Neutral Citation Number: [2019] EWHC 449 (Admin)

Case No: CO/4280/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 February 2019

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between :

The Queen on the Application of:
(1) RD (A child by his litigation friend LD)
(2) AW (A child by his litigation friend SW)
(3) OY (A child by his litigation friend KY)
(4) ZS (A child by his litigation friend SA) **Claimants**

- and -

Worcestershire County Council **Defendant**

- -
- -

Jenni Richards QC and Michael Armitage (instructed by **Bindmans LLP**) for the **Claimants**
Peter Oldham QC (instructed by **Legal Services Department**) for the **Defendant**

Hearing dates: 19-20 February 2019

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Approved Judgment

The Honourable Mr Justice Nicklin :

1. The Claimants are four children with significant disabilities and support needs. They live, with their families, in Worcestershire. Until 1 October 2018, each of them benefitted from the provision of Portage services by the Defendant Council. From 1 October 2018, the Defendant withdrew provision of Portage services. This Judicial Review claim essentially challenges the lawfulness of the withdrawal of those services from the Claimants.

Portage

2. Portage is an educational support service for pre-school children (from birth to 5 years-old) provided through regular home visits from a trained Portage home visitor. It is named after a town in Wisconsin, USA, where the service was originally developed. Portage was introduced in the United Kingdom in the mid-1970s. Portage aims to:

    i) work with families to help them develop a quality of life and experience, for themselves and their young children, in which they can learn together, play together, participate and be included in their community in their own right;

    ii) play a part in minimising the barriers that confront young children with special educational needs and disabilities ("SEND") and their families;

    iii) support the national and local development of inclusive services for children with SEND.

3. The principal objective of Portage is to achieve its aims through a partnership between the Portage home visitor, the family (including parents, siblings, carers and wider family) and other support agencies.

4. Prior to their withdrawal, Portage services were available in the Worcestershire area to children of pre-school age (0 to 5 years-old). The "entry requirements" for the service included that the child has significant developmental delay in at least two areas, or a recognised disability or diagnosis, and that s/he is not already attending a special needs placement.

The Claimants

5. The First Claimant is now 4 years-old. He suffered from a middle cerebral artery infarction when he was born, which has left him with an acquired brain injury. He has global developmental delay and suffers from cataracts. He requires significant support from a variety of professionals. Prior to their cessation, the First Claimant had been receiving regular (fortnightly) Portage services from a dedicated Portage home visitor since he was 14 months-old, having been referred for support in November 2015.

6. The Second Claimant is 2 years-old. He has suffered from hypoxic ischemic encephalopathy at birth, as a result of which he has a range of conditions including microcephaly, cerebral palsy, visual impairments and global learning difficulties. He is unable to sit, roll or use his hands. He also suffers from seizures which require daily medication. The Second Claimant has been receiving Portage services since March 2017.

7. The Third Claimant is 21 months-old. He was born with Down Syndrome and has experienced developmental delay as a result. He had been receiving fortnightly Portage services from a dedicated Portage home visitor since September 2017.

8. The Fourth Claimant is 3 years-old. He was born with Down Syndrome which affects several aspects of his health and development. He is both cognitively and developmentally delayed by at least 18 months. The Fourth Claimant had been receiving regular (fortnightly or monthly) Portage services from a dedicated Portage home visitor since approximately June 2016.

9. The evidence of the Claimants' parents is that the Portage service has "*helped… invaluably*", "*provided an immense benefit to [their] family*"; has been a "*constant source of support to me and my family and … greatly beneficial to all*", and has "*helped keep [their] family together*"

The Defendant's Review of Portage provision: the Peridot Report

10. In December 2012, the Defendant's Early Years and Childcare Service (the department then responsible for the Portage service in Worcestershire) commissioned a consulting firm, Peridot Associates, to review the service and "*evaluate the impact of the current service delivery and to identify potential changes that could provide additional outcomes and identify any realistic savings projections*".

11. The resulting report (the "Peridot Report"), produced in March 2013, found that parents and children experienced a wide range of benefits from the Portage service in Worcestershire, and included a "Social Return on Investment" report which concluded that for £1 invested in Portage a return of £1.62 was realised. The Peridot Report recommended that the Council "*acknowledges the impact of its service delivery on its service users and the added value this brings to them*", and that the service should be extended to school-aged children.

12. The Peridot Report noted that Portage home visitors in Worcestershire were required:

    i) to deliver a Portage service to children with disabilities and/or significant special needs to them and their families in a home environment;

    ii) to support the holistic development of children with disabilities and/or significant special needs aged 0-5, to improve opportunities for achievement and learning;

    iii) to work with a range of multi-agency professionals to ensure a consistent approach to the individual child's support package;

    iv) to empower parents to support their children's holistic development; and

    v) to lead group activities for Portage parent(s)/carer(s) and their children.

13. As a result of interviews with some 60 parents, the Peridot Report identified 4 key areas that parents valued from the Portage service:

    i) the developmental support that was provided for the child and the family;

    ii) networking opportunities for parents and carers;

iii) signposting ("*Portage has helped us understand what help we needed, what help is out there and how to claim it*"); and

iv) support for the family.

14. The views of other professionals engaged in provision for SEND children were also captured. The Peridot Report stated:

> "Without Portage, the professionals noted:
>
> - It would be difficult to make accurate early diagnosis; in some cases impossible (Consultant Paediatrician)
> - Managing children's disabilities in a holistic, family friendly way would be extremely challenging, if not impossible (Consultant Paediatrician)
> - Unsupported families would really struggle – relationships may well break down and children may be harmed (Consultant Paediatrician)
> - There would be safeguarding concerns for some families
> - Concerns about parent skills and confidence in child development and positive parenting beyond what health visitors can offer
> - Worcestershire would not be able to fully support families with complex needs without this service, having a huge impact on the other support services in the county
> - Early education is essential for children with special needs and it is becoming increasingly difficult to find appropriate support. If Portage is withdrawn it may be very difficult for us to offer any regular home-based support or developmental support to very young children with general developmental delay (e.g. Downs syndrome) aged 0-4 years. Many of these children are too young to attend Nursery. (Consultant Paediatrician specialising in Child Development and Pre-School Years)"

Consultation on whether to cease providing Portage services

15. Between 4 April 2016 and 3 May 2016, the Defendant conducted a consultation on a proposal to stop providing dedicated Portage services with effect from 1 October 2016. The results of the consultation were published in May 2016:

i) 100% of parents/carers currently receiving support from Portage and who completed a survey indicated that they were against the proposal to cease the provision of Portage services;

ii) 86% of professionals who responded to the survey expressed disappointment at the proposal. Some felt that ceasing Portage could impact on children's school readiness because children with additional needs would be left "*largely unsupported in anything other than their medical needs until they start their education*", and that removing Portage would also lead to an "*increase in demand on specialist provision and social care*".

16. Subsequently, towards the end of May 2016, the Defendant announced in a document entitled, "*Portage Consultation 2016*", that it was proposing to cease providing the Portage service with effect from 1 October 2016:

> "After exploring the viability of [other] options the council is proposing to stop providing a dedicated Portage service in Worcestershire from 1st October 2016. Following a consultation with families currently accessing Portage and taking into consideration the feedback they provided, the council is proposing the following measures to ensure that those families who are currently receiving support from Portage and who would otherwise continue to receive support post-October 2016 are not disadvantaged by stopping Portage; …
>
> - Develop a transition plan for all families that the decommissioning of the service will impact on with the wider services working with the families and identify a lead professional…
>
> - Access funding to provide personal budgets for those families that the decommissioning of the service will impact on to enhance the support they receive in a holistic way…"

Letters in similar terms were also sent to the Portage home workers on 31 May 2016 by Hannah Needham, the Defendant's Strategic Commissioner – Early Help and Partnerships.

17. On 21 July 2016, Ms Needham wrote again to the Portage home workers to confirm that, following the consultation, the decision had been taken to close the Portage service:

> "… The Cabinet Member with responsibilities for children and families (Cllr Marc Bayliss) has agreed to formally make the decision to cease the service. This is in line with advice from our Legal and Democratic Services that the decision is significant and should therefore be a Member decision.
>
> The steer from Cllr Bayliss is that he is prepared to make the decision to cease the service on the basis of the impact on those 56 families who would stand to lose the service from September 2016 is mitigated in full. Therefore, funding has been agreed to continue delivering a Portage service under September 2018 where the majority of these families would be 'naturally discharged' from the service. This time would also allow for the remaining 10 families to be worked with intensively so they too don't require the service from September 2018."

The First Equality Impact Assessment: 11 August 2016

18. An Equality Impact Assessment was completed by the Defendant and signed off by Ms Needham on 11 August 2016 ("the First EIA"). The Defendant's policy was that EIAs were published on the Council's website:

    i) Under "*Aims/Objectives*", the EIA stated: "*To plan and prepare for ending the current Portage service in 1 October 2018*".

    ii) Under "*Intended outcomes*", it stated: "*Families continue to receive the help they need (from alternative sources of support and advice); £200k savings target for [Child & Family Services] is achieved.*"

iii) Implementation of the decision was indicated as likely to have an adverse impact on the young and those with disabilities:

> "Portage is a targeted service for children aged 0-5 years who have a developmental delay in at least two areas. These Families already experience considerable challenges in daily life, so that any change to or removal of services on which they rely has the potential to result in an adverse impact for them…"

iv) In the section, "*Action planning and time frames*", under the heading "*Planned action*", the EIA stated, "*For the small number of families who would still be eligible for a service from October 2018, we [will] develop a transition plan with the wider services working with the family*". The action was to be completed by October 2018 and the monitoring responsibility was stated as:

> "We will track every service user to ensure they have a transition plan in place and that other professionals working with that child are informed of the potential changes."

The decision to close the Portage scheme

19. On 22 August 2016, Councillor Bayliss made the decision to close the Portage scheme from 1 October 2018 ("the August 2016 Decision"). The material upon which the Councillor based the August 2016 Decision included: (1) a report from the Council's Executive ("the Executive Report"); (2) the First EIA; (3) the Peridot Report; and (4) a report summarising the consultation.

20. The Executive Report:

i) identified the main functions of Portage;

ii) stated, in paragraph 10:

> "Portage is in itself a discretionary service and whilst it supports wider statutory duties such as under section 17 of the Children Act 1989, the professional conclusion is that needs could be met in a more effective and cost-efficient manner. Disabled children are considered as 'children in need' under the Children Act 1989, as are children whose health or development are likely to be significantly impaired or further impaired without the provision of services under Part III of that Act and thus children for whom we owe duties under that Part. Under section 27 of the Children and Families Act 2014 we must keep under review the educational, training and social provision made in Worcestershire for children who have Special Educational Needs (SEN) or disability, or such provision made outside the county for children with SEN for whom the Council is responsible, or children with a disability within the county. As part of that duty, the Council must consider whether such provision is sufficient to meet the children's needs. The professional conclusion is that, having regard to the consultation undertaken, a dedicated Portage system is not necessary, nor the most appropriate method of meeting our duties; and sufficient provision is otherwise available if it were to cease. It is considered that the proposal is in line with our duty under s.11 of the Children Act 2004 to ensure our functions are discharged having regard to [the] need to safeguard and promote the welfare of children. We could of course continue the Portage

> Service if we wished but there are alternative, effective ways to meet our statutory responsibilities…"

iii) in respect of the consultation, noted:

> "44 parents/carers responded to the consultation which equates to a 45% response rate from current service users. 14 professionals responded to the consultation. Feedback was entirely against the proposal unless an adequate alternative service would be available for families after Portage stopped."
>
> "100% of the parents/carers currently receiving support from Portage were against the proposal to stop providing a dedicated Portage service. 51% of parents/carers do not consider the savings or alternatives to be equal to, or capable of, providing the same levels of practical and emotional support to parents currently provided by Portage to meet their child's developmental needs which 73% of parents/carers consider the most important thing."

iv) under a heading, "Proposed Plans", stated:

> "After considering the consultation feedback a revised proposal recommends that the Portage service be continued until 30 September 2018, rather than stopping the service on 30 September 2016 which was the original proposal. This responds to the feedback from families accessing the service that they oppose the proposals to stop the service and would reduce the disruption to them. This will enable those families who currently receive the Portage service to continue to receive support until the majority of their children would naturally be discharged from the service in any event upon reaching the compulsory school age. Out of the current cohort of 56 children, 10 would be due to continue to receive a service post October 2018 and 3 from October 2019. However, during these two years the Home Workers will work with these families to ensure they are well-prepared for the service to be withdrawn so that the impact is better mitigated and any needs for alternative support identified…"

v) recognised the equality and diversity impact of the decision and referred expressly to the First EIA (which was attached):

> "The Assessment identified the possibility of some adverse impact on children aged 0-5 with developmental delays if the service were to be withdrawn from those families who currently access the service. These families have become accustomed to and value particular aspects of the Service; although other specialist services are available to the children and families who have additional needs the Council considers that the current Portage Recipients may find it difficult to adjust to alternative service delivery models in the short term… The proposal to extend the service for an additional two years mitigates this potential adverse impact for the majority of those families already receiving support from the service. The Home Workers will work with the 10 families who would have received a service post October 2018, to ensure that they are able to access alternative services which can meet the needs previously addressed through the Portage service, e.g. specialist educational placement".

21. The record of the August 2016 Decision, which was published on the Council's website, stated that Councillor Bayliss had considered the recommendations contained in the

Executive Report, noted the contents of the First EIA and "*approved the proposals to cease delivery of the dedicated Portage Service in Worcestershire on 1 October 2018 with the transitional arrangements from 1 October 2016 as set out in the [Executive Report]*".

22. None of the Claimants' families was provided with any written notification of the August 2016 Decision (either at the time it was made, in the case of the First and Fourth Claimants - who were receiving Portage services at the time - or subsequently, in the case of the Second and Third Claimants) or given any details of the "*transitional arrangements*" that would be made for them.

The premise and effect of the August 2016 Decision

23. Considering the arguments that have been advanced on this claim for Judicial Review, it is important to look closely at the August 2016 Decision. My findings are as follows (with references in square brackets to earlier paragraphs of this judgment):

    i) It was clearly recognised and accepted by the Defendant that the withdrawal of the Portage service was likely to have an adverse impact on the children who were enrolled in the programme: First EIA [18(iii)]; and Executive Report [20(iv) and (v)].

    ii) The impact needed to be mitigated but the Defendant believed that it could discharge its statutory obligation to provide for the needs of the affected children in alternative ways other than through the Portage scheme: Executive Report [20(ii)].

    iii) The Executive Report was clearly premised on the basis that, if Portage was discontinued, "*sufficient provision is otherwise available*" and "*there are alternative, effective ways to meet [the Defendant's] statutory responsibilities*": Executive Report [20(ii)].

    iv) However, this was an *expectation* of future provision, not a conclusion based on any analysis of existing services provided by the Council: "*… needs <u>could</u> be met in a more effective and cost-efficient manner*": Executive Report [20(ii)].

    v) It was therefore expressly recognised that there was need for transition planning for the affected families, "*to ensure that they are able to access alternative services which can meet the needs previously addressed through the Portage service*": Executive Report [20(v)]; Consultation Report [16]; and First EIA [18(iv)].

    vi) This was entirely consistent with the Defendant's statement to the Portage home workers in July 2016: that the impact on the affected families of any decision to close Portage would be "*mitigated in full*" and that those families still receiving Portage services when it was withdrawn would be "*worked with intensively so they… don't require the service from September 2018*": 21 July 2016 letter to home workers [17].

    vii) The approval given to close Portage from 1 October 2016 in the August 2016 Decision was expressly premised on these "*transitional arrangements*" being made: [21].

24. In the language of Judicial Review, I find that the Defendant made a clear representation to the parents affected by the August 2016 Decision (and to the public generally) that it would devise and implement transitional arrangements to mitigate the impact of the withdrawal of the Portage service by ensuring that the families affected were able to access alternative services which would meet the needs that had previously been addressed by Portage.

25. Nothing that happened in the period from August 2016 to September 2018 undermined or withdrew that representation. Indeed, subsequent events demonstrate that this representation was not only acknowledged but it was also reinforced by the Defendant.

The Second Equality Impact Assessment: 6 April 2018

26. A further Equality Impact Assessment, dated 6 April 2018, was prepared by the Defendant ("the Second EIA"). It was completed, apparently, because of impending staff changes as a result of the withdrawal of the Portage service. The stated "*Aims/Objectives*" of the Second EIA were "*to plan and prepare for ending the current Portage provision with effect from 1 October 2018.*" The "*Intended outcomes*", were identified as: "*Families will transition to alternative support provided by a range of agencies and future needs can be met through Health, early education and childcare and the Early Help offer.*" The Second EIA, like the First, recognised potential adverse impact for the disabled children who received the Portage service (including an acknowledgement that Portage provided both practical and emotional support to the families). The details of the adverse impact were identified as:

> "… A change or removal of practical and emotional support has the potential to result in an adverse impact for families and children. However, the positive change is that the support needed by these families is being embedded in alternative provision e.g. Health, early education, and childcare and the Early Help offer. This should result in more equitable access for children who need this support. 49 families are currently receiving support from the team. It is anticipated 21 families have children who will transition at the end of the 2017/18 academic year to school or special school nursery provision. A transition plan has been developed for all the families not due to transition which includes the key professional, other agencies working with the families, diagnosis, comments, concerns, future plans and any safeguarding issues where appropriate." (emphasis added)

27. Under "*Action planning and time frames*", the Second EIA identified the "*planned action*" as:

> "For the 28 families who would still be eligible for a service from October 2018, a transition plan will be developed and worked through for each family" (emphasis added),

and the monitoring of this was to be achieved by:

> "… the Early Intervention Team Manager will monitor the development and implementation plans for each family and where appropriate through the use of the early help assessment will plan for any unmet need resulting from the provision ceasing"

28. There is no evidence that, at the date of the Second EIA, any transition plan "*had been developed*" or was in existence for any of the families whose children had been

identified as being at risk of adverse impact from the withdrawal of the Portage scheme at the end of September 2018. Nevertheless, the Second EIA clearly acknowledged not only the need for such a plan, but also the need for monitoring of the implementation.

The Ofsted/CQC report

29. Between 5-9 March 2018, Ofsted and the Care Quality Commission ("CQC") had carried out a joint investigation of the Worcestershire area to determine the effectiveness of the implementation of the SEND reforms set out in the Children and Families Act 2014.

30. On 3 May 2018, Ofsted and CQC wrote to the Defendant to set out the findings from their inspection. In relation to the Portage provision, the letter stated:

> "The impact of the reduced, and soon-to-be-removed, portage service … is of grave concern to both parents and professionals. The local area has not yet considered the impact of this on the support available for parents of young children who have SEN and/or disabilities."

31. In her witness statement dated 14 November 2018, Sarah Wilkins, the Defendant's Interim Assistant Director of Early Help and Commissioning, stated:

> "Consideration of the impact of the cessation of Portage on parents and children has been included as part of the SEND Action Plan formulated to go with the [Defendant's] Written Statement of Action. Paragraph 2.6.6 identifies the activities determined to ensure effective developmental/educational support is available for 0-3 years with special educational needs and disabilities. A workshop to review the pathway and related early support is due to take place on 4th December 2018. Families in Partnership will take part in this review along with commissioners and providers of services for young children. Following the work the pathway will be published. Any gaps will then need to be considered as part of a needs assessment or addressed through changing or transforming existing services."

32. The SEND Action Plan referred to was the Defendant's response to the Ofsted/CQC findings and was initially prepared at the end of July 2018. Paragraph 2.6.6 stated, under "*Activity*":

> "To ensure effective developmental/educational support is available for children with SEND and disabilities (sic) between 0-3 yrs…
>
> Ensure that parents and carers are assisted in supporting the early development of their children, and are constructively signposted and supported to access support including that from the voluntary sector and parent networks.
>
> Linking with parents for co-production engagement and support, develop and confirm the service offer (taking into consideration cessation of Portage), ensuring links with locality education and childcare provision wherever possible."

The timeframe for this "activity" was stated as "Jan 2019".

33. Ofsted/CQC confirmed, on 24 August 2018, that they accepted the Defendant's SEND Action Plan was "*fit for purpose*", although the issue of any "*transition plan*" for Portage users was not an area specifically addressed in the plan. A final version of the SEND Action Plan was produced on 2 October 2018.

Was there a "transition plan"?

34. In order to devise the promised transition plan – and more generally to act consistently with the express representation in the Executive Report that services to these 'children in need', historically provided by Portage, would be met by "*alternative, effective ways*" – one approach the Defendant could have adopted was, first, to identify *what* needs of the children, previously addressed through the Portage service, it should continue to provide; and second, to identify whether and how those needs could be met from its existing or planned SEND (or other) provision.

35. It is a striking feature of this case that there is no contemporaneous evidence of any transition planning at all in the period from August 2016 to September 2018. As late as the date of the SEND Action Plan, the Defendant was still identifying as a target (to be completed by January 2019), "*linking with parents for co-production engagement and support, develop and confirm the service offer (taking into consideration cessation of Portage)*" and Ms Wilkins in her evidence referred to the "*workshop to review the pathway and related early support*" then planned for December 2018. But, by the beginning of September 2018, the Defendant had still not devised or implemented any "*transition plan*" for the families affected by the withdrawal of Portage. At the hearing, I asked Mr Oldham QC whether he could identify the transition plan to which reference was made in the Second EIA. He told me that all the relevant documents had been included in the evidence before the Court. None contained a "*transition plan*".

36. The Defendant has disclosed a document headed: "*Portage Transition Plans Summer 2018*", but this was a document prepared by one of the Portage home workers, Su Collings. It simply set out, in tabular form, the name of several children receiving the Portage service (but not including the Third and Fourth Claimants), his/her date of birth, address, details of the child's professionals, agencies, nursery and groups and his/her diagnosis. This was not a plan. That is no criticism of Ms Collings. There is no evidence that she was given the task of devising a "*transition plan*". Nevertheless, that responsibility remained, as it accepted in the Second EIA, with the Defendant.

37. There is a second document headed "*Su Collings – Portage Caseload*", apparently dated 4 September 2018. This appears to consist of short case summaries for several children. In fact, these case studies have simply been copied from the existing case notes for each child. Most of the document has been redacted, but there are entries for the First and Second Claimants:

    i) RD

> "Visiting fortnightly – he has a child minder and attends [name of nursery]. [RD] will be attending [name of centre] as from September and also attending nursery… Su would have given transition support for six months when he started at [the centre] before closing.
>
> Actions
>
> Su is visiting tomorrow, mum is aware the service is ceasing. Su will ask mum if she would be happy for Jo to visit with Sue (sic) to ensure she is getting the support she required"

ii) AW

> "Complex needs, including visual impairment and epilepsy. Regular visits have been booked in but some have been missed due to complex health needs. Mum is concerned about how she will manage when portage ends as [AW] can do nothing for himself. She has very little time to spend with her other children. Mum has agreed to a referral to [Children with Disabilities ("CWD")] and there has also been a referral to Homestart. [AW] doesn't have specific targets as he is not well enough to do them but he does love music and Su has done some support around this. He would be eligible for nursery but he won't feed from anyone else so mum is working on this.
>
> Actions
>
> Visit arranged for next Wednesday, Su will contact to see if she is happy for Jo to visit and a worker from CWD. Su will complete referral to CWD.
>
> Remaining involved: Paediatrician, S&L, physio, OT, visual impairment team [name], health visitor and known to pre-school forum. Waiting to hear from Home start.

38. It is not clear to me whether the Defendant suggests that these documents are, or amount to, a "*transition plan*", but they are/do not. They only relate to two of the Claimants and represent, at best, an attempt to summarise each child's current situation and to identify some immediate issues.

39. On the basis of this evidence, I am driven to the conclusion that the Defendant had not developed/implemented and did not develop/implement any transition plan, despite the fact that (a) the August 2016 Decision was premised on the clear representation that such transitional arrangements would be made *before* the Portage service was withdrawn; and (b) the Second EIA had stated that a transition plan either had been, or would be, developed. There was also no monitoring of "*the development and implementation plans… for any unmet need resulting from [Portage] ceasing*": Second EIA [27]. Indeed, it was not until September 2018 that there was any engagement the Defendant with the Claimants' families. Even then, the evidence strongly suggests, these belated efforts were only triggered by the complaint by solicitors acting on the families' behalf (see [45]-[46] below) and were not executed pursuant to any "*transition plan*".

Engagement with parents regarding the withdrawal of Portage

40. Although some of the parents had a general awareness that the Portage scheme was likely to come to an end in the final quarter of 2018, specific information was given to them as follows:

i) The First Claimant's mother, LD, was told on 15 August 2018, by Ms Collings, that the last Portage visit would be on 19 September 2018. On that date, Ms Collings was accompanied by Jo Gandy, the Defendant's Team Manager of Early Intervention Family Support. LD describes this meeting in her first witness statement:

> "Someone from the Council's Early Interventions team jointly visited us with Su when she came for the last Portage session on 19 September 2018… They asked us what we needed help with, but I felt they failed to really tell

> us how they could help us; they did not put anything concrete forward to us about what they were offering…"

ii) The Second Claimant's mother, BW, was told on 21 August 2018, by Ms Collings, that the Portage service was ending on 1 October 2018. On 11 September 2018, BW was visited at home by Ms Collings, Ms Gandy and a social worker, Diane Bennett. The written summary of the visit records that the purpose of the visit was to "*ascertain if parent would like to access a service via the [Children with Disabilities Team]*". The notes record that it was agreed that the Defendant would assess whether the Second Claimant could receive direct payments to pay for Ms Collings to continue to provide him with 2 hours of therapeutic work twice a week. Under "*Actions to be taken following this visit*", it was recorded that Ms Bennett would action the following "*as soon as possible*":

> "A Service Request From to actioned to request direct payments [DP] to purchase 2 hours DP twice a week for [AW] with a view that parents can use his DP to employ Su Collings – current worker to remained (sic) involved after the Portage service disbands."

41. The Third Claimant's mother, KY, received no direct contact from the Defendant about the withdrawal of the Portage service until after the Claimants' solicitors had written to the Defendant on 27 September 2018 to notify it that they were acting for the Third Claimant. On 1 October 2018, Ms Gandy telephoned KY and told her that she had overseen all of Ms Collings' cases and wanted to come and see KY on 10 October 2018 (subsequently rearranged to 16 October 2018) to discuss the Third Claimant and the availability of other services following the withdrawal of Portage.

42. The Fourth Claimant's mother, SA, had her last Portage visit from Ms Collings towards the end of September 2018. She had heard nothing further from the Defendant before instructing the Claimants' solicitors at the end of September 2018.

43. On 28 September 2018, Ms Gandy sent letters to those parents who were being affected by the withdrawal of Portage ("the Withdrawal Letter"). KY did not receive the Withdrawal Letter until 3 October 2018 and SA did not recall receiving it. The Withdrawal Letter was a standard template:

> Dear {Name of Parent(s)},
>
> Re: {Child's name and date of birth}
>
> Further to the recent visit from your Portage Home Worker, I am writing to outline the support available to you should you need it moving forward.
>
> You should have received a copy of your child's Portage report from your final visit which provides an overview of your child and his/her progress. The purpose of this report is to ensure that other professionals working with you and your child have an up to date account of your child's progress in order to ensure a co-ordinated approach is taken when providing services now and in the future.
>
> Our understanding is that {name of child} has the support of his {identify family and carer(s)}. He has the following professionals involved: {identify}.
>
> Further information is also available through the following websites:

> SEND Local Offer
>
> http://www.worcestershire.gov.uk/thelocaloffer
>
> Help and advice around childcare:
>
> http://www.worcestershire.gov.uk/info/20507/childcare/1579/do_you_need_extra_help_or_advice_around_childcare
>
> Family Support:
>
> http://www.worcestershire.gov.uk/familysupport
>
> Special Educational Needs and Disabilities Information and Advice Service (SENDIASS):
>
> http://www.worcestershire.gov.uk/info/20417/special_educational_needs_and_disabilities_information_advice_and_support_service
>
> If you have any queries concerning the right service to contact, please call or email the Early Intervention Family Support Team on 01905 844760 or eifs@worcestershire.gov.uk
>
> Yours sincerely,
>
> Jo Gandy
> Team Manager
> Early Intervention Family Support

The letter sent to SA omitted the third paragraph.

44. The few brief meetings that the Defendant organised with some of the parents and the Withdrawal Letter, sent two days before the discontinuance of Portage and received by some parents after the service had been discontinued, could hardly be described as a "*transition plan*". Mr Oldham QC submitted that the interactions between the families and the Defendant in the period before and after 1 October 2018 were a transition plan. I reject this. Even taken together, they certainly did not amount to a plan "*which includes the key professional, other agencies working with the families, diagnosis, comments, concerns, future plans and any safeguarding issues…*"; they did not "*plan for any unmet need resulting from [Portage] ceasing*" and they did not "*ensure that [the parents were] able to access alternative services which can meet the needs previously addressed through the Portage service*". At best, the Withdrawal Letter might be regarded as providing an element of 'signposting' to parents that had previously been one of the benefits of Portage.

Pre-Action correspondence from the Claimants' solicitors

45. By emails on 14 and 15 August 2018, the Claimants' solicitors notified the Defendant that they were acting for the First and Second Claimants in relation to a potential challenge to the removal of the Portage service and the Council's "*ongoing failure to consider the impact of removal of this service and to make arrangement for alternative services*".

46. A formal letter of claim was sent on behalf of the First and Second Claimants on 24 August 2018. It also complained about the "*ongoing failure to adequately consider the impact of the removal of this service and to make the arrangements for alternative services to meet the needs of [the Claimants].*" It is right to note that, at that stage, one target of potential challenge was an alleged "*fresh decision*" in August 2018 "*to decommission Portage services*".

47. On 11 September 2018, the Defendant's solicitor responded. The Defendant contended that the threatened claim for judicial review was substantially out of time because the challenge was, in reality, directed at the August 2016 Decision. As to notification to the Claimants of the closure of Portage, the Defendant stated:

> "… the Council's view is that the Portage Workers kept your clients up to date about the closure of the Portage Service and while more could have been done to communicate effectively both families were made aware on several occasions that the service was ending in October 2018".

It added:

> "… the Council will identify any unmet needs and ensure that appropriate provision is made… A transition report has been completed in relation to [RD] and a similar report is due to be completed on [AW]".

48. On 27 September 2018 and 2 October 2018, the Claimants' solicitors notified the Defendant that they were now instructed on behalf of the Third and Fourth Claimants respectively, advanced details of their respective claims and responded to the Defendant's letter of 11 September 2018. In the letter of 27 September 2018, the Claimants' solicitors indicated that the Claimants were no longer seeking to challenge the August 2016 Decision, but that they considered the SEND Action Plan constituted "*a further challengeable decision given the absence of any adequate replacement for the Portage service…*" The Claimants invited the Defendant to continue to provide the Portage services, "*pending a full assessment of the impact of the removal of the service and identification of alternatives…*"

The Claim for Judicial Review

49. The Claim Form was issued on 26 October 2018. The targeted decision was stated in Section 3 as:

> "The decision to remove Worcestershire Portage Service from 01.10.18, the ongoing failure to adequately consider the impact of the removal and to make alternative arrangements, and the associated SEND Action Plan"

50. The principal remedy sought was:

> "An order requiring the Defendant to reconsider its decision to cease the provision of the Portage services having proper regard to the full complement of statutory duties as set out in the Claimant's (sic) Statement of Facts and Grounds"

51. The Claimants' Statement of Facts and Grounds identified the Claimants and set out the history of their receipt of Portage provision in Worcestershire. In paragraph 4, the claim for judicial review was summarised:

> "The Claimants contend that the decision to cease Portage services with effect from 1 October 2018, as confirmed in its response to the Ofsted/CQC findings… was unlawful, especially in the absence of (i) any meaningful assessment of the impact of that decision on the Claimants or other Portage recipients, and (ii) the provision of any alternative services to ameliorate the impact of the decision."

52. The Claimants contended that the "common thread" of the identified grounds of judicial review was:

> "… it was unlawful for the Council to cease the Portage service on 1 October 2018 in circumstances where, contrary to its previous indications, it had not (i) conducted any meaningful assessments of the impact of the cessation of those services on the Claimants; or (ii) following such assessments, ensured that suitable alternative services were in place for the Claimants."

53. In summary, the five grounds of judicial review identified were:

i) *Breach of s.27 Children and Families Act 2014*[1]

Before terminating the Portage service, the Defendant had failed to consider whether the alternative provision was sufficient to meet the Claimants' educational, training and social care needs. The Defendant had failed to comply with its duty under s.27(3) to consult, *inter alia*, the parents of the Claimants.

ii) *Breach of statutory obligations in relation to the welfare of children*

The statutory provisions identified were:

(a) s.11 Children Act 2004[2] (which it was said applied to the exercise by the Council of its functions generally);

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[1] **s.27 Duty to keep education and care provision under review**

(1) A local authority in England must keep under review—
  (a) the educational provision, training provision and social care provision made in its area for children and young people who have special educational needs or a disability, and
  (b) the educational provision, training provision and social care provision made outside its area for—
    (i) children and young people for whom it is responsible who have special educational needs, and
    (ii) children and young people in its area who have a disability.

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

(3) In exercising its functions under this section, the authority must consult [ten identified bodies and] … such other persons as the authority thinks appropriate.

[2] **s. 11 Arrangements to safeguard and promote welfare**

…

(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.

(3) In the case of a local authority in England, the reference in subsection (2) to functions of the authority does not include functions to which section 175 of the Education Act 2002 applies.

(b) s.17 Children Act 1989[3] (which it was contended applied because the Claimants were all "children in need" under s.17(10) due to their serious disabilities); and

(c) s.175 Education Act 2002[4] (which it was argued applied to the extent that the Council was exercising its education functions).

Relying upon ***R (Nzolameso) -v- Westminster City Council*** **[2015] 2 All ER 942** [32] and ***R (E) -v- Islington Borough Council*** **[2018] PTSR 349** [117]-[118], the Claimants contended that the Defendant had provided no evidence that it had considered whether ceasing to offer Portage services to the Claimants with effect from 1 October 2018, without any alternative services being identified or provided, was consistent with the identified statutory duties.

iii) *Breach of the Public Sector Equality Duty ("PSED") imposed by s.149 Equality Act 2010*

The Defendant – in the two Equality Impact Assessments – had identified that closing Portage would potentially have an adverse effect on disabled children. The Claimants contend that there is no evidence that the Defendant recognised that the cessation of Portage in the absence of any alternative provision for the Claimants engaged the PSED. Withdrawal of the service was a breach of the Defendant's continuing obligations under s.149.

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[3] **s.17 Provision of services for children in need, their families and others.**

(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—
  (a) to safeguard and promote the welfare of children within their area who are in need; and
  (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,

by providing a range and level of services appropriate to those children's needs…

(10) For the purposes of this Part a child shall be taken to be in need if—
  (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
  (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
  (c) he is disabled,

and "family", in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.

[4] **s.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…

(4) An authority or body mentioned in any of subsections (1) to (3) shall, in considering what arrangements are required to be made by them under that subsection, have regard to any guidance given from time to time (in relation to England) by the Secretary of State or (in relation to Wales) by the National Assembly for Wales

iv) *Breach of s.1 Childcare Act 2006*[5]

The Defendant's conduct with regard to the Portage service gave rise to the risk of (a) a reduction in the well-being of young children in its area (namely those who had been receiving Portage services); and (b) increased inequalities between young people in its area in relation to matters such as physical and mental health and emotional well-being and was therefore a breach of s.1 Childcare Act 2006.

v) *Unlawfulness at common law*

Finally, the Claimants contended that, applying the appropriate intensity of review having regard to the profoundness of the impact of the challenged decision (objectively judged) on the individual affected, the decision was:

(a) irrational: in that the Defendant failed to conduct any meaningful assessments of the effect of the removal of the Portage services on the Claimants (or any other affected children); and

(b) a breach of a legitimate expectation that the Claimants had that the Portage service would not be ceased before transition plans and alternative services were in place, where this was the express basis on which the August 2016 Decision was based. This legitimate expectation has been confounded by ceasing the Portage service without conducting any meaningful transition planning or putting in place any alternative services prior to the cessation of the service.

54. The Claimants also issued an Application for urgent consideration seeking expedition. The reason given for the urgency was:

> "This claim is a challenge to the cessation of Portage services in Worcestershire. Portage services were discontinued as of 1 October 2018 and the Defendant has failed to make arrangements for adequate alternative services that meet the needs of the Claimants…"

55. On 2 November 2018, King J granted an order anonymising the Claimants; on 8 November 2018, Garnham J granted expedition and on 28 November 2018, Butcher J granted permission and directed the substantive hearing to take place before the end of February 2019. In light of some of the submissions that have been made by Mr Oldham QC, on behalf of the Defendant, I need to note several matters from these Orders:

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[5] **s.1 General duties of local authority in relation to well-being of young children**

(1) An English local authority must—
  (a) improve the well-being of young children in their area, and
  (b) reduce inequalities between young children in their area in relation to the matters mentioned in subsection (2).

(2) In this Act "well-being", in relation to children, means their well-being so far as relating to—
  (a) physical and mental health and emotional well-being;
  (b) protection from harm and neglect;
  (c) education, training and recreation;
  (d) the contribution made by them to society;
  (e) social and economic well-being.

i) On the issue of delay that had been raised by the Defendant, King J stated:

> "I note… that the Defendant may be contending that the Claim is well out of time relating back to the [August 2016 Decision], whereas the Claimants say that they do not challenge the decision to cease Portage *per se* but ground their challenge on the cessation of Portage services on 1 October 2016 without (on their case) any alternative provision for the Claimants being in place, the provision of which they say the [August 2016 Decision] was premised." (emphasis added)

ii) Again, on the issue of delay, Garnham J stated:

> "I see no significant delay here and it is plain that this case is fairly urgent given the potential impact of the loss of 'Portage' on the claimants."

iii) When granting permission, Butcher J (who had the Defendant's Grounds of Resistance, in which points as to delay and the availability of alternative remedy were raised as a preliminary point) did not refer to the issue of delay/alternative remedy.

56. The Defendant's Detailed Grounds of Resistance relied upon the original Grounds of Resistance and did not amplify them. The Defendant's case in answer to the Claimants' claim, in summary, is:

Ground 1

i) s.27 Children and Families Act 2014 (see [53(i)] above) is not engaged at the level of individual decision-making; rather it is a duty that applies to the setting of policy in general. Alternatively, if the section did impose a duty to consult, then the Defendant had complied with it by consulting fully prior to the August 2016 Decision.

Ground 2

ii) As to the alleged breaches of duties imposed by the identified statutes:

s.11 Children Act 2004

a) First, s.11 does not require children's welfare to "*be the paramount or even of primary consideration*": ***Nzolameso*** [28]; ***R (Tilley) -v- Vale of Glamorgan Council*** **[2016] EWHC 2272 (Admin)** [77]. Second, the section also does not alter the nature or scope of the functions to which it relates; it regulates the way in which each such body's existing functions are to be discharged: ***Kensington and Chelsea Royal London Borough Council -v- Mohamoud*** **[2016] PTSR 289** [66]; ***R (X) -v- Secretary of State for Justice*** **[2017] 4 WLR 106** [37]. Third, and consequently, the duty will be discharged through the authority's observance of other duties which consider children's interests.

b) There was no breach of s.11, given that the interests of the children were taken into account through consultation in 2016, the production of EIAs (the contents of which the Claimants do not criticise), a report to the decision maker in August 2016 referring to EIA, and the discussion of

provision with families which was or might be available after the end of Portage.

s.17 Children Act 1989

c) First, this provision (see [53(ii)(b)] above) is not enforceable by an individual for failure to provide for his/her needs: ***R (G) -v- Barnet London Borough Council*** **[2004] 2AC 208** [85].

d) Second, even had s.17(1) been enforceable, it could not have required the Council to provide a discretionary service such as Portage.

s.175 of the Education Act 2002

e) The same points apply: this provision (see [53(ii)(c)] above) is not enforceable by an individual. Even had it been, it would have not required a particular outcome for a particular child, nor the continuation of discretionary services.

Ground 3

iii) As to the alleged breach of the PSED:

a) The Defendant was under no obligation to replicate Portage. Those to whom Portage had been provided might have needs which the Council was required to meet, but the Claimants do not contend that the Defendant has failed in such a duty.

b) The duty under s.149 is to have due regard to the need to eliminate unlawful discrimination, to promote equality of opportunity and to foster good relations, between those with and without a protected characteristic. As the two EIAs and the Executive Report demonstrate, the Defendant was aware that cessation of Portage might affect the young and the disabled and had identified mitigating steps.

Ground 4

iv) First, the Claimants accept that s.1 Childcare Act 2006 is a target duty and is not enforceable by an individual complaining about provision which s/he receives. Second, the contention that, following withdrawal of Portage, the Claimants were left with "no alternative support" is factually wrong.

Ground 5

v) In relation to the irrationality challenge, the Council did acquaint itself with information to allow it to know the impact of closure of the Portage service. It consulted users and others, and the Executive Report was provided and considered before the August 2016 Decision was taken. Shortly before Portage ceased, the Defendant then talked to parents about the transition to them using other services.

vi) In relation to the legitimate expectation challenge, first, there has been transition planning, and there is no allegation of failure to provide a service which the

Council was obliged to provide. Second, there is no factual basis for a legitimate expectation claim, i.e. a clear representation of a benefit or procedure which was subsequently denied.

Delay/Alternative Remedy

57. In addition to its response on the merits, the Defendant also contended that the claim for judicial review should be rejected on the grounds of delay and/or the availability of an alternative remedy.

58. The Claimants' case is that they are not seeking to challenge the August 2016 Decision. However, the Defendant contends that, in substance, that is exactly what they are doing and that such a challenge should be rejected because of the substantial delay.

59. As to alternative remedy, the Defendant submits that the Claimants' true complaint is that the closure of Portage has affected them adversely. If so, it is argued that the real issue here is a very practical, non-legal one. Mr Oldham QC asks, what assistance or services do Claimants say they need or are entitled to but are not getting? This is about the detail of service delivery over which the Court has no control.

60. The Defendant contends that there are both statutory and non-statutory procedures for complaints and requests for assistance, including under ss.36-37, and ss.51-54 Children and Families Act 2014; s.114 Health and Social Care (Community Health and Standards) Act 2003; and under the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009. Mr Oldham QC says that the Claimants have made no complaint.

61. Relying upon ***R (Cowl) -v- Plymouth CC*** **[2002] 1 WLR 803** [14] and ***R -v- Birmingham City Council, ex p. Ferrero Ltd*** **[1993] 1 All ER 530**, **537**, the Defendant argues that the Court should not permit proceedings for judicial review to proceed if a significant part of the issues between the parties could be resolved outside the litigation process, particularly if there is a statutory appeal route.

62. Ms Richards QC responds that the alternative remedies suggested by the Defendant are not more "*effective and convenient*" than a claim for judicial review: ***R -v- Huntingdon District Council, ex parte Cowan*** **[1984] 1 WLR 501, 507**. She also argues that the argued alternative remedy consists of the Claimants complaining to the Defendant and that, on the basis of its response to the claim, there is no real prospect of the Council adopting any different stance.

No substantially different result: s.31(2A) Senior Courts Act[6]

63. Finally, Mr Oldham QC argues that the claim for judicial review should be refused on the grounds that the Court can and should conclude that it is highly likely that the outcome for the Claimants would not have been substantially different if the conduct complained of had not occurred.

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[6] (2A) The High Court—
(a) must refuse to grant relief on an application for judicial review, and
(b) may not make an award under subsection (4) on such an application,
if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

64. This requires the Court to "*undertake its own objective assessment of the decision-making process, and what its result would have been if the decision-maker had not [conducted itself in the way complained of]*": ***R (Goring-on-Thames Parish Council) -v- South Oxfordshire District Council*** **[2018] EWCA Civ 860** [55] *per* Sir Terence Etherton MR.

What is being challenged in this claim?

65. Before I turn to consider each of the grounds, I need to resolve a logically anterior question: what is the target of the challenge?

Parties' submissions

66. Mr Oldham QC in his submissions has repeatedly made the point that the Claimants cannot point to any decision other than the August 2016 Decision that is susceptible to challenge. The Claimants have clearly disavowed a challenge to the August 2016 Decision, so, Mr Oldham QC asks, what is being attacked? He submits that the Claimants are trying to create a challengeable event as a way of getting around the fact that they cannot now challenge the August 2016 Decision.

67. Ms Richards QC for the Claimants contends that there must have been a decision to *implement* or go-ahead with the August 2016 Decision to discontinue Portage at the end of September 2018. That decision is a legitimate target for this claim and the Claimants seek to impeach it on the identified grounds.

68. Mr Oldham QC submits that such an approach cannot be accepted. The August 2016 Decision was not conditional or expected to be subject to any further review; Councillor Bayliss "*approved the proposals to cease delivery of the dedicated Portage Service in Worcestershire on 1 October 2018*". He contends that an individual might have contended that the Defendant had failed in some particular legal duty of assessment or provision in his case following the termination of Portage, but the Claimants' claims are not put on that basis.

69. What the Claimants cannot do, he submits, is to argue that, because there was a period of notice and transition, the Defendant was under a duty to undertake a further assessment of whether to close Portage at all. There is no authority to support such a duty, which is effectively to create an implied duty of reconsideration which does not exist. All the grounds of claim assert adjectival and "*have regard*" to functions in relation to this alleged duty of reconsideration. As the duty does not exist, the claim must fail, for this reason alone.

70. Mr Oldham QC submits that, since the August 2016 Decision was a final decision, any challenge had to be made promptly and at any rate within three months of it. He contends that the Claimants could have raised all the claims they raise now in a challenge to that decision i.e. arguing that the decision to cease Portage on 1 October 2018 was unlawful because insufficient thought had been given to what would replace it.

71. In reply submissions, Mr Armitage submitted that the August 2016 Decision was expressly premised on the understanding that there would be transition planning to mitigate the impact on those affected. Assessed legally, Mr Armitage argues, the Defendant had essentially divorced the various statutory duties to which it had to have regard from the August 2016 Decision and had effectively transferred them to the

transition planning. A judicial review challenge to the August 2016 would, he submits, have been met with the almost unanswerable contention that the claim was premature; it was not until the transition plan had been devised that families who were potentially affected by the withdrawal of Portage services could argue that they had been in any way disadvantaged.

Decision

72. In my judgment, the struggle to identify the decision under challenge (if it is not the August 2016 Decision) does not lead to the conclusion, urged by Mr Oldham QC, that the Claimants have no basis for complaint. I consider that it helps to pin-point the real target of the Claimants' claim: the absence of any transition planning. The Claimants are not creating a duty to reconsider; their case is that they were entitled to expect the Defendant would execute the transition planning that it had promised it would carry out. That is a claim to legitimate expectation.

73. In his submissions, Mr Oldham QC complained that the Claimants' claim had been a moving target. He submitted that the Court should insist on procedural rigour and not permit the Claimants to stray from their pleaded case: see ***R (Talpada) -v- Secretary of State for the Home Department*** **[2018] EWCA Civ 841** [67]-[69]. Insofar as he was arguing that the nature of the claim had changed, I reject that. The substance and factual basis of the Claimants' claim has always been clear, and it has not changed; nor have the grounds. I am satisfied that there has been no unfairness to the Defendant or any 'ambushing' with new points. King J understood, and succinctly summarised, the Claimant's case when the claim first came before the Court on paper. Indeed, it appears to me that he identified the key issue (see the underlined words in [55(i)] above). What has taken some time to crystallise clearly – and on which there has been much (legitimate) argument – is the proper legal framework against which the claim falls to be assessed. In my judgment, the key issue that has emerged is that of legitimate expectation (which was always one of the Claimants' grounds, albeit perhaps not originally at the forefront of them).

74. Ms Richards QC has pointed to the fact that a number of the points that the Defendant has relied upon to resist the legitimate expectation claim have emerged, not from the pleadings (the Detailed Grounds of Resistance simply relied upon the Grounds of Resistance – see 56 above), but for the first time in argument.

Legitimate Expectation

The law

75. A legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue: ***Council of Civil Service Unions -v- Minister for the Civil Service*** **[1985] AC 374, 401B** *per* Lord Fraser.

76. Of the three broad categories of legitimate expectation that were identified by the Court of Appeal in ***R -v- North and East Devon Health Authority ex parte Coughlan*** **[2001] QB 213** [54], two potentially have a bearing on this case:

    i) procedural legitimate expectation: where the court decides that the promise induces a legitimate expectation of, for example, being consulted before a particular decision is taken; and

ii) substantive legitimate expectation: where the court decides that a promise has induced a legitimate expectation of a benefit which is substantive, not simply procedural.

77. The Court recognised that it may be difficult to decide into which category a decision should be placed [59]. But, in both cases, if the legitimate expectation is established, the court will require the promise to be fulfilled unless there is an overriding reason to resile from it. The question is whether the frustration of the expectation is so unfair that it amounts to an abuse of power.

> "[One category of abuse of power], as cases like ***ex p. Preston*** **[1985] AC 835** now make clear, is reneging without adequate justification, by an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals." [69]

78. Relying upon paragraph [59], Mr Oldham QC submits that there will be a breach of a substantive legitimate expectation only if the representor acts in a way that is analogous to breach of contract. In this respect, he also relies on observations of Lord Scarman, in ***ex parte Preston*** at 866-867, that the conduct relied upon must be "*equivalent to a breach of contract or breach of representation*".

79. Those statements of principle might be regarded having been made in the infancy of the doctrine of legitimate expectation. The House of Lords in ***R (Reprotech Ltd) -v- East Sussex County Council*** **[2003] 1 WLR 348** held that to have effect a substantive legitimate expectation does not depend upon being able to identify a private law analogy. Lord Hoffmann said:

> [33] … I think that it is unhelpful to introduce private law concepts of estoppel into planning law. As Lord Scarman pointed out in ***Newbury District Council -v- Secretary of State for the Environment*** **[1981] AC 578, 616**, estoppels bind individuals on the ground that it would be unconscionable for them to deny what they have represented or agreed. But these concepts of private law should not be extended into "*the public law of planning control, which binds everyone*". (See also Dyson J in ***R -v- Leicester City Council, ex p. Powergen UK Ltd*** **[2000] JPL 629, 637**.)
>
> [34] There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power: see ***ex p. Coughlan*** **[2001] QB 213**. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote. Public law can also take into account the hierarchy of individual rights which exist under the Human Rights Act 1998, so that, for example, the individual's right to a home is accorded a high degree of protection (see ***Coughlan***'s case, at pp. 254–255) while ordinary property rights are in general far more limited by considerations of public interest: see ***R (Alconbury Developments Ltd) -v- Secretary of State for the Environment, Transport and the Regions*** **[2003] 2 AC 295**.
>
> [35] It is true that in early cases such as the ***Wells*** case **[1967] 1 WLR 1000** and ***Lever Finance Ltd -v- Westminster (City) London Borough Council*** **[1971] 1 QB 222**, Lord Denning MR used the language of estoppel in relation to planning law. At that time the public law concepts of abuse of

> power and legitimate expectation were very undeveloped and no doubt the analogy of estoppel seemed useful… It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet.

80. Similarly, in ***R -v- Secretary of State for the Home Department, ex parte Zeqiri*** **[2002] ACD 60** [44], Lord Hoffmann said:

> "The question is not whether it would have founded an estoppel in private law but the broader question of whether, as Simon Brown LJ said in ***R -v- Inland Revenue Commissioners, ex p. Unilever plc*** **[1996] STC 681**, **695B**, a public authority acting contrary to the representation would be acting '*with conspicuous unfairness*' and in that sense abusing its power."

81. It is common ground that the representation must be "*clear, unambiguous and devoid of relevant qualification*": ***R (Bancoult) -v- Secretary of State for Foreign and Commonwealth Affairs (No.2)*** **[2009] 1 AC 453** [60] *per* Lord Hoffmann.

82. In ***United Kingdom Association of Fish Producer Organisations -v- Secretary of State for the Environment, Food and Rural Affairs*** **[2013] EWHC 1959 (Admin)**, Cranston J identified ten propositions underpinning the doctrine of substantive legitimate expectation:

i) The undertaking must be clear, unambiguous and without relevant qualification: ***Bancoult*** [60].

ii) On ordinary principles, an undertaking can derive from a representation or a course of conduct. However, the mere existence of a scheme is inadequate in itself to generate a substantive legitimate expectation: ***R (Bhatt Murphy) -v- Independent Assessor*** **[2008] EWCA Civ 755** [63].

iii) Whether there is such an undertaking is ascertained by asking how, on a fair reading, the representation or course of conduct would reasonably have been understood by those to whom it was made: ***R (Patel) -v- General Medical Council*** **[2013] 1 WLR 2801** [44]-[45], applying ***Paponette -v- Attorney General of Trinidad and Tobago*** **[2012] 1 AC 13** [30].

iv) Although in theory the defined class being large is no bar to the members of the class having a substantive legitimate expectation, in reality it is likely to be small if the expectation is to be made good: ***Bhatt Murphy*** [46]. In ***Paponette*** the successful class to whom a collective promise had been made was some 2,000 people.

v) Detrimental reliance is not an essential requirement. However, it may be necessary where the issue is in the macro-political field or a person-specific undertaking is alleged: ***Bancoult*** [60] *per* Lord Hoffmann; ***R -v- Secretary of State for Education and Employment, ex p. Begbie*** **[2000] 1 WLR 1115**, **1124B-C**, **1133D-F**.

vi) To justify frustration of a substantive legitimate expectation, the decision maker must have taken into account as a relevant consideration the undertaking and the fact that it will be frustrated: ***Paponette*** [45]-[46].

vii) Legitimate expectation is concerned with exceptional situations: ***Bhatt Murphy*** [41].

viii) Justification turns on issues of fairness and good administration, whether frustrating the substantive legitimate expectation can be objectively justified in the public interest and as a proportionate response. Abuse of power is not an adequate guide: ***R (Nadarajah) -v- Secretary of State for the Home Department*** **[2005] EWCA Civ 1363** [70].

ix) The intensity of review depends on the character of the decision. There will be a more rigorous standard than *Wednesbury* review, with a decision being judged by the court's own view of fairness. A public body will not often be held, bound to maintain a policy which on reasonable grounds it has chosen to change. There will be less intrusive review in the macro-political field. As well, respect will be accorded to the relative expertise of a decision-maker: ***Bhatt Murphy*** [35], [41]; ***Patel*** [60]-[62], [83].

x) Transitional arrangements, and whether there has been a warning of possible change, are not essential but may be relevant to the court's assessment of justification: ***Bhatt Murphy*** [18]-[20], [56]-[57], [60]-[61], [65]-[70]; ***Patel*** [77], [83].

To those principles, I might tentatively add,

xi) Knowledge of (or detrimental reliance upon) an express representation is not an essential requirement where the representation relied upon is made to the public at large or a class of persons: ***R (Rashid) -v- Secretary of State for the Home Department*** **[2005] Imm AR 608** [25] *per* Pill LJ and [47] *per* Dyson LJ; ***Begbie***, 1133 *per* Sedley LJ; ***R (Save Britain's Heritage) -v- Secretary of State for Communities and Local Government*** **[2019] 1 WLR 929** [50] *per* Coulson LJ.

83. Mr Oldham QC has submitted the Court should adopt caution before accepting some of Cranston J's summary of the principles:

i) In relation to whether detrimental reliance is required, he contends that such reliance is "*a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power*": ***Paponette*** [20]. Further, he suggests that the issue is more complicated. The question of whether and when detrimental reliance is needed *in itself* is not clear cut. He submits that, in ***Talpada***, Singh LJ identified the requirements for a legitimate expectation to be established as including both reliance and detriment: [60].

ii) Closely following his submission that the law of legitimate expectation is analogous to the law of misrepresentation, Mr Oldham QC submits that there must, at some point, be personal knowledge of the representation and detrimental reliance upon it.

iii) Finally, he submits that Cranston J's suggestion (in principle (viii)) that "*abuse of power is not an adequate guide*" is not accurate. He refers to Singh LJ's judgment in ***Talpada*** [66] where he stated the requirement as "*the sort of extreme case where it can be said that there was unfairness amounting to abuse of power*".

84. I am not prepared to re-interpret the principles Cranston J identified. On the contrary, I must apply them unless I consider that they are clearly wrong. In any event, I do not accept Mr Oldham QC's submission that reliance and detriment need to be shown in every case.

i) ***Paponette*** suggested that it might be a factor in whether it would be an abuse of power to resile from an otherwise clear and unambiguous representation.

ii) I cannot reconcile an alleged requirement in every case to demonstrate both reliance and detriment with the clear statements of principle that even *knowledge* of the representation is not required in some categories of case (see [82(xi)]). That would open up the possibility that some people in a defined class to whom an otherwise clear and unequivocal representation was made would have their claim rejected on the basis of absence of knowledge, whereas those who had knowledge would succeed. Unsurprisingly, that proposition has been rejected. In ***Rashid***, Pill LJ said such a result would be "*grossly unfair*" [25].

iii) Equally, Mr Oldham QC's contention that detrimental reliance must be shown by these Claimants is contradicted by authority (see [82(v)] above). In ***R -v- Newham LBC, ex parte Bibi*** **[2002] 1 WLR 237** Schiemann LJ, emphasising the difference between public law and private law concepts of misrepresentation, said [55]:

> "In our view these things matter in public law, even though they might not found an estoppel or actionable misrepresentation in private law, because they go to fairness and through fairness to possible abuse of power. To disregard the legitimate expectation because no concrete detriment can be shown would be to place the weakest in society at a particular disadvantage. It would mean that those who have a choice and the means to exercise it in reliance on some official practice or promise would gain a legal toehold inaccessible to those who, lacking any means of escape, are compelled simply to place their trust in what has been represented to them."

85. It might be asked rhetorically, in this case, what detrimental reliance could these Claimants (or their parents) have shown? Assuming some parents could demonstrate this, is relief to be refused to the others? It seems to me that the proper analysis is that absence of reliance and detriment may well be factors that the Court considers when deciding whether frustrating the legitimate expectation would be an 'abuse of power'. In ***Bhatt Murphy*** [30], Laws LJ said:

> "There may be questions such as whether the claimant for relief must himself have known of the promise or practice, or relied on it. It is unnecessary for the purpose of these appeals to travel into those issues; I venture only to say that there are in my view significant difficulties in the way of imposing such qualifications. My reason is that in such a procedural case the unfairness or abuse of power which the court will check is not merely to do with how harshly the decision bears upon any individual. It arises because good administration ('*by which public bodies ought to deal straightforwardly and consistently with the public*': paragraph 68 of my judgment in ***ex p. Nadarajah***) generally requires that where a public authority has given a plain assurance, it should be held to it. This is an objective standard of public decision-making on which the courts insist. I note with respect the observations of Peter Gibson LJ on the importance of reliance in ***ex p. Begbie*** at 1124B—D; but that was a case (or a

> putative case) of substantive legitimate expectation, where different considerations may arise."

86. As to Cranston J's eighth principle, it seems to me that this is no more than a reminder that 'abuse of power' has become a shorthand description of the concept and that much jurisprudence has been gathered explaining it in the context of frustrating a legitimate expectation. For example, Lord Hoffmann described it as the circumstances where "*a public authority acting contrary to the representation would be acting 'with conspicuous unfairness' and in that sense abusing its power*" (see [80] above).

Parties' submissions

87. Ms Richards QC argues that the failure to carry out the promised transitional planning confounded the legitimate expectation of the Claimants. She contends that the present case is analogous to ***R (B) -v- Worcestershire County Council*** **[2009] EWHC 2915 (Admin)**, in which a decision to close a care home was expressly taken on the basis that all users' needs would be met in alternative placements, and yet the defendant authority failed to conduct the assessment necessary to satisfy itself that this would be the case. Alternatively, she contends that the failure to carry out the transitional planning is irrational.

88. At my invitation, the parties supplemented their arguments on legitimate expectation after the hearing in some further written submissions. I have dealt with Mr Oldham QC's legal submissions above. As to the facts, he argues that the claim of legitimate expectation is based upon the alleged representation that "*alternative support to address any unmet need*" would be "*identified and provided*". The nature of the representation, he submits, has varied in the Claimants' submissions and this vagueness undermines the contention that the representation was "*clear and unambiguous*".

89. If the Court were to find that the Claimants did have a legitimate expectation, Mr Oldham QC has not advanced any argument on behalf of the Defendant that frustrating the legitimate expectation can be objectively justified in the public interest and as a proportionate response.

Decision

90. I have set out above my findings about the representation made by the Defendant when the August 2016 Decision was made (see [23]-[24]). I find that, on a fair reading, this representation was:

    i) clear and unambiguous;

    ii) not subject to any qualification; and

    iii) directed at, and would reasonably have been understood by, the parents whose children would still be receiving Portage services at the end of September 2018.

91. Although none of the parents of the Claimants acted to his/her detriment in reliance on the representation, that is not determinative in this case. In any event, insofar as knowledge of the representation is a requirement (and in my judgment, in this case it is not), it is probable that the parents of the Claimants knew of the representation before 1 October 2018 because, by that stage, they had instructed their solicitors who had sent detailed letters on their behalf.

92. In my judgment, the representation gave rise to a legitimate expectation that the Defendant would devise and implement transitional arrangements to mitigate the impact of the August 2016 Decision by ensuring that the families affected were able to access alternative services which would meet the needs that had previously been addressed by Portage.

93. In my judgment, the following factors reinforce the decision that the representation gave rise to a legitimate expectation:

    i) When implemented, the August 2016 Decision was one that took away a benefit which the Claimants had previously enjoyed. This was not a gratuitous representation of some future benefit. The transition planning was intended to mitigate the impact of the withdrawal of Portage.

    ii) The benefit that was being withdrawn had been, at least in part, provided by the Defendant in discharge of its statutory duties towards 'children in need' (as recognised in the Executive Report [20(ii)]) in respect of which there was a general public interest.

    iii) The representation was deliberate and made to a limited and identified class in the specific contemplation of the Defendant. To the extent that the Second and Third Claimants were enrolled into Portage *after* the representation was made, (a) it was the Defendant's choice to extend Portage services to them in circumstances where it would have been apparent that they would therefore be receiving Portage services at the date of withdrawal; (b) there was no suggestion to the parents that they would not similarly benefit from the promised transitional plan; and, in any event (c) the representation was repeated and reinforced by the Second EIA.

    iv) The strength and weight to be attached to the promise is substantial. The Defendant clearly recognised that, without transitional planning, the August 2016 Decision would expose the Claimants (and other children benefiting from Portage) to potential detriment. The August 2016 Decision was therefore premised upon transitional arrangements being made; in other words, the transitional arrangements were an integral part of the August 2016 Decision. Recognising the legitimate expectation is consistent with, and reflects, the principles that public authorities should not act arbitrarily and should implement their stated policies unless they determine, on a rational basis, not to do so, or that the relevant policy should be withdrawn, amended or replaced.

94. It is a matter of debate whether the legitimate expectation I have found is procedural or substantive. Although it might be argued that the Defendant was promising to assess the impact of the August 2016 Decision on each of the children who were receiving Portage services, on balance I consider that the promise of a "*transition plan*" that would mitigate the impact of the August 2016 Decision was substantive. Nevertheless, I am satisfied that, however the legitimate expectation is categorised, it makes no difference to the outcome.

95. The Defendant's failure, as I have found ([39] above), to devise or implement any transitional plan frustrated that legitimate expectation. The Defendant has offered no justification for doing so.

96. In light of that conclusion, I can deal shortly with the remaining points.

Delay

97. As the decision is that the Defendant has frustrated the legitimate expectation of the Claimants, the complaint of delay has no substance. The Claimants took up their complaint, in August 2018, when it was apparent that the Defendant had not devised or implemented any transitional plan. The Claim Form was issued at the beginning of October 2018. Like Garnham J, I consider that there has been no delay (see [55(ii)] above).

Alternative Remedy

98. The Defendant's arguments about alternative remedy were premised upon the Claimants' complaints being directed at a failure to provide for their needs following the withdrawal of Portage. That is one stage removed from the real target of this claim for Judicial Review. Had there been a failure to *deliver* what a transitional plan had identified as the children's needs following the withdrawal of Portage, that might have been suitable for a complaint using the various routes identified by the Defendant (see [60] above). However, my finding is that there has been a failure to devise and implement the promised transitional plan. That is not failure that could, realistically, have been made the subject of a complaint or request for assessment using the routes identified by the Defendant.

No substantially different result

99. Several witness statements have been filed by the Claimants and the Defendant setting out what has happened since the withdrawal of Portage on 1 October 2018. I have no doubt that those at the Defendant responsible for providing help and support have done so conscientiously, professionally and with a genuine desire to assist the families. Nothing in this judgment should be taken as any suggestion to the contrary. In her second Witness Statement, Ms Wilkins has carefully identified and explained the services offered by the Defendant since October 2018 to support pre-school age SEND children. She states that it is her belief that the lack of the Portage service is not having an adverse effect on the children who previously benefited from it "*as all the services provided by Portage workers [are] available to that cohort of children in a comprehensive and sustainable way*".

100. I accept that this is Ms Wilkins' sincere belief, but, in this Judicial Review claim, the Court cannot assess whether she is correct in her assessment; not least because I lack a basis on which to do so. However, I should note that it is not a view that is shared by the parents, who have expressed clearly in their evidence what they believe they have lost as a result of the withdrawal of Portage. Regrettably, the evidence has begun to venture into the territory of whether the parents are failing to take advantage of services that are available to them. Not only is that evidence largely irrelevant on the substantive claim (it post-dates the subject of the challenge), but criticism of the parents is positively unhelpful in terms of securing the best outcome for the Claimants. The partnership between the parents and those who provide help and assistance is essential to promoting the welfare of the children. Adversarial litigation risks putting a strain on this relationship, and signs of such a strain are starting to emerge in the evidence.

101. It is quite impossible for me to decide that, had the Defendant devised and implemented a transitional plan, the result for the Claimants would be no different. The complaint that I have upheld in this claim for judicial review is that the Claimants have been wrongly deprived of a considered transitional plan. The position they are in now is that

the Defendant is very much approaching the issue on the basis that it is for the parents to identify what needs of the children are not being met. That is not what was envisaged at the time of the August 2016 Decision or subsequently.

102. It is for the Defendant, as part of this transitional planning, to identify any unmet need following the withdrawal of the Portage service. It is at this stage that the various duties identified under Grounds 1 to 4 have potential bearing. The Claimants are not entitled to demand that the Defendant reinstate the Portage service. It is clear from their evidence that they had all hoped for that outcome, but I think they accept that the Court cannot make any such order. It is the Council's duty to consider whether its SEND provision is sufficient to meet the identified needs of the children. I have suggested one approach that could be adopted in devising a transitional plan ([34] above), but ultimately it is for the Council to make that assessment and not the Court.

Conclusion and relief

103. For those reasons I have set out, the frustration of the legitimate expectation was not lawful and the Claimants are entitled to a declaration to that effect. If the parties are unable to agree what further orders the Court should make, I will hear further submissions.