Neutral Citation Number: 2014 EWHC 3481 (Admin)

CO/4033/2014

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

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ

Date: 23 October 2014

Before :

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

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Between :

THE QUEEN ON THE APPLICATION OF

(1) MICHAEL ROBSON (by his mother and litigation friend Mary Robson)
(2) JENNIFER BARRETT (by her mother and litigation friend Elaine Barrett) **Claimants**

- and –

SALFORD CITY COUNCIL **Defendant**

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Ian Wise QC & Azeem Suterwalla (instructed by **Irwin Mitchell LLP Solicitors, Manchester**) for the **Claimants**

Paul Greatorox (instructed by **Manchester and Salford Legal Services**) for the **Defendant**

Hearing date: 15 October 2014

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JUDGMENT

His Honour Judge Stephen Davies.

His Honour Judge Stephen Davies:

Summary

1. The claimants, who are both adults with severe disabilities who live in the City of Salford, challenge the defendant's decision, made on 30 June 14 and confirmed on 23 July 14, to cease providing directly, through its Passenger Transport Unit ("PTU"), a transport service for eligible adults living in its area, including themselves, to enable them to attend adult day centres.

2. The context for the decision is that it is part of a package of measures intended to achieve savings in the defendant's community, health and social care budget. The defendant's alternative approach is to apply a revised transport policy, entitled "criteria for transport", under which individual transport arrangements are made for each individual eligible adult service user, through a variety of different means, such as the "ring and ride" service, taxis (adapted as necessary) or motability vehicles driven by their carers, coupled with support, whether by making provision for an escort, or by providing financial assistance, in appropriate cases.

3. In summary, the claimants advance the following grounds of challenge:
   (a) A failure to provide viable transport arrangements will be in breach of the defendant's statutory duty under section 2 of the Chronically Sick and Disabled Persons Act 1970 ("the CSDPA").
   (b) The withdrawal of services without lawful reassessments of service users was unlawful.
   (c) The decision was procedurally improper because it was taken in the absence of a lawful consultation as required at common law.
   (d) The defendant breached its statutory duty in failing to comply with the public sector equality duty imposed under section 149 of the Equality Act 2010 ("the Equality Act").

4. The defendant's position, in summary, is as follows:
   (a) The claimants' challenge confuses two entirely separate decisions: (i) the "high level" decision to cease providing a direct transport service via the PTU and to apply instead the individualised criteria for transport policy; (ii) individual decisions made in relation to individual eligible adult service users as to the particular transport arrangements to be made for them to access adult day centres.
   (b) As regards the high level decision, the defendant's case is that the challenge is misconceived, because the defendant is not required to fulfil its obligations to eligible adults such as the claimants to make arrangements for the provision of transport to day centres by any one particular method, such as the provision of a direct transport service via the PTU. All that the defendant is required to do is to fulfil the obligation it owes to an individual eligible adult under s.2 CSDPA by the provision of appropriate facilities or assistance, and there is no basis for suggesting that it is not ready, willing and able to

fulfil that duty through its individualised criteria for transport policy. It rejects the challenges to the decisions in relation to the failure to undertake proper consultation and in relation to the alleged breach of the public sector equality duty.

(c) As regards the individual decisions in relation to individual service users, the defendant's position is that: (a) there is no discrete challenge made in this case to the individual decisions in relation to each of the claimants; (b) in any event any such challenge would be premature, because the decision as communicated to them was not a final decision and/or because both have exercised the right afforded to them by the defendant to request further assistance and/or to appeal, and that process is still ongoing in relation to each. The defendant submits that it is only if and when a final decision is communicated to them with which they disagree that judicial review would be appropriate.

5. At the same time as the claim was issued on 28 Aug. 14 the claimants made an application for interim relief seeking to prevent the defendant from closing down the PTU with effect from 29 Aug. 14, as had initially been communicated. That issue was resolved by the defendant agreeing, at a hearing before me on 4 Sept. 14, to maintain the PTU until 1 Nov. 14 or further order. On that basis I gave directions for an expedited timetable. I subsequently granted permission on the papers on 10 Sept. 14, the substantive hearing was listed on 15 Oct. 14, and this judgment now follows.

6. My decision is that the claimants' challenge fails, for reasons which I shall give in the following sections of this judgment.

The Statutory Scheme

7. The statutory scheme is not in dispute, and can be shortly summarised.

8. It is common ground that the defendant is obliged under section 29 of the National Assistance Act 1948 and s.2 CSDPA, where it is satisfied that it is necessary in order to meet the welfare needs of eligible adults living in their area, to make arrangements for the provision of welfare services. Thus in this case the defendant has made arrangements for the claimants, and the other disabled adults affected by the decision, to attend adult day centres and social care respite centres.

9. It is also common ground that in such circumstances the defendant is also obliged under s.2(1)(d) CSDPA to "*make arrangements for … the provision … of facilities for, or assistance in, travelling to and from his home for the purpose of participating in any services provided under arrangements made by the authority*".

10. The defendant submits, and the claimants accept, rightly in my view, that the obligation is to make arrangements for facilities or assistance to be provided, and that this imports no

obligation to provide facilities or assistance directly. The provision of facilities or assistance by other means, such as by entering into appropriate contracts with private organisations, or arranging for the eligible adult or his carer to provide his own transport, where appropriate with financial assistance, is permitted.

11. The claimants submit, and the defendant accepts, again rightly in my view, that it is implicit in s.2(1)(d) that the facilities or assistance should be suitable for the required purpose.

12. The claimants draw to my attention the statutory scheme for the assessment of the need for community care services. The obligation upon a local authority to undertake an assessment of needs and to make a decision as to whether those needs call for the provision of community care services, is imposed by section 47 National Health Service and Community Care Act 1990. In so doing, the local authority must comply with the Community Care Assessment Directions 2004, which include obligations: (a) to consult with the person and, where appropriate, his carers; (b) to take all reasonable steps to reach agreement with the person and, where appropriate, his carers.

13. The claimants also draw to my attention the statutory guidance, issued by the Department of Health under section 7(1) Local Authority Social Services Act 1970, entitled "Prioritising need in the context of putting people first: A whole system approach to eligibility for social care" dated 2010. That gives detailed guidance as to the assessment procedure, including the provision of an appropriate support plan, recorded in writing. In a section dealing with carers warning is given not to make inappropriate assumptions about how much support carers are willing or able to provide. The claimants accept of course that they have already been assessed on previous occasions, so that the process which they contend should have happened here would have been a review process, in respect of which the publication also gives guidance. Emphasis is placed on the desirability of adopting a simple flexible review process, but also to address certain specified matters in the course of such reviews. The claimants emphasise the need to address areas of risk, and the need to update the support plan where appropriate at the conclusion of the review process.

14. The claimants submit that this statutory guidance should be followed unless the local authority decides, on proper grounds, that there is good reason to depart from it: see the decision of Sedley J (as he then was) in R v LB Islington ex p Rixon (1986) 32 BMLR 136.

15. The claimants also submit that in this case there is a co-extensive duty upon the defendant, arising at common law, not to withdraw services previously provided to them without a re-assessment of their needs, and rely upon the decision to that effect at first instance in the Divisional Court, not challenged or doubted or disturbed by the Court of Appeal or the House of Lords, in R v Gloucestershire CC ex p Barry [1997] AC 584.

16. Finally, the claimants note that there is no statutory right of appeal against decisions in relation to assessment or the provision of services, including therefore the provision of transport in this case. Local authorities such as the defendant may have internal appeal and complaints procedures, and complaints may be escalated to the Ombudsman, but there is no formal appeal process to an independent tribunal. Thus the only legal remedy for a dissatisfied person in such circumstances would be by way of judicial review.
17. The defendant does not challenge these propositions as propositions of law, although it disputes their applicability and/or relevance to this case.

Summary of the facts

(a) The circumstances of the individual claimants

18. I have already explained that the claimants are both severely disabled adults who live in Salford. More detail as to the personal circumstances of the claimants, including their disabilities and the impact of those disabilities upon their life, is to be found in the witness statements provided by their carers and mothers, Mary Robson and Elaine Barrett respectively. I hope I will be forgiven for not referring to the detail of those matters in this judgment. For present purposes it suffices to say that both are fully dependent on others for their care, and are only able to continue living at home due to the unstinting care and attention of their mothers, assisted in Jennifer's case by other members of her family.
19. So far as Michael Robson's position as relevant to this claim is concerned, he attends day centres five days a week, using the PTU service twice weekly (rising it appears to three days weekly more recently), using a taxi twice weekly, and by his mother driving him in a motability vehicle once weekly. The PTU service, in short, involves the use of drivers, directly employed by the defendant, driving wheelchair adapted buses, with ramps, leased by the defendant (known as "white buses"). Those buses, manned by passenger assistants as well as drivers, collect eligible adult service users from their homes and drop them off at various day centres in Salford, and then collect and return them in due course. It is, in effect, rather like a school bus service, so that defined routes, collecting and dropping off particular service users at particular times, are operated. Under the existing arrangements this service is not necessarily provided free of charge, so that Michael has to contribute £3.90 per return trip for the use of the service. He also has to contribute £5 per return trip for the taxi service.
20. He was seen by a social worker, Anne Fallon, at a pre-arranged meeting on 21 May 14, at which his mother was present. A bespoke transport assessment form was completed, which recorded relevant details as to his transport needs and abilities, ascertained by obtaining answers to a number of what appear to me to be eminently sensible and well focussed questions. In a box entitled "alternative transport options" it was concluded that he could be

taken to day centres by mobility car or by wheelchair accessible taxi, or by using the ring and ride service, although it was accepted that he had never previously used ring and ride unaided. It was also noted that his mother said that any changes to the existing transport arrangements would increase the stress upon her as Michael's carer.

21. This assessment form was not sent to Michael or to his mother as his carer for comment or agreement. Instead Michael, like others in his position, received a letter dated 29 July 14 which stated that the defendant had made the decision that it would "*no longer provide a specialist passenger transport service to day centres and respite centres*", and that "*an assessment has been undertaken of your transport needs which takes into account all the information we have on your current situation. The outcome of the assessment is that your transport needs can be met by mobility car or taxi funded by yourself.*" The letter continued that the service would cease on 29 Aug. 14, a month later, but concluded as follows:

"If you feel you need additional help to meet your transport needs then please contact the Transport Project Team [which] will try and help you identify appropriate transport options that will meet your needs.

You may wish to appeal against this decision if you have additional information that you feel we have not considered, by contacting the Transport Project Team."

22. His mother says that for perfectly good reasons she is unable to drive him to and from day centres five days a week using the motability vehicle, and that she communicated her position to that effect to the defendant on 21 May 14. She also says that the cost of a taxi would be unaffordable, as much as £30 per return trip. Her concern is that the practical result of losing the PTU service would be that Michael would have to stop attending day centre, which she says, I have no doubt rightly, would be an extremely damaging outcome so far as they are both concerned.

23. It is common ground that she has exercised the rights of assistance / appeal offered by the letter of 29 July 14, and that this process has not concluded, but that in the meantime Michael continues to receive the PTU service as previously. I have not been given details of the assistance / appeal process, but I have been told that the defendant has been informed that the first claimant does not wish any final decision to be taken in that regard whilst this judicial review is pending.

24. So far as Jennifer Barrett's position is concerned, she attends a day centre four days a week, using the PTU service. She uses the same service to attend day centre when she is in respite care. She cannot walk and uses a specialist wheelchair, which is quite bulky and heavy. Her family has a recently acquired motability vehicle, but it is not wheelchair accessible, and her mother is unable to put the wheelchair in and out of the vehicle unaided. Her mother says that

a taxi service would cost £60 / week, which is unaffordable, and in any event it would have to be a wheelchair adapted taxi, which is not always available. Her mother is concerned that without the PTU service she would have to cease using the day centre, and that this might compromise her own ability to care for Jennifer at home.

25. Jennifer was also seen by a social worker, Lesley Curran, on 28 April 14 in her mother's presence. A similar assessment was produced which concluded that the motability vehicle ought to be wheelchair accessible or that Jennifer could use disabled taxis. The letter to her dated 29 July 14 was identical to that sent to Michael, save that in her case the outcome of the assessment was stated to be that "*your transport needs can be met by using assisted taxis as your mobility car is currently unsuitable for your needs, though the possibility of changing your vehicle will also be pursued by your family*".

26. There is a second witness statement from Elaine Barrett made 30 Sept 14 which was served by the claimants on the defendant on 2 Oct 14, and to which the defendant objects, although sensibly has accepted I should read on a provisional basis and decide in my judgment what if any weight I should place on it. In short, it confirms that Jennifer is still being provided with the same service as before by the PTU, and that her appeal is still pending. She also refers to the April 14 assessment and complains that: (a) she did not receive a copy of the assessment; (b) it is inaccurate in recording that Jennifer is "fully independent on support", because she has problems with swallowing which could cause her to choke. Finally, she refers to a visit from a member of the defendant's learning disability team, accompanied by a social worker and an occupational therapist, which took place on 18 Sept. 14, which was clearly not a positive experience for Elaine Barrett, and she exhibits a copy of the occupational therapist's report which she received the following week. Mr Wise QC & Mr Suterwalla drew my attention in particular to the conclusion at p.8 to the effect that Jennifer is unable to recognise danger or risk and so should not be left alone.

(b) <u>The circumstances of others who have used the PTU service</u>

27. There is little evidence and some dispute between the parties as to this, but I can summarise the position as follows.

28. It is recorded in a report to cabinet dated 11 March 14 that the PTU was providing services to 204 adults currently using adult social care services, as well as to 700 children accessing school. (I should say that there has never been any question of the childrens' service being affected by this proposal.) As at this time the PTU used 23 vehicles and employed 36 people, including 17 drivers and 17 passenger assistants. It records that of the 204 an "initial assessment" had shown that alternative transport arrangements could be made for 100, but

that specialist vehicles were required for the remainder and the revised policy would seek to clarify how alternative transport arrangements for those could be funded. It concluded that "*for those who continue to need support of a more specialist nature there will be continued responsibility to ensure there are suitable, safe options to meet that need*".

29. Following the transport assessment procedure which it appears was undertaken in relation to all adult service users the defendant's position was that 169 could make adequate alternative arrangements and that the remaining 40 (the number of users seems to have increased to 209) could use alternative transport with some support. It appears from the defendant's summary grounds [par. 19] that these claimants were included in the group of 169, all of whom received letters similar to those received by the claimants.

30. The defendant's position is that as at the end of Aug. 14 alternative arrangements had indeed been made for around 100 service users. By the time Mr Clemmett of the defendant came to make his witness statement in mid Sept. 14 the number had increased to 133. Mr Greatorex told me on instructions from Mr Clemmett at the hearing that the number had increased to 172, with 37 service users, including the claimants, still outstanding. In the absence of evidence to prove this the claimants were unable to accept it, but I have no reason to doubt it.

31. Equally, however, as the claimants submitted, there is no evidence to the effect that all of those are content with the alternative arrangements, still less that on an objective analysis they are being provided with suitable, safe transport. The position is merely that they have not actively indicated their wish to take advantage of the right of further assistance or appeal notified to them. Included in the further witness statements submitted by the claimants there are statements from other carers who speak movingly of their understandable and obviously genuine concerns in relation to the impact of the decision on those disabled adults for whom they have responsibility. It is not immediately clear whether they all form part of the 37 who on current evidence are still receiving the PTU service and who are in the further assistance / appeal process. There is clearly room on their evidence for the possibility that some of the 172 have reluctantly accepted what they may regard, or what may be, an unsuitable or unsafe transport service.

32. The reality, it seems to me, is that I am in no position to make a positive finding either way in relation to that aspect of the case but nor, in my view, do I need to do so to decide this case.

(c) <u>The defendant's consultation and assessment process</u>

33. On 26 Feb. 14, at a full council meeting, the defendant approved the proposed 2014-15 revenue budget, which included substantial proposed savings from, amongst other areas, the adult social care budget, including a proposal to achieve savings by the "*withdrawal from the direct delivery of specialist transport for people with a disability and the introduction of a*

revised criteria for support with transport that emphasises the use of more ordinary options for more individuals".

34. It was of course understood that these proposals would have implications for vulnerable individuals, and at p.12 the need for further consultation and a further equality impact assessment was recognised.

35. The public consultation process began on 3 Mar. 14. Details are to be found in various documents, including the report to mayor and cabinet for 30 June 14 [p.247]. The consultation process included letters being sent to all service users and carers, including those using the PTU service, some 9,000 letters in total, enclosing a survey booklet which summarised the proposals and included a questionnaire. The claimants complain that the details of the proposal as set out in the brochure were materially misleading, because they did not make it clear that the proposal was to close the PTU service.

36. They point to the description of the proposal [p.181], which read as follows:

"The council's passenger transport service provides transport for 204 people who use adult social care services within day centres.

We assess the different options that can meet the transport needs of people who use this service. The options include transport provided by families and friends, public transport, ring and ride services, and community links, developing travel skills and using mobility benefits. Of the total of 204 people, we are already helping 100 adults get alternative transport to meet their needs.

The proposal is to assess all adults that receive the specialist transport service to see if alternative transport options can be used. If such alternative transport is not available we would try to identify benefits which could be available to help meet their transport needs …"

37. They also point to the relevant part of the questionnaire [p.188], which asked the following questions:

Q5. Do you agree that it is fair that people use available alternative transport options if they are able (eg transport from family or friends, bus, taxi, tram, ring and ride) before the council provides a special service?

Q6. Do you have any other comments on this proposal?

38. The defendant invites me to note that this was by no means the only element of the consultation. Thus the defendant's website gave notice of the consultation, with the facility to complete the questionnaire online; a dedicated phone line was provided; posters and social media were employed to publicise the consultation, as were advertisements placed in newspapers. Moreover, Mr Clemmett notes that there were presentations of the proposal undertaken at various locations, including various adult day centres. He also says that there

were personal visits to all adult users of the PTU. This is clearly intended to be a reference to the visits during which the assessment forms were completed. He says that he has spoken to all those who conducted these visits and they have all confirmed that they included "*discussion about the proposals and the planned closure of the PTU*". Mr Clemmett also noted that there was large scale media coverage which made explicit reference to the planned closure of the PTU. Mr Greatorex also invites me to note that there is no positive evidence from the claimants' mothers that they were unaware that this was the proposal. Although he notes that Ms Tidswell in her recent witness statement (the admission of which he objects to on the same basis as he does in relation to the second witness statement from Elaine Barrett - see paragraph 26 above) says that she did not understand the proposal having read the booklet, he invites me to discount that evidence on the basis that it is the only positive evidence adduced by the claimants to that effect, and further on the basis that it is clear from her evidence as to the assessment meeting that she must have known the reality of what was proposed.

39. I shall address the significance of these points when I come to consider the argument on this ground, but it suffices to say at this stage that in my view the defendant has produced no hard evidence to demonstrate that, <u>if</u> the booklet was materially misleading, the impact of that misleading impression was removed in relation to all those affected by other means, including the personal visits to the existing service users and their carers. It seems to me that the evidence is not sufficient to establish that those who conducted the personal visits to undertake the assessments were specifically tasked with making it clear to the users and their carers in unambiguous terms that the proposal <u>would</u> involve the closure of the PTU and its replacement by other alternatives. That was not the stated purpose of the visits, and I note that the letter to Mr Robson to arrange the meeting [p.269] does not state in terms that this was the proposal.

40. I turn to the equality impact assessment which was undertaken. It is dated May 14, and was produced by a team with the lead officer being the senior manager of day services. I should say that there is no witness statement from that person or anyone else in relation to the conduct of the assessment, save only that Mr Clemmett exhibits a document [p.123] which summarises the brief and the process, so that the documentary evidence must speak for itself.

41. So far as the assessment is concerned, it is a 13 page document which begins with a summary and continues in five sections to address (a) what is being impact assessed; (b) whether an assessment is required; (c) the results of the consultation; (d) (in tabular form) the potential impacts and how they will be addressed; (e) the proposals for an action plan and review.

Time and space prevent me from referring to, or setting out the detail of, the document in full. What is most relevant in my view are the following points:

(1) In section C3 the report addresses the common themes emerging from the consultation, namely issues of reliability, availability, costs and safety so far as the alternative arrangements are concerned, and how those areas of common concern could be addressed.

(2) In section D the impact on those with disabilities was addressed by noting the disproportionate impact on those with learning difficulties, physical and mental disabilities, and the risk of isolation if unable to use alternative forms of transport. No other risks were specifically identified; in particular no specific risks in relation to safety were identified, although the risk in relation to the financial implications was addressed in a later section in relation to socio-economic equality, as were risks in relation to carers.

(3) In that same part of section D the response to the question "if the impact is negative how will it be reduced or eliminated?" was answered first by reference to providing knowledge about alternative forms of transport, and second by reference to the recent travel assessments providing encouragement in relation to alternatives and planning to develop skills to enable them to use those alternatives. The issues of safety and support were referred to in the next section where the positive impacts were considered.

(4) In section E, although of the three identified impacts two were positive and only one was negative (the impact on carers), the proposed actions included: (a) assessing the ability to travel independently, including by way of individual meetings to discuss alternatives; (b) assisting movement from specialised transport to ordinary services, where possible; (c) further collaboration between services with family, friends and neighbours.

42. The claimants complain that this is a superficial, as opposed to a rigorous, analysis which does not begin to address in any or any sufficient detail the real negative impacts or how they are to be addressed. They complain that it is a retrospective purported justification of a decision already taken. They complain that by emphasising the positive impacts, by minimising or even ignoring the negative impacts, and by failing to examine in any meaningful degree of detail how those negative impacts could be eliminated, reduced or mitigated, the defendant manifestly failed to discharge its public sector equality duty.

43. Whilst I will consider that submission in due course, I should also note at this point that the impact assessment was referred to in the report to mayor and cabinet for 30 June 14 [p.247]. There then follows a section entitled "proposal following consultation and engagement"

which explained the plan for a project team to focus on the cohort of 40 identified as having ongoing needs for supported transport, to consider matters such as safety assessments and financial assistance. I should also note that the report clearly referred to the Equality Act assessment [p.252] and also to the legal implications, including the need to comply with the public sector equality duty [p.253]. The decision made on that date by the mayor and cabinet, being the first stage in the decision under challenge, is recorded in writing and refers to the assessment and the need to comply with the public sector equality duty [p.262]. Finally, it is apparent from the record of the called-in meeting of the full council on 23 July 14 that matters in relation to the proposal as regard transport for disabled adults, particularly safety and cost, were considered and discussed before the decision was upheld [p.387-392].

Grounds 1 and 2 – breach of s.2 CSDPA and failure to assess before withdrawing service

44. These grounds were presented by the claimants together, and it is convenient to consider them in that manner.

45. As I have already said, there is no dispute as to the applicable statutory scheme or legal principles; the dispute lies in their application to the facts of this case.

46. In my judgment, the claimants have failed to separate out the issues which arise in relation to the decision under challenge and the individual decisions in relation to the individual claimants and other PTU service users.

47. I accept the defendant's fundamental submission that the decision under challenge is a high level decision in relation to how the defendant was going for the future to satisfy its obligation under s.2 CSDPA to make arrangements for the provision of facilities for or assistance in travelling to day centres, namely either by continuing to provide a direct transport service through the PTU or to adopt revised transport criteria involving making arrangements for the individual transport needs to be met in a number of different ways, depending on the individual circumstances of the individual service user. The answer to the question "will these new arrangements place the defendant in breach of its duty under s.2 CSDPA?" can only be answered by considering the specific arrangements proposed in relation to the individual service users, having regard to their specific circumstances and needs. It is impossible in my judgment for the claimants to argue that the implementation of this decision would in itself, and without more, put the defendant in breach of its s.2 CSDPA duty. That is because it cannot sensibly be contended that in relation to all existing PTU service users nothing other than the continued provision of transport services through the PTU would meet their individual needs. Nor in my judgment can it be shown that the same would be true in relation to a majority, or even a significant number, or indeed to a single one, of that cohort. That is because, as Mr Greatorex submitted, there is no basis on the evidence for concluding

that any of these individual existing PTU service users could not have their individual needs satisfied other than through the PTU. And that is because the essential feature of the PTU, on the evidence, is that it provides a transport service using a wheelchair accessible vehicle manned by a suitably trained and accredited driver and assistant, to deliver the service user from home to day centre and back again. There is no evidence that this or a suitable similar facility could not be provided through external commissioning, as opposed to through the PTU, in relation to those service users who needed that level of service. Indeed that appears to be precisely what was under specific consideration in relation to the identified cohort of 40 in that section of the 30 June 2014 report to which I have already referred and, it appears, is still under consideration in relation to the outstanding cohort of 37.

48. In the same vein, and for the same reasons, I accept the defendant's submission that there was no requirement, whether under statute or at common law, to undertake the degree of assessment contended for by the claimants before making the decision under challenge, because it was a high level decision, which would not by itself lead to a reduction in the service being provided to individual service users to below the level required of the defendant to fulfil its s.2 CSDPA duty. It was sufficient, in my judgment, for the defendant to do what it did, which was to conduct an individual transport assessment on the basis of a personal meeting, so as to satisfy itself that the withdrawal of the PTU service and its replacement with individualised transport arrangements was feasible and was not such as would likely result in its being unable to comply with its s.2 CSDPA duties in relation to the existing PTU service users.

49. In the end, it seems to me that the claimants could only succeed on grounds 1 and 2 if they could show either that the assessment process was so seriously deficient that no rational local authority could have proceeded to take the high level decision which it did on the basis of that evidence base, or that on the evidence before it when taking the decision no rational local authority could have concluded that it would be able to comply with its s.2 CSDPA duties in relation to the PTU service users if it ceased using the PTU and implemented the alternative arrangement. Whilst the claimants have produced some evidence from which there might be some basis to criticise the individual assessments and/or the individual conclusions as to suitable alternative transport arrangements, and whilst the claimants may be able to point to some areas of concern in relation to the implementation of the new arrangements, that is very far indeed in my judgment from what they need to establish to make good their challenge to the high level decision. In my judgment the report of 30 June 14, with its careful consideration at section 5.9.6 as to whether or not the proposal should be revised following and as a result of the consultation and assessment process, and its conclusion that it should

proceed on the basis of the specified further actions, provides a complete answer to that complaint. If the defendant was to shut down (or, for that matter, to downsize) the PTU with effect from the end of this month, and was unable to make arrangements for a safe, suitable alternative means of transport for one or more eligible adults, then it would be open to such person(s) to bring a legal challenge on that basis and, if necessary, to seek and obtain urgent interim relief. There is no cogent evidence before me that the defendant would simply be unable to comply with any such order without maintaining the PTU in its existing form.

50. If this case was not about the challenge to the high level decision, but about a challenge to the individual decisions as communicated to the individual claimants by the letters of 29 July 14, different considerations would have come into play. Mr Greatorex submitted that even these challenges would have failed, because they were premature. I do not accept this submission. I read the letters as communicating final decisions in relation to final assessments, subject only to the right to request further assistance and/or to appeal. It does not seem to me that these options have the effect of changing the essential status of the letter from a final to a provisional decision. Nor does it seem to be that these options would in themselves amount to a sufficient alternative remedy to prevent the claimants from seeking to challenge the decisions by judicial review. That is because, as the claimants submit, there is no indication that the defendant was prepared to offer a complete review on the basis of a fresh full scale re-assessment and fresh decision.

51. However, if that was to have been the basis of challenge, it would have been necessary for that to have been made clear in the claim form and detailed grounds. The focus would have needed to be on the individual circumstances of the individual claimants, the conduct of the assessment, and what had been made known to the defendant in that regard, so as to consider whether or not the decision was impugnable on the basis of inadequate assessment and/or failure to meet the s.2 CSDPA duty. Without indicating what the result of such a specific challenge would have been, I tend to share the view expressed by Mr Greatorex that the defendant's likely pragmatic response, as it appears in practice to have been in the event, would have been to agree to undertake a further assessment and to take a fresh decision having regard to the results of that fresh assessment.

52. Neither in written nor in oral submissions did the claimants seek to contend that it was open to me, or that it was appropriate for me, to decide this case on the basis that they were seeking to challenge the individual decisions as communicated to them, as opposed to the decision to withdraw the service delivered by the PTU and provide individual travel arrangements under the new policy, and I am satisfied that that is not a course which it is properly open for me to take on the basis of the claim as made in the claim form and as advanced by the claimants.

Ground 3 – no lawful consultation

53. The claimants contend that the defendant was obliged at common law to undertake a proper consultation with those affected before taking the decision to withdraw the PTU service and replace it with individualised transport arrangements. The claimants contend that this duty is an aspect of the overarching common law duty to act in a procedurally fair manner. They rely on the decision of the Court of Appeal in R v Devon CC ex p Baker [1995] 1 All ER 73 in support of that proposition. They also draw my attention to the observations of Lord Reed JSC in Osborn v Parole Board [2013] 3 WLR 1020 at pars. 64-72 to emphasise first that fairness is for the court and not for the decision-maker to decide, and second his explanation of the benefits to be gained from procedurally fair decision making. As to what is required in terms of consultation, they refer me to the well-known statement of Lord Woolf MR, in R v North & East Devon HA ex p Coughlan [2001] QB 213 at paragraph 108, where he said that:
"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 p Gunning (1985) 84 LGR 168."

54. They also refer me to the analysis of the Court of Appeal, given by Arden LJ, in Royal Brompton & Harefield NHS Foundation Trust v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472 at pars 8-14. In particular they emphasise the requirement that the consultation document must present the issues in a way that facilitates an effective response, and in a way which is clear to the general body of consultees, the requirement that the available information must be presented fairly and not inaccurately, and that the unfairness need only be shown to affect a group of those affected by the consultation, as opposed to all of them.

55. Mr Greatorex in his submissions did not quarrel with the above as statements of principle. He also however emphasised par. 13 of the judgment in Royal Brompton, where Arden LJ referred to the observations of Sullivan J (as he then was) in the Greenpeace case, to the effect that clear unfairness must be shown, and that the error must show that there has been no proper consultation, and that something has gone clearly and radically wrong with the consultation process. He also referred me to the very recent decision of the Court of Appeal in Rusal v London Metal Exchange [2014] EWCA Civ 1271, where Arden LJ again summarised the law relating to consultation, and also stated (at pars 51-53) that the court

should not ignore information which on the evidence was well known to the consultees anyway, even if not expressly referred to in the consultation document.

56. As I have indicated, the claimants' complaint in relation to consultation focuses on what they say was the misleading explanation given as to what was proposed, which brings me back to the booklet.

57. I accept that the booklet does not state in terms that the proposal involved withdrawing the existing PTU service from adult service users. However, it seems to me that this complaint, to borrow if I may from paragraph 142 of the statutory guidance in relation to assessments, focuses too much on services as opposed to outcomes. The booklet makes it clear that what is being proposed is to assess adults currently using the PTU service to see if alternative transport arrangements, such as family transport or ring and ride, or alternative arrangements funded by benefits, can be used. It is the change in approach to transport arrangements, and in particular the aim of moving service users off the PTU and onto alternative travel arrangements, which is important to the existing service user consultees in my judgment, not the consequential impact on the continued existence of the PTU. That would, of course, be important to employees, but: (a) they would be consulted separately anyway as employees; (b) it is abundantly clear that they knew what the effect of the proposal on the PTU was for them.

58. Furthermore, although I accept not stated in explicit terms, it would be impossible in my judgment for any sensible reader not to have understood that this proposal would involve the withdrawal of the PTU service from those who were assessed as being able to use alternative transport arrangements. Moreover, the reference to the defendant already helping 100 of the 204 cohort to get alternative transport clearly demonstrates in my judgment the seriousness of the intention which is made apparent in the proposal, namely to move a very high proportion, if not all, of the existing service users away from the PTU.

59. In those circumstances, whilst I accept that the explanation given was not as clear, or the warning as to the potential consequence not as stark, as it might have been, in my judgment any such failing is not such as would render the consultation process as a whole so clearly unfair that the decision should be impugned on that basis.

60. As I have already said, if I had reached the alternative conclusion I would not have felt able to conclude that the defendant had demonstrated that what they say had been communicated to the users or carers at the personal visits, or what they say was the affected users' or their carers' knowledge in any event, would have been sufficient to remedy the position. As the claimants submit this is not a case, as was Rusal, where one is considering a small, knowledgeable pool of relevant consultees. It is not necessary for me, however, to express

any opinion as to whether or not, if that had been the only successful ground of challenge, I would have held that to have been sufficient to justify quashing the decision.

61. For completeness, however, I should add that in my judgment there can be no possible basis for complaint about the consultation process overall, which seems to me to have been conspicuously thorough and fair.

Ground 4 – breach of the public sector equality duty

62. I was taken by Mr Wise QC and Mr Suterwalla to s.149, who emphasised: (1) the mandatory nature of the obligation imposed by the section; (2) the specific obligation to have due regard to the need to take steps to meet the different needs of (in this case) disabled adults from non-disabled adults and, in particular, to take steps which take account of disabled adults' disabilities. As to point (2), they submitted that this was far from being a vague or a general exhortation, but a hard edged requirement to have regard to the need to identify how the needs of disabled adults differed from those of non-disabled adults and to ascertain what steps could and should be undertaken to meet those needs.

63. I was also referred by them to the decision of the Divisional Court in Brown v Sec. of State for Work & Pensions [2008] EWHC 3158 (Admin), where Aikens LJ: (a) held that the obligation to have "due regard" meant to have proper and appropriate regard for the goals set out in the (predecessor) section [par. 82]; (b) held that in order to comply with that obligation it was necessary to have due regard to the need to gather relevant information [par. 85]; (c) identified a number of relevant principles as to how that duty should be fulfilled in practice, including a duty to exercise the duty in substance, as opposed to box ticking, with rigour and with an open mind [pars. 90-96].

64. I was also referred by Mr Wise QC and Mr Suterwalla to the decision of the Court of Appeal in Bracking v Sec. of State for Work & Pensions [2013] EWCA Civ 1345 and, in particular, the 8 relevant principles identified by McCombe LJ at par. 26 of his judgment. The claimants particularly emphasised: (a) principle 4, the need to assess the risk and extent of any adverse impact and means of elimination before adopting the policy and not as a rearguard action; (b) principle 6, the need to have specific conscious, as opposed to merely general, regard; (c) principle 8, the need for a proper and conscientious focus on the statutory criteria, and the need to make inquiry.

65. Mr Greatorex did not contest these principles. He did however remind me, by reference to these authorities, that it is a duty to have regard, not a duty to achieve a particular result, and that weight was a matter for the decision maker and not the court. He also referred me to the decision of the Court of Appeal in Bailey v Brent LBC [2011] EWCA Civ 1586, to the effect that: (a) the decision is a fact-sensitive one [par. 83]; (b) s.149 does not require the decision

maker to speculate, investigate or explore *ad infinitum*, or to apply the degree of forensic analysis which a QC would deploy in court [par. 102]. He also submitted that, although recommended as advisable, there was no positive obligation to undertake or to record the result of a formal equality impact assessment, so that I should have regard to the totality of the process, and not limit myself to conducting a forensic analysis of the words used in the impact assessment.

66. Mr Greatorex also submitted that in a case such as the present, which was concerned exclusively with disabled persons, it could not possibly be said that the defendant had overlooked its duty to have due regard to the impact of its decision on disabled persons. Mr Wise QC and Mr Suterwalla countered by submitting that this illustrated the danger of adopting a general approach, as opposed to the focussed rigorous approach which was required, particularly by reference to the need to have due regard to the need to take mitigating steps.

67. I begin by considering the need to gather relevant information. In my judgment there can be no criticism of the defendant's approach in that regard. They produced an action plan, and (as I have already found) undertook a thorough consultation exercise, writing to all service users and their carers and making personal visits to undertake individual assessments.

68. Moreover, it is apparent from section C of the impact assessment that the defendant conducted a careful analysis of the results of the consultation exercise. In particular, I consider that it is apparent from section C3 that they had analysed with some care the results of the consultation exercise so as to identify the nature of the common concerns raised. They had also in that same section C3 identified the ways in which those concerns might be eliminated, reduced or mitigated. Although the claimants submitted that they were insufficiently rigorous, I am unable to agree. It seems to me that they contained reasonable suggestions for the elimination, reduction or mitigation of the adverse impacts about which concerns had been expressed. It is not the function, in my judgment, of this procedure to provide what is in effect a detailed action plan to address each and every area of concern in the same way as one might expect an individual assessment in relation to an individual user to do. This process operates, as it must, at a relatively high level. It cannot be said in my judgment that the suggested options fail to engage in any meaningful way with the concerns expressed, or that important matters have simply not been addressed at all. In my judgment the claimants' approach falls foul of the cautionary note sounded in the Bailey case, namely to avoid infinite speculation, investigation or exploration.

69. Accordingly, whilst I accept that neither the particular part of section D which relates to disabled persons nor section E are as detailed or as rigorous as they might, and perhaps should

have, been; and whilst I also accept that if those parts of the impact assessment were read in isolation there would be grounds for concern, in my judgment that is not enough by itself to enable the claimants to succeed in their challenge under this ground. It is necessary to read the impact assessment as a whole, without undue forensic analysis, before reaching a conclusion. In my judgment, when the impact assessment is read as a whole in that manner and, in particular, when sections D and E as a whole are read fairly in the light of section C3 as a whole, I am satisfied that there is no proper basis for concluding that the defendant did not have due regard to the matters identified in s.149 of the Equality Act. It seems to me that whilst the claimants might quarrel with what they contend was the overly optimistic tone of the impact assessment, I must remind myself that weight is a matter for the decision maker and this is not the opportunity for a merits based review of the outcome.

70. I also reject the complaint as to the insufficiency of the detail. In addition to the points made in paragraph 68 above, I would also wish to emphasise the continuing nature of the duty under s.149. Thus the question as to whether or not it was complied with in relation to the decision under challenge has to be considered by reference to the nature of the decision made which was, as I have said, a high level decision. It follows that the defendant was also under a continuing duty to comply with s.149 at the time when it made, and when it continues to make, decisions in relation to the individual transport arrangements in relation to individual disabled adults who require such facilities. It also follows, however, that the extent of the obligation to consider the detail of the proposed alternatives and the detail of any mitigating measures must have been less intense at the stage of the decision under challenge than might otherwise have been in a case where there was, in effect, a once and for all decision with an immediate effect on those with relevant protected characteristics.

71. Moreover, even if there was any residual doubt in that respect, I also consider that it is necessary to have regard to the process as a whole. As I have said, by reference to the documents, it is apparent that throughout the whole process the defendant was evidently aware of its legal duty under s.149. More importantly, perhaps, the documents to which I have referred also demonstrate that it was also evidently aware in its decision making process as to the potential adverse impacts on existing disabled adult service users, and that it was actively considering steps to take to meet the needs of such persons and to eliminate, reduce or mitigate those adverse impacts. In such circumstances I am satisfied that at the time when it made the decision under challenge the defendant had properly complied with its public sector equality duty.

72. In all the circumstances I reject this ground of challenge as well.

Conclusion

73. Whilst I have every sympathy for the individual claimants and their carers and families, and indeed for all those adults affected by these changes and their carers and families, and whilst I recognise that this decision will be bitterly disappointing to them, I am unable to accept that their challenge is made out, and I must therefore dismiss the claim.

74. In the circumstances there is no need for me to go on to consider the question of remedy, about which there was some debate. I need only indicate that if I had found for the claimants on grounds 3 and/or 4 it seems to me that the appropriate remedy would have been simply to quash the decision made, so that the defendant would have been perfectly entitled to proceed to re-take the decision having properly complied with its consultative and equality duties, but that on any view it would have not been proper to have ordered the defendant to continue to perform its s.2 CSDPA duties in any particular manner, whether by provision of the PTU service or some variant thereof or otherwise, for the future.

75. I conclude by expressing my gratitude to all those involved in the preparation and presentation of the case in enabling it to be dealt with in such an effective and expeditious manner.

Postscript – matter arising following the dissemination of my draft judgment

76. At the conclusion of the hearing I indicated that given the urgency of the matter (see paragraph 5 above) I would hand down judgment on 23 Oct. 14 and would endeavour to provide a draft judgment in advance of that date, which I was able to do on 17 Oct. 14. The claimants subsequently invited me to reconsider the substance of my decision, which after consideration I declined to do. It was also agreed that I would decide the question as to whether I should grant permission to appeal on the basis of written submissions, which I have received and considered. I decline to grant permission on the basis that I am not satisfied that the proposed appeal has any real prospect of success and that there is no other compelling reason for the appeal to be heard.

77. Yesterday evening Mr Wise QC invited me in an email to defer handing down judgment on the basis that the Supreme Court would be handing down judgment in a case, R (Moseley) v London Borough of Haringey [2014] UKSC 55) in which he had appeared as counsel for the claimant, and believed that the content was highly material to the decision in the instant case and may affect its outcome. Mr Greatorex responded this morning, objecting to that course on the ground of delay and on the further ground that there was no good ground for believing its content to be highly material, particularly since neither the decision of the Court of Appeal (R (Stirling) v London Borough of Haringey [2013] EWCA Civ 116) nor the further appeal to the Supreme Court had even been mentioned during the substantive hearing.

78. I have briefly considered the decision of the Court of Appeal, and as it seems to me there is nothing in that decision which is of relevance to the instant case, which doubtless explains why it was not referred to by counsel for either side. The basis of complaint was entirely different from the present. There is no indication from that judgment, or from what is available on the Supreme Court website, that anything which may appear in the judgment of the Supreme Court, whether at a high level as to the general principles applicable to the obligation to consult, or at a lower level as to the decision in the particular case, is likely to have any material impact on my decision in this case in relation to consultation, which in my opinion merely applies existing settled legal principles to the facts of the particular case.
79. In the circumstances I am not prepared to accede to the suggestion from Mr Wise.
80. I am however prepared to accept that it is a further reason why I have not felt able to accede to Mr Greatorex's submission that I should abridge the time for lodging any appeal to the Court of Appeal from the prescribed 21 days to 7 days.