The Queen -on the application of- Gurpreet Kaur Juttla (a child, by her litigation friend Satnam Kaur), Sienna Scott (a child, by her mother and litigation friend Emma Turner), Liam Murphy (a child, by his mother and litigation friend Angelina Murphy) v Hertfordshire Valleys Clinical Commissioning Group v Hertfordshire County Council, Hertfordshire Community NHS Trust, East and North Herfordshire Clinical Commissioning Group

Case No: CO/5906/2017

High Court of Justice Queen's Bench Division Administrative Court

21 February 2018

[2018] EWHC 267 (Admin)

2018 WL 01035858

Before: Mr Justice Mostyn

Date: 21/02/2018

Hearing dates: 6-7 February 2018

Representation

Jenni Richards QC & Sian Davies (instructed by Irwin Mitchell) for the Claimants.
Eleanor Grey QC & Ms Nicola Greaney (instructed by Capsticks) for the Defendant.
Clive Sheldon QC & Hannah Slarks (instructed by County Solicitor) for the 1st Interested Party.
The 2nd & 3rd Interested Parties did not attend and were not represented.

Approved Judgment

Mr Justice Mostyn:

1 My decision is that the resolution made by the defendant on 16 November 2017 to remove funding of £600,000 annually from Nascot Lawn in Watford (a respite service for children with complex medical needs) with effect from 16 May 2018, is set aside under the first ground of challenge. The remaining five grounds are all dismissed. The consequence is that the defendant must now comply with its legal duty formally to consult Hertfordshire County Council (HCC) about its proposal to withdraw that funding. That should lead to a collaborative dialogue. If no agreement is reached HCC can refer the controversy to the Secretary of State who has far-reaching powers to make a merits-based decision on the issue. I am satisfied that aside from the first ground the complaints made by the claimants about the process which led to the decision are not made out.

2 The defendant is Hertfordshire Valleys Clinical Commissioning Group. Clinical

commissioning groups were created by the Health and Social Care Act 2012 , and replaced Primary Care Trusts on 1 April 2013. They are clinically-led statutory NHS bodies responsible for the planning and commissioning of health care services for its local area. There are now 207 clinical commissioning groups in England. The defendant is one of the bigger clinical commissioning groups. It is in financial trouble. In the first two years of its existence (2013-14, and 2014-15) it met its financial targets. In the third year (2015-16) it was only able to do so by taking a number of special non-recurrent measures and by exiting the year with an underlying deficit. In the summer of 2016, that is to say about a third of the way through that financial year, it was obvious that the position of the defendant had deteriorated. It was spending far more in that year than it had in the previous year. In the year 2014–15 the defendant spent £668 million. In the year 2015–16 it spent £711 million. And in the year after that, 2016-17, it spent £761 million.

3 In the summer of 2016 the defendant disclosed the financial problems to NHS England and was placed in formal "financial turnaround". This unwelcome status required certain measures to be taken. A "turnaround director" was appointed to examine the defendant's expenditure to help achieve a balanced position for the financial year. Further, the defendant also established an Investment Committee.

4 For the year 2017-18 the defendant has been allocated an increase of £20 million or 2.73% on the previous year's allocation. Plainly, this will not come close to meeting the historic rate of increase of expenditure. Taking into account the expected growth in demand for services, inflationary pressures and changes to things that the defendant is required to commission, its financial plan has concluded that there is a gap between allocated funding and expected expenditure of £34 million in the current financial year, 2017- 18, and a further shortfall on top of that of £23 million in the following year. Therefore, savings have to be made of around £47 million. Therefore, painful though it will be, some services in the local area will have to be cut.

5 Nascot Lawn has been providing a respite care service for children with complex health needs and their parents since at least 1986. The defendant inherited Nascot Lawn from its predecessor primary care trust. Around 35 (the figure varies) children use the overnight service. Three of them are the claimants in these proceedings. These children suffer from very severe physical and mental impairments; they are truly some of the most disadvantaged individuals with whom the defendant has to deal. There are around 20 staff. Half of that number are nurses; the other half are trained health care support workers. The children stay for short breaks; four nights a month is not unusual. Obviously, the primary benefit is respite for the parents who otherwise have round-the-clock care of these severely impaired children. But plainly when they are at Nascot Lawn the children are receiving health services.

6 The defendant is the principal funder of Nascot Lawn. Two other neighbouring clinical commissioning groups also contribute funds but in much smaller amounts. The £600,000 per annum provided by the defendant represents the great majority of Nascot Lawn's funding. Without it closure is inevitable. It is common ground that closure would be very distressing not only to the children but particularly to their parents.

7 The defendant has decided that part of the £47 million saving it must make will come

from the withdrawal of funding from Nascot Lawn. The members of the Investment Committee who made that decision on 16 November 2017 were well aware of how upsetting the impact of the decision would be; the statements from the parents were described by one member as "heart-rending, unsettling and humbling", by another as "heart-rending". A principal justification for the decision that had to be made was that arrangements could be made for respite care to be continued elsewhere in the county for these children. Nascot Lawn is one of four such facilities in Hertfordshire. The other three are all provided by HCC and are in, respectively, Rickmansworth, Welwyn Garden City and Hertford. Each of these caters for some children with complex health needs, although in each facility that cohort is in a minority. Care in those facilities is provided by trained carers and not by nurses. There is capacity in the other three facilities for the children who will be displaced by the closure of Nascot Lawn, although realistically having regard to the geography for most of the affected children the only feasible alternative is the facility in Rickmansworth.

8 Unfortunately, HCC does not have the money to enter into a partnership with the defendant in order to secure the continuation of the funding.

9 The first ground of challenge (**Ground A**) contests the defendant's view that it is not funding a "health service" within the terms of sections 3 and 3A of the National Health Service Act 2006 . These provide:

> **3 Duties of clinical commissioning groups as to commissioning certain health services**
>
> (1) A clinical commissioning group must arrange for the provision of the following to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility–
>
> (a) hospital accommodation,
>
> (b) other accommodation for the purpose of any service provided under this Act,
>
> (c) medical, dental, ophthalmic, nursing and ambulance services,
>
> (d) such other services or facilities for the care of pregnant women, women who are breastfeeding and young children as the group considers are appropriate as part of the health service,

(e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as the group considers are appropriate as part of the health service,

(f) such other services or facilities as are required for the diagnosis and treatment of illness.

…

3A Power of clinical commissioning groups to commission certain health services

(1) Each clinical commissioning group may arrange for the provision of such services or facilities as it considers appropriate for the purposes of the health service that relate to securing improvement—

(a) in the physical and mental health of the persons for whom it has responsibility, or

(b) in the prevention, diagnosis and treatment of illness in those persons.

…

10 On any view nursing services are being provided at Nascot Lawn as well as services for the care of persons suffering from illness. Ms Grey QC is realistic enough to recognise that looked at literally what is happening at Nascot Lawn is the provision of health services as described in the 2006 Act. But she argues that this does not mean that they ought to be considered to be meeting 'health' needs, or viewed as health services which fall properly within the responsibilities of the defendant. Perhaps recognising the weakness of that argument, she quickly moved to an alternative one namely that even if it is a health service the same decision would reasonably and lawfully have been taken anyway. That may be true, but it does not address the point that if the funding of Nascot Lawn is the provision of a health service then a specific legal obligation formally to consult HCC arises, as I shall explain.

11 Looked at from first principles it seems to me obvious that even if the primary

motive or objective is to provide respite for the parents that the services being provided are health services nonetheless. But the matter is put beyond doubt by authority. In *R (on the application of T & Ors v London Borough of Haringey [2005] EWHC 2235 (Admin)* Mr Justice Ousley was concerned with a three-year-old child who needed tracheostomy care. There was a dispute as to the amount of respite care that should be provided and whether this was the responsibility of the local authority or the relevant NHS body. In the course of his judgment Mr Justice Ousley stated at [65] –[67]:

> 65. To my mind, it also shows how the purpose of the care should be regarded. It is spoken of as respite care for the mother. From one viewpoint, the purpose of its provision is so that the mother can have a few nights of unbroken sleep per week or some time by herself a week or to look after T. That could be seen as social care for the mother. But its nature and purpose is to provide medical care for D; the intention behind the provision of that medical care is her safety while her mother enjoys respite. There is nothing different in quality or care about the disputed provision.
>
> 66. The gravity of the consequences of a failure in care, the duration of the care need, which required her carer always to be present lest something had to be dealt with rapidly, underscores the medical rather than social service nature of the provision.
>
> 67. It has in fact always been provided by nurses except where the mother has had specific training. The reluctance of others, whether teachers, close relatives or health care assistants, to be trained in the particular procedures serves only to emphasise the medical nature of the provision without itself being determinative. The nurses themselves require specific training in tracheostomy care. While it is possible for others to be trained in that specific care, it would still clearly be an important medical procedure in which they were trained.

The fact that the care happened to be provided by nurses was not determinative. On this reasoning, with which I fully agree, there can be no doubt that the services provided at Nascot Lawn are health services.

12 Regulation 23 of the Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013 (SI 2013 No. 218), falls within Part 4 of the Statutory Instrument which is entitled " **Health Scrutiny by Local Authorities** ". That Part establishes a scheme whereby local authorities will be fully and formally consulted on any major health service changes in their area, will have the opportunity to scrutinise them, and in the absence of agreement will have the opportunity of seeking redress from the Secretary of State. Regulation 23 provides, so far as is relevant to this case, that:

> (1) Subject to paragraphs (2) and (12) and regulation 24 , where a responsible person ("R") has under consideration any proposal for a substantial development of the health service in the area of a local authority ("the authority"), or for a substantial variation in the provision of such service, R must -

(a) consult the authority;
(b) when consulting, provide the authority with -

(i) the proposed date by which R intends to make a decision as to whether to proceed with the proposal; and
(ii) the date by which R requires the authority to provide any comments under paragraph (4);
(c) inform the authority of any change to the dates provided under paragraph (b); and
(d) publish those dates, including any change to those dates.
…
(4) Subject to regulation 30(5) (joint committees) and any directions under regulation 32 (directions as to arrangements for discharge of health scrutiny functions), the authority may make comments on the proposal consulted on by the date or changed date provided by R under paragraph (1)(b)(ii) or (c).

(5) Where the authority's comments under paragraph (4) include a recommendation to R and R disagrees with that recommendation -

(a) R must notify the authority of the disagreement;
(b) R and the authority must take such steps as are reasonably practicable to try to reach agreement in relation to the subject of the recommendation; and
(c) in a case where the duties of R under this regulation are being discharged by the responsible commissioner pursuant to paragraph (12), the authority and the responsible commissioner must involve R in the steps specified in sub-paragraph (b).
(6) This paragraph applies where -

(a) the authority has not exercised the power in paragraph (4); or
(b) the authority's comments under paragraph (4) do not include a recommendation.
(7) Where paragraph (6) applies, the authority must inform R of -

(a) its decision as to whether to exercise its power under paragraph (9) and, if applicable, the date by which it proposes to exercise that power; or
(b) the date by which it proposes to make a decision as to whether to exercise that power.
(8) Where the authority has informed R of a date under paragraph (7)(b), the authority must, by that date, make the decision referred to in that paragraph and inform R of that decision.
(9) Subject to paragraph (10), the authority may report to the Secretary of State in writing where -

(a) the authority is not satisfied that consultation on any proposal referred to in paragraph (1) has been adequate in relation to content or time allowed;
(b) in a case where paragraph (2) applies, the authority is not satisfied that the reasons given by R are adequate; or
(c) the authority considers that the proposal would not be in the interests of the health service in its area.
(10) The authority may not make a report under paragraph (9) -

(a) in a case falling within paragraph (5), unless the authority is satisfied that -

(i) the steps specified in paragraph (5)(a) to (c) have been taken, but agreement has not been reached in relation to the subject of the recommendation within a reasonable period of time;
(ii) R has failed to comply with its duty under paragraph (5)(b) within a reasonable period of time; or
(b) in a case to which paragraph (6) applies, unless the authority has complied with the duty in paragraph (7) and, where applicable, paragraph (8).
(11) A report made under paragraph (9) must include -

(a) an explanation of the proposal to which the report relates;

(b) in the case of a report under paragraph (9)(a) or (b), the reasons why the authority is not satisfied of the matters set out in paragraph (9)(a) or (b);
(c) in the case of a report under paragraph (9)(c), a summary of the evidence considered, including any evidence of the effect or potential effect of the proposal on the sustainability or otherwise of the health service in the area of the authority;
(d) an explanation of any steps the authority has taken to try to reach agreement with R in relation to the proposal or the matters set out in paragraph (9)(a) or (b);
(e) in a case falling within paragraph (10), evidence to demonstrate that the authority has complied with the applicable condition in that paragraph;
(f) an explanation of the reasons for the making of the report; and
(g) any evidence in support of those reasons.
…

13 If a report is made under paragraph 9 to the Secretary of State then by virtue of regulation 26 he can make a decision on the issue which may either require further consultation or a determination of the issue in a particular way. Therefore, in this case were the question of the withdrawal of the funding of Nascot Lawn to be referred to the Secretary of State then he could, on the merits, direct that the funding be continued.

14 Ms Grey QC did not seriously dispute that if what was happening at Nascot Lawn was the provision of a health service then the proposal to withdraw most of its funding amounted to a substantial variation of it.

15 Ms Grey QC argued that by virtue of some rather desultory correspondence sent by the defendant to HCC the duty to consult under regulation 23 had been fulfilled. I cannot accept that, and the position of HCC is that they have never been formally consulted under regulation 23 . Indeed, they have written correspondence pointing out to the defendant its legal obligations. Plainly, the regulation 23 process has not happened. If a consultation pursuant to regulation 23 were to take place then I would expect that the consultation document plainly states that it has been prepared and sent pursuant to that regulation. It is obvious from the position of HCC, the interested party in these proceedings, that were the regulation 23 process to be gone through they would be seeking an agreement which provided for the continuance of the funding of Nascot Lawn, and in default of reaching such an agreement would intend to refer the matter to the Secretary of State seeking a decision from him that the funding be continued.

16 It is therefore my conclusion that the decision by the defendant to withdraw the funding of Nascot Lawn was made on an incorrect legal basis with the consequence that it has not complied with its legal obligations under regulation 23 . On that basis, and on that basis alone, the decision is quashed, with the consequence that the regulation 23 path must now be followed.

17 Having reached this primary conclusion, it is strictly speaking unnecessary, and arguably otiose, for me to pronounce on the remaining five grounds. It is a core tenet of judicial review law that relief will not be granted if there is an alternative remedy. I have decided that there is an alternative remedy. It could be said, therefore, that it would be wrong for me even to consider the remaining five grounds. However, given that the remaining grounds contain fierce criticism of the defendant it is only right that I should give my views on those arguments, lest failure to do so might leave behind a lingering belief that the criticisms were in fact merited. But I can do so in rather more abbreviated form than would have been the case had I not decided that the first ground

succeeded.

18 The remaining grounds are:

B: Failure to assess the needs of users

C: Failure to consult

D: Breach of the Public Sector Equality Duty set out in section 149 of the Equality Act 2010 .

E: Breach of section 11 of the Children Act 2004

F: Breach of Art 8 of the ECHR taken with Art 3 of the UNCRC

19 Although at times it appeared that Ms Richards QC was arguing that Nascot Lawn was somehow immune from closure in any circumstances, it is right that I record that she accepted, on being pressed by me, that it would have been possible for the defendant to have reached a decision to withdraw funding lawfully. But even where the financial difficulties are formidable she rightly argues that a decision such as the one with which I am concerned must be taken lawfully, and she says that for the five reasons set out above this one was not.

20 So far as the **Ground B** is concerned I emphasise that this court is not conducting a de novo review of whether sufficient material had been gathered in order to make a sound decision. The claimant must show by reference to the classic public law tests that the deficit of information was so extreme that the boundary of irrationality or perversity was crossed.

21 The claimant's statement of facts and grounds says: "the defendant's decision to cease funding Nascot Lawn was irrational because of the failure to carry out adequate individual assessments of the affected children". I agree with Miss Grey QC that there is no duty to provide individual assessments of potentially affected users to decision makers in a situation such as this. There is clear authority to this effect. In *R v North and East Devon Health Authority ex parte Couglan [2001] QB 213* , the Court of Appeal held at [103] that:

> "In the absence of special circumstances, normally we would expect it to be unrealistic and unreasonable, on grounds of prematurity alone, for the health authority in all cases to make assessments of patients and to take decisions on the details of placement ahead of a decision on closure. Neither the statutory provisions nor the guidance issued expressly require assessments to be made or decisions on alternative placements to be taken before a decision to close can be lawfully made."

22 Notwithstanding the absence of any duty to assess potentially affected individuals it is clear, however, that there was a wealth of material about each of the relevant children available to the officials preparing the agenda pack for the meeting on 16

November 2016. They included detailed impact assessments. These assessments were summarised sufficiently in the paperwork for the committee.

23 It cannot be said that either in fact or law there was a failure to assess individually the affected children and that therefore the decision reached on 16 November 2017 was irrational or perverse.

24 I am equally satisfied that **Ground C** is meritless. The scope of the duty to involve the public in this case is prescribed by the National Health Service Act 2006 in a number of separate places. There is no general common law duty to consult. The common law may supply a requirement to consult where Parliament has not spoken and where the facts cry out for public involvement. But I do not need to consider the ramifications of that doctrine as I am certain that it would be constitutionally aberrant for a court to start using the common law to augment, or worse still, alter, the scope of an obligation to involve the public defined by statute.

25 The 2006 Act provides:

> **14J Publication of constitution of clinical commissioning groups**
>
> (1) A clinical commissioning group must publish its constitution.
>
> …
>
> **14P Duty to promote NHS Constitution**
>
> (1) Each clinical commissioning group must, in the exercise of its functions—
>
> (a) act with a view to securing that health services are provided in a way which promotes the NHS Constitution, and
>
> (b) promote awareness of the NHS Constitution among patients, staff and members of the public.
>
> ….
>
> **14Z2 Public involvement and consultation by clinical commissioning groups**
>
> (1) This section applies in relation to any health services which are, or are to

be, provided pursuant to arrangements made by a clinical commissioning group in the exercise of its functions ("commissioning arrangements").

(2) The clinical commissioning group must make arrangements to secure that individuals to whom the services are being or may be provided are involved (whether by being consulted or provided with information or in other ways)—

(a) in the planning of the commissioning arrangements by the group,

(b) in the development and consideration of proposals by the group for changes in the commissioning arrangements where the implementation of the proposals would have an impact on the manner in which the services are delivered to the individuals or the range of health services available to them, and

(c) in decisions of the group affecting the operation of the commissioning arrangements where the implementation of the decisions would (if made) have such an impact.

(3) The clinical commissioning group must include in its constitution—

(a) a description of the arrangements made by it under subsection (2), and

(b) a statement of the principles which it will follow in implementing those arrangements.

…

26 The Constitution of the defendant states:

6.2.2 Public Involvement

In carrying out its functions the CCG shall make arrangements to secure public involvement in the planning, development and consideration of proposals for changes and decisions affecting the operation of commissioning arrangements by ensuring that the views of individuals to whom the services commissioned

are being or may be provided are represented:

- In the planning of the CCG commissioning arrangements.
- In the development and consideration of the proposals by the CCG for changes in the commissioning arrangements.
- In the decisions of the CCG affecting the operation of commissioning arrangements where the decisions would, if made, impact on the manner in which the services are delivered to the individuals or the range of health services available to them.

27 The NHS Constitution states (on page 9):

> You have the right to be involved, directly or through representatives, in the planning of healthcare services commissioned by NHS bodies, the development and consideration of proposals for changes in the way those services are provided, and in decisions to be made affecting the operation of those services.

28 Therefore, by three distinct routes the 2006 Act explicitly requires public involvement in this case as follows:

i) Under the defendant's constitution: the right to public involvement in the planning, development and consideration of proposals for changes.
ii) Under the NHS constitution: the right to be involved in the development and consideration of proposals for changes.
iii) Under section 14Z2(2) : the right to have arrangements to secure that individuals to whom the services are being or may be provided are involved (whether by being consulted or provided with information or in other ways).

In my judgment these rights compendiously define the scope of the duty to "consult". There is no room for the common law to augment, let alone alter, these rights.

29 The decision of 16 November 2017 did not come out of a clear blue sky. On 19 January 2017 the Investment Committee had in fact decided to cease funding Nascot Lawn, but this was on a clearly legally erroneous, and therefore unlawful, basis. That decision was quashed by consent on 9 October 2017. The consent order recorded that that the defendant agreed that prior to making a further decision it would "(i) carry out public engagement including engagement with affected families, HCC, HCT and ENHCCG, (ii) conduct a fresh Equalities Impact Assessment, and (iii) complete assessments in respect of the children funded by the CCG that use Nascot Lawn". In my judgment the agreement by the defendant to carry out "public engagement" (which terminology was agreed by the claimants) correctly reflects the scope and nature of the obligations which I have set out above.

30 I am satisfied that the defendant fully complied with its obligations, and its agreement. There had been much engagement with the public including meetings and

correspondence with the parents, carers and community interest groups. These are fully set out in the evidence before the court. On 10 October 2017 a document was sent out seeking comments on the proposal in effect to close Nascot Lawn by 23 October 2017, later extended to 6 November 2017.

31 I have to say that the highly sophisticated argument that somehow the defendant failed to comply with its obligations is groundless. There was a very full public involvement in the proposal to withdraw funding. The defendant fully complied with its statutory obligations. The claimants may have felt that that their protests were no more than beating the air and that there was an inevitability about the decision eventually made. That may be true, but the savings had to be made so the closure proposal was always likely to be the one reached.

32 **Grounds D, E and F** all assert breach of statutory duty. There is a significant human rights element to each ground. The alleged breaches have given rise to hundreds of pages of written evidence; dozens of legal authorities; and many pages of sophisticated legal argument. The decision in question was made by a committee of eight comprising employees of the defendant, GPs, and lay members. None was legally qualified. Their decision was recorded in minutes. As I listened to the submissions of Ms Richards QC about these grounds I gained the impression that she was saying that in dealing with these duties the committee should have rendered a decision as detailed, erudite, perfect and complete as a judgment from one of the higher courts.

33 I cannot accept that. In my judgment when the Administrative Court scrutinises a decision such as the one here it should afford the decision as much latitude, and indeed probably more given the high level of wrongness that needs to be shown, as an appellate court extends to a lower court whose exercise of discretion is under review. In the famous case of *Piglowska v Piglowski [1999] 1 WLR 1360* Lord Hoffmann stated at 1372:

> "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case … These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973] . An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

34 Citing this passage in *Re F (Children) [2016] EWCA Civ 546* at [23] Sir James Munby P stated:

> "It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To

> adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in 'narrow textual analysis'."

This approach applies equally where the challenge in question asserts that the decision-maker failed to grapple with a Human Rights Act claim: see *Broadland District Council v Brightwell [2010] EWCA Civ 1516* . It is noteworthy that in the case of *Zoumbas v Secretary of State for the Home Department [2013] UKSC 74* Lord Hodge dismissed a sustained challenge to the Secretary of State's admittedly succinct decision letter, saying at [23]: "In our view, the Secretary of State does not have to record and deal with every piece of evidence in her decision letter."

35 I have to say that in relation to these three grounds the court has experienced "tortuous mental gymnastics to find error in the decision under review when in truth there has been none".

36 **Ground D** alleges breach of the well-known Public Sector Equality Duty. This is expressed in section 149(1) of the Equality Act 2010 , which provides:

> 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.

This is a key provision in the corpus of anti-discrimination law. Breach of it is a serious matter. Allegations of breach of it should not be lightly made.

37 The obligation on every public authority is to "have due regard to the need to" eliminate or advance or foster the goals that then follow. The noun "need" supplies an imperative quality. The noun "regard" means no more than to have in mind. The adjective "due" means "such as is necessary or requisite; of the proper quality or extent; adequate, sufficient", as in "driving without due care and attention". Therefore, the public authority must have sufficiently in mind, when exercising its functions, the necessity of achieving these goals. This has been explained by Lord Neuberger in the Supreme Court in *Hotak v London Borough of Southwark [2015] UKSC 30, [2015] 2 WLR 1341* at [74] – [75]:

> "74. As Dyson LJ emphasised, the equality duty is "not a duty to achieve a result", but a duty "to have due regard to the need" to achieve the goals identified in paras (a) to (c) of section 149(1) of the 2010 Act. Wilson LJ explained that the Parliamentary intention behind section 149 was that there should "be a culture of greater awareness of the existence and legal

> consequences of disability". He went on to say in para 33 that the extent of the "regard" which must be had to the six aspects of the duty (now in subsections (1) and (3) of section 149 of the 2010 Act) must be what is "appropriate in all the circumstances". Lord Clarke suggested in argument that this was not a particularly helpful guide and I agree with him. However, in the light of the word "due" in section 149(1) , I do not think it is possible to be more precise or prescriptive, given that the weight and extent of the duty are highly fact-sensitive and dependant on individual judgment.
>
> 75. As was made clear in a passage quoted in *Bracking* , the duty "must be exercised in substance, with rigour, and with an open mind" (per Aikens LJ in *R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin), [2009] PTSR 1506* , para 92. And, as Elias LJ said in *Hurley and Moore* , it is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that "there has been rigorous consideration of the duty". Provided that there has been "a proper and conscientious focus on the statutory criteria", he said that "the court cannot interfere … simply because it would have given greater weight to the equality implications of the decision".

38 Therefore, any challenge can only be to process and not to outcome. The 2010 Act does not provide for a statutory right of appeal against any alleged breach, but left any challenge to judicial review proceedings. Therefore, the classic judicial review standards of irrationality or perversity must be satisfied if a challenge is to succeed. I fully agree with Mr Justice Flaux in *R (on the application of Ghulam & Ors) v Secretary of State for the Home Department & Anor [2016] EWHC 2639 (Admin)* where he stated at [329]:

> "…what is required is a realistic and proportionate approach to evidence of compliance with the PSED, not micro-management or a detailed forensic analysis by the court. Second, it is clear that the PSED, despite its importance, is concerned with process, not outcome, and the court should only interfere in circumstances where the approach adopted by the relevant public authority is unreasonable or perverse."

39 In this case an Equality Impact Assessment (EIA) was undertaken by the defendant. Such an assessment is not mandated by the 2010 Act but as Mr Justice Wyn Williams stated in R (Diocese of Menevia) v City and County of Swansea Council [2015] EWHC 1436 at [98]:

> "The fact that a public body has produced an EIA in appropriate form in advance of the decision in question is, usually, convincing evidence that it has had regard to its public sector equality duties when making the relevant decision."

40 I reject the suggestion that the EIA in this case was "facile". On the contrary, I consider that it laid out sufficiently and appropriately the impact of the proposal. I agree with Miss Grey QC that the EIA

i) recognised that the Defendant was the major funder of Nascot Lawn and any decision to end discretionary funding "may lead to decisions to close the service";
ii) focussed on analysing the impact of a decision which culminated in the unavailability of Nascot Lawn as a respite service;
iii) set out the mitigating steps that had been taken by the defendant to address the anxiety of parents and carers including the health assessment process, training programme for carers, identification of a lead professional in HCT for each child to liaise with HCC; and
iv) set out the alternative respite options that would be available and noted that HCC would provide transport to any new respite care or short breaks placement in line with assessed need.

41 The EIA was given proper and conscientious consideration by the committee on 16 November 2017. The criticisms made of the process have descended into the types of micro-management and detailed forensic analysis which is not the work of a court undertaking a judicial review of performance of the PSED. What has to be shown is, within the decision-making process, either irrationality or perversity. The criticisms made by the claimants do not come close to meeting these standards.

42 **Ground E** alleges breach of section 11 of the Children Act 2004 . This falls within Part 2 which is entitled "Children's Services in England".Section 11(1)(bb) states that it applies to a clinical commissioning group. Section 11(2)(a) states: "each person and body to whom this section applies must make arrangements for ensuring that their functions are discharged having regard to the need to safeguard and promote the welfare of children."

43 This is conceptually similar to section 149 of the 2010 Act. When discharging its functions a clinical commissioning group must have made arrangements which "have regard" to the need to safeguard and promote the welfare of children. It is noteworthy that when enacting section 11 Parliament chose not to incorporate verbatim article 3 of the 1989 United Nations Convention on the Rights of the Child (UNCRC), which provides:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Rather, Parliament enacted a lesser duty which requires as part of the process of decision making that regard is had to the need to safeguard and promote the welfare of children. That is a long way from requiring public bodies to ensure that in all aspects of its decision-making the best interests of any affected child shall be a primary consideration. This point was made in *Nzolameso v City of Westminster [2015] UKSC 22* at [28] where Lady Hale stated " section 11 does not in terms require that the children's welfare should be the paramount or even a primary consideration." In [29]

she stated: "We have not heard argument on the interesting question of whether, even where no Convention right is involved, section 11 should nevertheless be construed consistently with the international obligations of the United Kingdom under article 3 of the UNCRC. That must be a question for another day." It has not been suggested that I should in this case so construe section 11 . Therefore, the issue is whether the defendant is in breach of the limited duty stipulated by the literal words of section 11 .

44 Ms Richards QC states:

> "The foreseeable consequence of the withdrawal of funding is that Nascot Lawn, a service provided to the most disabled and vulnerable of children, will close. It was plainly incumbent upon the defendant to have specific regard to the need to safeguard and promote the welfare of the children using Nascot Lawn when taking its decision. It is equally plain from the contemporaneous documentation that the defendant did not have any such regard and thus breached the section 11 duty."

I disagree. The EIA had sufficient regard to the welfare of the children, and their interests were considered properly by the committee. Further, as Ms Grey QC rightly says, the defendant has been involved in discussions with the local authority and the provider in order to facilitate the next steps for the respite provision for the families, children and young people affected.

45 **Ground F** alleges a breach of Article 8 of the European Convention on Human Rights (ECHR) taken with Article 3 of the UNCRC. It is interesting that notwithstanding that Parliament explicitly declined to incorporate verbatim Article 3 of the UNCRC, and that refusal has been endorsed by the Supreme Court, it is nonetheless argued that Article 3 is in play through the medium of Article 8 of the ECHR . This argument is articulated by Ms Richards QC thus:

> "In particular, the Claimants submit there was a failure to treat their best interests as a primary (or indeed any) consideration in the decision making, pursuant to article 3 of the UNCRC. It is widely accepted that a breach of an unincorporated Convention article can support a finding of a breach of an incorporated ECHR right; see for example *Mathieson v SSWP [2015] UKSC 47* at [44] and *Zoumbas v SSHD [2013] 1 WLR 3690* at [10] ("the best interests of a child are an integral part of the proportionality assessment under article 8 of the Convention")."

46 It is said that Article 8 of the ECHR is engaged in this case because:

> "In the present context, however, the provision of respite care to the Claimants is a discharge of the positive obligation to promote the right to family and private life for these severely disabled children. Furthermore, there is a real risk that the cessation of funding for Nascot Lawn may lead to a breakdown of the Claimants' respective family lives, as the witness statements powerfully

> demonstrate. It is the potential impact on the family and private life of the Claimants that brings this particular case squarely within the scope of Article 8 ."

Therefore, it is argued that Article 3 of the UNCRC is in play.

47 In the deportation case of *Zoumbas v SSHD* at [10] Lord Hodge stated that:

> "(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR ;
>
> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
>
> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant; …"

However, the Supreme Court upheld the decision in that case that is was not contrary to the interests of those children, aged seven years, four years and five months, all born in the UK, to return to the Democratic Republic of the Congo with their parents.

48 In this case I agree with Ms Grey QC that Article 8 is not engaged. In my judgment it does not arise where a statutory body is responsible for providing a particular service but reduces the care package provided to an individual. If it were otherwise then the limited terms of section 11 of the 2004 Act would be routinely outflanked by the deployment of an Article 8 ECHR argument which brings in Art 3 of the UNCRC by its coat-tails.

49 If I am wrong about this, and Article 8 is engaged, then I agree with Ms Grey QC that there is no violation by virtue of the wide margin of appreciation afforded to the state where there is a balance to be struck between the competing interests of the individual and the community as a whole, particularly where there is a need to assess priorities in the context of the allocation of limited resources.

50 That concludes this judgment.