Neutral Citation Number: [2014] EWHC 2134 (Admin)
Case No. CO/1240/2014

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

Royal Courts of Justice
Strand
London WC2A 2LL
23 May 2014

B e f o r e :

MR JUSTICE SUPPERSTONE

Between:
THE QUEEN ON THE APPLICATION OF
(1) Mary WEST
(2) Nicola BEER
(3) Paula WEBB
(4) Donna THOMAS — **Claimants**

v

RHONDDA CYNON TAFF COUNTY BOROUGH COUNCIL — **Defendant**

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Mr N Griffin QC and Miss J Clement (instructed by Bindmans) appeared on behalf of the Claimants
Mr J Goudie QC and Mr J Milford (instructed by Rhondda Cynon Taff) appeared on behalf of the Defendant

Hearing dates: 19 to 20 May at Cardiff Civil Justice Centre

HTML VERSION OF JUDGMENT

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MR JUSTICE SUPPERSTONE:

Introduction

1. The Claimants challenge the decision of the Defendant council to cease funding full time nursery education for three-year-olds from September 2014, the start of the next academic year.

2. For many years the Council has provided full-time nursery education free of charge. However, on 8 January 2014, the Council's cabinet decided that the nursery arrangements would be changed from September 2014 so that part-time nursery education of up to only 15 hours a week would be provided from the term after a child's third birthday; and full-time provision would not be provided until the term after a child's fourth birthday. The loss of this full-time provision will also result in the termination of free school meals and free school transport for the children concerned. It is estimated that the decision affects in excess of 3,300 children and their families.

3. The Cabinet's decision was "called in" for consideration by the Education and Lifelong Learning Scrutiny Committee. On 20 January the Scrutiny Committee resolved not to refer the decision back to the Cabinet for reconsideration and that the decision should take effect as from 20 January 2014.

4. On 17 April, HHJ Jarman QC ordered that this claim be listed for a "rolled up" hearing.

<u>The Factual Background</u>

5. On 22 July 2013, the Council's Director for Corporate Services reported to Cabinet that the Council faced a very substantial budget gap over the four years from 2014/15 to 2017/18. The report stated that the Council faced "an unprecedented challenge over the next four to five years to deliver a balanced budget strategy". The funding gap has now been assessed at £63.4 million. The Cabinet resolved on 22 July 2013 that "reports be presented to Cabinet on service change options as soon as they become available".

6. On 21 October, the Council's corporate management team reported to Cabinet on a number of service change proposals to meet the Council's budgetary difficulties. The report included ten different proposals regarding nursery education, whose advantages and disadvantages were analysed, including a preferred proposal to fund three hours' education per day rather than full-time education, for three and four year-olds until the September after a child's fourth birthday. It was estimated that the proposal would save £4.4 million in a full year.

7. The Cabinet resolved on 21 October to initiate consultation on the proposal and various other service change proposals concerning meals on wheels, libraries, youth provision and day centres. The consultation exercise took place between 4 November and 2 December 2013. An 84-page consultation pack was produced which included detailed information about each of the proposals. Over 6,000 consultation responses were received. Thereafter, a 58 day page consultation report was drawn up on the basis of the responses, summarising views on all the proposals.

8. An Equality Impact Assessment was published for each of the proposals on 18 December 2013.

9. The Cabinet met to consider the proposals on 8 January 2014. Before the Cabinet members took the decision, they had "access" to the consultation responses which relevant members spent time "viewing". (See first witness statement of Mr Bradshaw, the Council's Director of Education and Lifelong Learning, paragraphs 35 to 40).

10. Before the meeting all Cabinet members were provided with a report of 21 October 2013, the consultation report and the EIA.

11. The Cabinet decided to amend the proposal. The decision it made is recorded in the following terms:

> "That the implementation be delayed until September 2014, thereby not disrupting existing full-time attendance during the academic year and giving parents and careers more time to make any amended child care arrangements prior to the start of the September term. Also to provide full-time education from the term after a child's fourth birthday rather than from the September after a child's fourth birthday as originally proposed. This will produce savings in a full year of £3.7 million."

12. In the 2014/15 financial year, because the decision will not be implemented until September 2014, the anticipated savings will be £2.7 million (see Mr Bradshaw's second witness statement, paragraph 14).

13. Three Council members called in the decision. On 20 January 2014, as I have said, the Council's Scrutiny Committee resolved not to refer the decision back to the Cabinet for reconsideration.

14. On 26 February, the 2014/15 revenue budget proposed by the Cabinet was approved at a meeting of the full Council.

15. Primary schools in the Council's area received their formula budget allocations on 4 March, they are required to set budgets to the 2014/15 financial year by 31 May.

16. The Council is aware of the budget decisions taken by 98 of the 108 primary schools affected. Of those, 59, approximately 60 per cent, intend to continue to offer free full-time education for three-year-olds in the 2014/15 school year. The Council objected in their acknowledgement of service to the standing of first two Claimants on the grounds their school was going to continue to offer full-time nursery provision for three-year-olds. Two further claimants; Ms Webb and Ms Thomas, who have children attending schools that are offering only part-time nursery education were therefore added as claimants to the proceedings. Mr James Goudie QC, for the Council, confirmed that standing is not now a live issue.

The Legal Framework

17. (1) A duty to provide sufficient nursery education:

18. Section 118(1) of the School Standards and Framework Act 1998 provides that:

> "A local education authority in Wales shall secure that the provision (whether or not by them) of nursery education for children who-
>
> (a) have not obtained compulsory school age, but
>
> (b) have attained such age as may be prescribed is sufficient for their area."

The Education (Nursery Education and Early Years Development and Childcare Plan (Wales) Regulations 2003 (as amended) provide that the prescribed age shall be the term after a child's third birthday.

19. Section 118(2) of the 1998 Act provides, so far as relevant, that:

> "In determining for the purposes of sub-section (1) whether the provision of such education is sufficient for their area a local authority-
>
> (b) shall have regard to any guidance given from time to time by the National Assembly for Wales."

20. The relevant guidance is Welsh Office Circular 7/99. Under the heading "Statutory duty on local authorities to secure provision" paragraph 3.7 states:

> "The Government's guiding principles for early years education continue to be.
>
> *Targets*
>
> The provision of a free, at least half-time, good quality, education place during the three terms before the start of compulsory education for every four-year-old whose parents want this. It should be as accessible as possible to the child's home. Half time means a minimum of ten hours a week for around the same number of weeks as the normal school year. This has already been achieved in Wales from September 1998.

Securing provision

> Integration of early years education with childcare, in line with local childcare strategies and childcare plans, to meet the needs of children and their parents."

The guidance refers to the year 1999-2000, and therefore on a literal reading it is inapplicable. However the Council regards the guidance as continuing from year to year and for "four-year-old" one should now read "three-year-old".

21. <u>(2) The Childcare Act 2006:</u>

22. Section 22(1) of the Childcare Act 2006 provides that:

> "A Welsh local authority must secure, so far as is reasonably practicable, that the provision of childcare (whether or not by them) is sufficient to meet the requirements of parents in their area who require childcare in order to enable them:
>
> (a) to take up, or remain in, work; or
>
> (b) to undertake education or training which could reasonably be expected to assist them to obtain work."

23. The duty under section 22(1) applies to anyone under the age of 14. Section 22(2) further provides that:

> "In determining for the purposes of sub-section (1) whether the provision of childcare is sufficient to meet those requirements, a local authority-
>
> (a) must have regard to the needs of parents in their area for-
>
> > (i) the provision of childcare in respect of which the childcare element of working tax credit is payable,
> >
> > (ia)the provision of childcare in respect of which an amount in respect of childcare costs may be included under section 12 of the Welfare Reform Act 2012 in the calculation of universal credit
> >
> > (ii)the provision of childcare which is suitable for disabled children, and
> >
> > (iii)the provision of childcare involving the use of the Welsh language..."

24. Section 22(3) requires a local authority in discharging its duty under sub-section (1) to have regard to any guidance given from time to time by the Assembly. The relevant guidance is 013/2008, paragraph 2.7 of which states that:

> "To fulfil its Childcare Act duty, the local authority will need to assess the local childcare market to develop a realistic and robust picture of parents' current and future need for childcare. The local authority will compare this assessment of parents' demand for childcare with information about the current and planned availability of childcare places."

25. Local authorities are also required by regulations made by the Assembly under section 26 of the 2006 Act to prepare assessments of the sufficiency of the provision of childcare in their area and to review any such assessments prepared by them. The current regulations of the Childcare Act 2006 (Local Authority Assessment (Wales) Regulations 2013.

26. <u>(3) Children in need:</u>

27. Section 17(1) of the Children Act 1989 imposes a general duty on Welsh local authorities to "safeguard the welfare of children within their area who are in need". By section 17(10), a child shall be taken to be in need if (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part; (b) his health or development is likely to be significantly impaired, without the provision for him of such services; or (c) he is disabled.

28. Section 18(1) of the 1989 Act states that local authorities must provide such day care as is appropriate for children in need within their area who are (a) aged 5 or under; and (b) not yet attending school. Section 18(5) provides that:

    "Every local authority should provide for children in need within their area who are attending any school such care or supervised activities as is appropriate-

    (a) outside school hours."

29. <u>(4) Eradicating child poverty:</u>

30. The Children and Families (Wales) Measure 2010 makes provision about contributing to the eradication of child poverty. Section 1 sets out the broad aims for contributing to the eradication of child poverty which include promoting and facilitating paid employment for parents of children, reducing inequalities and educational attainment between children and helping young persons participate effectively in education and training. Section 2 requires a Welsh local authority to prepare and publish a strategy for contributing to the eradication of child poverty.

31. By section 17 of the 2010 Measure the Welsh ministers may give guidance to Welsh local authorities to which they must have regard when exercising their functions under sections 1-10. The Welsh government has published guidance under this section which states:

    "We know the quality of early education and childcare makes a difference to children's life chances and we know that is especially beneficial to children from the most disadvantaged backgrounds."

32. In "Building a brighter future: early years and childcare plan" it is explained that:

    "For early education and childcare to meet the requirements of families in Wales it needs to be of a high standard, available at the times and places where it is needed, at a price the parents can afford and available for children of different ages, backgrounds, cultures, abilities and needs."

33. <u>(5) The public sector equality duty:</u>

34. Section 149(1) of the Equality Act 2010 imposes a duty upon public authorities to have "due regard" to the three equality needs when exercising their functions. It states 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; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it. The protective characteristics include age, gender, race, religion and disability.

<u>The Grounds of Challenge</u>

35. Mr Nigel Giffin QC, for the Claimants, advances five grounds of challenge to the decision:

    (1) The Council failed to fulfil its duty under section 22 of the 2006 Act to secure, so far as is as reasonably practicable, that the provision of childcare is sufficient to meet the requirements of parents in their area who require childcare in order to enable them up to take up or remain in work or undertake education or training

which could reasonably be expected to assist them to obtain work;

(2) The Council failed to have regard, or due regard, to its duty under section 118 of the Schools Standards and Framework Act 1998 to secure that the provision of nursery education for three-year-olds is "sufficient" for their area;

(3) The Council failed to have due regard to the three equality needs set out in section 149(1) of the Equality Act 2010;

(4) The Council failed to have regard, or due regard, to its duties under section 17 and 18 of the Children Act 1989;

(5) The Council failed to have regard, or due regard, to its duties regarding child poverty under the Children and Families (Wales) Measure 2010.

The Parties' Submissions and Discussion

36. It is convenient, for reasons that will become apparent, to consider grounds (1), (2), (4) and (5) together and then ground (3) separately.

37. The logical starting point is ground (2), the alleged failure to secure efficient nursery education. The decision in this case concerned educational provision. At the same time it plainly impacts upon childcare provision because any change in the hours of educational provision for three-year-olds potentially affects parents' need for childcare.

38. In relation to ground (2), Mr Giffin submits that not only were members not directed in the report to Cabinet or other documents provided for the 8 January meeting, that the Council's duty was to provide "sufficient" nursery education, but the Council misdirected itself in law. Appendix 1 to the report to Cabinet on 8 January 2014 is the report to members dated 21 October 2013. Section 5 concerned with School Admission Arrangements includes the following:

> "**Statutory Obligations**:
>
> 5.5 Our statutory obligation is to provide all children with ten hours of nursery education per week from the beginning of the term following their third birthday.
>
> 5.6 Whilst this is an obligation, it is not compulsory for children to attend school until they become of Compulsory School Age. This is the term following a child's fifth birthday.
>
> 5.7 Accordingly from the term after a child's third birthday to the term after their fifth birthday our obligation is to make available ten hours per week of nursery education but the take up is at the discretion of parents/carers.
>
> 5.8 Clearly our current admission arrangements, consisting of full-time education pre-compulsory school age (as detailed at 5.1) are in excess of statutory minimum requirements."

(See also paragraph 5.12 and the first page of Appendix 1 to that report of 21 October 2013).

39. Mr Goudie submits that reading the relevant sections of the report as a whole, they correctly recognise that this was a "statutory minimum requirement", not a fixed obligation. I do not agree. In my view, the likelihood is that members reading this section of the report headed "Statutory Obligations" would have understood that there is a statutory obligation to provide ten hours of nursery education per week, and if that is achieved, no further statutory duty arises. No other statement in any other document placed before Cabinet on 8 January 2014 would have disabused them of that misapprehension.

40. Mr Goudie submits that in any event, whatever the Council's view of the obligations imposed by statute, it cannot have erred in law if in substance it considered what was "sufficient" for children on the premise that this might (or might not) be more than ten hours' education. In support of this submission Mr Goudie relies on the well-known observations of Dyson LJ (as he then was) in Baker v Communities and Local Government Service [2009] PTSR 809.

> "36. I do not accept that the failure of an inspector to make explicit reference to section 71(1) [of the Race Relations Act 1976] is determinative of the question whether he has performed his duty under the statute. So to hold would be to sacrifice substance to form (...)
>
> 37. The question in every case is whether the decision-maker has *in substance* had due regard to the relevant statutory need. Just as the use of a mantra referring to the statutory provision does not show that the duty has been performed, so too a failure to refer expressly to the statute does not of itself show that the duty has not been performed (...) To see whether the duty has been performed, it is necessary to turn to the substance of the decision and its reasoning."

41. Mr Goudie submits that the premise for the proposal put before Cabinet, and the information given to Cabinet relating to that proposal, was that Council would need to consider what amount of nursery education was in fact sufficient for the children concerned. He submits that this is evidenced by references in the report to Cabinet of 21 October 2013 to the educational advantages and disadvantages of full-time versus part-time nursery education: statements in consultation responses that a reduction from full-time to part-time education for three-year-olds would have a detrimental effect upon their levels of attainment, and the identification of any special needs they might have; the summary in the consultation report (in particular paragraph 6.11) of concerns raised about the impact that the proposal would have upon children's development; and the detailed consideration given in the EIA (see in particular paragraphs 5.1.2-5.1.18) as to the benefits or otherwise for children's development of having full-time rather than part-time education from the age of three.

42. It is incontrovertible that the material before Cabinet on 8 January 2014 referred to the advantages and disadvantages of full-time versus part-time nursery education. However, what the report detailing the results of the Consultation Exercise attached to the report for Cabinet at Appendix 2 does is as section 6 (dealing with proposal 1 - school admission arrangements) states:

> "This section provides a summary of the detailed open comments and feedback received." (Para 6.1)

43. The executive summary to the report outlines a summary of the main issues and themes raised during the consultation process.

44. However, the Council's duty under section 118 of the 1998 Act was ignored in the report to the Cabinet. If members are not informed of their statutory duties then there is a real risk they will adopt the wrong approach when they come to consider an issue such as securing the provision of sufficient nursery education. That is, in my view, what happened in the present case. The Council did not ask itself the question as to what is sufficient nursery education for its area, nor, in my view, can it be inferred that it considered its duty to provide sufficient nursery education when taking the decision. Mr Goudie makes the point that the part-time education to be provided is for 15 hours, which is more than the minimum requirement. However, I accept Mr Giffin's submission that is there is no evidence that the Cabinet considered 15 hours per week as providing sufficient education. The Cabinet may merely have considered 15 hours per week to be an appropriate number of hours in the circumstances, having regard to the Council's budgetary problems.

45. Further, what is sufficient nursery education for an area will depend, amongst other matters, on what childcare provision is available and affordable for those with children to meet their needs outside the times when they are in receipt of nursery education. It is common ground between the parties that the Council's duty under section 22(1) of the Childcare Act 2006 is a highly relevant and material factor in this regard.

46. Mr Giffin submits that in the present case, as in R(on the application of Littlefair) v Darlington Borough Council [2013] EWHC 2744 (Admin), where the court was concerned with the equivalent duty for English local

authorities under section 6 of the 2006 Act, the Cabinet had to ask itself: if nursery education provision is reduced from full-time to part-time provision, will the Council be able to comply with its statutory duty to ensure sufficient childcare for those covered by the Act? It had, Mr Giffin submits, to address that question on an informed basis, however, the report to Cabinet (and the accompanying documentation) of 8 January 2014 did not address that question, nor did it advise members to address it, and it did not provide any analysis on the basis of which it could be addressed. It merely invited members to consider the information in the appendices to the report, and to decide whether to proceed with the proposal.

47. In this connection Mr Giffin reminds me of the observations of Sedley LJ in R(Domb) v Hammersmith and Fulham LBC [2009] EWCA Civ 941 at paragraph 79 (a case concerned with a Predictive Equalities Impact Assessment pursuant to statutory equality duties) which are equally relevant in the present case:

> "Members are heavily reliant on officers for advice in taking these decisions. That makes it doubly important for officers not simply to tell members what they want to hear, but to be rigorous in both enquiring and reporting to them. There are aspects of the evaluation, quoted by Rix LJ, which strike me as Panglossian - for example, the ignoring of actual outcome in favour of 'planned outcome' and the limiting of consequential risk to the possibility that charges would not be introduced - and parts of the report to members which present conclusions without the data needed to evaluate them."

48. In response to this ground Mr Goudie repeats his submission that it is immaterial that the Council's statutory duty, in this instance, under the 2006 Act was not specifically referred to in the report or supporting materials for the 8 January meeting, provided that the Council in substance had regard to the duty when taking the decision.

49. Mr Goudie submits that the Council plainly did consider the question whether there would be sufficient childcare provision for children within its area when it has ceased funding nursery education for three-year-olds. The principal means through which the Council assesses the need for childcare in its area is through a "Childcare Sufficiency Audit", which provides a detailed analysis of the local demand for childcare, and the availability of provision to meet that demand. There was the Audit for 2011-14 which includes detailed analysis of the provision of childcare in respect of which the childcare element for working tax credit is payable, and the costs of childcare generally, the provision of childcare suitable for disabled children, and the provision of childcare involving the use of the Welsh language. In addition there was a "refresh" of that Audit, which is made on an annual basis, the current one being for 2013. Moreover, the issue of childcare availability was raised throughout the consultation responses, and lack of childcare provision was pointed to in the consultation report as a theme emerging from the consultation responses. Further, evidence that the Cabinet had regard to the issue of childcare provision for children, Mr Goudie submits, is that on 8 January 2014, the Cabinet specifically delayed implementation of funding cuts from April 2014 to September 2014 in order that there should be time for adequate alternative childcare provision to be arranged.

50. I accept Mr Giffin's submission that not having any regard to the section 22 duty or the statutory guidance as such is not a purely formal omission. Having regard to the guidance is mandatory. Further, if members had been referred to the terms of section 22 in the statutory guidance they would have had to consider specifically the matters set out therein and to consider whether they had sufficient information to make a decision.

51. The observations of Sir Thomas Bingham MR in R v Somerset County Council ex p Fewings [1995] 1 WLR 1037 at 1046 are equally applicable in the present context. Where the attention of the Council is not drawn to the governing statutory provision and the question they should have been addressing, then if a decision is lawful, it is more by good luck than judgment.

52. In fact members did not have the 2011-2014 Childcare Sufficiency Assessment and the 2013 Refresh documents before them when taking the decision. There is no basis for inferring that they had sufficient knowledge of their contents in order to have regard to them. In any event, as Mr Giffin has demonstrated, there are passages in those documents that, if read, would put the Cabinet on notice of potential problems.

53. Further, the 2011-2014 Audit identifies in the Executive Summary a number of matters relating to sustainability of some childcare provision, particularly in the more deprived areas, which should have been brought to the

attention of members. In addition a shortage of Welsh speaking, suitably qualified early years and childcare staff is noted as an ongoing challenge locally. Further, although significant strides have been made in the last few years in terms of integrating disabled children in ordinary childcare settings, there are particular difficulties surrounding provision for children with significant healthcare needs.

54. Further, as Mr Giffin correctly observed, the three year Audit and the annual Refresher had, of course, not addressed question as to what the childcare provision position was likely to be if the proposal being considered on 8 January 2014 was implemented. Mr Goudie submits, by reference to the audits, that there has been a year on year increase in childcare vacancies across the Council's area and that the 2013 Audit Refresh identifies an increase in the number of vacancies "again" for the year. He further observes that the number of childcare places that would need to be found in the light of the decision is inevitably dependent upon what choices parents make between January and September 2014 and, in particular, whether they choose to provide childcare themselves or look for informal provision, for example, from grandparents. That may be so. However, there is no evidence that any consideration was given to these matters by the Cabinet on 8 January 2014 in the context of the statutory duty imposed on the Council.

55. Mr Goudie relies on the observations of Baroness Hale in R(Morge) v Hampshire County council [2011] 1 WLR 268 at 282, where she said:

> "Democratically elected bodies go about their decision making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose would be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, not the courts', to weigh the competing public and private interests involved."

56. The problem in the present case is that the material report to Cabinet and accompanying documents neither referred to the Council's statutory obligations (with the exception of the public sector equality duty) nor identified, arising from those obligations, the issues to be determined. Apart from the EIA, all that the Cabinet was provided with was a report detailing the results of the consultation exercise. From that report and from the responses, Cabinet members would have read what was said in the responses about the issue of the sufficiency of childcare. However, they were provided with no framework in which to consider and properly assess the issue.

57. I agree with Mr Giffin that once it is accepted that childcare is a relevant issue to be considered then it has to be considered on the correct basis, that is, on the basis of a correct appreciation of the local authority's statutory duties in that respect. That being so, proper regard must be had to the statutory guidance. Public authorities are obliged to ask themselves the right questions and take reasonable steps to acquaint themselves with the relevant information to enable them to answer it correctly (Secretary of State for Education and Science v Thameside Metropolitan Borough Council [1977] AC 1014 at 1065B).

58. In my judgment the Cabinet did not, in substance, have due regard to the relevant statutory need as required by 118 of the 1998 Act, or section 22 of the 2006 Act. Both grounds of challenge are, in my view, made out.

59. Turning to ground 4, I accept that the duty under section 17(1) is a general or "target" duty which is concerned with the provision of services overall, rather than a particular duty owed to specific children (R(G)v Barnet LBC [2004] 2 AC 208 per Lord Hope at paragraphs 76 to 91; Lord Millett at paragraph 106 and Lord Scott at paragraphs 113-116 and 135). At paragraph 66 of the Council's summary grounds, examples are given of the range of services which identify children that are in need within the Council area and provide care for them. Further, the Council appreciated that "children 'at risk' may face greater risk at home due to not being in school full-time until Reception year" (see Option 4 in Appendix 1B to the 21 October 2013 report to Cabinet); and in the EIA (at paragraphs 6.15 and 6.16) the Council noted its duties to support vulnerable children if the proposed preferred option was adopted.

60. Mr Goudie submits that the Council specifically considered the possibility that children who are at risk might be more at risk as a result of spending more hours at home and therefore it gave explicit consideration to care issues concerning "children in need". (See consultation responses quoted in paragraphs 6.11 and 6.12 of the consultation report; and the reference in paragraph 6.6 to "impact on vulnerable individuals and deprived areas" as being one of the main themes to emerge from the consultation process).

61. However, the Cabinet was not referred to its statutory duties under the Children Act and therefore had no statutory framework in which properly to consider the consultation material. Further, I accept Mr Giffin's submission that there is no proper attempt in the EIA to analyse childcare provision and the effect of the proposed change on childcare provision for children in need. Indeed, as I have noted, the report suggests that there will be problems (see in particular paragraph 5.1.27).

62. In my judgment the Council did not comply with its duties under section 18 of the 1989 Act for children in need.

63. As to ground 5, Mr Giffin submits that where the decision will inevitably have an adverse impact on child poverty and is likely to entrench or worsen social deprivation, the failure on the part of the Cabinet members to have regard to the Council's statutory duties and the Council's own plans to combat child poverty was an error of law. In my view this ground of challenge is not made out. The consultation report, in particular at paragraph 6.12, noted concern from respondents that the preferred proposal would have an impact on the most vulnerable members of the community, including those residents living in deprived areas and those in need of additional support. Further, and importantly, the EIA (see in particular paragraph 5.1) specifically considered issues relating to social deprivation.

64. I next turn to consider the public sector equality duty (ground 3). The parties are agreed as to the applicable legal principles, save for one matter. Mr Goudie submits that the question whether "due regard" has been paid to the equality needs set out in s.149(1), and the weight to be given to the various matters taken into account, are challengeable only on rationality grounds. Mr Giffin does not agree. He submits that it is for the court itself to determine whether "due regard" was had. I have considered the authorities to which I was referred by Counsel. In my view Wilkie J in R(Williams) v Surrey County Council [2012] EWHC 867 (QB) at paragraphs 18-25 reaches the correct conclusion. Having referred to the passages at paragraphs 77 and 78 in the judgment of Elias LJ in R(Hurley and Moore) v Secretary of State for Business Innovation and Skills [2012] EWHC 201 (Admin), Wilkie J continued at paragraph 24:

> "In my judgment that exposition of the two stage process of the court considering: first whether the statutory obligation to give 'due regard' has been discharged; and second, (if it is sought to review it) the decision which flows from it, involves the court, at the first stage, deciding whether the authority has, in fact, surmounted the threshold required by the statute. That is not, on my reading of it, it a Wednesbury based exercise. However, once the authority has surmounted the threshold of 'due regard', the lawfulness of the decision which emerges from the consideration of those matters and all the other relevant (possibly countervailing) factors, is a matter which the court has to approach on the Wednesbury basis."

65. Not only did the report to Cabinet inform members on 8 January 2014 of the Council's statutory equality duty, but there was in addition before them a full EIA. The criticism levelled by the Claimants is that the EIA prepared by officers fails to discharge the Council's duty under section 149(1) in that it has not adequately identify the equality implications arising out of the decision.

66. Mr Giffin makes five points. First, that because the Council had not carried out any proper analysis of the likely availability of alternative childcare provision, it was in no position properly to assess how significant the disproportionate impact on women, because of the extent they bear primary childcare responsibilities, would be. Second, the EIA does not properly analyse the extent of the impact of the Council's proposals on children from deprived families or those living in poverty. The issue of affordability is identified as being a consideration but not really grappled with. Third, the EIA reached conclusions which were not tenable or gave an incomplete

account of the state of the evidence about the impact of the provision or non-provision of full-time nursery education for children of a certain age. Fourth, the EIA fails to consider the extent of the impact on children with a disability. It does not properly address the question as to whether childcare will be available for children with disability. Fifth, under the rubric of the protected characteristic of race, the EIA refers to consultation responses that "suggest" that the Welsh language skills of young children will be impacted negatively. The EIA asserts that it can be "assumed" that the research on general attainment would apply to acquiring Welsh language skills, but no assessment is made of the availability of alternative Welsh medium provision. In summary, Mr Giffin submits that the EIA does not contain anything like the rigorous analysis necessary to comply with the duty.

67. In responding to these submissions Mr Goudie accepts that the importance of complying with the duty should not be understated. Nevertheless, he submits, relying on the observations of the court in R(Bailey) v Brent LBC [2011] EWCA Civ 1586 at paragraph 102 that local authorities cannot be expected to speculate on or investigate or explore matters ad infinitum. Nor can they be expected to apply, indeed should be discouraged from applying, the degree of forensic analysis for the purpose of an equality impact assessment which a QC might employ in court.

68. In summary, Mr Goudie responds to the points made by Mr Giffin as follows: first, the PSE Duty did not require the Council to undertake a forensic analysis of exactly how great the impact upon women would be. Second, the EIA did consider in some detail the effect that the proposal was likely to have upon children from deprived families (see paragraphs 5.1.4-5.1.22). Third, the EIA did specifically consider the impact of the proposal on children with a disability (see paragraphs 5.2.1-5.2.2). Fourth, the Council did consider the impact of the proposal on Welsh language provision. There is little evidence on the impact of full-time as opposed to part-time nursery provision on Welsh language skills.

69. There is, in my view, some force in Mr Giffin's criticism that the EIA lacks rigorous analysis, at least in certain respects. However, I am not satisfied that the deficiencies in the EIA that Mr Giffin has identified lead to the conclusion that the Council has failed in its duty to have "due regard" to the equality needs set out in section 149 of the 2010 Act.

70. I turn finally to the issue of delay. Claims for judicial review must be brought promptly and in any event within three months from the date when the grounds of the claim first arose. The test is "promptness" and a claim will not necessarily be within time simply because it is brought within three months. There is an issue between the parties as to whether time runs from 8 January 2014, when the decision was made (as the Council assert), or 20 January 2014, when the Scrutiny Committee decided not to call that decision into question (as the Claimants assert). In my view it is the latter, being the date on which the decision took effect. I agree with the observations of Nicol J in R(De Whalley) v Norfolk County Council [2011] EWHC 3789 (Admin) at paragraphs 35 to 36. However, whether the material date be 8 January or 20 January matters not, in my view, in the present case.

71. The claim was brought on 20 March 2014, which is within three months of 8 January and there was good reason for waiting until 20 January before considering any challenge.

72. On 30 January, Parents Against the Cuts to Education in RCT wrote to the Legal Department of the Council in a letter headed "Legal Challenge" alleging that the Council had acted in breach of its statutory duties. The letter concluded:

> "We are currently liaising with our legal team and anticipate we will shortly be issuing proceedings for judicial review".

73. The Council replied on 7 February 2014 asserting that it had complied with its obligations.

74. On 24 February the Claimants' solicitors sent a pre-action protocol letter setting out at some length the grounds of complaint. The letter concluded as follows:

> "111. We assume that, like our client [the Council] will wish to resolve this matter as soon as

possible. We would therefore ask that we receive a substantive response to this letter within seven days; that is, by 3 March 2014.

112. We would also be grateful if you could acknowledge receipt of this letter and provide, at the same time, the assurance sought above that the full Council will be made aware of this letter either before or during the Council meeting on 26 February 2014 when the budget will be discussed."

The Council responded to the pre-action protocol letter (and a further letter from the Claimants' solicitors on the following day) on 10 March 2014.

75. Mr Goudie submits that this claim has not been brought promptly and at the detriment to good administration from delay in this case is obvious. Allowing the challenge to proceed now would have a number of adverse affects. First, it would in all likelihood require the Council to re-open its budget; second, re-opening the budget would call into question the level of council tax, which is determined by other parts of the budget strategy; third, it would throw into disarray the planning of 108 schools within the Council's area; and fourth, it would disrupt forward planning of childcare providers.

76. I do not accept these submissions. The Council was put on notice on 30 January and 24 February as to the legality of the decision but nevertheless went ahead and set the budget on 26 February on the basis that the decision was lawful. It plainly, in my view, was not. The delay between 30 January and 24 February was due to the Claimants, who were members of the campaign group, organising themselves, seeking legal advice and obtaining legal aid. I am satisfied that there is good reason for any delay that did occur. Further, I am not persuaded that there is the detriment on good administration that is suggested. As Mr Giffin observes, it is difficult to see, however promptly the claim had been commenced, it could have been resolved before the Council had to set its budget. Further, whilst there are issues between the parties as to how the saving from the decision could be made (assuming that the decision is maintained after reconsideration on a lawful basis) the Council would not be required to re-open its entire budget.

Conclusion

77. In my judgment this claim is arguable on all the grounds of challenge. Accordingly permission is granted. For the reasons I have given, grounds (1), (2) and (4)(but not grounds (3) and (5)) are made out and this claim succeeds. The decision of the Council will be quashed.

78. MISS CLEMENT: My Lord, I am very grateful for your Lordship's judgment and also the speed at which it was produced. My clients are also very grateful to the Legal Aid Agency for funding this claim without which the claim could not have proceeded and the unlawful decision would not have been quashed.

79. My Lord, unsurprisingly I have two applications arising as a result. The first is an order that the Defendants pay the costs of this claim to be the subject of detailed assessment if not agreed. I ask for the entirety of the costs. Your Lordship found that three of the -- well, the main grounds of challenge were made out, three grounds of challenge made out. The two that were not successful were those on which very little time was spent in preparation and very little time before taking --

80. MR JUSTICE SUPPERSTONE: Certainly one of those two grounds, eradication of poverty, I don't think we spent too long on.

81. MISS CLEMENT: No.

82. MR JUSTICE SUPPERSTONE: What about the public sector equality duty? There was a fair bit of work that no doubt went into that in the preparation and the submissions in writing and in the oral submissions.

83. MISS CLEMENT: Well, as your Lordship summarised in your judgment, there were five very short points that we made, very short factual points. The Council responded to those, again on a very short factual basis, saying that was sufficient, the parties agreed all of the legal principles bar one, they are not controversial, there was

some limited argument on that one legal point but otherwise it was dealt with fairly rapidly at the hearing and there was not extensive time taken up in the skeleton arguments so, my Lord, I say we should get 100 per cent of our costs as we have succeeded on the main aspects of the claim and succeeded in having the decision quashed.

84. MR JUSTICE SUPPERSTONE: Yes.

85. MISS CLEMENT: My Lord, on that basis I also have an application for an interim payment. We ask in the first instance for 60 per cent of the costs estimate to be provided or to be paid to the Claimant within 14 days. My Lord, 60 per cent is a reasonable sum, it is in accordance with the principles in Mars UK Limited --

86. MR JUSTICE SUPPERSTONE: 60 per cent, you say, is a reasonable percentage?

87. MISS CLEMENT: It is, my Lord, yes.

88. MR JUSTICE SUPPERSTONE: Well, what is the sum?

89. MISS CLEMENT: Well, my Lord at the moment we only have a very rough and ready estimate, it is quite difficult to put it together.

90. MR JUSTICE SUPPERSTONE: Yes, but if you are asking for an interim payment then you have to have a figure in respect of which one can apply a percentage.

91. MISS CLEMENT: My Lord, yes, the rough estimate at the moment is somewhere between 100,000 and 150,000. It is a very rough estimate.

92. MR JUSTICE SUPPERSTONE: Is there anything in writing to show how that figure has been calculated?

93. MISS CLEMENT: My Lord, no, not at present. So there are two ways we can approach this --

94. MR JUSTICE SUPPERSTONE: Have the Council been given notice of this application for interim payment?

95. MISS CLEMENT: My Lord, no, because obviously we didn't know the result of your Lordship's judgment before --

96. MR JUSTICE SUPPERSTONE: No, that I appreciate but if you were to succeed, then inevitably you would have known there would be an application for costs and if you wanted to make an application for interim payment then it could be said, I will hear from Mr Milford, that notice of that application should have been given in advance so some consideration could have been given to figures.

97. MISS CLEMENT: My Lord, it shouldn't be a surprise to Mr Milford that I make an application for interim payment as that is the ordinary event, particularly when the Claimants' solicitors are -- well, we all are legally aided.

98. MR JUSTICE SUPPERSTONE: If one is working on minimum figures for present purposes, for interim payment.

99. MISS CLEMENT: Yes.

100. MR JUSTICE SUPPERSTONE: Can you give me some indication as to how that figure is calculated, the 100,000. Before we take too much time going into this, can I just direct the question to Mr Milford. Mr Milford, first of all, as far as the application for costs generally?

101. MR MILFORD: The application for costs generally, my Lord, I couldn't realistically resist, save that I say that it would be appropriate to order the Council to pay 75 per cent rather than 100 per cent of costs.

102. MR JUSTICE SUPPERSTONE: So some reduction.

103. MR MILFORD: Some reduction because I don't for a moment accept Ms Clement's submissions that there was no little importance or time spent on --

104. MR JUSTICE SUPPERSTONE: The public sector equality duty.

105. MR MILFORD: In particular that was the only real legal issue between the parties, my Lord, as my Lord will recollect. I mean, it was the question of how one looks at the "due regard" issue and not only that but it is a substantial amount of time spent on answering the factual contentions of that duty and the Claimants' skeleton runs to about three and a half pages on factual intentions and similarly the Defendant's skeleton on breach of the PSE duty --

106. MR JUSTICE SUPPERSTONE: You have to set out all the statutory provisions and look at the way the authorities have dealt with the matter.

107. MR MILFORD: Of course, absolutely, my Lord, and that is the single ground on which there is most authority so we say it did take a substantial amount of time.

108. MR JUSTICE SUPPERSTONE: So you say 75 per cent.

109. MR MILFORD: Yes.

110. MR JUSTICE SUPPERSTONE: Interim payment: taken by surprise or not?

111. MR MILFORD: Taken by surprise, my Lord, and it would have been helpful had the claimants written to us indicating approximately what their costs were and that they would be seeking an order --

112. MR JUSTICE SUPPERSTONE: I mean, I see you are flying solo today.

113. MR MILFORD: I am flying solo, my Lord, so I cannot take instructions on the reasonableness of what has been put to me so the fact it has been made at the last moment without notice puts me in some difficulty.

114. MR JUSTICE SUPPERSTONE: And you, I assume, are not in a position really to respond to the figures. You certainly can't do so on instructions and one would expect counsel to have the assistance of an instructing solicitor in order to respond on a costs warrant.

115. MR MILFORD: Yes.

116. MR JUSTICE SUPPERSTONE: Thank you very much.

117. One way we could -- dealing with that second matter first, the interim application, I mean, we could deal with this in writing, written submissions, give both sides a little time to put together -- your side, a document which shows at least in rough terms it is going to be a minimum of £100,000 and I can deal with the matter on the basis of written submissions.

118. MISS CLEMENT: My Lord, we could, that is one option, I will take it as my fall-back option if I may, but I would still hope to persuade your Lordship to make an order now. The reason for this is -- I wonder if I could hand up the decision of the Supreme Court in costs in JFS and the importance of inter partes costs orders and also a decision of Mars UK Limited which deals with --

119. MR JUSTICE SUPPERSTONE: I am concerned by the fact that no notice was given to the Council of this when it was known that leading counsel would not be here and Mr Milford would be on his own and in all likelihood, as I say, on his own and certainly no certainty that anybody would attend from the Council.

120. MISS CLEMENT: My Lord, you can see quite how many people have come up from Cardiff on my side.

121. MR JUSTICE SUPPERSTONE: I understand but those instructing you could have given notice.

122. MISS CLEMENT: My Lord, the figures were still being put together this morning. I wonder if the appropriate way to deal with this is to rise for 15 minutes, allow Mr Milford to make a phone call and take the same instructions he would take if he had a solicitor sitting behind him. I am sure there is someone available on the phone, given that everyone knew that judgment was being handed down.

123. MR JUSTICE SUPPERSTONE: Just before I hear from Mr Milford, is there an urgency in this matter in terms of the individuals having paid out money that they need to recoup as speedily as possible? What is the urgency with regard to the interim application for costs in this case?

124. MISS CLEMENT: My Lord, may I just turn my back for a moment?

125. MR JUSTICE SUPPERSTONE: Yes, certainly.

126. MISS CLEMENT: My Lord, the basis -- I am sure your Lordship is familiar with the observations in JFS about the importance of inter partes costs orders for those who conduct publicly funded work.

127. MR JUSTICE SUPPERSTONE: Absolutely.

128. MISS CLEMENT: At present --

129. MR JUSTICE SUPPERSTONE: I am saying nothing about the merits of your application whatsoever.

130. MISS CLEMENT: My Lord, absolutely. I simply make the point that at present no payment has been received by the Legal Aid Agency when work has been done since January so really it is the importance of making sure that payments are received swiftly. I take your Lordship's point that it could be dealt with on the papers and, as I say, that is my fall back position but what I would say is what we really do not want is that this goes off for detailed assessment, many, many months later this matter is resolved. I do say it shouldn't have come as a surprise to my learned friend because in this most cases where the Claimant is legally aided this sort of application will be made.

131. MR JUSTICE SUPPERSTONE: Mr Milford tells me he is surprised, I accept what he says.

132. MISS CLEMENT: My Lord, I wonder perhaps if we could deal with that by Mr Milford taking some instructions by phone.

133. MR JUSTICE SUPPERSTONE: No, no. I am not prepared to do that. I don't think it is a satisfactory way of proceeding and I am sure there is a telephone line between here and Cardiff but I don't think it is satisfactory that we should deal with this application on that basis when no notice was given and indeed no document is put before the court today indicating the basis on which the application is made in any particular sum. What I am prepared to do is to deal with the application on the basis of written representations. I am in fact away from today until Monday 9 June and that gives the parties plenty of time for both parties to make written representations. If, sensibly, you let the Council have something in writing, shall we say by close of play -- it is the holiday weekend, isn't it? Tuesday, Wednesday? It is entirely a matter for you.

134. MISS CLEMENT: My Lord, I am personally away until close of play Tuesday so if we could have until close of play on Wednesday.

135. MR JUSTICE SUPPERSTONE: Certainly. If you want longer, have it.

136. MISS CLEMENT: My Lord, actually could we have until Thursday?

137. MR JUSTICE SUPPERSTONE: Yes, most certainly. 4.00 pm on Thursday an application with any accompanying submissions to the Council. Response, Mr Milford, by? What we are aiming for is documents to

be with me, filed in the court, by 4.00 pm on Friday the -- what is it? 6 June, so that I can deal with them first thing on Monday morning, the 9th, and you will have a decision very shortly thereafter.

138. MR MILFORD: My Lord, that sounds very sensible and the sooner we gets the Claimants' submissions, the sooner we may be able to take a sensible view on whether we can actually agree them.

139. MR JUSTICE SUPPERSTONE: Exactly, well, that is precisely what I am thinking. So respond by 4.00 pm, you are getting them on the Thursday. The Monday or the Tuesday? Following.

140. MR MILFORD: My Lord, if we could have until 4.00 pm on the Tuesday that would be very helpful.

141. MR JUSTICE SUPPERSTONE: Yes, certainly. Whatever date that is, 4.00 pm on the Tuesday.

142. MISS CLEMENT: That is the 3rd, my Lord.

143. MR JUSTICE SUPPERSTONE: Yes, then if there is any reply, shouldn't be but if there is, that can be done within 24 hours and everything filed with the administrative court office by 4.00 pm on the Friday and then as I say, I will deal with it on the Monday so there won't be too much delay. I appreciate the concern but I think that's the best in the circumstances.

144. MISS CLEMENT: My Lord, I am grateful.

145. MR JUSTICE SUPPERSTONE: So that is the interim application. Mr Milford rightly says you are entitled to your costs, what do you say about any reduction? He says 75 per cent.

146. MISS CLEMENT: My Lord, in terms of the fifth ground I say no reduction for that, very, very little time was spent on it at all, so in reality we are only talking about the public sector equality duty. I make two points on that: first, in terms of the only legal point in dispute between us, your Lordship found for the Claimants. The legal test to be applied is it is for the court to decide who has -- whether a public body has had "due regard" so in terms of any legal argument your Lordship heard, we were successful on that. Then as for the five particular points that were raised in argument, my Lord, I see your Lordship has turned, I think, to the core bundle and the skeleton argument.

147. MR JUSTICE SUPPERSTONE: I am looking in the skeleton arguments, yes.

148. MISS CLEMENT: My Lord, that's what I have in front of me. Your Lordship can see it is only a very few pages, two or three pages, that deal with these very simple factual points. Now, your Lordship found that there were a number of deficiencies in the Equality Impact Assessment but if I can paraphrase, nevertheless it just got over the goal line. This is not a case where this was an ideal Equality Impact Assessment that clearly on any analysis satisfied the public sector equality duty, it was a case where there were some difficulties in it, it was quite proper for these points to be taken, not very long was taken on them and therefore I submit that to ask for a 25 per cent reduction on simply the factual analysis, applying legal points on which the claimants were successful, to an inadequate EIA, the discount sought by Mr Milford is far too high. I would suggest if any discount is made it should be in the region of five per cent.

149. MR JUSTICE SUPPERSTONE: Thank you very much.

150. I take the view there should be some discount in relation to grounds (3) and (5), the principal one of those two being ground (5). It is right to say that the Claimants did succeed on the one legal issue between the parties, however, they lost on the point as a ground of challenge. Doing the best that I can, considering the amount of time that was taken up in court on the point and having regard to the amount of time that it is likely would have been taken up considering the matter before coming to court and in the written skeleton argument, I take the view that there should be a reduction of 15 per cent in relation to the public sector equality duty and the other ground and so the claimants are entitled to 85 per cent of their costs.

151. MR MILFORD: My Lord, I am very grateful. It is always an invidious task to seek to persuade the trial judge that there is an arguable error of law in his decision but we do say that an appeal would have a real prospect of success on the basis that in essence as a matter of substance not form, that the Council has complied with its duties and your Lordship's judgment, with the greatest of respect, imposes too high a standard upon it so I do seek permission from your Lordship to appeal to the Court of Appeal.

152. MR JUSTICE SUPPERSTONE: Mr Milford, that is an application that will have to be repeated elsewhere if your clients choose to do so.

153. Thank you both very much.