

LITIGATING THE CUTS

WORKSHOP NOTES

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PUBLIC LAW GROUNDS

Wednesbury: General reluctance of the courts to interfere in budgetary decisions or decisions taken in the context of macro-economic policy:

- Wednesbury threshold is high: *R v Secretary of State for the Environment ex parte Nottinghamshire CC* [1986] AC 240; *R (Luton BC and others) v Secretary of State for Education* [2011] EWHC 217 (Admin). Test of bad faith, improper motive or absurdity.
- Wide margin of appreciation under Convention law: *R (SRM Global Master Fund LP) v Treasury Commissioner* [2010] BCC 558.
- But where “the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable”, it may be held to be unlawful – *R (RJM) v SoS for Work and Pensions* [2009] 1 AC 311, [57]
- The reluctance of courts to intervene applies to service-provision decisions involving allocation of limited resources to individuals, eg: *Lambeth LBC v Ireneschild* (2007) 10 CCLR 243 [44]; *R v Cambridge Health Authority ex p B* [1995] 1 WLR 898.
- But where scarcity of resources is not the decisive factor, a decision can be challenged on other public law grounds: *R (Otley) v Barking and Dagenham NHSPCT* [2007] EWHC 1927 (Admin) – decision contrary to the PCT’s policy.

The statutory regime may prohibit regard to resources

- The important distinction between a power, a target duty and an absolute duty:
R (G) v LB Barnet [2004] 2 AC 208, Lord Nicholls of Birkenhead:

“12 The ability of a local authority to decide how its limited resources are best spent in its area is displaced when the authority is discharging a statutory duty as distinct from exercising a power. A local authority is obliged to comply with a statutory duty regardless of whether, left to itself, it would prefer to spend its money on some other purpose. A power need not be exercised, but a duty must be discharged. That is the nature of a duty. That is the underlying purpose for which duties are imposed on local authorities. They leave the authority with no choice.

13 The extent to which a duty precludes a local authority from ordering its expenditure priorities for itself varies from one duty to another. The governing consideration is the proper interpretation of the statute in question. But identifying the precise content of a statutory duty in this respect is not always easy. This is perhaps especially so in the field of social welfare, where local authorities are required to provide services for those who need them. As a general proposition, the more specific and precise the duty the more readily the statute may be interpreted as imposing an obligation of an absolute character. Conversely, the broader and more general the terms of the duty, the more readily the statute may be construed as affording scope for a local authority to take into account matters such as cost when deciding how best to perform the duty in its own area. In such cases the local authority may have a wide measure of freedom over what steps to take in pursuance of its duty.”

- *R v Gloucestershire CC ex p Barry* [1997] AC 584: resources are relevant in determining the degree of a person’s need for community care services and whether it is necessary to meet the need.
- *R v East Sussex CC ex p Tandy* [1998] 1 AC 714: what amounted to “suitable education” within the meaning of the Education Act was to be determined purely by educational considerations. As there was nothing in the Act to suggest that the availability of financial resources was relevant, a local authority could not take into account the availability of its resources in failing to comply with its duty to provide a suitable education.
- *R v Birmingham CC ex p Taj Mohammed* [1999] 1 WLR 33: local authorities are not entitled to have regard to their resources in determining whether to approve a disabled facilities grant, but must consider objectively whether, having regard to the applicant's needs and the nature of the works proposed, those works will achieve their intended purpose and whether that purpose comes within the statutory provisions.

Circumstances in which resources are of no or limited relevance

- Resources may be of relevance subject to minimum standards which have to be met:
 - *R (Friends of the Earth) v SoS for Energy and Climate Change* [2010] PTSR 635
 - *R (Calgin) v LB Enfield* [2006] 1 All ER 112
- Limited resources will not excuse other public law errors:

- The requirement for a reasoned and rational analysis of evidence necessary to support the decision: *R (B and others) v Worcestershire CC* [2010] 13 CCLR 13.
- Requirement to take into account the statutory objective: *R v Secretary of State for Social Security ex p CPAG* [1990] 2 QB 540; *Friends of the Earth* (above)
- Requirement to have regard to relevant factors and act within the statutory framework: *R (Police Federation) v SSHD* [2009] EWGC 488 (Admin); *R (Mersi) v SSHD* [2000] INLR 511
- Requirement to act in accordance with a policy: *Otley* (above)
- ...and for the policy to be rational: *R (Rogers) v Swindon NHS PCT* [2006] 1 WLR 2649; *NW Lancashire Health Authority v A, D and G* [2000] 1 WLR 977

Legitimate expectation

- Substantive expectation:
 - *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213 – promise of home for life was “lawful, unambiguous and a reasonable promise that induced a substantive legitimate expectation”, and to frustrate it would be “so unfair that ...[it] would amount to an abuse of power”
 - *R v Bhatt Murphy v Independent Assessor* [2008] EWCA Civ 755: Both substantive and procedural expectations arise in exceptional situations:
 - “[43] ...where a substantive expectation is to run the promise or practice which is its genesis is not merely a reflection of the ordinary fact (as I have put it) that a policy with no terminal date or terminating event will continue in effect until rational grounds for its cessation arise. Rather it must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured.”
 - Requires a “pressing and focussed ...kind of assurance”, probably directed to a small number of beneficiaries [46]
- Procedural expectation: *Bhatt Murphy*:
 - A distinct promise to consult an affected group
 - Or where “the impact of the authority's past conduct on potentially affected persons must, again, be pressing and focussed. One would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit: not necessarily for ever, but at least for a reasonable period, to provide a cushion against the change. In

such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult.” [49]

- *R (Luton BC and others) v Secretary of State for Education* [2011] EWHC 217 (Admin) – abrupt cessation of projects without notice or consultation was so unfair as to amount to abuse of power. Not excused by pressing economic problems.

Duty to consult

- Consultation might be required because of:
 - Statutory requirements to consult – Local Government Act
 - Consultation as a component of fulfilling statutory equality duties.
 - Legitimate expectation as to consultation
- Requirements of consultation
 - *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213 at [108]: undertaken at a time when proposals at a formative stage; include sufficient reasons for the particular proposals to allow for intelligent consideration and response; adequate time; product to be taken into account conscientiously.
 - Consultation is not negotiation: *R (Medway Council) v Secretary of State for Transport, Local Government and the Regions* [2003] JPL 583, [26]

Other public law grounds

- Statute imposing mandatory considerations: eg Section 149 Equality Act 2010; section 7 Public Libraries and Museums Act 1964; section 11 Children Act 2004.
- Ultra vires:
 - The wrong decision-maker: consider whether a decision by the executive/cabinet should have been made by the full Council, because the executive/cabinet decision involved a determination in a non-urgent case which was not wholly in accordance with the budget or the plan or strategy approved or adopted by the authority in relation to their borrowing or capital expenditure – Regulation 4 Local Authorities (Functions and Responsibilities)(England) Regulations 2000/2853

Identifying the target

A decision taken by a public authority to cut a specific service is usually the end point of series of budgetary decisions. By the time that decision is taken, an authority might plead that its hands are tied by earlier unchallenged budgetary decisions. So when is the right time to challenge a budget decision, and on what basis? This was the question posed by the Court of Appeal in *R (Domb) v LB Hammersmith and Fulham* [2009] EWCA Civ 941: The decisions under challenge were as to cuts to adult social services. The social services committee was constrained by a cut to its budget, determined as a result of the Council's decision to reduce the council tax and which had not been challenged. The committee considered that it had to take one of two options: charge for services or cut eligibility. It chose the former. The Court of Appeal rejected the claim that the statutory equality duties required consideration of all possible options including forgoing the council tax reduction or reducing services elsewhere. See Rix LJ:

60 In my judgment, this is in truth a big point, but it comes forward in this case in a form which makes it impossible to grapple with. ..the budget meetings in February 2008, none of which are in issue or before us as a matter of evidence, will have looked at the options and had come to certain preliminary decisions and, in all likelihood, many final decisions too. One example of those final decisions was the decision to reduce Council Tax by 3%. It is conceded by Mr Wolfe that he cannot attack that decision, but that must be true of the very many other budget decisions as well. We just do not know the ramifications of the budgetary meetings and decision-making: those decisions have not been challenged and no evidence about them has been formulated. They simply lie in the past, as data. For all we know, the budget had to be balanced; and each department or spending area had to be capable of living within its own budget. However, we simply do not know these matters, for they have never had to be investigated.

61 In these circumstances, it is in my view mistaken to suggest that all possible theoretical options had to be regarded as being open and in contention in connection with the matter which came up for consideration on 16 June 2008. Decision making would become simply impossible on such a basis. One has to start somewhere, and the budget decisions which had already been taken, whether final or capable of being revisited, are not capable of being impugned in these proceedings.

62 I am far from saying, however, that in another case, it might not be necessary for a local authority to be able to demonstrate, as a matter of its duty to have due regard to the need to promote disability equality that it had considered, in substance and with the necessary vigour, whether it could by any means avoid a decision which was plainly going to have a negative impact on the users of existing services. However, in my judgment, the complaint that the Council failed to do that in the limited circumstances open on the occasion in question, viz on 16 June 2008, is not here sustainable."

Sedley LJ highlighted the difficulty even more forcefully:

78 I agree that this appeal fails; but I do so with very considerable misgivings because the appeal itself has had to be conducted on a highly debatable premise – that the prior decision of the local authority that council tax was to be cut by 3% had to be implemented. Once this was given, the only practical choice for social services was going to be to raise the eligibility threshold or to charge for home care. That, accordingly, was what the entire consultation and ultimate decision addressed.

...

80 But these [considerations of the quality of officers advice to members] lose significance against the backdrop of a predetermined budget cut. The object of this exercise was the sacrifice of free home care on the altar of a council tax reduction for which there was no legal requirement. The only real issue was how it was to be accomplished. As Rix LJ indicates, and as I respectfully agree, there is at the back of this a major question of public law: can a local authority, by tying its own fiscal hands for electoral ends, rely on the consequent budgetary deficit to modify its performance of its statutory duties? But it is not the issue before this court.

Note that in *Domb*, as Sedley LJ emphasised, the budget cut was purely politically motivated – there was no legal requirement to reduce the budget. However, the question highlights a difficulty in all budget cuts cases, that is as to where a legal challenge should start. And, if it is proper to challenge the macro-budget decisions rather than a consequential individual spending decision, what legal obligations attach to such decisions?

See “The Public Sector Equality Duties”, [2011] JR 1, Sales J:

“29....as the cuts fall to be implemented by a range of public bodies....They will be obliged to consider the mandatory considerations set out in s. 149. There are signs in the cases that this will be a significant and onerous obligation. In the scale of decision-making, from adoption of general policies or schemes at the most abstract level down to love level decisions – such as how much to spend on paper clips and where to spend it – how far down the scale will the duty extend its substantive content? Will the courts expect fuller consideration, evidenced by a documentary trail, where the adoption of general policies is under consideration, and then treat individual decisions under those policies as having been covered by that consideration? Will the courts allow for more limited consideration lower down the decision-making scale, where the impact of the decision on the wider social policies which eth duty exists to protect may be expected to be minimal?”

30. I think one can expect development of the law along these two axes, but it is very difficult to draw hard-and-fast lines. The relevant functions to which the duty will apply are entirely general. The very abstract formulation of the duty, which is to “have due regard” to certain matters, should also be noted. What is “due regard”? The statute does not give us much information about that, other than again in very general terms of s 149(3). The practical effect of the combination of a very wide range of application for the duty across all public functions and a very abstract formulation of what has to be done means that the burden of spelling out the practical content of the duty devolves upon the courts. As a statement of the obvious, the context will be very important....The role for the courts...will be to spell out a notion of proportionality between the significance of the decision to be taken and the notice to which the public authority is subject that the decision may have significant impacts upon one or more of the social values set out in s 149, on the one hand, and, on the other hand, the extent of the effort required by the authority to inform itself about the situation and degree of consideration required to be given to those matters in that particular context.”

A number of key points:

- The above is consistent with the following propositions as to the disability equality duty (and which apply equally to the other statutory equality duties) were adopted by Court in *R (W) v Birmingham City Council* (2011) 14 CCLR 516 at [151]:

To what decisions does the duty apply?

- i. The duty applies to all decisions taken by public bodies, including policy decisions and decisions on individual cases;

- ii. The duty 'complements' specific statutory schemes which may exist to benefit disabled people;
- iii. The disability equality duty is at its most important when decisions are taken which directly affect disabled people;
- iv. The duty requires public authorities to take action to tackle the consequences of past decisions which failed to give due regard to disability equality;
- v. The duty requires the circumstances of the full range of disabled people to be taken into account and may require certain groups of disabled people to be prioritised, for example on the basis that they experience the greatest degree of exclusion;

What does the duty entail?

- vi. The equality duties impose 'significant and onerous' obligations on public bodies in the context of cuts to public services;
- vii. 'Due regard' means specific regard by way of conscious approach to the specified needs;
- viii. Due regard requires analysis of the relevant material with the specific statutory considerations in mind;
- ix. General awareness of the duty does not amount to the necessary due regard, being a 'substantial rigorous and open-minded approach';
- x. In a case where the decision may affect large numbers of vulnerable people, many of whom fall within one or more of the protected groups, the due regard necessary is very high;
- xi. The duty (and in particular DDA 1995 s 49A(1)(d)) may require positive steps to be taken if the circumstances require it to address disadvantage to disabled people;
- xii. Thus, if changing a function or proposed policy would lead to significant benefits to disabled people, the need for such a change will carry added weight when balanced against other considerations;
- xiii. Similarly, if a risk of adverse impact is identified, consideration must be given to measures to avoid that impact before fixing on a particular solution;
- xiv. Impact assessments must contain sufficient information to enable a public authority to show it has paid due regard to the duty and identify methods for mitigating or avoiding adverse impact;

When must 'due regard' be given to the duty?

- xv. Due regard must be given before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question;
- xvi. As such due regard to the duty must be an essential preliminary to any important policy decision, not a rearguard action following a concluded decision;
- xvii. Put another way, consideration of the duty must be an integral part of the formation of a proposed policy, not justification for its adoption
- xviii. The duty is continuing and is engaged at all stages of a decision-making process, meaning that further consideration to the duty may be required where new information comes to light;

Who needs to pay 'due regard'?

xix. The duty is non-delegable and is owed by primary decision-makers;

xx. Decision-makers must be properly informed of the nature and extent of the duty at the time relevant decisions are taken;

xxi. In particular, decision-makers need rigorous and accurate advice and analysis from officers, not 'Panglossian' statements of what officers think members want to hear;

What is the role of the Court?

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

(emphasis added)

- Thus PSED applies to all budget decisions. It applies to setting an overall budget, and to the consequential spending decisions (departmental budgets and specific services).
- How in practice can a public authority subject every possible consequence of its budget to the rigorous evaluation which the courts have held that the PSEDs require?
- It is not necessarily the case that the PSED imposes lighter obligations in relation to high level decisions (eg: setting the overall budget) than in relation to lower level ones (specific spending/service provision decisions). See propositions i, vi, and x in *W* (above) and *Sales J* (above). Also:
 - In a case involving “large numbers of vulnerable people, very many of whom fall within one or more of the protected groups, the due regard necessary is very high” – *R (Hajrula) v London Councils* [2011 EWHC 448 (Admin) at [62]
 - The fact that decisions are being made in straitened times does not diminish the duty. On the contrary, the need for clear well-informed decision-making when assessing the impacts on less-advantaged people is “as great if not greater”: *R (Rahman) v Birmingham City Council* [2011] EWHC 944 (Admin).
- Consider in what way the duty to have due regard attaches to the budget decision where the proposed budget makes a particular spending outcome inevitable as compared to the proposed budget leaving open the possibility of a range of outcomes, including not cutting services. Test the question against the *Domb* conundrum – does the prior decision tie the hands of the decision-maker? If so, the prior decision requires a high level of due regard.
- Does this accord with the reality of budgetary decisions? Reduced budgets will always lead to reduced services/higher charges?

- See Kenneth Parker J in *R (JG and MB) v Lancashire CC* [2011] EWHC 22295 (Admin) at [50]:

“What, in fact, has happened in this case is that the decision-maker has taken a preliminary decision in relation to its budget, fully aware that the implementation of proposed policies would be likely to have an impact on the affected users, in particular, disabled persons, but not committing itself to the implementation of specific policies within the budget framework until it had carried out a full and detailed assessment of the likely impact. In my view, there is nothing wrong in principle with such an approach and nothing inconsistent with the duties under the DDA . I reject entirely, in the light of the detailed evidence relied upon by the Council, the hypothesis that the procedure was a cosmetic exercise, in which the Council was already committed to the implementation of specific policies at the time the budget framework was set, and was doing no more than going through the motions of setting out the consequences of a pre-determined course. The economic reality was that to meet imperative needs of reducing expenditure it would be extraordinarily difficult to avoid an adverse effect on adult social care. But there remained flexibility as to how any such effect on disabled persons could be minimised and mitigated, and I am satisfied that the Council kept an open mind as to the precise policies that would be implemented.”

- Is this correct?
- Compare:
 - *W v Birmingham*
 - *Hajrula*
 - *R (Fawcett Society) v Chancellor the Exchequer* [2010] EWHC 3522 (Admin).
- Similar questions arise in relation to consultation. Bearing in mind that consultation must be taken when the proposals are still at a formative stage and that the product of consultation must conscientiously be taken into account]), when should consultation take place in a budget-making context? Prior to determining the overall budget or only prior to taking a consequential decision affecting the particular service in question? As to this see:
 - *R (Chavda) v LB Harrow* [2007] EWHC 3064 (Admin): Is the option of “no change” really on the table?
 - *R (Boyejo) v LB Barnet* [2009] EWHC 3261