Neutral Citation Number: [2017] EWHC 986 (Admin)

Case No: CO/2780/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/05/2017

Before:

MR JUSTICE GARNHAM

- -

Between:

The Queen
on the Application of

(1) Liverpool City Council
(2) Nottinghamshire County Council **Claimants**
(3) London Borough of Richmond Upon Thames
(4) Shropshire Council

- and -
The Secretary of State For Health **Defendant**

The Secretary for Communities and Local Government **Interested Party**

- -

James Goudie QC & Hannah Slarks (instructed by **City Solicitor, Liverpool**) for the **Claimants**
Jason Coppel QC and Joanne Clement (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 15th & 16th March 2017

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Approved Judgment

Mr Justice Garnham:

Introduction

1. In 2014 the Supreme Court handed down its judgment in Cheshire West and Chester Council v P [2014] AC 896. That judgment provided an authoritative definition of "deprivation of liberty". It established that the statutory regime for the deprivation of liberty covered people lacking capacity whenever the person concerned was under continuous supervision and control and was not free to leave the accommodation they occupied. The costs of complying with the regime thus understood have proved to be very substantial indeed.

2. By these proceedings, four English councils seek to challenge what they describe as the government's "*ongoing failure to provide full, or even adequate, funding for local authorities in England to implement the deprivation of liberty regime*". They suggest that the financial shortfall suffered by councils across the country generally is somewhere between one third of a billion pounds and two thirds of a billion pounds each year and claim that the Government must meet that shortfall. They seek a declaration that, by his failure to meet those costs, the Secretary of State for Health has created an unacceptable risk of illegality and is in breach of a policy known as the "New Burdens Doctrine" ("the NBD"). They seek a mandatory order requiring the Secretary of State of Health to remove the "unacceptable risk of illegality" and to comply with that doctrine.

3. The Defendant Secretary of State, the Secretary of State for Health, and the Interested Party, the Secretary of State for Communities and Local Government, contends that this claim is out of time, is without merit, and that no relief is appropriate.

4. I set out first the relevant background and the statutory scheme. I then summarise the advice from Government to local authorities about the impact of Cheshire West, and the consequences of that decision. Next, I summarise the evidence I received on the funding of local authorities and the costs facing local authorities in meeting the obligations identified by the Supreme Court. I then consider the views of the Law Commission in its recent report and the terms of the NBD on which the Claimants rely. Finally, I turn to the issue of delay, before considering the merits of the two arguments advanced by the Claimants.

The Background and the Statutory Scheme

5. On 5 October 2004 the Fourth Section of the European Court of Human Rights (ECtHR) handed down its judgment in HL v United Kingdom (2004) 40 EHRR 761. The court held that the UK had been guilty of a violation of article 5(1) of the European Convention of Human Rights (ECHR). The court held that the "doctrine of necessity", as a ground for the detention of incapacitated mental patients, did not fulfil the requirements of legality in article 5(1) ECHR.

6. In response to that decision, the UK amended the Mental Capacity Act 2005. Paragraph 6 of Schedule 9(1) to the Mental Health Act 2007 introduced a comprehensive regime of standards governing the deprivation of liberty ("deprivation of liberty safeguards" or "DoLS"). The following provisions are relevant to this challenge.

"4A Restriction on deprivation of liberty
(1) This Act does not authorise any person ("D") to deprive any other person ("P") of his liberty.
(2) But that is subject to–
(a) the following provisions of this section, and
(b) section 4B.
(3) D may deprive P of his liberty if, by doing so, D is giving effect to a relevant decision of the court.
(4) A relevant decision of the court is a decision made by an order under section 16(2)(a) in relation to a matter concerning P's personal welfare.
(5) D may deprive P of his liberty if the deprivation is authorised by Schedule A1 (hospital and care home residents: deprivation of liberty).

4B Deprivation of liberty necessary for life-sustaining treatment etc
(1) If the following conditions are met, D is authorised to deprive P of his liberty while a decision as respects any relevant issue is sought from the court.
(2) The first condition is that there is a question about whether D is authorised to deprive P of his liberty under section 4A.
(3) The second condition is that the deprivation of liberty–
(a) is wholly or partly for the purpose of–
(i) giving P life-sustaining treatment, or
(ii) doing any vital act, or
(b) consists wholly or partly of–
(i) giving P life-sustaining treatment, or
(ii) doing any vital act.
(4) The third condition is that the deprivation of liberty is necessary in order to–
(a) give the life-sustaining treatment, or
(b) do the vital act.
(5) A vital act is any act which the person doing it reasonably believes to be necessary to prevent a serious deterioration in P's condition.

16 Powers to make decisions and appoint deputies: general
(1) This section applies if a person ("P") lacks capacity in relation to a matter or matters concerning–
(a) P's personal welfare, or
(b) P's property and affairs.
(2) The court may–
(a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or
(b) appoint a person (a "deputy") to make decisions on P's behalf in relation to the matter or matters.
(3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests).

(4) When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that–

(a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and

(b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.

(5) The court may make such further orders or give such directions, and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2).

(6) Without prejudice to section 4, the court may make the order, give the directions or make the appointment on such terms as it considers are in P's best interests, even though no application is before the court for an order, directions or an appointment on those terms.

(7) An order of the court may be varied or discharged by a subsequent order.

(8) The court may, in particular, revoke the appointment of a deputy or vary the powers conferred on him if it is satisfied that the deputy–

(a) has behaved, or is behaving, in a way that contravenes the authority conferred on him by the court or is not in P's best interests, or

(b) proposes to behave in a way that would contravene that authority or would not be in P's best interests.

<u>16A Section 16 powers: Mental Health Act patients etc</u>

(1) If a person is ineligible to be deprived of liberty by this Act, the court may not include in a welfare order provision which authorises the person to be deprived of his liberty.

(2) If–

(a) a welfare order includes provision which authorises a person to be deprived of his liberty, and

(b) that person becomes ineligible to be deprived of liberty by this Act,

the provision ceases to have effect for as long as the person remains ineligible.

(3) Nothing in subsection (2) affects the power of the court under section 16(7) to vary or discharge the welfare order.

(4) For the purposes of this section–

(a) Schedule 1A applies for determining whether or not P is ineligible to be deprived of liberty by this Act;

(b) "welfare order" means an order under section 16(2)(a)."

7. Further elements of the scheme are to be found in Schedule A1 to the Mental Health Act 2005 and in the Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008/1858.

8. Schedule A1 provides that the "managing authority", who may be a care home or a hospital, must obtain authorisation from the relevant local authority, the "supervisory body", to deprive someone lacking capacity of their liberty. The local authority has to arrange assessments in order to determine whether the qualifying criteria for DoLS are met. That necessitates carrying out six assessments namely:

   i) an age assessment, to determine whether the person is over 18,
   ii) a "no refusals assessment" to determine whether the authorisation would not conflict with a valid advanced decision made by the person concerned before they lost capacity, or a decision made on the person behalf, whether by a person holding a lasting power of attorney or by a deputy appointed by the Court of Protection,
   iii) a mental capacity assessment to determine that the person lacks the capacity to decide on their own care or treatment,
   iv) a mental health assessment to determine whether the person is suffering from a mental disorder,
   v) an eligibility assessment to determine whether the person is subject to treatment under the Mental Health Act 1983 and
   vi) a best interest assessment to ensure the deprivation is in the best interest of the person concerned, is necessary in order to prevent harm to them and is a proportionate response to the likelihood of them suffering harm.

Governmental Advice

9. In May 2008, the Department of Health prepared a detailed impact assessment on the new DoLS contained in Schedule A1. That set out the Department's view of the likely costs and benefits of the new regime. It set out the Department's estimate for the number of persons who might need to be covered by DoLS and estimated the average cost of the necessary assessment at £600.

10. Also in 2008 the Government produced a code of practice. That code made it clear that the definition of "deprivation of liberty" was a matter for the courts. The code offered this advice:

> "*1.5 A decision as to whether or not deprivation of liberty arises will depend on all the circumstances of the case...It is neither necessary nor appropriate to apply for a deprivation of liberty authorisation for everyone who is in hospital or a care home simply because the person concerned lacks capacity to decide whether or not they should be there. In deciding whether or not an application is necessary, a managing authority should carefully consider whether any restrictions that are, or will be, needed to provide ongoing care or treatment amount to a deprivation of liberty when looked at together…*
>
> *1.21 Under the Human Rights Act 1998, the duty to act in accordance with the ECHR applies only to public authorities.*

> *However, all states that have signed up to the ECHR are obliged to make sure that the rights set out in the ECHR apply to all of their citizens. The Mental Capacity Act 2005 therefore makes it clear that the deprivation of liberty safeguards apply to both publicly and privately arranged care or treatment.*
>
> *There is no simple definition of deprivation of liberty. The question of whether the steps taken by staff or institutions in relation to a person amount to a deprivation of that person's liberty is ultimately a legal question, and only the courts can determine the law…*
>
> *Further legal developments may occur after this guidance has been issued, and healthcare and social care staff need to keep themselves informed of legal developments that may have a bearing on their practice."*

11. On 2 May 2008 the Department of Health produced what it entitled "Impact Assessment of the Mental Capacity Act 2005". That document estimated the financial impact of the authorisation process for people in care homes and hospitals as follows:

> "*We envisage more assessments being undertaken in the first year, with progressively fewer in subsequent years as all parties become familiar with the safeguards. The proportion of deprivation of liberty authorisations would remain fairly constant, with numbers of authorisations ranging from around 5,000 in the first year, to approximately 1,700 each year after 2015/16. The costs of 21,000 assessments in the first year are estimated to be £13.6M and of approximately 7,000 assessments in 2015/16 to be £4.3M."*

12. In April 2013 local authorities assumed responsibilities for the authorisation process for people in both care homes and hospitals. The Department of Health produced a funding fact sheet which considered the new DoLS role local authorities had to assume and the likely funding. That document provided a "best estimate" that the total cost of DoLS assessments in hospital would be £5.4 million.

Cheshire West and its Consequences

13. It would appear that local authorities nationally were able to cope with the cost of DoLS authorisations under the 2005 Act until the full scale of the obligation imposed on them became apparent as a result of the decision of the Supreme Court in Cheshire West.

14. In that decision, the Supreme Court considered the criteria for determining whether the living arrangements made for a mentally incapacitated person amounted to a deprivation of liberty under article 5 of the ECHR. The Court held that, far from disability entitling the State to deny such people human rights, it imposed a duty to make reasonable accommodation to cater for their particular needs. Those rights included the rights to physical liberty as guaranteed by article 5.

15. The Court held that the key feature of such cases was that the person concerned "*was under continuous supervision and control and was not free to leave*". The person's compliance or lack of objection was not relevant; the relative normality of the placement was not relevant; the reasonable purpose behind the particular placement was not relevant. The purpose of article 5 was to ensure that people were not deprived of liberty without proper safeguards. Because of the extreme vulnerability of the people like the Claimants, a periodic independent check on whether the arrangements were in their best interest was needed. In the course of her judgment, Lady Hale said this:

> *"46…it seems to me, what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage.*
>
> *48…So what are the particular features of their "concrete situation" on which we need to focus?*
>
> *49 The answer, as it seems to me, lies in those features which have consistently been regarded as "key" in the jurisprudence which started with HL v United Kingdom 40 EHRR 761: that the person concerned "was under continuous supervision and control and was not free to leave."*

16. The potential effect of Cheshire West was immediately obvious. The numbers of persons whose deprivation of liberty would have to be authorised under the 2005 Act would increase enormously. In these proceedings, the Secretaries of State accept that the costs of implementing the DoLS regime has, as a result of the Supreme Court's decision, been much greater than had been initially anticipated.

17. The Department of Health wrote to local authorities on 28 March 2014 drawing the Supreme Court's judgment to their attention. On 8 September 2014 the Department of Health provided an update on the impact of the judgment. That guidance included the following:

> "*There has been a good deal of consensus around how the response should be handled. It was clear to many local authorities that the clarified Supreme Court deprivation of liberty test could not be fully implemented overnight. It is equally clear however that a 'do nothing' approach is not acceptable. Best practice has been to rapidly identify those individuals who may be potentially subject to deprivation of liberty and then work through this list, assessing first those individuals who stand to benefit most from the safeguards.*

> *Many authorities and supervisory bodies need to have a plan as to how they will move forwards with compliance with the law but it is clear that this action should be undertaken in a proportionate manner that does not for example result in a decline in the level of care and support provided to service users."*
>
> *Funding*
>
> *A number of local authorities…..have expressed their concerns regarding the financial pressures resulting from the Supreme Court judgment. As you know central government has funded local government to fulfil its statutory responsibilities and their DoLS since the regime came into force in 2009. In this financial year alone, central government has provided £35m for MCA-DoLS activities. Government policy in respect of DoLS is unchanged but clearly the clarifications in the law following the Supreme Court judgment has resulted in a significant increase in applications to local authorities. We will continue to assess the impact over the next few months……and feed this into our financial planning as has been the case previously*." (Emphasis added)

18. On 14 January 2015 the Department of Health wrote to directors of adult social services. The letter indicated that there had been a more than eight-fold increase in the applications under DoLS.

19. On 22 October 2015 the Department of Health wrote to "*MCA-DoLS Leads in Local Authorities and the NHS*", enclosing a new guidance note. That note recorded that DoLS applications had risen approximately 10-fold since the Supreme Court judgment and noted the additional burden that imposed on local authorities. Paragraph 10 read "*It is also clear….that due to the significant increase in requests for authorisations; many local authorities are struggling to process these within the legal time limit.*" Paragraph 14 of the Note read as follows:

> "*It is clear that implementing the Supreme Court judgment is a journey - such a significant change in frontline practice could never be brought about over night. The Department and our partners….are clear however, that providers and local authorities should have a plan in force for how to respond to the judgment. A 'do nothing' approach is not acceptable.*
>
> *15. This plan will inevitably involve an element of prioritisation to ensure that those individuals most likely to benefit from a DoLS application and assessment are afforded attention in a timely manner. ADASS has developed a prioritisation tool that will help in this. It is particularly important, given the level of applications made, that robust procedures are in place to ensure that particularly vulnerable individuals can be identified rapidly and appropriate action taken.*

> *16. Health and care providers will understandably be concerned should applications made to local authorities not be assessed with the statutory time limit. Whilst this is not ideal, this is an inevitable consequence of the unexpected large increase in applications that local authorities are now charged with processing. Providers should not delay in sending DoLS applications to local authorities for individuals whose circumstances they believe may meet the Supreme Court's acid test.*
>
> *17. Fundamentally it is the Department's view that providers that can demonstrate that they are providing good quality care/treatment for individuals in a manner compliant with the principles of the MCA, and who follow DH and other national guidance should not be harshly treated for technical DoLS breaches."* (Emphasis added)

Funding and Costs

20. There is no dispute between the parties as to the essential mechanisms for local authority funding. That funding comes from a number of sources. These include grants from Central Government, for example the Revenue Support Grant; ring-fenced grants from Central Government, for example the Public Health Grant; locally raised council tax; locally raised business rates, through the Business Rate Retention Scheme; capital receipts obtained from selling capital assets; borrowing, for example from the Public Works Loan Board; and each council's financial reserves.

21. Central Government funding of local government is well explained in the witness statements of Mr Ed Moses of the Department of Health. In my judgment, the skeleton argument of the Secretaries of State accurately summarises the position:

> *"The Government decides how much it can afford to spend and reviews its expenditure priorities through regular Spending Reviews, which typically determine Departmental spending plans for up to four years. The most recent Spending Review took place in the Autumn of 2015. Decisions were made in the Spending Review about the available level of funding across Government as a whole. There are many competing demands for resources, and difficult decisions needed to be made."*

22. The legal authority to commit expenditure comes from Parliament after the Spending Review process. Parliamentary authority is obtained by a "Vote on Account" which authorises spending on continuing services by departments in the early part of the financial year. Statutory authority for this vote is provided by a Supply and Appropriation (Anticipated and Adjustments) Act. Authority on an annual basis is provided through Supply Estimates, and subsequent Supply and Appropriation (Main Estimates) Acts. It is possible to amend departmental budgets through agreement with HM Treasury, but subsequent parliamentary approval is required for the department to incur that additional expenditure.

23. Decisions were taken at the 2015 Spending Review as to the resources available to local authorities over the course of the present Parliament. The Government specified the sum of money to be paid out by the Interested Party, the DCLG, to local authorities through various grants (the "Local Government Departmental Expenditure Limit"). It also set "locally financed expenditure", being the amount to be raised by local authorities locally, (council tax and the local authority share of retained business rates)**.**

24. The Local Government Finance Settlement for 2016/17 was published on 8 February 2016. The Local Government Finance Report (England) 2016/2017 was laid before Parliament on the same day in accordance with section 78A of, and paragraphs 4-5 of Schedule 7B to, the Local Government Finance Act 1988.

25. For 2016/17, the Local Government Finance Settlement provided a little less than £3.5 billion of additional support for adult social care for the period to 2019-20, through a new adult social care "precept". The precept permitted relevant local authorities to raise council tax by an additional two percent, before having to call a referendum, with such additional revenue to be spent on adult social care.

26. The argument advanced by Mr James Goudie QC, on behalf of the Claimants, turns not on the mechanics by which funds are made available to local authorities by the Government but on the adequacy of those funds to meet the costs of DoLS. As to that, I have seen and read a number of witness statements from officers of the four councils.

27. Mr Samih Kalakeche is a director of Adult Social Services with Liverpool City Council. He describes the dramatic increase in the number of DoLS applications made every month since the decision in Cheshire West. He explains the considerable efforts Liverpool Council has gone to in order to cope with the increase in demand. He explains that the Council received a one-off grant of a little over £315,000 in 2015-16. But that was insufficient and additional money had to be found "*from efficiencies and cuts from other areas*". He explains that, despite the fact that his colleagues are working at and beyond their capacity, the Council does not have the resources to ensure that authorisations are in place for everyone who needs them within the statutory timeframe. He says that many care homes are not requesting as many standard authorisations as they should be and that, accordingly, numbers of applications are likely to increase in the future. He says that a significant number of people are deprived of their liberty in supported accommodation or domestic settings without authorisations.

28. Mr Kalakeche explains that the Council's budget report estimates the current annual cost of administrating the changes brought about by Cheshire West at about £1.2 million per year. He says the current situation is unsustainable and unless the Government funds DoLS "*service users are going to be subject to unacceptable risks*".

29. In a subsequent statement, Mr Kalakeche says that, due to changes in central government funding, Liverpool City Council is required to make £90 million of savings in the next three years. He says that there is currently a backlog of at least 959 standard authorisations to be considered and that it is projected that 2,687 applications will be submitted in the period to 31 March 2017. He says that the

Council has recently considered whether council tax should be increased. Following a consultation, however, the Council decided not to proceed with plans for a referendum on this issue.

30. The Director of Adult Community Services at London Borough of Richmond Upon Thames, Ms Cathy Kerr, describes the dramatic growth that Richmond has seen in their obligations under DoLS since April 2014. She says

> "*The Defendant is making no attempt to fund DoLS adequately. In particular, I would like to explain how the funding shortfall that we face is leaving us in a position where it is highly likely that we will not be able to comply with our obligations under the Mental Capacity Act 2005 and article 5….".*

She estimates that in order to comply with their DoLS obligations the Council would need an additional £1,066,700 annually.

31. Mr Jeremy DeSouza, the Assistant Director of Adult Social Services at Richmond Council, concludes in his statement that Richmond's resources were

> *"stretched to the limit before the huge increase in the cost of DoLS. We have already cut our budget dramatically since 2010 even by the Defendant's own figures we have less money for the next few years in cash terms. In real terms and on up-to-date financial projections we have far less. At the same time we are being asked to deliver far more……"*

32. Ms Lorraine Currie is the Deprivation of Liberty Lead at Shropshire Council. She describes how the Council is facing an ever increasing pressure on its adult social care budget. She says that Shropshire's current budget for DoLS is £45,000 which is a "*wholly inadequate figure*". She estimates that the real cost would be £1,680,000. She explains how the Council have attempted to "*plug the gap*" by reallocating resources from elsewhere. But she says that, even with those changes, the Council has not managed to provide the safeguards "*to even half the people deprived of their liberty within our area*". She says that "*if the Defendant continues to fail to provide funding for DoLS, I do not see how the Council will be able to provide the mandatory safeguards lawfully*".

33. In her statement, Ms Sue Batty, the Service Director for Adult Social Care and Health and Public Protection for Nottinghamshire County Council, describes a sudden and dramatic increase in the DoLS workload. She says that adult social care has already seen significant cuts to its budget since 2010-11 amounting to an overall cut of £100 million. In her second statement, she describes how the Council has a backlog of 172 Schedule A1 applications. She says that the County Council has agreed a DoLS budget of £2.8 million for the coming year with an additional £1 million one-off funding from reserves. She says that the local government financial settlement for 2017-18 provided two funding streams in relation to adult social care. It provided a power to set a social care precept of up to 3% a year over the next three years with a cap of a maximum of 6% over the three year period. But she says that;

> "*will do very little to balance the substantial reductions in our grants from central government. At the same time NCC is experiencing pressures in demand for other services from other areas…As a result of decreasing central government funding and increasing financial pressures NCC's medium term financial strategy has projected £63 million shortfall in NCC's finances over the three year period…..to 2020-21."*

34. I have also read statements from Tania Miles, Head of Adult Services at Shropshire and Andrew Buck of Liverpool City Council which echo these concerns.

35. In response, the Defendant relies on the witness statements of Mr Moses and that of Matthew Stile of the Department of Communities and Local Government. Mr Moses ends his first statement indicating that there was recognition by the Department "*that the Supreme Court judgment clarified that local authorities obligations were greater then previously recognised*". He said that the

> "*Government does not purport to have fully funded those additional costs by way of additional funding via the spending review settlement for local government and it does not have any legal obligation to do so. ….This is an area where local authorities are expected to fulfil their statutory obligations within their current funding constraints, taking into account the ranges of sources of funding, potential further efficiency savings and decisions in respect of their discretionary functions."*

The Law Commission Proposals

36. The Law Commission commenced a comprehensive review of mental capacity and deprivation of liberty in 2014. It published a detailed consultation paper in July 2015 and an interim statement in May 2016. A final report and a draft bill were published on 13 March 2017, two days before argument in the present proceedings began. Its first recommendation was that "*the DoLS regime should be replaced as a matter of pressing urgency*".

37. The Final Report noted that it was a

> "*a matter of considerable concern that the law is still failing to deliver Article 5 safeguards to many people who lack capacity to consent to their care or treatment and are being deprived of their liberty. The official figures show, for example, a significant backlog of cases referred for authorisation under the DoLS, with the legal timescales for DoLS assessments being routinely breached and a significant number of cases not being assessed at all. As detailed in this report, we have also received evidence of significant delays in reviews and renewals of DoLS authorisations, and that many NHS bodies and local authorities are not even considering deprivation of liberty*

> *cases outside hospital and care home settings or involving 16 and 17 year olds."*

38. The Claimants referred, in addition, to a costings exercise undertaken by the Commission. It was argued that, on the Commission estimates, the Government would need to provide between £405,664,343 and £651,564,435 if DoLs was to be properly funded. The vast majority of the costs in this table, it was said, are attributable to local authorities.

The New Burdens Doctrine

39. In June 2011 the Department for Communities and Local Government produced a policy paper entitled "New Burdens Doctrine – Guidance Government Departments". That paper explains how;

> "*Successive governments have sought to keep the pressure on council tax bills to a minimum through some form of 'new burdens doctrine'. This requires all Whitehall departments to justify why new duties, powers, targets and other bureaucratic burdens should be placed on local authorities as well as how much these policies and initiatives will cost and where the money will come from to pay for them."*

40. The document sets out

> "*the process that departments must follow when considering new burdens. Departments cannot expect to receive collective Cabinet clearance of proposed policies and initiatives if they fail to follow this guidance*"

41. The following sections of that document are particularly material to this challenge:

> *"2.5 Broadly, a new burden is defined as any policy or initiative which increases the cost of providing local authority services. This includes duties, powers, or any other changes which may place an expectation on local authorities, including new guidance. In some cases, a new burden may arise as a result of a transfer of function. The full definition of what constitutes a new burden can be found in Section 3…*
>
> *2.7 The new burdens doctrine only applies where central government requires or exhorts authorities to do something new or additional. Action to ensure that they adequately fulfil a role for which they are already funded is not a new burden…*
>
> *3.1 A burden will arise where new powers/duties/expectations could lead to authorities having to increase spending. It does not have to be a new duty. A new power also creates a new burden. The Government does not generally provide powers unless it expects them to be used, and authorities will generally*

come under pressure to make use of the powers they have been given.

3.2 Nor do new burdens result only from new legislation: they can arise from authorities being asked to exercise existing powers and functions in new ways, e.g. in new guidance. If it is the Government's policy that authorities should do something and that this will cost them more money, the department responsible for the policy must ensure that the necessary funding is provided. A new burden can also arise from changes causing an authority to lose income.

3.3 The key definition of a new burden is a change that could lead to an increase in council tax if it was not additionally funded by Central Government. …

3.5 The new burdens procedure applies to all burdens, regardless of cost. However where the aggregate value of all a department's burdens (i.e. the total of all burdens in a particular financial year) is below £100,000, that department will not be required to make any transfer…

6.3 Each year the assessments of a small number of new burdens from a range of departments will be independently evaluated after the event. A framework outlining the remit of the scrutiny, selection of new burdens, arrangements for scrutiny and the nature of the outcomes expected is set out below.

6.7 Reviews may conclude that costs turned out to differ from the original new burdens estimate. This ought not to be surprising nor a cause for criticism; nor will there be an automatic assumption that departments must make good under-estimates (or indeed recoup over-estimates). There is a recognition that

- *funding decisions are inevitably based on the best available information at the time*
- *the post-implementation scrutiny itself will be based on assumptions and estimates, albeit informed by experience on the ground and*
- *actual costs will depend on how local authorities choose to implement policies – something over which departments may not have control*

6.8 It is of course good practice for policy makers to review the impact of their policies once implemented, and that will often include the impact on local authorities. Departments will naturally be free to organise such reviews whenever they feel it

> *is appropriate. However, Communities and Local Government will also take responsibility for selecting a limited number of new burdens for independent post-implementation scrutiny each year.*
>
> *6.9 Selections will be made with input as appropriate from HM Treasury and in consultation with the department(s) concerned. The bi-annual meetings with departmental finance directors will be helpful in this. The expectation will be that on average no more than six new burdens from across the whole of Government will be selected for independent scrutiny per year and that there should normally be no more than one for an individual department - as arrangements need to ensure that individual departments are not unduly burdened with reviews. However, the possibility that circumstances may require more cannot be ruled out."*

Discussion

42. I had the benefit of detailed skeleton arguments on behalf of both the Claimants and the two Secretaries of State. I also heard detailed oral submissions from Mr James Goudie QC on behalf of the Claimants and Mr Jason Coppel QC on behalf of the Secretaries of State. I am grateful for their clear and concise submissions.

(1) Delay

43. By these proceedings the Claimants challenge what they assert is inadequate funding provided by the Defendant department. The mechanics for such funding is set out above. It is apparent from that description that Government makes decisions about funding annually.

44. Pursuant to CPR 54.5, a judicial review claim must be filed promptly and in any event not later than three months after the grounds to make the claim first arose. In my judgment the grounds for making this claim arose no later than 8 February 2016 when the Local Government Finance Settlement was published. That settlement contained a decision as to the total amount of the Revenue Support Grant payable to local authorities. That settlement informed the Claimants of the funding they would receive for the financial year 2016-17. The grounds for making this claim arose at that date.

45. The claim was filed on 6 May 2016, two days short of the three month period from the date of that settlement. It is trite law that CPR 54.5 does not provide a three month time limit for commencement of judicial review proceedings; claims have, in any event, to be filed "promptly". What is "prompt" depends on the nature of the challenge. This was in substance, a challenge to a budgetary decision of central government. In my judgment it is self-evident that such a challenge has to be brought very promptly indeed since it potentially threatens the budgetary arrangements of the Government for an entire year.

46. Mr Coppel refers me to the decision of Ouseley J in R (Fawcett Society) v The Chancellor of the Exchequer [2010] EWHC 3522 (Admin). In that case Ouseley J

refused permission to apply for judicial review on the grounds of delay where the claim was filed five weeks after the budget. That decision illustrates what promptness requires in circumstances such as this. On any view to delay the commencement of proceedings until two days short of three months was not prompt.

47. Mr Goudie suggests that that analysis is misplaced because what he complains about is a continuing failure by the Defendant properly to fund the DoLS regime. In my judgment that is entirely unreal. Whilst it is right that the Government could make additional funds available outside the budget process, sensible financial planning by Central Government requires that the decision as to the funds to be allocated to local authorities is reached by means of the recognised budgetary mechanism. If there is to be a challenge it has to be to that decision. Additional funding on the scale for which the Claimants contend has the potential significantly to affect the Budget; delay in such a context is unconscionable.

48. In granting permission to apply for judicial review in these proceedings, Soole J expressly reserved to the court hearing the claim the question of delay. In my judgment this claim is brought out of time and for that reason alone I would refuse the relief sought. I see no good reason for extending time. It would plainly be prejudicial to good administration for budgetary decisions taken in 2016 to be quashed as a result of an application made almost three months later.

49. In case this matter goes further, and in deference to the quality of the arguments I heard, I go on to consider the merits of the claim.

(2) Ground 1 – Unacceptable risk of illegality – The Argument

50. Mr Goudie argues that since 1998 local authorities have been deprived of the power to set their own local taxation and expenditure. He says that the consequence of that is that local authorities cannot discharge the duties imposed on them by Parliament unless central government lessens the constraints on local taxation or increases central funding. He says that it is plain there has been a massive increase in the costs of deprivation of liberty safeguards since Cheshire West, that there is no basis for saying that those costs will diminish in the foreseeable future, and that even if the Law Commission's proposals were to result in a reduction in costs, they would still be markedly higher than they were before Cheshire West.

51. Mr Goudie argues that overall the level of resources available to local authorities has shrunk in the last decade and will continue to shrink for the foreseeable future. He says that DoLS costs are not the only increase which local authorities are facing. He points in particular to changing demographics and the imposition of the national living wage which has increased local authority costs in the field, in particular, of adult social care.

52. Mr Goudie says that the result of those changes has been to create an unacceptable risk of illegality contrary to public law principles. He says that in a series of cases the courts have recognised that, when public authorities establish a system of safeguards, they are under a duty to ensure that the system does not give rise to a risk of illegality. He refers to two cases in which claimants challenged the lawfulness of fast track asylum appeals processes, namely R (Refugee Legal Centre) v Secretary of State for the Home Department [2005] 1 WLR 219 and Lord Chancellor v Detention Action

[2015] 1 WLR 5341. In both those cases, he argues, the Court of Appeal approved the principle that the Government was not entitled to provide a system which placed asylum seekers at unacceptable risk of being processed unfairly.

53. Mr Goudie says that the courts have applied the same principle when considering the lawfulness of processes for investigating death in police custody; (R (Delezuch) v CC Leicestershire Constabulary [2014] EWCA Civ 1635). He says the same principle was upheld in a challenge to the Government's policy for detaining asylum seeking families with children R (Suppiah) v Secretary of State for the Home Department [2011] EWHC 2 (Admin).

54. Mr Goudie argues that those cases applied principles that first had been developed in R (Hillingdon LBC) v Lord Chancellor [2008] EWHC 2683 (Admin) and R (Medical Justice) v Secretary of State for the Home Department [2010] EWHC 1925 (Admin). He says the same principles were used to challenge the lawfulness of regulations that limited the scope for legal aid in cases involving prisoners R (Howard League for Penal Reform) v Lord Chancellor [2015] EWCA Civ 819.

55. On the back of those authorities Mr Goudie submits that two important principles merge. First, he says that a public authority must ensure that there is no systemic flaw in practice which creates an unacceptable risk of illegality. Second, he says that the system would be unlawful where the funding shortfall to those implementing it creates an unacceptable risk of illegality. Applying those principles to the facts of this case Mr Goudie contends that the Defendant is obliged to ensure that the DoLS system which the Secretary of State funds does not give rise to unacceptable risk of illegality. He says that duty has been breached on the facts of this case because of the inadequate funding provided to local authorities.

56. In response, Mr Coppel distinguishes the cases concerned with procedural fairness (Refugee Legal Centre, Medical Justice, Suppiah, Delezuch, Howard League and Detention Action.) He says here there is no challenge to the terms of the relevant procedural regime. Mr Coppel says the only case identified by the Claimants which concerns the allocation of resources is Hillingdon. But on proper analysis, he says, Hillingdon was not an "unacceptable risk of illegality" case at all. In any event, argues Mr Coppel, the claim fails on its facts. Local Authorities have a choice as to how they spend their available resources. It is a matter for them to decide what funding to use to meet each statutory obligation and what funding to use for discretionary matters.

My conclusions on the "Unacceptable risk of illegality" Ground

57. At the heart of the Claimants' case is the assertion that the Secretary of State's failure to fund the costs of DoLS created an unacceptable risk of illegality and that such a risk entitles the Claimants to the relief they seek. Based primarily on a series of cases about procedural unfairness, notably in the context of claims for asylum, the Claimants assert that there has emerged as a principle of public law that "*when public authorities establish a system of safeguards they are under a duty to ensure the system does not give rise to an unlawful risk of illegality*". Applying that suggested principle to the present case the Claimants contend that "*the Defendant is obliged to ensure that the DoLS system he funds does not give rise to an unacceptable risk of illegality*."

58. In my judgment, the authorities referred to establish no such wide-ranging principle. The Refugee Legal Centre and Medical Justice cases were carefully analyzed by Richards LJ in R (On the Application of Tabbakh) v The Staffordshire and West Midlands Probation Trust [2014] EWCA Civ 827. In that case the Court of Appeal considered an appeal from Cranston J. At paragraph 46-47 Richards LJ set out the analysis of Cranston J:

> *"46 The relevant law was considered by the judge at paragraphs 42-52 of his judgment … The third basis is that laid down in the Refugee Legal Centre case. The judge said that Sullivan LJ in the Medical Justice case "held that despite Silber J referring to a wider test, he had in fact applied the Refugee Legal Centre test" and that Sullivan LJ "did not support the wider test which Silber J advanced in the course of his judgment" (paragraph 48)…*
>
> *47. He then set out his conclusion as to the appropriate test, and his reasons for it, as follows:*
>
> > *"51. My conclusion is that what I have termed the wider test – a policy giving rise to an unacceptable risk of unlawful decision-making – should be avoided. It did not have the support of the Court of Appeal in Medical Justice. Wyn Williams J's decision in Suppiah was overtaken by the Court of Appeal decision in that case. ... What the authorities demand is that the policy must lead to unlawful action, or that there be a very high risk or an inevitability of that occurring (Gillick ; the Court of Appeal in Medical Justice). To put it another way there must be a proven risk of unlawfulness, going beyond the aberrant and inhering in the system itself (Refugee Law Centre). In Article 3 cases there need only be a significant risk of unlawfulness flowing from the policy (Munjaz). The lower threshold where a policy raises Article 3 issues is justified because of the unqualified nature of the right that article 3 confers.*
>
> *52. In my view these high thresholds are justified, first, for evidential reasons. Policies can have disparate impacts in practice and the overall impact will be difficult to gauge. These evidential difficulties may be more acute where challenges are brought to policies by NGOs and particular claimants are not involved. It is likely that Sedley LJ had evidential problems in mind when he referred in Refugee Law Centre to a proven risk of unfairness, which went beyond the aberrant but was inherent in the system. A risk inherent in the system will be more obvious than an unacceptable risk, or even a serious possibility of unlawfulness. Secondly, there are institutional and constitutional limits to what the courts should determine. The executive is in daily touch with areas of administration; the courts will not have the same expertise to calculate how policies play out in practice and what their overall likely*

> *impact is. But the courts should adopt a high threshold for a more fundamental reason. Policy making and implementation is an imperfect business. Sometimes there will be a strong imperative to adopt a particular approach. Governments will not consciously adopt a policy they know leads to unlawfulness. For a court to strike down a policy because the risk of unlawfulness is 'unacceptable' risks, in my view, going over the line. Especially with social and economic policies it has long been recognised that government is entitled to a wide margin of appreciation. The high thresholds I have identified in the case law recognise this."*

59. At paragraph 48-49 he set out what he regarded as the appropriate test:

> *"48 That is a thoughtful and challenging analysis. It will be apparent from what I have said above, however, that I do not subscribe to the entirety of the judge's conclusion. In so far as he puts Munjaz to one side, I agree with him. Where I disagree with him is in the use he makes of the other authorities. First, I would also put Gillick to one side. It was concerned with the reviewability of guidance on the ground that it was erroneous in law and would therefore lead to unlawful decisions. That is a materially different issue from the issue of procedural unfairness that arises here, in relation to which the decision in the Refugee Legal Centre case is directly in point. I have explained how I read the decision in that case. It concentrates on whether the system established by the relevant policy is inherently unfair. It does not reject the test of "unacceptable risk" of unfairness but effectively equates an unacceptable risk of unfairness with a risk of unfairness inherent in the system itself. The material part of the decision of the Court of Appeal in the Medical Justice case goes no further than to hold that the first instance judge in that case applied the approach in the Refugee Legal Centre case that he said he would apply. The reference by the first instance judge to "a very high risk if not an inevitability" of infringement was not a formulation of the legal test and was not endorsed as such by the Court of Appeal.*
>
> *49 In summary, I take issue with the detail of Cranston J's analysis and think that he expressed the test erroneously when he said that "[w]hat the authorities demand is that the policy must lead to unlawful action, or that there be a very high risk or an inevitability of that occurring". Nevertheless, it seems to me that he was correct to view the relevant threshold as a high one. That the court will be slow to find that a system is inherently unfair and therefore unlawful is illustrated by the Refugee Legal Centre case itself, where the court had evident concerns about potential rigidity in the system but concluded that so long as it was operated flexibly it could operate without an unacceptable risk of unfairness."*

60. In R (Delezuch) v Chief Constable of Leicestershire Constabulary [2014] EWCA Civ 1635, Richards LJ cited his judgment in Tabbakh. At paragraph 54 of Delezuch he said:

> "*The Refugee and Tabbakh cases…..were both concerned with whether there was an unacceptable risk of procedural unfairness effectively equated with a risk of unfairness inherent in the system established by the policies under challenge."*

61. In my judgment, that is the principle to be extracted from all but one of the authorities on which the Claimants rely. I would reject, in particular, the submission that the decision of Wyn Williams J in Suppiah is authority for any wider proposition. It is right that at paragraph 137 in his judgment in that case the Judge said

> "*I am content to accept that as a matter of law a policy which cannot be operated lawfully cannot itself be lawful; further it seems to me that there is clear and binding authority for the proposition that a policy which is in principle capable of being implemented lawfully but which non-the-less gives rise to an unacceptable risk of unlawful decision making is itself an unlawful policy*".

But, as always, the context in which that Judge made that remark is critical. He was considering a procedural regime relating to the administrative detention of families with children pending removal or deportation. The authorities on which he relied in support of that analysis were the Refugee Legal Centre and Medical Justice cases to which I have referred above. These cases too were concerned with the propriety of various procedural regimes. The proposition which flows from all of those cases is the one identified by Richards LJ in Tabbekh. That principle, whether a policy is inherently unfair, has no application on the present facts where the Claimants accept the DoLS procedure is entirely fair.

62. The one exception to the conclusion that all the cases on which the Claimants rely are concerned purely with procedural fairness is Hillingdon. That was a case on which Mr Goudie placed considerable emphasis and it is necessary to consider it in a little detail.

63. In that case the claimant local authorities sought judicial review of an increase in court fees for public law childcare applications and placement order applications. Those increases had been introduced by the Family Proceedings Fees Order 2008 and the Magistrates' Courts Fees Order 2008 which put into effect an earlier decision of the Lord Chancellor that the principle of full costs recovery in setting court fees should be applied to public law family proceedings. The local authorities contended that the orders were unlawful as they were made without proper consultation, were irrational and defeated their substantial legitimate expectation that the increase in fees would be fully funded by Government. The important conclusion of the Divisional Court for present purposes is as to the second of those challenges.

64. The ratio of the decision on that point emerges from the judgment of Dyson LJ (as he then was). The court held that where the interest of vulnerable children was potentially at stake the court had to consider the issue of irrationality with anxious

scrutiny. Accordingly, the orders would be unlawful if there was a real risk that the increase in fees would result in local authorities not performing there statutory obligations in relation to children who were at risk. On the evidence, local authorities would continue to be compensated in public law family proceedings and that compensation was sufficient to avoid any real risk that the new fee regime may lead to the interests of children being harmed. The reason given in justification of the orders was not illogical; the aim of achieving greater visibility of the true costs and benefits of the services provided was a proper reason.

65. It is apparent from that summary of the ratio, and from the relevant parts of Dyson LJ's judgment, that the court was there considering an irrationality challenge. In stark contrast, on the present facts, the Claimants accept that they cannot challenge the rationality of the Secretary of States' funding decisions.

66. It is right to say that in paragraph 60 Dyson LJ made the following observation:

> *"During the course of argument it became clear that the essential issue raised by this question was whether charging the full cost involves a real….risk that the interest of vulnerable children would be jeopardised by the policy."*

The "*question*" referred to was the question set out in the preceding sentence, namely, "*whether the application of this general policy to court fees in public law family cases is irrational*". Thus the focus of the inquiry was entirely on the rationality of the decision. It was no part of the case advanced by the Claimants in Hillingdon that the fees orders were unlawful because they created "*an unacceptable risk of illegality*". None of the line of cases advanced by Mr Goudie before me in support of the proposition that an unacceptable risk of illegality was a principle of general public law was cited to the Divisional Court in Hillingdon.

67. In any event, as Mr Coppel submits, there is an obvious further distinction between the present case and Hillingdon. In Hillingdon the challenge was to the decision taken by the Lord Chancellor to increase fees. Here the increase in costs has been caused not by the decision of government but as a result of Supreme Court's judgment in Cheshire West. The only relevant decision taken by the government in the present case, which the Claimants cannot, and do not, challenge expressly are what Mr Coppel calls "*high level macroeconomic decisions as to the total level of funding available to local authorities*".

68. In my judgment, however, there is yet a more fundamental judgment reason for rejecting this ground. Even if contrary to the conclusion above, the "*unacceptable risk of illegality*" arguments could, in principle, be run in the present case, it could not succeed on the facts.

69. In my judgment the Claimants' evidence did not come close to establishing that any of the Claimant local authorities is unable to meet the costs of complying with its duties under the DoLS regime. Certainly, the evidence shows that doing so is, and will continue to be, extremely difficult; certainly the evidence suggests that complying with those obligations would necessitate diverting substantial sums from other parts of the Councils' budgets. But it does not establish that the proper funding of the DoLS regime cannot be achieved.

70. Local authorities spend a proportion of their budget meeting express statutory duties. Sometimes precisely what they have to spend on performing such duties is, in effect, outside their control. The DoLS regime is an example. Sometimes the way in which local authorities meet their statutory duty involves an exercise of discretion and the local authorities as a result retain some control over the amount that is spent. Sometimes local authorities spend on services which they have discretion, but not a duty, to fund. A good example of that was provided by Mr Coppel during the course of the hearing. Following the announcement in the March 2017 Budget that the Government would provide additional funds for adult social services, the Leader of Liverpool City Council indicated that additional monies would be spent on library services in the city. That was an entirely proper decision; but it illustrates the fact that councils have discretion as to the way they allocate much of their available funds.

71. The Claimant Councils did not even attempt to suggest that the total sums available to them were insufficient to meet the total cost of complying with all their statutory duties. That being so, there can be no grounds for contending that the Government decisions on funding that might be used to meet the costs of the DoLS regime creates any risk of illegality at all. The local authority claimants are obliged, as a matter of law, to comply with their DoLS duty; they are not so underfunded as to make compliance with that statutory duty impossible; they cannot properly plead lack of funds as an explanation for not doing so. That being so, in my judgment, there is no risk of illegality as a result of the Defendants' funding decisions. Accordingly, this element of the challenge cannot succeed.

(3) The New Burdens Doctrine

72. Mr Goudie argues that local authorities have a legitimate expectation that central government will abide by the NBD. Mr Coppel argues that there has been no breach of the doctrine; but in any event, he says, that doctrine could not create a legitimate expectation on the part of the local authorities.

73. In my judgment Mr Coppel is right on both of the points he advances.

74. Conventionally, a legitimate expectation arises where a claimant can establish a clear promise or settled practice which engenders an expected advantage, whether procedural or substantive. What is required is a promise which is "*clear and unambiguous and devoid of relevant qualifications*" (See Bingham LJ in R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Limited [1990] 1 WLR 1545 at 1569 and R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2) [2009] 1 AC 453 at paragraph 60.

75. In my judgment, there is no such clear, unambiguous and unqualified promise on the present facts. Mr Goudie is unable to point to any statement in the NBD which promises, expressly and unambiguously, that local authorities would receive more funding from the Government if a court judgment altered the understanding of what was required of local authorities.

76. On the contrary, in my view, the NBD makes crystal clear that Government will not refund local authorities if an estimate of what the policy will cost turns out to be erroneous, which is what has happened here. Part 6 of the NBD deals with review and evaluation, and explains how government departments will consider in retrospect

whether there has been compliance with the guidance. I have set out the relevant parts above, but it is worthwhile repeating Paragraph 6.7:

> *"Reviews may conclude that costs turned out to differ from the original new burdens estimate. This ought not to be surprising nor a cause for criticism; nor will there be an automatic assumption that departments must make good on their estimates or indeed recoup over estimates."* (Emphasis added)

77. Given that provision, it is impossible to read the NBD as providing a promise by central Government to make good the difference between the costs of DoLS and the estimates of those costs before Cheshire West. On its proper construction, there has been no breach of the doctrine.

78. Mr Goudie seeks to make good the absence of a clear and unambiguous promise in the NBD by referring to other communications from the Department of Health. In my judgment, he faces a substantial evidential difficulty in that approach; a legitimate expectation cannot, in my view, be constructed by an amalgam of remarks by a public authority unless read together they provide the necessary clear and unambiguous promise. And that is not provided here.

79. He refers to the note from the Department of Health dated 28 March 2014 to which I made reference above. Certainly that note reminds local authorities of the obligations which they are under, as explained by the Supreme Court. That obligation, however, does not arise from any decision of Government. Instead it is the result of the Supreme Court's interpretation of obligations introduced by primary legislation. The Note, read alone or with the NBD, contains no new promise of funding.

80. It is suggested that the NBD "*must require central government to fund the lawful manifestations of its new policies*". But, as Mr Coppel submits, the DoLS regime was introduced in April 2009, prior to the introduction of current NBD in 2011. It is accepted that, with the benefit of hindsight, the Secretary of States' estimate of the impact of the new regime was inaccurate and that the Supreme Court's judgment clarified the scope of the responsibilities which, on proper analysis, had been in place since April 2009. But I accept Mr Coppel's submission that "*the Claimants cannot now rely on the new burden doctrine to re-open the 2008 estimates*". That is not changed by the Department of Health's note of March 2014 which does no more than draw Councils' attention to the judgment and make suggestions as to how local authorities might consider meeting the obligations identified in Cheshire West.

81. In those circumstances this head of challenge must also fail.

Conclusions

82. For the reasons set out at paragraphs 43 to 48, I conclude that this claim was not brought promptly and I refuse to extend time.

83. For the reasons set out at paragraphs 57 to 71, I reject the argument that the funding to the Claimants created an unacceptable risk of illegality.

84. For the reasons set out at paragraphs 73 to 81, I reject the argument that the failure to provide further funding constituted a breach of a legitimate expectation in the Claimants.

85. Accordingly, this application is refused.