Neutral Citation Number: [2019] EWHC 618 (Admin)

Case No: CO/1735/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2019

Before :

LADY JUSTICE SHARP
and
MRS JUSTICE MCGOWAN

Between :

The QUEEN	**Claimants**
on the application of	
KIAN HOLLOW (by his mother and litigation friend Alicia McColl) and others	
- and -	
SURREY COUNTY COUNCIL	**Defendant**

Ms Jenni Richards QC and Mr Stephen Broach (instructed by **Irwin Mitchell LLP**) for the **Appellant**
Mr Jonathan Moffett QC and Mr Michael Lee (instructed by **Surrey County Council Legal Services**) for the **Respondent**

Hearing dates : 2-3 October 2018

Approved Judgment

Lady Justice Sharp:

Introduction

1. This is the judgment of the Court.

2. The claimants are five children who are resident in Surrey, and who have special educational needs and disabilities (SEND). They bring this claim for judicial review acting through their mothers as their litigation friends, and have adequate standing to bring this claim. The mothers have made it clear they are content for their children to be identified by name. The defendant is Surrey County Council (the Council). The Council bears responsibility making provision for the special educational needs of the claimants.

3. Permission to apply for judicial review was granted on 23 May 2018 by Holman J. On 20 September 2018 Walker J permitted the claimants to amend the claim to add one ground (Ground D: see para 8 below) and to adduce fresh evidence, namely further evidence from the mothers of the children concerned.

4. The claimants challenge a decision taken by the Council on 27 March 2018. By that decision, the Council's Cabinet (the Cabinet) approved the Council's detailed service revenue and capital budgets for the 2018-19 financial year, including the Council's budget for schools and special educational needs and disabilities (the SSEND budget). The claimants submit the Council's decision to make significant reductions in the funding available for SEN (special educational needs) provision was flawed and invite this Court to grant declaratory relief, and an order quashing the SSEND 'budget allocation for 2018-19' and costs.

5. In the Amended Grounds and Statement of Facts, the claimants state that the relief sought in the present case would not involve the Court quashing the Council's entire revenue budget or interfering with the council tax calculation: but would require the Council "to reconsider its SEN budget from within all resources then available to it and in the light of the guidance from the Court as to its legal obligations in this regard."

6. The budget for overall Council expenditure was set at £1,711,989,000. This included the budget for the Children's Schools and Families Directorate, set at £795,175,000, and within it the SSEND budget of £228,836,000. The latter included eight line items of savings totalling £21,001,000. The nature of the savings identified in the SSEND Budget for the 2018-19 financial year was set out in the Council's Medium Term Financial Plan (MTFP).

7. The claimants originally challenged the decision to approve the savings of £21,001,000 to which we have referred, that is in the eight line items identified in the SSEND budget in the MTFP. At the hearing before us however, Ms Jenni Richards QC for the claimants confined her challenge to only one of those line items, namely item number seven, which is described as "areas of focus" (AOF) (inclusion, commissioning, provision and transition) comprising £11,694,000.[1]

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[1] The evidence is that in respect of some of the line items, the savings identified are those which are expected to flow from past decisions of the Council, which were "impact assessed" and consulted on at the time, which have not been challenged, and some of which have been implemented.

8. The specific grounds of review as formulated on behalf of the claimants are as follows. The decision under challenge was taken: Ground A: without consultation as required by statute and/or common law; Ground B: in breach of the public sector equality duty (PSED) imposed by section 149 of the Equality Act 2010 (the 2010 Act); Ground C: in breach of section 11 of the Children Act 2004 (the 2004 Act); Ground D: in breach of section 27 of the Children and Families Act 2014 (the 2014 Act); and Ground E: in breach of the common law requirement to have regard to relevant considerations and the "*Tameside* duty" of sufficient inquiry: see *Secretary of State for Education v Metropolitan Borough Council of Tameside* [1977] AC 1014.

9. Notwithstanding the way in which the discrete grounds are framed, the substance of the challenge as it has been argued before us is centrally concerned with the issues of rationality and consultation. The claimants contend there were failures to comply both with the Council's statutory and common law duties to consult and with statutory duties which gave rise to a duty to consult. They further seek to argue that to set such a budget in such circumstances, including proposed savings in the SSEND budget, without knowing precisely how those savings would be made, or what the implications and likely impact of making them might be, was irrational.

10. There was some suggestion at an earlier stage of these proceedings that the claimants might wish to put in expert evidence on matters concerning local government finance, but in the event they did not do so. There is therefore no challenge to the evidence served by the Council in opposition to this claim, which explains in detail the material facts concerning the decision under challenge.

11. It is common ground that no consultation took place. The Council submits that on the unchallenged evidence it was lawful and permissible as a matter of local government finance and accounting practice for the Cabinet to include in its budget the eight line items, which made up the savings in the SSEND budget, including item seven; and that the claimants' case is predicated on the flawed assumption that the decision to approve the savings in the SSEND budget relating to the AOF will result in a reduction of services provided by the Council to children with SEND.

12. The Council accepts that if or when identifiable cuts to SEND services are proposed it will fully consult upon those proposals in accordance with any legal duties to do so. However the evidence shows that the decision under challenge is not a decision to cut spending or services, let alone to make a global and indiscriminate "cut" to the provision of services to children with SEND.

13. In simple terms, the budget is part of a lawful local government accountancy process that identifies how savings might be made, but the budget is not set in stone. What the Council has identified is the potential for future savings. To put it another way, the Council has identified areas of spending upon which it proposes to concentrate as the potential areas in which savings could be made. In those circumstances, the Council could not know what the impact of cuts might be in those areas, or consult on them, because at the time the decision under challenge was taken, no cuts had been decided upon or worked out.

14. In our view, the Council's opposition to the claim is well founded for the summary reasons given above; and for the more detailed reasons set out below, we would dismiss this application.

The claimants' evidence

15. The evidence adduced by the claimants in this case comes principally from the mothers of the claimants. The mothers are, naturally enough, extremely concerned about the position of their children and the prospect that the services currently provided to them, or which they may need in the future, will be affected by decisions made by the Council. Their evidence undoubtedly demonstrates the vital importance of SEN services to children with such needs and to their families, and the importance from the families' perspective of consultation and having their say. That said however, the evidence does not bear on whether the nature of the decision under challenge was rational or gave rise to a duty to consult as a matter of law. We should nonetheless record what is said.

16. Alicia McColl is the mother and litigation friend of Kian Hollow (aged 14 the relevant time) who has a diagnosis of Autistic Spectrum Disorder (ASD) and co-occurring Attention Deficit Hyperactivity Disorder (ADHD). Kian uses the Council's transport and specialist school services. In particular, he benefits from 'one to one' and group therapy sessions and dedicated daily support. She contended that 'significant deficiencies' remained in Kian's current Education, Health and Care Plan (EHCP) because of the Council's alleged failure to engage with their social care team to ascertain Kian's social care needs. She had concerns about the outcomes envisioned in the EHCP, especially in relation to his progression into college and the workforce. On previous occasions, she has successfully challenged decisions cutting Kian's SEN services; however, she fears that she will not be able to repeat the success of previous challenges in light of the SSEND budget.

17. Sarah Jones is the mother and litigation friend of Kyffin Carpenter (aged 4). He suffers from a rare neuromuscular condition that causes severe muscle weakness. This affects his ability to eat and communicate. He currently attends nursery and benefits from 'one to one' support and therapy. From September 2018, he had attended school but was not eligible for the Council's transport services. Further, he was refused a place in the school's communication and interaction needs unit. Ms Jones contended that Kyffin's latest EHCP failed to comply with the Special Educational Needs Code of Practice. She contended that it neglected to make provisions for the necessary 'one to one' support and contemplated that Kyffin may have had to attend a primary school which would not provide the required support for his SEN. Ms Jones maintains that this can only be understood against the background of "the cuts", as she describes them, made by the Council. Further, she says that some aspects of his therapy were available only through private funding. She expresses concern about the lack of consultation prior to the budget decision, which, she says, could have resolved uncertainty relating to the effects of the proposals.

18. Debbie Butler is the mother and litigation friend of Zoe Butler (at the relevant time aged 15) and Sean Butler (aged 12). Both have SEN. Zoe was diagnosed with classic autism at the age of 3 and depends on the Council to provide transport and boarding services. Following her diagnosis, Zoe benefitted from attending a Severe Learning Disability (SLD) school and is now studying at GCSE level. She is likely to secure employment in the future and live independently.

19. Sean was diagnosed with ASD and suffers from severe anxiety disorder. He attended a mainstream school with a specialist SEN unit until year three but was transferred to a specialist school in year four due to the severe difficulties he experienced in mainstream

education. He is not expected to obtain GCSEs and is unlikely to be able to live an independent adult life. His current EHCP indicates that he will attend a boarding school. Ms Butler says that she noticed a real difference between the Council's response to Zoe and to Sean. She attributes this to savings made by the Council in SEN service provision in the two years during which Zoe and Sean respectively became of school age. She notes the refusal of the Council to send Sean to a SLD school and the many 'uphill battles' she has had in securing sufficient service provision for him. She stresses the importance of the transport and boarding service. Although no specific cuts have been made to either of those services she fears that cuts may be made following the implementation of the SSEND budget. In a second witness statement, she says Sean has now been denied boarding, as 'one to one' support would be necessary but was not available. She does not accept that only anxieties would have been expressed if a consultation had taken place.

20. Catriona Ferris is the mother and litigation friend of Dominic Ferris (at the relevant time aged 15). He has a diagnosis of ASD with traits of Pathological Demand Avoidance. He depends on transport services funded by the Council and attends a SEN school. Following his enrolment, Dominic has made significant progress, as evidenced by a decrease in violent episodes. He benefits from 'one to one' support and extensive counselling provided by the school. Ms Ferris is concerned about potential changes to SEN services for children over the age of 16 following the SSEND budget decision. She says that Dominic will continue to require 'one to one' support and transport services after he enters Sixth Form College. Ms Ferris expresses dismay that the Council failed to consult parents of SEN children prior to the "budget decision" and says parents of children with SEN would have requested greater detail in order to be able to understand how the "intended cuts" would impact on them and their children.

The Council's evidence

21. Before addressing the detail, it is helpful to start with an overview of the relevant chronology, which we can take from the summary provided by Mr Moffett QC for the Council:

    i) *Jul-Mar 2017* The Council and the Cabinet discussed the pressures on the Council's delivery of SEND services, existing deficiencies in that provision (such as those identified by Ofsted in 2016), and the challenge faced in making the necessary savings in the delivery of that provision;

    ii) *Oct-Nov 2017* The Cabinet discussed potential savings that could be made in its provision of SEND services, the challenge involved in making such savings, and the possible impact of such savings;

    iii) *30 Jan 2018* The Cabinet considered a report from the Leader of the Council for the purpose of making recommendations to the full Council in respect of the Council's gross revenue expenditure budget for the 2018-2019 financial year and the council tax precept that should be set for the same year. The Cabinet resolved to make various recommendations to the full Council, including a recommendation that it approve a gross revenue expenditure budget for 2018-2019 of £1,705,000,000;

iv) *6 Feb 2018* The full Council met to consider a report from the Leader asking it to approve the Council's gross revenue expenditure budget for the 2018-2019 financial year and the council tax precept. The full Council resolved to approve the recommendations made by the Cabinet and it set the Council's gross revenue expenditure budget for the 2018-2019 financial year at £1,705,000,000 and set the council tax precept for the same financial year;

v) *27 Mar 2018* The Cabinet considered a further report from the Leader recommending that it approve the 2018-2019 Budget and indicative budgets for the years 2019-2020 and 2020-2021 as set out in the then draft MTFP 2018-2021 that was appended to the report. An equalities impact analysis was also appended to the report (the EIA). The Cabinet Member for Education, Mary Lewis, addressed the cabinet orally at this meeting. The Cabinet approved the detailed service revenue and capital budgets for the 2018-2019 financial year.

22. Under Section 151 of the Local Government Act 1972, each local authority in England and Wales has to make arrangements for the proper administration of its financial affairs and has to secure that one of its officers has responsibility for the administration of those affairs. Mr Kevin Kilburn, a chartered accountant, who is the head of the Council's Finance Department, has that responsibility on an interim basis, and is therefore referred to as the Interim Section 151 Officer. His responsibilities include ensuring that Council members and senior officers are fully informed of the financial implications of all key decisions and policies and that proper accounting arrangements are in place across the Council. Amongst other things, he provides commentary on all Cabinet reports so that members understand the financial implications of decisions they are being asked to make. Further, alongside the Chief Executive and the Leader of the Council, he is accountable and responsible for drawing up the Council's yearly budgets and medium term financial plans, the coordination of the budget strategy, developing the budget management process through the year, and closing the Council's accounts.

23. Mr Kilburn was closely involved in the drawing up of the MTFP and the 2018-2019 budget (albeit as deputy to Ms Sheila Little, who then held the position he currently holds). In his evidence, he describes the budget pressures currently faced by the Council; how the Council sets its budget in general terms and the process of approval of the Council's budget for the 2018-2019 financial year as part of the MTFP.

24. The position in summary is as follows:

i) In June 2017 it became apparent that £25,000,000 of the savings projected for the 2017-2018 financial year would not in fact be made, and that there were other rising budget pressures. A budget gap of £25,000,000 in the 2017-2018 financial year was primarily attributable to overspending in the areas of adult social care (ASC), children's social care (CSC) and SEND. This overspend was offset by under-spending in other areas: the overspend in SEND services was funded by the Dedicated Schools Grant (DSG) of £9.3 million, and was ultimately carried forward to the 2018-2019 financial year;

ii) Following discussions at the Schools Forum after the end of the 2017-2018 financial year, there was agreement in principle that the overspend would be funded by the underspend on the schools and early years blocks of the DSG;

iii) When the budget for the 2018-2019 financial year was set, there was an identified budget gap of £56,000,000 between the Council's projected income and its projected expenditure. The Council is part of the Business Rates Pilot Scheme and this generated a one-off income of £20,000,000, thereby reducing the budget gap to £36,000,000. This gap has been further reduced by using £21,000,000 from the Council's reserves, with a further £15,000,000 raised through the flexible use of capital receipts, in order to balance the Council's budget.

25. As for the process by which the Council sets its annual budget, because the Council operates executive governance arrangements, the decision-making that is required to set the Council's annual budget is divided between full Council (i.e. all of the elected members of the Council sitting together as the full Council) and the Cabinet. In practice there are three stages in the process of setting an annual budget:

i) The Cabinet approves a draft budget, which it recommends to the full Council;

ii) The full Council approves the Council's gross revenue expenditure in order to set the Council's council tax precept. The setting of the council tax precept is a function of the full Council;

iii) The Cabinet then approves a final budget in the light of the Council's decision.

26. The statutory requirement on the Council is to set the council tax precept. There is no statutory requirement to set a detailed budget in any particular form, and in particular, there is no obligation to produce budgets in the form of a medium term financial plan. Such documents have no statutory force. They are produced to assist the Council in setting the council tax precept and managing its finances effectively with a view to balancing its budget.

27. In late November/early December each year local authorities are informed of their expected provisional funding from central government (which is finalised at a later date: for example, central government published the local government settlement for the 2018-2019 financial year on 7 February 2018) alongside the permitted increases in the council tax and audit social care precepts. At this stage, the financial team's practice has been to provide the different service areas within the Council with estimates of the funding they are likely to receive and projections of their likely expenditure for the coming financial year. The projections are typically based on the relevant service area's expenditure in previous years (and any other relevant available information). They do not therefore always take account of all the factors that might affect actual expenditure in the forthcoming financial year.

28. The service revenue and capital budgets considered by the Cabinet will often include savings. Some of the savings that are identified will arise out of decisions taken in the previous financial year, which will produce on-going savings. In certain instances, the savings, although described as such, are, in effect, an adjustment to the projected expenditure. In some cases, there will be savings that the service area expects to be able to make, but in relation to which there has not yet been a decision to take particular steps to realise the savings. In some cases, all that will have been identified are areas where there might be the potential for savings.

29. Savings identified in the budget might be dependent on further decisions being taken, by the Cabinet or full Council as appropriate, during the course of the relevant financial year (a similar approach has been adopted by other local authorities). In particular, from a local government accounting perspective it is not unusual for a local authority to set an annual budget which in part relies on the possibility that savings will be identified in certain areas. Though such an approach is generally undesirable, it is nonetheless permissible. The approach taken in relation to the AOF (described by Ms Elizabeth Mills and summarised below at paras 40 to 44) is an example of this permissible practice. Mr Kilburn says:

> "Whilst the Council hopes and expects that it will be able to make the savings identified in those budgets, the budgets for each service area, and for specific heads of expenditure within those areas, are not set in stone. They are, in effect, funding envelopes in relation to which there is flexibility if the savings identified cannot be achieved. The budgets are not an absolute cap on what will be spent by a certain service area, or on specific head of expenditure within that area.
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> ..Indeed, sometimes it transpires that certain savings cannot be made. For example, the monthly budget monitoring report for the month to 28 February 2018 recorded that £16,000,000 of the savings identified for the 2017-2018 financial year had proved to be unachievable…and I have already referred to previous overspends in relation to SEND services.
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> …It is important to note that the fact that an overspend occurs in relation to a particular service area does not result in the "tap being turned off" for that service area: the various service area budgets do not operate like a notional bank account whereby, once the allocated sums have been exhausted, no more money can be spent. On the contrary, the relevant service will continue and means of addressing the overspend (such as carrying it forward into the next financial year) will be found."

27. In relation to the full Council's decision on 6 February 2018, Mr Kilburn further says as follows:

> "…Ms Little reported to members that local government as a whole was under significant pressure, with increasing demand and significant funding pressures. She noted that councils and public services of the future need to shift towards a more place-based, outcome driven model, working together with residents to improve outcomes, managing demand more effectively, delivering infrastructure and generating new income sources to fund public services.
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> …Ms Little drew to the full Council's attention the fact that the financial situation it was considering at the time was a very serious one. She acknowledged that the Council had made significant efficiencies and cost reductions, but pointed out that

> more was required and the Council needed to further develop and implement service transformation on a bigger scale. She further explained that the challenge of managing spending pressures within budgets was as difficult as delivering service cost reductions and it was therefore essential that the Council continued to monitor both savings actions plans and the service pressures very closely throughout the 2018-2019 financial year.
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> …Ms Little concluded by drawing the Council's attention to the fact that the budget for 2018-2019 had been balanced only by the significant use of one-off funding and that this could not be repeated.
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> The Leader's report … acknowledged that the savings identified would not necessarily be achieved …explained that a risk rating had therefore been applied to each identified saving reflecting the likelihood of it being achieved… Specifically, in the SEND Budget, £19,001,000 of the £21,001,000 savings identified had been risk rated as "red" or "amber", meaning that there were severe or significant barriers to them being achieved …It acknowledged that there was a high degree of risk around all of the identified savings being achieved, and explained that in Ms Little's view the Council was likely to need to draw on its reserves or take some other alternative action …
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> …the Council hopes and expects to achieve the savings, but it would not be unprecedented for it not to do so, or for there to be an overspend on the budget for the 2018-2019 financial year generally, or on the budget for SEND services in particular. Indeed, as I have explained above, the Council has in the past overspent on its budget for SEND services. Such issues were in fact before the Cabinet at the 27 March 2018 meeting itself, when the monthly budget monitoring report was considered …"

30. Ms Mills is the Council's Assistant Director for Schools and Learning. In her evidence she explains that some of the savings identified in the SSEND Budget for the 2018-2019 financial year derive from decisions taken by the Council prior to the approval of the MTFP and the 2018-2019 budget on 27 March 2018, decisions which have not been challenged. The means by which other of the savings would be achieved was still in the process of being formulated, but Cabinet members were aware of the general areas in which there was considered to be the potential to achieve them. She also explains, like Mr Kilburn, that the 2018-2019 Budget is not set in stone: some of the savings identified will be achieved, but some will have to be varied or carried forward into subsequent years. She says in terms that until such time as plans to make any savings identified in the 2018-2019 budget have been fully formulated, consulted upon as required, and formally approved by the Cabinet with regard to all relevant considerations and statutory duties, the approval of the 2918-2019 Budget will have no impact on the delivery of the Council's services.

31. She describes the increase in demand for SEND services, the pressures this created for the Council, and the way in which this was dealt with in previous financial years. Thus

in the 2015-2016 financial year, the Council allocated £10,000,000 from the Schools Block to the High Needs Block in order to fill a shortfall between the High Needs Block funding received and the expenditure the Council was likely to incur on SEND services, given the increases in demand. For the 2017-2018 financial year there were continued pressures on the Council's SEND services, as demand continued to increase at a greater pace than the High Needs Block, and a shortfall of £10,000,000 was forecast.

32. Following concerns raised by schools, it was agreed by both the Schools Forum and the Cabinet that the shortfall would be addressed by making savings in the Council's approach to the delivery of SEND services. It was not considered sustainable repeatedly to seek further funding from the other areas of the DSG or other service areas within the Council. To work towards achieving the necessary efficiency savings, a High Needs Working Group was set up within the Schools Forum to explore possible ways of achieving savings in the Council's delivery of SEND services. This approach, and the delegation of the final approval of any savings identified to the Leader of the Council, the Cabinet Member for Schools, Skills and Achievement, and Ms Mills was approved by the Cabinet at its meeting on 22 November 2016 after it considered a report prepared by the relevant Cabinet Member. Annex 1 to the report set out a number of specific proposals for achieving the £10,000,000 shortfall. Paragraph 32 of the report considered by the Cabinet recognised that it was likely that achieving the savings would "necessitate further reductions in SEN support… and vigorous management of increasing pressures".

33. Ms Mills says that Cabinet members are very aware of the very significant pressures on the Council's delivery of SEND services. Those pressures have been regularly discussed by both the full Council and the Cabinet in recent years, as have the deficiencies in the Council's delivery of SEND service identified by Ofsted in 2016 and the challenge of achieving savings of the scale required. In particular, in the run up to setting the MTFP and the 2018-2019 budget, members of the Council, including the Cabinet, were frequently reminded of this:

    i) In a statement to the full Council on 11 July 2017, Ms Lewis (the new Cabinet Member for Education) explained that in respect of SEND services the Council was a high spending authority with poor levels of parental satisfaction. Ms Lewis explained that the Council's mainstream schools needed to be more inclusive, and its special schools more flexible.

    ii) In a statement to the full Council on 10 October 2017, Ms Lewis referred to the key weaknesses identified in the SEND local area inspection conducted by Ofsted. Ms Lewis explained that progress had been made in addressing those weaknesses This progress was confirmed by the Minister for Children and Families in his letter of 6 December 2017.

    iii) In a statement to the full Council on 5 December 2017, Ms Lewis explained that for the following year, the Council was forecasting an overspend in the High Needs Block due to unprecedented increases in demand. She said that Council officers would work with schools to ensure that High Needs funding was sustainable, whilst continuing to secure improvements in the experience of children with SEND and their families.

iv) On 20 March 2018, Ms Lewis told the full Council in a statement that the Council had seen an increase of just under 20% in the number of children with EHCPs between 2016 and 2017, and at the same time the average High Needs Block funding per pupil had been reduced. Ms Lewis explained that managing the increase in demand and corresponding budget pressures represented a significant challenge for the Council.

34. On 18 October 2017, the Cabinet met informally for a business and budget-planning workshop. The Leader of the Council regularly organises informal meetings between members of the Cabinet and Service Directors and other officers. They provide Cabinet members with an opportunity to receive presentations from officers on certain topics and then to ask follow up questions.

35. During Ms Mills' presentation on this occasion she explained to the Cabinet that the Council's estimated expenditure on SEND services for 2018-2019 was significantly higher than the High Needs Block funding it would receive, that to contain the expenditure within the available funding, further savings of around £12,000,000 to £14,000,000 would be needed in the 2018-2019 financial year and that achieving those savings would be challenging. In so doing, Ms Mills highlighted the increased demand for SEND services in Surrey, reminded members of the Cabinet of the increase in EHCPs in Surrey, the increased number of children being placed in expensive independent sector placements and the increased pressure being placed on the High Needs Block. She further highlighted steps that had already been identified as being ones that could be taken to make savings. These included managing market inflation (not increasing sums paid to contractors in line with inflation, save where legally required or in exceptional circumstances); reviewing vacancies when they arise and only recruiting where necessary; productivity efficiencies; which involves allocating funding for SEND services in respect of which there has been an underspend to those in respect of which there has been an overspend; and savings for the 2018-2019 financial year resulting from a policy that the Council adopted in relation to SEND transport services in November 2017.

36. The presentation to the Cabinet expressly posed the question whether the forecast shortfall should be managed within the DSG funding or whether it should be funded from elsewhere within the Council. This resulted in discussion of the level of pressure on the SSEND Budget, the need to ensure that appropriate provision was made for children and young people, the scale of the challenge, and the potential impact on service users. The view of the meeting was that SEND services need to be sustainable, and therefore the forecast shortfall should continue to be managed within the DSG.

37. In light of the pressures on the funding of SEND services, after consulting the relevant lead Cabinet member and the Director of Children, Schools and Families, Ms Mills decided to ask the Schools Forum to allocate £3,000,000 from the other areas of the DSG to SEND services. Changes to the rules governing the DSG meant that for the 2018-2019 financial year the Council needed the approval of the Schools Forum in order to do this, failing which the Secretary of State for Education's approval had to be sought, and the amount that could be transferred was also limited to 0.5% of the Schools Block (subject to the Secretary of State agreeing a higher percentage). As a result, a proposal to transfer £3,000,000 from other areas of the DSG to the High Needs Block was included in a consultation paper that was circulated to schools in autumn 2017.

38. The Cabinet met informally again on 23 November 2017 to discuss business planning. Again, as part of a presentation given by various officers, Ms Mills gave a presentation to the Cabinet about the planning for the SSEND Budget for the 2018-2019 financial year. Ms Mills informed the Cabinet of the Schools Forum's decision not to agree to the transfer of £3,000,000 from other areas of the DSG to the High Needs Block.

39. Ms Mills' view, discussed with colleagues in the Finance Department, the Director of Children, Schools and Families, and Ms Lewis, was that the Council should not approach the Secretary of State to seek to overturn the Schools Forum's decision. There were two reasons for this:

    i) First, there was not a particularly strong case to put to the Secretary of State. In particular, there were concerns that they could not demonstrate a sustainable plan for the long-term funding of SEND services from the High Needs Block, and that the transfer requested would therefore be seen as a means of seeking a regular top-up from the Schools Block, rather than as a temporary measure to assist the Council in transitioning to a more sustainable model for the provision of SEND services. This would have made the application a difficult one, as in accordance with paragraph 120 of the Education & Skills Funding Agency's Operational Guidance on Schools revenue funding 2018 to 2019, the Council would have had to provide evidence of such a sustainable plan as part of its application;

    ii) Secondly, the Council required the support of the Schools Forum for other funding decisions that would need to be taken in the near future, and did not want to jeopardise those decisions by potentially damaging the Council's relationship with the Schools Forum.

40. At the 23 November 2017 meeting, the Cabinet agreed that the Council should not seek to overturn the Schools Forum's decision. Ms Mills therefore presented a two-year plan for attaining a sustainable high needs service for children. This identified five broad areas in which she considered work could be done by the Council to identify ways of reducing the cost of the SEND services that it provides by making fundamental changes to the way in which these services were delivered. These included:

    i) Transition: improved planning of transition into adulthood. This would involve improving joint working with Adult Social Care services to ensure that there was a joint pathway for young persons transitioning into adulthood, with a focus on lifelong learning. If successful, such an approach should result in improved outcomes for young people with SEND transitioning into adulthood;

    ii) Inclusion: increased inclusion of children with SEND within mainstream school settings. This would involve developing a strategy for local schools to become more inclusive, allowing children with SEND to attend local schools in a supported environment. Ms Mills discussed the fact that it was generally better for children to be educated alongside their local peers, as this can enable them to form friendships locally and to avoid the need for long journeys to school. Indeed, there is a statutory presumption that children with SEND should be educated in mainstream schools. However, she also pointed out that some children do require specialist schooling, and sometimes the appropriate provision can only be made at independent special schools;

iii) Market sustainability: ensuring key provision was available, cost effective, and well managed. Ms Mills explained that this would involve ensuring that the Council achieved best value when commissioning placements in independent special schools and ensuring that the Council had sufficient provision of its own to meet children's needs.

iv) Early years: identifying support required in a timely and targeted manner. She explained that this would involve identifying children with SEND earlier so as to enable early intervention.

v) Admissions: reviewing admissions agreements. This would involve changing the dates for admissions so as to ensure that Surrey children has a full opportunity to access Council provision, rather than have places in Council provisions first taken up by children from outside the County, as had been the case in the past.

41. The Cabinet was made aware of (and discussed) the potential negative impact of making savings in the provision of SEND services in this way, but it was not possible to identify the potential impact of specific proposals, as there were no specific proposals to consider. All that had been done was the identification of broad areas in which Ms Mills considered work could be done by the Council to identify ways of reducing the cost of the SEND services that it provided. There was nothing scientific about this; and Ms Mills had not formulated any specific plans about how the Council might go about achieving savings in those areas. She was therefore not in a position to identify any specific impact that such plans might have.

42. In relation to AOF, Ms Mills says that this identified areas in which there was, in general terms, the potential for savings to be made (hence the reference to "areas of focus"). This type of approach is not unusual, and the Cabinet is very familiar with it. The precise means by which some of the savings identified in the SSEND Budget might be achieved is still being discussed, both within the Council and between the Council and relevant interested parties. In particular, insofar as the SSEND Budget for the current financial year is concerned, the Council has not yet made any formal decisions that would have an impact on the services actually being received by service users.

43. In this context, it is important to note that the sum allocated to this heading represented the remaining savings that the Council needed to make (in addition to those discussed above) in order to achieve the aim of ensuring that the SSEND budget was balanced (i.e. expenditure did not exceed relevant funding). The sum of £11,649,000 was not calculated by reference to specific savings that are anticipated to add up to that precise figure.

44. Like Mr Kilburn, Ms Mills says it is important to note that the SSEND budget is not set in stone, and it is not the case that the savings identified must be achieved at all costs. Whilst obviously undesirable, there is always the real possibility of the savings identified not being achieved. If the saving identified in the SSEND Budget are not achieved, in accordance with recent practice, the Council will carry forward the overspend into subsequent years. For example the overspend of £9,300,000 in relation to SEND services in the 2017-2018 financial year has been carried forward to the current financial year. As at June 2018, an overspend of £30,000,000 on High Needs

Block SEND services was being forecast for the 2018-2019 financial year, as recorded in paragraphs 25 to 28 of the Budget Monitoring Report to 31 May 2018.

45. It was again made clear to the Cabinet during the meeting on 27 March 2018 that not all of the savings anticipated in the SSEND Budget had been identified. For the purposes of her evidence, Ms Mills reviewed a webcast of the meeting. During the meeting, Ms Lewis explained to the Cabinet that there was a particular challenge in relation to the High Needs Block and reminded them that she had spoken about this on numerous occasions during the previous six months. Ms Lewis specifically explained to the Cabinet that £11,649,000 of savings (i.e. those allocated to AOF "Inclusion, Commissioning, Provision, Transition") were required to fund the gap between anticipated expenditure and funding and that those savings had not yet been identified. She reminded the Cabinet that this sum had been rated "red", meaning that there were severe barriers to it being achieved.

46. Ms Lewis referred to the fact that she had attended the Schools Forum (i.e. the meeting on 15 January 2018) and went on to explain to the Cabinet that a working group was considering options for delivering services in different way, with the result that services would remain in place but would be delivered differently. She stressed that the work was ongoing and that no final decisions had been made, and that there were a range of different options.

47. Ms Lewis then highlighted the AOF. She explained that the Council was working with mainstream schools on ways they could be more inclusive of pupils with SEND. She referred to the concept of transition and preparing children for an independent and fulfilling adulthood. She spoke about the Council's need to improve its commissioning to deliver better value for money, to manage the market more effectively, and to explain the need for the Council's own specialist provision to have sufficient places and flexibility to meet a wide range of needs, as previously too narrow a type of need had been targeted. Ms Lewis acknowledged that people were of course anxious about savings being made in relation to the provision of services of this type. She told the Cabinet that work to identify the savings was being done recognising the Council's duty under section 11 of the 2004 Act to have regard to the need to safeguard and promote the welfare of children, and reiterated that that was the spirit of the way in which the savings were being worked upon.

48. Ms Lewis also emphasised that if any changes were going to be made to the way in which services were delivered as a result of the work being done to identify savings, that would be the subject of consultation and detailed equality impact assessments. In that regard Ms Lewis reminded the Cabinet that £7,000,000 of a targeted £10,000,000 savings had been made in the 2017-2018 financial year and that some of the projects for making savings had already started. She said that some equality impact assessments and consultations had taken place in relation to certain proposals which had already been approved, but that more would be required as other proposals were taken forward, and she expressly referred to pages 194 and 195 of the EIA that accompanied the Leader's report.

49. As regards the evidence of the mothers, Ms Mills records that the Council does not accept proper provision has not been made for the claimants' special educational needs, or that the Council has attempted not to do so or has been dilatory in this regard, whether as a result of funding cuts or otherwise. Each of the claimants has a statutory ECHP,

and the Council is under a statutory duty to provide the special educational provision set out in those plans, and currently does so at a total cost of over £200,000 per annum. Unless and until any change is made in those EHCPs, the Council remains under an obligation to ensure the claimants receive their dedicated special education provision for, and that the duty is not affected by the Council's MTFP.

50. Ms Mills has now updated the position for the purposes of the hearing:

> "The Council's progress in making savings…
>
> 7. Throughout the 2018-2019 financial year work on the four areas of focus… has been ongoing. The Council's intention is to implement a programme of transformational change in the provision of SEND services in Surrey that will result in an improved service that is provided at lower cost. The programme will involve a focus on early intervention which, as Ms Ferris recognises in her second witness statement, has the potential to produce long-term cost savings whilst providing an improved service to children and their families.
>
> 8. The Council therefore remains hopeful that in due course it will be able to make significant savings to its expenditure on SEND services by implementing a programme of transformational changes. However, almost half of the financial years has now passed and, at this point in time, the Council has concluded that it will not be possible for it to implement such a programme of change during the current financial year. It has not been possible to identify sufficiently specific proposals early enough for them to be subject to an appropriate decision making process and then adopted during the current financial year.
>
> 9. As a result, for the 2018-2019 financial year the Council has continued, and will continue, to provide SEND services in the same way as it has done previously. No changes to services will be made during the present financial year as a result of any programme of transformational change, whether based upon the "Areas of Focus" in the SSEND Budget for the 2018-2019 financial year, or otherwise.
>
> 10. I explained …that the SSEND Budget is not set in stone, that there is always a real possibility of identified savings not being achieved, and that the Council's recent practice in such circumstances has been to carry forward the overspend into the following year's budget…as of June 2018 an overspend of £30,000,000 on High Needs Block SEND services was forecast for the 2018-2019 financial year. Despite efforts to manage increasing demands on services and increasing costs, as at 31 July 2018 the estimated overspend for the 2018-2019 financial year was around £15,000,000. A significant part of that estimated overspend is attributable to the fact that the Council has not yet implemented a programme of change based on the

"Areas of Focus" identified in the SSEND Budget for the 2018-2019 financial year during the present financial year. The Council has therefore accepted that when a budget is set for the 2019-2020 financial year, an overspend of £15,000,000 in the SSEND Budget will have to be carried forward unless additional sources of funding for the 2019-2020 financial year are agreed following the Schools Funding Consultation referred to in paragraph 13 below.

11. In the meantime, work remains ongoing to introduce a programme of transformational change for the provision of SEND services in Surrey. However, the introduction of that programme, and any savings that it produces, will not fall to be considered when the Council produces a budget and MTFP for the 2019-2020 and subsequent financial years.

12. I explained …that if and when plans to achieve savings under the "Areas of Focus Heading" were identified, a full decision-making process would be followed in relation to them, including consultation where appropriate, consideration of any relevant considerations, and the completion of any necessary equalities impact assessments. As the Council's plans to implement a programme of transformational change develops, that process is now underway, but, as I explained above, the focus is now on the 2019-2020 financial year.

13. The Council's current transformation plan and the accompanying funding proposals are described in the "SEND Transformation Programme" and "Schools Funding" sections of a School's Funding Consultation paper... That paper was sent to Surrey Head teachers and governors on 5 September 2018. Consultees have been asked to provide their feedback on the plans by 25 September 2018.

14. The consultation paper explains that it forms an early part of a wider consultation process, which will include consultation with children and young people and their families, and which will inform the Cabinet's decision making in relation to the next MTFP. That process will involve a wide-ranging consultation with a range of different stakeholders, including children with SEND and their parents, focusing not only on financial priorities, but on the future provision of SEND services in Surrey as a whole. The Council's current intention is to begin a wider consultation and engagement on the proposals for a programme of transformational change towards the end of September/early October.

15. Part of the process will also include consultation on the draft MTFP for the 2019-2022 financial years (both in relation to the SSEND Budget and other areas of the Council's expenditure). That consultation is likely to take place towards the end of

> November/early December and will form part of the Council's "Vision for Surrey in 2030" programme…"

The case for the claimants

51. Ms Richards QC submits as follows. On the facts, the Council itself acknowledged in autumn 2017 that considerable work was needed to improve SEND services. Further there was evidence of a significant rise in the number of children with complex SEN in the Council's area. The Council itself described what was submitted to the Cabinet for approval on 27 March 2018 as "final detailed budgets and savings within budget", and its stated intention, as the minutes of that meeting record, was "to ensure these [savings] were delivered in full". There must inevitably be some reduction in, or changes to services, if budget cuts of anything close to the magnitude determined by the Council are to be given effect. And yet the decision to make a substantial reduction in SEND funding was made with little or no information as to or consideration of how savings might be made, what the impact might be or how disabled children and others with protected characteristics might be affected.

52. The claimants accept that local authorities such as this one are under real financial pressure and may have difficult decisions to make, but that does not "excuse compliance with PSEDs": per Blake J in *R (Rahman) v Birmingham CC* [2011] EWHC 944 (Admin). Further, it was open to the Council with the permission of the Secretary of State, to transfer additional funding to cover the shortfall between the funding allocated to it by central government for SEN provision through the High Needs Block (from its general schools fund to the High Needs Block); or to allocate further general funding from its general funds to make up some or all of the High Needs Block shortfall. Yet it elected not to do so. Further, the shortfall does not negate the need to comply with the relevant legal duties, but reinforces how important it is to comply with them to ensure that the difficult decisions that are made, are taken fairly and on an informed basis. Though it is said that the budget was not "immutable", the decision under challenge established a strong presumption that very significant savings would be made through cuts to SEN provision; and the Council made a decision which it intended would be implemented.

53. The claimants submit there were three sources of the obligation to consult in this case: the duty of inquiry inherent in the PSED under section 149 of the 2010 Act, the duty arising from section 27 of the 2014 Act, and the common law duty to act fairly. In this connection their case is principally founded on the decision of HHJ Cotter QC, sitting as a Deputy High Court judge in *R (KE) v Bristol CC* [2018] EWHC 2103. Ms Richards QC submits the failings by the defendant in that case are materially indistinguishable from those in this case, and that the reasoning in *KE* strongly supports the claimants' case, to the extent that if *KE* is followed, as it should be, this claim must succeed.

54. In relation to the substantive challenges concerning the PSED and section 11 of the 2004 Act, Ms Richards QC accepts the references made to those duties in the report before Cabinet were a correct statement of the legal position. But she submits, neither duty was, as a matter of fact, complied with. The complaints in this regard all centre on the same issues.

55. The Cabinet did not have the information it needed to consider the equality implications of the savings, or the impact of the budget on children, and there is no evidence that

these matters were actually considered. Further, the fact that specific sums were allocated demonstrates that unless the sums were arbitrary, officers must have had some idea as to how savings could be made, even if this fell short of concrete proposals. More information could and should therefore have been provided. The Council was also under a duty pursuant to section 27(2) of the 2014 Act to consider the extent to which the relevant provision is "sufficient to meet the educational needs, training needs and social care needs" of children and young people with SEN and disabled children and young people: see *KE* at para 113 and the observations of Laing J in *R (DAT and BNM) v West Berkshire Council* [2016] EWHC 1876 at para 30. But there is nothing to suggest it engaged with this duty.

56. In relation to the relevant considerations challenge, Ms Richards QC submits there were three considerations that were so obviously material, it was unreasonable not to take them into account: (i) the potential impact of a significant reduction in funding on children with SEN and their families. If the Council could not consider the impact because it did not know what the particular decisions would be, then it was perverse to take the decision at all; (ii) the implications of the significant increase in demand for high-level SEN support in the area; and (iii) the deficiencies in the existing SEN provision.

57. As for the *Tameside* duty of inquiry, the claimants accept that the threshold for the Court to interfere is irrationality, but submit this high threshold is surmounted on the facts. It was, they submit, irrational to reduce SEN funding so substantially without having any idea how the cuts would be made and the implications of making them. In this context, it is submitted that it is important to understand that the budget, though not set in stone, was more than aspirational, and plays an important part in decision-making.

The case for the Council

58. Having regard to the substance of the evidence before the court, Mr Moffett QC submits as follows.

59. The simple fact is that at the time it took the decision under challenge, the Council did not and could know what the impacts of it would be because the changes in the provision of SEND services that might result had not been worked out. Logically, it cannot be said that the Council unlawfully failed to take something into account if it was unascertainable; and it is notable that the claimants have not pointed to any specific impact that was ascertainable or that flowed from the savings. Similarly, it cannot be said that the Council acted unlawfully by failing to consult, because no such duty had arisen on the facts. The fact that the savings line goes into the budget does not mean, either in theory or in practice, that this saving might or will happen.

60. Thus, the case for the claimants has to come down to an argument that the Council was not entitled to include AOF unless it had the detail of the changes required to make the savings, and could assess the impact of making those changes. However it was permissible for the Council to include the AOF in the SSEND budget, in the way that it did, on professional advice from its section 151 Officer, and the decision cannot be characterised as irrational. The fact that the Council could have made different budgetary arrangements is nothing to the point, as its choice in this regard is quintessentially a political decision, the merits of which cannot be questioned before the Court: see e.g. *R (L) v Warwickshire County Council* [2015] LGR 81 at paras 11-

12. Further, the financial prudence of the Council is not a matter on which the court can adjudicate: see *Gibb v Maidstone and Tunbridge Wells NHS Trust* [2010] IRLR 786, at para 16.

61. The evidence does not bear out the claimants' argument that matters identified as relevant were not taken into account. Insofar as it is said that more detail was required, the case fails for the reasons given above. The Council cannot have acted unlawfully by not taking into account something it could not have identified.

62. In relation to the claimants' case on consultation, Mr Moffett QC submits the duty of inquiry framed by reference to the PSED is simply an application of the conventional *Tameside* duty on a public body to take reasonable steps to acquaint itself with the information necessary to enable it properly to perform the relevant function. And the claimants' case critically depends on the flawed proposition that it could not lawfully take the decision under challenge without worked out proposals and consultation on the impacts of them. Further, on established authority this is not a case where it can be argued that there is a common law duty to consult, and insofar as the claimants rely upon the decision of *KE* in this context, the case is distinguishable on the facts, and the analysis of the law on consultation is *per incuriam* and wrong. Yet further, there is no evidence that the absence of consultation gave rise to any prejudice.

63. As for the substantive challenge made by reference to the PSED, in order to succeed the claimants would have to show it was irrational for the Council to conclude that it had sufficient information to discharge its PSED duty and not to make good any insufficiency of information by way of a consultation exercise. However this argument collapses back into the claimants' flawed argument on rationality. As for section 11 of the 2004 Act, the report to Council on 27 March 2018 drew attention to that duty; and in circumstances where it was not possible to identify the likely impact of the AOF, and the Council was aware that the impact could be positive and negative, regard, appropriate to the circumstances, was had to that duty.

64. Finally, the case made by reference to section 27 of the 2014 Act is misconceived. This provision is concerned with a consideration at a strategic level of the global provision for SEN that is made by a local authority, or which is accessed by children for whom it is responsible. It would be absurd to suggest that the review and consideration required by section 27(1) and (2) must be carried out every time a local authority makes any alteration to the SEND services it provides, still less, that it is required to do so whenever it makes a budget decision in relation to such services.

Discussion

65. Notwithstanding the somewhat complex factual background, in our view the reasons for rejecting this challenge are relatively straightforward.

66. As the evidence adduced on behalf of the Council shows, the decision under challenge was, as the Cabinet was aware, a decision, to include for budgetary planning purposes, AOF which, to use Ms Mills' words, were broad areas in which work could be done by the Council to identify ways of reducing the cost of the SEND services that it provided. As the Cabinet were also aware, as and when concrete proposals were developed to achieve the identified savings, if they would result in any variation to the services actually provided, the proposals would be consulted upon and assessed at that time.

This budgetary approach was not unique to the SEND provision: the same approach was taken for example in relation to Highways and Transport and Waste Management, where, in the full MTFP, the savings were described as yet to be identified. Importantly, the inclusion of such areas in the budget was lawful as a matter of local government finance and accounting practice.

67. It is to be noted that on the face of the evidence before the Cabinet the aim was to focus on areas where it would be possible to identify different and more "joined-up" ways of delivering services, rather than simply to reduce or withdraw services, but the particular steps that would be taken to achieve this had not yet been identified at the time the SSEND budget was approved. It is further to be noted that, as Mr Moffett QC correctly identifies, the claimants have not engaged with this evidence. Nor have they pointed to any specific impact that was ascertainable, or would flow from the AOF. This is not surprising given that the AOF referred to areas where there were, in general terms the potential for savings, and where it might be possible to make fundamental changes to the way those services were delivered, but which could improve the outcomes for children with SEND.

68. In our view it cannot be said that no reasonable decision-maker could reach the decision to include the AOF in the budget; indeed there was nothing wrong as a matter of principle with this budgetary approach, which was a sensible and lawful way for the Council to plan and manage its finances. This conclusion unravels the remainder of the claimants' case, which is, in truth, dependent on the proposition that the Cabinet could not lawfully make the decision under challenge absent worked-out proposals of how the savings might be made, or what the impact of such proposals might be.

69. A number of important points can be crystallised from the evidence.

70. *First*, the Council was not under a statutory obligation to produce such a budget. *Secondly*, the savings identified in the budget were not specific or concrete proposals to make actual cuts or alter services. They represented a projection or prediction of expected income and expected expenditure at that specific point in time, to help the Council manage its finances, with a high (RAG) risk that the savings identified would not be achieved. *Thirdly*, nothing in the budget compelled any particular decision or bound the Cabinet (it is true that the word "deliver" was used at the 27 March 2018 meeting, but it is plain from the context, that this did not imply an imperative command to "deliver" savings, as Ms Richards QC submits but was used as a synonym for "achieve"). *Fourthly*, the budget did not represent a finite pot of money with a cap on spending, but a 'spending envelope' with flexibility to overspend, as had occurred in the previous financial year, and which, in the event, occurred in this one. The Council is right therefore to say (as it did repeatedly) that the budget was not 'set in stone'. All this, the Cabinet knew.

71. *Fifthly*, the evidence does not support the proposition that the Cabinet failed to consider the specific factors identified by the claimants in their relevant considerations challenge.

72. We start by looking at the practical realities. Plainly, the meeting of the 27 March 2018 would have been unmanageable if every part of the background to every part of the budget, covering many areas other than the SEND provision, had to be specifically addressed at the meeting itself. Further, the Cabinet, as the executive body of the

Council, clearly had a high degree of 'institutional knowledge' of matters such as the high pressure on SEND services. The process of arriving at the decision under challenge was a lengthy iterative one, during which the specific matters fastened on by the claimants in this context were considered. In these circumstances, in our view, it would be artificial and wrong to detach the decision under challenge from its context, and the process that led up to it.

73. As it is, the Cabinet's attention was repeatedly drawn to the unprecedented increase in demand for SEND services (in the run up to the setting of the MTFP at Cabinet and full Council meetings, during informal Cabinet sessions when budget planning for the 2018-9 year was discussed and in material prepared for the meetings of 30 January 2018, 6 February 2018 and 27 March 2018) and this was specifically recognised in the MTFP itself. Further, the pressures on the Council's SEND provision plainly formed an essential backdrop to the discussions that were taking place in the run-up to the meeting of 27 March 2018. The evidence shows members of the Cabinet were well aware of the 2016 Ofsted report, and of the deficiencies it identified. Poor levels of parental satisfaction and the need to find solutions to long-standing problems were also specific topics of discussion. Insofar as the claimants argue that the Cabinet needed more information about how the savings identified in the AOF would be achieved, this challenge must fail for the reasons identified in respect of the rationality challenge.

74. *Sixthly*, as already recorded, Ms Richards QC submits that the identification of the sum of £11.684 million in the MTFP means either that the plans (for savings) were sufficiently developed and 'costed' to consult upon, or if not, that the figure was (irrationally) plucked out of thin air. In fact, the evidence shows this was not the position. The Council's purpose was to put the SEND service on a sustainable footing: and that the sum identified in the budget was the difference between the funding available and the costs of provision. The identification of this gap did not mean however either that the Cabinet was *functus* or that its discretion was fettered as to whether or how that gap was to be filled.

75. Having regard to this evidence, and our conclusions on rationality/relevant considerations, and subject to a discrete issue relating to section 27 of the 2014 Act, we can deal with the remainder of the case made relatively shortly.

76. First, the common law consultation challenge. The case advanced under this head was, as Ms Richards QC described it, advanced for the sake of completeness.

77. The claimants do not appear to advance a case under this head on orthodox grounds. That is, that such a duty arises where there has been a promise to consult, an established practice of consultation or where a failure to consult will lead to conspicuous unfairness, amounting to an abuse of power: see *R (BAPIO Action Ltd) v SSHD* [2007] EWCA Civ 1139, at paras 41 to 47, per Sedley LJ; *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] 3 All ER 261, at para 98 and *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 at paras 47-50 and 58-9 per Laws LJ. We would add that if it is suggested this is a case of conspicuous unfairness, there is nothing on the facts to support such a case, nor any explanation of how it is supported by the evidence. Further, the claimants have not advanced any convincing case on substantial prejudice: see *R (Plant) v Lambeth London Borough Council* [2017] PTSR 453, albeit Ms Richards QC says there is no need for the claimants to do so.

78. Instead, the claimants' case principally rests instead on their submission that this case is indistinguishable on the facts from those in *KE,* where in analogous circumstances, a common law duty to consult on grounds of fairness was found. However we do not think the case assists the claimants for two reasons. First, we do not agree that the facts of *KE* are analogous to this one. *KE,* unlike this case, was concerned with a concrete budgetary decision by the full council to reduce provision and "to cut the extent of services to a defined group", so that it was "axiomatic" that some elements of the service "would reduce or even cease". Further, it was not open to subsequent decision-makers to re-open the relevant budget line and the budget set by the defendant council in that case was indeed 'set in stone': see paras 7, 17, 31, 61, 72, 90- 91, 101, 113 and 128. Secondly, even if we are wrong about that, with respect to the judge in *KE,* as Mr Moffett QC submits, it is not entirely clear what test he applied in arriving at the conclusion that a common law duty to consult arose or that he applied a correct approach as a matter of law (see for example, para 125, where the judge referred to a "simple, broadbrush and impressionistic test"). In particular, we do not accept that such a duty arises simply because the likely effect of a decision is that some services to a vulnerable group may be withdrawn or reduced. Insofar as the decision is to be read, in this or in other respects, as departing from well-settled legal principles, including those to which we have referred, we would therefore decline to follow it.

79. Second, the PSED. Section 149(1) of the 2010 Act provides that 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.

80. We start by observing that what constitutes 'due regard', will depend on the circumstances, particularly, the stage that the decision-making process has reached, and that the nature of the duty to have 'due regard' is shaped by the function being exercised, and not the other way round. If it was lawful for the Council to include the AOF in its budget, it followed that there could be sufficient compliance with the PSED notwithstanding the absence of worked out proposals (and their impact).

81. The EIA for example, described the impact for SEND savings of £10.7 million, for the "Alternative Dedicated Schools Grant" as "To be determined". The accompanying rationale was that "The proposals to achieve these savings are as yet to be determined, and they will be developed in consultation with schools in order to mitigate potential negative impacts. Where an EIA is required, this will be completed following consultation with schools and published on the council's website." In our judgment, having regard to the stage that the decision-making had reached, there was indeed sufficient compliance with the PSED on the facts.

82. In relation to the substantive challenge, as is clear from Ms Richards QC's submissions, the complaint is that the Council should have developed concrete proposals in relation to the AOF and then assessed the equality impacts of them before including savings attributable to the AOF in the SSEND budget. However, that is not, in substance, a complaint about a failure to comply with the PSED, but about the rationality of making the decision under challenge, which founders for the reasons identified above. See *R (Fawcett Society) v Chancellor of the Exchequer* [2010] EWHC 3522 (Admin) at paras

11, 14 and 15. See also *R (JG) v Lancashire County Council [*2011] EWHC 2295 (Admin) and *R (A) v Oxfordshire County Council* [2016] EWHC 2419 (Admin) where Kenneth Parker J said of a challenge made in analogous circumstances:

> 50. What in fact 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 with 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 DDA…
>
> 52…in my view it was sensible, and lawful for the Defendant first to formulate its budget proposals and then, at the time of developing the policies that are under challenge, to consider the specific impact of proposed policies that might be implemented within the budgetary framework."

83. Third, the duty of consultation said to be inherent in the PSED duty. In our view this is indeed no more than the conventional *Tameside* duty of inquiry. The Council's obligation to comply with its statutory duties is not in question. However, what is required by way of compliance must depend on the nature of the decision in question. The starting point must be that it will only be unlawful for a public body not to make a particular inquiry if it was irrational for it not to do so; and further, that it is for the public body, not the court to decide on the manner and intensity of any inquiry: see *R (Khatun) v Newham LBC* [2005] QB 37 at paras 33 to 35 per Laws LJ. See further, *R (Hurley) v Secretary of State for Business, Innovation and Skills* [2012] HRLR 13 at para 89.

84. In those circumstances, the answer to the point made here is that it was not irrational for the Council to conclude it had sufficient information to discharge its duties under section 149 of the 2010 Act, or, more particularly, that no consultation was needed to make good any insufficiency of information. It makes no sense in this context, as in others, to criticise the Council for failing to seek further information about the impacts of savings in relation to the AOF where the way in which those savings would be achieved had not been worked out. We agree therefore that as the Council submits, this argument ultimately collapses back into the argument on rationality.

85. Fourth, the claimants' section 11 challenge. The duty imposed by section 11(2) of the 2004 Act is to ensure that decisions affecting children have regard to the need to safeguard and protect them and promote their welfare. The reach and impact of the duty is qualified by the nature of the function being carried out and what the particular circumstances require: see *Davies v Hertfordshire County Council* [2018] 2P&CR 37 at para 17. The claimants' challenge, in substance, mirrors that made in relation to the PSED, and fails for the same reasons. The report to the Cabinet drew attention to the duty, as did the Leader of the Council and the Lead Member for education during the meeting itself. The Cabinet was told that it was not possible to identify the impacts of the AOF and it was aware that the impacts could be positive and negative. In our judgment, in the circumstances, this was appropriate and all that was required.

86. In the course of her submissions Ms Richards QC said there was no evidence before the Court that Cabinet members took various matters into account (such the Leader's Report which referred to the Council's duties under the PSED and section 11 of the 2004 Act). However, as Sales LJ made clear in *The Queen on the application of Jewish Rights Watch Ltd v Leicester City Council* [2018] EWCA Civ. 1551 at para 34, when dealing with compliance with such legal duties by a multi-member body, such as a committee of a local authority, there is no requirement that each councillor files a witness statement. Instead, inferences can be drawn in the usual way from the materials placed before the body, the terms of any resolution and report adopted by it and the minutes of the debate. Further, elected councillors can be expected to have a good understanding of issues affecting their area.

87. Finally we must address the case made by reference to section 27 of the 2014 Act. This case, initially raised in pre-action correspondence, was added by late amendment, following the decision in *KE.* It has two aspects, substantive and procedural: first, that there was no reference, by the Council, to the statutory duty imposed by section 27 at any material point when the decision under challenge was made; and secondly, it was one of the sources of the duty to consult in relation to that decision. In our view, this part of the claimants' claim is fundamentally misconceived.

88. The duty on a local authority to keep special educational provision under review was first introduced by section 2(4) of the Education Act 1981 which introduced the special educational needs regime. That section provided that "It shall be the duty of every local authority to keep under review the arrangements made by them for special educational provision." This provision was re-enacted in section 159 of the Education Act 1993, which introduced a duty to consult, in these terms:

> "A local authority shall keep under review the arrangements made by them for special educational provision and, in doing so, shall, to the extent necessary, consult the funding authority and the governing bodies of county, voluntary, maintained special and grant-maintained schools in their area."

89. This legislation was later consolidated in section 315 of the Education Act 1996, which provided as follows.

> "(1) A local education authority shall keep under review the arrangements made by them for special educational provision;
>
> (2) In doing so, the authority shall, to the extent that it appears necessary, or desirable for the purpose of co-ordinating provision for children with special educational needs, consult the funding authority and the governing bodies of county, voluntary, maintained special and grant-maintained schools in their area."

90. This latter provision, now repealed, has been replaced by section 27 of the 2014 Act, which provides as follows:

> **27 Duty to keep education and care provision under review**
>
> (1) A local authority in England must keep under review—

(a) the educational provision, training provision and social care provision made in its area for children and young people who have special educational needs or a disability, and

(b) the educational provision, training provision and social care provision made outside its area for—

(i) children and young people for whom it is responsible who have special educational needs, and

(ii) children and young people in its area who have a disability.

(2) The authority must consider the extent to which the provision referred to in subsection (1)(a) and (b) is sufficient to meet the educational needs, training needs and social care needs of the children and young people concerned.

(3) In exercising its functions under this section, the authority must consult—

(a) children and young people in its area with special educational needs, and the parents of children in its area with special educational needs;

(b) children and young people in its area who have a disability, and the parents of children in its area who have a disability;

(c) the governing bodies of maintained schools and maintained nursery schools in its area;

(d) the proprietors of Academies in its area;

(e) the governing bodies, proprietors or principals of post-16 institutions in its area;

(f) the governing bodies of non-maintained special schools in its area;

(g) the advisory boards of children's centres in its area;

(h) the providers of relevant early years education in its area;

(i) the governing bodies, proprietors or principals of other schools and post-16 institutions in England and Wales that the authority thinks are or are likely to be attended by—

(i) children or young people for whom it is responsible, or

(ii) children or young people in its area who have a disability;

(j) a youth offending team that the authority thinks has functions in relation to—

(i) children or young people for whom it is responsible, or

(ii) children or young people in its area who have a disability;

(k) such other persons as the authority thinks appropriate.

(4) Section 116B of the Local Government and Public Involvement in Health Act 2007 (duty to have regard to assessment of relevant needs and joint health and wellbeing strategy) applies in relation to functions exercisable under this section.

(5) "Children's centre" has the meaning given by section 5A(4) of the Childcare Act 2006.

91. Further, section 30 of the 2014 Act provides that:

30 SEN and disability local offer

(1) A local authority in England must publish information about—

(a) the provision within subsection (2) it expects to be available in its area at the time of publication for children and young people who have special educational needs or a disability, and

(b) the provision within subsection (2) it expects to be available outside its area at that time for—

(i) children and young people for whom it is responsible, and

(ii) children and young people in its area who have a disability.

(2) The provision for children and young people referred to in subsection (1) is—

(a) education, health and care provision;

(b) other educational provision;

(c) other training provision;

(d) arrangements for travel to and from schools and post-16 institutions and places at which relevant early years education is provided;

(e) provision to assist in preparing children and young people for adulthood and independent living.

(3) For the purposes of subsection (2)(e), provision to assist in preparation for adulthood and independent living includes provision relating to—

(a) finding employment;

(b) obtaining accommodation;

(c) participation in society.

(4) Information required to be published by an authority under this section is to be known as its "SEN and disability local offer".

(5) A local authority must keep its SEN and disability local offer under review and may from time to time revise it.

(6) A local authority must from time to time publish—

(a) comments about its SEN and disability local offer it has received from or on behalf of—

(i) children and young people with special educational needs, and the parents of children with special educational needs, and

(ii) children and young people who have a disability, and the parents of children who have a disability, and

(b) the authority's response to those comments (including details of any action the authority intends to take).

(7) Comments published under subsection (6)(a) must be published in a form that does not enable the person making them to be identified.

(8) Regulations may make provision about—

(a) the information to be included in an authority's SEN and disability local offer;

(b) how an authority's SEN and disability local offer is to be published;

(c) who is to be consulted by an authority in preparing and reviewing its SEN and disability local offer;

(d) how an authority is to involve—

(i) children and young people with special educational needs, and the parents of children with special educational needs, and

(ii) children and young people who have a disability, and the parents of children who have a disability,

in the preparation and review of its SEN and disability local offer;

(e)the publication of comments on the SEN and disability local offer, and the local authority's response, under subsection (6) (including circumstances in which comments are not required to be published).

(9)The regulations may in particular require an authority's SEN and disability local offer] to include—

(a) information about how to obtain an EHC needs assessment;

(b) information about other sources of information, advice and support for—

(i) children and young people with special educational needs and those who care for them, and

(ii) children and young people who have a disability and those who care for them;

(c) information about gaining access to provision additional to, or different from, the provision mentioned in subsection (2);

(d) information about how to make a complaint about provision mentioned in subsection (2).

92. Section 27 is contained in Part 3 of the 2014 Act. The Explanatory Notes to the 2014 Act at paras 15 and 16 explain the new provisions in Part 3 of the 2014 Act in these terms:

15. Part 3 of the Act contains provisions following the Green Paper *Support and Aspiration: A new approach to special educational needs and disability* published by the Department for Education on 18 March 2011 and the follow up *Progress and Next Steps* published 15 May 2012.

16. The provisions are a major reform of the present statutory framework for identifying children and young people with special educational needs (SEN), assessing their needs and making provision for them. They require local authorities to keep local provision for children and young people with SEN and disabilities under review, to co-operate with their partners to plan and commission provision for those children and young people and publish clear information on services they expect to be available. The provisions set out the statutory framework for identifying, and assessing the needs of, children and young people with SEN who require support beyond that which is normally available. Statements made under section 324 of the Education Act 1996 and Learning Difficulty Assessments made under section 139A of the Learning and Skills

Act 2000 are replaced by new 0-25 Education, Health and Care plans (EHC plans) for both children and young people. The provisions place a new requirement on health commissioners to deliver the health care services specified in plans.

93. Specifically, in relation to section 27, the Explanatory Notes state that:

'Duty to keep education and care provision under review

186. This section requires local authorities in England to keep under review the educational and training provision and social care provision made in their area for children and young people with special educational needs or disabilities and the provision made outside their area for children and young people with special educational needs for whom they are responsible and for those with disabilities.

187. Local authorities must consider the extent of provision and whether it is sufficient to meet children and young people's educational needs, training needs and social care needs. This complements the local authority's duties under section 14 and section 15ZA of the Education Act 1996 to secure sufficient schools and suitable education and training for young people.

188. When keeping their provision under review local authorities are required to consult with children and young people with special educational needs and disabilities, parents of children with special educational needs and disabilities, the bodies named in subsection (3) of the section and any other such people as the local authority thinks appropriate.

189. In carrying out their duties under this section local authorities must have regard to the relevant Joint Strategic Needs Assessment and Health and Well-being Strategy.

190. This section replaces section 315 of the Education Act 1996 in England and will operate alongside section 26 on joint commissioning to provide the local authority with relevant information with which to prepare the local offer."

94. The "Special educational needs and disability code of practice: 0 to 25 years, Statutory guidance for organisations which work with and support children and young people who have special educational needs or disabilities" issued by the Department of Education in January 2015 (the Code of Practice) says at para 3.16, under the heading "Establishing effective partnerships across education, health and care" that:

"The local authority must review its educational, training and social care provision, consulting a range of partners, including children and young people with SEN or disabilities and their parents and carers. This consultation will inform the development and review of the Local Offer (Section 27 of the Children and Families Act 2014)."

And para 3.19 states that:

"Local authorities must review their provision, taking into consideration the experiences of children, young people and families (including through representative groups such as Parent Carer Forums), voluntary and community sector providers and local Healthwatch. Information from such reviews will contribute to future arrangements and the effectiveness of local joint working."

95. Chapter 4 of the Code of Practice covers the Local Offer. As it explains, the chapter sets out the statutory duties on local authorities to develop and publish a Local Offer setting out the support they expect to be available for local children and young people with SEN or disabilities. It covers, amongst other things, preparing and reviewing the Local Offer, including involving children, young people and parents and those providing services; publishing the Local Offer; publishing comments on the Local Offer and the action to be taken in response; what must be included in the Local Offer and information, advice and support. The relevant legislative provisions are sections 27, 28, 32, 41, 49 and 51-7 of the 2014 Act, and the Special Educational Needs and Disability Regulations 2014 (Part 4).

96. At para 4.1 and following the Code of Practice explains what the Local Offer is and how it works. It says:

> What is the Local Offer?
>
> 4.1 Local authorities must publish a Local Offer, setting out in one place information about provision they expect to be available across education, health and social care for children and young people in their area who have SEN or are disabled, including those who do not have Education, Health and Care (EHC) plans. In setting out what they 'expect to be available', local authorities should include provision which they believe will actually be available.
>
> 4.2 The Local Offer has two key purposes:
>
> • To provide clear, comprehensive, accessible and up-to-date information about the available provision and how to access it, and
>
> • To make provision more responsive to local needs and aspirations by directly involving disabled children and those with SEN and their parents, and disabled young people and those with SEN, and service providers in its development and review
>
> 4.3 The Local Offer should not simply be a directory of existing services. Its success depends as much upon full engagement with children, young people and their parents as on the information it contains. The process of developing the Local Offer will help local authorities and their health partners to improve provision.
>
> 4.4 The Local Offer must include provision in the local authority's area. It must also include provision outside the local area that the local authority expects is likely to be used by children and young people with SEN for whom they are responsible and disabled children and young people. This could, for example, be provision in a further education college in a neighbouring area or support services for children and young people with particular types of SEN that are provided jointly by local authorities. It should include relevant regional and national specialist provision, such as provision for children and young people with low-incidence and more complex SEN.

97. Further, paras 4.18 to 20 of the Code of Practice, under the heading: "Keeping the Local Offer under review state that:

"4.18 The requirement on local authorities to publish comments on their Local Offer and their response to those comments is relevant to their duty to keep under review the educational and training provision and social care provision for children and young people with SEN or disabilities and their role in contributing, with their partner CCGs, to Joint Strategic Needs Assessments and the development of local Health and Wellbeing Strategies (see chapter 3).

4.19 Local authorities must keep their educational and training provision and social care provision under review and this includes the sufficiency of that provision. When considering any reorganisation of SEN provision decision makers must make clear how they are satisfied that the proposed alternative arrangements are likely to lead to improvements in the standard, quality and/or range of educational provision for children with SEN (School organisation (maintained schools), Annex B: Guidance for Decision-makers, DfE 2014 – see the References section under Chapter 4 for a link).

4.20 Local authorities should link reviews of education, health and social care provision to the development and review of their Local Offer and the action they intend to take in response to comments. This will help to identify gaps in provision and ensure that the Local Offer is responsive to the needs of local children and young people and their families. At a strategic level local authorities should share what they have learned from the comments they receive with local Health and Wellbeing Boards where appropriate, to help inform the development of Health and Wellbeing Strategies and the future provision of services for children and young people with or without EHC plans."

98. As Mr Moffett QC submits, and we agree, section 27 of the 2014 Act is concerned with consideration at a strategic level of the global provision for SEN made by a local authority, or which is accessed by children for whom it is responsible. It both complements the general duties imposed on local authorities by Chapter III of Part I of the Education Act 1996 and "feeds in" as he puts it, to the local offer that must be published pursuant to section 30 of the 2014 Act.

99. As Mr Moffett QC also submits, an examination of the structure of section 27 makes this clear. First, it imposes a duty on a local authority to review the provision that is made in its area for children with SEND and the provision that is made outside its area for children with SEND who are from its area. Secondly, when reviewing the relevant provision, the local authority must consider whether it is sufficient. Thirdly, the duties are to be performed from time to time, as the occasion arises. In this connection, no specific 'trigger' for the duty to review is provided. Thus by s12(1) of the Interpretation Act 1978, the power may be exercised, or the duty is to be performed, from time to time as occasion requires. Fourthly, when reviewing the relevant provision and considering whether it is sufficient, the local authority must consult a wide range of persons and bodies who are likely to have an interest in the relevant provision, namely all those bodies or individuals specified in section 27(3) of the 2014 Act.

100. These are children and young people in its area with special educational needs, and their parents; children and young people in its area who have a disability, and the parents of children in its area who have a disability; the governing bodies of maintained schools and maintained nursery schools in its area; the proprietors of Academies in its area; the governing bodies, proprietors or principals of post-16 institutions in its area; the governing bodies of non-maintained special schools in its area; the advisory boards of children's centres in its area; the providers of relevant early years education in its

area; the governing bodies, proprietors or principals of other schools and post-16 institutions in England and Wales that the authority thinks are or are likely to be attended by children or young people for whom it is responsible, or children or young people in its area who have a disability; a youth offending team that the authority thinks has functions in relation to (i) children or young people for whom it is responsible, or (ii) children or young people in its area who have a disability and such other persons as the authority thinks appropriate.

101. We would add that although the drafting of section 27(3) is not entirely clear, in our view, the duty of consultation applies compendiously to the functions described by sections 27(1) and (2). That is, we do not consider that what is contemplated is consultation in relation to the review, pursuant to section 27(1) and section 27(3) and then a further consultation in relation to the sufficiency of provision, pursuant to section 27(2) and section 27(3).

102. The claimants' case that section 27 of the 2014 Act is engaged by the decision under challenge must carry with it the proposition that the extensive duties of consultation made mandatory by section 27(3), of the many different parties who must be consulted, are engaged whenever a local authority makes any alteration to SEND services, including budgetary decisions of the kind taken by the Council in this case. This is an interpretation that we are unable to accept. We do not consider Parliament can have intended that the extensive and onerous duties of consultation made mandatory by section 27, should be undertaken on a "rolling basis" let alone, that it would be triggered every time a change is made to the provision of SEN. Such an interpretation would be capable of leading to absurd results, adversely affecting both the ability of local government to carry out its business, and the amount of resources available to meet the needs of those the legislation is designed to protect.

103. In our view, there is nothing in the legislation, or legislative history for that matter, to support such an interpretation, or to indicate that this was Parliament's intention. On its face, and when read in the statutory context to which we have referred, in our view, the legislation imposes a duty on local authorities, which arises from time to time, to consult at reasonable intervals, those identified in section 27(3) in order to keep the provision referred to under review, in which connection local authorities must consider the extent to which the provision referred to is sufficient to meet the educational needs, training needs and social care needs of the children and young people concerned.

104. The case for the claimants rests here on an observation made by Laing J in *R DAT* and on a finding in *KE* that a specific duty to consult under section 27 of the 2014 Act arose on the facts of that case. In *DAT,* it was held that the duties imposed by section 27 must bite where a local authority makes a decision which will necessarily affect the scope of the provision referred to in section 27. However, in the short passage in her judgment, at para 30, where section 27 was considered, the judge gave no reasons for her conclusion, and expressed misgivings about it, in particular because, as she said, she had heard limited, if any argument on the point, and had not been referred to any material which explained the frequency with which the duties were expected to be exercised. In that connection the judge was not referred to section 12(1) of the Interpretation Act 1978 to which we have referred.

105. We think the judge was right to express those misgivings. If her reluctant interpretation were to be correct, the results would be startling indeed. This would mean that every

time a local authority makes a decision that will affect the scope of provision made in its area for children with SEND or the provision that is made outside its area for children with SEND who are from its area, no matter how small, it must review the entirety of its provision both in and outside its area. It must consider whether the entirety of its provision is sufficient and it must consult the wide range of persons and bodies identified (including children with SEND) whether the decision is to reduce the scope of provision or increase it, regardless of the interest that such consultees, such as youth offending teams, might have in any change.

106. The decision in *KE* which referred to and relied on the decision in *DAT,* carries the claimants' case in this regard no further; the judge in *KE* did not refer to the terms of section 27, referring only to a duty to consult "relevant children and their parents" without reference to the actual breadth of the consultation requirement. In the circumstances, and with great respect to the judges concerned, we consider their interpretation of section 27 of the 2014 was wrong, and we would decline to follow it (for this purpose, see *R v Greater Manchester Coroner, ex p Tal* [1985] QB 67, 81).

107. In the circumstances, in our judgment, both the claimants' substantive and procedural case under section 27, namely that it gave rise to a duty to consult, must fail.

108. Finally, a number of different arguments on remedy were advanced before us. In view of our conclusions on the merits however, there is no need to address them. In all the circumstances, the claim must be dismissed.