

CO/11886/2010

**Neutral Citation Number: [2011] EWHC 861 (Admin)**  
**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**THE ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand  
London WC2A 2LL

FRIDAY, 28TH JANUARY 2011

**B e f o r e:**

**MR JUSTICE CALVERT-SMITH**

**Between:**

**THE QUEEN ON THE APPLICATION OF HAJRULA\_**

**Claimant**

v

**LONDON COUNCILS\_**

**Defendant**

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165 Fleet Street London EC4A 2DY  
Tel No: 020 7404 1400 Fax No: 020 7404 1424  
(Official Shorthand Writers to the Court)

**MISS H MOUNTFIELD QC & MISS A MCCOLGAN** appeared on behalf of the  
**Claimant**

**MR J COPPEL** (instructed by the Comptroller & Solicitor, The City of London  
Corporation) appeared on behalf of the **Defendant**

J U D G M E N T  
(as approved by the court)

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MR JUSTICE CALVERT SMITH: This is an application for judicial review by Zanepa Hajrula and Mura Hamza, who are users of a service provided by the Roma Support Group. That service is funded by the defendant and the challenge is to the decision of the defendant to cut the funding of the Roma Support Group as from 30 June 2011. The Roma Support Group supports the children of Roma and travellers, in particular in education.

The defendant is a body created by the London Boroughs and the City of London pursuant to powers under the Local Government Act 1972. The defendant operates a quota scheme pursuant to Section 48 of the Local Government Act 1995, which permitted the Boroughs and the City to set up a scheme for the making of grants to voluntary organisations whose activities "will directly or indirectly benefit the whole of Greater London or any part of it extending beyond the area of any particular constituent council." The scheme does not involve any delegation of authority by its members to fund particular types of service and member authorities retain their own powers to fund voluntary action in their own areas or to cooperate with others for the same purpose.

The funding in this case of the Roma Support Group ("RSG") was brought into force following a change in the scheme by the defendant over 2005 and 2006 and this particular funding was to run from 1 November 2008 to 31 October 2012. Although the funding was said to be for four years, the terms were that it could be withdrawn or reduced on the basis either of poor performance or lack of funds.

Either in late 2009 or certainly by early 2010 the defendant decided that a review of the scheme was necessary owing principally to the difficult financial situation of which we all are aware. In short, ways had to be found to reduce the defendant's budget for the scheme.

During the course of 2009 the constituent Boroughs, or many of them, were pressing for a number of services in respect of which the defendant had awarded funding by way of a levy on them to be taken away from the defendant so that individual Boroughs could decide on and fund themselves such services as they wished to provide for their residents. The scheme is funded by a levy on the constituent boroughs calculated pro rata by population.

Because of these concerns, the defendant embarked upon two parallel but closely linked processes. First, a review of the scope of the defendant's activities, and secondly a review of the currently commissioned services, ie the ones brought in under the 2005 and 2006 scheme. A mechanism was sought for deciding which services currently funded by the defendant could be, in the term used throughout the papers, "repatriated", so that individual boroughs could decide for themselves.

It is accepted on all sides as a background to the case that in the current financial climate all public spending must be closely scrutinised to see whether it is necessary, and even if it is, whether it can be reduced by efficiency savings and the like. It is accepted on all sides that in attempting to carry out these two tasks, the defendant carried out consultations both internally and externally. It is also common ground that

in doing so it had some regard to its duties under the three Acts of Parliament which prohibit discrimination and in particular create public service equality duties: the Race Relations Act 1976, the Sex Discrimination Act 1975 and the Disability Discrimination Act 2005.

The claim makes two allegations which are split into sub-heads: first, that the consultation was not lawful, and second that the regard paid to its public service equality duties was insufficient so that on either or both grounds the decision of the Council to recharacterise the claimant and others as organisations which should not qualify for funding by the defendant, to terminate such funding from 30 June 2011, and to set a budget which reflected that decision were unlawful.

In November 2009 the defendant undertook a scoping consultation which was designed to begin the process of prioritising services. As far as the RSG was concerned, the result of that scoping consultation was that the service head under which the work done by the RSG was characterised -- which was numbered 19 -- was listed number 4 of 61 in order of priority.

The scoping consultation was presented to a meeting of the Grants Executive of the defendant on 24 March 2010. The report asked the Grants Executive to consider the issues raised "and give any thoughts, views or comments to help inform and steer the incoming administration concerning the 2011 - 2015 programme properties". There was, of course, an election in May and it was, of course, only natural for matters to be put on hold until the new situation was known.

On 14 July 2010 the Grants Committee met and considered another report entitled "Review of future role and scope of London Boroughs Grant Scheme," compiled by Nick Lester and Ian Redding. The report informed the reader that the Leaders Committee, which is the ultimate decision making body of the defendant, had, at its Annual General Meeting on 8 June 2010, announced the need to "review the Grants Scheme with a view to establish the degree to which services are now more appropriately delivered at a local level. It is anticipated that this would lead to a significant repatriation of the programme to boroughs". The report presented the members of the Grant Committee with details of the existing programme and an initial indication of the degree to which currently commissioned services could be considered for local commissioning.

Although there had been different ways of organising the scheme operated by the defendant over the years, the current scheme in 2010 involved 69 service heads, within which one or more provider would provide the service. At paragraph 8 of the report it reads:

"It was suggested to the Executive that the review covers the following issues: the scope for repatriating current areas of activities from the existing grants programme to boroughs and sub-regional scope groupings, the scope for a residual London-wide grants programme together with budget and priorities for this, and the timetable and processes to achieve change."

It then went on to set out what it described as its initial categorisation exercise and it divided the 69 service heads into three:

- "(a) those where there is a strong argument for services to be carried out at a London-wide level where it is unlikely that work could reasonably be undertaken at a local level;
- (b) those which could be undertaken by a group of authorities, perhaps at a sub-regional level, but where it would be difficult or possibly unrealistic to carry out at a local level.
- (c) those which essentially appear to be local, but are currently commissioned on a pan-London basis for one or more of the following reasons:
  - (i) economies of scale.
  - (ii) cross-borough pattern of service users.
  - (iii) services uneconomic at single borough level.
  - (iv) services where a common and/or consistent approach are of key importance.

The ability of individual boroughs to commission these services economically at the borough level could be the significant factor in determining whether these services will continue to either viable or remain a priority at a local level."

It went on to indicate what the budgetary implications would be if the initial characterisation of service heads at (a), (b) and (c) were carried out.

At paragraph 17 it said this:

"This is of course only one way to address the issue of repatriation and is just an illustration based on the existing programme, leaving open the question of scale of and priorities for any future London-wide activity. However, the analysis when completed does provide a starting point for any future consideration and public consultation before decisions are made in November and December."

At 18, it reads:

"However members decide they wish to progress the review, the legal advice is that consultation with the third sector and in particular those organisations currently commissioned is required. This is not just to ensure that consultation is compliant with the terms of the compact, but also because given the nature of the services funded by the Grants Committee and the target clients groups it is likely that changes in priorities for commissioning and/or the way they are commissioned,

(London-wide, local, et cetera) will have an impact on particular equality streams. Consequently, quality impact assessment will be necessary not just in terms of services that continue to be commissioned at London Councils, but also for those that will then pass to boroughs for them to prioritise and commission."

Following that meeting letters were sent to providers, including the RSG, which informed them that:

"as you will have already heard, London Councils has announced that a review is to be conducted to look at the future role and scope of the London Boroughs Grant Scheme...the principal reason for this exercise is to establish the degree to which currently commissioned services should now more appropriately be commissioned and delivered at local level and is consequent to the increasing devolution of powers and services by Government to the local level. It is anticipated that this will lead to a significant repatriation of the programme to boroughs to be spent on locally determined priorities. A further factor is the anticipated cuts in public sector spending which are expected to have a substantial impact on services from April 2011 onwards. Boroughs may well therefore not be in a position to contribute as much as previously to the grants budget and London Councils will need to take a view on priorities within spending that remains within the grants programme...all of the services commissioned by the Grants Committee were for a period of four years in principle subject to satisfactory delivery of those services and the availability of the resources to meet the costs. Because of the uncertainties caused by the review and the forthcoming financial position in 2011/12, the Committee is therefore unable to guarantee any funding beyond 31 March 2011."

In that context and in respect only of the RSG, it is perhaps noteworthy to insert here that on 11 February 2010 the RSG had received a letter from the Policy and Grants Officer of the defendant, which said:

"I am pleased to advise you that the London Council Grants Committee at its meeting on 10 February 2010 agreed to renew funding to your organisation for a further 14 months (1 May 2010 to 30 June 2011 - 14 months)."

Over the next weeks the defendant put together a consultation which consisted of a background paper and a series of questions. Respondents were encouraged to reply online but the possibility of written responses was left open. The background document explained the two drivers behind the need for it; the move to devolution of powers to local authorities together with the squeeze on public sector finances. It focused on three main issues: what funded activities, if any, should be delivered locally by individual London Boroughs in the future; what London-wide activities/programmes should be funded in the future, together with budget and priorities for this; the timetable and processes to achieve the resulting in changes. It pointed out the tight timetable

under which it, and therefore of course the RSG, were working, which culminated with the need, in December 2010, for the Leaders Committee to agree scope, priorities and budget for the grant scheme for the period 2011/12 onwards.

Under 3, headed "Important information for responding to this consultation":

"3.2. we are particularly interested in your views on any equalities impacts arising from the proposed changes to the Grant Scheme. Please reflect your views on equalities considerations throughout the response form.

3.3. section 3 of the consultation seeks the respondent's views on the potential recharacterisation of services for funding purposes. There are currently 69 services funded by the London Council's Grants Scheme. Each service has been characterised as being either a London-wide service, category A; a service that is delivered across more than one London Borough, category B; or a local service which could be commissioned and delivered within a single borough boundary, category C."

It then went to on amplify the criteria which had informed the choice of category.

3.4 points consultees to section 4 of the questionnaire and indicates that there are four main options for implementing a new approach: one, all current funding ends on 31 March 2011 whether or not the term of their original approval has been completed. That, of course, was the message from the letter of 31 July. Two, all funding under category A continue to be funded through London Councils for the remainder of the term of their original approval, even if this is beyond 31 March 2011, and B and C end on 31 March 2011. Three, all current funding continues for the remainder of the term of the funding agreement under London Councils' administration. Four, some funding ceases on 31 March 2011 with funding for category A and some other services continuing beyond that date.

The actual form to be filled in by those wishing to respond referred throughout, with one exception to the service categories or heads. The service heads were listed under 12 headings, the RSG's heading being "children and young people", and its category at 19 being "improve education and attainment of disadvantaged children and young people". The one exception to the service category description is the question "what difference would it make to your ability to apply for and receive funding if commissions were determined locally rather than via the London Councils' Grants Scheme?".

Very soon after the consultation paper had gone out on 3 September, the Voluntary Sector Forum ("VSF") wrote to the defendant on 7 September. It raised a number of matters representing, as it does so the court was informed, all the bodies which received funding from London Councils. It suggested that the question asking for views on any equalities impacts was insufficient to constitute an Equality Impact Assessment. It asked, among other questions:

"what monitoring of the impact of these potential cuts has been done (on all equality groups)? How will the cuts be reviewed if the impact is deemed negative on equalities groups and how will you mitigate against the negative impact? Please will you send us a copy of your equality scheme and any equality impact assessments that you have carried out to date."

It wrongly predicted that the equality duties by the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995 would be replaced in October 2010 by those imposed by the Equality Act 2010. The latter will not, however, come into force until April 2011.

In another section it asked:

"Has London Council built in sufficient time to allow groups to respond to the allocation if at the end of the process they remain allocated to a category, the outcome of which is repatriation."

This letter, like most of the respondents' contributions, and in particular that of the RSG, recognised the fact that the reality of the situation was that repatriation was going to mean almost certainly a substantial reduction, if not the complete elimination, of the services hitherto provided.

During September there were meetings of the Strategic Monitoring Zones, at which, it was reported, concerns were expressed about the categories, amongst others, of domestic violence, homelessness, and legal advice services, and to whether they should or should not remain "pan-London" and under the umbrella of the defendant.

Mr Redding of the defendant replied to the Voluntary Sector Forum letter on 28 September. In answer to the questions on equalities, he said:

"Given the nature of the services commissioned by London Councils, equalities are at the very heart of all priority activities that the Grants Committee is currently supporting. Consequently, taking the most appropriate approach to equalities impact assessments is important in determining the way forward. There is a very different situation as regards EIA, where a Grants Programme runs its course and time expires as opposed to the potential situation were the boroughs might not be able to afford to continue current in principle commitments through to their normal timing expiry. Also, the nature of the proposals around the future role of the Grant Scheme does not necessarily mean that there would be cuts in funding and more significantly if that were to happen it would need to be clear where that decision was taken and by whom."

He went on to indicate that he had been taking advice from the scheme's legal adviser, and to summarise that advice, the understanding that EIA applies to all public bodies; that if a programme runs its course to time expiry, there is no change in policy and therefore no need for an EIA, although when a new programme is created it would be customary to carry out an EIA and, significantly, where relevant decisions are taken by

London Councils to change mid-period it is London Councils rather than the boroughs who are responsible for the EIAs. However, where relevant decisions are taken by boroughs mid-period, it is the boroughs rather than London Councils who are responsible for EIAs. The letter goes on:

"Whilst on the one hand London Councils could argue that there is a reasonable expectation of a budget in line with previous decisions, we have been on notice since at least March 2010 that this might not be the case, a concern that has grown as the extent of public sector cuts have become clearer. So the decision on how much the boroughs wish to and/or can afford to fund through London Councils' grant scheme is one for boroughs individually, so they must do the EIA. Put another way, London Councils cannot carry out an EIA on any policy which relates to the funding which is going back to boroughs, because the impact cannot be assessed until the boroughs have made their decisions. It is therefore individual boroughs which must carry out an EIA for their areas.

However that should pan out, we did commence work on EIA for a prospective new set of priorities earlier this year, the net product of which was among papers considered by the Grants Executive and the Leaders Executive back in March 2010. We anticipate updating members on this when the Grants Executive meets on 19 October, which will be when the way forward on the scheme begin to take shape."

He then deals with worries about the questionnaire and the speed with which everything was done. Then, towards the end of the letter, he says this:

"The allocation of A B C categorisations were made by officers on the nature of services themselves and where responsibility for the associated services also lies. It was not done to reflect how services are currently commissioned, although you could argue that there is a direct correlation between many of the front line "patterns of provision" services and the "local" category.

The detail of this service by service will be the main focus of discussion by Grants Executive members on 19 October because a clear differentiation into A, B or C is not as straightforward as that and many services are dependent on sub-regional and regional elements."

Those paragraph seem to me to be the closest the defendant ever got to indicating a possibility that some categorisation other than by service heads might in due course be considered by the defendant.

On the following day, the 29th -- again I derive this from the papers, although there is nothing emanating from the actual event -- it seems that VSF held a conference at which, no doubt, the problems faced by those commissioned by the defendant will have been discussed. On 19 October a progress report was produced on the Review of the Role and Scope of the defendant's scheme. There was a summary of the consultation

replies in so far -- because the consultation had not closed -- indicating that the majority of respondents, whether overall or limited to the funded organisations, was against taking funding away from the defendant and "repatriating it to boroughs."

That day, 19 October, the claimants issued a letter before action aimed at the consultation and again, the same day, 19 October, there was a meeting of the London Councils Grants Executive, at which, no doubt, the progress report was considered. The minutes of that meeting record, in response to a councillor's question about any legal advice in relation to equalities impact assessment:

"Ian Redding said that the focus was on who were the key beneficiaries targeted in service delivery, as most had a focus on one or more equality streams. Councillor Colin Campbell said, that although equalities impact assessments were legally necessary, the final decision needed to have regards to the outcome of the assessment, a decision could still be taken. The chair stated that it was important that members did not lose sight of the objective of London Councils' funding."

No doubt that is not a verbatim record, but in my judgment it was clearly a shorthand way of saying that although the defendant has to have regard to the impact on protected groups, in the end it can take a decision based on the financial situation.

On 29 October the RSG submitted its response to the consultation. It is a lengthy document and it sets out the reasons why the RSG should not be categorised in C but in A. It answered the questions in respect of all headings and its submission was, effectively, that all headings should remain in A rather than be repatriated. It highlighted the particular consequences for its beneficiaries, Roma children and young people, Roma parents and school children and teachers across London who would lose the Roma culture workshops which had done a good deal to educate non-Roma and boost the confidence of Roma children. It set out what it claimed were the cost benefits of continuing funding on the pan-London basis rather than having to obtain funding, if any were available, from individual boroughs.

It followed up its response in a letter of 1 November from the Chief Executive Officer, focusing Mr Redding's attention on the Roma community, the fact that the Roma community is highly mobile, the fact that homeless Roma are being housed by organisations for the homeless, such housing not being designated by borough boundaries but by the availability of housing generally. It also highlighted the huge gap between those young Roma who complete GCSE against the average over the UK, and pointed out that they experienced the highest level of permanent and fixed period exclusion from school. It also enclosed a number of documents with supporting letters.

On the following day the defendant replied to the letter before claim and indicated that in spite of the letter, it was not prepared to suspend the consultation process, which would continue. That closed on 10 November, by which time some 686 replies had been received. The court was informed that of the 69 heads, 320 services had been commissioned from 260 providers. The responses, of course, came from many other interested persons, including members of the public and as I shall mention later, the Mayor of London.

The judicial review process continued with orders being made by Treacy J on 16 November, an acknowledgement of service being served on 23 November, and on 25 November there was a meeting of the Grants Committee of the defendant at which it considered a number of documents, in particular a report by Mr Redding which summarised the by now complete set of responses to the consultation. The report concluded, before certain appendices, with a paragraph headed "equalities impacts". After pointing out that the defendant and its constituent councils are subject to the three Discrimination Acts, it stated:

"In making decisions in relation to the future role and scope of the Grants Scheme members must have due regard to the need to promote equality of opportunity and eliminate discrimination in relation to gender, disability and race. In relation to disabled people, there is also a duty to have regard to the need to promote positive attitudes towards disabled people and to encourage their participation in public life. The consultation exercise has sought input from affected organisations regarding the role they play in furthering equalities objectives and the results of that consultation are set out in the schedule at appendix 12."

That schedule listed the various service heads and gave an indication as to the groups, where appropriate, who were served under that head or indicated that it was effectively the community at large.

The report went on:

"members must consider the impact on affected groups when making recommendations to the Leaders Committee. For example if your Committee decides to recommend that services categorised as C should be commissioned locally, members should be aware that without a commitment of the individual boroughs to continue the the funding, then the equalities impact of those services not being funded will need to be taken into account."

Perhaps I should say, too, that in the preamble to appendix 12, to which I have just referred, the point is made again, as far as category B and C services, which it was then suggested might be decommissioned from 1 April 2010, that:

"There can be no assumption that individual London boroughs would decide to recommission those services at either a local or sub-regional level. There is a potential for adverse impact on a number of equality strands, as indicated with the attached schedules and summarised at the end of this document. There is also the added concern that there will be little time to consider the extent to which any detrimental impact on the equalities could be mitigated... **If any commissions are terminated before they naturally expire it will have an effect on equalities strands.**"

Finally in this preamble document there are six boxes indicating race, gender, disability, religion/belief, sexual orientation and age and it is indicated that if a decision is taken to terminate commissions early there will likely be an effect in each and every area.

The meeting also had before it budget proposals, which were based on the categorisations and provided options in financial terms, with figures beside each option. According to notes of the meeting on item five, which was the review of future role and scope, a matter upon which Mr Coppel relied in making one of his arguments, the chair said:

"During this process we are struggling with fairness trying to make it as least divisive and damaging as possible. I am conscious that there is a wide range of opinion regarding the review, which makes it even more difficult to reach a consensus. We are talking about commissions and not about organisations when making this decision. There are two parts to today's discussion: one, the extent to which the scheme is down-sized; two, the transition from the current to the future position."

He then described the process:

"When deciding about the future of commissions it is a two hurdle process: one, how would it be best to deliver the work each commission entails - regional, sub-regional, local. We applied this test to all commissions; two, we then looked at the revised statements of priorities to see which commissions fitted these, which means that some commissions might be classed as A but are no longer priorities for the scheme. In order to continue being funded the commissions need to meet both of these criteria... this process is about commissions rather than organisations, and just because an organisation works cross-borough it does not mean that a commission needs to be delivered on a pan-London basis, for example truancy occurs in all boroughs, but it does not mean that it is most appropriately addressed on a pan-London level. In fact it is most appropriate to be addressed on a local level."

There are noted, no doubt in short summary, comments and contributions by various members of the Committee. It is right to say that a number of those comments did not appear to be dealing with service headings, albeit a number of them did, but with particular topics which might cross service heading boundaries. However, having read the document as a whole, and in particular the introductory comments I have just quoted, it is absolutely clear to me that although the Chair used the word 'commissions', he was referring to service heads.

On 6 December there was a decision of the defendant, no doubt following the discussions at the meeting, to create a new sub-category, A\*, effectively dividing A into two categories. Category A's funding would continue until the end of its four year period, and category A\* would contain those whose funding would be likely to continue thereafter.

On 14 December the leaders meeting took place. It is this meeting's decisions which are effectively the decisions under challenge, albeit that in terms of the RSG and no doubt others, they were communicated to them by letter about a week later. At this meeting there was an equality impact assessment available. There was a huge amount of paper so the court was informed. The court has upwards of 400 pages of material, including all the responses to the consultation together with reports in summary form for the meeting and a report from Ian Redding on role and scope and a report from Ian Redding and Frank Smith on budget proposals for 2011/12. There was a summary of answers to the consultation by Ipsos MORI, which clearly set out in different ways, in chart and narrative form, the way in which its various questions were answered, according to the type of respondent and whether it was a human or organisational respondent, the ethnicity and so on of the respondents. In summary a very complete analysis of the responses.

It is conceded by Ms Mountfield QC on behalf of the claimants that it is unrealistic to suppose that every member of the Leaders Committee, which consists of the leaders of the Boroughs and City, would have read every single one of the pages and, that they were entitled to rely, to an extent, on summaries such as that in the Ipsos MORI document and in the reports of Mr Redding and his colleague.

It is also right to say, as a matter of record, that as a result of the consultation, or at least in part as a result of the consultation, a decision was made to recategorise a number of service heads from C to A, so that they remain within the scope of the scheme rather than being "repatriated". There were proposals at the meeting by various of the members that a number of other service heads be reinstated back into the programme, but the vote for those proposals was lost.

The two reports from Mr Redding, first of all Role and Scope, dealt with the history of the process so far; referred to input from the strategic monitoring zones; meetings with London funders; the responses from boroughs; issues that had emerged from the Voluntary Sector Forum conference, to which I have referred; the response from the Mayor of London, who had highlighted particular areas and particular voluntary sector organisations as being worthy of consideration for inclusion in category A or A\*; and another summary of responses to the consultation, whether online or written. It repeated what had already been said before on equalities:

"46. Given the nature of the Scheme's focus on addressing disadvantage. It is inevitable that refocusing the scheme's priorities will have an impact on the communities we seek to support. In proposing that the priorities remain within the scheme, members should consider the extent to which they can mitigate any detrimental impact on equalities by focusing on those areas considered most likely to have a positive impact on equalities whilst de-prioritising those that, whilst important, are likely to have a lesser impact in promoting equality and whether to do so would be appropriate in the circumstances."

The proposal on the table thus far, to terminate commissions in categories B and C at the end of March 2011, was suggested to be too soon. It was recommended instead that

commissions should be extended until 30 June so that boroughs could have sufficient time to agree amongst themselves which (and to what extent) services they would take up. At paragraph 70 it asked the Committee to agree:

- "• The Principles for the Scheme as set out in paragraph 43.
- The Priorities for the Scheme as set out in paragraph 45.
- The definitions of categories A-London-wide, B-Sub-regional, C-Regional used to determine the future path the services will follow as set out in paragraphs 48 to 50.
- The categorisation of existing services in the A B C categories as set out in appendix 11.
- The services within category A that will no longer fit within the priorities proposed for the future revised Pan-London scheme, also in appendix 11.
- The process of managed change for services within the categories B and C (Option 3 paragraphs 62 to 65) or:
  - Terminate funding at 31 March 2010 (Option 1: paragraphs 58 and 59).
  - Allow them to continue to time expiry (Option 2: paragraphs 60 and 61).
- The approach to appeals set out in paragraph 68."

On appeals, the recommendation was that there should be no appeal process for organisations "that lose funding solely because of a reprioritisation of the service they deliver". It was pointed out that individual appeals would effectively be on the basis of a vested interest in the appellant to the potential detriment of those not the subject of the instant appeal. The decision of the meeting, contained in the minutes, was that the Leaders Committee agreed:

- "• The principles of the future scheme and the related priority areas as set out in the report. The categorisation of currently commissioned services into A London-wide, B sub-regional, C local in nature categories as proposed in the report.
- The timing of the proposed changes.
- Transitional arrangements to enable the process of change to be properly managed.
- An appeals process was not relevant for organisations affected by the proposed changes."

On 21 December the defendant wrote to the RSG and no doubt all the other organisations in categories B or C informing them that they were in those categories and that their funding would end on 30 June 2011.

On 13 January 2011 permission to bring these proceedings was granted by Lindblom J and on the following day Wyn Williams J ordered that a hearing take place at least by 28 January 2011 so that the process for setting a budget, the last day of which is 31 January 2011, can take place in the knowledge of the court's decision.

As I have said, there are two heads of claim. The first attacks the consultation process. In considering the legal criteria relevant to consultation, I have been referred to a number of cases, in particular the often quoted principles set out in R v Brent London Borough Council ex parte Gunning [1985] 84 LGR 168 at 189.

"First, that consultation must be at a time when the proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third, to which I shall return, that adequate time must be given for consideration and response, and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."

In addition I have taken into account the judgment of the Court of Appeal, Richards LJ, in R(Eisai) v NICE [2008] 11 CCL Rep. 385 at para. 24, R v Secretary of State for Social Services ex parte AMA [1986] 1 WLR 1, and the judgment of Webster J:

"There is no general principle to be extracted from the case law as to what kind or amount of consultation is required before delegation, of which consultation is a precondition, can validly be made. But in any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party. Sufficient, in that context, does not mean ample, but at least enough to enable the relevant purpose to be fulfilled. By helpful advice, in this context, I mean sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implications for the consulted party, being aspects material to the implementation of the proposal as to which the Secretary of State might not be fully informed or advised and as to which the party consulted might have relevant information or advice to offer."

These are similar statements of principle in R(Capenhurst) v Leicester City Council (2004) 7 CCLR 557 and R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213.

In summary the complaints made about the consultation are, first, that the decisions to be made in the end were not clearly identified: in particular, were they about cuts to existing commissions or simply the seeking of information to inform the next round of commissions. Next, that there was no sufficient identification of the reasons for the preliminary categorisation under A, B and C. Next, that there was no sufficient opportunity to comment on the equality impacts, that there was no sufficient explanation of how the consultation would use the categorisations to inform its decisions on funding, and in general terms, that the consultation gave the defendant insufficient time to sort out the various different strands and provide a coherent answer. Consultees were not told that this was their last chance to argue for recategorisation and importantly, in view of my decision in due course, there was no understanding within the consultation document of the possibility of services provided within a service head being considered differently from other services provided within that same head.

It was submitted that the defendant's response to consultation was insufficient; that although of course there were changes made after the consultation, they were changes by topic rather than by any particular consideration of disadvantaged groups within the three Discrimination Acts.

In answer to these submissions Mr Coppel submitted that the Gunning principles had been applied properly - that the consultation was adequate in that it clearly identified the purposes of the consultation, namely the need for London Councils to decide whether and to what extent it continued funding and whether and to what extent services could be repatriated for decision to be taken at Borough level. He submitted that this is not a Capenhurst situation, in which relevant information had been withheld, thus vitiating the consultation. He submitted that the minutes of the meeting following the consultation show that at each level at which the consultation was considered it was properly reviewed; witness the fact that decisions were actually changed both as to allocation into each category and indeed the criteria for the categories. He stated that although time was tight, it was sufficient for the defendant to make a considered and legally sound decision.

In my judgment the first head, failure to clearly identify decisions which the defendant proposed to make, is not made out, with the important exception that throughout the consultation and through to the eventual decision the defendant considered service heads as opposed to individual commissions, or even commissions by class of a protected characteristic.

As far as failure to define terms sufficiently, again I do not find the ground made out. It seems to me that looking overall at the preamble and the questionnaire the terms are clear, albeit the potential effects were perhaps not spelt out as clearly as they might have been. There is no doubt in my mind, having read the responses, that respondents, and in particular the RSG, were well aware of the particular consequences of categorisation. Indeed many of the submissions it made were against the background of the fear that the categorisation of C would mean the end of the funding.

Again, I find against the claimant on the last two heads. As to the failure to explain how the decisions could affect final decisions the defendant would adopt, it seems to

me that reading the documentation and the correspondence, including the correspondence with the Voluntary Sector Forum, of which the RSG is a member, it was perfectly clear what the decisions taken as a result of the consultation would mean so that the consultees were able to make their best case. As far as the timing is concerned, although the timing was necessarily tight, it was sufficient for a good deal of excellent work to have been done collating and summarising the results so that insofar as they were valid and not flawed by any breach of public sector equality duty, proper decisions could be taken.

However, the matter to which I have referred which seems to me to have been a flaw, namely the failure to consider seriously either individual providers within service heads or individual classes of provider by reference to disabled persons, gender or race, carries over into the next complaint.

Insofar as the law is concerned, as Miss Mountfield described in her helpful potted history of this legislation which has created now three public service equality duties, culture within the public services, and of course within the courts, has developed since the memorable words of Sir William McPherson's investigation into the murder of Stephen Lawrence. The shift in attitude away from punishing direct or indirect discrimination to compelling public services to abide by equality duties has generated a good deal of litigation. I refer in particular to the Court of Appeal judgment in R(Elias) v the Secretary of State for Defence [2006] 1 WLR 3212 [274] [297]:

"263...One of the great social challenges of the day is to ensure equality for all persons in accordance with the law. This challenge is comparatively new because it is only relatively recently that the law has expressly provided for the elimination of discrimination on the grounds of race, gender and certain other grounds.

274. It is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation. It is not possible to take the view that the Secretary of State's non-compliance with that provision was not a very important matter. In the context of the wider objectives of anti-discrimination legislation, section 71 has a significant role to play. I express the hope that those in government will note this point for the future."

I also had in mind the judgment of the Court of Appeal, given by Dyson LJ in R(Baker and Others) v the Secretary of State and the London Borough of Bromley [2008] LGR 239 [30]-[32], [36]-[37]:

"31. In my judgment, it is important to emphasise that the section 71(1) duty is not a duty to achieve a result, namely to eliminate unlawful racial

discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to have due regard to the need to achieve these goals. The distinction is vital. Thus the Inspector did not have a duty to promote equality of opportunity between the appellants and persons who were members of different racial groups; her duty was to have due regard to the need to promote such equality of opportunity. She had to take that need into account, and in deciding how much weight to accord to the need, she had to have due regard to it. What is due regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing.

32. In the context of the present case, the areas of the appellants' lives affected by the inequality of opportunity are of central importance to their well-being and the extent of the inequality of opportunity is substantial. As is clearly stated at para 5 of Circular 01/2006, gypsies and travellers suffer the worst health and education status of any disadvantaged group in England and there is a pressing need to promote equality of opportunity in these areas between gypsies/travellers and the general settled community in order to eliminate the problem. Again as recognised by the Circular, an effective way of achieving this is to reduce the number of unauthorised encampments and developments and increase the number of gypsy and traveller sites in appropriate locations with planning permission."

I have also had in mind passages from R(E) v JFS [2008] EWHC (Admin) 1535; R(C) v the Secretary of State for Justice [2009] 1 QB 657; R(Brown) v the Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin); R(Eisai) v NICE [2008] 11 CCL Rep. 385, but in summary, for the purposes of this schedule, I gratefully adopt the words of Rix LJ in R(Domb and Others) v the London Borough of Hammersmith and Fulham (2009) BLGR 843 at paragraph 52. Having himself indicated that the court's attention had been drawn to most of the authorities to which I just referred, he said this:

"For present purposes I take from those summaries in particular the observations that there is no statutory duty to carry out a formal impact assessment; that the duty is to have due regard not to achieve results or to refer in terms to the duty; that due regard does not exclude paying regard to countervailing factors but is "the regard that is appropriate in all the circumstances" that the test of whether a decision maker has had due regard is a test of the substance of the matter, not of mere form box ticking, and that the duty must be performed with vigour and with an open mind and that it is a non-delegable duty."

As far as previous cases and their facts are concerned, for the claimants I am asked to look at in particular the facts and the subsequent judgment in R (Kaur and Another) v

the London Borough of Ealing [2008] EWHC 2062 Admin. That was a case involving the Southall Black Sisters, an organisation which helped women the subject of domestic abuse within the Asian and Afro-Caribbean community. In that case the London Borough concerned had taken a conscious decision, having weighed up what it believed to be the rights and wrongs of commissioning services that the victims of domestic abuse should be dealt with on a whole community basis, and therefore gave notice to the Southall Black Sisters that their funding was to come to an end. In giving the judgment of the court Moses LJ criticised the late appearance of the Equality Impact Assessment, which had only appeared after the proceedings were launched, but also and more importantly he criticised the fact that although there was such an assessment, no doubt conscientiously carried out, it contained an incorrect approach to the statistical data of the incidents of domestic violence, and without going into the details because there were clear flaws within the equality impact assessment, the fact that there had been one, and that it had been conscientiously compiled, did not mean that the Council concerned had paid "due regard" to the impact on the service users of the Southall Black Sisters.

Section 71 of the Race Relations Act provides on this topic:

"(1) Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions have due regard to the need:

- (a) to eliminate unlawful racial discrimination; and.
- (b) to promote equality of opportunity and good relations between persons of different racial groups.

(2) The Secretary of State may by order impose, on such persons falling within Schedule 1A as he considers appropriate, such duties as he considers appropriate for the purpose of ensuring the better performance by those persons of their duties under subsection (1).

The duty to produce a document setting out how a particular public body is going to achieve those purposes is part of the race equality duty. Section 49 A of the Disability Discrimination Act 1995 provides:

"every public authority shall, in carrying out its function, have due regard to -

- (a) the need to eliminate unlawful discrimination and victimisation.
- (b) the need to eliminate harassment of disabled persons that is related to their disabilities.
- (c) the need to promote equality of opportunity between disabled persons and other persons, and.

- (d) the need to take steps to take account of disabled persons disabilities, even where that involves treating disabled persons more favourably than other persons.
- (e) the need to promote positive attitudes towards disabled persons and of the need to encourage participation by disabled persons in public life."

Section 76 A of the Sex Discrimination Act 1975 provides:

- "(1) a public authority shall in carry out its functions have due regard to the need to.
  - (a) to eliminate unlawful discrimination, harassment and victimisation and.
  - (b) to promote equality of opportunity between men and women."

On the other hand, the principal case on its facts relied upon by Mr Coppel representing the defendant is the case of R(Domb & Ors) v London Borough of Hammersmith and Fulham [2009] BLGR 843 from which I have already quoted in general terms. Domb concerned a local authority which exercised a statutory power to charge for home care services. The complaint was made that the decision to charge did not take due regard of two of the three equality duties; the race and gender equality duties. Examining the facts of that case and upholding the first instance judge's decision that there had been no judicially reviewable breach by the local council, makes it clear, in Mr Coppel's submission, that what the Discrimination Acts are concerned with is process rather than outcome. Provided a proper process has been embarked upon, then the outcome is not a matter for judicial review. If the outcome results in direct or indirect discrimination against a person or persons, then they can take appropriate action against the body who has discriminated against them, but provided the proper process has been followed no judicial review should be allowed against a public authority.

The evidence in this case, he submits, is that all proper steps have been taken up to and including the equality impact assessment and its consideration by the leaders committee. As set out by Mr Lester in his statement on behalf of the defendant, this resulted in an overall decision that financial considerations had to outweigh the considerations of detrimental impact on various protected groups.

The duties are fundamental duties. They were introduced into law with all-party support and they now form a crucial part of any public body's make up. "Due regard" I have taken from the judgment of Davis J in R(Meany) v Harlow District Council [2009] EWHC 559 (Admin) at paragraph 72:

First, the statutes require that the public body has "due regard" to the specified matters; and what is "due" depends on what is proper and appropriate to the circumstances of the case. Therefore, if a challenge is made, the question of due regard requires a review by the court. It is not

simply a question of determining whether no regard at all was had to the statutory criteria. Second, if the submission of Mr Holbrook were right it would be contrary to the authorities, which indicate that a tick box approach may not necessarily in any given case give a complete answer. It is true that, as Baker and Brown make clear, how much weight is to be given to the countervailing factors is a matter for the decision maker. But that does not abrogate the obligation on the decision maker in substance first to have regard to the statutory criteria on discrimination."

In a case where large numbers of vulnerable people, many of whom fall within one or more of the protected groups, are affected, the due regard necessary is very high. The complaint is made that the impact on protected groups was not considered early enough, in particular when officers proposed and the committees agreed, in considering both budget and role and scope by dealing with service heads and not in any other way, that following the replies, many of which in fact highlighted the problems caused by the categorisation by pointing out, particularly in the case of the claimant, its particular focus on a particular ethnic minority, no sufficient account was taken at that stage to comply with the duty. Indeed, it is submitted that it is only really after the letter before action was sent and received that equality started to play a significant role, and that even then the defendant never got to address the issue properly, in spite of the matters raised by the Voluntary Service Forum, by the claimants in their letter before action and claim, by the response from the Mayor of London, and by comments by individual councillors as to particular services. The categorisation was never revisited in such a way as to comply with the equality duties, including the positive duty as far as disabled persons are concerned. Therefore there was a likelihood, and still is, that dealing with things purely by way of the 69 heads would have a detrimental impact on one or more protected groups. In another argument which effectively makes the same point, the claimants rhetorically ask the question posed by the Code of Practice on the race equality duty at paragraph 3.16:

"3.16 To assess the effects of a policy, or the way a function is being carried out, public authorities could ask themselves the following questions.

- A. Could the policy or the way the function is carried out have an adverse impact on equality of opportunity for some racial groups? In other words, does it put some racial groups at a disadvantage?
- B. Could the policy or the way the function is carried out have an adverse impact on relations between different racial groups?
- C. Is the adverse impact, if any, unavoidable? Could it be considered to be unlawful racial discrimination? Can it be justified by the aims and importance of the policy or function? Are there other ways in which the authority's aims can be achieved without causing an adverse impact

on some racial groups?

D. Could the adverse impact be reduced by taking particular measures?

E. Is further research or consultation necessary? Would this research be proportionate to the importance of the policy or function? Is it likely to lead to a different outcome?"

They ask the court to consider the actual results as bearing out the complaints made. It in fact turns out that on the defendant's own figures in appendix 12, where the service heads are listed and said to be targeted at all communities or particular groups, the services said to be targeted at all communities or categories other than race, sex or disability are disproportionately now categorised as A rather than those now categorised as B or C. Some 70 per cent of those with a preliminary categorisation of B or C are regarded by the defendant itself as being targeted primarily at protected groups, whereas only 38 per cent of those categorised as A were so regarded.

Mr Coppel submits, as I have already indicated, that the court must look not at the result, but at the process. He submits that one can find within the papers indications that attention was drawn to possible alternative categorisations. I have gone through the documents already and I have not found evidence to support that, albeit the respondents to the consultation themselves, naturally, focussed upon their particular area, and in the case of RSG on the plight of Roma children. Although there are references in the documents to the 'commission', which would of course mean commission of a particular organisation to provide a particular service, the whole process was dealt with from start to finish by service heads, which, as is conceded on both sides, were not created with protected groups in mind. They were quite different categories, so within different service heads there may be services targeted at protected groups and services targeted at the community at large, or indeed not at protected groups.

He submits further that there is no need for a defendant to justify a decision, provided it has paid due regard and that the weight to be attached to the equality duties is for the decision maker to weigh up, subject of course to Wednesbury principles. In that respect I agree, however I do find that the flaw that I have identified, which puts this case in the Kaur category in my judgment, is such that the process was vitiated from the outset, and was never put right. Further, it was submitted that in fact, as I have indicated from some of the documents it was suggested, actually the task of carrying out the impact assessment should be for the boroughs, who will have to make decisions on whether services no longer to be funded by the defendant will be funded at all, and if so to what extent. Of course that is correct if it happens, but it is in my judgment still incumbent on the defendant, as again Mr Redding made plain in some of the earlier documents, to carry out themselves such an assessment, bearing in mind the likelihood that their decision will likely bring an end to the services to many protected persons.

Accordingly I find that the consultation was properly carried out, subject to the flaw I have identified, which would not, had it purely been a question of proper consultation,

have vitiated the consultation. That flaw, however, permeates through to the second complaint as far as the equality duties are concerned.

So far as remedy is concerned, Mr Coppel submitted that in view of the possible consequences and in view of the narrow way in which he submits the claim has been brought, any remedy should be confined to the claimants and the RSG.

I have considered that tempting suggestion carefully. However, I have come to the conclusion that my finding means that it is the process which was flawed, and that the claimants are entitled to a declaration that the defendant breached its public service equality duties by failing to give due regard to the need to eliminate unlawful discrimination, promote equality of opportunity and to promote good race relations in performance of these functions. That entitled it to an order quashing the decisions, save and except any decisions in respect of providers of services who may have consented to the decision in their case, which terminated their funding as from 30 June 2011, and an order requiring the defendant to carry out a proper equality impact assessment in the performance of its duties, which considers service providers either by heads of protected characteristics or by individual provision, or perhaps by the institution of an appeal process, or otherwise fairly, and not to cut off funding to any such service provider before three months from the decision to do so have lapsed.

My provisional view, subject to anything counsel want to say on costs, is that the defendant should pay 60 per cent of the claimants' costs in view of the limited finding in the claimants' favour, and to order an assessment in the normal way of the claimants' costs for the purposes of public funding.

MR COPPEL: My Lord, as far as the question of relief is concerned, and what should be quashed and what consequential orders should be made, I have not yet had the opportunity to make submissions on that, and I know --

MR JUSTICE CALVERT SMITH: That is what I propose to order. Would you like 7 days to come back on paper? It is a bit hard to ask you to do so now.

MR COPPEL: My Lord, I saw the note this morning and I did make some points to my learned friend. Can I make some brief points to my Lord now?

MR JUSTICE CALVERT SMITH: Of course you can, but please feel free, if you want some time.

MR COPPEL: I will take instructions, my Lord.

MR JUSTICE CALVERT SMITH: I think you have had sufficient opportunity to mount -- because you did it on paper -- the submission that I should confine myself to RSG.

MR COPPEL: Yes, I don't seek to come back on that.

MR JUSTICE CALVERT SMITH: And if there are particular matters which are not going to go against the basis of my decision which might make matters simpler for both

parties I would be very happy to consider them, obviously I have gone out on a limb, I have not done what you ask for.

MISS MOUNTFIELD: I am extremely grateful for that, my Lord. There is a point on relief I want to make, my Lord, given the time of day perhaps I should do it in writing, I have tried to do it in writing, but perhaps not clear enough. Our concern is that unless the decision is quashed include the consequent budgetary decision we end up with in effect relief being cut off. The budget is £12 million less --

MR JUSTICE CALVERT SMITH: It seems to me the London Councils are going to have to work that out for themselves. They have to continue funding, if they obey my order, until they have carried out another assessment which cures the defects which I have found there to be, and to continue funding for 3 months after. What effect that has on budget, whether they will have to go back to council, or whatever, that is a matter for them, is it not?

MISS MOUNTFIELD: The problem is -- I don't know if you saw the note I sent this afternoon.

MR JUSTICE CALVERT SMITH: I did.

MISS MOUNTFIELD: The problem is that unless the headline budget is deemed to be the last year's budget the whole thing goes off into an irresolvable mess. Some people say no, we have already approved that budget, we are not approving any more.

MR JUSTICE CALVERT SMITH: Mr Coppel is convinced that his client can simply rejig the budget, that is what he told me yesterday, it seems to me he probably knows more about the way his client works than I do.

MISS MOUNTFIELD: The budget has been cut by almost 50 per cent, I understand the majority of that is --

MR JUSTICE CALVERT SMITH: Yes. It is now going to have to find money, at least temporarily, whilst it carries out its reconsideration to fund your client, which I presume is all you are really concerned about, and others, who may be affected, until certain things have happened.

MISS MOUNTFIELD: But my Lord, the consequence of that may be, suppose it took until 6 months from today, which may be realistic --

MR JUSTICE CALVERT SMITH: I was thinking of saying end of October.

MISS MOUNTFIELD: If it took the time.

MR JUSTICE CALVERT SMITH: Would you please just let me finish.

MISS MOUNTFIELD: I am so sorry, my Lord.

MR JUSTICE CALVERT SMITH: I did think of putting a time limit, and then I saw your note and thought well, 3 months from whenever they make their decision is probably safer. It is up to them to get it through as quickly as they can, sorry I interrupted you.

MISS MOUNTFIELD: The difficulty with that, my Lord, is that all the funding agreements are subject to funding being available. If it took 6 months, which I think is probably realistic to make the decision, that would use up almost everything in the budget, on my solicitor's calculation the budget, if everyone went on being funded, would be used up by the end of November. Consequently, when they came to make decisions of what to do for the rest of the year for future commissioning, there would be no money and the possibility of saying we need to rethink the budget and perhaps repatriate less would not be open to them. That was why I was keen not to lose the deeming mechanism, although as I have always said, it would be of course open to them to say the headline budget may be £30 million, we cannot possibly and will not spend that much and we will spend whatever that may be.

MR JUSTICE CALVERT SMITH: They are bound to say that, there is no money, no money in the bank. The only question is was this initial decision made fairly as between groups who are subject to Discrimination Acts protection and those who are not, and I found that the answer was no, it was not. In the end that decision is going to be made, and then in the end it is going to be down to boroughs when a fair decision is made to decide whether the funding which has stopped following that is to be continued by them or not, so that will be done to the boroughs in any event, will it not, rather than down to this defendant's budget.

MISS MOUNTFIELD: Yes, but the budget being set -- well, my Lord, you have my submissions, the boroughs cannot, are very constrained in what they can possibly reconsider, unless the ring is held by there being a budget, and the budget having been quashed, there is no mechanism for them to be forced to agree a budget unless the decision is deemed to have been taken at the appropriate time. Since you have my submissions on that and Mr Coppel says he has things to say on that submission.

MR JUSTICE CALVERT SMITH: Yes.

MR COPPEL: Well, my Lord, yes, there is the question about the construction of the legislation, which we heard yesterday. Obviously it is not essential for my Lord to rule upon that, but it would be --

MR JUSTICE CALVERT SMITH: On the budget issue?

MR COPPEL: Yes, as to whether the legislation is triggered if -- I am sorry, as to whether given that the budget has been approved.

MR JUSTICE CALVERT SMITH: I don't think I have seen anything, frankly, until about this afternoon in writing on the legal implications, I would have had to do that very much on the hoof, and I am very unwilling to do it.

MR COPPEL: My Lord, it seems to me, with respect, that there are a number of issues which arise as to relief, both on our side and on my learned friend's side, and it may be that we do need to have either some short further argument or some written submissions.

MR JUSTICE CALVERT SMITH: You did indicate to me that it was actually only in the last week or so that the budgetary position had clarified, ie 24 of your 32 had actually passed it.

MR COPPEL: Yes.

MR JUSTICE CALVERT SMITH: Well, that was not part of the original JR, it could not have been, because it had only just happened. That is the decision, is it not?

MR COPPEL: Well, the decision which --

MR JUSTICE CALVERT SMITH: Because if 24 had not actually voted in the end, whatever the Leaders Committee had said, there would not have been a budget and we would have been back to 2009/10.

MR COPPEL: Yes, but this judicial review challenge, and what you have been asked to quash, and I think what you propose to quash, is the decision of the Leaders Committee recommending the budget to the member authorities. Now, that recommendation was taken up and approved by the requisite number so we say -- and the argument which I raised at the hearing yesterday for the first time, I accept -- is that the budget has been approved, the legislation deeming last year's budget does not come into play. If you quash the decisions which you have been asked to quash then we will have to reconsider the budget, to reconsider what to recommend the budget to be.

MR JUSTICE CALVERT SMITH: Yes, quite.

MR COPPEL: But we will do that in an environment where the previous year's budget has not been forced upon us, and it would be --

MR JUSTICE CALVERT SMITH: So what you are saying to me is that you would prefer me to quash the decision having gone as far as I have, because that would enable you --

MR COPPEL: No, my Lord, I would prefer you not to quash the decision.

MR JUSTICE CALVERT SMITH: No, but having gone as far as I have, are you suggesting that it is going to make life simpler for you?

MR COPPEL: No, I am not, my Lord.

MR JUSTICE CALVERT SMITH: I thought you were.

MR COPPEL: If you accept my learned friend's submission that the budget recommendation of London Councils must be quashed, which I have to say was

nowhere in the claim form, nowhere in the amended claim form, nowhere in the skeleton argument, it was only raised at the hearing yesterday, if you take the decision to quash the budget recommendation as opposed to how the budget is to be divided up, which I think is the focus of your decision, then the issue arises as to how the legislation applies, are we then, as of midnight on Monday, stuck with last year's budget or are we free to reconsider a new budget. If, however, your decision is, as I think you have just said, that the budgetary recommendation and therefore budgetary approval is valid, we have to look again at how that budget is divided up, then the issue of legislation does not arise and I will sit down, but it does depend on whether you accept my learned friend's submission that the budget itself should be quashed or my submission that in the light of what you have said in your judgment what you should quash is the way in which the decisions as to the way in which the budget is divided up, the categorisations and so forth. There are several discrete decision of the Leaders Committee in the minutes. It is quite possible to quash the decision relating to categorisation on the basis that that was not properly consulted upon, that was not properly considered, but not to quash everything else.

MR JUSTICE CALVERT SMITH: Quite.

MR COPPEL: But my Lord, it may be that you do not want to rule on this today, or you wish to have submissions.

MR JUSTICE CALVERT SMITH: Yes, well Miss Mountfield it seems to me that -- and I am very happy to have further submissions in writing -- because this question of consequence as to the budget, it does not seem to me to be a matter for me, indeed they only arose quite recently. The question was how fair was the process and did it comply with the duties under the various Acts. The answer is it did not. The actual budget itself does not seem to me to be really a matter for me to decide, particularly, if I may say so, because of the vagueness of what the actual consequences may be, which are not being fully argued.

MISS MOUNTFIELD: My Lord, I certainly intended to criticise all the decisions made, at least in this respect: under items 3 and 4 of the agenda, and that is what I sought to clarify in my reply skeleton argument, saying we were not confining to the decisions on the Roma Support Group, look how we put it, the decision is 14 December. It is true that how this argument has played has changed over time, partly because, as we perceived it, the defendant started saying there is a prematurity argument, and then said there is a practical difficulty, because we are getting close to the budget date we could not possibly re-approve a budget and then said on the morning of the hearing, very shortly before the hearing started -- this is no criticism of Mr Coppel, this is a reflection of the chronology, that I had an email from him just before court yesterday saying the 24 councils had approved, and their understanding of it was that if you were to quash the budget the redeeming provision would therefore not apply; because the 24 had approved, it would not be that there was no approved budget by the date, it would simply be there is no budget and then we would go back to the budget, and then the opportunity to (inaudible) my concern of that was put in the note this afternoon. I appreciate you are being bombarded with new points as they come up, but the problem is that it is not possible to put us back in the position we had been in on 14

December, where if there is, can I put it this way, an almighty argument as to whether the cuts should be borne by London Councils' grant scheme or at the borough level, whatever it may be, London simply do not agree a budget, London Councils is left without a budget and without any money to pay and there is no guillotine mechanism because it is not within X days of the budget being presented for recommendation, 31 January, and the rest of the local government budgeting process goes on, the boroughs have to set their budgets, for which they need to know what the top line levy they might have to pay London Councils is, and that is why my preferred solution is to say there is in fact no valid budget approved by two-thirds of the defendants by 31 January because of the errors of law which vitiated this budget, there was nothing lawful for the boroughs to, approve. Consequently there has not been a decision, and there should be a redeemed budget of £30 million, but I make it absolutely clear that that does not mean we would in any sense suggest it was unlawful, the boroughs said we still take the view that most of this should be repatriated, we want it to be a lesser level, now look at how it is shared.

MR JUSTICE CALVERT SMITH: I understand you are putting it the way you put it yesterday, I think I have the point and Mr Coppel raised -- again, there is no evidence one way or the other about this before me -- the practical difficulties about that solution, which did not mean quite what Miss Mountfield said; well, you know, you get a budget of £30 million, but you need only spend £13 million, in the end, however much you originally decided if you come to the conclusion that X or Y, and you said that it does not work that way. It is no use saying it to me at 5.30 on a Friday afternoon without any papers, law or anything to help me make my mind up. Can I ask you to put it in writing with submissions, because this cannot be the first time that a court has inconveniently intervened about the time a budget is being set, it is just not being over familiar with this jurisdiction, I cannot simply call to mind all the cases which might assist me on this topic. If it be that the only fair way of effectively carrying out my decision is to grant the order which actually was asked for in your skeleton argument, to be fair to you, it is not a late arrival, the decision is the order you asked for. If that is the only fair way of dealing with it, I will deal with it, but I think I want it see on papers why it is that that is not necessary. It would also help, Mr Coppel, if the practical implications of my decision, as it currently stands, are taken on board and addressed by you, because on the contrary it does mean that the result is that your budget will run out in the middle of year and you will simply be able to say to every single provider, whether category A, B, C, sorry no more money, then I need to know that.

MR COPPEL: That certainly is not the position.

MR JUSTICE CALVERT SMITH: I am sure it would not be.

MR COPPEL: I am --

MR JUSTICE CALVERT SMITH: Both sides are contending for quite extreme difficulties from their side, and if I may, perhaps within 7 days, because you do need to get on with it.

MR COPPEL: My Lord, there is a concern behind me that the meeting at which levy has to be set is on 3 February.

MR JUSTICE CALVERT SMITH: Which is?

MR COPPEL: Thursday next, Of next week.

MR JUSTICE CALVERT SMITH: If you can get me stuff on Monday I will look at it then.

MISS MOUNTFIELD: My Lord, I may need to reply, I could do that on Tuesday, I suppose, or Wednesday.

MR JUSTICE CALVERT SMITH: A the latest Tuesday. Monday is a day on which I know I am going to have a little time, I think, to consider things in the afternoon, if it runs according to what I think is going to happen.

MR COPPEL: Can we say by 1pm on Monday?

MR JUSTICE CALVERT SMITH: And electronically, please, to my clerk, and I will make sure you have the address.

MISS MOUNTFIELD: May I have a chance to reply, because if Mr Coppel comes up with some new law which I have not thought about.

MR JUSTICE CALVERT SMITH: Yes, and he will want to reply back. You have put in lots of replies.

MISS MOUNTFIELD: We do need a sequential point of view. If he is going to raise a new point I must be able to deal with it, it is only natural justice that I can respond if he raises a new argument that has not been raised before at 1 o'clock Monday, I must have some time to respond.

MR JUSTICE CALVERT SMITH: Well, do the best you can. If the meeting is when, 4 o'clock, or in the morning?

MR COPPEL: 1 o'clock on Thursday.

MR JUSTICE CALVERT SMITH: 1 o'clock on Thursday. Can you get something to me by lunchtime Monday, 1 o'clock, and of course to Miss Mountfield?

MR COPPEL: Yes, indeed.

MR JUSTICE CALVERT SMITH: Can you respond by the end of the day or are you in court?

MISS MOUNTFIELD: I am not in court, I have a Court of Appeal deadline, but I can do it, provided I can deal with the point in however many hours that is, obviously I will do my best, my Lord.

MR JUSTICE CALVERT SMITH: All right, I will let you have the result on Tuesday. So at least you will know where you stand.

MR COPPEL: My Lord, I am very grateful.

MISS MOUNTFIELD: My Lord, we are very grateful to you for giving judgment.

MR JUSTICE CALVERT SMITH: There are lots of mistakes.

MISS MOUNTFIELD: Shall I put them in writing as I might do with a written judgment?

MR JUSTICE CALVERT SMITH: What I was thinking of doing was getting the transcript, sending it out to you both, because there are bound to be corrections, and I know I got page numbers wrong, and names, and even other things. So if I could ask you both, but that could take place rather slower rather than this stuff, I will get the draft transcript, I will make corrections as I can see and send it out to the two of you.

MISS MOUNTFIELD: We are very grateful to you.