

Challenging the budget cuts

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The traditional approach – “super wednesbury¹”

1. The courts usually give an extremely wide margin of discretionary judgment to the decision maker in budgetary decisions. For example:

- (i) *R. v Secretary of State for the Environment Ex p. Nottinghamshire CC* [1986] AC 240 where the authority challenged the level of rate support grant on the basis that it differentiated between those that budgeted above and below a measure known as grant related expenditure (GRE). Part of the challenge was based on irrationality. The leading speech on this issue was given by Lord Scarman who said that it was not constitutionally appropriate, save in very exceptional circumstances, for the courts to intervene on the ground of unreasonableness in decisions concerned with the limits of expenditure by public authorities. There were matters of political judgment and not for the courts to decide. Intervention would be justified only if:

“a prima facie case were to be shown for holding that the Secretary of State had acted in bad faith, or for an improper motive, or that the consequences of his guidance were so absurd that he must have taken leave of his senses” [247].

- (ii) This was followed in *R. v Secretary of State for the Environment Ex p. Hammersmith and Fulham LBC* [1991] 1 AC 521 involved challenges by a number of local authorities to their designation for the purposes of charge capping, the Secretary of State having decided that their budgeted expenditure was “excessive”. Lord Bridge said at p. 596:

¹ The term used by Simon Brown LJ in *R (Smith) v MOD* [1996] Q.B. 517 (CA) to describe the extreme deference shown in macro-economic decisions. But in *O'Connor v Adjudication Officer* 9 Mar 1999 CA, Auld LJ said: “It is wrong to deduce from those dicta a notion of “extreme” irrationality. Good old Wednesbury irrationality is about as an extreme form of irrationality as there is”.

“There is here no suggestion that the Secretary of State acted in bad faith or for an improper motive or that his decisions to designate the appellants or the maximum amounts to which he decided to limit their budgets were so absurd that he must have taken leave of his senses. Short of such an extreme challenge, and provided always that the Secretary of State has acted within the four corners of the Act, I do not believe there is any room for an attack on the rationality of the Secretary of State's exercise of his powers under Part VII of the Act”.

And at 597:

“If the decisions have been taken in good faith within the four corners of the Act, the merits of the policy underlying the decisions are not susceptible to review by the courts and the courts would be exceeding their proper function if they presumed to condemn the policy as unreasonable”.

(iii) A modern example of the same principle is *R (Luton BC and others) v S of S Education* [2011] EWHC 217 (Admin). Having held that the Defendant had not misdirected himself Holman J said:

“The Secretary of State and the government are politically answerable for the decisions they have taken. Their reasons may or may not withstand political scrutiny and challenge; but, being satisfied that there is no inherent irrationality about them, I decline further to examine their rationality. To do so would, in my view, be a grave and exorbitant usurpation by the court of the minister's political role.

(iv) See also:

Regina (Friends of the Earth and another) v Secretary of State for Energy and Climate Change (formerly Secretary of State for Business, Enterprise and Regulatory Reform and another) [2010] PTSR 635 (below).

R on the application of Cordant Group PLC v Secretary of State for Business, Innovation and Skills [2010] EWHC 3442 (Admin) para 23 – concerning changes to the national minimum wage scheme. In that case Parker J declined (para 29) to interfere on the basis that the

Defendant had misunderstood the economic consequences of the exercise being undertaken and so had failed to have regard to relevant considerations. In effect the argument invited the court to evaluate the merits and so the restrictive approach outlined above still applied.

2. This cannot be avoided by reliance on Convention Rights because a similar margin applies to socio-economic decisions, at least at a macro level see e.g:
 - (i) *James v UK* (1986) 8 EHRR 123 (legislation for leasehold enfranchisement) – judgment as to what is in the public interest accepted unless “manifestly without reasonable foundation”[46-7], measure not disproportionate if it could be regarded as reasonable and suited to achieving a legitimate aim and a fair balance. [50-2];
 - (ii) *Lithgow v UK* (1986) 8 EHRR 319 (shipyard nationalization) at para 121-2,
 - (iii) *R. (on the application of SRM Global Master Fund LP) v Treasury Commissioner* [2010] BCC 558, [2009] EWCA Civ 788 at 75 (manifestly without reasonable foundation test appropriate where the action – compensation for Northern Rock shareholders - arose in the context of macro-economic policy and even though not motivated by political ideology).
3. This does not mean that decisions of this kind cannot be challenged but only that the threshold is extremely high. Whether the case is analysed in domestic law or in Convention terms the courts have recognized, in theory at least, that the point may come when a decision is unsustainable. For example:
 - (i) *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311 at 57:
 - (ii) *R v Secretary of State for Social Services ex parte CPAG* [1990] 2 QB 540 at p 555.

Whose resources?

4. This is a significant issue because if the resources to be taken into account are necessarily limited then any challenge may produce little benefit since the hands of a decision-maker will still be bound by the amounts that are open to them to spend.
5. In *R (Domb & ors) v LB Hammersmith & Fulham* [2009] EWCA Civ 941 the Cabinet decided to make charges for non-residential care home services and this was the subject of the challenge. There was no challenge to the prior budget decision of the authority that had been made some 3 months earlier and had both set the budget and reduced council tax by 3% (para 8) and this had to be taken as a “fixed datum” (56). This necessarily reduced the department’s room for movement and meant that it was driven to chose between charging and changing the eligibility threshold (61-2).
6. Rix LJ explained that “in another case, it might not be necessary for a local authority to be able to demonstrate, as a matter of its duty to have due regard to the need to promote disability equality that it had considered, in substance and with the necessary vigour, whether it could by any means avoid a decision which was plainly going to have a negative impact on the users of existing services...” [61].
7. As Sedley LJ put it [80]:

“But these [criticisms of the evaluation process] lose significance against the backdrop of a predetermined budget cut. The object of this exercise was the sacrifice of free home care on the altar of a council tax reduction for which there was no legal requirement. The only real issue was how it was to be accomplished. As Rix LJ indicates, and as I respectfully agree, there is at the back of this a major question of public law: can a local authority, by tying its own fiscal hands for electoral ends, rely on the consequent budgetary deficit to modify its performance of its statutory duties? But it is not the issue before this court”.
8. In *R (W) Birmingham CC* [2011] EWHC 1147 (Admin) this issue was avoided because the material prepared for the authority at the relevant dates ought to

have recognized that there were other options than reducing eligibility to critical care needs only [182-3]

9. This leaves open the possibility of challenging a budget decision at the point that it forecloses spending options for various departments. *Domb* and *W* both concerned cuts and the equality duties but there is no reason in principle why the argument should end there.

10. A similar issue arises for central government. In *Friends of the Earth* (below) the point was taken that the Defendant Secretary of State could require an increase in central funds and so could not rely in defence on his own limited budget. The Court of Appeal rejected this argument and accepted the analysis put forward by counsel for the Defendant:

“Parliament...lays out the expected cash and resource expenditure of each department over the forthcoming financial year. Parliament—in fact, the House of Commons—passes a resolution approving them and an Appropriation Act is later passed for the year in question. Schedule 2 to each Appropriation Act sets out the allocated funds for each department and sets out, in broad terms, the purposes for which the money may be spent. This is not necessarily the end of the matter. If a need for additional funds arises, supplementary estimates may be presented by HM Treasury to Parliament to seek increased resources for particular purposes during the financial year. When approved, these are enshrined in a further Appropriation Act .

“Against this background, Mr Coppel submits that, if the claimants are correct in their interpretation of section 2 of the 2000 Act, HM Treasury would have to assume that, each year, there would have to be allocated sufficient money to permit the eradication of fuel poverty in accordance with the strategy, save to the extent that the cost would be disproportionate to the expected benefit. Given that public finance is limited, the eradication of fuel poverty would have to be prioritised over other government commitments such as the National Health Service, education, defence, policing etc because they are not the subject of a statutory obligation such as that found in section 2 . Mr Coppel submits that this would be “constitutionally startling” and that it is inconceivable that, in the absence of clear and unambiguous language, Parliament intended to bypass the long-established constitutional processes and controls in respect of public expenditure. I accept this submission—which was rejected by McCombe J. In my judgment, having regard to the unanticipated scale of the increase in fuel prices, I do not consider that the Secretary of State was in error if he considered reasonable practicability at least to some extent by reference to departmental budgets. Section 2 does not require or permit the Secretary of State to spend in a particular year vastly more on the eradication of fuel poverty than has been made available for that purpose by the Appropriation Acts. It is also relevant that the duties under

section 2 are imposed on the Secretary of State and not on HM Treasury or the Government as a whole and that it is the Secretary of State who is the defendant in this claim for judicial review. **I reach these conclusions with a degree of relief because it seems to me that, if the position were otherwise, the scene would be set for a wholly undesirable judicialisation of public spending priorities**".

11. For the purposes of the ECHR financial resources that may be relied on to establish justification are the resources of the decision maker. This follows because s. 6 of the HRA 1998 imposes a duty on the individual public authority not to act incompatibly with Convention rights rather than imposing a duty on the state as a whole – *Morgan v MOJ* [2010] EWHC 2248 (QB). Similarly in *R v Chief Constable of Sussex* [1999] 2 AC 418 the public policy justification (under Art 36 of the EC Treaty) for not deploying greater numbers of police officers to police protests against livestock exports was assessed by reference to the resources available to the Chief Constable and not the UK as a whole.

The boundaries of Super-Wednesbury

12. It is important to recognize the limits of cases like *Nottinghamshire* and the types of challenge that they do not prevent.

Budget-based decisions relating to an individual

13. The comments above related to national economic policy, subject either expressly or implicitly to Parliamentary scrutiny. This high level of discretionary judgment is not confined to decision making at this level. It extends to other cases where similar judgments have to be made:

[R \(London and Continental Stations and Property Ltd\) v The Rail Regulator \[2003\] EWHC 2607 \(Admin\)](#) Moses J, *R (Centro) v Secretary of State for Transport* [2007] EWHC 2729 Admin (paragraph 36) (both dealing with transport subsidy), *R v Hillingdon LBC ex p Pulhofer* [1986] AC 484, 518D-E, (homelessness), *Lambeth LBC v Ireneschild* [2007] EWCA Civ 234 at § 44 (community care) and *R(Bishop) v Bromley LBC* [2006] EWCA 2148 (Admin) at § 24 (closure of day centre). [Reg. v. Cambridge Health Authority, Ex parte B. \[1995\] 1 W.L.R. 898](#)– withholding life-sustaining treatment from a child. The authority was not required to adduce evidence of its costs.

14. However, the Court may still be persuaded to take a closer look where the issues do not concern the same kind of generalised decision, particularly where fundamental rights are at stake:

R (Otley) v Barking and Dagenham NHSPCT [2007] EWHC 1927 (Admin) a decision not to fund cancer treatment was held to be irrational where on any view of the policy (which provided for funding in exceptional cases) this case was exceptional. The funding sought was for a trial of 5 cycles and so involved little financial commitment so that it did not place the Trust's duties to other patients at risk and there were no other treatments available.

15. Similarly under the ECHR the Court is more ready to balance competing interests where interference with a Convention right happens in a specific case and outside "the context of a process of economic social or political reform" – *Scordino v Italy* 2007 45 EHRR 7 where failure to pay compensation at full value when property was expropriated imposed an excessive and disproportionate burden on the applicant and so was a breach of Art 1 Prot 1.

16. In some cases the strength of the Convention right may be sufficient to outweigh reliance on resources altogether – see *R (Clue) v Birmingham CC* – below.

17. Even here though the state will still be given a wide margin of discretion in "implementing social and economic policies necessary to secure social justice and public benefit" – *Belcic v Croatia* (2005) 41 EHRR 13 (concerning an individual decision to re-possess a flat after a prolonged absence by the tenant).

Decisions that do not attack the judgment on the merits

18. The highly restrictive approach applies only once the court has decided that the ministerial action in question does not contravene the requirements of the statute, whether express or implied [Hammersmith at p. 597]. Action may also be struck down, even where it touches on national economic policy on other public law grounds, for example if it has followed an unfair procedure or

frustrates the policy of the statute as the court decides it to be – *Padfield v MAFF* [1968] AC 997.

“if there are matters which, on the true construction of the statute conferring discretion, the person exercising the discretion must take into account and others which he may not take into account, disregard of those legally relevant matters or regard of those legally irrelevant matters will lay the decision open to review on the ground of illegality”

Possible challenges

Who is the relevant decision-maker?

19. S. 13(2) of the Local Government Act 2000 provides that most functions of an authority are the responsibility of the executive.
20. This is subject to exceptions in the 2000 Act or any other enactment and in Regulations made under the section. The Regulations are the Local Authorities (Functions and Responsibilities) (England) Regulations 2000/2853.
21. Calculation of the annual budget is a matter reserved to the full council and cannot be devolved to the executive – Local Government Finance Act 1992 s. 67(1)(d). This refers to the calculation of the budget and this task is carried out on the basis of estimates provided by the executive to the full council.
22. Execution of the matters provided for in the budget is a matter for the executive. However, by schedule 4(2) of the Regulations, this does not apply where the executive (in a non-urgent case) is
 - (a) minded to determine the matter [i.e. a matter concerned with the authority’s budget or their borrowing or capital expenditure] contrary to, or not wholly in accordance with—
 - i. the authority's budget; or

ii. the plan or strategy for the time being approved or adopted by the authority in relation to their borrowing or capital expenditure; and

(b) is not authorised by the authority's executive arrangements, financial regulations, standing orders or other rules or procedures to make a determination in those terms.

23. Paragraph 4(2) makes similar provision where the executive is minded to determine any matter in a manner which departs from “plan or strategy (whether statutory or non-statutory)...adopted or approved by the authority” in respect of that matter.

24. This raises the possibility that the council in full meeting may limit the executive’s freedom of action. Decisions which appear to remove funds from one type of service for which budget provision has been made or to re-allocate them to another may require the approval of the full council rather than being made by the executive alone. Similarly, the Regulations do not identify what may be the subject matter of a plan or strategy for these purposes and so a plan might be adopted that requires expenditure on particular projects or for services to be provided of a particular kind. It will not then be open to the Cabinet to reach a contrary decision without reference to the full authority.

Cases where on a proper construction of the statute the decision-maker may not have regard to resources

25. Ordinarily where there is an unstructured or open-ended discretion then the decision maker may have regard to resources. This is so, even where the statute imposes a mandatory duty. For example *Regina (Friends of the Earth and another) v Secretary of State for Energy and Climate Change (formerly Secretary of State for Business, Enterprise and Regulatory Reform and another)* [2010] PTSR 635 concerned s. 2 of the Warm Homes and Energy Conservation Act 2000 under which the Defendant was obliged to prepare and publish a strategy setting out policies for reducing fuel poverty in England “as far as reasonably practicable” and specifying target dates for achieving

that objective. The Defendant was obliged to take such steps as were in his opinion necessary to implement the strategy, and from time to time to assess progress and revise the strategy as considered appropriate”. Despite the Act fuel poverty had increased since it had been passed, mainly because of rising fuel prices.

26. The CA agreed with McCombe J that the Act used the language of effort to achieve targets rather than a guarantee that targets will be reached. It rejected a submission that while the Defendant could choose the route he could not choose the destination and so was bound to achieve the specified outcome.
27. The CA also noted the number of recent Acts that were framed in a similar way, imposing a route from “policy, via strategy, to implementation in terms of legal obligation within a temporal framework”. These included the [Climate Change and Sustainable Energy Act 2006](#), [Climate Change Act 2008](#), and now, the [Child Poverty Act 2009](#). Some, it noted, were harder edged than others and “On any view, this is a rapidly developing area of public law with an obvious and concerning potential for litigation”
28. The 2000 Act was one of the softer edged ones and it permitted the Secretary of State to have regard to budgetary considerations in deciding what steps were necessary to meet the targets in the Strategy. However, the Court accepted that this would not enable him to fall below the minimum standard to be attained in the performance of the duty. Significantly the Secretary of State accepted (and this was apparently accepted by the Court) that to eliminate winter fuel payments in their entirety or cut Warm Front funding to zero would be a breach. Neither of these were express requirements of the Act but they were key elements of the strategy.
29. But not all decisions, even those that involve a judgment being made by the authority, allow the authority an unfettered ability to take account of budgetary concerns. Examples are:

Where the Act, properly construed, imposes a duty to Act that cannot be avoided by reference to resources:

30. *R v East Sussex CC ex p Tandy* [1998] AC 714 – “suitable education” in what is now s. 19 of the Education Act 1996 dealing with home provision meant suitable (s. 298 Education Act 1993) meant suitable, having regard to the child's age, ability, aptitude and needs. Resources were not relevant to that assessment and could not justify a reduction in the number of hours from 5 to 3 per week. Where the Act is framed in terms of a duty then it is more likely that resources will be held to be irrelevant –

“Once the reasonableness of the actions of a local authority depends upon its decision how to apply scarce financial resources, the local authority's decision becomes extremely difficult to review. The court cannot second-guess the local authority in the way in which it spends its limited resources: see also [Reg. v. Cambridge Health Authority, Ex parte B. \[1995\] 1 W.L.R. 898](#), especially at p. 906D-F. Parliament has chosen to impose a statutory duty, as opposed to a power, requiring the local authority to do certain things. In my judgment the courts should be slow to downgrade such duties into what are, in effect, mere discretions over which the court would have very little real control. If Parliament wishes to reduce public expenditure on meeting the needs of sick children then it is up to Parliament so to provide” Lord Browne Wilkinson at p. 748.

31. *R (Conville) v Richmond upon Thames LBC* [2006] 1 WLR 2808 – duty to provide accommodation for such time as will give the applicant a reasonable opportunity to secure accommodation is to be judged from the point of view of the applicant so that the authority's resources are not relevant.

32. *R v Birmingham CC ex p Mohammed* [1999] 1 WLR 33 – resources irrelevant in deciding whether to provide a disabled facilities grant.

33. *R (Noorkoiv) v Secretary of State for the Home Department* [2002] 1 WLR 3284 – duty to provide a hearing under Art 5(4) within a reasonable time.

34. The more specific and precise the duty the more likely it is that the duty is an absolute one – *R (G) v Barnet LBC* [2004] 2 AC 208.

35. But see to the contrary: *R v Gloucestershire BC ex p Barry* [1997] AC 584 – resources relevant in deciding what is necessary to meet community care needs.

Where, even though resources can be taken into account, provision cannot fall below a minimum standard:

36. *Regina (Friends of the Earth and another) v Secretary of State for Energy and Climate Change (formerly Secretary of State for Business, Enterprise and Regulatory Reform and another)*[2010] PTSR 635 – resources relevant in deciding what was necessary to implement fuel poverty strategy but could not justify failure to make minimal provision such as winter payments.
37. *R (Limbuella) v Secretary of State for the Home Department* [2006] 1 AC 396.
38. [*R \(Calgin\) v Enfield London Borough Council* \[2006\] 1 All ER 112](#) (out of district accommodation – accommodation within district to be provided “so far as reasonably practicable”. Elias J said, at para 34: “There is a minimum standard below which the council cannot fall, and lack of resources will not justify going below that standard”
39. If there is more than one way of meeting the minimum then that is within the discretion of the authority:

‘it is a matter of judgment for the authority to decide what accommodation on the spectrum of suitable accommodation to select’ per Dyson J in *R v Newham London Borough Council, Ex p Sacupima* (1999) 33 HLR 1 , para 23.”

Where the decision-maker must exercise a discretion or judgment but resources have to be allocated to achieve a particular object:

40. *R v Secretary of State for Social Security ex p CPAG* [1990] 2 QB 540 – Secretary of State had a discretion as to the number of adjudicators to appoint but “this is a discretion to be exercised reasonably, taking into account the

legislative scheme requiring the expeditious disposal of claims within 14 days where this is practicable”.

41. See also *Friends of the Earth* (above) .

Misdirection – failure to have regard to relevant factors

42. It has always been clear that in order to benefit from the wide margin allowed by cases such as *Nottinghamshire* the decision maker must act within the four corners of the statute.

43. *R Police Federation of England and Wales v Secretary of State for the Home Department* [2009] EWGC 488 (Admin) – Home Secretary making a decision to delay updating commutation factors for police pensions when the decision was not a matter for her but for the Government Actuary.

44. *R (Mersin) v Home Secretary* [2000] INLR 511 –delays in granting leave to remain unlawful because although the allocation of resources to decision-making was a matter for the minister the system failed to take account of the difference between those who had succeeded on appeal and so had a right to be granted leave and others.

45. *R v Secretary of State ex p JCWI* [1997] 1 WLR 275 – Subordinate legislation cannot be used to deny benefits to late asylum claimants where the effect would be to prejudice, and on occasion defeat, the rights of asylum seekers to claim asylum.

46. *R (Clue) v Birmingham CC* [2011] 1 WLR 99 – an authority cannot exercise its powers to determine applications for assistance under the Children Act 1989 in such a way as to undermine the power of the Secretary of State to determine applications for leave to remain. Where an application has been made that is not obviously abusive then the authority cannot decline to provide support on economic grounds pending to outcome of the assessment.

47. In some cases the statute imposes a statutory mandatory consideration that must be given particular weight. This does not override budgetary considerations but does require that the decision-maker give specific conscious consideration to the issue and that they address whether or not there are factors justify departing from it. The equality duties are an example of this kind of technique. Others are the duties in s. 11 of the Children Act 2004 and s. 55 of the Borders Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children.

Consistency

48. Where a restrictive policy is adopted then it must be internally consistent. If it provides for funding, or a service to be provided in exceptional cases then it must be possible to envisage what exceptional case there might be. Otherwise the policy may be a fetter by another name.

49. *North-West Lancashire Health Authority v A, D, and G* [2000] 1 WLR 977. D's policy recognised gender identity dysphoria as an illness but would not fund gender reassignment surgery except in cases of "overriding clinical need or exceptional circumstances". It was permissible for the authority to leave the exceptional category undefined but examination of the authority's other policies showed that it did not really accept that the condition was one that required any treatment other than counselling and this "makes a nonsense of the policy if, as a matter of its medical judgment, there is no effective treatment for it for which there could be an overriding clinical need". In effect the authority operated a blanket ban.

50. *R (Rogers) v Swindon NHS PCT* [2006] 1 WLR 2649. D's policy was not to fund the use of Herceptin except in exceptional clinical or personal circumstances. This was not a case where resources were relevant because the authority had funds available. The Court of Appeal explained Lancashire as follows:

“As we see it, that means that a policy of withholding assistance save in unstated exceptional circumstances (in the case addressed by Auld LJ, and no doubt in this case also, overriding clinical need) will be rational in the legal sense provided that it is possible to envisage, and the decision-maker does envisage, what such exceptional circumstances might be. If it is not possible to envisage any such circumstances, then the policy will be in practice a complete refusal of assistance: and irrational as such because it is sought to be justified not as a complete refusal but as a policy of exceptionality” [62]².

Consultation

Basic requirements

“The test of what constitutes a fair consultation process was explained by Lord Woolf MR when giving the judgment of the Court of Appeal in R v. North and East Devon Health Authority ex parte Coughlan [2001] QB 213 , 258 [108] where he stated that:—

“To be proper, consultation must be undertaken at a time when proposals are still at a formative stage. *It must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response* ; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken” (italicisation added).

42. Lord Mustill also explained in R v. Secretary of State ex parte Doody [1994] 1 AC 531 , 550 that:—

“(5) Since the person affected cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer”.

43. In order to determine whether proper consultation in this particular case has taken place, it must not be forgotten that:—

“... the precise demands of consultation ... there according to the circumstances. The extent and method of consultation must depend on the circumstances. Underlying what is required must be the concept of fairness” (per Keene J (as he then was) in R v. London Borough of Islington ex parte East [1996] ELR 74 at page 88 relying on a passage in the judgment of Simon Brown LJ in R v. Devon County Council ex parte Baker [1995] 1 All ER 73 , 92).

² On the facts of this case the authority had decided that resources were not an issue. Once that was out of the way there was no rational basis for distinguishing between R and other patients.

(cited in *Capenhurst – below* at para 41-3).

See also the Cabinet Office Code of Practice on Consultation at

<http://www.bis.gov.uk/files/file47158.pdf>

51. When does the duty arise?

- (i) Where statute so provides.

- (ii) Where there is an unequivocal assurance of consultation arising from either:
 - i. an express promise of consultation.

 - ii. An established practice³.

 - iii. Where it will be an abuse of power not to consult. This will be the case where “the impact of the authority’s past conduct on potentially affected persons must, again, be pressing and focused. One would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit: not necessarily for ever, but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult” – Laws LJ in *R (Bhatt Murphy v the Independent Assessor* [2008] EWCA Civ 755. This will not be made out merely because the authority changes its policy or practice because such a change will not involve an abuse of power.

³ As recognized in *Luton (above)* this may depend on how one defines the scope of the prior practice. In that case there was no practice of consultation on scrapping the entire BSF policy but there had been a practice of consultation or dialogue in respect of the implementation of the previous policy.

iv. There may well also be a duty to consult where it would be unfair not to do so or where it is necessary to allow the decision-maker to apprise itself of necessary information. In *R (Eisai Ltd) v NICE* [2008] EWCA Civ 438, the Court of Appeal held doubted that the National Institute for Clinical Excellence (NICE) could avoid the need to consult over the licensing of medication for Alzheimer’s sufferers given the interests at stake and its obligation to, among other things, “develop a process to enable it to ascertain and take into account the views of the general public, and to make provision for an appeal on grounds of procedural fairness” (Para 24).

52. Where an authority decides voluntarily to consult then it must do so fairly and must observe the principles set out above – *R (Capenhurst & ors) v Leicester CC* [2004] EWHC 2124 (Admin) at paras 18 and 42.

Formative stage/conscientious consideration

53. These are often two sides of the same coin. The authority must start with its mind open to change and must genuinely consider relevant factors bearing on the decision. In practice challenges rarely succeed on these grounds. In particular, the court will not often find that the consultation only happened after the decision was made so that the authority had pre-determined the issue.

(i) In *R (Chavda) v LB Harrow* [2007] EWHC 3064 (Admin) the leader of the council expressed concern about the consultation exercise leaving open a “no change” option because it was “very unlikely” it would be adopted. The Claimant argued that the decision was already taken. The officers also failed to put an objection from the PCT before the council and it was said that the case had not been conscientiously considered. The argument failed because taken as a whole the consultation was full and other witnesses said that the matter remained open.

(ii) This is consistent with the caselaw on bias and councillors' prior statements or pre-dispositions to a particular outcome where the test is whether there was a closed mind or a real risk of a closed mind but this will not lightly be inferred— *R(Lewis) v Redcar & Cleveland BC* [2009] 1 WLR 83⁴. If clause 14 of the Localism Bill 2011 becomes law then this will be on a statutory footing. That clause provides:

“(1) Subsection (2) applies if—

(a) as a result of an allegation of bias or predetermination, or otherwise, there is an issue about the validity of a decision of a relevant authority,

and

(b) it is relevant to that issue whether the decision-maker, or any of the decision-makers, had or appeared to have had a closed mind (to any extent) when making the decision.

(2) A decision-maker is not to be taken to have had, or to have appeared to have had, a closed mind when making the decision just because—

(a) the decision-maker had previously done anything that directly or indirectly indicated what view the decision-maker took, or would or might take, in relation to a matter, and

(b) the matter was relevant to the decision”.

(iii) A counter example is *R (Boyejo) v Barnet; R (Smith) v Portsmouth CC* [2009] EWHC 3261. In the Portsmouth case it was held that the consultation had not happened at a formative stage although this was one of a series of defects in the process. The conclusion appears to have been reached as a result of a combination of:

- i. The language used which conveyed the impression of dealing with questions about a process that had already been decided rather than consultation on proposals.

⁴ How far this can go is shown by the approval of the decision in *Condrón v National Assembly for Wales* [2006] EWCA Civ 1573; [2007] LGR 87, CA where no pre-determination was found despite a statement by a councillor before the meeting that “I’m going to go with the inspector’s report...”

- ii. The lack of consideration of alternatives.
- iii. The speed with which a final decision was made following the last of the consultation meetings.

Sufficient information

54. Most successful challenges to the adequacy (as opposed to the absence) of consultation relate to this factor. The Courts are prepared to be generous in construing consultation documents and will assess what the proposals were reasonably understood as meaning against the other background information available to the consultees (see e.g. *R (Hajrula) v London Councils* [2011] EWHC 448 (Admin) at Para 50). However, sufficient information means that the consultee must know not only what the proposal is in sufficient detail but also the factors that are likely to be of importance in the individual decision or the basis on which the decision will be taken.

- (i) In *Capenhurst* (above) the council decided to cut grant funding for 6 bodies. In advance of the decision it had told them that it would only fund “core” projects but it did not explain that projects would only be core if they met the statutory requirements of the council as well as its strategic objectives. The lack of information prevented the consultees from presenting properly focused submissions.
- (ii) This was applied in *Devon CC v Secretary of State for Communities and Local Government* [2010] EWHC 1456 (Admin). The Secretary of State consulted on proposals for Exeter CC and Norwich CC to become unitary authorities. He set out 5 criteria including affordability and value for money. He later decided to dispense with those requirements in view of the economic downturn. The decision was quashed because the consultees would otherwise have presented their objections differently.
- (iii) In *W v Birmingham CC* a consultation challenge succeeded because it failed properly to focus on the equality duty. In addition it was confusing and did not make clear that the necessary savings could be made from other parts of the budget while retaining services for those with substantial needs. What mattered here was how the consultation

materials would be generally understood and it was not sufficient for the Defendant to point to the fact that some consultees understood the true position [189]

- (iv) Consultees may also be entitled to sufficient information about the reasons relied on by the decision-maker to enable them to challenge the accuracy of any facts and the validity of any arguments upon which the reasons are based – objectors should be given sufficient information about the reasons relied on by the department as justifying the draft scheme to enable them to challenge the accuracy of any facts and the validity of any arguments upon which the departmental reasons are based” – [Bushell v Secretary of State for the Environment \[1981\] AC 75](#) , at p.96⁵. In *Eisai* (above) this required the disclosure to the Claimants of a fully executable version of the Defendant’s economic model so that the Claimants could carry out their own checks as to its accuracy.

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1 JUNE 2011

⁵ This may require the decision-maker to disclose advice that it has received - *R v Secretary of State for Health, ex parte United States Tobacco International Inc* [1992] 1 QB 353.

“Challenging the Budget Cuts”

Robert Latham,
1 June 2011

1. Introduction

All public authorities are having to make substantial cuts in their budgets over the next three years as a result of the Comprehensive Expenditure Review which was announced on 20 October 2010. This paper considers the recent case law. It then goes on to consider the principles which can be drawn from the cases in respect of public sector equality duties (PSEDs).

In all these cases the PSED arose from the Race Relations Act (RRA) 1976; Sex Discrimination Act (SDA) 1975 and the Disability Discrimination Act (DDA) 1995). On 5 April 2011, the new PSED under s.149 Equality Act 2010 came into force in England, Scotland and Wales. No Code of Practice has yet been issued, but the EHRC have issued 5 non-statutory guides.

The PSED in the Equality Act (EA) 2010:

- (i) Provides a uniform PSED which builds on the existing PSEDs which have evolved incrementally (race since 2 April 2001; disability - 4 December 2006; gender – 2 April 2007).
- (ii) Builds on and expands the previous disability duty.
- (ii) Extends the duty to the eight protected characteristics.
- (iii) s.149(6) permits an authority to treat some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act. More favourable treatment of disabled people is permitted (s.13(2)). Different treatment on grounds of age is the treatment can be shown to be a proportionate means of achieving a legitimate aim (s.13(3)). More favourable treatment may also be justified as “positive action” under s.158.

The current and previous duties are set out in the Appendix.

2. The Recent Cases

R (Chavda and others) v Harrow LBC [2007] EWHC 3064 (Admin); HHJ Mackie QC (20 December 2007)

C challenged D’s decision to restrict adult care service to people with critical needs. After D’s proposal, an equalities impact assessment was made and a report prepared for D’s cabinet. The assessment addressed different groups of service users and found a risk of impact on various individuals, but it did not address the disability equality duty owed by D under s.49A

Disability Discrimination Act (DDA) 1995. A summary with the report simply stated that implementing the proposal could result in potential conflict with that Act.

C challenged the decision on two grounds:

(i) Human Rights (Articles 3 and 8): This aspect of the challenge was found to be premature. Any violation of Convention rights did not arise when a local authority took a decision that potentially violated such rights, but rather when an individual contended that a violation of Convention rights had occurred.

(ii) Breach of D's disability equality duties under s.49A DDA 1995. This aspect succeeded. There was no evidence that the legal duty and its implications were drawn to the attention of the decision makers who should have been informed, not just of the disabled as an issue, but of the particular obligations that the law imposed. It was not enough for the summary attached to the report to refer obliquely to potential conflict with the DDA 1995. Such a reference did not give a busy councillor any idea of the serious duties imposed upon the local authority by the DDA 1995, and D could not and did not weigh matters properly in the balance without being aware of what its duties were.

R (Kaur and Others) v Ealing LBC (EHRC Intervening) [2008] EWHC 2062 (Admin); Moses LJ (29 July 2008)

C challenged D's decision to award funds to a provider who would provide services to all individuals experiencing domestic violence within the borough irrespective of their ethnic origin. C were recipients of services from Southall Black Sisters which provided specialist services to Asian and Afro-Caribbean women particularly in relation to issues arising from domestic violence. D decided that rather than funding individual organisations under sponsorship agreements it would commission borough-wide services from community and voluntary organisations by open competition according to published criteria.

The challenge succeeded on two grounds:

(i) Breach of D's race equality duty under s.71 Race Relations Act (RRA) 1976: There had been no full racial equality impact assessment until sometime after the proceedings were launched. That failure established a clear breach of s.71. In determining as criteria that the provider should be a single source of services to all throughout the borough or a consortium with a single leader before a full racial equality impact assessment had been undertaken, D had acted unlawfully. Moreover it was wrong to fix on a solution with only the prospect of monitoring its effect on minorities in the future. Once the authority had identified a risk of adverse impact, it was incumbent upon it to consider the measures to avoid that impact before fixing on a particular solution. Moreover D adopted an incorrect approach to the statistical data of the incidence of domestic violence and reached a perverse conclusion that there was no correlation between domestic violence and ethnicity.

(ii) Rationality: D erred in believing that cohesion could only be achieved through making a grant to an organisation which would provide services equally to all within the borough and that any other decision was contrary to s.35 RRA 1976.

R (Brown) v SofS for Works and Pensions and SofS for Business Enterprise and Regulatory Reform (Royal Group Limited and Post Office Limited (Interested Parties) and (EHRC Intervening)) [2008] EWHC 3158 (Admin); Scott Baker and Aikens LJ (18 December 2008)

C challenged the actions of D1 and D2 relating to the post office closure programme. C alleged that D had breached their equality duties in various aspects in respect of the government's post office closure programme. All aspects of the claim failed.

Aikens LJ summarises the principles established by recent case law at [90] – [96]).

R (Domb and Others) v Hammersmith & Fulham LBC [2009] EWCA Civ 941; Lord Clarke MR, Sedley LJ, Rix LJ (19 December 2008)

C challenges D's decision to charge for its non-residential home care services. D faced increasing financial pressure on its budget, including its social services budget. Officers identified two ways of bridging the gap in funding by: (i) increasing the threshold eligibility criteria or (ii) introducing charges for them. On 17 January 2008 the Council embarked on a three month consultation process on the possibility of re-introducing a home care charging scheme. Meanwhile, on 4 February 2008, the Council agreed the budget for 2008/9. This included a 3% cut in the council tax. This decision was taken in the context of a medium term financial strategy; a forecast of increasing spending on home care services because of demographic changes and restrictions on funding on a national level.

C challenged the decision on two grounds:

(i) Legitimate expectation – this failed at first instance and was not renewed on appeal.

(ii) Breach of D's equality duties under s.49A DDA 1995; s.76A Sex Discrimination Act (SDA) 1975 and s.71 RRA 1976. This challenge also failed.

During the course of the appeal, C conceded that the 3% council tax was a fixed datum. This decision had not been challenged at the time. It could no longer be asserted to be a component in the submission of a failure to have due regard to the Council's positive duty to promote equality of opportunity. In substance, D had therefore had two options namely to (i) introduce the charges or (ii) restrict the eligibility criteria. All members of the Court voiced misgivings as to how this issue had been approached. Sedley LJ summarised his concern in these terms:

“There is at the back of this a major question of public law: can a local authority, by tying its own fiscal hands for electoral ends, rely on the consequent budgetary deficit to modify its performance of its statutory duties?”

R (Boyejo) v Barnet LBC; R (Smith) v Portsmouth CC [2009] EWHC 3261 (Admin); (2010) CCLR 72; HHJ Milwyn Jarman QC (15 12 2009)

C challenged Ds' decisions to withdraw resident wardens or staff from sheltered housing schemes on three grounds, all of which succeeded:

(i) Breach of Ds' equality duties under DDA 1995. The Judge provides a useful analysis of the case law at [49]- [59]

(ii) Consultation: The disability discrimination duty had raised an expectation that C would be consulted. D2 had failed to do so.

(iii) Rationality: D1's conclusion in their impact assessment report which stated that the proposed changes did not and could not have an adverse impact on members of equality groups was found to be *Wednesbury* unreasonable. D2's assessment did not deal with whether there could be a different impact, as originally asked. This was also found to be *Wednesbury* unreasonable.

R (Fawcett Society) v Chancellor of the Exchequer [2010] EWHC 3522 (Admin); Ouseley J (6.12.2010)

This was a renewed application for permission in which C sought declaratory relief in respect of the 2010 Budget on the ground that the Government had failed to carry out an equality impact assessment. C had initially sought a quashing order. Permission was refused on grounds of both merits and the delay.

The first aspect of the challenge related to the whole budget. D pointed out that no other government had produced an equality impact at this stage. The Judge accepted D's argument that an assessment can lawfully be carried out by the subsequent consideration of the line items in the Budget.

The second aspect related to the public expenditure envelope set out in the Budget. These were broken down into various categories.

(i) Items which had been passed into legislation by the Finance Act (No.2) 2010: The Judge was satisfied that some (such as corporation tax and MP's expenses) were not going to give rise to gender impact issues. Others (such as VAT increases) did have such an impact, but an assessment had been carried out. In any event, a continued challenge to legislation which had been enacted was academic.

(ii) The government conceded that it should have carried out assessments at an earlier stage in respect of items relating to the upgrading of benefits by CPI rather than RPI and the freezing of public sector pay. The Court accepted that this aspect of the claim was now academic.

(iii) The final categories related to items for which no assessment was required because they had no real prospect of a disproportionate effect on gender. There were some items where an impact assessment would be carried out and taken into account once the terms of the policy had been sufficiently developed. A judgement as to the point of time by which the policy has been formulated fit for assessment was one for the government which could only be challenged on grounds of irrationality.

The original proceedings to quash the Budget were started some 5 weeks after the Budget, by which date some of the measures had already passed into law. These proceedings were capable of having a very significant impact on the important issues of the Budget for a new government. They should have been brought much more quickly.

R (Hajrula) v London Councils [2011] EWHC 448 (Admin); Calvert-Smith J (28.1.11)

C, users of a Roma support group, challenged the decision by D to withdraw the group's funding. D was a body created by the London Boroughs and the City of London to make grants to voluntary organisations whose remit extended beyond individual boroughs.

The Challenge was brought on two grounds:

(i) Consultation: The Judge concluded that C's complaints about the identification, explanation and communication of information were unfounded, save in so far as they related to the second ground.

(ii) Failure to discharge equality duties. The Judge found that the equality duties process had been vitiated from the outset and had never been put right.

Remedy: The funding decisions were quashed except where individual service providers had consented to them. D was required to carry out a proper equality impact assessment and to reconsider its service categorisation. However, its decisions regarding the future of the grant scheme remained valid.

R (Luton BC and others) v SofS Education [2011] EWHC 217 (Admin); Holman J (11.2.11)

C, five local authorities, challenged D's decision to stop school building projects which had been earmarked under the Building Schools for the Future programme. After the change of government in May 2010, D decided on July 5, 2010 to end it. The projects affected were principally those which had received "outline business case" approval after January 1, 2010, but which had not received "final business case" approval (from which a promise of funding flowed) by July 5, 2010.

(i) Rationality: It was contended that the SofS's selection of January 1, 2010 as the cut-off date was arbitrary and irrational and bore no relation to any date in the BSF programme or process. This argument was rejected: the decision was patently political with heavy macro-economic content.

(ii) Fetter of Discretion: The Judge was satisfied that rules were applied in a hard-edged way, with no individual discretion.

(iii) Legitimate expectation. The judge was satisfied that the outline business case approvals did not create a substantive legitimate expectation that any given project would definitely proceed. Further, the law recognised that public bodies, and especially central government, enjoyed a wide discretion to change policies from time to time to reflect their conception of the public interest.

(iv) Consultation: The way in which D abruptly stopped those projects, without any prior consultation with C, was found to be so unfair as to amount to an abuse of power

(v) Failure to discharge equality duties: Neither the papers prepared for ministers in the period May to July 2010, nor the decision itself, contained any reference to disability, race or gender need or impact. It seemed that no regard was had to the relevant duties at all, let alone rigorous regard.

Remedy: Relief was restricted to these 6 authorities. The Judge noted that the decision had been made 7 months previously and that any other authority would now be too late to apply for judicial review. Fortune had favoured the brave.

R (Rahman and others) v Birmingham CC [2011] EWHC 9444 (Admin), Blake J (31.3.11)

C challenged D's decision to stop funding legal advice services which they used. The services were supplied at centres run by voluntary agencies to advise ethnic minorities and the physically or mentally disabled of their legal entitlements. However, in order to reduce its budget, D decided to terminate the funding.

C successfully argued that D's decisions were unlawful because it was taken in breach of its equality duties. The initial decision was unlawful because there was no evidence that the decision-makers were aware of their equality duties. And although by the time of the second decision, the decision-makers were aware of the equality impact needs assessment that assessment was also defective because it had focused upon the advantages to be derived from a new policy rather than the degree of disadvantage to existing users of terminating funding arrangements until new arrangements could be put in place. Further, it had not been based on adequate consultation.

The Judge found that even where the context of the decision-making was a local authority's limited financial resources, that did not excuse compliance with the equality duties. Indeed, there was much to be said for the proposition that in straightened times the need for clear, well-informed decision-making when assessing the impacts on less-advantaged members of society was as great, if not greater.

The Judge dealt with the additional arguments on rationality and consultation summarily. Their true context lay within rather than separate from the public sector equality duties.

Remedy: The judge held that it was necessary for the current funding to continue until either the services were recommissioned or a lawful decision to terminate had been made.

R (W and others) v Birmingham CC [2011] EWHC 1147 (Admin); Walker J (19.5.11)

C challenged D's decision to reduce its budget for adult social care by £51m for 2011/2 by restricting the provision of support for people with disabilities to those whose needs were assessed to be critical. Previously, services had also been provided for users with "substantial needs". C were all severely disabled adults who, as recipients of adult social care services from the local authority, had a direct interest in that decision since each had a mixture of substantial and critical needs. C challenged both the decisions of D's full Council (1 March) to approve the budget and Cabinet (14 March) to approve the new social care policy. The initial claim was issued on 25 February. The "rolled up" hearing took place between 14 and 20 April.

C's challenge succeeded on the ground that that D had failed to have due regard to the disability equality duty under s.49A DDA 1995. C argued that the minimum required for due regard was to consider whether savings could have been found in other areas to prevent the need to reduce spending on adult social care, which the local authority had failed to analyse properly. D argued that the courts should be wary not to intervene in questions involving the balancing of competing claims, which were matters for expertise, specialist knowledge, local policy and democratic accountability.

The Judge accepted that D had failed to address whether the impact on the disabled of the move to "critical only" was so serious that an alternative which was not so draconian should be identified and funded to the extent necessary by making savings elsewhere. D had not in any real sense refined and focused on the likely impact of moving to financial provision for

critical needs only. It was difficult to see how "due regard" could be paid to the matters identified in s.49A without some attempt at assessing the practical impact on those whose needs in a particular respect fell into the "substantial" band but not into the "critical" band.

The Judge did not find it necessary to make any detailed findings on the additional grounds raised by C, namely illegality and consultation. The argument that D had not asked the right question, added little to the substantive challenge. The Judge considered that the consultation was flawed, but this was also an aspect of the failure to comply with the equality duties. .

Remedy: The Judge quashed the 14 March decision of D's Cabinet. D have indicated that they have sufficient contingencies within their budget to enable them provide additional funding for its adult social care budget.

3. Principles Relating to the Public Sector Equality Duty⁶

3.1 What is the role of the Court?

The Court must review whether 'due regard' has been paid, not merely consider whether the absence of due regard was *Wednesbury* unreasonable⁷.

The PSED creates a form of mandatory relevant consideration potentially applicable across the full range of the functions to which it applies⁸.

"The role for the courts in seeking to set out sensible and coherent application of the duty, so that it fosters rather than undermines good administration, will be to spell out a notion of proportionality between the significance of the decision to be taken and the notice to which the public authority is subject that the decision may have significant impacts upon one or more of the social values set out in section 149, on the one hand, and, on the other hand, the extent of the effort required by the authority to inform itself about the situation and degree of consideration required to be given to those matters in that particular context."⁹

3.2 What is the nature of the duty to have "due regard"?

"What is meant by "due regard"? Dyson LJ stated, in the same paragraph in *Baker*, that "due regard" in the Race Relations Act provision meant the regard that is appropriate in all the particular circumstances in which the public authority concerned is carrying out its function as a public authority. The same principle applies here. There must, therefore, be a proper regard for all the goals that are set out in section 49A(1) (DDA) paragraphs (a) to (f) , in the context of the function that is being exercised at the time by the public authority. At the same time, the public authority must also pay regard to any countervailing factors which, in the context of the function being exercised, it is proper and reasonable for the public authority to consider. What the relevant countervailing factors are will depend on the function being exercised and all the circumstances that impinge upon it. Clearly, economic and practical factors will often be important. Moreover, the weight to be given to the countervailing factors is a matter for the public authority concerned, rather than the court,

⁶ This section is based on 22 agreed propositions advanced by the Claimant's Counsel and apparently agreed by the Defendant which are noted by Walker J in *R (W) v Birmingham CC* (at [151]).

⁷ HHJ Milwyn Jarman QC in *R (Boyejo) v Barnet LBC* at [56]

⁸ "The Public Sector Equality Duty", lecture to ELBA and ALBA by Sales J, 13 December 2010)

⁹ "The Public Sector Equality Duty", lecture to ELBA and ALBA by Sales J, 13 December 2010).

unless the assessment by the public authority is unreasonable or irrational: see Dyson LJ's judgment in *Baker at paragraph 34*.¹⁰

Section 149(1) sets out three goals to which an authority must have "due regard" in carrying out their functions. The authority must have proper regard to the need to achieve those goals¹¹.

Section 149(4) EA 2010 (which replicates s.49A(1)(d) DDA 1995) is different in that it requires steps to be taken "to take account of the disabled persons' disabilities. "The phraseology is convoluted. It does not identify a goal which is an end in itself. However, in our view the paragraph imposes a duty on public authorities to pay "due regard" to the need *to take steps* to do two things which are means which will assist in achieving the goals identified in the other paragraphs in section 49A(1) . First, public authorities must have "due regard" to the need to take account of the fact of disabled persons' disabilities in the context of "carrying out their functions". Secondly, public authorities must have "due regard" to the need to recognise that this may involve treating disabled persons more favourably than others. But we emphasise that, in both cases, no duty is imposed to take steps themselves, or to achieve results. The duty is only to have "due regard to ... the need to take ..." the two steps we have identified. The court will only interfere if the public authority has acted outwith the scope of any reasonable public authority in the circumstances. To do both of these things, the public authority concerned will, in our view, have to have due regard to the *need* to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration. We emphasise once again, however, that the duty is to have due, ie. proper, regard, to "the need to take steps."¹²

"Even where the context of decision making is financial resources in a tight budget, that does not excuse compliance with the PSEDs and indeed there is much to be said for the proposition that even in the straightened times the need for clear, well-informed decision making when assessing the impacts on less advantaged members of society is as great, if not greater"¹³.

The duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of "ticking boxes"¹⁴.

'Due regard' means specific regard by way of conscious approach to the specified needs.

Due regard requires analysis of the relevant material with the specific statutory considerations in mind¹⁵.

The equality duties impose 'significant and onerous' obligations on public bodies in the context of cuts to public services.

¹⁰ Aikens LJ in *R (Brown) v SofS Work and Pensions* at [82]

¹¹ Aikens LJ in *R (Brown) v SofS Work and Pensions* at [83]

¹² Aikens LJ in *R (Brown) v SofS Work and Pensions* at [84] – [85]

¹³ Blake J in *R (Rahman) v Birmingham CC* at [46]

¹⁴ Aikens LJ in *R (Brown) v SofS Work and Pensions* at [92]

¹⁵ Walker J in *R (W) v Birmingham CC* (at [179])

The decision-makers must ask themselves the right question. In *R (W) v Birmingham CC*, Walker J concluded that it was difficult to see how 'due regard' could be paid to the matters identified in s.49A DDA 1995 "without some attempt at assessment of the practical impact on those whose needs in a particular respect fell into the 'substantial' band but not into the 'critical' band". The questions which arose when considering whether the impact on the disabled of the move to "critical only" was so serious that an alternative which was not so draconian should be identified and funded to the extent necessary by savings elsewhere (see Walker J at [175] and [183]).

An equality assessment should focus upon an assessment of the degree of disadvantage to existing users of terminating funding, rather than the hopes of advantage to be derived from a new policy¹⁶

General awareness of the duty does not amount to the necessary due regard, being a 'substantial rigorous and open minded approach'¹⁷.

In a case where the decision may affect large numbers of vulnerable people, many of whom fall within one or more of the protected groups, the due regard necessary is very high¹⁸.

The duty (and in particular DDA 1995 s 49A(1)(d)) may require positive steps to be taken if the circumstances require it to address disadvantage to disabled people.

Thus, if changing a function or proposed policy would lead to significant benefits to disabled people, the need for such a change will carry added weight when balanced against other considerations.

Similarly, if a risk of adverse impact is identified, consideration must be given to measures to avoid that impact before fixing on a particular solution¹⁹.

Impact assessments must contain sufficient information to enable a public authority to show it has paid due regard to the duty and identify methods for mitigating or avoiding adverse impact.

3.3 Consultation

Consultation with services users or those affected by the decision may be an important element of any assessment of the impact of the proposal²⁰.

3.4 Policies

Authorities may have their own published policies for conducting equality impact assessments. Good administration and fairness demands that a public authority is only entitled to depart from its own policy where to do so represents a proportionate response to the circumstances which led the authority to consider such a departure²¹.

¹⁶ Blake J in *R (Rahman) v Birmingham CC* at [35]

¹⁷ HHJ Milwyn Jarman QC in *R (Boyejo) v Barnet LBC* at [59] and Walker J in *R (W) v Birmingham CC* at [179]

¹⁸ See Calvert-Smith J in *R (Hajrula) v London Councils* at [62] and Walker J in *R (W) v Birmingham CC* at [179]

¹⁹ Moses LJ in *R (Kaur and Shah) v Ealing LBC* at [44]

²⁰ See *R (Rahman) v Birmingham CC* and *R (W) v Birmingham CC*

²¹ Moses LJ in *R (Kaur and Shah) v Ealing LBC* at [27]

3.5 The Relevance of Non-Statutory Guidance issued by the EHRC

“In general terms I consider the advice recently issued in non-statutory guidance by the Equality and Human Rights Commission (“Using the equality duties to make fair financial decisions”) to be of assistance to decision makers such as this defendant in the no doubt very difficult decisions that have to be taken in this field”²².

3.6 To what decisions does the duty apply?

The duty applies to all decisions taken by public bodies, including policy decisions and decisions on individual cases²³.

The duty ‘complements’ specific statutory schemes which may exist to benefit disabled people.

The disability component is at its most important when decisions are taken which directly affect disabled people.

The duty requires public authorities to take action to tackle the consequences of past decisions which failed to give due regard to disability equality.

The duty requires the circumstances of the full range of disabled people to be taken into account and may require certain groups of disabled people to be prioritised, for example on the basis that they experience the greatest degree of exclusion.

3.7 When must ‘due regard’ be given to the duty?

The “due regard” duty must be fulfilled before and at the time that a particular policy that will or might affect persons who share a relevant protected characteristic is being considered by the public authority in question. It involves a conscious approach and state of mind²⁴.

As such, due regard to the duty must be an essential preliminary to any important policy decision, not a rearguard action following a concluded decision²⁵.

Put another way, consideration of the duty must be an integral part of the formation of a proposed policy, not justification for its adoption²⁶. In *R (Kaur and Shah) v Ealing LBC*, Moses LJ (at [37]), criticised the production of “policy-based evidence rather than evidence-based policy”²⁷.

²² Blake J in *R (Rahman) v Birmingham CC* at [46]

²³ See *Pieretti v Enfield LBC* [2010] EWCA Civ 1104; [2011] HLR 3

²⁴ Aikens LJ in *R (Brown) v SofS Work and Pensions* at [91]

²⁵ Aikens LJ in *R (Brown) v SofS Work and Pensions* at [91]; see also Sedley LJ in *R (BAPIO) v SSHD* [2007] EWCA Civ 1139 at [3]

²⁶ Moses LJ in *R (Kaur and Shah) v Ealing LBC* at [24]

²⁷ See also Blake J at [35] in *R (Rahman) v Birmingham CC*

The duty is continuing and is engaged at all stages of a decision-making process, meaning that further consideration to the duty may be required where new information comes to light²⁸.

3.8 Who needs to pay ‘due regard’?

The duty is non-delegable and is owed by primary decision-makers²⁹.

In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the PSED. In those circumstances the duty to have “due regard” to the needs identified will only be fulfilled by the relevant public authority if (1) it appoints a third party that is capable of fulfilling the “due regard” duty and is willing to do so; and (2) the public authority maintains a proper supervision over the third party to ensure it carries out its “due regard” duty³⁰.

Decision-makers must be properly informed of the nature and extent of the duty at the time relevant decisions are taken. Thus, an incomplete or erroneous appreciation of the duties will mean that “due regard” has not been given to them³¹.

In particular, decision-makers need rigorous and accurate advice and analysis from officers, not ‘Panglossian’ statements of what officers think members want to hear³².

3.9 Good Practice

The fact that the public authority has not mentioned specifically the PSED in carrying out the particular function where it has to have “due regard” to the needs set out in the section is not determinative of whether the duty under the statute has been performed. But it is good practice for the policy or decision maker to make reference to the provision and any code or other non – statutory guidance in all cases where PSED is in play. In that way the policy or decision maker is more likely to ensure that the relevant factors are taken into account and the scope for argument as to whether the duty has been performed will be reduced³³.

It is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their disability equality duties and pondered relevant questions. Proper record keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the PSED³⁴.

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1 June 2011

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²⁸ Aikens LJ in *R (Brown) v SofS Work and Pensions* at [95]

²⁹ Blake J in *R (Rahman) v Birmingham CC* at [32]

³⁰ Aikens LJ in *R (Brown) v SofS Work and Pensions* at [94]

³¹ Rix LJ in *R (Domb) v Hammersmith & Fulham LBC* at [53]

³² Sedley LJ in *R (Domb) v Hammersmith & Fulham LBC* at [79]; and Walker J in *R (W) v Birmingham CC* at [179]

³³ Aikens LJ in *Baker v SofS Work and Pensions* at [93]

³⁴ Aikens LJ in *Baker v SofS Work and Pensions* at [96]

Appendix – Public Sector Equality Duties – Present and Past

1. The Current Law: Equality Act 2010

149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

- (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
- (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

- (a) tackle prejudice, and
- (b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

- age;
- disability;
- gender reassignment;

pregnancy and maternity;
race;
religion or belief;
sex;
sexual orientation.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to—

- (a) a breach of an equality clause or rule;
- (b) a breach of a non-discrimination rule.

(9) Schedule 18 (exceptions) has effect.

2. The Previous Law

Race Relations Act 1976, s.71 (extract)

(1) Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need—

- (a) to eliminate unlawful racial discrimination; and
- (b) to promote equality of opportunity and good relations between persons of different racial groups.

Sex Discrimination Act 1975, s.76A (extract)

(1) A public authority shall in carrying out its functions have due regard to the need—

- (a) to eliminate unlawful discrimination and harassment, and
- (b) to promote equality of opportunity between men and women.

Disability Discrimination Act 1995, s.49A (extract)

(1) Every public authority shall in carrying out its functions have due regard to—

- (a) the need to eliminate discrimination that is unlawful under this Act;
- (b) the need to eliminate harassment of disabled persons that is related to their disabilities;
- (c) the need to promote equality of opportunity between disabled persons and other persons;
- (d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons;
- (e) the need to promote positive attitudes towards disabled persons; and
- (f) the need to encourage participation by disabled persons in public life."