OUTER HOUSE, COURT OF SESSION

[2020] CSOH 4

P1120/19

OPINION OF LORD BOYD OF DUNCANSBY

In the petition of

ROY MCHATTIE

Petitioner

against

SOUTH AYRSHIRE COUNCIL

Respondent

Petitioner: Bain QC, Crawford; A WM Urquhart
Respondent: Macpherson; Clyde & Co

27 December 2019

[1] The petitioner is the guardian of his son Craig McHattie under a Guardianship Order granted in his favour at Ayr Sheriff Court on 5 September 2019. Craig McHattie is 32 years old. He suffers from a number of significant health issues including severe learning and mobility issues. He attends Kyle Adult Care Centre 5 days a week and has done so for the last 13 years. He and his parents are reliant on the facilities provided at the Kyle Centre and he has developed important relationships with the carers. The facilities provide an alternative to outings in the wider community which present significant hurdles to the petitioner's son.

[2] The respondent has decided to close the Kyle Centre. The date on which such a decision was taken is somewhat obscure for the reasons set out below but the primary decision appears to have been taken by the South Ayrshire Integrated Joint Board (the IJB) on 26 June 2019. The IJB is a body corporate established under the Public Bodies (Joint Working) (Scotland) Act 2014. It is not clear to me whether or not the IJB have had intimation of the petition but since it appears the decision may also have required the approval of the respondent's Leadership Panel the issue is of no moment. The Kyle Centre is operated by the respondent. The respondent did not suggest that they were not responsible for the decision.

[3] The petitioner objects to the closure of the Kyle Centre. First he says that the respondent failed to meet its statutory obligations under section 149 of the Equality Act 2010 (EA 2010) and the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012/162 (the Specific Duty Regulations). Specifically he submits that the respondent failed to carry out an Equality Impact Assessment (EIA). Secondly he submits that he had a legitimate expectation that he would be consulted on a proposal to close the Kyle Centre and no such consultation took place. Thirdly, as a result of these failures the decision to close Kyle Centre was irrational.

[4] The petitioner seeks

1) Production and reduction of the purported decision dated 26 June 2019.
2) For declarator that the respondent, by reaching the decision dated 26 June 2019 without consultation with the petitioner (and other service users and guardians) that they frustrated the legitimate expectations of the petitioner.

3) *Separatim* for declarator that in reaching the decision dated 26 June 2019 the respondent failed to perform its statutory duties under section 149 of the Equality Act 2010.

4) *Separatim* for declaratory that the decision dated 26 June 2019 was irrational *et separatim* lacking in reasons *et separatim* unreasonable.

The petitioner also sought craves for suspension and interdict *ad interim.*

History of petition

[5] The petition was lodged on 9 December 2019. On 13 December Lord Woolman heard a motion for permission to proceed, first orders and interim orders. He dispensed with intimation and service, granted permission to proceed after hearing that the respondent did not oppose permission being granted, made no order in respect of the motion for interim orders and found the petition suitable for urgent consideration. He assigned 19 December as the date for the substantive hearing, dispensed with the requirement for a procedural hearing and made ancillary case management orders.

[6] I heard the substantive hearing on 19 December. I had the benefit of a full speaking note from the Ms Bain QC and a note of argument from Mr Macpherson, Advocate. Ms Bain supplemented her submissions with a short written submission to meet a point from the respondent not foreshadowed in the petition or note of argument. I made *avizandum.* On 23 December I issued an interlocutor reducing the decision to close the Kyle Centre and declarators as sought. This opinion records my reasons.

Background

[7] The closure of the Kyle Centre was foreshadowed in South Ayrshire Health and Social Care Partnership's Adult Learning Disability Strategy 2017 - 2023. The review noted that one of the issues that would put pressure on the provision of learning services was "Kyle Centre Day Services regarded as not fit for modern day service provision". This was apparently followed by an options appraisal exercise in 2018 which led to the conclusion that the best option for the Kyle Centre was to transfer users to externally provided services, "benefitting both users and the Partnership through improved service, achievement of strategy and cost savings."

[8] This was followed by a business plan dated 15 January 2019. It recommended the closure of the Kyle Centre and replacing it with externally provided support. A number of anticipated benefits and dis-benefits were identified. The document set out indicative timescales for the implementation of a decision. In particular it envisaged a consultation process including staff, users and carers taking place between March and June 2019 and an EIA between March and April 2019. The comment on the latter was "start asap and ongoing." The proposal was to go to the IJB for approval in June with a projected closure in October 2019.

[9] The IJB held a meeting on 26 June 2019 to consider the budget for 2019 - 2020. The report for the Board included a section on Learning Disability Day Services Review. It noted that a budget working group had recommended a range of savings measures including some re-provisioning of the service. Savings of £0.095 million were achievable in a full year with £0.56 million in 2020. The recommendation to the IJB from the Chief Finance Officer included an agreement to efficiency measures set out in a table which had not previously been approved. Table 2 included an item "LD Day Service Review" with savings of £56,000

for 2020. The minute of the meeting records the IJB's approval of the recommendation. That appears to be effectively the decision to close the Kyle Centre. It is to be noted that in contrast to what had been envisaged in the business plan there had been no consultation with users and carers on the proposal to close the Kyle Centre and no EIA on that proposal had been carried out.

[10] The report for the IJB did include an EIA for the budget. In respect of disability the assessment recorded positive impacts on people with disabilities through new forms of provision. The EIA noted that full EIA would be required for specific proposals to fully determine the impact and "these will be produced when required".

[11] On 29 October 2019 the respondent's Leadership Panel considered a report from Billy McClean, the Head of Health and Care Services entitled Proposed Closure of Kyle Day Centre. Its purpose was said to be to advise the Leadership Panel of the decision taken by the IJB on 26 June 2019 and to seek funding of voluntary severance payments for staff employed there. The report acknowledged that there had been a lack of consultation with the Council during the decision making period but notes that action to progress the closure has been undertaken. A closure date of 31 December had been proposed.

[12] The report also noted that the proposal had been assessed through the EIA scoping process and there were no significant positive or negative equality impacts of agreeing the recommendations. The scoping assessment attached to the report is dated 11 October 2019 and signed by Mr McClean. A cross in the positive impacts box is noted against the community of "people with disabilities". Low impacts are recorded for promoting positive attitudes towards different communities or groups, increasing participation of particular communities or groups in public life and promoting the human rights of particular communities or groups. The summary assessment is that a full EIA is not required. The

rationale for the decision is given as "the change increases the choice, control and participation of those with learning disabilities who currently attend the Kyle Day Centre, The impact is positive and has a low level of impact". The respondent has not produced any information on how these impacts were assessed.

Engagement with petitioner and other users

[13] On 10 July 2019 Sandra Rae, the respondent's Manager Learning Disability wrote to the petitioner's son, the user of the Kyle Centre. The letter commences,

> "I am writing to advise you that the South Ayrshire Health and Social Care Partnership is reviewing the future provision of day support to adults with a learning disability and that this may mean that those individuals currently attending the Kyle Adult Day Centre may have their support provided in a different way in the future, or by a different provider".

The letter referred to the fact that the building housing the Kyle Day Service had been rated as only adequate in the past by the Care Inspectorate. The letter says that following receipt of the letter service users, carers and guardians will be consulted by care managers to explore how eligible care needs and support can best be provided in the future and what alternatives might be available. The letter continues,

> "For now you need take no action. The Kyle Day Centre remains open and will continue to operate normally while the review is on-going, If there is to be a change in the way that support is to be provided, Care mangers will discuss this fully with you and will make suitable arrangements to ensure that assessed needs and outcomes are met going forward."

[14] There was then an exchange of correspondence between the petitioner and the respondent as a result of which there was a meeting between the petitioner and other carers and the respondent's officials on 10 September 2019. At that meeting the petitioner and other carers were informed that the IJB had proposed to the Council that the Kyle Day

Centre was to be closed by Christmas. This was the first time they had been told that the Kyle Centre was to be closed.

[15] Affidavits from the petitioner and his wife set out not only the terms of their engagement with the respondent but also the reasons why they consider that the proposed alternatives are not suitable for their son. These are not relevant for the legal issues that I have to resolve. I am satisfied that they are matters of substance relating to the care of their son. They may well be relevant to a decision on whether to close the Centre.

[16] There are a number of supportive affidavits from the families of other users of the Kyle Centre.

Conclusions on the factual background

[17] There is no properly minuted decision to close the Kyle Centre. The IJB took a decision on 26 June to make budget savings which effectively meant the closure of the Kyle Centre. Yet anyone looking at the report to the IJB on the budget for 2019 - 2020 would be hard pressed to appreciate that the IJB was to decide to close the Kyle Centre. Equally the minute of the IJB makes no reference to the Kyle Centre, recording merely "[the IJB] agreed to the further efficiency measures in Table 2 not previously approved." I am satisfied that any member of the public looking at these minutes would be unable to ascertain that the IJB had taken such a decision.

[18] Thereafter there appears to have been what might charitably be called some confusion on the part of the respondent as to whether a decision had been taken to close the Kyle Centre. At a meeting of the IJB on 4 September Mr Cooper, a trades' union representative asked whether any formal decision had been taken regarding the closure of

the Kyle Centre. He was told that discussions were ongoing "however, it is anticipated that the service will end at Kyle and be commissioned in alternative ways".

[19] Mr Macpherson's position was that the decision had to be ratified by the Leadership Panel. Yet the report to the Panel for 29 October is to recommend noting (my emphasis) the decision taken by the IJB to close Kyle Day Care Centre.

[20] Although there was consultation about the alternative care arrangements that might be put in place for users following the decision to close the Kyle Centre there was no consultation on the proposal itself. It is also clear that the users and families were not aware that a decision had been taken to close the Centre until the meeting on 9 September, over 2 months after the decision of the IJB. Nor were they told, if it be the case, that it was subject to ratification by the Leadership Panel.

[21] None of this reflects well on the respondent. The question is whether in taking the decision to close the Kyle Centre the respondent has acted illegally.

The first issue: failure to produce an EIA

The law

[22] Section 149 of the Equality Act 2010 is in the following terms:

> **"Public sector equality duty**
>
> (1) A public authority must, in the exercise of its functions, have due regard to the need to—
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> (2) …

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

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

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
(a) tackle prejudice, and
(b) promote understanding.

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

(7) The relevant protected characteristics are—
- age;
- disability;
- gender reassignment;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to—
(a) a breach of an equality clause or rule;
(b) a breach of a non-discrimination rule."

[23] Specific duties on local authorities are set out in the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012/162 (Scottish SI). Regulation 5 states:

"Duty to assess and review policies and practices

(1) A listed authority must, where and to the extent necessary to fulfil the equality duty, assess the impact of applying a proposed new or revised policy or practice against the needs mentioned in section 149(1) of the Act.

(2) In making the assessment, a listed authority must consider relevant evidence relating to persons who share a relevant protected characteristic (including any received from those persons).

(3) A listed authority must, in developing a policy or practice, take account of the results of any assessment made by it under paragraph (1) in respect of that policy or practice.

(4) A listed authority must publish, within a reasonable period, the results of any assessment made by it under paragraph (1) in respect of a policy or practice that it decides to apply.

(5) A listed authority must make such arrangements as it considers appropriate to review and, where necessary, revise any policy or practice that it applies in the exercise of its functions to ensure that, in exercising those functions, it complies with the equality duty.

(6) For the purposes of this regulation, any consideration by a listed authority as to whether or not it is necessary to assess the impact of applying a proposed new or revised policy or practice under paragraph (1) is not to be treated as an assessment of its impact."

[24] A useful summary of the law is given in the case of *Bracking and others* v *Secretary of State for Work and Pensions* [2013] EWCA Civ 1345. At paragraph 26(5) McCombe LJ endorsed the a summary of the law by Aikens LJ in the Divisional Court in *R (Brown)* v *Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin)* as follows:

"i) The public authority decision maker must be aware of the duty to have 'due regard' to the relevant matters;
ii) The duty must be fulfilled before and at the time when a particular policy is being considered;
iii) The duty must be 'exercised in substance, with rigour, and with an open mind'. It is not a question of 'ticking boxes'; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
iv) The duty is non-delegable; and
v) Is a continuing one.

vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty."

[25] For present purposes there are I consider three important aspects to that summary. The first is that the duty has to be fulfilled before a policy that might affect a particular class of protected persons is adopted. It is an essential preliminary to lawful decision making: see also *Monaghan on Equality Law* (2nd edition), at 16.66. The second point is that the duty must be exercised in substance with rigour and an open mind. It is not a question of ticking boxes.

[26] The third aspect is the continuing nature of the duty. That means that as policy evolves due regard has to be made to the duty under section 149 of the 2010 Act. The duty does not end with the completion, for example, of an EIA. As the policy is developed and executed the public authority must continue to have regard to the duty.

[27] Further guidance on these matters comes from two booklets from the Equality and Human Rights Commission: Guides for Public Authorities in Scotland entitled 'Essential Guide to the Public Sector Equality Duty' and 'Assessing Impact and the Public Sector Equality Duty'.

Submissions for parties

[28] Ms Bain submitted that the respondent had failed to carry out the duties incumbent upon it. In summary she submitted that the business plan of January 2019 had identified a specific timescale for the taking the decision, including the carrying out of an EIA. That timescale had not been adhered to. It was a matter of agreement that no EIA had been carried out to support the closure of the Kyle Centre. The IJB then took the decision in

June 2019 which effectively resulted in the closure of the Kyle Centre for financial reasons. That resulted in the absolute necessity for the Kyle Centre to close by the end of 2019.

[29] This mismanagement, as she submitted, resulted in Mr McClean doing a scoping exercise after the IJB decision (though before the Leadership Panel met on 29 October 2019). This was nothing more than a tick-box exercise to enable the respondent to meet the timetable for closure.

[30] Mr Macpherson, in response, made two points. First, he submitted that it was difficult to see where the alleged discrimination came in; all of the users of the Kyle Centre were being affected in the same way. Secondly he suggested that in substance the duty had been complied with. A failure to comply with regulation 5(1) of the 2012 regulations would not of itself result in reduction of a decision if the duties in section 149 had been complied with in substance: *A* v *NHS Greater Glasgow and Clyde Health Board* 2018 SLT 123 per Lady Carmichael, paragraph 71.

Decision on first issue

[31] Mr Macpherson's first point can be disposed of quickly. The duties in the Equality Act 2010 and specifically section 149 are not simply about the prevention of discrimination but the promotion of policies which will help eliminate differences between the protected group and those who do not share that protection. That is clear from the wording of section 149(1)(b), (3)(b) and (4). Accordingly I am satisfied that the duty bites on the respondent.

[32] In developing the business plan the indicative timescale recognised the need for an EIA to be carried out. It is significant that it was to be done before the proposal for closure of the Kyle Centre was put to the IJB in June 2019. That did not happen. The EIA that was

carried out was on the budget 2019 - 2020. It did not mention the Kyle Centre. It recognised that full EIA's would be required for specific proposals and these "will be produced as required". It is reasonable to assume that members of the IJB who took the decision to make the savings involving the closure of the Kyle Centre knew that it would be subject to a further decision with a full EIA to help inform the decision making process.

[33] Although it could be argued that the decision was taken at the Leadership Panel that is not the way in which the respondent dealt with the decision taken by the IJB. All the evidence points to the respondent acting on the decision of the IJB and taking it as authority to close the Kyle Centre. That is how it was presented to the Leadership Panel on 29 October whose only function appears to have been agreeing the severance payments to staff. It is also how it was presented to the petitioner and other users at the meeting on 10 September.

[34] The effective decision to close the Kyle Centre was taken on 26 June. There was no EIA presented to the IJB on the effects of closing Kyle Centre. Accordingly it cannot be said that the respondent paid due regard to the effect of the policy on its duties under section 149. In my opinion there is force in Ms Bain's submission that having appreciated that an EIA had not been carried out a scoping exercise was carried out to justify the decision that had already been taken.

[35] I accept that the failure to carry out a formal EIA may be excusable if it can be shown that in substance the duty under section 149 has in reality been observed. I am not satisfied that the respondent can demonstrate that it has discharged its duty. The scoping exercise may or may not be sufficient in the circumstances of this case. But it has all the hallmarks of a tick-box exercise completed after the decision had been taken. There is no evidence as to what matters Mr McClean took into account when completing the scoping assessment. Moreover, as I go on to find below the respondent also failed in its duty to consult with

users, carers and guardians. It seems to me be difficult to conclude an EIA which deals with the impact of a policy on persons with a disability without consulting them on how the proposed policy may affect them.

[36] For these reasons I am satisfied that the respondent failed in its duty under section 149 of the Equality Act and I shall grant a declarator to that effect.

The second issue: failure to consult

The law

[37] As Lord Reed JSC noted in *R (Stirling)* v *Haringey LBC* [2014] 1 WLR 3947 at paragraph 35 there is no general common law duty to consult persons who may be affected by a measure before it is adopted. A duty of consultation will however exist in circumstances where there is a legitimate expectation of such consultation, usually arising from an interest, which is held to be sufficient to found such an expectation, or from some promise or practice of consultation. A legitimate expectation of consultation was found to exist where a local authority proposed to close a care home without consulting the residents: *R* v *Devon County Council, Ex p Baker* [1995] 1 All ER 73. Similarly in *R* v *Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168 a decision to close two schools without consulting the parents had been unlawful.

Submissions for parties

[38] Ms Bain maintained that the petitioner had a legitimate expectation of consultation. She contrasted the lack of consultation on the proposal to close the Kyle Centre with the fact that the respondent consulted on a proposal to impose a flat rate of £10 for the use of day centres.

[39] Mr Macpherson submitted that although there had been no consultation on the proposal to close the Kyle Centre there had been public engagement on the 2017 strategy which had flagged the possibility of closing the day centre. There had been consultation with the users, carers and guardians on alternative provision of care following the decision to close the Centre. In any event any lack of public consultation did not render the decision irrational, lacking in reasons or unreasonable. At most it amounts to a procedural impropriety.

Decision on the second issue

[40] I am satisfied that the petitioner had a legitimate expectation of consultation on the proposal to close the Kyle Centre. His son had attended the Centre every day for 13 years. It was an integral part of his life. He and his parents relied on it. He had built up personal relations with the staff. In *Stirling* Lord Wilson JSC discussed the decision of the Court in *R (Osborn)* v *Parole Board* [2014] AC 1115 and endorsed Lord Reed JSC's judgement in that case on the purposes of procedural fairness. He noted, first, that a requirement for consultation is liable to result in better decisions. Secondly it avoids "the sense of injustice which the person who is the subject of the decision will otherwise feel".

[41] Lord Wilson added a third purpose which he said was reflective of the democratic principle at the heart of our society. In that case he said that the question was not

> "Yes or no, should we close this particular care home, this particular school etc? It was: Required as we are to make a taxation related scheme for application to all inhabitants of our borough, should we make it in the terms which we here propose?" (paragraph 24).

In this case one might pose the question, "Required as we are to make savings on our social care budget should we make these savings by closing the Kyle Centre?"

[42] I do not consider the failure to consult as "at best a procedural impropriety" but one which went to the heart of the decision making process. That process was fundamentally flawed by the failure to consult persons who had a legitimate expectation of such consultation. It resulted in a feeling of grievance and injustice in the making of a decision which had profound implications for a group of vulnerable people.

[43] For these reasons I shall grant a declarator in the terms sought.

***Wednesbury* unreasonableness**

[44] Ms Bain did not advance any separate submission under this heading and I do not consider that I need to consider this any further. Clearly the decision was flawed as it did not take into account either an EIA or information which may have been received in the course of the consultation process.

Exercise of discretion: should the decision to close the Kyle Centre be quashed?

Submissions of the parties

[45] Mr Macpherson submitted that if I found against him on the substantive issue I should nevertheless exercise my discretion not to quash the decision. He pointed out that was the course of action taken by the Supreme Court in *Stirling* where declarators had been made but the court held that it would be disproportionate to quash the taxation scheme which had already been in operation for some 2 years.

[46] In support of this submission Mr Macpherson maintained that the effective of closure was 24 December. All but three of the staff had taken the voluntary severance payment. It was unclear whether there would be sufficient staff to keep the facility open; they could not be obliged to return to work. The manager had also taken a severance package. It was not

clear whether he might be willing to return. An affidavit from Eddie Gilmartin, Manager, Registered Services points out that in terms of Regulation 17(1) of the Social Care and Social Improvement Scotland (Requirements for Care Services) Regulations each service must have a manager who is in full time day to day charge of the service. In any event all but one of the users of the Kyle Centre had accepted alternative provision of care. The one remaining user who had not accepted an alternative provision was the petitioner's son. This was borne out in the affidavits lodged for the respondent. Was it right to keep the Centre open for only one user?

[47] In response Ms Bain submitted under reference to the affidavits lodged on the petitioner's behalf from other guardians and carers of users, that most of the users did not accept the closure of the Centre. If alternatives had been accepted it was only because the decision was now seen as a *fait accompli* and they had taken the decisions in order to avoid the users being left without any provision. This was a situation entirely of the respondent's own making. The court should not overlook an unlawful decision on the basis that it was now a *fait accompli*.

[48] Since this argument was not foreshadowed in the petition or the note of argument submitted by the respondent I allowed Ms Bain to make a further written submission.

[49] Ms Bain submitted that the court has a discretion to refuse to grant a remedy, even where the respondent has acted illegally where it can be said that to do so would be futile. What is futile will depend on the circumstances. The onus was on the respondent to make out a case for refusing to quash a decision: *R (Lichfield Securities Ltd)* v *Lichfield District Council* (2001) EWCA Civ 304 (2001) 3 PLR 33 at 26. The test for futility was a high one; see eg *Warren* v *Uttlesford District Council* (1997) COD 483. It was sufficient that there was a "reasonable possibility" that the decision might not be the same; *R (S)* v *Northampton Crown*

Court (2010) EWCH 723 (Admin) 2012 1 WLR 1 at 29. The discretion ought to be used sparingly so as not to encourage unlawfulness: *R (C)* v *Secretary of State for Justice* (2008) EWCA Civ 882 (2009) QB 657 at 49; *R* v *Inner London Crown Court ex p Sitki* (1994) COD 342; *R* v *Tynedale District Council, ex p Shield* (1990) 22 HLR 144 at 148; *R v Ealing Magistrates' Court, ex p Fanneran* (1996) 8 Admin LR 351 at 356E. The court should not try and guess the outcome of any review following a decision to quash. In this case the respondent fell foul of these principles.

[50] In addition, there is a lot which weighs against the court exercising its discretion not to quash: eg the respondent's misleading correspondence about a "review"; the vulnerability of the service users; the importance of the requirements imposed under the Equality Act 2010 and the Specific Duties Regulations, and the importance of discouraging illegality.

Discussion

[51] I accept the submission of Ms Bain as to the legal principles that are involved. A court should be slow to refuse to quash an illegal decision by a public authority. The onus is on the respondent to make out a good reason why the decision should not be quashed. Insofar as the decision maker would require to be retake the decision it seems to me that it would only be where it was plain and obvious that the outcome would be the same that it would be right to refuse to reduce a decision on that ground. The court should not attempt to take over the decision making process or speculate as to what the outcome might be.

[52] The fundamental principle at stake is the rule of law. An illegal decision is an affront to the rule of law. Of course there are times when the court has to take a pragmatic decision in the interests of good governance and the wider interests of society in ensuring certainty.

That may be important where people have altered their position in reliance of the decision that has been taken. Even there, however, the question will be whether any alteration of position can be restored without undue cost in money or emotional distress.

Application of principles to this case

[53] Kyle Centre is due to close in a few days' time. The respondent has agreed severance packages with all but three of the staff, including the Centre's manager. All but the petitioner has agreed to new care provision. The respondent in effect presents the situation as a done deal.

[54] On the other hand it appears that no enquiry has been made with departing staff as to whether they would be prepared to stay on in the event the decision to keep Kyle Centre open. It may be possible to re-assign staff from elsewhere to make good any shortfall. While the respondent is no doubt right to say that all but the petitioner have agreed new care provision it appears from the affidavits lodged by the petitioner that it is because they view the decision to close as a *fait accompli* and accordingly have agreed to new arrangements. It is not suggested that if the Kyle Centre is to remain open they would want to remain with the new arrangements rather than stay with the Kyle Centre.

[55] I also agree with Ms Bain that the respondent has brought this position on itself. Whether consciously or not it appears that the decision to close the Kyle Centre has been attended by mismanagement and obfuscation so that those who were most affected by the decision were kept in the dark until 2 months after the decision to close. Such decisions cannot be taken by stealth; they must be open and transparent and comply with the duties which Parliament has imposed upon the respondent.

[56] I am not persuaded that I should exercise my discretion to refuse to reduce the decision to close the Kyle Centre.

[57] This decision means that the respondent will require to keep the Kyle Centre open after the date it was due to close. I appreciate that this may mean re-hiring staff that have been the subject of severance payments. It appears that it will also mean re-hiring the manager who is one of the staff who has taken a severance package. If the manager is not willing to continue in post then that will pose a problem for the respondent which they will need to address. For the avoidance of doubt this decision does not mean that the Centre should operate unlawfully without a manager but the respondent will have to use every effort to ensure that it is properly staffed, if necessary be re-assigning staff from elsewhere.

[58] Ms Bain expressed concern that all that might happen is that the respondent will use the fact that staff have left and the use of the facilities has further reduced to justify a decision to close the Centre. I understand that concern. It may be that after the appropriate consultation and EIA the decision is taken to close the Centre but any decision as to the future of the Kyle Centre has to be one which is not seen as pre-ordained but is justified on all the facts including those which emerge from the consultation and EIA.

Conclusion and result

[59] I shall (a) reduce the respondent's decision to close the Kyle Adult Day Centre; (b) grant a declarator that in reaching the decision to close the Kyle Adult Day Centre the respondent acted unlawfully in respect that (i) it failed in its duty to have regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic, namely a disability and persons who do not share that characteristic in terms of section 149 of the Equality Act 2010, and (ii) failed to consult with the petitioner and other

users, carers and guardians of users of the Kyle Adult Day Centre who had a legitimate expectation of such a consultation; and (c) reserve meantime all question of expenses.