess need and sufficiency (as well as drawing its attention to adverse impacts) before it made its final Decision.

59. The re-named "family centres" were not ceasing to be children's centres; they were children's centres which provided *additional* services for older children and families with both older and younger children – like the Claimant's family. The Council rationally formed the view that it was not reasonably practicable to keep 35 children's centres open without making a substantial reduction in services, and moreover, that maintaining the status quo would not enable it to give the better support to families that it wanted. Option A had not found favour with consultees. Therefore, the real question for the Council when focusing on its duty under s.5A at the time of the Decision was whether the 16 centres it proposed to retain and use to deliver the existing and enhanced services would meet the need of families with young children in Buckinghamshire. In making that assessment, it was entitled to take into account the proposed use of those buildings which would cease to be used as children's centres, which included continuing to use them for early years provision.

60. The Council plainly concluded that the 16 family centres would suffice. It did not need to spell this out in terms, so long as it performed the duty in substance, as I am satisfied it did. There was no single line assessing a particular level of need or addressing sufficiency, which gave Ms Morris's submission a certain superficial attraction; but as Mr Goudie submitted, consideration of sufficiency to meet local need was pervasive through every stage of the decision-making process.

61. Prior to the Consultation, the relevant legal considerations were referred to in an appendix to the options appraisal document setting out in tabular form the relevant statute, the legal duty, and key considerations. So far as the duty under s.5A was concerned, the key consideration was specified as: "*model development to be cognisant of the duty"*. The model that was eventually adopted, the variant of Option B, plainly had the duty well in mind. Just to give one example, the "*Proposed design for new Family Support Service*" has a table on page 6 which sets out the programme of activities and services to be on offer at each family centre for each age group, (including 0-5 and their parents or carers) "*which reflects local need*". This was not just need for early help services; it was need for all the services that were to be offered at an integrated family centre, but the fact that the Council had regard to a wider range of needs does not mean that it failed to consider and address the needs of young children and their parents.

62. The Report specifically drew the attention of Members of the Cabinet, in section E, to the Council's various legal duties, including the duties under sections 1, 3, 5A and 5D of the 2006 Act as well as to the relevant Guidance. Paragraph 40 of the Report referred to the Guidance, and specifically to the need for the local authority to ensure that a network of children's centres was accessible to all families with young children and within reasonable reach of such families in both urban and rural areas. It specifically mentioned the presumption against closure of children's centres, and that where closure is proposed, the outcomes for children, particularly the most disadvantaged, should not be adversely affected. It added that in determining arrangements locally, the guiding considerations should be value for money and the ability to improve outcomes *for all children and families*, especially families in greatest need of support. All those topics were addressed in the body of the Report, as well as in the papers appended to it.

63. The Officer's Report contained, in paragraph 12, a fair and succinct summary of the Consultation findings and the Council's response. These included concerns by respondents that family support would be less accessible if children's centres were to close, in particular raising concerns about travel distances to family centres; concerns that it would be harder to identify families in need if children's centres closed; and views about retaining particular children's centres. The Council considered those concerns and proposed various means of addressing them. It made changes to site locations for family centres to reflect the consultation feedback, including retaining two additional children's centres.

64. Those changes were necessarily driven by an assessment that 14 centres would not have been enough to meet the need for children's centres in Buckinghamshire. Ms Morris complained that the reasoning did not specifically engage with the criteria under s.5A; but paragraph 19 of the Report states that "*the rationale for these additional sites is to effectively meet local needs, as well as to maximise the accessibility of family centres."* That demonstrates that the Council addressed its mind to the sufficiency duty. To suggest that there is a difference between "effectively" and "sufficiently" in that context would be an exercise in semantics.

65. Paragraph 18, in conjunction with Appendix 4, explained how the location of the family centres had been determined, and gave the full rationale for the choice of which centres were retained and which were to be closed. The "Family Centre Site Locations Report" explains that all family centre sites are proposed to be retained

children's centre buildings in order to ensure a continuing focus on the delivery of early years provision, as well as widening the use of the building for the benefit of families with older children. It states that the Council has considered how best to meet its statutory obligations in relation to the selection of sites for retained children's centres and service delivery, and it makes specific reference to the Guidance. It states in terms that to meet the Council's statutory duty to ensure sufficient children's centres within the area, as set out in that Guidance, consideration had been given in particular to accessibility, taking into account the distance and availability of transport, and the evidence in regard to each children's centre with a presumption against closure, unless the Council has the supporting evidence to demonstrate that the most disadvantaged would not be adversely affected. It then explains the numerous factors that were taken into account in making the choice of which centres to keep and which to close.

66. Paragraph 20 of the Report explained why, in the light of consultation feedback, the Council had changed its mind about closing a particular children's centre in High Wycombe and decided to close another instead. Part of that aspect of the Decision involved making a value judgment that one centre in that part of High Wycombe would be enough to meet local need. This was also an example of a situation in which the presumption against closure was not displaced on the evidence. Paragraph 20 spoke of a desire for an overall geographical spread of centres across Buckinghamshire. That was plainly addressing a critical aspect of the Guidance.

67. Paragraph 15 of the Report explained that the 16 family centres across Buckinghamshire were to support "*the continuing local accessibility of services*", again addressing what the Guidance required. Paragraph 16 made it clear that services would be provided from the family centres "*to meet the needs of families with children aged 0-19 (up to age 25 with children with special educational needs*)". That necessarily includes families with young children. It was stated that the buildings would be utilised for supporting families with older children "*as well as those with children aged 0-5 (current focus for the existing children's centres)"* [Emphasis added]. Paragraph 17 made it clear that the family centres would continue to be formally designated children's centres "*reflecting their continuing majority use for early years provision, alongside their wider potential use for activities to support families with older children*". The Claimant's skeleton argument referred to this as an "afterthought". I disagree. It is describing what is at the heart of what the Council is seeking to achieve.

68. Paragraphs 26-29 of the Report and Appendix 1 contained consideration of the alternatives suggested by respondents to the Consultation. In response to the suggestion that the Council should wait before making any changes until after a new Unitary Council was formed, the author of the Report stated that "*delaying a decision would mean that the County Council would be unable to fulfil its duty of care to improve outcomes for children and families*". That duty arose under the 2004 and 2006 Acts and the two sets of statutory guidance.

69. I am satisfied, having had regard to all the documents both before and after the Consultation, that the material before the court is sufficient to establish that the Council did assess the overall needs and locally based needs of families with young children, and of the children themselves, for children's centres; and that it did make a

conscious and informed decision that the 16 centres at the selected locations would be enough to meet those needs. Therefore, the Council fulfilled its duty under s.5A.

ALLEGED BREACH OF THE DUTIES UNDER SS1 AND 3 OF THE 2006 ACT AND S.11 OF THE 2004 ACT

70. The duty under s.1 of the 2006 Act (which in many ways reflects the duty under s.10 of the 2004 Act) is an over-arching "target duty" which is not imposed on local authorities alone and does not relate solely to children's centres. As recognised in the Claimant's skeleton argument, a decision which engages with the substance of the duty is only susceptible to challenge if it is irrational. This Decision was not irrational.

71. The decision maker must look at the population of those affected as a whole: see *R(T) v Sheffield City Council* [2013] EWHC 2953 per Turner J at [70]. It is unrealistic to suggest that in this case the Council merely paid lip service to the duty. The proposals were underpinned by a desire to improve the welfare and well-being of all children, but especially those who were most disadvantaged. Based on the contents of the Report, the Council rationally concluded that the proposed changes to the structure of delivery of its services would improve the well-being of young children *and reduce inequalitie*s between young children in Buckinghamshire. There was no breach of the s.1 duty.

72. Nor, in my judgment, was there a breach of the duties under s.3(6) of the 2006 Act or s.11 of the 2004 Act. Both these duties were "have regard" duties, the former relating to statutory Guidance and the latter relating to the need to safeguard and promote the welfare of children. The Guidance was expressly followed. As regards s.11, I endorse the observation of Supperstone J in *R(AD) v Hackney LBC* [2019] EWHC 943 (Admin) at [55]:

> *"Where the decision is in itself about children's welfare… there is in my view no additional duty to explain how children's welfare was taken into account, above and beyond explaining why needs will be met."*

73. The s.11 duty was specifically referred to in the Report at paragraph 35. One only needs to read the section entitled "Background" and paragraphs 13, 14 and, especially, 16 of the Report to appreciate that it was plainly discharged. The underlying suggestion made in the Claimant's skeleton argument, that the needs of children generally were being sacrificed to the smaller class of children with additional needs is completely misconceived.

ALLEGED BREACH OF THE PSED

74. If the substantive duty under s.1(1)(b) of the 2006 Act has been met, as it was here, then it is difficult to see how the PSED could not also have been complied with. As Laing J pointed out in *R (DAT) v West Berkshire Council* [2016] EWHC 1876 (Admin) at [41], the practical questions posed by s.149 of the Equality Act in relation to a particular decision will depend on the nature of the decision and the circumstances in which it is made. The decision maker, having taken reasonable steps to inquire into the issue, must understand the likely impact of the decision on those of the listed equality needs which are potentially affected by the decision. This may require no more than an understanding of the practical impact on the people with

protected characteristics who are affected by it. In my judgment, this is a paradigm example of such a situation.

75. Insofar as there was a requirement to have due regard to any of the equality duties, it was the need to advance equality of opportunity (always bearing in mind that the 2004 and 2006 Act are concerned with reducing or eliminating inequalities generally). One of the ironies of this aspect of the challenge is that it appears to run counter to the main thrust of the Claimant's complaint, namely, that the Council focused far too much on the need to eliminate perceived disadvantages to the most vulnerable children and their families in accessing help as soon as a problem arose (and thus advance equality of opportunity for those with one or more protected characteristics), allegedly at the expense of universal services which benefited all children under 5.

76. The Report specifically quotes s.149 of the Equality Act in Section G, before referring to the EIA and to the proposed key mitigation steps to try and overcome any negative impacts identified in it. The makers of the Decision therefore knew exactly what matters they were obliged to have "due regard" to. That, of course, is not enough in itself to show that they did comply with the PSED, but it is a step in the right direction.

77. The purpose of an EIA is to provide the information which will enable the decision maker to have due regard to the matters set out in s.149(3). The EIA which was carried out was thorough and rigorous, and it complied with the requirements set out in *Bracking*. The EIA identified the positive and negative impacts of the proposals on those with various protected characteristics, including age. So far as age was concerned, it assessed the designed service model as having an overall positive impact for families with children aged 0-19 (and for children and young people up the age of 25 if they have special educational needs or a disability), but expressly recognised that some parents/carers with young children had expressed concern about the closure of children's centres, and in that regard it referred to the Consultation responses.

78. The decision makers had access to the results of the Consultation. It was impossible to ascertain the extent of any prospective adverse impact, because that would depend on whether families would stop using the facilities at the children's centres despite the Council's attempt to ensure a good geographical spread and accessibility across the county. However, it was an essential aspect of the proposals under consideration that community services, including for young children, would still continue to be provided from the buildings that ceased to be designated children's centres.

79. Looked at in the round, the EIA identified that there would be some negative impacts but that there were measures that could be taken to help to mitigate them. That indicates a conscientious focus on the need to minimise any disadvantages to those with protected characteristics that the proposed decision, including the decision to close over half its children's centres, would have. The PSED was complied with.

CONCLUSION

80. I am satisfied that the Council carried out a fair Consultation before it made the Decision; it took the responses properly into account, and it complied with all its relevant statutory duties. This claim for judicial review must therefore be dismissed.