Challenges to budget-setting decisions

Jenni Richards QC

Katherine Barnes

Lessons from recent cases

- *R (KE) v Bristol City Council* [2018] EWHC 2103 (Admin) – HHJ Cotter QC sitting as a deputy
- *R (RD) (A Child)) v Worcestershire CC* [2019] EWHC 449 (Admin) – Nicklin J
- *R (Hollow) v Surrey County Council* [2019] EWHC 618 (Admin) – Divisional Court – Sharp LJ and McGowan J
- *R (AB) v Portsmouth* (decision withdrawn following issue)
- Ongoing cases including Hackney and Central Government funding challenge…

Agenda

- Consultation (including s.27 Children and Families Act 2014 and common law requirements)
- Public sector equality duty (s.149 Equality Act 2010)
- Section 11 Children Act 2004; s.175 Education Act 2002
- Irrationality
- Legitimate expectation

The decisions

- Bristol: Decision to set a schools' budget which included a reduction in expenditure of approximately £5 million (10%) in the high needs block budget (funds for supporting children with SEN)
- 3 ways in which D anticipated reductions would be made:

(i) Reduction in SEN top ups for maintained schools to be reduced by £767,000;

(ii) SEN top up for special schools to be reduced by £1,166,000

(iii) Funding for pupil referral unit to be reduced by £150,000

The decisions

- Surrey: Decision to approve service revenue and capital budgets for 2018/19, including the schools and SEN budget
- C challenged an aspect of the SEN budget - savings of £11,694,000 for 2018/19 for “areas of focus” (inclusion, commissioning, provision and transition) as set out in the Council’s Medium Term Financial Plan
- “the evidence shows that the decision under challenge is not a decision to cut spending or services” […] “the Council has identified areas of spending upon which it proposes to concentrate as the potential areas in which savings could be made” [12]-[13]

The decisions

- Portsmouth: Challenged 3 decisions by Cabinet designed to "manage the spend" within the High Needs Block for 2019/2020:

(i) Introduction of banding policy to allocate funding to children with EHC plans

(ii) 1% reduction in special school banded funding rates

(iii) 10% reduction in spending on outreach programmes

- Collectively designed to save approximately £400,000.

The nature of the decision

Bristol at [90]:

If the budget decision under challenge is sufficiently far removed from a final decision affecting the provision of an element of a service, then there is nothing wrong in principle in not undertaking a detailed assessment of the impact until specific policies have been formulated. The distance may be because the budget is sufficiently high level or, as in the case of a MTFP, not set in stone. Indeed, when setting a high level national budget it would often (but not invariably) be difficult to compile a sufficiently detailed consultation document or undertake a focussed impact assessment (although as conceded in Fawcett it may be both possible and necessary for certain elements). Also if, as in the JG and MB-v- Lancashire case, the door remains open, following the future result of a targeted consultation, to avoid any cut and thus any reduction in services at all, and/or to gain funding from another service, again there is nothing wrong in principle in not undertaking a detailed assessment of the impact until the result and impact of the consultation is known. However, due regard under the PSED (and if necessary consultation), consultation under section 27 of the 2014 Act and regard under section 11 of the 2004 Act must be essential preliminaries to any significant, sufficiently focussed, and in financial terms apparently rigid, decision to impose a reduction in spending, even if taken as part of the setting of "a budget".

Consultation

- In *R (KE) v Bristol* Court held there was a duty to consult

- In *R (Hollow) v Surrey CC* Court held that there was no duty to consult

- Which is correct?

Is there a duty?

– Possible sources of duty to consult:

- Statute?
- Legitimate expectation?
- Fairness/withdrawal of existing benefit?
- In fulfilment of PSED?
- In fulfilment of Tameside duty of inquiry?

Section 27 Children and Families Act 2014

(1) A local authority in England must keep under review –

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

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

Section 27 Children and Families Act 2014

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

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

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

(c) The governing bodies of maintained schools and maintained nursery schools in its area…

[and see the other bodies and people listed in sub-section (3)]

R (DAT) v West Berkshire Council

- [2016] EWHC 1876 at para 30
- Laing J
- Held – despite misgivings about practical consequences of wide-ranging consultation that would be required – that section 27 must bite :

"where, as here, a local authority makes a decision which will necessarily affected the scope of the provision referred to in section 27"

R (KE) v Bristol

- D's case was that duty to consult did not arise when budget was set but only when detailed proposals were developed. D relied on earlier authorities (*R (Fawcett) v Lord Chancellor [2010] EWHC 3522; R (JG) v Lancashire CC [2011] BLGR 909; R (A) v Oxfordshire [2017] 20 CCLR 539*.
- Judge rejected D's argument that consultation would have been inchoate or meaningless.
- Observed that at what point a duty arises is clearly fact specific – this was a £5m reduction to specific elements within education budget. Nature, extent and impact of the decisions being taken in the budget setting exercise will determine if duty arises.

R (KE) v Bristol cont'd

- Section 27 must have some utility
- Starting point is that D was by statute under a duty to review special educational provision and consider extent to which it was sufficient
- *"a potential decision to significantly reduce provision (which automatically follows from a decision to significantly reduce the budget) plainly brings into question, and therefore requires consideration of, the adequacy of what would be the remaining provision … If there is a clear issue requiring review as to the future adequacy of provision then, in exercising its functions of review, an authority is mandated to consult"*
- *"Rhetorically, if the duty does not arise in such circumstances when would it arise?"*

R (KE) v Bristol cont'd

- Consultation also required in order to comply with PSED
- *"this is a case where the Defendant was under a duty to acquire further information, including through consultation, in order to comply with the PSED yet did not do so"*
- Significant that D had not identified any other source of information, beyond a general appreciation that there would be some impact, which was before members when budget was approved and which would have informed them of the potential equality implications of the significant reduction in funding. PSED required members to have further information to understand likely impact of the proposals, without which they could not pay the required due regard.

R (KE) v Bristol cont'd

- Common law duty to consult can (the Judge held) be generated by the duty cast by the common law to act fairly
- Where existing benefits being withdrawn, fairness requires consultation (*R (LH) v Shropshire [2014] EWCA Civ 404)*
- Those affected had substantial grounds of belief that the existing level of provision would continue and could expect to have an opportunity to explain from their informed standpoint why cuts to the service should be avoided
- Asking simple, broad brush and impressionistic test – was this fair? Answer: No.

R (Hollow) v Surrey CC

- No common law duty to consult
  - No legitimate expectation
  - No conspicuous unfairness
  - *KE* distinguishable on its facts from present case – *KE* concerned concrete budgetary decision by full council to reduce provision so that it was axiomatic that some elements of the service would reduce or even cease and it was not open to subsequent decision-makers to re-open the relevant budget line
  - Not clear what test was applied by judge in *KE* – do not accept such a duty arises simply because the likely effect of a decision is that some services to a vulnerable group may be withdrawn or reduced

R (Hollow) v Surrey cont'd

- The duty to consult said to be inherent in PSED *"is indeed no more than the conventional Tameside duty of inquiry"*
- What is required by way of compliance must depend on the nature of the duty in question
- Only unlawful for a public body not to make a particular inquiry if it was irrational for it not to do so, and for the public body, not the court, to decide on the manner and intensity of any inquiry
- Was not irrational for D to conclude that it had sufficient information to discharge PSED and that no consultation was required to make good any insufficiency of information

R (Hollow) v Surrey cont'd

- As for section 27, Court held that it is *"concerned with consideration at a strategic level of the global provision for SEN made by a local authority"*
- Although the drafting of s. 27 *"is not entirely clear"*, the duty of consultation applies compendiously to the functions described in section 27(1) and (2) – it does not require a further consultation in relation to sufficiency of provision
- Parliament cannot have considered that the extensive and onerous duties of consultation under s. 27(3) should be undertaken on a rolling basis, let alone every time a change is made to SEN provision

R (Hollow) v Surrey

- Rather, section 27 imposes a duty on LAs, which arises from time to time, to consult at reasonable intervals those identified in section 27(3) in order to keep the provision under review, in which connection LAS must consider the extent to which the provision is sufficient to meet the needs
- Disagrees with *DAT* – the results would be *"startling indeed"* if every time a LA makes a decision that will affect the scope of provision no matter how small, it must review the entirety of its provision both inside and outside its area
- **NB This was not Cs' argument in the Hollow case …**

PSED

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. (*Rahman* [2011] EWHC 944 (Admin) – Blake J at [46]).

PSED

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.

PSED

Protected characteristics

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership (only aim 1 of PSED applies)
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

PSED

Useful summary of legal principles in *Bracking v SSWP* [2013] EWCA Civ 1345 at [25]. Key points:

- Must have "due regard" – no substantive outcome required
- "Due regard" is what is appropriate in all the circumstances. Completion of EqIA evidence of discharge but not determinative
- Duty is ongoing
- Need "conscious approach to statutory criteria"
- Duty of inquiry (as previously discussed)
- Must acknowledge harm (*Bracking* – end of Ind. Living Fund "very grave impact" for relevant disabled people)

PSED

Bristol - focus on PSED requiring consultation but also:

[D]ue regard under the PSED […] and regard under section 11 of the 2004 Act must be essential preliminaries to any significant, sufficiently focussed, and in financial terms apparently rigid, decision to impose a reduction in spending, even if taken as part of the setting of "a budget".

So what of the decision here? It was a decision to cut funding to a specified area within the education budget. It followed on from detailed consideration of historic overspend which identified how the savings could be achieved. In my judgment this was indeed a significant, sufficiently focussed and in financial terms apparently rigid decision to engage the duties to which I have referred. There was no problem with the detail of likely impact being not available or the decision being somehow too distant from the actual affect upon the services provided to children with special needs to make inquiry into likely impact and/or consultation meaningless or even difficult […] [90]-[91]

PSED

Surrey:

The EIA for example, described the impact for SEND savings of £10.7 million, for the "Alternative Dedicated Schools Grant" as "To be determined". The accompanying rationale was that "The proposals to achieve these savings are as yet to be determined, and they will be developed in consultation with schools in order to mitigate potential negative impacts. Where an EIA is required, this will be completed following consultation with schools and published on the council's website." In our judgment, having regard to the stage that the decision-making had reached, there was indeed sufficient compliance with the PSED on the facts. [82]

PSED

Portsmouth:

- Preliminary EqIA done which described “impact” of the decisions as preventing any future overspend by the High Needs Block
- Justification for not doing a full EqIA – no school will be disproportionately affected
- Therefore no consideration of impact on disabled children

S.11 CA

(2) Each person and body to whom this section applies must make arrangements for ensuring that–

(a) their functions are discharged having regard to the need to safeguard and ***promote the welfare of children****; and*

(b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need.

Applies to (amongst others): LA, CCG, NHS Trust, Police, National Crime Agency, Probation Board, Youth Offending Team, governor of prison, principal of secure college

S.11 CA

- Analogous to PSED in that no substantive outcome required BUT need to have regard (acknowledge harm).
- Supreme Court *Nzolameso v Westminster City Council* [2015] UKSC 22: s.11 CA applies "not only to the formulation of general policies and practices, but also to their application in an individual case" (Lady Hale) [24]. (Failure to discharge duty in accommodating single mother and her children out-of-borough). See also *R (E) v Islington LBC* [2017] EWHC 1440 (Admin).
- Supreme Court *R (HC) v SSWP* [2017] UKSC 73 (Lady Hale) [46]: "Safeguarding is not enough: their welfare has to be actively promoted" (effect of s.11 and s.175).

S.11 CA

Bristol – breach of s.11 found - D's argument rejected that consideration of need to safeguard and promote children's welfare inherent to DM process:

There is no evidence, from the extensive paperwork evidencing the Defendant's decision-making process, that members of the Council had any regard to the need to safeguard and promote the welfare of children, still less "actively promote" children's welfare, when making the decision to proceed with the proposed savings. Indeed, the decision-making process appears to be driven entirely from the standpoint of ensuring a balanced budget by 2020/21. In my judgment it is simply not good enough for compliance with section 11 to say "they must have done"; consideration is not self proving. As Baroness Hale made clear in Nzolameso at [37], it is for the local authority to demonstrate compliance with the duty. There is no evidence of such compliance here [129].

S.11 CA

Surrey – no breach of s.11:

The report to the Cabinet drew attention to the duty, as did the Leader of the Council and the Lead Member for education during the meeting itself. The Cabinet was told that it was not possible to identify the impacts of the AOF and it was aware that the impacts could be positive and negative. In our judgment, in the circumstances, this was appropriate and all that was required. [86]

Portsmouth – argued breach of s.11 as 1% cut in funding to special schools and 10% cut to outreach programmes (where no plans for more effective delivery of services) could only result in children receiving less. Need to acknowledge this.

S.175 EA

175 Duties of local authorities and governing bodies in relation to welfare of children

(1) A local authority shall make arrangements for ensuring that their education functions are exercised ***with a view to safeguarding and promoting the welfare of children****.*

- BUT query whether a general duty not enforceable by an individual as argued by D in *R (RD & Others) v Worcestershire CC* [2019] EWHC 449 (Admin) (point not determined – arguably *HC* at [46] suggests otherwise).

Rationality

Bristol:

- C argued D acted irrationally in not taking into account relevant considerations: impact on schools; D's recognition that children with SEN already not achieving their potential; possibility of protecting SEN budget and making cuts elsewhere.
- Court agreed irrational but stressed overlap with other grounds – D had failed to equip itself with the information necessary to make a lawful decision [135]-[136].

Rationality

Surrey:

- Court summarised C's primary rationality argument - D acted irrationally in setting a budget (including proposed savings in the SEN budget) without knowing how those savings would be made or what the likely impact would be.
- Not irrational [69]:

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

Legitimate Expectation

- Highly fact specific but see *Worcestershire* as an example.
- C challenged decision to withdraw Portage Services (educational support via home visits for pre-school children with SEN) from Oct 2018.
- In Aug 2016 the Defendant decided to withdraw Portage from Oct 2018 – recognised advise impact on the young and those with disabilities – representation that transition plan needed for those families eligible in Oct 2018.
- No transition plan developed or implemented.
- Substantive legitimate expectation LA would implement transitional arrangements to mitigate impact of withdrawal.

Remedies

- If an individual decision to cut a particular service then primary remedy is order quashing the decision.
- If decision under challenge is budget, problem with quashing whole budget is prejudice to decision-maker (so may get nothing or declaratory relief only).

Remedies

- Bristol: court accepted C's submission that appropriate remedy was order quashing only the relevant part of the budget (ie the High Needs Block budget allocation):

In my judgment this form of relief is proportionate, as it requires the Defendant to reconsider its funding allocation in this area in the light of the resources available at the material time, without disturbing other aspects of the budget or in particular the Council Tax calculation and without the Court telling the Defendant how its resources should be expended. [150]

- Surrey: C sought order quashing the SEN "budget allocation for 2018-19". Would require the Council "to reconsider its SEN budget from within all resources then available to it and in the light of the guidance from the Court as to its legal obligations in this regard."

Questions?