# CHALLENGING CUTS TO HEALTH & SOCIAL CARE SERVICES IN THE AGE OF AUSTERITY

Adam Hundt, Deighton Pierce Glynn, 2011

It has been difficult, over the last couple of years, to escape repetitive references to the need to cut public spending. Perhaps inevitably, the cuts have affected health and social care services, although in England the squeeze on local authority budgets has meant that social care has, so far, faced the pinch far more than the NHS. Carers, patients, and voluntary sector organisations have all felt the impact of these cuts, and are increasingly turning to the law in a bid to halt the worst effects. In this workshop we will look at how the Courts have dealt with such challenges in England over the last few years, by focussing on four cases, in four different contexts, which raise a number of key issues that can inform a discussion as to how such decisions can be challenged.

## 1. Broad-ranging budget cuts

### R (on the application of Chavda & others) v Harrow LBC [2007] EWHC 3064 (Admin)

Background

Until 2007 Harrow Council provided social care services to people whose needs had been assessed as either 'critical' or 'substantial'. There were approximately 3,500 people to whom services were provided. In 2007 Harrow decided that this was no longer affordable, and they decided to change the eligibility criteria for social care provision, so that services would only be provided to people whose needs were critical. The claimants were 3 service users, of different ages, genders and backgrounds, each of whom had a need for social services of one sort or another which Harrow had hitherto met, and each of whom faced losing, or potentially losing, some or all of the services on which they and their carers had come to rely.

The Claimants' submissions

The decision was challenged on 5 grounds:

a) The consultation process prior to the decision made was flawed and unlawful;
b) The decision-making process failed to take the Human Rights Act 1998 into account;
c) The decision-making process did not comply with the Defendant's Disability Equality Duty pursuant to s49A Disability Discrimination Act 1995 ;
d) By excluding large numbers of persons with substantial needs (subject only to an assessment process to ascertain that their needs have not changed) the Defendant had fettered its discretion to consider whether to provide community care services individually to each service user, including the Claimants;
e) The decision to exclude those with substantial needs was irrational, unreasonable, and disproportionate in all the circumstances of the case.

The Court's decision

Addressing each of the Claimants' submissions in turn, the judge held as follows:

a) Unlawful consultation - The first ground failed because, although the Claimants had made some valid criticisms of the process (for example, failing to bring to the decision-makers' attention a letter from the local health authority expressing disquiet about the impact of the decision on peoples well-being), and although a Councillor had said, prior to the consultation, that it was "very unlikely" that the status quo could be maintained, thus calling into question whether or not Harrow had approached the consultation with a genuinely open mind, the judge considered that, when the consultation process was looked at in the round, none of the criticisms were sufficiently substantial to render it unlawful. He seemed to be swayed in this respect by Harrow's submission that "*decisions involving a balance of competing claims on the public purse and the allocation of economic resources are, it is well established, complex matters best addressed by democratically represented Councillors not judges*." (para 24)

b) Human rights – This ground also failed, with the judge deciding that the relevant question was not whether a local authority had properly considered whether an applicant's Convention rights would be violated, but whether there has in fact been a violation of those rights. That question could not be asked or answered until the proposals had been implemented.

c) Disability Equality Duty – On this ground the Claimants struck gold. Although Harrow had completed an equality impact assessment, and noted that the proposals could have a potentially discriminatory impact, the judge decided that this was not enough to demonstrate that the Council had had 'due regard' to the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than

other persons. He held that there was "*no evidence that this legal duty and its implications were drawn to the attention of the decision-takers, who should have been informed not just of the disabled as an issue but of the particular obligations which the law imposes. It was not enough to refer obliquely in the attached summary to "* potential conflict with the DDA *"- this would not give a busy councillor any idea of the serious duties imposed upon the Council by the Act…. It is not enough to accept that the Council has a good disability record and assume that somehow the message would have got across. An important reason why the laws of discrimination have moved from derision to acceptance to respect over the last three decades has been the recognition of the importance not only of respecting rights but also of doing so visibly and clearly by recording the fact. These considerations lead me to conclude that if the relevance of the important duties imposed by the Act had been adequately drawn to the attention of the decision-makers there would have been a written record of it*." (para 40).

d) Fettering discretion – This ground failed. It was based on the unfairness facing two of the Claimants, who would automatically lose the services they had been receiving without consideration being given to their particular cases. The judge had little time for that, pointing out that "*The Defendant operates within the FACS guidance. It has freedom to operate within the FACS bands consistently with the guidance. Any step to restrict the range of service users will by its very nature limit the council's ability to assist them. But there is nothing unlawful about that and individual users have a statutory complaints system to seek redress for grievances*."

e) Irrationality – This ground also failed, which will come as no surprise to seasoned observers of the Administrative Court, who will know that judges are very reluctant to address the rationality of decisions directly, and instead do so obliquely, by focussing on procedural failings instead.

<u>Practice point</u>

It is interesting to note that the challenge was the brainchild of a local third sector organisation, which was joined by other similar organisations, all of whom were concerned about the impact that the decision would have on their service users. The organisations were unable to challenge the decision themselves, largely for financial reasons, and instead identified representative service users, who had a personal interest in the matter and were entitled to public funding (legal aid), who could act as claimants representing not only their own interests but those of the other 3,500 or so service users. This has proved to be a very effective modus operandi in cases like this.

Key issues

- The importance, and difficulty, of compliance with the equality duties,.
- The differing approaches of the Courts in different factual scenarios (eg; contrast this case with R (on the application of Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin)).

Applicability to other decisions

- Very similar decision by Birmingham City Council that was successfully challenged in the same way (judgment awaited) – http://www.birminghampost.net/news/west-midlands-news/2011/04/20/birmingham-city-council-social-care-cuts-ruled-unlawful-by-high-court-65233-28557053/2/
- Cuts to 'supporting people' budgets – at least one challenge pending.

## 2. Third Sector organisation funding cuts

**R (on the application of Hajrula & Hamza) v London Councils [2011] EWHC 448 (Admin)**

Background

London Councils is an organisation set up by London local authorities to administer grants to projects that work on a London-wide basis, from a pot of funds to which the local authorities contribute. One of the organisations funded by London Councils is the Roma Support Group (RSG), which provides assistance to the Roma community, in particular with educational support. As part of the drive to reduce local authority spending London Councils reviewed its grant-making scheme and classified existing grantees into 3 bands, distinguished by the extent to which funding could be 'repatriated' to individual local authorities rather than provided by London Councils. A shift to individual local authority funding would, in reality, mean a substantial or wholesale cut in funding, so the classification of RSG into a band which would result in its funding being 'repatriated' in this way meant that the organisation faced a cut in funding that threatened its future survival.

As part of its consultation on the proposals, London Councils asked respondents for their views on any equalities impacts arising under the proposed changes. The Voluntary Sector Forum complained that merely seeking respondent's views on

equalities was not enough to constitute an equality impact assessment. RSG responded to the consultation, giving reasons why it should be in the high priority category but the local authority refused to suspend the consultation process and proceeded to determine principles and priorities for future funding. It informed RSG that funding would end in six months.

The Claimants' submissions

The Claimants argued that the decision-making process was flawed because the consultation was not lawful, and because there had been a failure to discharge the equality duties.

The Court's decision

The judge decided that the consultation was lawful, so this ground of challenge failed, but with an important proviso; throughout the consultation and decision-making process London Councils had divided the services that were funded into 69 heads, within which services were provided by one or more provider. London Councils had considered the potentially discriminatory impact of reclassifying a service head, without looking at the impact on individual providers, or a particular protected group, within each service head. Although that was not enough to render the consultation unlawful, this defect in the consultation meant that London Councils had failed to comply with the equality duties.

Key issues:

- The crossover between consultation and equality duties.

Applicability to other decisions

- See also R (on the application of Rahman) v Birmingham City Council [2011] EWHC 944 (Admin)
- Other 3rd sector funding cuts challenges pending

Practice point:

- As with any JR, relief can be tricky, and certainly was in this case.
- Standing – 2 claimants essentially representing the interests of an organisation. This can pose funding difficulties with the Legal Services Commission, which will have to be convinced that no alternative funding is available, but does not seem to cause problems for the Court.

## 3. Service restructuring

**R (on the application of Enfield BC) v Secretary of State for Health, Barnet PCT, Enfield PCT & Haringey Teaching PCT [2009] EWHC 743 (Admin)**

Background

Although this was an unusual case, involving an application to set aside an order granting permission to proceed with an application for judicial review, the factual background is such that it contains some useful lessons for claimant lawyers in particular.

The claim was brought by a local authority (Enfield), who disagreed with the decision of the 3 primary care trusts (PCTs) to reconfigure local NHS services. The proposed service reconfiguration had been put to consultation, during which it was explained that in order to keep one hospital open, safe and running the same services, substantial capital investment was required. Five scenarios were put forward but, for reasons of financial feasibility and clinical sustainability, only two options were actually considered. Both involved discontinuing the local hospital's 24 hour accident and emergency service and its consultant-led maternity service. Those scenarios were put forward in a formal consultation document and one was chosen. A Joint Scrutiny Committee then reported the trusts' decision to the secretary of state (pursuant to the Local Authority (Overview and Scrutiny Committees Health Scrutiny Functions) Regulations 2002 reg.4(5) and (7)). The Scrutiny Committee considered that the consultation had been inadequate because the two options offered no choice about closure of the two services, which meant that a decision had been made without consultation. Upon advice from the Independent Reconfiguration Panel the secretary of state concluded that it was acceptable practice that only two options were put forward and that there was no requirement to put forward an option of no change if there was evidence to support appropriate analysis and non-feasibility. He also stated that the trusts had met their legal obligations in terms of overall consultation. Enfield issued proceedings on the last day of the 3 month period for bringing a challenge against the secretary of state's decision, and outside the period for bringing a challenge against the trusts' decision. They alleged that a decision had been taken by the trusts to discontinue specific services before the consultation had been carried out and that the secretary of state could not approve a consultation that was unlawful. An expedited paper application was put before the judge and he granted permission, before the time for acknowledgement of service had elapsed and without giving the secretary of state or the trusts the opportunity to put forward their objections.

The Court’s decision

After setting aside the original order granting permission, the Court refused permission. The key issue was delay; rather than challenge the reconfiguration decision and attendant consultation at the relevant time, Enfield had waited to see whether or not the Secretary of State would approve the decision-making process, and only after the Secretary of State gave such approval were proceedings issued. The claim was therefore brought against the Secretary of State’s decision (just within the 3 month time limit) as well as against the PCTs’ decisions (but after the 3 month deadline for challenging those decisions had passed.

The judge found that Enfield should not have waited for the scrutiny process to run its course before turning to litigation. It was the court's function to rule on the legality of the consultation process, not the secretary of state's. Regulation 4(7) only empowered the secretary of state to require a trust to take action if he reached the conclusion that the proposal was not in the interests of the health service in that particular area. That was quite different from the adequacy or otherwise of the process by which the proposal was reached. The secretary of state had reached the decision that the proposal was in the interests of the local health service and he was entitled to do so. There was no point in quashing the secretary of state's decision only to make the parties start the process again. The real target of complaint was the trusts' decision not to consult on the closure of the two services, which had already been made by the time that the public consultation document was first issued. Even if the local authority was justified in waiting until the result of the consultation process and deciding to challenge the decision made in consequence of the allegedly unlawful consultation, it did not act promptly or even within three months of that decision. Instead, it chose to wait until after the secretary of state had made his decision. That delay was not justifiable but it did not cause any prejudice, since the trusts could not implement their decision until the secretary of state had upheld it. However, it made it all the more important for the local authority to act with due expedition once it was notified of the secretary of state's decision and it had failed to do so. The lack of merit in the claim against the secretary of state would have been sufficient reason for refusing permission even without the inexcusable and unexplained delay. Although the claim for judicial review of the trusts' decisions was arguable, it was not so compelling that it would cause an injustice to the local authority for the court to refuse to hear it. The delay caused such a degree of prejudice to the trusts that it was not in the public interest to allow the claim to proceed further. The order was set aside and the local authority's application for permission to bring a claim for judicial review was refused.

Key issues:

- Delay. To the layperson it makes every sense to wait until the scrutiny process runs its course before turning to litigation as a last resort (why else have a scrutiny process?), so it is vital for advisers to be aware of this potential pitfall.
- Parallels can drawn with social care funding cuts, as there can often be a lengthy delay between a local authority decision to cut funding in a forthcoming budget, and the decision's subsequent approval . For campaigners, there is a danger of trying to persuade the local authority not to approve the decision, after which litigation is contemplated, at which point it could be more than 3 months after the initial decision, which is the real decision under challenge, was made.
- There is also a danger of the Court being presented with a fait accompli, for example if the challenge is to a decision to cut funding for the current financial year. In that case the Court will be reluctant to intervene and cause havoc by quashing a decision that is already being implemented.

## 4. Individual care package cuts

**R (on the application of W) v Croydon LBC [2011] EWHC 696 (Admin)**

Background

W was a young adult with autism and learning disabilities. He lived in accommodation (H) with facilities for young people with behavioural difficulties, paid for by the local authority under s21 National Assistance Act 1948. In March and June 2010, the local authority assessed W's needs. It concluded that W's accommodation was no longer suitable as it did not encourage his independence and was overly restricted and isolated, but also because it cost £4,800 a week, more than twice what the local authority would usually pay to accommodate someone with W's needs. In July 2010, the local authority informed W's parents that a review and assessment had been completed and that it was necessary to hold a meeting to discuss what would be in W's best interests. On the morning of the meeting, W's parents were provided with copies of the assessments. During the meeting, W's parents objected to their late receipt of the assessments, and pointed out some errors in their content. It was their wish that W remain where he was as he felt safe, secure and happy there.

In August 2010, the local authority gave notice of its intention to transfer W to alternative accommodation. W's parents later wrote to the local authority raising their concerns about what had happened and stating their view as to the appropriate

accommodation for W. The accommodation provider also responded to the assessments. W contended that the process of consulting his parents and the accommodation provider had been inadequate. He submitted that the local authority's decision to move him from H had been taken before the July meeting and that insufficient information had been provided in time for his parents to respond. W further argued that the views of his parents and H had not been taken into account, contrary to the National Assistance Act 1948 (Choice of Accommodation) Directions 1992.

## The Court's decision

Before the July meeting the local authority had a firm, but provisional, view as to the unsuitability of the current placement, but there was no evidence that it had not been prepared to consider the views of W's parents and their wish that he remain there. The local authority had listened to the parents' views and there had been discussion about the problems, to which they had responded. The consultation had, however, been inadequate. The local authority had known that the question of whether W should stay at his current placement would be an important one. There had been nothing in the local authority's letter inviting W's parents to the meeting to alert them to the issue of how far the local authority's thinking had gone and the cost of maintaining the placement. W's parents should have been involved in the earlier assessments of W's needs, and they had been given insufficient time before the July meeting to consider and formulate their responses to the proposal that W's placement should end. The local authority had taken its decision to terminate W's placement and the matter was effectively closed before his parents had presented material on which they wished to rely. Moreover, the views of the accommodation provider would have been valuable. The local authority was entitled to terminate W's placement because of the greater cost or because of the view it took of the nature of the place in relation to what it assessed were W's needs. However, one of the purposes of a consultation process was to enable other views than those which it formed on a provisional basis to influence it.

## Key issues:

- The limitations of relief

## Applicability to other decisions

- Many other potential examples of 'salami-slicing'.