Neutral Citation Number: [2013] EWHC 897 (Admin)

Case No: CO/10632/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/04/2013

Before :

THE HONOURABLE MR JUSTICE BLAKE

- -

Between :

THE QUEEN — **Claimant**

on the Application of

STUART BRACKING
PARIS L'AMOUR
GABRIEL PEPPER
ANNE PRIDMORE
JOHN ASPINALL by his mother and litigation friend Evonne Taylforth

and

SECRETARY OF STATE FOR WORK AND PENSIONS — **Defendant**

AND

Intervener

THE EQUALITY AND HUMAN RIGHTS COMMISSION

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- -

Representation:

Mr David Wolfe QC for the Claimants (instructed by Deighton Pierce Glynn for First, Second and Third Claimants and Scott Montcrieff and Associates LLP for Fourth and Fifth Claimants) .

Ms Lisa Busch for the defendant (instructed by DWP Legal Services)

Ms Helen Mountfield QC for the intervener EHRC

Hearing dates: 13 & 14 March, 2013

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Approved Judgment

The Honourable Mr Justice Blake:

Introduction

1. The claimants are all severely disabled people who are current users of the Independent Living Fund (ILF). They seek judicial review of two decisions of the defendant Secretary of State. The first is the consultation engaged in between July and October 2012 as to the impact of the proposed closure of the ILF and the second is the decision made in December 2012 to close the fund.

The Independent Living Fund

2. The ILF is a non-departmental public body sponsored by funding from the Department for Work and Pensions (DWP) and the Minister for Disabled People (MDP). It operates as an independent discretionary trust fund managed by a Board of Trustees. A legally binding trust deed sets out the powers and procedures of the Trustees and the eligibility criteria for help from the fund. The deed has been amended on a number of occasions between 2007 and 2012.

3. The original fund was set up in 1988 as an interim measure until the implementation of community care legislation and a review of social security benefits for people with disabilities. This fund was wound up in 1993 but due to its popularity, a commitment was made to maintain a fund to provide continued support. Funding was continued in two ways. There was first an extension fund that maintained payments to people who applied under the pre 1993 scheme but was closed to new applications; second, a 1993 fund was established to receive new applications from 1993 to 2007. These two funds were merged in 2007 but the two main groups of users reflected the history. Group 1 is the former extension fund users maintaining the pre- 1993 system. Group 2 users are those who have applied from 1993 onwards.

4. The fund works in partnership with local authorities to devise joint care packages which are a combination of services or direct payments from the local authority and cash from the ILF. Applications can only be made with the support of the social services department of the local authority. On receipt of an application, the ILF arranges for one of its own social workers to discuss an applicant's care needs, negotiate an appropriate package and provide advice and assistance, for example, with meeting any duties arising as an employer of carers.

5. The Trust deed requires trustees to ensure that payments out do not exceed the grant decided annually by the DWP and that priority is to be given to existing beneficiaries of the fund. In 2010/11 the fund received a budget of £359 million for distribution through the whole of the United Kingdom to roughly 20,000 claimants with complex and high support needs. As a result of financial constraints the ILF first announced that from March 2010 new applications would only be accepted from those in paid work of at least 16 hours per week and from 17 June 2010 that it would no longer be open to new applications. It was clear that the numbers of applications received before closure exceeded available funds.

6. In December 2010 a written Ministerial Statement from the MDP indicated that the present arrangements were no longer considered financially viable and that following the work of a Review Commission there would be a consultation aimed specifically at how to develop a new model for future funding of care and support.

7. The ILF explained its function in its submission to this Commission of 28 January 2011. From this and related material it is possible to identify a number of features of how the fund benefits its users:-

   i) The ILF pioneered a procedure of direct payments to users who are able to deploy the funds in a personalised budget. By contrast with the statutory scheme discussed below, the ILF, therefore, funds people rather than specific needs of disabled people.

   ii) Its payments complement sums awarded to claimants by social services departments of local authorities under the statutory schemes for adult social care and social security. It has, therefore, been used as a supplement rather than an alternative to local authority funding under the statutory scheme.

   iii) The aim of the Trustees of the fund is to support independent living and combating social exclusion on the grounds of disability. Payments are frequently used to provide one or more personal assistants so users can avoid having to live in residential accommodation, enter or remain in the labour market until normal retirement age, access further education, and engage in recreational and community activities that it would be difficult to undertake without assistance.

   iv) The fund has low administrative costs, is flexible and portable so that users may change addresses without undue difficulty in funding support.

The Local Authority Scheme of Support for Disabled People

8. The National Health Service and Community Care Act 1990 imposes a statutory duty on local authorities to assess those who appear to be in need of community care services. It requires the authority to make first an assessment of needs and then a decision, having regard to that assessment, as to the provision by them of any such services. Subject to any direction given by the Secretary of State the assessment should be carried out in such form as the local authority consider appropriate. Statutory guidance is issued by the Secretary of State, to which regard must be had and which should be followed unless appropriate reasons are identified for not doing so.

9. An informative description of the scheme can be found in the judgment of Mrs Justice Lang in the R (ota) JM and NT v the Isle of Wight Council [2011] EWHC 2911 (Admin). For some time there have been criteria for assessment of needs known as the fair access to care services (FACS) criteria that distinguish between four categories: Category 1- Immediate Risk/Crises; Category 2 – Substantial High Risk; Category 3 – Moderate Risk; and Category 4 - Low Risk.

10. Any single individual may have different categories of needs depending upon their level of disability and social circumstances. Local authorities, therefore fund, needs

rather than individuals. As a result of continuing budgetary pressure on local authorities only needs that came within Category 1 and 2 are likely to be funded. It is understood that at present a very few local authorities restrict funding to Category 1 needs.

The Defendant's Consultation

11. The purpose of the consultation was identified as seeking views on the impact on users and others of devolving funding to local authorities and devolved administrations. The closure of the ILF in 2015 was proposed. The Government also sought views on how closure could be managed in a way which would minimise disruption to the care and support needs of existing ILF users.

12. Consultees were invited to respond to five questions namely:-

> Question 1: Do you agree with the Government's proposal that the care and support needs of current ILF users should be met within the mainstream care and support system, with funding devolved to local government in England and the devolved administrations in Scotland and Wales? This would mean the closure of the ILF in 2015.
>
> Question 2: What are the key challenges that ILF users would face in moving from joint ILF/ Local Authority to sole Local Authority funding of their care and support needs? How can any impact be mitigated?
>
> Question 3: What impact would the closure of the ILF have on Local Authorities and the provision of care and support services more widely? How could any impact be mitigated?
>
> Question 4: What are the specific challenges in relation to Group 1 users? How can the Government ensure this group are able to access the full range of Local Authority care and support services for which they are eligible?
>
> Question 5: How can DWP, the ILF and Local Authorities best continue to work with ILF users between now and 2015? How can the ILF best work with individual Local Authorities if the decision to close the ILF is taken?

13. The Consultation document indicated at paragraph 27:

> "We will publish our response to this consultation in Autumn 2012. Alongside that response, which will set out the detail of our decision, we will publish a full Impact and Equality Impact Assessment. It would be premature to attempt to conduct a full Impact and Equality impact assessment at this stage because the details of our proposal have not yet been developed. The overview below is our initial assessment of the potential impacts for the different equality groups, as far as we are able to tell at this stage."

14. The consultation assessed the impact of the proposals with respect to the equality characteristic of disability to be:-

> "In general, ILF payments are not paid on the basis of particular impairment or health condition, but according to support needs. Nonetheless we know that current users have a range of primary and secondary disabilities and we will be assessing how the closure of the ILF will impact on particular groups of users on the basis of their impairment."

The White Paper

15. At the same time as the consultation on the ILF was launched the Secretary of State for Health issued a White Paper 'Caring For Our Future: Reforming Care and Support'. The foreword explained :-

> "We all want to live a full and active life, to live independently and to play an active part in our local communities. Supporting people to live this way is a central ambition of the Coalition Government. It is also the purpose of this White Paper. The unfortunate truth is that this is not the life lived by many of those with care and support needs. For them, the daily reality can be a life of dependence, of struggling with daily tasks, of loneliness and isolation. Across the country the quality of care and support that people receive can vary considerably. Services that are available as standard in some places are unavailable in others. And all too often the system only grinds into action in response to a crisis, rather than acting quickly to prevent one. Our system of care and support, developed in a piecemeal fashion over more than six decades, is broken and in desperate need for reform…
>
> Two core principles lie at the heart of this White Paper. The first is that we should do everything that we can – as individuals, as communities and as a Government – to prevent, postpone and minimise people's need for formal care and support. The system should be built around the simple notion of promoting peoples independence and well-being.
>
> The second principle is that people should be in control of their own care and support. Things like personal budgets and direct payments, backed by clear, comparable information and advice, will empower individuals and their carers to make the choices that are right for them. This will encourage providers to up their game, to provide high quality, integrated services built around the need of individuals. Local authorities will have a more significant leadership role to play, shaping the local market and working with the NHS and others to integrate local services."

16. The substantive proposed change to the statutory scheme was set out in Section D 'Assessment Eligibility'. The White Paper proposed that from 2015 the Government will introduce a national minimum eligibility threshold.

> "Once implemented, local authorities will be free to set their eligibility threshold at a more generous level, but will not be able to tighten beyond the new national minimum threshold.
>
> In 2015 we expect the significant majority of local authorities to have eligibility thresholds of 'substantial'. given the prioritisation of resources of social care in this Spending Review. In setting the level of the national threshold, the Government will need to review the eligibility position of local authorities and the resources available, and take into account work to develop options for a potential new assessment and eligibility framework."

The challenge to the consultation

17. In September 2012, the solicitors acting on behalf of these claimants wrote substantial letters before claim, challenging the consultation process and contending that the information provided in the consultation document was inadequate.

18. In the letter before claim on behalf of the first three claimants two points are made by way of preamble :-

> "5.1.9…..In all cases, the ILF funding invariably pays for considerably more than the eligible needs assessed by a local authority, the ILF assessments and funding is focused on independent living and holistic a approach to the care package whilst local authority assessment are based on critical and substantial needs".
>
> "5.1.11 Each of the claimants, based on their experiences of the respective assessments by their local authorities and the ILF, understand the position to mean that social services provide funding for their immediate needs (for example to get up, wash, eat and go to the toilet) whilst the ILF provides funding to live independently and to have a life outside their home, for example, taking part in voluntary activities, working, socialising and so on. They therefore anticipate that any change in the assessment of funding regime will lead to a loss of funding for those activities and the additional support that they need to live independently".

19. The letter recognised that the White Paper published at the same time suggested that national minimum eligibility threshold be set at the level of substantial and critical needs but complained:-

> "5.2.13 The claimants assume that the proposal to close the Fund in 2015 is in part to coincide with the setting of a national minimum eligibility threshold. However, this is not clear from the consultation paper, nor is there any explanation of how the proposals would work in practice. If the Government recognises the need for a national minimum eligibility threshold and aims to introduce this in 2015, it must be in a position to explain how ILF recipients will be assessed under that regime and the likely impact on their care packages, at least in very general terms for the majority of recipients. The claimants do not demand a detailed analysis as this would not be possible or appropriate at this

> stage, given that the proposal is supposed to be at a formative stage only. However, given that their local authorities are already informing them that they will not be in a position to replicate funding provided by ILF, it is imperative that the consultation provides at least some explanation as to how assessments and care provision will work if the ILF closes.
>
> …..
>
> 5.2.15 There is no explanation as to whether the central Government intends to make current ILF budget available to local authorities or whether any devolved funding would be ring fences in the adult social care budget for each local authority."

The proceedings

20. Being dissatisfied by the response to this letter and a similar letter written on behalf of the fourth and fifth claimants, these proceedings were commenced on 4 October 2012 by way of challenge to the legality of the consultation.

21. The Defendant lodged an acknowledgment of service and lengthy summary grounds of resistance on 25 October 2012.

22. In November 2012 Mr Justice Parker directed that permission on the original grounds should proceed by way of a rolled up hearing and subsequent directions adjourned that rolled up hearing to 13 March 2013.

The closure decision

23. On the 18 December 2012 the MDP made a Ministerial statement in the following terms:-

> "It is clear from the responses to consultation that the prospect of the ILF closing is causing current users anxiety, and that the fund has played a really important role in the lives of users and their families. But we also heard that the ILF had had its problems, that the current arrangement is unsustainable and that local authorities face challenges in supporting disabled people in a consistent and equitable manner given the complex way in which ILF funding interacts with the local authority funding for each user.
>
> We have considered all views carefully and, while I understand user concerns, I do not think the current situation is sustainable. Our commitment to maintaining current awards until 2015 remains, but on 31 March 2015 the ILF will close, and from that point local authorities in England, in line with their statutory responsibilities, will have sole responsibility for meeting the eligible care and support needs of current ILF users. The devolved administrations in Scotland, Wales and Northern Ireland will determine how ILF users in each of those parts of the UK are supported within their distinct care and support system. Funding

> will be devolved to each local authority and to the devolved administration on the basis of the pattern of expenditure in 2014/15.
>
> To ensure a smooth transition Government and the ILF will be working with the social care sector in England to produce a Code of Practice to guide local authorities on how ILF users can be supported through the transition. I expect that the devolved administrations in Scotland, Wales and Northern Ireland will engage with the ILF to develop processes and guidance reflecting the distinct approaches to care and support in those parts of the UK.
>
> The ILF will also be conducting a transfer review programme over the next 2 years which will ensure that the details of the care arrangements are captured and shared with their local authority and help those users not currently receiving any local authority funding to engage with the mainstream care systems so they can access the services they are eligible for."

24. The closure decision prompted the claimants to amend their claim form on 18 January 2013 and in the amended grounds the focus of the challenge was the equality impact assessment and the extent to which any or due regard was had to the public sector equality duty in making the closure decision.

25. On 28 January 2013 the Intervener Equality and Human Rights Commission sought permission, subsequently granted, to intervene to assist the Court with respect to the public sector equality duty engaged in this particular decision.

26. The claimants have provided evidence through their solicitor Louise Whitfield who has, amongst other things, analysed the responses of the local authority to the consultation. There is also a witness statement from a user of the ILF, Mr Shabaaz Mohammed, as to how closure could affect his ability to pursue university education.

27. For the defendant, Mr Given of the Personalisation and Independence Division and the team leader for the ILF Policy at the DWP has produced two witness statements exhibiting various internal documents and the analyses that were used in the formation of the decision-making process.

28. Substantial skeleton arguments were provided by all parties. The rolled up hearing was heard on 13 and 14 March over one and a half days at the conclusion of which I announced that permission would be granted, and judgment reserved.

Lawful consultation

29. There is no statutory duty to undertake a consultation before decisions of the kind contemplated here were made, nor has there been any reliance on any extraneous policy or statement as to how consultations would be undertaken.

30. Nevertheless it is clear that even where there is no duty to consult, if a public decision-maker decides to consult before making a decision it must do so properly. The recognised test was set out by Lord Woolf MR in R v North and East Devon Health Authority ex p Coughlan [1999] EWCA Civ 1871 [2001] QB 213:

"108. It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken (*R v Brent LBC ex parte Gunning* [1986] 84 LGR 168).

112. …….It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

The Public Sector Equality Duty (PSED)

31. By section 149 Equality Act 2010

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

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it…

…..

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

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any activity where participation by such persons is disproportionately low.

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

……..

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

32. There is extensive jurisprudence arising from previous versions of the statutory duty as to what having 'due regard' to the PSED means. The following summary of applicable principles has been identified by the Intervener without dispute by the parties:

i) The promotion of equality is concerned with issues of substantive equality and requires a more penetrating consideration than whether there has been a breach of the principle of non-discrimination (R (Baker) v Sec State for the Environment [2008] EWCA Civ 141 at [30].

ii) Due regard means analysis of the material available with the specific statutory consideration in mind (Harris v LB Haringey [2010] EWCA Civ 703 at [40]). A bare assertion that this has been done may not be sufficient R JL v LB Islington; [2009] EWHC 458 Admin; at [113] to [123]; R Equality and Human Rights Commission v Sec State for Justice [2010] EWHC 147 (Admin) [48]-[53].

iii) The duty must be brought to the attention of decision-makers and the court must be able to discern that due regard has been had to the specific elements in play (R (Hurley and Moore) v SS for Business Innovation and Skills [2012] EWHC 201 Admin at 96; R (Rahman) v Birmingham City Council [2011] EWHC 944 Admin at [31], [57].

iv) The nature of the duty is informed by the provisions of the UN Convention of the Rights of Persons with Disabilities 2006, ratified by the United Kingdom in 2009: see Burnip v SS Work and Pensions [2012] EWCA Civ 629 at [19] to [22]; AH v West London Mental Health Trust and SS Justice [2011] UKUT 74.

v) Defective information-gathering prior to a decision being made may result in inadequate consideration of the PSED: see R (JM) v Isle of White Council [118-9], 122, 126, 140; Lunt v Liverpool City Council [2009] EWHC 2356 Admin, [2010] 1 CMLR 14.

vi) An equality impact assessment is neither a necessary measure before due regard is had, or a sufficient one if the particular assessment does not provide the relevant information, but it is likely to be a useful tool as indeed may be consultation R Kaur v LB Ealing [2008] EWHC 2062 Admin.

1) The challenge to the consultation process

33. Mr Wolfe QC submitted that the consultation process engaged in before December 2012 decision was made was defective principally because:-

i) Inadequate information had been given as to what was understood by devolution of the fund to enable consultees to make an effective response and in particular provide sufficient data to inform the PSED.

ii) In particular it was not explained what devolution meant, namely whether local authorities were to exercise the same discretion to distribute funds allocated for this purpose as the ILF Trustees had had or by contrast whether it was proposed that the fund and its complementary funding stream would be abolished and replaced with a revised statutory duty to fund Category 2 needs and above.

iii) The consultation had not been undertaken with complete candour; thus the Department's assessment of the costs of closing the fund had not been disclosed and neither had the fact that discussions had been continuing for some time with the Local Government Association who regarded the ILF as an anomaly and were strongly in favour of the proposals to abolish it.

iv) The consultation was based on provisions in a draft Bill reflecting in the White Paper whereas the enactment of this legislation could not be assumed.

v) There has been no discussion of alternative options revealed in the Ministerial briefing papers of deferring closure until 2016 or beyond

34. I am not satisfied that the consultation was flawed as contended above or elsewhere in the submissions advanced.

35. The central question in this consultation was the impact on the existing 20,000 service users of the intended closure of the fund in 2015. The future of the ILF had been a matter of open discussion for some years, and since 2010 it was well known that it was closed to future users. The class of existing users was thus, by comparison with new potential users with similar needs who could not access the fund, a privileged group.

36. In my judgment:-

i) It was lawful for the decision-maker to proceed on one option alone and to make policy on the basis of the DH legislation that was planned to proceed in the intervening period.

ii) Taken along with the White Paper, as well as previous public statements made about the future of the ILF, it was reasonably clear from the consultation that

future funding for disabled people would be by local authorities applying the FACS scheme, albeit with a duty to support needs at Category 2 and above.

iii) There was no need to produce an EIA before the consultation was undertaken, and indeed one purpose of the consultation was to provide material to inform the EIA. Many of the 2000 respondents to the consultation were able to explain what the impact of the proposals would be for themselves, albeit without being able to state precisely what level of local authority support would be forthcoming.

iv) The claimants' letter before claim demonstrated that they understood the potential implications and were able to respond with examples of the kind of threat to independent living that the closure of the ILF might have.

v) Similar points were made by the ILF itself in response to the DH (see paragraph 41 below).

vi) Consultation was only one source of input to government decision making, and the impact of the PSED was only one of a number of factors to be eventually assessed by the decision maker.

vii) It is lawful for government to develop parallel lines of inquiry before, during or after a consultation of this sort.

37. Although there was information known to the DWP that was not in the consultation, none of the examples of absent data identified in the course of the argument persuaded me that this consultation was other than candid and open, having regard to what it was: a desire to know the consequences of a provisional decision to close the ILF.

38. I have regard to Lord Woolf's observations at paragraph 112 in Coughlan noted at [30] above. I am satisfied with the defendant's explanation of the omission of the costs of closure of the scheme from the consultation document and do not consider that the omission of this data detracted from the ability of the consultees to explain how closure had potential serious impact on them.

39. I therefore reject this head of challenge.

2) Having 'due regard' to the PSED

40. I regard this head of challenge as considerably more formidable. It is obvious that the existing users of the fund would be significantly disadvantaged by its closure if devolution simply meant that henceforth they would have to rely exclusively on local authority funding under the statutory scheme, even if the new scheme adopted some of the features pioneered by the ILF: such as direct payment, personal budgeting and portability when the user changed addresses between local authorities as the White Paper suggested it would.

41. The ILF's own response to the DH in December 2011 noted at p. 13:

> "We have recently analysed the characteristics of our user base. Whilst emerging statistics should be taken with some caution, some 33 per cent of ILF users have

> severe learning disabilities as their main impairment, and around 60 per cent of the ILF user group have some degree of learning disability. Of these almost one third are residing in supported living settings, almost always with 24-hour support. Many of these people have previously lived in residential care or long stay hospitals and these new arrangements represent a great leap forward in provision and independent living outcomes for this group. Local Authority representatives have told us that supported living placements for this group are becoming harder to finance since ILF stopped accepting applications, and that removal of the ILF as an exemplar provider of new large support packages is helping to reinforce a local view that councils can now ignore this aspect of equality for disable people with their non-disabled colleagues."

42. Devolution of the ILF fund is only a partial description of the product of the Minister's decision. It was true that in pursuit of both localism and the reduction of complexity in funding assessments, all future funding decisions would be taken by the local authority or devolved administrations rather than the ILF in conjunction with these authorities. However, what was being devolved was not the same kind of funding that beneficiaries of the ILF had received in the past and the funding was not to be ring-fenced for disabled users' needs.

43. In my judgment, there was thus a real possibility that after 2015 existing users of the ILF would have their funding packages reduced to the Category 2 criteria. This might well prevent them hiring the care assistants they are able to employ at present to enable them to access remunerative employment, pursue higher education, participate in civic society and most significantly, be able to maintain independent living arrangements rather than return to institutional care that ILF funding had enabled users to prevent recourse to.

44. The UN Convention on the Rights of Persons with Disabilities 2006 (UNCRPD) came into force on 3 May 2008 and was ratified by the United Kingdom on 8 June 2009 and by the European Union on 23 December 2010. Article 19 has particular relevance to the subject matter of this claim. It is headed 'Living Independently and Being Included in the Community'.

> "State parties to the present Convention recognise equal rights of all persons with disabilities living in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:
>
> a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
>
> b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs."

45. The claimants point out that the final Equality Impact Assessment of December 2012 at paragraph 32 plays down the substance of the evidence submitted to the consultation from most users and a number of local authorities:-

> "There is a potential negative impact on users of the ILF fund although whether there is any actual impact and how great that impact will be is dependent on individual circumstances. There is a potential positive impact for some users of the social care system who are not ILF users as they may get an improved service or level of funding from their local authority due to the greater amount of funding available. The Government's believes is that any negative impacts are justified by the policy aims of providing greater equity and fairness in the social care system and delivering this funding at a local level in a way which is accountable to local people through the electoral system".

46. Nevertheless, in these case, this issues are directed to the question whether 'due regard' was had to the duty, rather than whether the closure decision was unlawful as outside a reasonable range of options open to the decision maker or adjudicating on the weight to be given to the due regard when set alongside other considerations.

47. The parties have referred me to the extensive case law where judges have had to make this assessment in a variety of contexts. Since the hearing I have also noted two articles on the topic*: Too hot too cold or just right? The development of the Public Sector Equality Duties in Administrative Law* by Tom Hickman in Public Law April 2013 and *Austerity and Equality* by Lisa Busch[1] in Judicial Review March 2013.

48. Taken as a whole this material reveals that judges have continued to find helpful consideration of the six principles identified by Aikens LJ In R (Brown) v SS Work and Pensions [2008] EWHC 3158 (Admin) in summary:

i) The decision-maker must be made aware of the duty to have due regard to the identified goals at the time of the decision under consideration.

ii) Subsequent attempts to justify a decision as being consistent with the duty when due regard was not had at the time are not enough.

iii) The duty must be exercised in substance and with rigour, albeit the terms of the statute do not have to be expressly referred to. It is not a box-ticking exercise.

iv) The duty is non-delegable.

[1] As will be apparent Ms Busch acted for the defendant in these proceedings

v) It is a continuing one.

vi) It is best practice to keep an adequate record showing that the equality duties have been considered conscientiously.

49. Despite the criticisms and other observations made by the claimants and the intervener as to aspects of the decision-making process and some anxiety prompted by some of the language deployed in the way this decision was presented to the public, the defendant has satisfied me that the relevant statutory duty was brought to the decision-maker's personal attention and sufficient regard was had to the relevant elements engaged by the proposal.

50. It is clear that the MDP was aware that ILF users might face reduced funding. In addition to her statement to Parliament (quoted at [23]) she said in her foreword to the Government's Response to the Consultation:-

> "I was pleased to see such a strong response to the consultation from a wide range of individuals, organisations and local authorities from across the United Kingdom. You told us that the support provided by the ILF had played a really important role in the lives of users and their families, and that there was real concern that the closure of the fund would undermine the ability of users to lead full and independent lives. But we also heard that the ILF has had its problems, and that the current arrangement is making it difficult for local authorities to ensure that they are supporting all disabled people in a consistent way. We know that those using ILF funding have a wide range of needs, and that the balance between ILF and local authority support often depends on when users applied to the ILF and where they live. We have heard that for many individuals and interested organisations, the level of support provided is the most important thing, not who provides that support. We have reflected very carefully on all of the views submitted to the consultation. I understand the concerns of users but I do not believe that the current situation is sustainable. It would not be justified to continue to support those disabled people who were ILF users when the fund was closed to new applications, in a different way from other disabled people with similar needs".

51. I am satisfied from the evidence of Mr Given on behalf of the defendant that:-

i) The Minister was personally engaged with the process and would not agree the policy until she had sought and obtained some assurances from the Department of Health and others that a Code of Guidance would be introduced to address problems in transition from ILF funding to local authority statutory criteria.

ii) There was a rigorous process of analysing the response to the consultation and weighing the submissions made on behalf of the Local Government Association on one end of the spectrum and individual users fearful of the loss of their funding package on the other.

iii) There was both a draft Equality Impact Assessment dated 31 October 2012 and a final one published with the decision. Both recognised the potential loss

to individual users of parts of their existing funding package as a result of the changes made. It was perhaps these highlighted concerns that led the Minister to engage actively in seeking assurances on transitional measures to ease the burden on users. There was in addition an interim analysis of the consultation responses and an economic impact assessment.

iv) In addition to the documents noted at sub-paragraph (iii) above, Mr Given produced at least three briefings for the benefit of the Minister on 31 October 2012, 12 November 2012, and 16 November 2012, each addressing in different ways the concerns of users, local authorities and the Minister herself as to the impact of closure on certain existing users.

v) There were significant other factors in favour of reform such as administrative simplicity, enabling decisions to be taken at the local level by the body with statutory responsibility, the lack of economic sustainability of the ILF 'top-up' model in the current economic climate, and the concern about fairness. This last concern I understand to be the legitimate concern as to the inequality of treatment between those with similar needs as people with disabilities but only some of whom were users of the ILF, depending on the date of application.

vi) The Minister would be well placed to know that the option of extending the ILF to everyone at current levels was not realistic in the economic climate, indeed it was lack of economic sustainability that had led to the closure of the Fund for new applicants in 2010.

52. I thus conclude that the Brown principles have been demonstrated to have been met as well as the principles summarised at [32] above. This was not an after the event assertion that due regard had been had, but an anxious consideration of what closure would mean in general terms for the affected class.

53. Part of my concern in the course of this challenge was as to the absence of any reference to the UNCRPD and the Article 19 duty specifically. However, both the Ministerial statements cited at [15], [23] and [50] above and the very title of Mr Given's Division in the DWP (Personalisation and Independence) do suggest that due regard was had to the duty on the state to facilitate people with disabilities to live independently as far as is reasonably practicable.

54. The two judicial decisions where the terms of the UNCRDP have been cited with approval were both cases of individual claims of discrimination that were adjudicated on by the Upper Tribunal: Burnip v SSWP (see paragraph 32 (iv) above) and AH v West London Mental Health Trust [2011] UKUT 74 AAC. The present context is different and is principally concerned with how the resources of the state are to be fairly and efficiently distributed to people in need under the proposed revised statutory scheme. The Minister is not making individual decisions on care packages, and in the formation of government policy in this field it is both permissible and necessary to consult, evaluate and decide at a level of generality.

55. Nevertheless, as the fifth Brown principle explains, the public sector equality duty is a continuing one, and the express terms of the UNCRPD may well need due consideration and upon after reflection by public bodies developing and implementing

the policy of closure taken in this case. If the intended legislative reform set out in the White Paper is stalled or diluted, if the intended Code of Guidance to ease transition does not arrive in time or turns out to be too anaemic in content to enable the Convention principles to be brought to bear in individual cases, the application of the PSED may need to be revisited in the light of these developments. Similarly, this will need to be the case if the level of Treasury funding for disabled people generally or for this class of ILF users in transition back to the statutory scheme in particular is so austere as to leave no option but to reverse progress already achieved in independent living,

56. A number of significant developments remain outstanding. For this reason even if I had reached the conclusion that due regard had not been had to the PSED as it applied to people with disabilities, I would have confined any relief to a declaration rather than quashing the decision taken in 2012 to terminate the ILF in 2015.

57. In the event for the reasons given above the challenges to both decisions fail. I should add that I am very grateful to all counsel for the quality of their submissions written and oral.