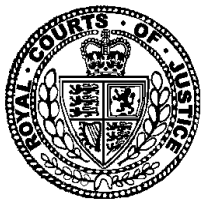

Neutral Citation Number: [2023] EWHC 866 (Admin)

Case No: CO/720/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/04/2023

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between:

THE KING (ON THE APPLICATION OF HL)	**Claimant**
- and -	
SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Defendant**

- -
- -

Shu Shin Luh and Alice Irving (instructed by **TV Edwards**) for the **Claimant**
Leon Glenister (instructed by **GLD**) for the **Defendant**

Hearing date: 24 October 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Julian Knowles:

Introduction

1. This is an application for judicial review with the permission of Turner J. The decision challenged is what the Claimant says was the Defendant's unlawful decision on 1 December 2021 not to make regulations pursuant to s 72 of the Care Act 2014 (the CA 2014) to make provision for appeals against decisions taken by a local authority in the exercise of its functions under Part 1 of the CA 2014 in respect of an individual.

2. In summary, Part 1 places local authorities under a duty to meet the care needs of eligible individuals within their area who, (typically) because of mental or physical disabilities, require such support. The local authority may do so, for example, by agreeing to fund so many hours a week of care and support for the individual, based upon an assessment of their particular needs.

3. Local authorities are under a general duty, in exercising their Part 1 functions in the case of an individual, to promote that individual's well-being: s 1(1). Well-being has an expansive definition, including personal dignity and control over day-to-day life: s 1(2). Local authorities are required to have regard to 'the importance of beginning with the assumption that the individual is best-placed to judge' their own well-being and to promote their participation in social care decisions as fully as possible: s 1(3).

4. A local authority has a duty to carry out a needs assessment of an adult where it appears they may have needs for care and support: s 9. Where an adult has needs for support, the local authority must determine whether any of the needs meet the specified eligibility criteria: s 13(1) (and see the Care and Support (Eligibility Criteria) Regulations 2015 (SI 2015/313). Section 18 provides that a local authority 'must meet [an] adult's needs for care and support which meet the eligibility criteria' where they are ordinarily resident in the local authority's area and certain financial criteria are met. Section 19 empowers local authorities to meet identified needs which they are not required to meet under s 18: s 19(1)

5. Where a local authority is required to meet an individual's needs under s 18, or decides to do so under s 19, it must prepare a 'care and support plan': s 24(1)(a). A care and support plan must specify, *inter alia*, the needs identified, those needs which meet the eligibility criteria, those needs the local authority will meet, and how they will meet them: s 25(1). In preparing a care and support plan, the local authority must involve the adult for whom it is being prepared and must take 'all reasonable steps to reach agreement with the adult … about how the authority should meet the needs in question': s 25(3), (5)

6. Section 72 of the CA 2014 is central to this case. It is entitled 'Part 1 appeals', and provides:

> "(1) Regulations may make provision for appeals against decisions taken by a local authority in the exercise of functions under this Part in respect of an individual (including decisions taken before the coming into force of the first regulations made under this subsection).

(2) The regulations may in particular make provision about -

(a) who may (and may not) bring an appeal;

(b) grounds on which an appeal may be brought;

(c) pre-conditions for bringing an appeal;

(d) how an appeal is to be brought and dealt with (including time limits);

(e) who is to consider an appeal;

(f) matters to be taken into account (and disregarded) by the person or body considering an appeal;

(g) powers of the person or body deciding an appeal;

(h) what action is to be taken by a local authority as a result of an appeal decision;

(i) providing information about the right to bring an appeal, appeal procedures and other sources of information and advice;

(j) representation and support for an individual bringing or otherwise involved in an appeal;

(k) investigations into things done or not done by a person or body with power to consider an appeal.

(3) Provision about pre-conditions for bringing an appeal may require specified steps to have been taken before an appeal is brought.

(4) Provision about how an appeal is to be dealt with may include provision for -

(a) the appeal to be treated as, or as part of, an appeal brought or complaint made under another procedure;

(b) the appeal to be considered with any such appeal or complaint.

(5) Provision about who is to consider an appeal may include provision—

(a) establishing, or requiring or permitting the establishment of, a panel or other body to consider an appeal;

(b) requiring an appeal to be considered by, or by persons who include, persons with a specified description of expertise or experience.

(6) Provision about representation and support for an individual may include provision applying any provision of or made under section 67, with or without modifications.

(7) The regulations may make provision for -

(a) an appeal brought or complaint made under another procedure to be treated as, or as part of, an appeal brought under the regulations;

(b) an appeal brought or complaint made under another procedure to be considered with an appeal brought under the regulations;

(c) matters raised in an appeal brought under the regulations to be taken into account by the person or body considering an appeal brought or complaint made under another procedure.

(8) The regulations may include provision conferring functions on a person or body established by or under an Act (including an Act passed after the passing of this Act); for that purpose, the regulations may amend, repeal, or revoke an enactment, or provide for an enactment to apply with specified modifications.

(9) Regulations may make provision, in relation to a case where an appeal is brought under regulations under subsection (1) -

(a) for any provision of this Part to apply, for a specified period, as if a decision ("the interim decision") differing from the decision appealed against had been made;

(b) as to what the terms of the interim decision are, or as to how and by whom they are to be determined;

(c) for financial adjustments to be made following a decision on the appeal.

(10) The period specified under subsection (9)(a) may not begin earlier than the date on which the decision appealed against was made, or end later than the date on which the decision on the appeal takes effect."

7. Section 72 therefore confers a power, but not a duty, on the Defendant to make regulations governing appeals. It is common ground that no such regulations have been made (and, in fact, s 72 itself is not yet in force: it is for the Defendant by order to bring it into force: see s 127). Whether that failure, in the circumstances in which the Claimant says it took place, is unlawful, is the central issue in this case.

8. The context of s 72 is as follows.

9. Sometimes the local authority and the individual disagree about the level of care and support that is necessary. For example, the individual may feel that they require more hours than the local authority is willing to pay for after its Part 1 assessment. At present, there is no direct mechanism by which such disputes, including the actual merits of the case, eg, how many hours are actually needed, can be resolved through an independent appeals process.

10. The individual can complain to the local authority via its internal complaints procedure (which all local authorities are required to have: see the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 (SI 2009/309)) and then (on limited grounds) to the Local Government and Social Care Ombudsman (LGSCO), or they can seek judicial review of the local authority's decision, or bring a claim under the Human Rights Act 1998.

11. The Claimant relies on evidence which she says shows these are not effective dispute resolution mechanisms because, in simple terms, none of them is capable of reaching a decision on the merits of any dispute with the local authority.

12. Section 72 was introduced by the Government following consultation, having been recommended by the Law Commission. The subsequent decision of the Defendant in 2016 to implement an appeal system was based on these consultation outcomes and further consultation in 2015. A detailed summary of the consultative history is in the Claimant's Statement of Facts and Grounds (SFG) at [30]-[48] and in her Skeleton Argument at [32]-[38].

13. The nub of the Claimant's complaint is that the Defendant decided in 2016 to implement an appeals system under s 72, but then on 1 December 2021 in a White Paper performed what she regards as a *volte-face* and decided not to implement the appeals system either alongside or irrespective of cost capping reforms and instead, re-opened the question of *whether* an appeals system was required at all.

14. There are three main grounds of challenge advanced on behalf of the Claimant:

    a. Ground 1: the Defendant breached his duty to consult prior to making his decision in December 2021 to 'shelve' the implementation of an independent appeals system. This duty arose at common law.

    b. Ground 2: the failure to implement an appeals system poses a real risk of individuals being unable to have effective access to a legal remedy to resolve social care disputes and impairs their right of access to justice.

    c. Ground 3: the failure also amounts to an interference with the procedural guarantees to an effective remedy to which the Claimant is entitled under Article 8 of the European Convention on Human Rights (ECHR).

15. Of these grounds of challenge, Turner J said:

> "It is at least arguable, I put it no higher than that, that in the context of the initial consultation and subsequent commitment to

> the implementation of an appeal system, the legitimate scrutiny of the Court is thus engaged. I am less enthusiastic about the standalone arguments relating to access to justice and Article 8 procedural rights but consider that it would be artificial to divorce these considerations from the scope of the review."

16. The two main bundles run to about 1000 pages and there is additional material as well. There were three voluminous bundles of authorities. This has all taken time to consider alongside the parties' detailed arguments. As well as my detailed hearing notes, I have full audio recordings of the hearing.

17. I am grateful to all parties for their helpful written and oral submissions.

18. I grant any necessary application to rely on further evidence (*per* the Claimant's Skeleton Argument at [6]-[11]). The Defendant objects to the admission of some of this evidence, but I think it is helpful if I have as rounded an evidential picture as possible. I am satisfied there is no unfairness to the Defendant in admitting this evidence.

The Claimant's factual background

19. The Claimant, whose identity I have anonymised as HL for reasons which I hope will be obvious, is in her 30s. She lives within the area of a large local authority (the responsible authority being the County Council) in the south of England. It is not necessary to identify it. I bear in mind the County Council is not a party to this claim and so has not responded to the Claimant's evidence.

20. The Claimant is severely disabled and has several complex long-term medical conditions, which cause significant mobility difficulties. She describes herself as being constantly in pain and exhausted. The Claimant is the sole carer for her 11-year-old son, who is autistic, has Attention Deficit and Hyperactivity Disorder and pathological demand avoidance, and exhibits very challenging and violent behaviour: I have anonymised his identity also.

21. There is some family support available to the Claimant, but she is heavily reliant on social care support, without which she would be unable to manage day to day living tasks and care properly for her son.

22. She says at [8]-[9] of her first witness statement (HL1):

> "8. The combination of my own disabilities, their impact on me physically and the demands of caring for my son on account of his disabilities make it exceedingly challenging to care for my son. I cannot perform many of the tasks that parents generally do for any child, such as supervising his bathing.
>
> 9. I have limited access to support from family members to help with parents being elderly and with their own health issues. Therefore I have had to rely heavily on social care support – both adult services and children's services. My son receives a package

> of social care support from Children's Services under s 17 Children Act and I receive a package of adult social care, under the Care Act 2014. Without this support, we simply could not manage and, to be blunt, my son would have to be taken into care."

23. For the avoidance of doubt, I accept entirely the Claimant's evidence about her own circumstances and the difficulties she faces.

24. Since June 2016, the Claimant has had a package of adult social care from the County Council. She initially received funding for 21 hours care per week, which she received by way of direct payments to hire carers. In April 2019, the Claimant's social care needs were re-assessed. The new care plan, issued in June 2019, cut her care package in half, to 10.5 hours per week. The Claimant says this reduction was 'inexplicable'. As a result of the reduction in care, she says she has struggled to take her medication, shower, wash her clothes, clean her house when she needed, and manage her son's complex behaviour. She also suffered a lot of pain and had several falls.

25. In July 2019, the Claimant made a formal written complaint to the County Council. They said they would respond in two months but failed to do so. She tried to find a solicitor to assist her but was initially unsuccessful (HL1, [13]-[14]):

> "13. On 26 July 2019, I made a formal written complaint about the reduction in hours to an Adult Social Services Manager, explaining how the decision had badly affected me and asking for Adult Social Services and Children's Services to work together to properly assess and meet the family's needs. I was told that it would be two months before they can respond, and that will be by 25 September 2019. In the meantime, the decision to cut my package would take effect and I had to struggle on with a care package that was reduced by half.
>
> 14. I didn't then get a reply by 25 September 2019 to my complaint. I looked into getting a solicitor because I didn't have the energy or the know-how to take the issue any further. I had an advocate who sent me a list of firms doing community care cases. It was really difficult to find solicitors to take on my case. A lot of solicitors said that they didn't take 'those types of cases' (challenging cuts to care packages) even though they were community care solicitors. Others said they didn't have any availability."

26. In October 2019, the Council said they would develop a joint support plan for HL and her son but gave no timescale for its completion. The Claimant raised a complaint with the LGSCO in November 2019 but she says that the LGSCO never investigated the complaint (HL1, [15]-[16]). The Claimant remained with an inadequate level of care.

27. In December 2019, having obtained legal representation from her current solicitors, TV Edwards, a legal letter was sent asking the County Council for the promised joint support plan. TV Edwards chased for an update on 17 and 23 December, 10, 14 and 30

January 2020. On 31 January 2020, the County Council responded to state there would be a meeting to discuss the plan on 3 February 2020 (HL1, [17]-[21]). However, no plan was forthcoming.

28. A chaser letter was sent on 26 February 2020. On 2 March 2020, the County Council stated that it was not possible to complete a joint support plan. It agreed to an incremental increase to the Claimant's care funding and said it would issue an amended support plan 'in the coming weeks'. Again, no amended plan materialised. No funding increase was implemented (HL1, [22]-[26]).

29. The Covid-19 pandemic then intervened. The Claimant had to shield because of her vulnerabilities, and could no longer access informal support from her parents, and struggled to cope (HL1, [27]).

30. On 30 March 2020, TV Edwards asked the County Council for a new care plan. It replied on 24 April 2020 offering a reassessment but gave no timescale for its completion (HL1, [28]-[29]).

31. Further correspondence ensued, and on 19 May 2020, the Council promised a re-assessment within three weeks. The Claimant says she heard nothing further (HL1, [30]-[33]).

32. In response to a pre-action protocol letter dated 12 June 2020, the Council gave a new timescale of 10 weeks to complete a care plan. Following further correspondence, on 8 July 2020 it agreed to temporarily increase the Claimant's care package to 20 hours per week. However, the Claimant's health had deteriorated since 2016 and this increase was inadequate to meet her needs (HL1, [36]-[40]).

33. New assessments were carried out in August and September 2020. The assessment outcome was not received until October 2020. Further correspondence ensued. On 12 December 2020, the Council confirmed that the Claimant's care package had been increased to 25 hours (HL1, [41]-[44]).

34. This whole process for resolving the dispute over the cut to her care package took 18 months and around 65 hours of solicitor's time (HL1, [44]). The Claimant describes the process as making her 'feel really powerless', very stressed, and 'at the mercy of social services' who were both responsible for cutting her care package in half and for dealing with her complaint (HL1, [47]-48]).

35. In May 2021, the Council told the Claimant they wanted to review her care plan. They did not progress this. In October 2021, the Council again said a review would take place but again did not contact the Claimant thereafter (HL1, [50]). The Claimant's says that her care needs have become more demanding. She is struggling to cope on her current care package but is reluctant to chase for the review for fear that her package will be reduced again (second witness statement, (HL2), [3]). Further, her care plan is meant to be reviewed annually. She says she is in a permanent state of worry that her plan will be cut, resulting in a lengthy battle to restore the support she needs (HL1, [49]).

The Claimant's other evidence

36. I turn to the other evidence filed on behalf of the Claimant. Ms Luh for the Claimant said this at [20] of her Skeleton Argument:

> "20. The Claimant's experience shows how difficult it is to resolve a fundamental dispute about adult social care effectively, quickly and fairly through the existing routes of redress. The evidence from the witnesses and contained in the 2011 Law Commission report and 2013 Joint Committee of Parliament report, make it apparent that the Claimant's experience is not an aberration."

37. The Claimant's solicitor, Monica Kreel, who has more than 10 years of experience in this field, describes the Claimant's experience as typical of this sort of dispute and gives two examples in her first witness statement (Kreel 1, [12]-[13]) and goes on to give anonymised examples:

> "12. The experience of the Claimant, HL, as described in her witness statement and the documents attached to that statement, is in my experience fairly typical of a Care Act case. She is herself disabled but is also a parent carer to a disabled child, which makes care planning all the more complex. But it is my experience that there is no straight forward social care case. Most clients have one or more factors that complicate their ability to access services, such as immigration issues meaning that they are destitute as well as disabled; a history of mental health admissions which may mean that they receive services under s 117 Mental Health Act as well as under the Care Act, housing problems which may mean that they need Occupational Therapy assessments or disabled facilities grants or re-housing as well as services under the Care Act 2014; mental capacity issues which means we have to consider whether there are best interests decisions to be made; or delayed discharge from hospital.
>
> 13. HL's witness statement sets out the long and frustrating process of trying to resolve her dispute with the local authority, [County Council], about the care package she had been awarded. The length of this dispute, the amount of correspondence between her solicitor (me) and the local authority's solicitor including pre-action protocol letters before claim and the number of assessments/reviews are unfortunately, also very typical for such cases. I have summarised her case in a timeline exhibited to my statement …"

38. What Ms Kreel views as the inadequacies of the existing remedies in relation to care package complaints to the local authority and the LGSCO are highlighted in Kreel 1 at [20]-[24], [25]-[35] (concerning complaints), and [36]-[44] (concerning judicial review). At [40] of that statement she says:

> "40. Moreover, the Administrative Court, through judicial review, is limited in the remedies that it can give to a successful claimant.

> The most that can be given is a quashing of the previous assessment, review or decision not to act, and an order for the local authority to take a new decision. The court is not in a position to resolve disputes over the nature of the disability or level of needs where there is a dispute of evidence on those issues. Some of the disputes that clients seek advice on are matters that are very significant in their lives but do not immediately raise legal issues, such as to have the continence pads changed when their pads are wet or soiled or to eat fresh food rather than food that has been cooked by a carer several days earlier."

39. Some further examples are provided by Catherine Searle, another experienced solicitor with more than 30 years' experience in the field (Searle WS, [10]-[15]). For example, she says at [10]:

> "Mr CC is 21 years old and has an acquired brain injury as a result of being knocked over by a car when he was a child. He had an appropriate package of social care support through his Education Health Care Plan until age 19, when he disengaged from further education. He has received no social care support for the past two years, because there is a dispute about the amount of support that he requires. The LA assessment indicates that he meets only four of the ten Care Act eligibility outcomes and he requires 30 hours support per week. Those representing Mr CC say he meets nine of the ten Care Act eligibility outcomes and requires 84 hours support per week. The difference in analysis is partly attributable to Mr CC's his brain injury: he lacks insight to his needs and unreliably reports that he can do things independently when he cannot. For example he cannot go outdoors without supervision, because he has no road safety awareness at all, and the nature of his brain injury prevents him from learning simple safety steps. The impasse between the LA and those representing Mr CC has continued for almost two years with no outcome. I was instructed at the end of January 2021 and am negotiating with the LA, who have now agreed to put Direct Payments in place and backdate them, pending a further assessment of Mr CC's needs. The Care Act assessments to date are evidently flawed and I anticipate that we will secure more than 30 hours support, but less than 84 hours support per week."

40. Further examples are provided by Linda Burnip, from Disabled People Against Cuts (Burnip WS, [13]-[37]). She has direct experience of the limitations and ineffectiveness of current remedies (at [5-12], [39-42]). Yet further examples are provided by Jenny Hurst, Action Disability Kensington and Chelsea (Hurst [19-33].

41. The Claimant argues that these case studies demonstrate that the existing mechanisms for resolving adult social care disputes are extremely time-consuming and often ineffective. Individuals are stuck in long-running disputes, characterised by a 'revolving door system of reassessments and review spanning many months' leaving the client 'stuck' without a final decision to challenge' by way of judicial review or

complaint (Searle WS [7]). Reassessments and reviews are often delayed, and if the outcome of the assessment or review is flawed, individuals find themselves back in the position they started, going through yet more correspondence leading, generally, to another promise of review or re-assessment. Such a process means that judicial review cannot proceed because there is an alternative remedy (potentially) available. Cases often finish with a client agreeing to accept an improved but inadequate care package, usually after one or two years of legal work during which they have not received adequate care support (Kreel WS1 [74]; Searle WS1 [8]).

Relevant policy and legal context in more detail

42. I have adapted this section of my judgment from the helpful summary in the Claimant's Skeleton Argument.

The Care Act 2014

43. Earlier, I explained that the CA 2014 is the core piece of adult social care legislation in England and Wales, and that Part 1 governs adult social care. I also explained the general duty of local authorities under s 9 to carry out a needs assessment for an adult where it appears they may have needs for care and support: s 9.

44. An additional point I would make is that local authorities must keep care and support plans under general review, as well as reviewing a plan upon a reasonable request from or on behalf of the adult to whom the plan relates: s 27(1). Absent a request for a review, authorities are expected to conduct general reviews annually: *Care and support statutory guidance* (updated 2 September 2022), [13.32].

Existing routes for challenging adult social care decisions

45. Local authorities in England are required to make arrangements for the handling and consideration of complaints in relation to their social service functions, including adult social care. However, there is no requirement this complaints procedure be independent from the local authority: see the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 (SI 2009/309).

46. If a complainant has exhausted the internal complaints procedure of their local authority, they may complain to the LGSCO. The LGSCO can investigate alleged or apparent maladministration in connection with a local authority's functions, and an alleged or apparent failure to provide a service: s 26(1), Local Government Act 1974 (LGA 1974).

47. The LGSCO is expressly precluded from questioning, 'the merits of a decision taken without maladministration by an authority in the exercise of discretion vested in that authority': s 34(3), LGA 1974. Maladministration has been interpreted to cover, 'the manner in which a decision is reached or a discretion is exercised; but excluding the merits of the decision itself': *R v Local Commissioner for Administration for the North and East Area of England ex p Bradford MCC* [1979] QB 287, pp311-312. The LGSCO can make recommendations for what action the local authority should take if the complaint is upheld but cannot require certain action to be taken: s 31, LGA 1974.

48. A local authority adult social care decision may be challenged by way of judicial review. Obviously, any such challenge is limited to public law grounds. A local authority will be the judge of any disputed fact, with their decision only open to challenge if 'it is obvious that the public body, consciously or unconsciously, are acting perversely': *R (VI) v Lewisham LBC* [2018] EWHC 2180, [66]-[69].

Section 72 of the CA 2014 and its history

49. I dealt with s 72 earlier and explained that it confers a power, but not a duty, on the Defendant to make regulations for appeals. I will now deal with the process by which it came into law.

50. Section 72 was introduced by the Government following public consultation, having been recommended by the Law Commission and a Joint Committee of Parliament. The subsequent decision of the Defendant in 2016 to implement an appeal system was based on these consultation outcomes and a further consultation in 2015, as I have said.

51. The Law Commission first addressed the perceived ineffectiveness of existing dispute resolution remedies in this area in March 2011 following a Law Commission 2010 consultation concerning adult social care legislation: see *Adult Social Care: A Consultation Paper* (Consultation Paper No 192). The Law Commission's 2011 *Adult Social Care: Consultation Analysis* (Consultation Paper No 192) found that a 'substantial number of responses' addressed the "efficacy of the current system for complaints and redress*'* ([14.20]-[14.31]).

52. The Local Government Association argued that the failure to address the issue was 'an omission' ([14.20]-[14.21]). Several consultees suggested that a community care tribunal should be established because of 'the problems with the current local authority complaints process'. These problems included a lack of independence in local complaints, the protracted and expensive nature of complaints to the LGSCO and court cases, the limited focus of judicial review on procedural rather than factual matters, and the tendency of complaints and court cases to create acrimony between the parties: [14.22]-[14.26].

53. In its resulting report *Adult Social Care* (Law Com No 326), May 2011, the Law Commission noted that the issue of complaints and redress, 'came up at the majority of consultation events we attended, and was raised in several submissions. In particular, many consultees argued that a community care tribunal was needed to provide a merits review of local authority decisions in this area' [12.38]. The Law Commission recommended that the government 'consider reviewing the complaints and redress system': Recommendation 76.

Joint Committee of Parliament Recommendation 2013

54. In 2012, the Defendant published a Care and Support Bill (the Care Bill) for public consultation. The Bill did not contain any provision concerning complaints or redress. In March 2013, a Joint Committee of Parliament published a pre-legislative scrutiny report on the draft bill (HL Paper 143) (the 2013 Joint Committee report). The issue of redress and complaints came up in evidence to the Joint Committee's enquiry. The

Association for Directors of Adult Social Services and the Local Government Association expressed concerns that the Bill did not 'provide for any means of redress other than through judicial review' ([259]). The Joint Committee concluded that, 'an urgent review of arrangements for providing redress and complaints resolution' was required and recommended that the government 'should reconsider establishing a care and support tribunal to provide independent merits reviews of decisions made by local authorities' ([263]).

Public consultation and amendments to the Care Bill 2013-2014

55. In May 2013, the Care Bill received its first reading. In July 2013, the Defendant's Department published a consultation paper *Caring for our future: Consultation on reforming how people pay for their care and support* which included a detailed section on '[p]roviding redress and resolving complaints': [239]-[251] (the 2013 consultation). The preface to that section confirmed the Defendant's agreement with the Joint Committee that 'it is important to ensure that arrangements for providing redress and resolving complaints are effective' ([246]). The Consultation Paper set out the Defendant's intention to review the existing complaints arrangements to assess 'whether there are effective means of challenging local authority decisions', including 'whether there is currently sufficient independence and whether it would be beneficial to introduce a system that provides 'independent merits reviews of decisions' ([247]). It also included a call for evidence, asking consultees, *inter alia,* whether they considered the 'existing processes to provide redress and resolve complaints [to be] appropriate and accessible' and whether any lessons could be drawn from complaints processes in other sectors: see Call for Evidence ([33]-[36]).

56. The consultation closed in October 2013. No analysis or response to the consultation was published. However, in February 2014, the clause which became s 72 was added to the Bill during the Committee Stage: *Hansard*, 4 February 2014, col 583-5. In introducing the clause, Norman Lamb, then Minister for Care and Support, stated that:

> "[I]t is important that individuals … are able to challenge decisions without having to resort to judicial review. Accordingly, we held a wide-ranging consultation during the second half of last year to seek opinions on how best we could ensure that. Following that consultation, we recognised the need for change in this area, and I have accordingly tabled a new clause that will give us the scope to develop detailed proposals for an appeals system, along with stakeholders, keeping to the spirit of co-production that has characterised our work on other areas of the Bill… [W]e will consult further… later this year… [T]he new clause demonstrates our recognition of the need for change and our determination to ensure that there is a clear, flexible and independent appeals system."

57. The Care Act 2014 received Royal Assent in May 2014.

The decision to implement an appeals system

58. There were several stages to this. I will describe them in turn.

(i) Public consultation 2015

59. From February to March 2015, the Defendant held a further consultation, *Care Act 2014: Consultation on draft regulations and guidance to implement the cap on care costs and policy proposals for a new appeals system for care and suppor*t (the 2015 consultation). Part 2 of that Consultation Paper, entitled *Appeals*, sought consultation feedback which would inform 'the need for an appeals system and the drafting of the regulations and guidance as we work towards implementation in April 2015' ([15.1]). An easy read version of the consultation was produced for consultees with disabilities, often the service users. That version explained the Government's rationale for introducing a new appeals system at pp31-2:

> "If you think the council's decision about your care is unfair, you can ask them to look at things again. At the moment you: make a complaint to your local council; ask the Local Government Ombudsman (LGO) to look at your complaint if you think the council has made a mistake; go to court. This can take a long time and is not very independent (from the council). We need a system that: is fair; treats everyone equally; is independent (not part of the council); is easy for people to use and councils to run.

60. In Chapters 15 and 16 the Consultation Paper contained detailed proposals for a three-stage appeals system, including the decisions that could be appealed, how each stage of the appeal would function, appeals timescales, funding and more. The proposals were detailed.

61. The Consultation Paper was accompanied by an Impact Assessment containing a detailed analysis of the costs and benefits of the proposed appeals system, at pp44-57.

62. The Impact Assessment stated ([238]-[239]) that the appeal proposals 'should be read in context of' the 2011 Law Commission and 2013 Joint Committee reports, the recommendations of which 'have greatly influenced the approach to reforming legislation.' Those reports said ([239], [243]) that the 'lack of a formalised appeal structure was highlighted in evidence" and that 'reform of the existing system of redress was needed'. The Impact Assessment stated ([239]) that the 'ability to appeal certain local authority decision is central to a more accountable and more equitable care and support system', given local authority decisions affecting a vulnerable section of the population 'have a big impact on their quality of life'. At [243]-[244], the Defendant expressed the view that the 'preferred option' was to introduce the right of appeal and doing nothing 'would not support the overall aims of the reformed care and support system'

63. The Government did not publish any analysis or response to the 2015 consultation. However, publicly available responses from key stakeholders, such as those from Age UK, Carers UK, Independent Age, and the Disability Law Service, showed support for an independent appeals system.

(ii) The 2016 decision to implement an appeal system

64. In early 2016, the Defendant announced the decision to introduce the proposed three-stage appeal system. The Claimant says this is clear and that the decision was recorded in:

    a. the *Care Act Factsheet 13: Appeals Policy Proposal* (updated in April 2016), which summarised a three-stage appeal systems proposal, stating that it 'has been designed with the aim of resolving disputes in a less costly and time consuming manner compared with legal routes of challenging decisions.' It stated:

> "This factsheet describes how our appeals policy proposals set out the process of appealing certain decisions taken by local authorities in relation to an individual under Part 1 of the Care Act 2014.
>
> *Why have an appeals system ?*
>
> The lack of a formalised appeal structure within care and support was highlighted in consultation responses as well as in debates when the Care Act 2014 progressed through Parliament.
>
> The government acted and amended the Care Act to include powers to introduce an appeals system under which decisions taken by a local authority under Part 1 of the Care Act 2014 might be challenged.
>
> Care and Support decisions have a large impact on people's quality of life. It is therefore important that where people feel an incorrect decision may have been made in relation to their care and support they have an effective means to have the decision reviewed.
>
> …
>
> The government plans to implement the appeals policy from April 2020. During the interim period, we will develop the policy to respond to the key issues identified during the consultation held in 2015. This will also allow local authorities sufficient time to prepare for implementation and appoint the independent reviewers."

    b. A written parliamentary answer (PQ 32039 24 March 2016).

(iii) More recent developments

65. On October 2020, in answer to a written parliamentary question, Lord Bethell, then Parliamentary Under Secretary of State for Health and Social Care, said that the introduction of an appeals process was:

> '… still on the horizon, but this is best placed as an overall reform of social care systems… We have therefore delayed the

> implementation of this appeal system until we can make it part of a larger commitment to reforming social care.' (Vol 806, 3.01pm)

66. The Claimant therefore says that, while social care reforms overall were delayed, there remained as of that date a clear intention by the Government to implement an appeals system as part of broader reforms.

67. Likewise, the Claimant says that in pre-action correspondence, the Defendant repeatedly affirmed his commitment to progressing the implementation of an appeals system (SFG, [49]; Kreel 1 [53]-[73]). On 24 May 2021, the Defendant said he 'maintains active consideration of an appeals system as part of wider social care reform'. Throughout this correspondence, the Defendant referred to the Care Act Factsheet 13, which I referred to earlier.

(iv) White Paper, December 2021

68. This is an important event for the purposes of this claim.

69. On 1 December 2021, the Defendant's Department published a White Paper, *People at the Heart of Care: adult social care reform* (CP560). The Claimant says the White Paper represented a change to the previous position, by making clear no appeals system would be implemented in the foreseeable future, despite what she says had been the Defendant's previous statements to the contrary.

70. The White Paper said at p56:

> "The Care Act 2014 includes a provision to introduce a new system to allow the public to appeal certain social care decisions made by local authorities. While we do not intend to introduce such a system immediately, we are keeping it under ongoing review as the new reforms are implemented and will continue to gather evidence to inform future thinking."

71. This is the decision challenged in this claim.

72. As I shall describe in a moment, the White Paper was preceded in 2021 by engagement between the Defendant's Department, and numerous stakeholders.

73. Section 3 of the Claim Form pleads in the alternative: '… if the Defendant asserts that they still intend to implement an appeals system, the ongoing failure to do so' is what is challenged.

The Defendant's evidence

74. The principal evidence relied on by the Defendant is in the statement of Thomas Surrey of 30 June 2022 and his exhibits. He works for the Department for Health and Social Care in the role of Director of Adult Social Care Policy within the Adult Social Care group. He is responsible for overseeing work on: service quality, models of care, and workforce strategy, capacity and developments in adult social care. As part of this, his remit covers policy on redress within adult social care.

75. In his statement he set out the history and the various consultations which preceded the CA 2014, which I have already broadly summarised and which are not especially controversial.

76. At [7] he pointed out that the 2015 Consultation considered wide ranging reforms to care and support, including funding reform and a potential cap on care costs (ie, the maximum amount anyone will have to pay for personal care to meet their eligible care and support needs), as well as appeals, and added that, 'It was always the case, and remains the case, that some policies may be prioritised over others due to finite resources.' At [8] he said that Section 15 of the Consultation Document covered the potential appeal system and explained that the appeal system policy was 'at an earlier stage of development than the rest of this consultation'. At [9] he stated:

> "9. As noted by the Claimant, no document was published which collated the consultation responses. The Department collated and considered the responses internally. In relation to the appeal system, there were mixed views in the responses to the consultation. There was broadly an even split between in favour, against and no response. Many representative groups were in favour of an appeal system, but other responses were not in favour and there was no consensus."

77. At [15] he said:

> "15. Since the consultation, and to the present day, any potential appeals system has been kept under review as part of the wider social care reforms, including the cap on care costs. The policy position in 2016 was that the cap on care costs, as well as the appeals system, were planned for April 2020. This was set out in an answer the Government provided to a question in relation to the appeals system on 21 March 2016 appended at [TS/8]."
>
> > "The Department plans to introduce the appeals system for adult social care in April 2020, alongside of the implementation of the cap on care costs."

78. However, by 2017, Mr Surrey said that the policy position had changed. He explained in [18] of his witness statement:

> "… At that time the government policy was that the wider plans in respect of social care would be considered and set out in a Green Paper. On 7 December 2017, then Under Secretary of State for Health Jackie Doyle-Price made an oral statement to the House of Commons, setting out that the April 2020 timeframe would be delayed for consideration of more of the adult care system:
>
> > 'To allow for fuller engagement and the development of the approach, and so that reforms to the care system and how it is paid for are considered in the round, we will not take forward the previous Government's plans to implement a

> cap on care costs in 2020. Further details of the Government's plans will be set out after we have consulted on the options. The Green Paper will focus primarily on reform of care for older people, but will consider elements of the adult care system that are common to all recipients of social care.'".

79. The Government's announcement that the funding reforms would be delayed and a Green Paper would be published in due course was recorded in a House of Commons Library briefing paper (Ex TS/10). This noted that it was not clear if the other policies that were to be introduced alongside the cap in April 2020 including the new appeals system, would also be deferred indefinitely.

80. Further work was done from 2019 onwards.

81. At [28]-[30] of his statement Mr Surrey said this:

> "28. In February 2021, the Department for Health and Social care published a White Paper titled 'Integration and Innovation: working together to improve health and social care for all'. This set out legislative proposals for a Health and Social Care Bill with a number of proposals for adult social care. Whilst none were specifically on an appeals system, it did for example include a proposed power for the Secretary of State to intervene when a local authority was failing to meet its [adult social care] duties.
>
> 29. Of relevance to the present case, it referred to the wider social care reform (which included the appeals system) to be covered by separate proposals later in the year (Ex TS/14):
>
> > '2.7 We also recognise that the social care system needs reform: this remains a manifesto commitment [at the 2019 General Election] and the government intends to bring forward separate proposals on social care reform later this year. No one piece of legislation can fix all the challenges facing health and social care – nor should it try – but it will play an important role in meeting the longer-term health and social care challenges we face as a society
> >
> > …
> >
> > 4.4. …We have committed to bringing forward proposals this year but, in the meantime, our legislative proposals will embed rapid improvements made to the system as it has adapted to challenges arising from Covid-19.
>
> 30. In relation to this wider reform, the Government was clear it was looking at social care reform in its entirety at this stage …"

82. At [33] onwards Mr Surrey addressed the 1 December 2021 White Paper, *People at the Heart of Care: Adult Social Care Reform*. Mr Surrey says the Government worked with

over 200 diverse organisations to shape the proposals in the White Paper, as described in its Annex A (which had been included in the Defendant's pleadings in response to this claim). These included charities and representative groups, as well as carers and service users. There were roundtables and workshops and other areas of work. The opening paragraph of Annex A was as follows:

> "Since March 2021, the department has been engaging extensively to shape the government's vision and priorities for adult social care system reform. We have worked with over 200 organisations to shape the content of People at the Heart of Care, including representatives from: local government, providers, provider representative bodies, workforce representatives, trade unions, charities, think-tanks, professional bodies, lived experience representative groups and those with lived experience of delivering unpaid care and drawing on care and support."

83. At [36] he said:

> "36. This engagement gave an opportunity for a range of stakeholders to set out the main issues which they considered required reform and central government intervention. A central purpose of the exercise was to establish prioritisation of reform. It was open to stakeholders to raise dispute resolution as an issue which should be prioritised. On a few occasions, a dispute resolution procedure was raised (for example through the Health and Wellbeing Alliance Social Sub-Group, two responses included reference to having better complaints procedures). However, overall it was not a significant feature of reform priority."

84. Paragraphs [37]-[39] of Mr Surrey's statement are key paragraphs:

> "37. Taking account of this extensive engagement exercise, the Secretary of State had to make policy decisions about which areas to prioritise early spending on. The engagement exercise was used to identify common themes and priorities. The most common priorities for reform cited during this engagement included: pressures recruiting and retaining the social care workforce; the need for better integration between health and care services; the recognition of the adult social care sector, the importance of people living independently in their own home or care setting that suits their needs; and the need for digital innovation across the sector.
>
> 38. This informed the prioritisation within the immediate reform package with at least £500m for the social care workforce, at least £300m in housing, and at least £150m in technology and digitisation. Separately, the Secretary of State published an integration white paper setting out focus to enable successful integration including the sharing of health records, accelerating

> progress to align and pool funding, and creating a single accountable person responsible for delivering shared outcomes at a local level.
> 39. The appeals system was initially considered as part of the plans for the immediate reform package, however in light of the amount of funding available the Secretary of State prioritised other areas. In reaching a decision on prioritisation, he considered specifically the provisions in the CA 2014 in relation to an appeals system. However, the Secretary of State did not include it in the immediate reform package because, in the context of tight funding envelope, it was not considered as higher reform priority as other areas."

85. The White Paper itself said at [5.18]:

> "A key component of better information includes a strong feedback culture and we recognise the importance of this in adult social care. This culture should enable organisations to continuously improve and ensure people have effective routes of redress if they are unhappy with the care or support they receive. The current system requires local authorities and social care providers to have their own complaints procedures.
>
> If someone is not satisfied with the way a care provider or local authority has dealt with a complaint, they may escalate it to the Local Government and Social Care Ombudsman.
>
> The Care Act 2014 includes a provision to introduce a new system to allow the public to appeal certain social care decisions made by local authorities. While we do not intend to introduce such a system immediately, we are keeping it under ongoing review as the new reforms are implemented and will continue to gather evidence to inform future thinking."

86. At [41] Mr Surrey said:

> "41. The Secretary of State determined to keep the appeal system under ongoing review as the other reforms were implemented, and to continue to gather evidence to inform future thinking. This made sense for a number of reasons which I will now explain."

87. The paragraphs which then follow ([42]-[51]) set out these reasons.

88. At [42] under the heading 'The relevance of other reforms', Mr Surrey noted the Secretary of State is proposing to implement a series of other reforms to the social care system that will impact the need, design and importance of the appeal system.

89. At [43] he referred to the work being done by the Equality and Human Rights Commission in this area, namely how older and disabled adults and unpaid carers can challenge local council decisions. Its terms of reference will directly consider issues

which may give rise for an appeal system. Paragraph [44] noted that the Secretary of State will consider the findings in his consideration of an appeal system.

90. Importantly, at [45] under the heading, 'Further consultation on dispute resolution', Mr Surrey said:

> "45. On 4 March 2022, the Secretary of State launched a consultation 'Operational guidance to implement a lifetime cap on care costs' ('the 2022 Consultation'). Written submissions were accepted until 1 April 2022. This consultation included a specific section and question on appeals (this document was appended to the summary grounds of resistance):
>
> > 'Following the implementation of the Act there has not been any strong evidence to suggest that existing local authority dispute resolution processes are ineffective or how they might best be improved. For this reason, we have no immediate plans to introduce a new appeals system, but we are keeping the implementation of such a system under ongoing review while we gather evidence of any challenges within existing local authority dispute resolution processes for local authorities or those who use their services.
> >
> > Question
> >
> > Across the new chapters, the draft guidance advises that any disputes arising from decisions related to these reforms should be handled by local authority complaints systems.
> >
> > Do you agree or disagree that local authority complaints systems effectively resolve disputes about care and support?
> >
> > Strongly agree
> >
> > Agree
> >
> > Neither agree or disagree
> >
> > Disagree
> >
> > Strongly disagree
> >
> > Please explain your answer"
>
> 46. This consultation was launched on the gov.uk website, and was publicly available. On the day the consultation was launched, Department officials emailed key stakeholders to inform them the consultation had launched. These were representatives of Age UK, Alzheimers Society, particular local authorities, Care England, Carers UK, Local Government Association, Mencap,

> National Care Association, National Care Forum, UK Homecare Association, Skills for Care, Care Quality Commission, Kings Fund, Social Care Institute for Excellence, Think Local Act Personal and Voluntary Organisations Disability Group."

91. Paragraphs [47] and [48] he went on to describe the further consultations with various groups (eg, Age UK, Association of Mental Health Providers, Voluntary Organisations Disability Group, Alzheimer's Society, Carers UK and many others) which took place.

92. Mr Surrey's summary of conclusions at [52] was as follows:

> "52. Drawing the facts in this witness statement together, I make the following points:
>
> a. It was in 2016, Government policy that the implementation of a cap of care costs and an appeal system would be introduced in April 2020, and this was set out in writing. However, in or around 2017 there was a change of policy to consider wider social care reform together and the appeals system was then going to be considered as part of that. The matter then fell for the Government in terms of deciding which parts of social care reform should be prioritised.
>
> b. In determining the prioritisation, the Secretary of State took account of views expressed during an extensive engagement programme, including with service users.
>
> c. There has been no decision by the Secretary of State that no appeal system is to be implemented. Rather, and as set out in the White Paper, following the extensive engagement programme, the Secretary of State prioritised other areas in the first phase of adult social care reforms. It will be kept under review and up to date evidence will continue to be gathered."

Submissions

The Claimant's submissions

93. In her submissions, Ms Luh for the Claimant described that what had happened to the Claimant was a typical 'revolving door' sequence of events which is common for disabled people who are in dispute with their local authority about their care package.

94. Ground 1 of the Claimant's case, in summary, is that following the passing of s 72 and extensive consultation, the Government publicly said it would make regulations under it to introduce an appeals procedure. Then, in late 2021, it signalled that it had changed its mind and would not now be doing so. It did so without further lawful consultation. That 'decision', as the Claimant characterises it and maintains, was unlawful by reason of the failure to consult fully, given the earlier history of consultation.

95. Ms Luh said the background to s 72 meant that there had been a settled practice of consultation, which in turn meant there should have been consultation before the

December 2021 White Paper, which she said had reversed the earlier decision to implement an appeals system: (*R (BAPIO Action Ltd) v SSHD* [2007] EWCA Civ 1139, [39], [53]. She relied on other factors as having created a duty to consult. Ms Luh said that the work done prior to the White Paper (as described by Mr Surrey) was not sufficient to amount to a lawful consultation.

96. Next, on Ground 2, the Claimant said the failure to do so amounts to an unlawful impediment to her common law right of access to a court. She submitted that the right of access to justice is a constitutional right inherent in the rule of law, which includes the right of access to the courts, to legal advice, and to communicate confidentially with a legal adviser: *R (UNISON) v Lord Chancellor* [2017] 3 WLR 409, [66], [78], [81]. Any such access must be effective. It is sufficient if a real risk of prevention of access to justice is demonstrated. That means that, in order to test the lawfulness of a measure on this basis, it is legitimate to have regard to evidence regarding its likely impact and the court has to make an overall evaluative assessment whether this legal standard is met or not: *R (A) v SSHD* [2021] 1 WLR 3931, 80. Ms Luh said the evidence adduced on behalf of the Claimant clearly showed that people in the Claimant's position did not have effective access to justice, and that is what the common law right of access requires. The Defendant has failed to secure access to justice in relation to social care disputes.

97. Lastly, on Ground 3, the Claimant also said that there is a positive obligation under Article 8 of the European Convention on Human Rights (the ECHR) to introduce an independent appeals mechanism, and so the failure to do so is a violation of Article 8. Circumstances may require there be access to an independent body competent to review the relevant evidence and reasons for a decision which affects an individual's Article 8 rights: *Kiarie v Secretary of State for the Home Department* [2017] 1 WLR 2380, [48]-[51].

The Defendant's submissions

98. On behalf of the Defendant, Mr Glenister submitted as follows.

99. As a headline, he emphasised that the Secretary of State had to make choices as to which areas could make the biggest difference immediately, within the available funding; and that 'this was a quintessential political decision'.

100. As to Ground 1, he said that no duty to carry out a full public consultation prior to the December 2021 White Paper arose. The fact that the Secretary of State had previously consulted twice on social care reform (once before and once after the CA 2014 was enacted), which included questions on an appeals mechanism, does not provide a basis for giving rise to an unambiguous representation that the public would always be consulted prior to any decision on dispute resolution. Further, there was no conspicuous unfairness in not consulting, not least because the Secretary of State did engage with a wide range of stakeholders on prioritisation in 2021. Whilst the Claimant points out that Government had previously planned to implement an appeal process, this was a policy position rather than a legal entitlement.

101. He also submitted that this ground of claim is in any event academic, because a consultation on dispute resolution has now occurred (in 2022, as described by Mr

Surrey) and will be taken into account in future decision making. He therefore said this claim serves the Claimant no practical purpose and a remedy should be refused.

102. In relation to Ground 2, Mr Glenister said it was inconsistent with Parliament's choice in s 72 to give the Defendant a power but not a duty to introduce an appeals system. The Claimant's reliance on a dozen or so case studies had to be seen in the context of the over 841 000 people accessing long-term care and support under the CA 2014. The right of access to a court does not extend to imposing a duty to create a new appeal mechanism where there has been no interference with any individual's ability to access the court.

103. As to Ground 3 specifically, the decisions on the CA 2014 are made by local authorities and the White Paper does not interfere with the Claimant's private and family life. Further, service users have an unfettered right to enforce their Convention rights.

Discussion

104. Let me say at once that I readily recognise the difficult situation that the Claimant and her son are in, and nothing in this judgment is intended to underplay that.

Ground 1

105. Contrary to the argument in the Defendant's Detailed Grounds of Defence (DGD) at [40], namely that there has been 'no decision not to implement an appeals system, as the Secretary of State has repeatedly clarified', I am prepared to assume (without deciding) in the Claimant's favour that the White Paper of 1 December 2021 represented a decision by the Defendant not to implement an appeals system under s 72 - or certainly not to do so within a foreseeable time frame – that is challengeable in public law terms.

106. That said, I am clear that this ground of challenge must fail, for the following reasons.

107. I begin with the applicable legal principles relating to consultation. It is common ground there was no *statutory* duty to consult in the present case. However, the Claimant asserts that a duty to re-consult arose, as of about 2019-2021 when a change in policy was being considered, from the common law, on the basis, broadly speaking, either (a) there had been a past practice of consultation, or (b) this is an 'exceptional case' where 'a failure to consult would lead to conspicuous unfairness' especially because she said the White Paper represented a policy reversal from what had gone before.

108. In *R (Better Streets for Kensington and Chelsea) v The Royal Borough of Kensington and Chelsea* [2023] EWHC 536 (Admin), [36]-[47], Lane J recently and helpfully summarised some of the relevant authorities on consultation in terms which I do not consider to be controversial:

> "36. In *R (Plantagenet Alliance Ltd) v The Secretary of State for Justice and others* [2014] EWHC 1662 Admin, the Divisional Court, at paragraph 98 of its judgment, summarised the general principles concerning the duty to consult as derived from the authorities. The Divisional Court noted, first, that there is no

general duty to consult at common law and that the government of the country would grind to a halt if every decision-maker were required in every case to consult everyone who might be affected by his decision.

37. I would add here that, in the case of a democratically-elected public authority, such as the defendant, the courts will be particularly cautious about inferring that a duty to consult has arisen. As Laws LJ held in *R (Bhatt Murphy) and others v the Independent Assessor* [2008] EWCA Civ 755 at paragraph 41, "Public authorities typically, and central government *par excellence*, enjoy wide discretions which it is their duty to exercise in the public interest… Often they must balance different, indeed opposing interests across a wide spectrum. Generally, they must be the masters of procedure as well as substance…".

38. As held in *Plantagenet Alliance*, a duty to consult may arise where there has been an established practice of consultation or where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Here again *Bhatt Murphy* is relevant. At paragraph 49, Laws LJ held that where there has been no assurance either of consultation or as to the continuation of the policy in question, 'there will generally be nothing in the case save a decision by the authority in question to effect a change in its approach to one or more of its functions. And generally, there can be no objection to that, for it involves no abuse of power'.

39. Even where, in a rare case, a common law duty to consult arises, the public authority will have considerable leeway to decide the nature of the consultation exercise. At paragraph 62 of his judgment in *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] Env LR 29, Sullivan J said:-

> 'A consultation exercise which is flawed in one, or even in a number of respects, is not necessarily so procedurally unfair as to be unlawful. With the benefit of hindsight it will almost invariably be possible to suggest ways in which a consultation exercise might have been improved upon. This is most emphatically not the test. It must also be recognised that a decision-maker will usually have a broad discretion as to how a consultation exercise should be carried out."

40. At paragraph 63, Sullivan J concluded that a finding that a consultation exercise was unlawful by reason of unfairness 'will be based upon a finding by the court, not merely that something went wrong, but that something went 'clearly and radically' wrong'.

41. In deciding whether a exercise has gone 'clearly and radically wrong', the court will have regard to what are referred to as the 'Gunning' or 'Sedley' criteria. In *R v Brent London Borough Council ex parte Gunning* (1985) 84 LGR 168, Hodgson J adopted the submissions of Mr Sedley QC (as he then was) concerning the basic requirements for a consultation process to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third, adequate time must be given for consideration and response. Finally, the product of the consultaiton must be conscientiously taken into account in finalising any statutory proposals.

42. The Gunning/Sedley criteria were approved in the judgment of Lord Wilson (with whom Lord Kerr agreed). In *R (Moseley) v London Borough of Haringey* [2014] UKSC 56, at paragraph 25. The criteria had earlier been approved by the Court of Appeal in *R v North and East Devon Health Authority, ex parte Coughlan* [2021] QB 213 at paragraph 108.

43. Recently, in *R (Article 39) v Secretary of State for Education* [2021] PTSR 696, Baker LJ, citing *ex parte Coughlan*, held at paragraph 78 of the judgments, that if as a matter of fact, a public authority consults albeit informally and over a limited period, then, whether or not consultation is a legal requirement, 'if it is embarked on it must be carried out properly and fairly'.

44. In *R (L) and another v Warwickshire County Council and another* [2015] EWHC 203 (Admin), Mostyn J held, at paragraph 17 of his judgment, that an action founded on an alleged breach of a promise to consult must demonstrate 'not just... a broken promise but there must also be shown to be unfairness amounting to an abuse of power for the public authority not to be held to it'. As regards an action founded on an alleged established practice of consultation the practice 'must be clear, unequivocal and unconditional and, again, there must also be shown to be unfairness amounting to an abuse of power'. As regards the exceptional case where a failure to consult would lead to conspicuous unfairness, 'the unfairness must be of a very high level'. Mostyn J added that 'where the decision not to consult has been made by democratically elected representative, the court should be very slow to intervene, for obvious constitutional reasons.'

45. In *R (Heathrow Hub Ltd and another) v Secretary of State for Transport* [2020] EWCA Civ 213, the Court of Appeal held that, whilst a promise of consultation need not be express, there must be a practice 'which is impliedly tantamount to such a promise. That practice must still give rise to a representation which is clear,

unambiguous and devoid of any relevant qualification': paragraph 69.

46. Newey LJ, giving the judgment of the Court of Appeal in *R (MP) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1634, held, at paragraph 35, that where 'a public body chooses to consult on a set of proposals, it has to conduct the consultation in respect of *those proposals* properly.' (original emphasis). So far as concerns the exceptional case in which fairness demands that a consultation be undertaken, Newey LJ emphasised the requirement of conspicuousness in approaching the test of unfairness. He also held, at paragraph 36, that "the fact that a proposal might be expected to excite interest and comment" did not provide a reliable answer to whether the proposal needed to be the subject of consultation in order to avoid conspicuous unfairness. Without more, a proposal of that character did not 'imply that there is a duty to consult on it'.

47. In *R (Binder and others) v Secretary of State for Work and Pensions* [2022] EWHC 105 (Admin), Griffiths J held that the question of whether a consultation was, in fact, held, such as to attract the *Gunning*/Sedley criteria, was one of substance rather than form, based on what was said and done at the time: paragraph 60. In holding that, in the case before him, such a consultation had been voluntarily embarked upon and that a particular survey was at the heart of that consultation, Griffiths J had regard to a press release issued by the defendant, in which it was said that the defendant's strategy would build 'on insights from the lived experience of disabled people' and that the defendant wished to ensure that there was 'enough time to get this right and undertake a full and appropriate programme of stakeholder engagements. People's views and insights would be crucial". In the case before him, Griffiths J found that the *Gunning*/Sedley criteria had not been complied with."

109. In *Plantagenet Alliance Ltd* (the Richard III case), to which Lane J referred, the Divisional Court said at [98] that the following general principles on consultation could be derived from the authorities:

"(1) There is no general duty to consult at common law. The government of the country would grind to a halt if every decision-maker were required in every case to consult everyone who might be affected by his decision. *Harrow Community Support Limited) v. The Secretary of State for Defence* [2012] EWHC 1921 (Admin) at paragraph [29], *per* Haddon-Cave J).

(2) There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth,

where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult (*R (Cheshire East Borough Council) v. Secretary of State for Environment, Food and Rural Affairs* [2011] EWHC 1975 (Admin) at paragraphs [68-82], especially at [72]).

(3) The common law will be slow to require a public body to engage in consultation where there has been no assurance, either of consultation (procedural expectation), or as to the continuance of a policy to consult (substantive expectation) (*(R Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755, at paragraphs [41] and [48], *per* Laws LJ).

(4) A duty to consult, *i.e.* in relation to measures which may adversely affect an identified interest group or sector of society, is not open-ended. The duty must have defined limits which hold good for all such measures (*R (BAPIO Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 at paragraphs [43]-[44], *per* Sedley LJ).

(5) The common law will not require consultation as a condition of the exercise of a statutory function where a duty to consult would require a specificity which the courts cannot furnish without assuming the role of a legislator (*R (BAPIO Ltd) (supra)* at paragraph [47], *per* Sedley LJ).

(6) The courts should not add a burden of consultation which the democratically elected body decided not to impose (*R (London Borough of Hillingdon) v. The Lord Chancellor* [2008] EWHC 2683 (Admin)).

(7) The common law will, however, supply the omissions of the legislature by importing common law principles of fairness, good faith and consultation where it is necessary to do, *e.g.* in sparse Victorian statutes (*Board of Education v Rice* [1911] AC 179, at page 182, *per* Lord Loreburn LC) (see further above).

(8) Where a public authority charged with a duty of making a decision promises to follow a certain procedure before reaching that decision, good administration requires that it should be bound by its undertaking as to procedure provided that this does not conflict with the authority's statutory duty (*Attorney-General for Hong Kong v Ng Yuen Shiu* [1983] AC 629, especially at page 638 G).

(9) The doctrine of legitimate expectation does not embrace expectations arising (merely) from the scale or context of particular decisions, since otherwise the duty of consultation would be entirely open-ended and no public authority could tell

> with any confidence in which circumstances a duty of consultation was to be cast upon them (*In Re Westminster City Council* [1986] AC 668, HL, at 692, *per* Lord Bridge).
>
> (10) A legitimate expectation may be created by an express representation that there will be consultation (*R (Nadarajah) v Secretary of State for the Home Department* [2003] EWCA 1768 Civ), or a practice of the requisite clarity, unequivocality and unconditionality (*R (Davies) v HMRC* [2011] 1 WLR 2625 at paragraphs [49] and [58], *per* Lord Wilson).
>
> (11) Even where a requisite legitimate expectation is created, it must further be shown that there would be unfairness amounting to an abuse of power for the public authority not to be held to its promise (*R (Coughlan) v. North and East Devon Health Authority* [2001] 1 QB 213 at paragraph [89] *per* Lord Woolf MR)."

110. It is (2) of these sub-paragraphs which is especially pertinent in this case.

111. In respect of past practice, in order to found a legitimate expectation, such practice must be 'so consistent as to imply clearly, unambiguously and without relevant qualification that it will be followed in future': *R (MP) v Secretary of State for Health and Social Care* [2021] PTSR 1122, [41]-[53]. At [53] Newey LJ said:

> "53. The correct position appears to me to be as follows:
>
> (i) An express promise, representation or assurance needs to be 'clear, unambiguous and devoid of relevant qualification' to give rise to any legitimate expectation, whether substantive or procedural;
>
> (ii) A practice must be tantamount to such a promise if it is to found any legitimate expectation. It may be, as Sedley LJ said in *BAPIO*, that a practice does not have to be entirely unbroken, but it does have to be so consistent as to imply clearly, unambiguously and without relevant qualification that it will be followed in the future."

112. In respect of exceptional cases where a failure to consult would lead to conspicuous unfairness:

    a. Mere fairness 'cannot of itself … act as a freestanding touchstone for when consultation on a proposal is necessary" and "is not…enough to found a duty to consult on its own': *MP,* [36]. It follows that even if there is 'unfairness' in not consulting, that is not sufficient to require consultation and there needs to be more than that.

    b. There is also not a freestanding principle of 'exceptionality' as to facts which requires consultation: *Plantagenet Alliance,* [154]:

> "154. Mr Clarke argued that a duty to consult arose because of the unique and exceptional nature of this case. He submitted that in the annals of the law and archaeology, the disinterring of the remains of a long lost King of England is almost certainly never to be repeated. Whilst this may well be true, it does not help the analysis. There may be other equally 'unique' circumstances or discoveries in other contexts which could rise to similar submissions. The law must, however, proceed on a principled basis. The fact that "*fairness*" may be essentially an "*intuitive*" judgment (c.f. *Doody, supra*), does not mean that it should not be principled. The principle here can only be some sort of a free-standing principle of 'exceptionality', *i.e.* that a duty to consult arises in a certain category of as yet undefined but exceptional cases. We do not think that this is a sound basis for developing the law. The difficulty in defining the category or nature of the 'exceptionality' required demonstrates the paucity of this approach. There may be many different circumstances in different fields which could equally be termed 'exceptional'. We agree with Mr Eadie QC that such an approach would be objectionable in principle because it is uncertain and open-ended and, as such, inimical to good administration."

113. In *Paulley v Secretary of State for Work and Pensions* [2022] EWHC 105 (Admin) the High Court declared that the Government's National Disability Strategy published in July 2021 was unlawful. The Secretary of State had failed to consult lawfully, via its UK Disability Survey, before publishing the strategy. The Court also said at [46]-[48]:

> "46. In the present case, there was no statutory obligation to consult. It is not suggested that there was a promise to consult or a legitimate expectation based on any representation or assurances that there would be consultation of the kind now sought. It is not suggested that this is a case in which there is an established practice of consultation.
>
> 47. Therefore, reliance has to be and is placed on the fourth example in para 98 sub-para 2. of *Plantagenet Alliance* : namely, where, in exceptional cases, a failure to consult would lead to "conspicuous unfairness". Such cases are exceptional for the reasons explained in the passage from *Plantagenet Alliance* which I have set out; see especially sub- paragraphs 3, 6, 9 and 11 of para 98 in the quotation above. It is accepted that this is not a case in which the claimants can rely on past conduct to create "conspicuous unfairness" as in *R (Brooke Energy Limited) v. Secretary of State for Business, Energy and Industrial Strategy [2018] EWHC 2012 (Admin) at para 66* .
>
> 48. Given the preliminary and general nature of the Strategy, I am not persuaded that consultation was legally required in order to avoid conspicuous unfairness or irrationality (even if, which the defendant does not accept, irrationality can be separated from the conspicuous unfairness exception). The Strategy did not

> immediately make any changes to law or detailed policy. It essentially provided a policy framework within which more specific future policies would be developed and implemented. The lack of specifics is, in fact, one of the criticisms made of it in the claimants' evidence (para 6 of the second witness statement of Jean Eveleigh). I recognise that the Strategy was of great interest and importance to the claimants, but the same might be said of many government policy documents and there is, nevertheless, no general common law duty of consultation. It was not as a matter of fact conspicuously unfair to publish this particular Strategy without full consultation. In my judgment, neither the content of the Strategy, nor its potential impact, made it one of those exceptional cases in which full consultation would be required."

114. I start with the observation that because complaints about a failure to consult ultimately come down to issues of fairness, it is relevant to note that the Defendant's position is *not* that he has given an absolute 'no' to making regulations under s 72 at some point (and he is bound as a matter of law to keep the matter under review: see *R v Secretary of State for the Home Department, Ex parte Fire Brigades Union* [1995] 2 AC 513, 551), but that work is ongoing, as described by Mr Surrey, and an appeals system may be introduced Whilst, as I have said, I have assumed there is a challengeable public law decision, the door is not closed. It is in that context that the Claimant's complaints have to be judged. Against that background, has what the Defendant done (or not done) produced actionable unfairness of the type which the authorities say is necessary in order for me to intervene ?

115. I do not think that it has. That is for the following main reasons.

116. First, there can be no suggestion that the Defendant made an *unequivocal* promise that he would always consult in relation to an appeals system under s 72 (or other aspects of social care reform of which it formed only a part). And I am unable to discern from the history something which establishes the necessary established practice of consultation.

117. True, there had been consultations before, but there was nothing to suggest that the full consultation of the type for which the Claimant contends would always be carried out. I agree with the Defendant that nothing in either of the earlier consultations (in 2013 and 2015) could have given rise to an expectation that decisions on social care reform generally would necessarily always be the subject of full public consultation, let alone the (relatively small) element of those consultations in relation to appeals to dispute resolution. I do not consider that this case discloses any facts which satisfy the relevant *Plantagenet* test. This is unsurprising in such a complex, policy laden area with the Defendant having to make a wide range of difficult choices.

118. Next, there is the fact that the December 2021 White Paper was preceded by a consultation of really quite a broad type, as Mr Surrey described in his evidence, which I set out earlier.

119. The annex to Mr Surrey's statement, which I did not set out earlier, said this at [2]-[4]:

“2. DHSC engaged extensively with the sector to support the content of this publication, a chorological summary of which is below.

Engagement Summary

3. DHSC’s far-reaching engagement programme included, but is not limited to:

a. bilateral discussions, beginning in March 2021, with disabled people’s organisations and lived experience representative groups. All attendees were asked their priorities for social care reform;

b. an initial sequence of roundtables in April 2021, engaging over 70 national stakeholders to inform the shape of the vision and outline priorities for change. All attendees were asked their priorities for social care reform;

c. a themed series of workshops in June 2021 involving over 90 national stakeholders. Discussion focussed on four priority themes emerging from the first series of engagements (see a. and b. above) – these included: integration, market shaping and commissioning, workforce and care quality, and new models of care, technology and innovation;

d. in-depth workshops across regions in England in August 2021, to engage with a diverse range of local stakeholders including providers, local authorities, local charities and support groups, as well as people who draw on care and support. All attendees were asked their priorities for social care reform; and

e. further workshops in August 2021 in collaboration with Carers UK and Social Care Futures to hear from unpaid carers and those who draw on care and support. All attendees were asked their priorities for social care reform.

4. Following the publication of Build Back Better: Our Plan for Health and Social Care on 7 September 2021, the Department intensified its work with the sector to shape its reform White Paper – People at the Heart of Care - as the next major step on the reform journey, by:

a. attending large external speaking engagements to discuss plans and take questions, including with local authority leaders from across England and at the Carers UK conference in November 2021;

b. setting up specific advisory groups of diverse stakeholders for each theme of the paper including assurance, unpaid carers, technology, market shaping, workforce, innovation and models of

> care, housing, and information and advice – these stakeholder groups met to provide advice to the department and support policy development, and several included people with lived experience of care and support;
>
> c. working with Think Local Act Personal and members of the Health and Wellbeing Alliance Social Care Subgroup to ensure that our approach to reform was informed by voices of those who draw on care and support;
>
> d. arranging detailed workshops with over 60 organisations and individuals across all regions in England to discuss choice, control, and independence; outstanding quality; and fairness and accessibility as the core pillars of our vision for reform;
>
> e. supporting and collaborating to deliver workshops for specific audiences, including officials and Ministers meeting jointly with a range of organisations representing working-age disabled adults. Other subject-specific sessions were held with providers, unpaid carers, and local authorities; and,
>
> f. working closely with stakeholders to refine the language used in People at the Heart of Care. The included sharing sections of the draft document in advance of publication with a diverse range of circa 15 sector leaders, including providers, local authority representatives, charities, and others, to discuss the content."

120. In [5] Mr Surrey then listed literally scores of organisations with whom the Defendant's Department had engaged during the development of the White Paper. These included charities, local authorities, religious groups, rights' groups, and many others. By my count, a total of 233 organisations were consulted (I may have missed a couple).

121. I consider that what Mr Surrey described met the *Gunning*/Sedley criteria. I also consider that it met the purposes of consultation as described by Lord Wilson in *Moseley*, [24]: (a) it ensured that the decision-maker receives all relevant information and that it is properly tested; (b) it avoided the sense of injustice which the person who is the subject of the decision will otherwise feel; (c) the broad and inclusive nature of the consultation exercise was reflective of the democratic principle at the heart of our society.

122. I think that what the Claimant's case under Ground 1 really comes down to is that there should have been a re-consultation because the December 2021 White Paper represented a fundamental change in circumstances. Even assuming that it did (an assumption which is not particularly sound because, as Mr Surrey explained, work is ongoing and an appeals system may yet be introduced), as a matter of law did that require the sort of re-consultation for which the Claimant contends ?

123. I do not consider that it did. The fact is that there had already been two consultations in recent years. In 2020 the Government had signalled its probable decision to delay an appeals system. Against that background, the Government was entitled to carry out the pre-White Paper consultation in the way that it did, and in my judgment it was lawful

for it to do so even though it fell short of a full public consultation. The consultation was, as I have said, extremely extensive.

124. Where there has been a change in government policy following a full consultation, it does not mean the entire consultation process has to be repeated; a more limited consultation may be lawful. I broadly agree with the Defendant's point that it is not the law that where a public body adopts an unimplemented policy position following consultation, there is then a duty to re-consult fully should the situation change (or certainly not absent particular circumstances that make it necessary). This broadly accords with *Bhatt Muphy*, [49], which I cited earlier.

125. To illustrate this, I refer to *R (Milton Keynes Council) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 1575. The context was planning and a change in Government planning policy – the exact details do not matter. There had been an earlier fuller consultation in 2009 and then a more narrow consultation when the policy change was being considered in 2010. The second consultation involved only a few stakeholders (not including the claimant council, and other councils, who brought the subsequent judicial review claim), following which the new policy was challenged on the grounds of unlawful consultation.

126. The Court said at [9] that:

> "9. The question arose whether further consultation was required before the new policy was implemented. Ministers were advised that there was no formal requirement to consult but that it would be helpful to seek the views of key stakeholders. If significant issues arose there could, it was contemplated, be a return to the possibility of a formal consultation."

127. A submission was made for the Defendant that it was solely a matter for him who to consult. At [32] the Court rejected that submission, but added at [33] and [38] (emphasis added):

> *"32. I do not accept the submission that a decision-maker can routinely pick and choose whom he will consult. A fair consultation requires fairness in deciding whom to consult as well as fairness in deciding the subject matter of the consultation and its timing.* The *Buckinghamshire* case was in a different statutory context in which it was decided that the local authority need not be consulted. No general principle that it is for the decision-maker alone to decide whom to consult can be extracted from that decision.
>
> 33. *The particular context must, however, be considered. The fairness of the 2010 consultation must be considered in the context of a very full consultation having been conducted in 2009. In that consultation, over a longer period, the council and all local planning authorities were given an opportunity to make representations upon a series of options,* which included Option 3 subsequently adopted by the Secretary of State in September 2010. Option 3 was placed before them in 2009 and detailed

> submissions as to its adverse impact, and as to specific problems likely to arise, could have been, and probably were, made. I do not accept that, upon a change of Government policy, the entire process needed to be repeated. In 2010, the Government was entitled to conduct a more limited consultation, both as to the identity of consultees and the content and duration of the consultation.
>
> …
>
> *38. That recent and comprehensive consultation in 2009 is in my judgment the key to the decision in the present situation. The Secretary of State was minded to make the orders challenged notwithstanding the strong, articulated objections to them by local planning authorities, of which he was aware. The decision to make them was a political decision which the Secretary of State was entitled to make. In the circumstances, he was then entitled, first, to make the consultation a limited one and, secondly, to decide that there was no evidence of significant new issues arising, which required fuller consultation."*

128. For these reasons I do not consider that anything went 'clearly and radically wrong' (*per Greenpeace*, [63]) in the pre-December 2021 consultation so as to permit the Court to intervene, or that there was any unfairness. The duty of fairness 'does not require perfection' and a 'challenge will not necessarily succeed simply by pointing out a way in which the consultation could have been better': *R (Keep the Horton General) v Oxfordshire CCG* [2019] EWCA Civ 646, [18] and [66].

129. I am reinforced in that conclusion by the fact that in 2022 further consultative work was done, as I have described. As I noted earlier, the Defendant argued that I should refuse relief in light of this in the exercise of my discretion (Skeleton Argument, [62] et seq) on the basis that a declaration would serve no purpose and in light of that consultation the Claimant has achieved all she could. Mr Glenister referred to cases such as *R (H) v Secretary of State for the Home Department* [2018] EWHC 2191 (Admin), [78], and *R (C) v Nottingham City Council* [2010] EWCA Civ 790, [31]-[40].

130. In my judgment it is not necessary to go that far. It suffices to say that the combination of the Law Commission's work; the 2013 and 2015 consultations; the pre-December 2021 work; and the 2022 work and ongoing consideration, taken together, mean that there has been no unfairness, let alone unfairness of the necessary cogency, which could properly lead me to intervene.

Ground 2

131. I turn to Ground 2, and Ms Luh's access to justice argument.

132. One of the earliest cases under this head was *R v Lord Chancellor ex parte Witham* [1998] QB 575. The Lord Chancellor, in purported exercise of his powers under section 130 of the Supreme Court Act 1981, by the Supreme Court Fees (Amendment) Order 1996 increased the fees for issuing a writ and other process and, in article 3, removed from litigants in person in receipt of income support their exemption from

payment of such fees conferred by article 5(1) of the Supreme Court Fees Order 1980, and rescinded the Lord Chancellor's power under article 5(3) of the Order of 1980 exceptionally to reduce or remit fees in cases of financial hardship. The applicant was an unemployed man in receipt of income support who wished to issue proceedings in person for defamation, for which legal aid was not available. He was not able to afford the fee and, by virtue of article 3, was no longer eligible for waiver. He sought judicial review by way of a declaration that article 3 was beyond the Lord Chancellor's powers under section 130 of the Act of 1981 and unlawful.

133. The Court (Rose LJ and Laws J) held, granting the application, that access to the courts was a constitutional right at common law which could be abrogated only by a specific statutory provision in primary legislation or by subordinate legislation whose vires in primary legislation specifically conferred the power to abrogate; that s 130 of the Act of 1981 contained nothing to empower the Lord Chancellor to prescribe fees so as to deny the poor access to the courts; that the effect of article 3 of the Order of 1996 was to bar absolutely many persons from seeking justice from the courts; and that, accordingly, it was *ultra vires* and unlawful.

134. Laws J said at p585:

> "It seems to me, from all the authorities to which I have referred, that the common law has clearly given special weight to the citizen's right of access to the courts. It has been described as a constitutional right, though the cases do not explain what that means. In this whole argument, nothing to my mind has been shown to displace the proposition that the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right."

135. I accept the broad propositions advanced by the Claimant in her Skeleton Argument at [71]-[72]. These are that:

    a. The right of access to justice is a constitutional right inherent in the rule of law, which includes the right of access to the courts, to legal advice, and to communicate confidentially with a legal adviser: *R (UNISON) v Lord Chancellor* [2017] 3 WLR 409, [66], [81].

    b. The right of access to justice means not merely theoretical but effective access in reality. The effectiveness of access must be decided according to the likely impact of arrangements in the real world on access to justice: *UNISON*, [85], [93]. Impediments to the right of access can constitute a serious hindrance, even if they do not make access completely impossible*:* [78].

    c. Where a policy affects access to justice, 'it is sufficient if a real risk of prevention of access to justice is demonstrated. That means that, in order to test the lawfulness of a measure on this basis, it is legitimate to have regard to evidence regarding its likely impact and the court has to make an overall evaluative assessment whether this legal standard is met or not (and statistics might have a part to play in making such an assessment. *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931, [80]. Anecdotal evidence provided in the form of case studies from

lawyers representing affected individuals may suffice for a finding there is a real risk of impediment to access to justice: *R (FB) (Afghanistan) v Secretary of State for the Home Department* [2021] 2 WLR 839.

136. Like *Witham, UNISON* was a fees case (in the Employment Tribunal). Lord Reed referred, at [87] to 'the Fees Order will be *ultra vires* if there is a real risk that persons will effectively be prevented from having access to justice.' This was further explained in *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931, [80]:

> "80. … In *UNISON* this court held that there is a fundamental right under the common law of access to justice, meaning effective access to courts and tribunals to seek to vindicate legal rights, which means that the executive is under a legal obligation not to introduce legal impediments in the way of such access save on the basis of clear legal authority: see the discussion by Lord Reed JSC in *UNISON* at paras 66–98. The decision was concerned with the introduction of an order imposing fees to bring claims in an employment tribunal, but the principles stated are of general application. The test applied was whether the making of the order created "a real risk that persons will effectively be prevented from having access to justice" (para 87; see also para 85, where *R (Hillingdon London Borough Council) v Lord Chancellor (Law Society intervening)* [2009] 1 FLR 39 is referred to as authority for such a test). As Lord Reed JSC observed (para 91), it is sufficient if a real risk of prevention of access to justice is demonstrated. This means that, in order to test the lawfulness of a measure on this basis, it is legitimate to have regard to evidence regarding its likely impact and the court has to make an overall evaluative assessment whether this legal standard is met or not (and statistics might have a part to play in making such an assessment). In *UNISON*, this court held that the fees order was unlawful on this basis"

137. The Supreme Court further considered this issue in *R (BF (Eritrea)) v SSHD* [2021] 1 WLR 3967, [68]:

> "UNISON is concerned with the lawfulness of policy or delegated legislation which creates an unreasonable or unacceptable impediment to being able to have access to a court or tribunal for the determination of legal rights and obligations: see our judgment in the *A* case [2021] 1 WLR 3931, para 80".

138. In *FB*, [91]-[94], Hickinbottom LJ said:

> "91. The importance of the rule of law, and the role of access to justice in maintaining the rule of law, was recently considered by Lord Reed JSC (with whom the rest of the Supreme Court agreed) in *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2017] 3 WLR 409 at [68]:

> ‘68. At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade…".

Thus, the right to access to justice is an inevitable consequence of the rule of law: as such, it is a fundamental principle in any democratic society which more general rights of procedural fairness are to a large extent designed to support and protect (see, e.g., *R (CPRE Kent) v Dover District Council* [2017] UKSC 79: [2018] 1 WLR 108 at [54] per Lord Carnwath of Notting Hill JSC, and *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812; [2018] 4 WLR 123 at [83]-[84] per Singh LJ).

92. The right of access to justice means, of course, not merely theoretical but effective access in the real world (*UNISON* at [85] and [93]): it has thus been said that ‘the accessibility of a remedy *in practice* is decisive when assessing its effectiveness’ (*MSS v Belgium and Greece* (European Court of Human Rights (‘ECtHR’) Application No 30696/09) (2011) 53 EHRR 2 at [318], emphasis added). This means that a person must not only have the right to access the court in the direct sense, but also the right to access legal advice if, without such advice, access to justice would be compromised *(R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 at [5] per Lord Bingham of Cornhill; and *MSS* at [319]). For these rights to be effective, as the common law requires them to be, an individual must be allowed sufficient time to take and act on legal advice.

93. So, where tribunal rules set a "timetable for the conduct of… appeals [that was] so tight that it [was] inevitable that a significant number of appellants [would] be denied a fair opportunity to present their cases…", those rules were held to be unlawful (*The Lord Chancellor v R (Detention Action)* [2015] EWCA Civ 840;

[2015] 1 WLR 5341, the quotation being from [38] per Lord Dyson MR).

94. Even closer to this case, in the 2010 *Medical Justice* case at [43], Silber J said that effective legal advice and assistance requires sufficient time to be given between service of notice of a decision by the Secretary of State which puts the individual at risk of removal (in that case, notice of removal directions) and removal itself:

> '… to find and instruct a lawyer who:
>
> (i) is *ready* to provide legal advice in the limited time available prior to removal, which might also entail ensuring that the provider of the advice would be paid;
>
> (ii) *is willing and able* to provide legal advice under the seal of professional privilege in the limited time available prior to removal which might also entail being able to find and locate all relevant documents; and
>
> (iii) (if appropriate) would after providing the relevant advice be *ready, willing and able* in the limited time available prior to removal to challenge the removal directions.' (emphasis in the original)

On appeal, upholding Silber J, Sullivan LJ said (the 2010 *Medical Justice* case (CA) at [19]):

> 'I refer to 'effective' legal advice and assistance because the mere availability of legal advice and assistance is of no practical value if the time scale for removal is so short that it does not enable a lawyer to take instructions from the person who is to be removed and, if appropriate, to challenge the lawfulness of the removal directions before they take effect.'"

139. At [120] Hickinbottom LJ said:

> "120. This ground involves a systemic challenge to the JRI Policy itself. Although systemic unfairness may be illustrated by what has happened in individual cases, such a challenge does not focus upon the consequences of unlawfulness for a particular individual or group as do most judicial reviews, but rather upon the administrative scheme itself and the risk of unfairness in a public law sense arising from that scheme as a scheme. As Lord Dyson MR said in *Detention Action*, at [27], 'a system will only be unlawful on grounds of unfairness if the unfairness is inherent in the system itself"; or, as Sedley LJ put it in *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481; [2005] 1 WLR 2219, at [7], it is sufficient for

> the claimant to show that there is "a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself". As I observed in *R (Woolcock) v Secretary of State for Justice* [2018] EWHC 17; [2018] 4 WLR 49 at [68(iv)], there is a conceptual difference between something inherent in a system which gives rise to an unacceptable risk of unfairness, and any number (even a large number) of decisions that are simply individually aberrant."

140. The policy at issue in *FB* was described at [2] as follows:

> "2. In these claims, the Appellants contend that the Secretary of State's policy for removing those without the right to enter or remain in the UK – which, for those who fall within its scope, after a relatively short notice period in which removal cannot be effected, sets a removal window within which the individual can be removed at any time without further notice – is unlawful as abrogating the right to access to justice in respect of decisions which bear upon their removal. In brief, it is submitted that the notice period is too short for those affected to instruct lawyers to make representations that leave to enter or remain should be granted, for any such representations to be considered by the Secretary of State, and then for an application to be made to a court or tribunal to challenge any negative decision; and so it is inevitable that many negative decisions affecting their right to remain and their removal (including decisions to extend the notice period or defer the removal window) are made after the notice period has ended, so that they become at risk of immediate removal without an adequate opportunity to challenge the material decision or decisions before a court or tribunal."

141. At [147] Hickinbottom LJ held the policy in question was unlawful because it incorporated an unacceptable risk of interference with the right of access to court by exposing a category of irregular migrants, including those who have claims on Article 2 ECHR and/or Article 3 human rights and protection grounds, to the risk of removal without any proper opportunity to challenge a relevant decision in a court or tribunal.

142. *FB* was therefore a case (as was *Witham* and *UNISON*) where the policy or provision in question risked preventing *any access at all* to a court or tribunal. They did not concern whether, in order to afford access to justice, an appellate body has to have particular powers. It seems to me, therefore, that the Claimant's case is not of that type. The Secretary of State has taken no action which has any direct or indirect effect on her ability to access a court or tribunal to vindicate her rights under law.

143. Making the required 'overall evaluative assessment' (per *A*, [80]), I do not consider that the Claimant has shown the necessary 'unacceptable risk' in this case. That is for the following reasons.

144. Firstly, whilst not necessarily conclusive, it is relevant to note as a starting point, I think, the choice which Parliament made in s 72. It did not legislate in a vacuum. Knowing of the existing routes of challenge for service users to local authority

decisions, and the earlier work that had been done and the concerns which had been expressed, Parliament chose to leave it to the Secretary of State to decide whether (and, if so, when) to bring s 72 into force and then to implement an appeals system via regulations. This is a clear sign that Parliament did not consider the problem so pressing to *require* the Secretary of State to implement such a system – as it surely would have done had there been real constitutional access to justice issues. The democratic choice made by Parliament needs to be given a significant amount of deference.

145. Second, the Claimant is not without remedies. I described them earlier but they include claims for judicial review and human rights claims. These confer broad and flexible powers on the Court. There is also the LGSCO. The Claimant (and her lawyers) may believe that these are not sufficient, but the fact is that the Claimant has a remedy if her local authority acted unlawfully. If a local authority obfuscated, or delivered a decision which (for example) put a service user's health or life in danger, the court would not be powerless to intervene. I do not accept the Claimant's evidence about the scope of judicial review is quite so desolate as she portrays it.

146. Next, there is the evidence. The clear thrust of Mr Surrey's evidence is that recent work done by the Department across a range of social care issues has not uncovered that much concern about the lack of a merits appeal system. To repeat what he said at [36]-[37] of his statement about the outcome of the 2021 consultation exercise (emphasis added):

> "36. This engagement gave an opportunity for a range of stakeholders to set out the main issues which they considered required reform and central government intervention. A central purpose of the exercise was to establish prioritisation of reform. It was open to stakeholders to raise dispute resolution as an issue which should be prioritised. On a few occasions, a dispute resolution procedure was raised (for example through the Health and Wellbeing Alliance Social Sub-Group, two responses included reference to having better complaints procedures). *However, overall it was not a significant feature of reform priority*.
>
> 37. Taking account of this extensive engagement exercise, the Secretary of State had to make policy decisions about which areas to prioritise early spending on. The engagement exercise was used to identify common themes and priorities. The most common priorities for reform cited during this engagement included: pressures recruiting and retaining the social care workforce; the need for better integration between health and care services; the recognition of the adult social care sector, the importance of people living independently in their own home or care setting that suits their needs; and the need for digital innovation across the sector."

147. This does not support the Claimant's case that the problem is so acute that it raises a constitutional access to justice issue. If it did, one might have expected the greater proportion of the stakeholders consulted in 2021 (which included many rights groups)

to have raised it very strongly with the Defendant and to have demanded urgent action as a priority. It is plain they did not do so.

148. Next, I turn to the Claimant's case studies in her evidence. I take the Secretary of State's general points that these are anonymous, second hand accounts which have not been tested, and the local authorities are not in a position to dispute them because even the Claimant's own County Council has not been joined as a party. But I think his better point is that the number of cases is small when compared with the more than 841 000 service users described by Mr Surrey in his statement at [51]. I do not regard the Claimant's examples as being statistically significant.

149. Next, and fundamentally, I do not find it easy to see that the Secretary of State has taken any action which has any direct or indirect effect on an individual's ability to access a court or tribunal in the way that the provisions in *Witham*, *UNISON* and *FB* did, which effectively prevented litigants 'getting through the court door'. Section 72 provides a discretion to create an appeals mechanism, but that is not (or not necessarily) through a court. The absence of regulations therefore has no impact on the right of access to a court or tribunal.

150. Overall, whilst I accept the Claimant's general points that the Defendant has, at times during the process, acknowledged a possible need for change regarding appeals, as have others who have expressed concerns over the last 12 years or so, that is far cry from saying that there is currently a risk of an unconstitutional and unlawful denial of access to justice for those in the Claimant's position. My judgment is that the available evidence does not show that.

151. For these reasons I reject Ground 2.

Ground 3

152. For essentially the same reasons, I reject Ground 3.

153. I accept as a general proposition that Article 8 carries procedural rights: *Kiarie v Secretary of State for the Home Department (R (Byndloss) v Secretary of State for the Home Department)* [2017] 1 WLR 2380. However, I do not read anything in [48]-[51] of that decision, under the heading, 'The requirements of Article 8', which assists the Claimant.

154. States have a margin of appreciation (or a margin of discretion at the domestic level) as to how those procedural rights are to be vindicated. The December 2021 White Paper constituted a political judgment, in an area in which there has to be a particularly wide margin of discretion for the purposes of Article 8 because it involves socio-economic choices. The Secretary of State had to determine which areas of reform to prioritise in light of a funding envelope and he did so, whilst keeping the option of introducing an appeals system under review and subjecting it to further work, which may yet result in a favourable outcome for the Claimant.

155. I reiterate: service users like the Claimant *can* access the courts and the LGSCO; legal aid is available; solicitors are available; and there is no hindrance to court access as there were in the trio of cases I mentioned earlier. I was shown no authority either at

the domestic level, or the Strasbourg level, which shows that Article 8 requires an appeals system of any particular type.

Conclusion

156. For these reasons, this claim is dismissed.