Neutral Citation Number: [2019] EWHC 364 (Admin)

Case No: CO/345/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2019

Before :

HIS HONOUR JUDGE BLAIR QC
Sitting as a Deputy Judge of the High Court

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Between :

THE QUEEN (on the application of Y)	**Claimant**
- and -	
THE LONDON BOROUGH OF RICHMOND-UPON-THAMES	**Defendant**
- and -	
ACHIEVING FOR CHILDREN	**Interested Party**

- -

Ms Zoe Leventhal (instructed by **Simpson Millar**) for the **Claimant**
Ms Deok-Joo Rhee QC and Mr Jack Anderson (instructed by **LB of Richmond-upon-Thames**) for the **Defendant**
The interested party was represented by the Defendant's advisers

Hearing dates: 7 February 2019

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Approved Judgment

His Honour Judge Blair QC :

The Background

1. An application has been brought by the Claimant for permission to bring a Judicial Review of the Defendant Council's consultation, dated 26 October 2018, entitled: 'SEND Futures'.

2. A letter before action was sent on 17 December 2018 and a Claim Form filed with the Court on 25 January 2019, together with an application for urgent consideration and for interim relief. That same day Mrs Justice Cutts DBE ordered an oral hearing on 7 February for the Claimant to make her application for an interim injunction preventing the Defendant from setting its budget on 14 February 2019 pending the application for Judicial Review. The judge wanted to allow the Defendant to be heard on the matter and directed that it serve written submissions.

3. The matter came before me on 7 February 2019 when I heard detailed submissions on behalf of the Claimant and Defendant. The Interested Party was represented by the Defendant's legal representatives and filed a witness statement in the proceedings. I agreed that the Claimant should be anonymized and she will hereafter be referred to simply as 'Y'. She is the mother of a disabled child who is in receipt of special educational provision from the Defendant in a mainstream school. She has sufficient standing to apply for permission to seek a Judicial Review of the Defendant.

4. On 8 February 2019 I notified the parties' representatives of my conclusions and indicated that my detailed reasons would follow in due course. These are my reasons. In very simple terms, my conclusions are that: (1) there is not a serious issue to be tried, therefore, it would be wrong to grant interim measures; (2) the claim has been brought prematurely; (3) even if I were wrong about (1) and (2), the balance of convenience does not favour the granting of the relief sought; and (4) given my conclusion that there is not a serious issue to be tried, I also refuse permission for a Judicial Review.

The Defendant's challenged Consultation

5. The Consultation ran from 26 October to 25 November 2018. It was available online (and in hard copy upon request). There were also 3 drop-in sessions during November 2018.

6. The long title of the Consultation was: "*Consultation on the future funding of education provision for special educational needs and disabilities (0 to 25 years)*". It began with this preface: "*Over recent years, the cost of providing education, health and care services for children and young people from Richmond with special educational needs and disabilities has far exceeded the funding allocated for this purpose by central government. With demand for these services continuing to rise, the Council would like to consult with stakeholders to ensure that we are as well informed as possible when making future budget decisions.*" It stated that it was looking at: "*…options to reduce the overspend on the High Needs Block (HNB) of the Dedicated Schools Grant (DSG)*" and its purpose was to ask parents, carers, young people and other stakeholders for their

views on the future of services for children and young people with special and educational needs and disabilities (SEND) in Richmond.

7. It acknowledged that SEND funding is a very complex area and stated that in the consultation the Defendant had tried to achieve the difficult balance of providing enough information to understand the options proposed, but without the level of complexity it has had to consider in arriving at these options. The purpose of the series of proposed options was explained thus: "…*to bring what we spend on SEND services more in line with what we receive from government.*" then adding: "*We would like to emphasise that the Council has not yet taken decisions about these options and therefore this consultation does not represent a list of intended actions.*"

8. The consultation document published a pie-chart showing how the 2018/19 education budget had been split (both in monetary sums and as a percentage of the whole) between the Early Years Block, Central School Services Block, Schools Block and High Needs Block. It observed that current demand had meant that more had been spent than the funding available to the Council and a deficit of £13m will have accumulated by 31 March 2019; "*without action to reduce costs or increase funding, the deficit will continue to rise significantly. It is not sustainable to continue spending more than we receive, so we are considering ways in which we could make changes to the way the schools budget is funded and spent.*"

9. The Defendant said it had already set its vision and strategy (earlier in 2018 the Defendant had published: 'SEND Futures: Our Vision and Priorities for 2020') "*but we all need to do more to bring spending into line with the funding available to us. This consultation sets out some principles and options.*" It had 3 priority 'Themes' and in this consultation asked for "*views about a range of options for reducing the overspend on the High Needs Block.*" Theme 1 was to "…***re-prioritise funding so a greater proportion of schools budgets are allocated to support children with SEND.***" This option would increase funding available for services for children and young people with SEND by transferring some of the money in schools' general budgets. Once the Schools Block funds have been allocated and passed to an individual school it is within that school's almost complete discretion how to use it. This made it difficult for the Defendant to assess what impact this option would have on individual pupils. Nevertheless, it produced a detailed spreadsheet estimating the consequences on each of its schools of a transfer from the Schools Block to the Higher Needs Block of £556,321 on the one hand and of £1,841,144 on the other. It sought comments on this principle of transferring funding. It also invited responses to another option: reducing the Central School Services Block by 5-10%.

10. The Defendant's Children's Services and Schools Overview and Scrutiny Committee met on 6 December 2018 and considered a report from the Director of Children's Services outlining the responses received to the consultation. It forecast that the anticipated accumulated £13m overspend of the Dedicated Schools Grant at the end of 2018/19 may increase by an additional £8m in 2019/20. The Committee was asked to note the report's content and comment on the results of the consultation so as to inform the schools' budget setting process, which the Defendant's Cabinet was due to agree at a meeting on 14 February 2019.

11. The Claimant is particularly exercised by the fact that in paragraph 4.9 of the report it says: "*The projected level of overspend is not affordable for schools or the Council and*

therefore it is important that all local partners ***continue to develop and implement plans to bring the cost of high needs services more in line with the Government's grant allocation and / or find alternative sources of funding***" and in paragraph 4.10 "*The Council is required under the Schools Standards and Framework Act to set a schools budget for its area in consultation with the Schools Forum…The Council is required to use the DSG only for the purposes of the schools budget and in accordance with conditions published by the Secretary of State.* ***The Council can however add to the schools budget from other sources.***" [my emphases in bold.]

12. Paragraph 4.11 explains that, where there are to be significant changes to services, consultation should take place with relevant stakeholders "*…at the point where there are sufficiently clear proposals for consultation and before the stage where it would be too late, i.e. before the budget is set in stone so that the savings have to be made.*"

The Grounds of Complaint in brief

13. Miss Leventhal, for the Claimant, argues that there was a clear error of law in the consultation because it made no reference at all to alternative ways of making good the anticipated shortfall of DSG (provided by central government) as against the Defendant's schools budget. The consultation was misleading she says, because consultees were being told the Defendant had to so something and asked what parts of the budget it should reduce, whilst omitting another course – namely, adding to the schools' budget by finding alternative sources of funding. This is a serious issue which needs to be tried.

14. Further, this application is not premature in seeking an order preventing the Defendant from setting its schools budget. The setting of the budget is imminent, there was an irretrievable flaw in the consultation which cannot be self-corrected, the budget will be set in stone next week (or shortly afterwards when a full Council meeting approves the Cabinet's recommendations) and, if the Claimant doesn't act now, she might later be criticised for not acting sooner.

The Defendant's response in brief

15. The Defendant applied to rely upon filed witness statements from Mr Maidment (its Director of Resources and Deputy Chief Executive) and Mr Dodds (Managing Director of the Interested Party). I granted that application. They provided much detail about the complexity of schools finance budgeting, consultations they have undertaken, the interaction between national and local government, etc., etc.

16. Their counsel, Ms Rhee QC, argues that the Claimant's challenge is predicated on the proposition that the Defendant is going to cut SEND provision which will impact upon the Claimant's daughter, whereas the clear purpose of the consultation was (amongst others) to examine how the Defendant might reduce the incontestable overspend in the High Needs Block by transferring funds from the Schools Block (in respect of which the required statutory consultee is in fact the Schools Forum) and reducing spending on the Central Schools Services Block, whilst trying to find ways of spending the 'demand-led' SEND provision more cost-effectively and efficiently.

17. Using Council reserves for these anticipated levels of deficit is self-evidently not sustainable in the long-term, the Department for Education expects the DSG to meet Local Government schools' expenditure and is demanding that local authorities address their overspending over and above DSG by providing detailed plans for remedying their DSG deficits within a specified time frame. Local Government (including the Defendant's officers) continue actively to challenge the Secretary of State for Education about the sufficiency of DSG, particularly in relation to the increasingly expensive demands of SEND provision. It is the Secretary of State who must now decide if the Defendant may transfer more from the Schools Block to the High Needs Block than is usually permitted and if they may transfer more than has been accepted by the Schools Forum. Even if the Secretary of State agrees to the Defendant's request (a decision which is said to be imminent) the Council has not yet made a decision as to whether or not to do that, and if so, whether to make a transfer of the highest amount permitted.

18. The Defendant was most certainly not saying in the consultation that its overspend was going to stop instantaneously in the financial year 2019/20, nor was it saying that it was intending to reduce its provision of SEND services (which it has a number of statutory duties to supply and for which any proposed cuts would require detailed consultations with stakeholders). The consultation was not lacking in sufficient information for meaningful responses – it is difficult to balance the need for intelligibility against the complexity of the subject area – and this document achieved that balance. There was nothing irretrievably flawed about it; the Claimant should wait for the Defendant's budget decision and, if there is any basis for a challenge, to take it then.

The Law

19. In R (on the application of KE) v Bristol City Council [2018] EWHC 2103 (Admin), HHJ Cotter QC granted a judicial review of a schools budget passed by a Council which had substantially reduced the amount of money provided for SEND without having undertaken any specific consultation on the effects of making such cuts with the relevant stakeholders.

20. That is not the case here, where: (a) consultation did take place and (b) in relation to SEND, this Council is seeking to support its expenditure on the High Needs Block, and maintain its service provision, by transferring money from another block. That transfer was consulted upon, both with the statutory consultee (The Schools Forum) and in the consultation subject to this challenge, the outcome of which is the subject of a determination by the Secretary of State, and then the actual budget will be set by the elected representatives in the light of the range of amounts they are notified they may transfer.

21. In R (on the application of Moseley) v Haringey LBC [2014] LGR 823 the Supreme Court considered an appeal concerning a judicial review of a local authority's consultation document about their proposed Council Tax Reduction Scheme (CTRS) (the reimbursement of which from Central Government was going to be restricted to 90% of the previous year's reimbursement of Council Tax Benefit). The Council's consultation document did not reference alternative options for meeting the 10% shortfall beyond its favoured scheme. Moreover, although Central Government then introduced a Transitional Grant Scheme (TGS) under which, upon meeting certain criteria, the effects of the change might be ameliorated, this Council concluded that it

would still face an unacceptable shortfall in receipts and resolved not to amend its draft scheme to comply with the criteria for the TGS and resolved not to bring the TGS to the attention of consultees. The wording of the covering letter to the consultation declared that the change in funding "*means that*" the CTRS in Haringey will directly affect the assistance provided to those below pensionable age and suggested that "*any*" CTRS would need to meet the shortfall in funding by reducing existing levels of benefit.

22. Lord Wilson (with whom Lord Kerr agreed) observed that a common law duty of procedural fairness will inform the manner in which any consultation should be conducted and he quoted some basic requirements set out in R v Brent LBC, ex p Gunning (1985) 84 LGR 168, which includes the need for the proposer to give sufficient reasons to permit of intelligent consideration and response. At paragraph [27] he stated: "*Sometimes, particularly when statute does not limit the subject of the requisite consultation to the preferred option, fairness will require that interested parties be consulted not only upon the preferred option but also upon arguable yet discarded alternative options.*" and at [28] "*even when the subject of the requisite consultation is limited to the preferred option, fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options.*" So, in that particular case Lord Wilson concluded at [29] "*Fairness demanded that…brief reference should be made to other ways of absorbing the shortfall and the reasons why (unlike 58% of local authorities in England…) Haringey had concluded that they were unacceptable."*

23. Lord Reed agreed with Lord Wilson in general, but wished to place less emphasis on the common law duty to act fairly and more upon the statutory context and purpose of the particular duty of consultation. He did not consider that a duty to consult invariably requires the provision of information about options which have been rejected, it depends on the context and the statutory provisions [40]. Even in a case where such a requirement does exist, it does not necessarily mean that there must be a detailed discussion of the alternatives or of the reasons for their rejection [41]. In his view this particular scheme did require enough to be said about realistic alternatives and the reasons for Haringey's preferred choice, so as to enable the consultees to make an intelligent response. The way the consultation was presented as the inevitable consequence of Central Government funding cuts disguised the choice made by Haringey itself and misleadingly implied that there were no possible alternatives. In reality there was no consultation on the fundamental basis of the scheme [42].

24. Lady Hale and Lord Clarke agreed with both of the judgments.

25. There are numerous examples of cases where consultations have been challenged under administrative law principles. I do not intend to set them all out in this judgment. It has been said that the factual context in which the consultation takes place is important in assessing what fairness requires in a particular case and *per* Lord Reed (above) he considered the statutory context to be more important than just the common law duty to act fairly.

26. *"The test is whether the process was so unfair as to be unlawful"*, and "*in reality a conclusion that a consultation exercise was unlawful on the ground of unfairness would be based upon a finding by the court not merely that something was wrong but that something went 'clearly and radically' wrong*", was the way Sullivan, LJ expressed it in R (on application of Baird) v Environment Agency and Arun DC [2011] EWHC 939. Arden, LJ quoted this with approval the following year in R (Royal Brompton and

Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472 when she said "*clear unfairness must be shown*".

27. The latter case addressed the question of whether a challenge to a consultation process may be objected to as being premature, because it does not represent the final decision of a public body. It was acknowledged that it is not easy to know when to make a challenge. Arden, LJ said "[89]…*the judge may properly conclude that, even though there has been a public law wrong, the matter is best dealt with by refusing relief and allowing the decision-maker to consider the matter following completion of the consultation and an opportunity to take appropriate action at that stage*….[93] *In short, it is inherent in the consultation process that it is capable of being self-correcting. This has to be borne clearly in mind. For the various reasons already indicated, the courts should therefore avoid the danger of stepping in too quickly and impeding the natural evolution of the consultation process through the grant of public law remedies and perhaps being led into areas for professional judgment of the decision-maker. It should, in general, do so only if there is some irretrievable flaw in the consultation process.*"

Conclusions

28. There was nothing misleading in the wording of the consultation. It set out the difficult financial landscape accurately and was only stating the obvious about a fast-growing deficit being unsustainable. To explain that it was exploring options with a view to bringing the schools budget "more in line with what we receive from government" and seeking the responses of consultees to some approaches towards achieving that end was a legitimate exercise to undertake.

29. Importantly it was not presenting hard and fast financial proposals in a way which sought to conceal discarded alternatives, thus making it no real consultation at all (as in the Moseley case).

30. There is no prospect, in my view, of the Claimant being able to establish that this consultation process was so unfair as to be unlawful. There is nothing that gets it to the stage of being properly described as 'clearly unfair' or 'clearly and radically wrong'. Therefore, there is no 'serious issue to be tried' which would give rise to the consideration of granting interim relief by way of an injunction preventing the Respondent from setting its budget.

31. This conclusion plainly leads to the inevitable consequence that there are also no arguable grounds for the grant of permission to bring a claim for Judicial Review. Therefore, that application is also refused.

32. The claim was also premature because the Council is plainly well aware and cognisant of the possibility that it may supplement the schools budgets with monies from other funding sources. The committee which was informed of the outcome of the consultation exercise was expressly reminded of this. This serves to reinforce the conclusion I have reached, that there wasn't an irretrievable flaw in the consultation process. Notwithstanding the absence of any reference to alternative funding in the consultation document the democratic process has shown that it has the ability of self-correcting this as the Respondent undertakes its budget setting processes.

33. Even if I were wrong in any of my conclusions above, I would not have considered that 'the balance of convenience' was such that I should stop the Respondent from setting its budget. The proper stage at which to challenge any unfairness or illegality will be once the Respondent has reached its public law decisions in this field.
Otherwise it is difficult to see what exactly the Respondent would now need to do in order to satisfy the Claimant before setting a budget.

34. I rule accordingly. A draft Order has already been submitted to me in the light of my announcement of my conclusions. I agree and approve it.