Neutral Citation Number: [2016] EWHC 2419 (ADMIN)

Case No: CO/2281/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/10/2016

Before :

THE HONOURABLE MR JUSTICE LANGSTAFF

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Between :

THE QUEEN ON THE APPLICATION OF (1) A (THROUGH HIS MOTHER AND LITIGATION FRIEND, B) (2) C (THROUGH HIS MOTHER AND LITIGATION FRIEND, D)	**Claimants**
- and –	
OXFORDSHIRE COUNTY COUNCIL	**Defendant**

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- -

MR DAVID WOLFE QC AND MS SARAH HANNETT (instructed by **Central England Law Centre**) for the **Claimants**
MR PETER OLDHAM QC (instructed by Oxfordshire County Council Legal Services) for the **Defendant**

Hearing dates: 19 & 20 July 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE LANGSTAFF

The Hon. Mr Justice Langstaff:

1. On 16th February 2016, Oxfordshire County Council determined its budget for the following year in full Council. It forecast its likely needs beyond 2016-17, setting them out in a "medium term financial plan" ("MTFP"). Part of the MTFP indicated that Oxfordshire would seek to reduce still further the amount of money it spent on early intervention services for children.

2. In the light of the decisions of 16th February 2016, Oxford's Cabinet (charged with making executive decisions, in the light of the budget set by the full Council) approved a plan to cut funding in respect of children's centres for 2017/2018.

3. Those two decisions are challenged in an application for judicial review, which comes before me as a rolled-up hearing: seeking permission, and thereafter, if permission is granted, relief. The Claimants are children. Their mothers, who act as their litigation friends for the purposes of the claim, say they have had considerable benefit from the open access nature of the existing children's centres.

4. Oxford's Council decision of 16th February 2016, and the subsequent Cabinet decision of 23rd February, have a considerable history behind them. This begins with public funding cuts, which affected the overall budget available to the Council.

5. Mr Oldham QC for the Defendants submitted, and I accept, that there were two strands of decision making which followed notification of the cuts: that of the full Council, and that of the Cabinet. The full Council is obliged to set the annual budget: the Cabinet cannot do so. This is the effect of the **Local Authorities (Functions and Responsibilities) (England) Regulations 2000** (SI2000/2853), Regulations 4(9), (10) and (11). The budget is to be set in accordance with Section 30(6) and (7) of the **Local Government Finance Act 1992**, the effect of which is that it is to be set before the financial year begins, but in respect of the one, coming, financial year alone.

6. Though the setting of Council Tax to meet the budget which determines it is a function of the whole Council, the Cabinet alone has the responsibility of determining the precise expenditure and allocation of the sums thus raised. This is the effect of Section 9D of the **Local Government Act 2000**, in particular Section 9D (2).

7. In the case of **R (Buck) v Doncaster Metropolitan Borough Council** [2013] EWCA Civ 1190 the Court of Appeal considered the operation of those provisions in practice. The full Council of Doncaster approved a budget. It provided for a level of funding which would have permitted the level of delivery of library services which had operated in the previous financial year to continue during the next. However, the Mayor and Cabinet decided not to spend those sums, since in order to save public money the Cabinet wished to change the way library services were provided in Doncaster. A Doncaster resident challenged the refusal of the Cabinet to spend the money allocated by the Council in respect of library provision. Her claim was dismissed by Hickinbottom J, whose decision was upheld by the Court of Appeal. It held in the light of the statutory provisions set out above that the full Council could not require the Cabinet to spend money in a particular way nor, unless it proposed to act in a way contrary to plans and strategies the making of which was reserved to the full Council, to expend money on a particular function.

8. In the case before me, not only did Oxford's Council set a budget, but also approved a rolling MTFP. This was not set in stone, but indicative as to the budget which would be available for the discharge of executive functions in future years. Though not required nor prescribed by statute, an MTFP is plainly an aid to effective decision-making, and making one is a process the Council has power to undertake pursuant to its general power of competence deriving from Section 1 of the **Localism Act 2011**, and section 111 of the **Local Government Act 1972**. Oxfordshire Council's practice was that adjustments to the MTFP were made each year, though broadly it was to be anticipated that the plan would indicate that which the following year's budget would formally set.

9. No doubt in response to the continuing pressures to make financial savings, Council decided in late 2013 to review the work of the Council's Children, Education and Families ("CEF") Directorate. It considered that the integration of the early childhood service (which provided amongst other matters for 44 children's centres across the county) with the adult service would save money overall. The MTFP adopted by the full Council on 18th February 2014 indicated that a saving of £3m per year from 2017/18 onward was to be aimed at consequent upon such an integration.

10. The following year, on 17th February 2015, the Council budgeted for further reductions of £1m per year from 2015/2016, and a further £2m per year (additional to the previously anticipated £3m) from 2016/17.

11. As at February 2015 therefore, the MTFP planned that £6m less per year would be spent on the CEF Directorate after the end of the financial year ending in 2018. This was to be achieved in three stages - £1m per year from 2015/16, a further £2m per year from 2016/17, and the final and additional £3m per year with effect from 2017/18.

12. At a meeting of the Cabinet on 23rd June 2015 a cross party advisory group ("CAG") was established to support the development of proposals by which the £6m budget reduction and fundamental re-design of early intervention services was to be achieved. It determined that there would be full public consultation on the proposals.

13. At a meeting on 15th September 2015, the Cabinet received a report from the Director for Children's Services which contemplated yet further savings, this time of £2m (making a total annual saving of £8m in each year following 2017/2018).

14. Consultation proceeded on a proposal to achieve this potential £8m annual reduction by replacing the then current provision of 44 open access children's centres, which offered universal services to the public, and 7 early intervention hubs, with 8 "children and family centres". These were to be more narrowly focussed on needy children – those who were on child protection plans, children in need, and those identified as vulnerable through Oxfordshire's Thriving Families Programme. The first option offered for consultation was that universal services were to be no more, though other options, too, were proffered: they included the provision of some limited universal services, or alternatively the making available of £1m per year to the voluntary sector for it to deliver some universal services across the county.

15. On 26th January 2016, the Cabinet made recommendations to Council as to the budget and MTFP, with a view to the adoption of those recommendations at the Council meeting in February.

16. If the Council had decided at its February meeting to set a budget incorporating the savings anticipated by the MTFP produced a year earlier, it would have budgeted for a £2m reduction in the annual expenditure of the CEF Directorate in respect of early intervention services. It decided to depart from what until then had been proposed by the MTFP. Instead, it budgeted for a £0.8m reduction in the budgetary year 2016/2017. This meant that if the original plan to reduce the annual budget by £6m from 2018 onwards was to be achieved, £1.8m annual savings would have been achieved during 2016/2017 (the £1m reduction effected in year 2015/2016, together with the £0.8m for 2016/17) leaving £4.2m further cuts to be introduced on an ongoing basis in 2017/2018.

17. Council declined to adjust the MTFP so as to add in the additional £2m savings suggested in September 2015 as an addition on top of the £6m, making the £8m upon which consultation had taken place.

18. The budget for 2016/17 thus having been set to show a lesser reduction than had been anticipated a year before, but a commensurately greater reduction in the 2017/18 (in effect, deferring £1.2m worth of cuts by a year) the question how children's centres should be provided for in future came before Cabinet on 23rd February 2016. The minutes of the Cabinet meeting recorded a resolution to develop 8 children and family centres in locations set out in a report before it. The meeting had before it a report of the outcome of the public consultation, which was then available, and was reminded of the terms of the decision made by Council on 16th February 2016. It had sight of a Service and Community Impact Assessment in respect of the proposals. There was discussion whether the decision to establish 8 hubs (in place of the previous arrangements) should be deferred, but Councillor Melinda Tilley, who was lead cabinet member for Children, Education and Families "affirmed that the County Council were required to find £6m, and the proposals currently before the Cabinet today were aimed at re-organising services in order to do that while meeting the needs of more vulnerable children." Jim Leivers, Director of Children, Education and Families explained that "…the suite of papers before the Cabinet had been prepared in order to change fundamentally how the Directorate for Children, Education and Families carried out its functions while addressing the requirement to find a budgetary reduction of £6 million over 3 years."

Grounds of Claim

19. Permission is sought to advance grounds of claim which are somewhat discursively expressed in the originating application. In essence, they are that the Cabinet acted unlawfully on 23rd. February 2016 in that "when it came to consider responses to the statutory consultation and the issues arising from the Public Sector Equality Duty ("PSED") it erroneously proceeded on the basis that the £6m budget cut contemplated by the MTFP was a given". It is said that by doing so it unlawfully failed to comply with Section 5D of the **Childcare Act 2006**, and did not discharge the Public Sector Equality Duty imposed by Section 149 of the **Equality Act 2010**; that rather than assess the need for children's centres the Cabinet assessed what should be provided within an assumed budgetary constraint. If, alternatively, the Council's approval of

the MTFP on 16th February 2016 indeed meant that the £6m cut was a firm decision "…then that decision itself was unlawful because it was reached without lawful compliance with the Section 5D consultation obligation and discharge of the PSED, and without being informed by a lawful assessment of need".

The Public Sector Equality Duty

20. Section 149 of the **Equality Act 2010** provides, so far as material:-

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it….
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –
>
> > (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
> >
> > (b) 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;
> >
> > (c) 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."

21. The judgment of McCombe LJ in **Bracking v Secretary of State** [2013] EWCA Civ 1345 includes at paragraph 26 a summary of 8 central principles by which Section 149 is to be given substance. The following are particularly relevant to the argument before me:

> "3. The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice…

> 4. A Minster must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rear-guard action", following a concluded decision: per Moses LJ sitting as a Judge of the Administrative Court, in **Kaur and Shar v London Borough of Ealing** [2008] EWHC 2062 (Admin) at [23-24].
>
> 5. These and other points were reviewed by Aikens LJ giving the judgment of the Divisional Court in **R (Brown) v Secretary of State for Work and Pensions** [2008] EWHC 3158 (Admin), as follows: (i) the public authority decision maker must be aware of the duty to have "due regard" to the relevant matters; (ii) the duty must be fulfilled before and at the time when a particular policy is being considered; (iii) the duty must be exercised in substance, with rigour, and with an open mind". It is not a question of just "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument; (iv) the duty is non-delegable; and (v) …continuing one (vi) it is good… practice for a decision maker to keep records demonstrating the consideration of the duty….
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> 7. Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them": **R (Domb) v Hammersmith and Fulham LBC** [2009] EWCA Civ 941 at [79] per Sedley LJ.
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> At paragraph 74 in the same case Elias LJ said:
>
> > "Any government, particularly in a time of austerity, is obliged to take invidious decisions which may exceptionally bear harshly on some of the most disadvantaged in society. The PSED does not curb government's powers to take decisions, but it does require government to confront the anticipated consequences in a conscientious and deliberate way insofar as they impact upon quality objectives for those with the characteristics identified in Section 149 (7) of the Equality Act 2010. "

22. The summary of principles given by McCombe LJ in **Bracking** was endorsed by the Supreme Court in **Hotak v Southwark London Borough Council** [2015] UKSC 30 (see paragraph 73). It was emphasised that the duty had to be exercised "in substance, with rigour and with an open mind" (adopting Aikens LJ in **R (Brown) v Secretary of State for Work and Pensions** [2008] EWHC 3158 (Admin), see per Lord Neuberger at paragraph 75).

23. The essential thrust of Mr Wolfe QC's submissions on behalf of the Claimants was that these decisions make it clear that the public sector equality duty is not to be considered after a decision has been taken, as it were by cross check of the validity of that decision, but at an integral stage in the making of it and before it is finalised. He argues that on the facts of the present case the relevant decision maker did not have regard to the duty when it came to making the relevant decision. Thus, in essence, if the Council at its meeting of 16th February did not have in mind the public sector equality duty in setting the budget for early intervention services, and in particular its likely impact upon those groups who might suffer from the discontinuance of open access children centres, then if the MTFP which it agreed was treated by the Cabinet as fixed the Cabinet would not be discharging the PSED on behalf of Oxfordshire in making its decision. In effect, the relevant decision would already have been taken – that funds necessary to keep matters as they were would not be provided.

Consultation

24. The **Childcare Act 2006** imposes general duties upon a local authority in relation to the well-being of young children. By section 1(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 sub-section (2)…"

25. By section 3, specific duties are imposed in relation to early childhood services. By section 3(2) those are to "…make arrangements to secure that early childhood services in [a local authority's] 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".

26. By section 5A it is provided 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 for 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."

27. It was thus common ground between counsel that an assessment of need fell to be made in the circumstances of the present case. By Section 5D it is provided that:-

> "(1) An English local authority must secure that such consultation as they think appropriate is carried out -
>
> (a) before making arrangements under section 3(2) for the provision of a children's centre;
>
> (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."

28. If authority were needed for the proposition that consultation should come in advance of a decision, rather than after the event, it is afforded by the words of Wilkie J in **R (Sardar and others) v Watford Borough Council** [2006] EWHC 1590 (Admin):

> "On the crucial "issue of principle" the sequence has been – decision first, consultation later. It is a different matter to decide to reverse a previous decision rather than to take one in the first place and, in my judgment, the consultation exercise and its fruits went on the issue of principle to inform a decision of the first type rather than one of the second."

He accordingly allowed an application for judicial review on the facts of the particular case before him.

29. Mr Wolfe QC drew attention to the case of **R (Domb) v Hammersmith and Fulham London Borough Council** [2009] EWCA Civ 941. It concerned a decision taken by the local authority's cabinet in the light of financial pressures to reintroduce a scheme to charge for home care. At paragraph 80 Sedley LJ observed:

> "The object of this exercise was the sacrifice of free home care on the altar of a council tax reduction for which there was no legal requirement. The only real issue was how it was to be accomplished. As Rix LJ indicates, and as I respectfully agree, there is at the back of this a major question of public law: can a local authority, by tying its own fiscal hands for electoral ends, rely on the consequent budgetary deficit to modify its performance of its statutory duties? But it is not the issue before this court."

30. Mr Wolfe QC submits that the "major question of public law" which Sedley LJ expressed, with support from Lord Clarke of Stone-cum-Ebony MR who concurred, arose here: the local authority had, he submits, tied its own fiscal hands.

31. However, the premise for these observations was that of a deliberate reduction in the rate at which Council Tax was to be set by the administration, for political ends. Sedley LJ referred to this at paragraph 78. The factual situation underpinning the present appeal, is to my mind, different, and the difference significant, in that the financial pressures were imposed upon the Council not by an intended reduction in Council Tax but a reduction in funding available from central government. To the extent that, it might be said, Council Tax could have been increased to meet the problems of need, however, these observations remain of some force, though there was no evidence that the purpose here was for political ends as such.

Need

32. Section 5A of the 2006 Act is augmented by statutory guidance published by the Secretary of State. It seeks to emphasise that local authorities should ensure that a network of children's centres is accessible to all families with young children in their area; 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; and that opening times and availability of services meet the

needs of families in their area. In assessing consultation in respect of these needs, Mr Wolfe referred me to the endorsement in **R (Moseley) v Haringey London Borough Council** [2014] UKSC56, per Lord Wilson JSC at paragraph 25 –

> "…consultation must be at a time when proposals are still at a formative stage; second that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken in to account in finalising any statutory proposals."

Lord Reed added (paragraph 38) that the purpose of the statutory duty to consult was in his opinion "to ensure public participation in the local authorities' decision-making process".

33. The Claimants argued that there had been no consultation worthy of the term feeding into a decision of the relevant decision maker, and no proper assessment of the needs to be served, in accordance with the **2006 Act**. The prospective budget was set out in the MTFP for 2017 and subsequent years by Council when it approved the MTFP without there being a formal report to it of the outcome of the consultation on the provision of children's centres which had just concluded. Insofar as Cabinet took this approval as a given, it was therefore adopting a decision which was not made in compliance with the **2006 Act**, and took no fresh, compliant, decision of its own.

34. The method by which the Defendant generally had sought to discharge its PSED was by making and considering Service and Community Impact Assessments (SCIAs). Mr Wolfe accepts that in its decision of 23rd February 2016, the Cabinet considered such an assessment of the need for children's centres, took into account the outcome of the Council's statutory consultation on the proposal to replace the children's centres and early intervention hubs with 8 children and family centres, and considered the equality implications of the proposal. He argued, however, that where it went wrong was that it did so upon the premise that financial proposals in the MTFP amounted to a fixed decision to make such cuts in the future, whereas it was not entitled to treat the MTFP as a "given".

35. If, however, it had been entitled to treat the MTFP as a given, then he argued that the MTFP itself was unlawful since at the time that it was made Council did not consider the outcome of the statutory consultation process, nor did it consider any SCIA or otherwise properly discharge its PSED.

Discussion

36. Central to the argument is whether Cabinet regarded the MTFP as a given, rather than as an indicative financial plan, within which there would be some flexibility. The Claimants rely upon the references in the minutes quoted above. Unless satisfactorily explained, they indicate that the Cabinet thought that there was no flexibility within the budget, and that the effect of what Council had decided was that there was no money to permit anything other than the closure of the centres.

37. **R (on the application of the Fawcett Society) v Chancellor of the Exchequer and others** [2010] EWHC3522 (Admin) was a case in which the Treasury set a budget

without having carried out a gender equality impact assessment. However, a challenge to the setting of the budget was refused by Mr Justice Ouseley. The budget set out a public spending envelope setting departmental limits. However, the PSED could be fulfilled if gender equality impacts were undertaken by consideration of each department: at paragraph 9 Ouseley J. recognised that, where there was flexibility within the departmental spend, the setting of a budget providing a maximum figure for that spend did not itself have to comply with the PSED in order for the ultimate departmental spending decision to be valid.

38. Mr Oldham QC argued that the evidence establishes that the Cabinet did not regard the MTFP impermissibly as set in stone. The documentary evidence before me contains the report of the Director for Children's Services to Cabinet on the occasion it made the decision under challenge. That includes, at paragraph 12:

> "An overriding consideration in the preparation of these reports has been affordability. Much of the change is required as a consequence of budget reductions arising from increasing volumes and decreasing resources. So whilst the concept of health and support delivered as part of a universal provision has been recognised as desirable it has been inevitable that services in some key areas will be reduced. In practical terms the proposals identified throughout the linked reports are made on the basis of protecting the most vulnerable and making the best of what we have."

Although the word "required" is used the sense is colloquial rather than representing, for instance, formal legal advice as to a statutory obligation.

39. In addition to the passages cited above, the minutes show that there was a significant conflict of view about whether children's centres should close: Councillor Pressel in particular objected to the proposal, though she was not alone. An overall view shared by most of the councillors was that cuts were necessary: the question, however is whether they regarded them as obligatory.

40. In her first witness statement, Melinda Tilley (lead member for Children, Education and Families) said (paragraph 4) that officers' reports about options for the future would be based

> "…on funding which is expected to be available, as shown the MTFP (sic) at a given point. Cabinet is not strictly speaking bound by the MTFP, as it is a flexible plan and can be adjusted, but if we were to take a decision to spend more money than was shown to be available in the MTFP, it would mean that equivalent savings would have to be found somewhere else in the Council's budget, as otherwise the MTFP would serve little purpose."

In part of the skeleton argument for the Claimants they had noted that the Defendant had not lodged any witness statement addressing the Cabinet's understanding of flexibility: the Chief Financial Officer who addressed understanding had said in her witness statement that she had no doubt that the Council fully understood that the MTFP was just a plan, but this referred to the Council as a whole, and not to what the Cabinet understood, let alone the basis upon which it proceeded at its meeting on 23rd

February. The skeleton argument went on to say that Councillor Tilley had set out her current understanding at the MTFP, and not that of which she was aware at the time, nor did she explain the apparent contradiction between the Minutes, which used the word "requirement", and her present understanding.

41. Councillor Tilley responded in these terms in a second statement of 12th July 2016:

> "I do not think that there is a contradiction. Minutes record that in debate I said that £6 million cuts were required. Minutes are not verbatim, but I may very well have said those words. I believed that those cuts were needed, in line with the MTFP. If I and other members had been persuaded that money could be saved from another part of the budget and given to fund children's services instead, then we would have considered whether to proceed on that basis instead. But that was not the case. I do not think that what I said shows that I thought that the MTFP was set in stone. At any rate I did not think it was."

42. She confirmed that the understanding of which she spoke in her first witness statement had been her understanding throughout the time she was a councillor.

43. There has been no application to cross-examine Councillor Tilley on that evidence. There is no evidence to the contrary. Mr Wolfe points to the absence of any other member of the Cabinet providing a witness statement expressing the same view. However I do not think this can have the effect of neutralising the evidence which is before the court, proffered by the Cabinet Councillor with lead responsibility for the area. Moreover, it seems to me to fit with the probabilities: all members of the Cabinet who were councillors were also, by definition, members of the full Council. Council had made a significant adjustment to the MTFP in respect of the very budget item to which the discussion at Cabinet related. Instead of the budget being set in accordance with the MTFP as it had been before the Council meeting, which had anticipated a £2 million reduction, this was now to be only £0.8 million. Discussion took place in Council about the advisability of closing children's centres, which demonstrates that those participating in the discussion did not think that the MTFP previously agreed was fixed in any conclusive way.

44. Accordingly, since the Claimants' case is that but for a belief that the MTFP was set in stone, the Cabinet decision could not be challenged on the ground of a failure to consider need, to consult properly, or to apply the PSED, the challenge as a whole must fail. It does so on the facts.

45. If, however, I had been persuaded that the facts were otherwise I would not have upheld the claim. I would then have been considering a case in which the Cabinet had considered that the budget was set in stone. This would not be a breach of the relevant duties (to consider consultation, to assess need, and to discharge the PSED) if (as Mr Oldham submits) Council in setting the budget was not required to do so, or, if it was so required, if it had sufficiently and separately done so in its meeting of 16th February.

46. In arguing that the Council was not required to do so, Mr Oldham QC submits that there is a difference in function between the Council when setting a budget and

approving an MTFP and a Cabinet or executive of a local authority making operational decisions within the scope of the funding envelope provided for by the budget once set. There is inherent flexibility, the presence of which persuaded Mr Justice Ouseley to reject the claim in **Fawcett**. Further, in **R (J G and another) v Lancashire County Council** [2011] EWHC 2295 (Admin) Kenneth Parker J. considered a case in which a local authority fixed a revenue budget limit for adult social care (amongst other services). The budget represented a finite cash sum from within which all such services were to be provided. Fixing this sum did not however, amount to approval as such for any of the particular budget proposals, which were to be the subject of later consideration. Thus the local authority had not considered the responses to consultation about the future provision of adult social care at the time it set the budget. It was proposed that there should be an increase in the threshold for adults accessing social care services under a fair access to care services scheme ("FACS") policy. This adversely affected the Claimants, who were disabled. They submitted that the authority had not paid due regard to the needs specified in Section 49A of the **Disability Discrimination Act 1995** (which was the statutory pre-cursor in respect of discrimination on the ground of disability to the provisions now in Section 149 of the Equality Act as regards not just disability but other protected characteristics). They argued that the authority should have had regard to a detailed assessment of the likely impact of its budget decision upon affected users of the relevant services, such as the Claimants. Kenneth Parker J, dismissing the challenge, said (paragraph 50):-

> "What…has happened in this case is that the decision-maker has taken a preliminary decision in relation to its budget, fully aware that the implementation of proposed policies would be likely to have an impact on the affected users, in particular, disabled persons, but not committing itself to the implementation of specific policies within the budget framework until it had carried out a full and detailed assessment of the likely impact. In my view, there is nothing wrong in principle with such an approach and nothing inconsistent with the duties under the **1995 Act**…The economic reality was that to meet imperative needs of reducing expenditure it would be extraordinarily difficult to avoid an adverse effect on adult social care. But there remained flexibility as to how any such effect on disabled persons could be minimised and mitigated, and I am satisfied that the Council kept an open mind as to the precise policies that would be implemented."

47. He considered that that expression of principle was reinforced by the decision in **Fawcett**.

48. Though I was taken by Mr Wolfe to paragraph 17 of the **Lancashire** decision, in which Kenneth Parker J made it clear that

> "if the cabinet member for adult and community services did not consider that it was appropriate to introduce any or all of the proposed changes to adult social care provision within that revenue cash limit agreed by the full Council, then it was open to him to consider

> whether savings could be found elsewhere, whether this be within the budget for adult social care, from other services within the adult and community services directorate or from services across the County Council."

this was not as I read it a finding of fact necessary to justify the conclusion expressed at paragraph 50. That conclusion did not depend upon there being flexibility in ***overall*** financial provision. I do not accept that Cabinet was obliged by the principles of "due regard" to reconsider the overall budgetary provision which Council had made. To do so would oblige it to take a decision which it was for the full Council to take.

49. As to whether the full Council paid due regard to the public sector equality duty this must be determined both in relation to the particular decision taken, and an understanding of its consequences, together with evidence of that which led to it taking the decision in question. It would be an undue fetter on the decision making process of public authorities, nor is it required by statute, for such authorities formally to be advised of the public sector equality duty and to consider it separately on each and every occasion it considers a particular resolution: what matters, as the authorities emphasise, is substance not form.

50. An SCIA assessing the effect of the development of an integrated adolescent and early childhood service was carried out in November 2013, for Council's budget which was set in 2014. The implementation of an integrated children's social care and early intervention service was assessed by means of an SCIA for the budget setting process for 2015/16. This was in November 2014. The report to Cabinet, at that time, with the purpose of enabling service and resource planning, made reference to, and attached, the SCIA. These SCIAs were not simply assessments referred to in passing, nor were the decision makers told they could access the SCIA from some other source if they wished to see them in their entirety (as, for instance, by providing a link to an external site) which might or might not be accessed by them. They were attached to the papers for Council discussion. It is to be assumed therefore that the Councillors read them.

51. The models put out to consultation in late 2015 were accompanied by an SCIA dated August 2015. It was promised that the impact would be reviewed again following a review of the feedback from public consultation, in preparation for the submission of final proposals (so described) to Cabinet in early spring 2016. A draft SCIA was compiled in advance of the final review of the responses to consultation. This was in February 2016. In the report of the Chief Finance Officer to Council, in respect of the corporate plan and service and resource planning from 2016/17 to 2019/20, members were referred at paragraphs 12 and 13 to the equality and inclusion implications of the decision, Council was reminded of the PSED, and reference was made to an overarching SCIA, setting out a general assessment of the broad impact of budget proposals, which had been included in Section 4.12 of a report presented to Cabinet in January 2016. During the course of the meeting, Council was presented with a petition urging it not to close children's centres but instead to keep them open to all families, as well as ensuring that 8 referral centres were accessible, by referral, to the most vulnerable families. The results of a medical study (The Adverse Childhood Experiences Study) was presented to Council, and Councillors urged to keep children's centres open to protect against "generational cycles of suffering and

social and economic difficulty". It was advised not to increase isolation in communities, in particular to the young or the elderly, by closing children's centres: and Council was told that 71% of those who had responded to consultation on the future of children's services had rejected the proposals. A service user described overriding concern about cutting universal services, since they had kept families safe. A speaker drew attention to the need for children's centres for those who suffered from ADHD, Aspergers, domestic abuse, and bereavement. The Green group on the Council proposed budget amendments to reverse the proposed £0.8m cut for 2016/17, and to make adjustments to the MTFP so that the £4.2m cut indicated for 2017/18 would not be planned for.

52. As I have noted, after discussion informed by the matters set out in the last paragraph, Council decided not to implement that which the MTFP agreed a year previously had anticipated for 2016/17 insofar as it dealt with the funding of Children, Education and Families.

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

54. As to the question of consultation on the proposed children's centre closures, Council was aware that the consultation which had occurred had yet to be reported on. It had some indication of the views the Respondents had expressed (see above). However, Council, in setting the budget, was not setting a budget so prescriptive as to permit of no choice as to the future provision of children's services: the consultation had specifically been about 3 options for change, upon which Oxfordshire wished views.

55. Adopting the same approach as Mr Justice Kenneth Parker in **JG**, I do not consider that the budget was unlawful because in one respect Councillors did not have the detailed consultation responses before Council for them to consider. To suggest they should have done so misunderstands the respective functions of Council and Cabinet. The latter took the effective decision as to the nature of services to be delivered. The latter required to consider the responses to consultation, and the needs of children and families, properly and lawfully before reaching its decision. There is no suggestion it did not do so.

56. Accordingly, had it been necessary to do so, I would have found no breach of the law even if the Cabinet had impermissibly regarded the budget as a given: it represented a funding "envelope"; there was sufficient flexibility within it (analogous to the position in **Fawcett)**; the decision of Council to set the budget at that level was in any event reached in accordance with the PSED in substance and after real debate; and the budget was not flawed by failure of Councillors to have before them a full and final report on the consultation which by then had ended.

57. Further, I accept Mr Oldham QC's argument that the Cabinet which reached its decision on 23rd February had considered the impact on the community and those who

were protected persons within it, sufficiently to satisfy its PSED, given that on 15th September 2015 (and therefore before Council adopted the MTFP it did on 16th February 2016), when considering a report recommending consultation on reorganisation proposals. There has been no challenge to the lawfulness of that decision, and it is not suggested that the Cabinet of February 2016 was differently composed from that of September 2015.

Further Arguments

58. A claim for judicial review must be brought "promptly, but in any event within 3 months" (CPR 54 Rule 5 (1)). The claim seeks to attack the Council Tax setting budget of the Council. Mr Oldham submits that a direct challenge to such a budget must be brought extremely quickly. Otherwise good administration is prejudiced. Though the claim as eventually advanced focussed more upon the cuts to be achieved in 2017/18, indicatively, nonetheless some element of the budget (£0.8m) was still to be taken from the finance available within which children's services which were to be provided for 2016/17

59. Though I recognise the very considerable difficulty caused to public administration by a challenge to a budget upon which so many facets of public administration depend, a pre-action protocol letter was sent to the Council on 4th March 2016. That is reasonably prompt. There was a full answer to it by letter dated 7th March. This ended by the Council suggesting that in the light of the director's proposal to re-consider developing a model within the new budget allocation, and in the light of that to bring a further report to Cabinet setting out how best to ensure funding of children's centres for the future, any claim for judicial review would be premature. The Claimants sought clarification. The Defendant responded on 21st April (i.e. nearly a month after this request) and the claim was issued only 8 days letter. Had there not been this iteration between the parties between the initial pre-action protocol letter and the issue of the claim, I would have considered that the claim was not brought promptly. In the circumstances, however, I would not have refused permission on the grounds of time: Oxfordshire itself was responsible for any prejudice to good administration which it suffered. This was caused by the steps it took itself seeking a delay in proceedings, as outlined above.

60. A similar point arose in Mr Oldham's submission that there would be a detriment to good administration if the claim were to be permitted. Suffice it to say that I would not have refused permission on this basis either, since it applies only if there has been undue delay (Section 31(6) **Senior Courts Act 1981**). Though it would undoubtedly been desirable if the challenge had been brought earlier than it was, I do not consider the delay to have been undue.

61. Finally, Mr Oldham argued that even if I had been minded to grant relief I should not have done so since it was highly likely that the outcome would have been the same. Section 31(3C) of the **Senior Courts Act 1981** provides that, when considering whether to grant leave, the Court, if the defendant asks it to, must consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred.

62. I accept, as Mr Wolfe points out, that the applicable principle was correctly stated by Blake J in R **(Logan) v London Borough of Havering** [2015] EWHC 3193 (admin)

at paragraph 55: that any consideration whether the outcome was highly likely to have been substantially different if due regard had been had to the PSED should "normally be based on material in existence at the time of the decision and not simply post-decision speculation by an individual decision maker." It is a relatively high threshold: **R (Enfield London Borough) v Secretary of State for Transport** [2015] EWHC 3758 (Admin). The question is theoretical, since I have found that the evidence was that the Cabinet did not regard the budget as set in stone, and there is no other effective challenge to its decision; and that even if there had been, the budget itself was reached in circumstances in which the PSED was considered in substance and with rigour by the Council when setting the budget. If I were wrong in my conclusion that the failure to have the concluded response to the consultation before Council vitiated that part of the budget which related to children, education and families, then I would have concluded that the error made no substantial difference to the outcome. Council was told of the nature of the responses. There was plainly significant debate before it as to the pros and cons of the proposal in respect of children's centres. I consider on this material (which was in existence at the time of the decision, and does not depend upon the speculation of an individual decision maker after the event) that the probability that the decision would have been the same is so strong that the high threshold is met.

63. I have specifically not considered whether I would have reached the same conclusion had I held that the PSED had not been satisfied by the Council at its meeting on 16th February 2016, since I have held the opposite, and any conclusion to this effect would be artificial. It is sufficient to say that here too there might be strong grounds for reaching such a conclusion.

Conclusion

64. The claim is untenable on the facts, and for that reason permission must be refused. In any event, I do not consider that the claim has any significant merit as a legal challenge to the decisions taken by Cabinet on 23rd February 2016 or the antecedent decision of the Council as to budget on 16th February 2016. Throughout, the papers are replete with consideration by the Council of the impact of funding cuts which it saw as necessary upon a number of the services it provided for the public amongst which were those of open access children's centres. For the reasons I have given above, although I have heard full argument, I would not have granted (and do not grant) permission, but in any event dismiss the applications which have been made.