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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MID-ULSTER DISTRICT COUNCIL FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT FOR COMMUNITIES

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Peter Oldham KC and John Maxwell (instructed by PA Duffy & Co, Solicitors) for the applicant
Paul McLaughlin KC and Peter Hopkins KC (instructed by the Departmental Solicitor's Office) for the respondent

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SCOFFIELD J

Introduction

[1] By these proceedings, Mid Ulster District Council (MUDC) ("the Council") challenges the decision of the Department for Communities (DfC) ("the Department") to set its 2022/23 rate support grant (RSG) budget at £8.924m. The decision was notified to the Council on 22 December 2022, along with notification of its and other councils' shares of that budget.

[2] RSG is a discretionary funding stream provided by the Department to district councils in Northern Ireland to supplement their resources in order to assist in councils' provision of public services. The Council's underlying complaint is that, by the decision under challenge, the Department has failed to provide adequate resources to it. The RSG budget provided for the 2022/23 financial year represented a significant reduction compared with previous years. All councils in Northern Ireland were informed of the RSG allocations for that financial year on 22 December 2022, that is mid-way through the year. (For local government finance purposes, the financial year runs from 1 April to 31 March). It is common case that the allocation formula – by which the overall budget is shared out between eligible

district councils – was correctly adhered to by the Department. The challenge is solely to the decision setting the overall amount as the RSG budget for 2022/23.

[3] The applicant relies upon four central grounds of challenge. First, that the Department's decision was irrational; second, that the Department failed to discharge its obligations under section 1 of the Rural Needs (Northern Ireland) Act 2016 ("the 2016 Act"); third, that the Department failed to discharge its obligations under section 75 of the Northern Ireland Act 1998 (NIA); and, fourth, that the Department failed to consult with the Council prior to making its decision. Leave to apply for judicial review was initially granted on the first, second and fourth of these grounds. A short hearing was convened in relation to the question of whether leave should be granted on the third ground and, for reasons explained further below, leave was granted on that ground also.

[4] Mr Oldham KC and Mr Maxwell appeared for the applicant. Mr McLaughlin KC and Mr Hopkins KC appeared for the Department. In addition to the materials provided by the Council and the Department, the court also received a written intervention from Derry City and Strabane District Council (DCSDC), which provided a written intervention. I am grateful to all parties for their helpful written and oral submissions.

Factual background

[5] The facts forming the background to the present application, by and large, are not the subject of dispute. What follows below is summary of the key facts relied upon by each party. More detailed discussion of some of the evidence appears in the court's consideration of the various grounds of challenge.

[6] The allocation of RSG to councils takes place each year. The overall amount of RSG to be made available is discretionary, but that amount must be apportioned as between district councils following a formula set out in secondary legislation (see further below). In previous years, the amount of RSG ultimately allocated by the Department had been higher, in some cases significantly so. However, for the financial year 2022/23, the Department, facing budget constraints and the additional pressures of a collapsed Executive, came to the decision to reduce the RSG budget.

[7] MUDC was formed in April 2015 in the course of local government reorganisation in Northern Ireland. Annual RSG allocations had been made to its predecessor councils for some years prior to this and continued to be made to MUDC from 2015 onwards. The applicant's deponent, Mr Tohill, the Council's Strategic Director of Corporate Services and Finance, has averred that the average total RSG for the financial years from 2011/12 through to 2021/22 was some £18.7m. The applicant compares that unfavourably to the impugned allocation of £8.924m. As appears further below, there is some dispute as to how the relevant figures should be approached. As is often the case with statistics, each side is able to present them in a manner which most suits their case.

[8] It is important to note in the context of this claim that, on 3 February 2022, the First Minister resigned and the Northern Ireland Executive collapsed, albeit a number of Ministers remained in post in a caretaker capacity for some time thereafter. A few days later, on 6 February 2022, the Council set its budget and struck the rate for the incoming 2022/23 financial year. (15 February 2022 was the final date for councils to strike rates for 2022/23.) Shortly after this, the Council submitted its rates return to the Department, showing its own estimate that it would receive £3.043m in RSG in the 2022/23 year. This formed part of the Council's statutory estimates required under the Local Government Finance Act (Northern Ireland) 2011 ("the 2011 Act").

[9] Around the same time, on 18 February 2022, the Finance Minister set the regional rate for 2022/23. On 8 March 2022, the Department augmented the initial May 2021 distribution of RSG, adding £10m to the RSG budget for the 2021/22 financial year, just at the tail-end of that year.

[10] Consideration then had to be given to the budget for the incoming financial year, 2022/23, with which these proceedings are centrally concerned. On 14 March 2022, a submission was provided to the Minister with responsibility for the Department ("the DfC Minister") in relation to the budgetary pressures which the Department was facing. On 14 April 2022, the Department of Finance (DoF) advised the Department to begin contingency budgetary planning for 2022/23 based on a budgetary envelope of £827.549m. On 5 August 2022, a submission was provided to the Permanent Secretary of the Department identifying "resource pressures" (funding shortfalls) of some £74.5m. A number of potential costs-saving measures were proposed, including that the RSG budget could be reduced by £4m (scalable up to £6m) for the opening budget for 2021/22. The Department's evidence provides a range of detail about its consideration of a variety of potential costs-saving measures during this general period.

[11] On 27 October 2022, the Department wrote to district councils permitting Covid reserves (unspent funds which had initially been provided to councils to deal with pressures arising from the coronavirus pandemic) to be released for general use. On the same date, the devolved administration in Northern Ireland ceased operating with the remaining ministers leaving their posts. Decisions thereafter became the responsibility of the Permanent Secretary of the Department rather than, as would usually be the case, a Minister in charge of the Department. On 31 October, the Department enquired of councils what Covid reserves they had held as at 31 March 2022.

[12] The applicant contends that, in early November 2022, the Department decided to allocate and distribute only £8.924m by way of RSG funding in 2022/23 but that district councils were not informed of this at that point. (There is some support for this in the respondent's evidence although, as appears further below, additional evidence provided by the respondent after the hearing in the case makes

clear that the "final" decision in this regard was taken only in mid-December.) At the same time, the Department itself had been informed that no additional funding would be made available to it in order to meet the budgetary pressures it faced. On 24 November 2022, the Secretary of State for Northern Ireland (SSNI) announced the 2022/23 budget for Northern Ireland Departments, since this was being set by the UK Government in the absence of the local administration, although the relevant figures had been trailed with the local departments in advance.

[13] On 8 December 2022, the Finance Working Group – a group which brings together finance officers from district councils and relevant Departmental officials – was informed that no final decision on RSG allocation had been made, although it is now evident that the Department's position was pretty clear internally at that point.

[14] The Department completed its equality screening form for the RSG budget allocation for the 2022/23 financial year on 14 December 2022. The content of this form has featured heavily in the third of the applicant's grounds of challenge; and I return to it below. Mr Carleton's second affidavit – sworn, filed and served after the hearing in this case – provided additional documents in relation to the decision-making around this point, as described below.

[15] In particular, on 6 December 2022 there was a presentation to the Top Leadership Team (TLT) of the Department concerning resource reallocation options for the 2022/23 financial year. This involved a meeting of that team with finance officials from the Department. A submission was provided to the Permanent Secretary on 20 December which provided the decision-making template on the RSG budget for 2022/23 for consideration and approval. This submission was dated 16 December but was sent to the Permanent Secretary four days later on 20 December. The Permanent Secretary's approval of the recommendation to pay an opening RSG budget of £8.924m was provided the next day, on 21 December, by email.

[16] On 22 December 2022, the Department informed councils of the RSG budget and RSG allocations for the 2022/23 financial year. This is the decision under challenge in these proceedings and it was the correspondence of 22 December which prompted the Council to take legal action. As I have said, the Council maintains that, in reality, the decision was made in substance some time earlier. In any event, the correspondence of 22 December, insofar as material, was in the following terms:

> "2. The Secretary of State released a Written Ministerial Statement on 24 November 2022, setting the Northern Ireland Budget for 2022/23. Following on from this Statement the Department's budget for 2022/23 has now been agreed and as a result the RSG for 2022/23 will be £8.924m. This allocation has been considered in the context of the wider budgetary position affecting the Department for the 2022/23 financial year. While this is a reduction in comparison to last year's opening position,

> significant RSG funding of £10m was provided in year during 2021/22 to provide ongoing support to councils.
>
> 3. The RSG allocation for each council is detailed in the attached Annex. The total allocation due to Councils will be paid in January 2023."

[17] On 23 January 2023, the Permanent Secretary of the Department wrote to political party leaders concerning the reduced RSG budget and council funding more generally. I return to that letter below. On 6 February 2023, the Council struck its rate for the 2023/24 financial year, increasing the rate at least partly as a result of the reduction in RSG funding which was to be made available for 2022/23. Two days later, on 8 February 2023, the Permanent Secretary of the Department wrote to council chief executives stating that the letter of 23 January 2023 to party leaders "outlines the reasons" for the £8.924m RSG budget for 2022/23. Following pre-action correspondence, these proceedings were later issued.

Relevant statutory provisions

[18] RSG is provided for by section 27 of the 2011 Act. Section 27(1) provides that:

> "The Department shall for each financial year make a grant under this section to councils (unless in any particular case the amount of the grant would be nil)."

[19] By section 27(2), the grant so made is known as the "rates support grant." Section 27(3) provides that, "The amount of the rates support grant payable to a council for any financial year shall be determined in accordance with regulations and shall not be reduced during the financial year." By section 27(5), regulations under section 27 may in particular make provision for the amount of RSG to be calculated by reference to a formula and for determining the manner in which (and time at which) that calculation is to be made. Pursuant to section 27(6), the formula may be such that the amount payable is nil. It is common case that there is an obligation to make a grant of RSG but that there is budgetary discretion as to the amount and that, in respect of some councils, the result of the application of the formula may be that no grant is payable. Indeed, several councils have never received RSG.

[20] Regulations have been made under section 27 in the form of the Local Government (Rates Support Grant) Regulations (Northern Ireland) 2011 (SR 2011/375) ("the 2011 Regulations"). Regulation 3 provides that, for the financial year beginning on 1 April 2012 and each successive year, the Department shall determine the amount of RSG in accordance with the formula described in Schedule 1 to the Regulations. The formula there set out (which is essentially designed to assess a council's net wealth) is as follows:

$$\left\{\frac{\text{Council gross penny rate product}}{\text{Northern Ireland gross penny rate product}}\times 100\right\}-\left\{\frac{\text{Council home population adjusted}}{\text{Northern Ireland home population adjusted}}\times 100\right\}=\text{Surplus or negative variance}$$

[21] A number of the elements of the formula are further defined; but it is designed to take account of factors such as the relative wealth, needs, population, deprivation and sparsity within each council's district. The parties agree that the allocation of the budget for the 2022/23 year properly followed this formula. The applicant's case therefore does not consider the allocation or distribution of the overall budget. Rather, it relates to the setting of the entirety of the overall RSG budget. In addition to section 27 of the 2011 Act, there are a number of other statutory provisions which are relevant to the present case.

[22] Section 3 of the 2011 Act provides for district councils' annual budgets. In each financial year, a council must cause to be submitted to itself estimates of its income and expenditure in the next financial year. Before the prescribed date in each year – which, by virtue of regulation 3 of the Local Government (Capital Finance and Accounting) Regulations (Northern Ireland) 2011, is 15 February each year – each council must, amongst other things, consider the estimates for the next financial year, approve them, and authorise the expenditure included in the estimates. In short, each council should set an annual budget. As part of this process, the council must fix for the next year the amount estimated to be required to be raised by means of rates made by the council: see section 3(2)(e) of the 2011 Act. The council is then limited to incurring expenditure authorised in the budget, unless it otherwise grants prior authorisation for the expenditure or necessarily incurs expenditure in circumstances of emergency: see section 3(3). The estimates contained in the draft budget must be the subject of a report from the council's chief financial officer as to their robustness: see section 4. Councils must also make their district rate for the next following year by 15 February each year (see regulation 2 of the Rates Regulations (Northern Ireland) 2007).

[23] Section 26 of the 2011 Act makes provision for a de-rating grant (DRG). This is a grant to compensate councils for the loss of district rating income as a consequence of the statutory de-rating of certain properties. The Department must each financial year make grants to councils of DRG (unless in any particular case the amount of the grant would be nil). The amount of DRG is to be an amount equal to the difference between the amount of the product of the district rate for that year and the amount which, but for certain provisions within the Rates (Northern Ireland) Order 1977, would have been the amount of that product. By section 26(5), payments in respect of DRG shall be made to a council at such times as the Department shall determine.

[24] Section 27A makes provision for a transferred functions grant (TFG). This is a grant payable to 'new' councils (within the meaning of Part 2 of the Local Government (Miscellaneous Provisions) Act (Northern Ireland) 2010) to support them in the delivery of new functions which were transferred as part of the local government reforms in 2014-15. The Department must for any prescribed financial

year make grants to such councils, with the amount of TFG payable being the amount equal to the difference between the amount of the product of the district rate for that year (so far as it relates to the rateable net annual values of the hereditaments in the district of that council) and the amount that would have been the amount of that product if the total of the rateable net annual values of the hereditaments in the district had been increased by a prescribed amount. Again, payments of TFG shall be made to a council at such times as the Department may determine.

[25] The respondent also drew my attention to section 28 of the 2011 Act, which provides for reductions in grants made under sections 26, 27 or 27A. I did not consider this particularly relevant since it applies only when the Department is satisfied that (in terms) the council concerned has failed to discharge its functions with reasonable economy and efficiency or has indulged in excessive expenditure.

The objective of RSG and its historical provision

[26] RSG was devised to assist councils which experienced difficulty in delivering some public services or doing so to similar standards as in other council areas. Its purpose is understood to be to supplement the resources of councils which are relatively 'rates poor' compared with others. It is a general-purpose grant which, both historically and presently, has not been limited to any particular purpose.

[27] As mentioned above, the Department has a discretion as to the amount of RSG, if any, which it distributes. However, it has consistently set a RSG budget for many years. The same seven councils (of the current eleven district councils in Northern Ireland) have received the grant every financial year since local government area reform in 2015.

[28] In his grounding affidavit, Mr Tohill explains that RSG was designed so that recipient councils could deliver services "on a par" with relatively wealthier councils. This characterisation is disputed in the Department's responding evidence, sworn by Mr Carleton (the Department's Director of Local Government and Housing Regulation). Mr Carleton instead avers that "while the statutory purpose of RSG is to assist councils which might otherwise experience difficulties in the delivery of high quality public services, achieving 'par' is not the statutory purpose, nor is it a mandatory outcome." Rather, the entitlement to receive any RSG payment and its percentage of the overall RSG budget is determined by means of the statutory formula. It is not necessary to seek to resolve this difference of view. However, it is of interest to note the divergence in outlook between the parties as to the purpose of the grant. Strictly speaking, the respondent is likely to be correct that the outcome of the allocation process is not required to place recipient councils on a par with wealthier councils. At the same time, the purpose of the grant is plainly to 'level up' the resources available to councils in receipt of less rates income for the provision of adequate public services.

[29] In terms of its historical provision, the RSG budget has, since 2015 (the year local government reforms came into force, although the provision of RSG predated those reforms), been relatively consistent. In the financial year 2015/16, the Department set aside £18.3m in RSG. The lowest figure was in 2019/20, when £15.865m was set aside for RSG; the highest was in 2020/21, which saw councils share an overall £22.8m RSG budget.

[30] The picture is, however, more complicated than those headline figures may suggest. In particular, there are two points which should be noted. First, not all councils receive RSG: only those with a negative variance applying the formula set out above will receive this form of grant funding. Second and more importantly for present purposes, the overall figures referred to above were not always the *opening* RSG allocation provided by the Department. Rather, in many years, the opening budget was revised upwards in-year, so that the total allocation turned out to be greater than the original figure offered or set aside by the Department. In fact, the original allocations were 'topped up' on four occasions between 2015/16 and 2022/23. The most significant top-ups occurred in 2020/21 and 2021/22, when the RSG budget benefitted from in-year uplifts of £6.345m and £10m respectively. Whether additional funds become available in-year to permit this to occur depends upon a range of factors, including whether additional funding is made available to the Department by DoF in the course of in-year monitoring rounds.

[31] These factors mean that each party was able to present their case by reference to figures which most suited them. Thus, the respondent relies upon the fact that the impugned decision only reduced the previous year's (opening) RSG budget by some £3m; whereas the applicant says that the impugned decision cut the previous year's (overall) budget by some £13m.

The setting of the 2022/23 RSG budget and the reasons given

[32] As explained above, the impugned decision set the 2022/23 RSG opening budget at £8.924m. Applying the statutory formula, four councils (Antrim and Newtownabbey; Ards and North Down; Belfast; Lisburn and Castlereagh) received no RSG allocation. The applicant council, Mid Ulster, was the highest recipient, receiving £1.825m; followed by DCSDC, which received £1.687m. Mid and East Antrim; Armagh, Banbridge and Craigavon; and Causeway Coast and Glens Councils each received allocations of over £1m. The remaining recipient councils were Newry, Mourne and Down; and Fermanagh and Omagh.

[33] The sum of £8.924m is roughly a £3m reduction from the RSG opening position for the previous (2021/22) financial year; and a £13m reduction from the actual RSG budget for the 2021/22 financial year, taking into account the additional £10m allocated in March 2022. The proposed 2022/23 budget looks to have crystalised in or around 7 November 2022 – the date on which DfC was informed by NIO and DoF that no additional funding would be made available to it to meet budgetary pressures, and that it would have to live within the budget of which it

had previously been advised and on the basis of which it had been conducting its contingency planning. The position was formally communicated to councils some six weeks later on 22 December.

[34] In response to a letter from the leaders of the five largest political parties at Stormont, the Permanent Secretary of the Department addressed the reduction in a letter dated 23 January 2023. This letter was later stated, in a letter from the Permanent Secretary to council chief executives of 8 February 2023, to have contained the Department's reasoning; and the applicant in these proceedings has focused much of its argument, at least in relation to the first ground, on the text of the 23 January 2023 letter. That letter is in the following terms (with an important, and contentious, passage being the second to fifth paragraphs in the excerpt below):

> "I acknowledge the difficulties that are being faced across both Local and Central Government at this time. The Department for Communities (DfC) was allocated a budget for 2022/23 as a result of the Secretary of State releasing a Written Ministerial Statement on 24 November 2022. Although a budget for 23/24 has not yet been set, all indications are suggesting that further difficult decisions will be required.
>
> As you have noted in your letter the RSG is a statutory grant, but its budget is discretionary and must therefore be considered in the context of the Department's overall budget priorities and challenges. The opening RSG budget for 2022/23 is £8.924m which equates to a reduction of £3m on the opening budget of £11.924m in 2021/22. RSG represents a small percentage of Councils' total income each year.
>
> Councils received an additional RSG amount of £10m at the end of 2021/22 and were also able to access COVID-19 funding for cost-of-living pressures. On 23 March 2022 the Department issued an Accounts Direction to Councils setting out that all unspent COVID-19 funding should be transferred to a usable reserve in 2021/22 and ring-fenced for the purposes allocated.
>
> On 27 October 2022, after the Department of Finance agreed that Councils could use their unspent COVID-19 money to continue to support the recovery in the context of increased operating costs as a result of the cost-of-living crisis, the then Minister announced that Councils could utilise funds in excess of approximately £33m to address

> the impact of the cost-of-living on their recovery from the Pandemic.
>
> It should also be noted that DfC also provided funding for Derating and Transferred Functions grants of £38.9m to Councils in 2022/23.
>
> DfC will continue to engage with SOLACE NI [the Society of Local Authority Chief Executives Northern Ireland] and Councils through PSG/SOLACE meetings, which the Department of Finance also attends. Engagement will also continue with Council representatives of the Association of Local Government Finance Officers (ALGFO) and officials within DfC Local Government Finance."

[35] The applicant contends that the entirety of the passage just set out constitutes the 'reasons' for the Department's decision which is impugned in this case; and it bases its rationality challenge on its criticism of some of this reasoning. The respondent instead suggests that only the first paragraph in the excerpt above contains reasons for the relevant decision, with the following paragraphs merely providing further explanation and context about then recent developments in relation to local government funding more generally.

The parties' arguments

[36] The applicant council's central contention is that the reduction in RSG budget effected by the impugned decision, properly regarded, is one of £13m, as that is the reduction in additional funding which affected councils will feel in real terms. It argues that the decision to reduce the RSG budget so drastically based on the reasons provided in the 23 January letter was irrational for the following reasons:

(a) First, RSG is not "a small percentage" of the Council's total income. The applicant says that the Permanent Secretary was wrong to state that RSG represented a small percentage of total income. Whilst RSG may be a limited amount of the total income of *all* councils, some councils do not receive the grant at all. In reality, the RSG received by MUDC funds up to 7.9% of its income. (Taking an average over the 2015/16 to 2021/22 period indicates that RSG made up some 7.05% of MUDC's income). On any representation, the Council says, that is not a 'small' figure. Relatedly, the applicant says that the approach of considering RSG as a proportion of council income fails to take into account the effect of even marginal cuts to services when council budgets are very hard pressed.

(b) Second, the applicant asserts that the Department is not entitled to compare the RSG allocation of £8.924m with merely the *opening* budget of £11.924m for 2021/22, arguing that this is an irrational comparison, particularly where

there is no evidence that the Department had any intention of providing further RSG for 2022/23 (and indeed, as we now know, did not in fact do so). The Council highlights that the Department's position has consistently been that funding pressures would prohibit awarding any 'top up' to the RSG budget in the 2022/23 financial year.

(c) Third, councils could not necessarily use Covid grants from 27 October 2022, as the Department suggested, as a replacement for lost RSG funding. The Council argues that the Department's reasoning in this regard is irrational in two respects. First, Covid funds were reserved for a particular purpose and were provided to all councils, unlike RSG which is more targeted, so the two are not comparable. Second, the Council avers that the Department could not have known how much (if any) Covid funding councils had left. Such funds could, and should, have been spent for the purposes for which they had been given. (The Department had asked councils what Covid funds remained as of 31 March 2022; but that date was seven months *before* any funds remaining were unrestricted and released for general purposes on 27 October 2022). Thus, by not factoring in the passage of time, the Department left open the (reasonable) risk that (a) councils may have since used up those funds; or (b) the funds may have been ring-fenced for expenditure elsewhere. The Department's actions were therefore based on unevidenced assumptions.

(d) The applicant next observes that de-rating and transferred function grants serve different statutory purposes, such that they also cannot properly be assumed to be relevant to the funding of services which RSG funding would support. The 2011 Act provides different statutory purposes for DRG and TFG grants respectively. It was therefore irrational, the Council argues, for the Department to expect these funds to "take up the slack left by reduced RSG", especially when both grants were factored into the formula in the 2011 Regulations which determines whether a council will receive RSG in the first place. On this basis, taking them into consideration again represents 'double counting.' Secondly, the Council again contends that the Department had no idea whether funding provided in the form of such grants had been committed or spent elsewhere.

[37] The applicant's second ground of challenge concerns the interpretation and application of the 2016 Act (see para [3] above). Essentially, the applicant argues that the district areas of councils in receipt of RSG are disproportionately rural in nature and, since the Department was under a duty to have due regard to rural needs under section 1 of the 2016 Act, it erred when reducing the RSG budget for 2022/23 without having done so, adequately or indeed at all.

[38] The third ground of challenge relates to the equality duty under section 75 of the NIA. Section 75 requires public authorities to have due regard to the need to promote equality of opportunity in Northern Ireland between different protected groups. The applicant notes that six out of the seven councils in receipt of RSG have

majority Catholic populations and that Catholics are the largest religious group in each such council's population. The reduction in RSG budget therefore disproportionately burdened Catholic rate-payers. The Council acknowledges that the respondent carried out an equality screening exercise. However, it contends that the Department then "turned its back on its own findings" and refused to consider the equality implications which its decision to reduce the RSG budget entailed. More recently, it has argued that the equality screening exercise was a 'pretence', conducted *after* the real decision in relation to the RSG budget had been made. The applicant also contends that these proceedings are an appropriate vehicle by which to challenge this failure, rather than by way of complaint to the Equality Commission.

[39] The final ground of challenge concerns an alleged duty to consult. The Council argues that the reduction in RSG represents an exceptional case which gives rise to conspicuous unfairness. It states that RSG is itself a form of exceptional support; and that the Department's failure to tell councils that the RSG budget would be cut before they had to submit their rates estimate in February 2022 put councils "in a highly invidious position from the start, since their rates and budgets had to be based on informed guesswork." Further, it argues that the delay in decision-making, owing to the collapsed Executive, should have provided the Department with even more reason to seek councils' views. The Council asserts that the Department was, at all material times, aware of what the Council had budgeted for RSG and ought to have consulted it as a means of correcting the Council's erroneous assumption as to its likely RSG entitlement and to at least permit it to make representations. It also contends that the number of parties which should have been consulted was small: ranging from seven councils at its lowest to eleven at its highest. In those circumstances, fairness required consultation before the Department's decision was taken, the applicant submits.

[40] DCSDC is another Council which is in receipt of a significant portion of the allocated RSG budget and which, therefore, was also significantly affected by the impugned decision. Its intervention supported the applicant's case, particularly in relation to the irrationality challenge and the argument identified at para [36](a) above, as well as the argument based on section 75 NIA. Its evidence was that, in the 2023/24 financial year, it had the highest entitlement of any council to RSG. It submitted that the diminution in funding which was under challenge would accelerate the widening gap between wealthier councils and poorer councils (which have higher per capita costs owing to greater deprivation and need, along with greater rural spread), which was in direct conflict with the aim of the RSG scheme. Additional factual detail was provided by DCSDC's Lead Finance Officer, Mr Dallas. I have taken this into consideration; and it is generally in line with the evidence provided by Mr Tohill. In particular, DCSDC indicates that its rates increase for 2022/23 was 3.44% but that, had no reduction been applied to the RSG grant, this rate increase could have been reduced to 2.56%, making a significant difference to ratepayers in its council area. Alternatively, scenarios are provided as to the capital expenditure the 'lost' RSG income could have underpinned. The intervener also

complained that the 2022/23 reduction could not be considered in isolation, since it represented merely one of a number of significant reductions which had been applied to RSG budget since 2008/09.

[41] For its part, in response to the first ground of challenge, the Department highlights that it was itself under severe budget pressure at the relevant time, giving rise to intensely challenging decisions on prioritisation. It highlights that this is an area where the courts have traditionally given a wide margin of discretion to public authorities which have to decide how to apportion discretionary funds. On this, the Council relied strongly on the reasoning of Gillen LJ in *Re Bell* [2020] NI 180, at para [43] and elsewhere (see further below), to the effect that the courts are ill-equipped to determine questions about the allocation of scarce resources and the adequacy of funding provided by government to different areas.

[42] As to the specific points raised by the applicant on irrationality (see para [36] above), in summary the respondent says as follows:

(a) The statement that RSG represents a small percentage of councils' total income was a general statement about the overall RSG budget when compared to total income for district councils. For a majority of councils which *receive* RSG, the contribution is in the range of 1-2% of income, albeit MUDC and DCSDC have had historically higher percentages. In any case, it is not for the court to adjudicate on the meaning of what is (or is not) a "small" percentage.

(b) The letter of 23 January 2023 made clear that the Department's comparison was between opening positions, highlighting separately the additional £10m of RSG 'top-up' funding granted in the previous financial year. This reveals no irrationality of approach.

(c) The Department did not take into account Covid funding when setting the RSG budget, as made clear in Mr Carleton's sworn evidence. This aspect of the challenge therefore does not arise, since the evidence shows that the RSG allocation decision was taken as part of a balanced package of measures to address the projected resource expenditure pressures and to find sufficient savings in order to balance the departmental budget. On a fair reading of the 23 January letter, the reference to unspent Covid funds simply provided additional context and reassurance to political leaders about the overall potential funding impacts which the RSG decision might have. The argument concerning DRG and TFG does not arise for the same reasons.

[43] In relation to the assessment of rural needs, the Department accepts that it must have due regard to rural needs when devising or revising a policy. It maintained that such regard was given in this case because (a) the Department could not identify particular impacts upon rural communities from the RSG reduction without knowing how each council would determine its spending priorities and

allocate the funding granted to it; and (b) given the consideration of 'sparsity' already contained within the statutory formula for RSG allocation, rural needs were already, inherently taken into account.

[44] Turning to the section 75 argument, the respondent stressed that a screening exercise in relation to the decision was conducted and that its results were recorded. The Department recognised that there would likely be impacts on protected groups; but legitimately considered that it was too difficult for it to be able to conduct a meaningful assessment because (a) different councils would be affected in different ways; and (b) different councils could also make their own decisions on budget allocation, which may or may not mitigate adverse effects on different groupings. As such, the Department's position was that the councils themselves were better placed to assess equality impacts when preparing their own budgets.

[45] The Department therefore submitted that its approach was appropriate and rational because it was aware of the potential for equality impacts; that it conducted a screening exercise, showing that it was alive to its section 75 duties; that its decision could not be considered in isolation from the future budgetary decisions which would be taken in due course by councils upon receipt of their RSG allocation; and that the effects were thus too remote for the Department to itself assess and should, instead, be assessed by each council. Although there may have been alternative ways to approach this issue, the respondent contended that its approach was not irrational and that it plainly "had regard" to the relevant matters. Further, it argued that the proper forum for resolution of the applicant's concerns was by way of complaint to the Equality Commission for Northern Ireland (ECNI) rather than intervention by the court.

[46] As to the consultation ground, the respondent's position was that there was no legal duty to consult the Council (or others more generally) in relation to this decision; and, as a fall-back position, that, if there was such a duty, it had in substance been discharged by the engagement between Departmental officials and councils under the auspices of the Finance Working Group and/or SOLACE, through which councils were aware of the likely level of reduction in RSG funding as a result of the financial climate and therefore able to make representations.

The irrationality challenge

[47] Resolution of the applicant's irrationality challenge requires consideration of a number of issues including the scope of the Department's discretion when setting the RSG budget; the availability and intensity of review on the part of the court in relation to the merits of the Department's decision; and, importantly, whether the content of the Permanent Secretary's letter of 23 January 2023 (upon which the applicant lays very significant emphasis) represents the actual reasons for the impugned decision.

[48] There is no real dispute that while the Department is under a duty to provide RSG funding, it enjoys a broad discretion when allocating funds from its general budget to the RSG budget. In doing so, the Department must, of course, be entitled to have regard both to the funds which have been made available to it and to competing calls upon its budget.

[49] As a matter of practice, the overall budget for Northern Ireland Departments is set first. In the 2022/23 financial year, owing to the absence of the Northern Ireland Executive, the budget was ultimately allocated by Parliament on foot of a Bill introduced by the SSNI for that purpose. In turn, each department's budget will be set from the available funding, generally following negotiations between each department and DoF. From its budget, the Department must allocate funding for each of its needs and obligations, of which RSG forms one.

[50] The manner in which the RSG budget is arrived at in a 'normal' year is described in the first affidavit of Mr Carleton. Some 90% of the Department's budget will "relate to expenditure on matters for which the Department is subject to a legal obligation and for which it will have little or no scope for non-payment or reductions in payment." The RSG budget, by contrast, "is regarded as an area of discretionary resource expenditure by the Department for budgetary purposes." The RSG budget therefore falls within the 10% of the Department's funding which is not already effectively ring-fenced. Necessarily then, there is an element of ebb and flow as to how much RSG can be allocated in a given year, depending upon the resources available and the competing priorities, particularly in other fields of discretionary spend. The Department can factor in further relevant considerations, including the form submitted by councils setting out their General Estimates of Rates, which takes into account an estimation of anticipated RSG by the councils, as well as other sources of funding expected to be available to them (including DRG and TFG). The Department ultimately arrives at a final budget for RSG – subject to in-year monitoring and later additional allocations or re-allocations – and applies the allocation formula set out in the 2011 Regulations to the opening budget.

[51] That explains how the opening positions for the RSG budget are arrived at by the Department each year. However, much of the applicant's argument relies upon the fact that the Department has granted councils in-year 'top-ups' (of up to £10m) in the last few years. Mr Carleton explains this as follows:

> "Any decision to increase the total RSG budget in-year will depend upon the availability of additional funding and also other competing budgetary pressures … The last two occasions on which the Department made in-year increases to the RSG budget occurred when Councils faced specific funding pressures as a result of the impact of the Covid-19 pandemic and additional funds were made available from central government for that purpose.

> However, it was later made clear to Councils that those increases were not repercussive."

[52] On some occasions, therefore, the Department has the capacity to provide additional support, having considered other budgetary pressures and funding which unexpectedly remains or becomes available. However, these in-year additional allocations are never guaranteed at the time when the initial RSG budget is set for the year.

[53] In the present case, the evidence makes clear that the Department was under significant pressure to find cost-saving measures in advance of setting its 2022/23 budget. Contingency planning began in April 2022 and a £74.5m "resource pressure" (that is, predicted funding deficit) was identified in August 2022. The Department identified RSG funding as one area where resources could be scaled back, including a suggestion at several points that RSG provision could be scaled back by up to £6m. This potential reduction was under consideration throughout much the budget-setting process, including as late as 3 November 2022, when the Department's Permanent Secretary wrote to his counterpart in DoF outlining that, although £6m could be cut from the RSG budget, such a reduction could pose a "risk to council service delivery and potential for legal challenge." As is now known, the RSG budget was ultimately 'only' reduced by £3m when compared with the starting position for 2021/22.

[54] The court is satisfied from the evidence provided that the budgetary landscape facing the Department at the relevant time was both complex and extremely serious, with a number of difficult choices having to be made as a result of reductions in its budget from the previous year. It is against that backdrop that I turn to consider the court's proper role in interfering with government departments' well-recognised discretion in resource allocation.

[55] The respondent argues that issues of budgetary policy are matters of discretion and that the court should engage only in extremely light-touch review of such matters. In this regard, Mr McLaughlin placed considerable reliance upon the case of *Re Bell* (supra). The *Bell* case concerned the allocation of funding to the Police Ombudsman for Northern Ireland (PONI). The challenge arose out of the applicant's complaint about the delay, because of funding constraints, in PONI's investigation into police alleged misconduct following a murder in 1982. Before the High Court, the applicant was initially successful in her challenge, as the court found that the Department of Justice (DoJ) had failed in its duty to provide sufficient funding to PONI, rendering the Ombudsman unable to fulfil his statutory obligation to investigate the respondent's complaint within a reasonable period of time. That decision was overturned by the Court of Appeal. In its judgment, the Court of Appeal paid considerable attention to the statutory scheme governing PONI's funding arrangements, as set out under para 11 of Schedule 3 to the Police (Northern Ireland) Act 1998, which provided that the DoJ was required to pay to PONI "such sums as appear to the Department of Justice to be appropriate for defraying the

expenses of the Ombudsman under this Act." This represented the language of discretion, conferring a broad latitude and discretion upon the funding department.

[56] In the course of his judgment in the *Bell* case, Gillen LJ addressed a number of relevant authorities and proposed the following "seemingly uncontroversial" principles at para [19]:

> "(a) Normally, the question whether the Government allocates sufficient resources to any particular area of state activity is not justiciable.
>
> (b) A decision as to what resources are to be made available often involves questions of policy, and certainly involves questions of discretion. It is almost invariably a complex area of specialized budgetary arrangements taking place in the context of a challenging economic environment and major cutbacks on public spending. There should be little scope or necessity for the Court to engage in microscopic examination of the respective merits of competing macroeconomic evaluations of a decision involving the allocation of (diminishing) resources. These are matters for policy makers rather than judges: for the executive rather than the judiciary.
>
> (c) The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the Court must necessarily be in holding a decision to be irrational. Where decisions of a policy-laden nature are in issue, even greater caution than normal must be shown in applying the test, but the test is sufficiently flexible to cover all situations.
>
> (d) Provided the relevant government department has taken the impugned decision in good faith, rationally, compatibly with the express or implied statutory purpose(s), following a process of sufficient inquiry and in the absence of any other pleaded public law failing, such a decision will usually be unimpeachable.
>
> (e) However when issues are raised under Articles 5 and 6 of the European Convention on Human Rights and Fundamental Freedoms as to the

guarantee of a speedy hearing or of a hearing within a reasonable time, the Court may be required to assess the adequacy of resources, as well as the effectiveness of administration.

(f) Nonetheless in general a court is ill-equipped to determine general questions as to the efficiency of administration, the sufficiency of staff levels and the adequacy of resources.

(g) There is a constitutional right of access to justice and access to the courts.

(h) Powers ought to be exercised to advance the objects and purposes of the relevant statute."

[57] Applying those principles in that case led to the following additional observations:

"[42] Cast as it is in broad and general terms the duty contained in the statute can readily be construed as affording scope for the Department to take into account matters such as budgetary policy, macroeconomic constraints, the availability of funding within its budget and its responsibilities to other bodies within its remit when deciding how best to perform the duty in its own area. In such a case we consider the Department has a wide measure of freedom over what steps to take in pursuance of its duty. Not only is the responsibility to make the payment placed solely in the hands of the Department but significantly it is only such sums as appear to the Department to be appropriate as opposed to such sums as are 'necessary' or 'required.' We are satisfied this selection of wording reflects Parliamentary intent and has been deliberately and carefully chosen.

[43] Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of bodies for whom a Department is responsible. That is not a judgment which the court can make. Specialized budgetary arrangements taking place in the context of a challenging economic environment and major cutbacks in public spending are an area too complex for this Court. It should not engage in microscopic examination of the respective merits of competing macroeconomic

> evaluations of a decision involving the allocation of (diminishing) resources. A court is ill-equipped to determine such general questions as to the efficiency of administration, the sufficiency of staff levels and the adequacy of resources for the PONI. These are matters for policy makers rather than judges, for the executive rather than the judiciary and in the instant case, for the Department."

[58] These principles apply equally in the present case. Although section 27 of the 2011 Act does not contain an express reference to the Department exercising its judgment as to what is "appropriate", it is clear that the statutory scheme prescribes only the allocation of RSG funding as between councils. It does not guarantee or require any particular level of RSG funding to be provided by the Department, provided that the Department properly informs itself and makes its decision on funding in good faith and in accordance with the statutory purposes. In short, the statutory scheme leaves an element of discretion to the Department in terms of the amount of funding which is allocated for RSG purposes.

[59] In view of the evidence in relation to the difficult budgetary position in which the Department found itself (as did other departments), including that it had been asked to actively seek out cost-saving measures owing to overarching financial pressures, the court cannot come close to concluding that it was substantively irrational for the Department to significantly reduce this area of discretionary spend or to set it at the level which was allocated.

[60] Much of the argument persuasively advanced by Mr Oldham on behalf of the applicant, on analysis, invited the court to engage in what Gillen LJ referred to as "microscopic examination of the respective merits of competing macroeconomic evaluations of a decision involving the allocation of (diminishing) resources." In accordance with the principle set out at sub-para (d) of para [19] of *Bell* (see para [56] above), provided the Department has taken the impugned decision in good faith, rationally, compatibly with the express or implied statutory purpose(s), following a process of sufficient inquiry and in the absence of any other pleaded public law failing, its decision must be considered unimpeachable. That does not exclude any possibility of supervision of the Department's decision, or the grant of relief in relation to it, but it significantly limits the nature of the grounds upon which such relief is likely to be granted and the intensity of any review alleging irrationality. In particular, the scope for review on the basis of 'outcome rationality' is negligible: see also the *McMinnis* case in the Court of Appeal (discussed below), at paras [77] and [80]. Although review on the basis of 'process rationality' remains available in this context, this will very much be light-touch review given the nature of the issues in play. (I use here the helpful terminology demarking different types of rationality challenge recently explained again by Chamberlain J in *R (KP) v Foreign Secretary and Home Secretary* [2025] EWHC 370 (Admin), at paras [55]-[57].)

[61] In this case, the Department unfortunately had to set about saving costs. The evidence indicates that it looked at a wide range of money-saving measures reasonably available to it and did so in good faith. In that regard, I note the following matters:

(i) First, both the Department and local councils were aware of the difficulties surrounding the 2022/23 budget. Councils were informed in a Finance Working Group Meeting (on 10 March 2022) that the budget allocation for 2022/23 had not yet been confirmed and that "there may be a delay to the payment of the 1st instalment of the RSG depending on when [the Department] is notified of the budget provision." RSG was confirmed as being a "discretionary part of the overall budget." This position was unaltered in September 2022, when a follow-up meeting confirmed a delay in payment. It was well known to all that the amount which would be available for RSG allocation was dependent upon the Department's own budget and that there was continuing uncertainty about that given the unusual circumstances with the budget being set, late in the financial year, by Westminster.

(ii) Relatedly, the Department knew ahead of time that its budget would be restricted. A contingency planning letter from the Budget Director at DoF of 14 April 2022 set out that an "understanding of funding for which there may be a reasonable degree of certainty will be reflected in a Budget position brought to a future Executive for consideration." In that letter, the non-ringfenced budgetary position was set at £827.549m, which represented a very significant reduction from the previous year. There were therefore budgetary pressures which were highly likely to be faced by the Department which needed to be managed and which were the subject of debate and discussion within the Department (as well as in conjunction with DoF) over a number of months.

(iii) Third, and most importantly, the Department carefully considered a range of possible cost-saving measures which are addressed in the evidence before the court. A resources pressure of £74.5m was identified on 5 August 2022. In the same document, RSG was identified as a "green status" saving measure, *viz* as presenting a cost-saving measure which was "relatively straight forward and could be taken forward immediately." Consequently, the Department identified that it could reduce the RSG budget by £4m (but scalable up to a reduction of £6m). This is to be contrasted with "amber" and "red" status saving measures, which were decisions which would be harder to deliver, and would have "some" or a "significant negative impact on the bodies DfC delivers public services to", ie on the Department's own core functions. These included matters such as staffing costs, performing core statutory obligations, committed contractual arrangements or ongoing capital projects. This position remained in September 2022, although the resource pressure was considered to have reduced somewhat at that point to £70.6m.

(iv) In any event, owing to its "green" status, the potential cost-saving in relation to RSG remained at £4m at that stage. In a submission provided to the DfC Minister at that point, the only identified costs-saving measure which was rated "green" was a potential reduction in the RSG budget for the 2022/23 year, with consideration still being given to reducing the budget by 50% (ie by £6m). On 3 November 2022, the Department's Permanent Secretary confirmed that the Department had identified £40.3m of savings options but stressed that "only £5m of these are deliverable without a detrimental and adverse impact on public service delivery, including services to some of the most vulnerable in our society and certain section 75 groups." The Department therefore recognised that it was making difficult choices which would have negative implications for the public. Nonetheless, in a letter to DoF drafted on 11 November 2022, the Department stated it would "endeavour to deliver the proposed saving options (1-3) as required and live within the proposed Resource allocation of £848.314m."

(v) As noted above, in the event, the reduction to the RSG allocation was not as severe as had originally been contemplated or proposed.

[62] The evidence emphasises the severe funding constraints felt at central government level and the ripple effect which that had on departments. The Department engaged in negotiations with the DoF to set its budget for 2022/23 in a context where savings would have to be made. At all times, the Department was cognisant of the potential impact (at least in general terms) to which each budget reduction would or might gave rise. It made a reasoned assessment as to the viability of each proposed saving measure. The advice provided to the Permanent Secretary on 8 September 2022 outlined the competing interests at play within the Department. Annexed to the advice was a table which expressly considered the impact or consequence which each proposed cut would have. The consequence of the RSG cut was described in the following way:

> "Propose that up to £4m reduction could be applied on the Rates Support Grant. Once the RSG budget figure is set it can't be reduced in year but funds can be added if any further funding becomes available.
>
> Opening baseline RSG budget was £11.9m in 2021-22 (which was a reduction from £15.9m in 2020-21). It should be noted that DfC made additional payments in both 2021-22 (£10m) and 2020-21 (£6.4m).
>
> Whilst this grant is statutory the amount of the grant is discretionary. [The legal opinion produced for the Department was then summarised].

> Any RSG allocation would remain indicative until a Departmental Budget is allocated for 2022-23."

[63] The essence of the reasoning behind the impugned decision was that the RSG budget could be reduced because the level of funding did not have a statutory minimum and the amount could in any case be topped up (however unlikely that eventuality may be). This is in contrast to the explanations given for areas in the "amber" and "red" zones, where cost saving measures would be harder to attain, particularly in cases where there was a more direct or restrictive statutory obligation to make payments or provide services. The Department's own budgetary allocation was only known well into the financial year, at a time when a number of payment obligations had accrued further limiting room for manoeuvre. As noted above, the RSG reduction was not as significant as originally proposed. The respondent further relies upon the fact that an additional £10 million in RSG allocation was provided in the 2021/22 financial year, but extremely late in that year (in March 2022), such that it was unlikely to have all been spent by the time the new financial year came around. This recent additional allocation of RSG was consistently identified in the internal Departmental papers.

[64] The Department was obviously aware of the competing objectives in play; and the award of £8.924m at a time of intense financial pressure cannot be said to be an irrational allocation, even assuming the court has a role in determining that issue. Any case based on outcome irrationality must fail.

[65] I turn now to the discrete complaints made about the Department's reasoning, which are said to have affected the decision-making *process* rather than merely to represent a challenge to the outcome of that process.

[66] I do not consider that the whole of the discussion in the 23 January letter (see para [34] above) should be taken to represent the Department's contemporaneous reasoning for the impugned decision, as the applicant suggests. That is not supported by the internal, contemporaneous documentary evidence, as well as being contradicted by the Department's evidence in these proceedings. The truth of the matter is that the RSG budget was cut as it was comparatively easy to reduce as compared with other potential costs-saving measures and judged by the Department to have less impact on its (the Department's) core functions. In short, given the discretionary nature of the spend RSG was one of the easiest areas for the Department to cut; and the reasoning was not much more sophisticated than that brutal reality.

[67] The reference in the 23 January letter to more general issues relating to local government funding represents a certain degree of padding of that correspondence, or 'spin', both to give the impression that there was an element of swings-and-roundabouts in relation to the provision of funds to local government and to emphasise various funding streams which had been made available. The response was to political leaders who had raised queries about what short-term

financial assistance could be provided to councils, rather than asking merely for an explanation of the reasons for the RSG budget decision. In submissions, Mr McLaughlin described the party leaders' letter as a campaigning letter, which related to all councils (not merely those who had been in receipt of RSG) and which is not a detailed request to explain the decision impugned in these proceedings. Rather, it was a plea for more funding for everyone, including by way of immediate short-term measures, which was why the Permanent Secretary's response ranged across a number of issues, seeking to provide some degree of reassurance about the position rather than providing a detailed explanation of the Department's reasoning in setting the RSG budget. Although there is some focus on RSG in particular in the party leaders' letter, it is right that the letter does expand into wider issues of local government funding more generally, including by seeking financial assistance to *all* councils, with an increase in the RSG budget being a separate request. The casual reference in later correspondence to the 23 January letter containing reasons does not fundamentally alter the character of the correspondence or the evidence showing the contemporaneous rationale for the proposed reduction. In light of this, I consider that much of the applicant's process rationality challenge – treating the 23 January letter as if it represented detailed, contemporaneous reasons taken into account by the Permanent Secretary in advance of the impugned decision – rests on an unsound foundation.

[68] The two exceptions to this are the comparison between *opening* RSG budget positions, which the applicant criticises; and the observation that the RSG allocation represents 1% to 2% of total council income each year, each of which *is* reflected in the contemporaneous documentation surrounding the decision (in particular, the submission of 16 December 2022 before the Permanent Secretary's final decision).

[69] As to the observation that RSG represents only a small percentage of councils' total income, this does not appear to me to be an irrational statement, insofar as it goes; nor is the general proportion of RSG funding as compared with other local government funding an irrelevant consideration. The applicant complains that the Department's statement is unduly simplistic and disregards the effect that the reduction in the RSG budget would have on MUDC in particular. Mr McLaughlin pointed to evidence that, in the previous three budget years, RSG provided a range of between 0%-6.62% of all councils' funding. This, he submitted, meant that across all councils RSG routinely only provides for 1-2% of funding. In any case, the respondent says it is not for the court to adjudicate between 'small' and 'not small.' I am inclined to agree with that last submission.

[70] That is not to understate or underestimate the effect of such a reduction in practice to the councils most reliant upon RSG (notably, MUDC and DCSDC); nor is it to suggest that the Departmental 'spin' in the letter of 23 January did justice to the full nuance of the position. Nonetheless, the Department was entitled to take into account the effect of the decision on all councils and not merely those most severely affected. There is also no evidence to suggest that the Department wrongly considered that RSG represented only 1-2% of the income of the applicant Council.

It was aware that some councils were much more reliant on RSG than others. I have not been persuaded that the Department took into account an irrelevant consideration, or left out of account a relevant consideration, which is what this aspect of the challenge ultimately resolves to.

[71] It was also not irrational in my judgment for the Department to consider its initial allocation of RSG funding against the *opening* position from the previous year. Whether (and to what extent) additional funding may become available in-year will always be a matter of speculation. The provision of additional funding, when available, should be viewed as exceptional rather than establishing a baseline funding position for future years. (The evidence shows that, in the seven years between 2015/16 and 2021/22, the RSG budget had been topped up only four times; and, prior to the 2015 reforms, the RSG budget was topped up only once.) There is no entitlement, or ongoing entitlement, to discretionary in-year increases in the budget. Indeed, the grant of previous 'top-ups' would have been made on that basis. I therefore consider that, at the point of the impugned decision, the Department was entitled to compare its allocation with the opening position in the previous year. The in-year 'top ups' previously provided were obviously welcome but were not guaranteed and were not designed or expressed to be recurrent. Although not at all anticipated, it was possible that, if additional funds unexpectedly later became available in the 2022/23 financial year, a similar additional allocation could have been provided. Again, I do not consider there to have been irrationality in this approach. The Department was only setting an opening budget for the 2022/23 year, albeit (unfortunately) it was highly likely that it would not be possible for an additional allocation to be made towards the end of that year.

[72] As to the reference to unspent Covid funding which had been released for more general expenditure by councils, it is not in principle irrelevant for the Department to note that there was potential access to additional funds (which had previously been restricted) which might be available to fund other council services to which an RSG allocation may have contributed. (In MUDC's case, a sum of £2.6m such funds were held by it as of 31 March 2022, as disclosed in both its return of August 2022 and statutory accounts of September 2022). Once again, the significance of this may well have been overstated or overplayed in the 23 January letter for the reasons given by Mr Oldham in argument. Although any remaining such funds had become unrestricted, they may already have been spent on Covid-related issues or have been committed elsewhere. Once the decision had been taken to release these funds for general expenditure, however, they were not restricted for particular purposes and were in principle available to fund services which RSG would also have funded. More importantly, however, there is no proper basis to go behind the averment in the respondent's evidence that this factor was not taken into account when setting the RSG budget for 2022/23. Had the Department taken this factor into account in a way which amounted to a plain error of fact or absence of due inquiry, this may have represented a ground for setting aside the Department's decision; but the evidence does not establish this.

[73] A similar point arises in relation to the reference to de-rating and transferred functions grants. The Department would have had more information about these funds since each is addressed in the rates estimate which councils must provide to the Department before the RSG budget is set. The applicant is right to suggest that these are grants provided for different purposes, to all councils and not targeted in the same way in which RSG is, and that they represent part of the council's wealth which is accounted for in the allocation formula (since they are treated as part of the council's rates-derived income). In principle, there is a strong argument that it would be legally irrelevant to take them into account as a basis for reducing RSG provision. However, the Department's clear evidence is that it did not take the availability of these separate grants into account when setting the RSG budget.

[74] Mr Carleton's sworn evidence is that – whilst the Department of course would have been aware of other funding provided to councils by it – those funding sources "were not taken into account by the Department when determining the overall RSG budget"; and that the level of reserves held by councils "was not considered when setting the RSG budget." It would have been better if the averments in this regard had been provided by the actual decision-maker, the Permanent Secretary. However, Mr Carleton's affidavits make clear that he was authorised to swear them on behalf of the respondent Department. He was also the official who provided the key submission of 16 December 2022 to the Permanent Secretary. Additionally, I accept Mr McLaughlin's submission that it is of particular significance that these additional sources of funding were not mentioned at all in any of the contemporaneous, internal departmental papers which discussed the proposed reductions and the rationale behind it as part of that rationale.

[75] For these reasons, I do not find any aspect of the applicant's irrationality challenge to be made out.

Consideration of rural needs

[76] The second aspect of the applicant's challenge concerns the Department's statutory obligation to take account of rural needs in Northern Ireland. Section 1 of the 2016 Act frames this duty in the following way:

> "(1) A public authority must have due regard to rural needs when—
>
> (a) developing, adopting, implementing or revising policies, strategies and plans, and
>
> (b) designing and delivering public services.
>
> (2) For the purposes of this Act, "public authority" means any body or person listed in the Schedule."

[77] "Rural needs" is defined in section 6 of the 2016 Act as meaning "the social and economic needs of persons in rural areas." It is common case that the Department is a relevant public authority for this purpose. An issue arises as to whether the setting of the RSG budget is a "policy" for the purposes of this section or is otherwise caught by its provisions. The applicant relies upon the fact that the Department accepts that its decision in this case *was* a policy for the purposes of equality impact assessment and section 75 NIA. In that context, the Department's Equality Scheme defines the concept widely, at para 4.1:

> "In the context of Section 75, 'policy' is very broadly defined and it covers the ways in which we carry out or proposed to carry out our functions in relation to Northern Ireland. In respect of this equality scheme, the term policy is used for any (proposed/amended this/existing) strategy, policy initiative or practice and/or decision, whether written or unwritten and irrespective of the label given to it, e.g., 'draft', 'pilot', 'high level' or 'sectoral.'"

[78] Although this had not been conceded in the respondent's response to pre-action correspondence, in submissions Mr McLaughlin indicated that he could not dispute that the decision in this case was in relation to a policy; and he did not therefore argue on behalf of the respondent that the duty under the 2016 Act was not engaged. I proceed on the basis, therefore, that the setting of the annual RSG budget was the implementing or revision of a policy for this purpose. The focus of the argument on this ground was on whether the duty was properly discharged.

[79] The precise nature of a "due regard" obligation merits some discussion. In this case, the applicant relied upon a number of authorities dealing with a comparable duty, the public sector equality duty (PSED) applicable in England and Wales pursuant to section 149 of the Equality Act 2010. The respondent did not dispute that, given the nature of the obligation at issue, some guidance could be found in these authorities and I have found them to be of some assistance. As noted below, the guidance issued by the relevant department also suggests that the principles set out in English case-law relating to the PSED may be of assistance in this connection. (In contrast, the respondent disputed the relevance of such authorities in relation to the section 75 NIA ground, given the particular statutory mechanisms for discharge of that duty through equality schemes contained within the NIA.)

[80] In my judgment, having due regard to a statutorily mandated matter requires its active consideration. The decision-maker (usually in this context the Minister but, in the present case, the Permanent Secretary) is under an obligation – when making a decision caught by section 1(a) or (b) of the 2016 Act – to consider the implications of the decision on rural needs. That, of course, does not dictate the substantive outcome of the decision; but rural needs must be considered. This should be more

than a mere tick-box exercise such that, at the very least, whether through contemporaneous documentation (ideally) or otherwise, the Department should be in a position to show that it recognised the requirement to have regard to rural needs and actively considered them.

[81] In this regard, the principles set out by McCombe LJ in relation to the PSED in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 are instructive. The PSED requires public authorities exercising certain functions to have due regard to the need to, inter alia, eliminate discrimination and advance equality of opportunity. The principles set out by McCombe LJ at para [26] of his judgment include the following:

> "(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).
>
> (3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.
>
> (4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at [23 – 24].
>
> (5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:

(i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;

(ii) The duty must be fulfilled before and at the time when a particular policy is being considered;

(iii) The duty must be "exercised in substance, with rigour, and with an open mind." It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

(iv) The duty is non-delegable; and

(v) Is a continuing one.

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

(6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at [74-75].)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them": *R (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 at [79] per Sedley LJ."

[82] The eighth principle further set out that the concept of 'due regard' requires the court to "ensure that there has been a proper and conscientious focus on the statutory criteria" before going on to explain that, "if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker." The Court of

Appeal also recognised that the court should "have due regard to the need to take steps to gather relevant information" in order that the decision-maker could properly take into account the statutory consideration in the context of the particular function at issue. (That formulation came from Elias LJ in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) at paras [78] and [89], which McCombe LJ adopted in full in the *Bracking* case). These judgments about the approach to a "due regard" obligation designed to promote equality on the part of disadvantaged groups – or at least proper consideration of the impacts of the decision to be taken on such groups – were given well before the decision of the Northern Ireland Assembly to pass the 2016 Act in the terms in which it did. The heaviness of the burden imposed by such an obligation when formulating policy – to do so consciously, in substance, with rigour and an open mind – was further emphasised in paras [60] and [61] of the judgment in *Bracking*.

[83] The Department of Agriculture, Environment and Rural Affairs (DAERA) has issued a guide to the 2016 Act for public authorities under section 2 of the Act. It refers to a number of the principles mentioned above (drawn from the *Brown* case) and notes that public authorities might find them helpful given their previous application to 'due regard' obligations. It further recommends that a public authority discharging its section 1 duty undertake a formal rural needs impact assessment (with guidance as to how this should be undertaken), although I accept Mr McLaughlin's submission that this is not required in every case as a matter of law given the limited nature of the obligation as expressed in the statutory wording.

[84] How then has this obligation been discharged, and what evidence is there in relation to that, in the present case? The respondent accepted that it could not point to a particular document showing any analysis in this regard. However, it says that (a) appropriate regard was had to rural needs when determining the RSG budget as the Department actively took into account the 'sparsity' aspect of the RSG formula; and (b) in any event, as with equality implications, it was too hard to meaningfully assess *at that stage* the possible downstream impact on particular groups, including rural dwellers.

[85] As to the first of those arguments, the formula set out at para [20] above refers to the relevant council's "adjusted" population. Pursuant to para 4 of Schedule 1 to the 2011 Regulations, measures applied to adjust for additional needs are (a) deprivation; (b) an influx of additional population; and (c) sparsity. Sparsity adjusts population by providing a weighting to population density and private household data, making an adjustment of the proportion that waste collection expenditure is to total expenditure, as prescribed in the detailed provisions of para 7 of Schedule 1. This aspect of the respondent's case is fleshed out in the Department's evidence in the following terms:

> "72. A reduction in RSG may be felt throughout a Council's district, including both rural and urban areas.

> In the case of Council areas which have large rural populations, this aspect is already taken into account by means of the "sparsity" consideration within the statutory formula for entitlement and allocation of RSG. Rurality considerations are therefore already "built in" to the allocation of RSG in a manner which is favourable to districts with larger rural populations.
>
> 73. The purpose of a rural needs assessment would be to inform the Department of any likely impacts of the cut in the RSG budget upon rural communities and to give the Department the opportunity to mitigate against the impact of those cuts if [it] was able and willing to do so. However, as noted above the allocation of RSG is conducted by means of a statutory formula and the Department is unable to make adjustments to the distribution in a manner which targets rural communities. In addition… in the absence of knowledge of how a Council proposes to determine its spending priorities and to allocate funding, the identification of particular impacts from the RSG reduction upon rural communities is sufficiently uncertain and difficult, that the exercise is more appropriately carried out at the Council level."

[86] In response, the applicant argues that paying due regard to rural needs at the stage of applying the formula (ie when the budget has already been set) amounts to a post hoc exercise. MUDC is a council with a large rural population, meaning that a cut to RSG in Mid-Ulster will have a greater effect on the rural population compared to urban populations. This is true across the board: the average percentage of population which is classified as rural in the councils in receipt of RSG is 61.31%, as compared with only 19.87% in authorities not in receipt of RSG. The applicant says, therefore, that the argument that rural needs are adequately considered at the formula stage ignores the disproportionate effect that a cut to RSG will have on the rural populations.

[87] I consider there to be force in this submission. The statutory allocation formula takes into account (a proxy for) rural needs to some degree; but that is to miss the point. The formula dictates how much of the available pot each council will receive. That follows, and is logically distinct from, the decision to set the overall RSG budget in the first place. Put another way, the mere fact that, applying the allocation formula, councils with greater rural populations may receive a greater proportion from the available pot does not sound on the question of whether a larger fund should be allocated in the first place given the (arguably disproportionate) effect of reduction on those with rural needs.

[88] Mr Tohill's evidence suggests that there is a clear disparity in treatment between councils with high levels of rural population and those without. The statistical evidence he has provided shows that there is an extremely strong correlation between councils which are predominantly rural in nature and those who receive high levels of RSG. Although this may be oversimplistic, this is because rural areas are relatively rates poor. Put simply, there is a strong prima facie case that reductions in RSG particularly affect councils with large rural populations and, hence, the provision of services to those populations. The applicant's evidence also addresses a number of ways in which it has had to reduce its rural services as a result of the decision. This has had a particular effect on recycling, with the Council having to close a number of rural sites. Cuts have also been made in other service areas, including biodiversity projects, maintenance of landfill sites, environmental health projects and community services. In this regard, the applicant relied generally upon information published by the DAERA highlighting difficulties already experienced by those living in rural areas, including in particular extant difficulties with access to services, which (in DAERA's view) already have a disproportionate impact on rural dwellers.

[89] The applicant contends that there is no evidence that it even occurred to the Department during its decision-making that the 2016 Act was relevant. I accept that submission. None of the evidence provided in the case suggests that it did so. Indeed, this is rather supported by the Department's evidence in the case which, as indicated above, focuses exclusively on the fact that some concept of rurality is incorporated within the statutory allocation formula. That reasoning is entirely ex post facto and, in my view, addresses a separate issue. Proper consideration of this factor may have led the respondent to mitigate the proposed reduction. (Although there was plainly very limited scope to do so, I cannot conclude that, had the particular likely effects on rural needs been conscientiously considered, the outcome would inevitably have been the same. Indeed, the materials exhibited to Mr Carleton's second affidavit relating to the presentation to the TLT on 6 December 2023 suggest that there was some last-minute flexibility in light of additional funds allocated to DfC by the NIO in the budget settlement for cost-of-living support.)

[90] For the same reason, I reject the respondent's second argument on this ground, namely that it was – or, more properly, *would* have been – too difficult to assess any impact on rural needs because any such impacts would depend on future decisions to be made by the councils in receipt of reduced amounts of RSG. It seems to me quite possible that this may have been easier to assess than potential impacts on disparate section 75 groups; but, in any event, unlike the position in relation to equality impacts, this is again an entirely ex post facto rationalisation of the failure to have due regard to rural needs at the time. There is nothing to suggest this was considered at the relevant time, much less to the extent which would satisfy the due regard obligation in section 1 of the 2016 Act. Again, I cannot conclude that, had this factor been properly considered, the outcome would inevitably have been the same.

[91] I find this aspect of the applicant's case to have been made out.

Section 75 NIA

[92] The applicant also contends that the Department's decision was taken in breach of its obligations under section 75 of the NIA which requires a public authority carrying out its functions relating to Northern Ireland to have due regard to the need to promote equality of opportunity between various groups, including between persons of different religious belief. The respondent disputed this aspect of the claim in substance but also contended that any such complaint should not be adjudicated upon in these proceedings. Rather, it submitted, the correct forum for resolution of such a complaint was by the ECNI under Schedule 9 to the NIA. For the reasons given below, particularly in light of recent guidance from the Court of Appeal in this area, I accept that submission.

[93] The section 75 screening form relating to the decision on the 2022/23 RSG budget was signed off in December 2022 (by Mr Glass, the Head of Finance, on 13 December; and by Mr Carleton on 14 December). The applicant argued that this cannot have been done in advance of the relevant decision which, on its submission, must have been made by late November (either 11 November or 24 November 2022). In any event, the applicant also argues that the substance of the consideration – by which the decision was 'screened out' so as not to require a detailed equality impact assessment (EQIA) – was irrational and failed to satisfy the requirements of section 75.

[94] The applicant has provided evidence suggesting that the adverse impact of the reduction in the RSG budget would be disproportionately felt by Councils having a majority Catholic population. Four out of the seven councils in receipt of RSG have an outright majority of Catholic inhabitants in their district; and in a further two of the councils in receipt of RSG Catholics form the largest group in the area population. Further, 51% of the population in all councils in receipt of RSG are Catholic as opposed to 17% for the next highest denomination. (For councils not in receipt of RSG, only 27% of their population is Catholic.) On this basis, Mr Oldham suggested that there was a real disparity in the effects of the impugned decision and that it was "very likely to affect both numerically more Catholics than people in other religious groups, and a greater proportion of Catholics than people in other religious groups." The applicant contends that this was simply not appreciated or considered in the course of the decision-making process.

[95] The equality screening exercise is designed to ascertain whether a full EQIA is required or whether the new policy can be screened out because the likely impact of the policy in respect of all of the equal opportunity or good relations categories is none, that is to say having no relevance to equality of opportunity or good relations (see para 4.14 of the respondent's Equality Scheme). In addition, para 4.8 of the Equality Scheme provides that in order to answer the screening questions, the Department "will gather available relevant information and data, both qualitative

and quantitative." The applicant challenges the perfunctory (in its submission) manner in which these matters were considered by the respondent.

[96] In this case the screening form says that there are no section 75 categories which might be expected to *benefit* from the intended policy. The form recognises that a range of stakeholders will or may be adversely affected by the decision, including staff, service users, other public sector organisations, voluntary or community organisations or trade unions. As to third party organisations, it is noted that organisations financially supported by district councils could be indirectly impacted "but this is a matter for district councils." In relation to the identification of impact upon service users, the screening form states as follows: "District Councils and indirectly ratepayers – funding may impact on the provision of council services." The applicant relies upon the fact that this particular portion of the assessment does *not* make reference to the impact being indirect otherwise than in relation to ratepayers.

[97] As to the impact on different section 75 categories, in relation to those of different religious belief, the equality screening form states as follows:

> "The changes will occur at district council level, which is too general to be able to make any assertion about an impact on any specific group. Each council is a statutory authority with an equality duty in its own right."

[98] In respect of all other section 75 categories, the comment is simply made: "as above." When it comes to the screening questions, where the likely impact on equality of opportunity is assessed (and graded as 'none', 'major', or 'minor') the following is said in relation to the religious belief category:

> "The changes will occur at district council level, the grant is paid out as a general financial support without specification for use and measure, and therefore it is too general for DfC to directly assess any impact on any specific group. Councils, impacted by the budget, as public authorities in their own right, are responsible for screening the impact of the budget at a District Council level."

[99] Again, in relation to other section 75 categories, the response is then simply noted: "as above." The form later suggests that "there is no opportunity to further promote equality of section 75 groups within this policy." Overall, the decision was not to undertake an EQIA on the basis that, "At a departmental level, no adverse impacts can be identified at this stage."

[100] In short, the equality screening exercise took the view that no meaningful assessment of the impact on section 75 groups could be undertaken because the

actual impact upon them could only be determined later, depending upon whether the affected councils could still provide services from other funding streams or from reserves, and depending upon which services councils chose to reduce or abandon and how they chose to do so.

[101] In this regard, the respondent relied upon the case of *R (Dudley MBC) v Secretary of State for Communities and Local Government* [2012] EWHC 1729 (Admin). That was also a case about local government funding, in which a local authority challenged the decision of central government to withdraw its declining balance public finance initiative grant. Singh J dismissed the claim that the defendant had acted in breach of the PSED (see paras [89]-[91]). He stressed that "due regard" to equalities implications was the regard which was appropriate in all of the circumstances of the particular case. In that case, the judge accepted the Secretary of State's argument that the suggested impact was a "contingent and indirect one", since it left it up to the claimant council how the withdrawal of funding would be managed. The local authority had a choice about whether it would cut or reduce a particular service and/or whether and how they would find alternative funding for it. The local authority may well have to perform the PSED itself before it decided which course it should take. This very much chimes with the argument made by the Department in the present case. The *Dudley* case is not on all fours with the present case; firstly because, as Mr Oldham stressed, the decision-maker in that case could be seen to have personally considered the equality implications of the decision (unlike the Permanent Secretary in this case); and, secondly, because the effects of the decision in the *Dudley* case would arise only some years in the future, rather than (as in this case) much more immediately, such that there were too many vicissitudes for the court to be able to say that the defendant had breached its duty.

[102] As is usual, the respondent's Equality Scheme provides that a complaint may be made to the Department in relation to an alleged failure of it to comply with its approved equality scheme. If the complaint has not been resolved in a reasonable time, or is not resolved satisfactorily, the complaint can then be brought to the ECNI. This means that the issue of whether or not the court should entertain this element of the applicant's claim was engaged.

[103] On that point, the applicant relied heavily upon the *McMinnis* case at first instance: *Re McMinnis and Another's Application* [2023] NIKB 72. That decision sought to provide some clarity as to when, exceptionally (as the Court of Appeal had held it could in authorities such as *Re Neill's Application* [2006] NICA 6), the Judicial Review Court might consider an alleged breach of section 75 obligations rather than leaving enforcement entirely to the ECNI. In particular, paras [175]-[176] of the decision offered the following guidance:

> "[175] Having considered the case-law, it seems to me that the following are broad principles which might be gleaned from the authorities on this issue:

(1) A court will rarely permit a section 75 claim to proceed by way of judicial review. The strong general rule is that such claims should be pursued by way of complaint to the Equality Commission under Schedule 9 to the NIA for failure to comply with the authority's equality scheme, which is the primary means by which provision is made for the discharge and enforcement of the section 75 duty.

(2) Nonetheless, the court retains a discretion – reflecting its discretion to hear and determine a case even where an effective alternative remedy exists – to allow a section 75 claim to proceed by way of judicial review. The governing principle expressed by the Court of Appeal in *Neill* is whether the alleged breach is procedural or substantive; but, in light of additional authority post-dating *Neill*, it is clear that something exceptional is required.

(3) The result is that a court will very rarely permit a section 75 claim to proceed by way of judicial review where the complaint is about the conduct of a full EQIA. Where a full EQIA has been carried out, it is likely that any complaint about the content of that exercise will be a matter of detail better addressed by the Equality Commission.

(4) Different considerations may apply where the complaint is essentially that, by means of the approach taken to an equality screening exercise, or by not conducting a screening exercise at all, the public authority concerned has simply side-stepped any proper equality assessment of the policy or decision under consideration.

(5) Even then, this will often be a matter to be pursued with the Equality Commission. It may, however, be appropriate for the court to intervene in such a case where:

    (a) the approach adopted, by which the impugned decision has been 'screened out' of equality assessment, is arguably irrational on its face or amounting to bad faith; and

(b) the impact on a protected group is likely to be particularly serious (for instance, giving rise to objectively very significant detriment to them, such as physical danger in the Toner case or other significant adverse impact, rather than something such as mere offence or inconvenience).

[176] Put another way, it may be appropriate for the court to intervene where there is a particularly egregious failure to equality-proof a decision, which can easily be addressed as a matter of legal argument without requiring detailed analysis, and where the consequences for a protected group are so serious as to merit action by the court, rather than requiring the complainant to proceed to the Equality Commission and then to the Secretary of State."

[104] Mr Oldham submitted that this case fell squarely within the type of case contemplated by para [175](4) and (5) and by para [176]; and that, in any event, one could not be prescriptive about every circumstance when the court would or could exercise its jurisdiction in this context. I accepted that this was arguable and, for that reason, granted leave on the third ground after a contested hearing.

[105] Subsequent to the substantive hearing in this case, however, the relevant aspect of the *McMinnis* decision was overturned on appeal: see *Re McMinnis' Application* [2024] NICA 77, particularly at paras [128]-[151]. The parties were afforded, and each availed of, an opportunity to make further submissions in writing in relation to the effect of the Court of Appeal's judgment on their earlier submissions.

[106] The Court of Appeal referred (at para [139]) to the "principle of heavily limited recourse to the supervisory review jurisdiction of the High Court in any case falling within the enforcement mechanism constituted by section 75(4) of and Schedule 9 to the Northern Ireland Act" which was said to be a "powerful one." Indeed, in para [136], the Court of Appeal also referred to the legislature having "reserved all cases" belonging to the category which the ECNI was empowered to investigate (*viz* cases where there is a complaint that a public authority has failed to comply with its equality scheme) to the ECNI. The High Court's jurisdiction was therefore considered to be limited to cases which were not of this character (*viz* cases which ECNI was not empowered to investigate) or to challenges to the ECNI's exercise or non-exercise of its functions in this context: see para [137].

[107] In its further submissions, the applicant urged this court to determine the section 75 issue notwithstanding the Court of Appeal's decision in *McMinnis*. Those submissions brought into focus a lack of clarity in the Court of Appeal's judgment as

to whether, on the one hand, the High Court's jurisdiction was ousted, so that it had no power to determine an issue which could be considered by the ECNI; or whether, on the other hand, the court retained a discretion to deal with such a claim even if this jurisdiction overlapped with that of the ECNI under Schedule 9 of the NIA.

[108] The former approach (ouster) may be thought to be indicated by:

(a) the emphasis on "the presumptively mandatory "shall" in section 75(4)" at para [132] of the Court of Appeal judgment;

(b) the reference to the legislature having "conferred *sole* responsibility" upon the ECNI in this field when its powers are engaged at para [133];

(c) the further reference to the legislature having "*reserved* all cases belonging to this category to ECNI" at para [136];

(d) the reference to "the prism of *vires*" in para [137], along with the identification of limited types of cases in which the High Court "would be *competent* to act" in that paragraph; and

(e) the reference to ECNI investigation before court involvement being "*mandated* by the legislature", with the result that the "quasi-judicial responsibilities of the ECNI *must* be discharged" in para [143] [my emphasis in each case].

[109] On the other hand, the latter approach (no ouster but judicial review to lie only in very limited circumstances) may be thought to be indicated by:

(a) the endorsement, at para [129] of the Court of Appeal judgment, of previous dicta in the *Neill* and *Stach* cases which did not close the door to the court exercising its jurisdiction in parallel with ECNI powers and treated the courts' reluctance to do so only as a strong *general* rule and as a facet of the discretionary bar to judicial review where an alternative remedy existed;

(b) the identification of reasons why investigation by the ECNI may be preferable at paras [130] and [133], which are irrelevant if the court's jurisdiction is simply ousted; and

(c) the reference only to recourse to the High Court's jurisdiction being heavily "limited", rather than excluded, along with reference to the non-ouster principle at para [139].

[110] My reading of the Court of Appeal judgment in *McMinnis* is that it is designed to suggest that the High Court only enjoys jurisdiction in this field, where the ECNI has power investigate under Schedule 9, where the challenge is to the ECNI itself for having failed to deal with a complaint or for having erred in the course of doing so (see para [137] of the judgment). That is also consistent with

reference to judicial review having "not been *altogether excluded* by this statutory model" [my emphasis] at para [139]. In other words, the statutory scheme excludes the jurisdiction of the High Court where the ECNI has *vires* to investigate but does not altogether exclude its jurisdiction in this territory in cases where the statutory enforcement mechanism does not operate properly. Assuming that correctly discerns the reasoning of the Court of Appeal, there is simply no scope for the applicant's challenge in this case (see also para [114] below).

[111] I recognise, however, that another reading of the Court of Appeal's decision is possible, namely that it leaves open the possibility that the High Court may exceptionally (although in undefined circumstances) determine a section 75 complaint even in cases where the ECNI could also investigate it. In case I am mistaken in my interpretation of the Court of Appeal judgment set out in the preceding paragraph, I also address the position on this alternative basis. Indeed, there may be much to be said in support of this being the better reading of the judgment; first, because much clearer language would have been required than that contained in section 75(4) of, and Schedule 9 to, the NIA to have the effect of excluding the High Court's jurisdiction completely, even if only in a category of cases; and, second, because the Court of Appeal does not purport to overrule or depart from what it previously held in either the *Neill* or *Stach* cases. For my own part, unconstrained by authority I would have considered the Schedule 9 mechanisms to be an *additional* protection for those claiming breach of the duties under section 75(1) and 75(2) in the context of the new constitutional arrangements established by the NIA after the Belfast Agreement, rather than an exclusive means of enforcement of those duties which might (at least in some cases) reduce the opportunity for effective enforcement.

[112] The Council contended that there was still scope for the court to determine its section 75 complaint in this case and urged me to do so, including on the basis of the following submissions:

(a) This is not a case where, at least in relation to one element of the claim, the ECNI enjoys any particular expertise. The assertion that the respondent's purported engagement with its section 75 duty was "post hoc and a pretence" is a matter with which the court is well-equipped to deal; and is materially different from the type of complaint which had been made in *McMinnis*.

(b) Looking at the matter through the "prism of vires", as the Court of Appeal did, it would in fact be a trespass on the court's supervisory jurisdiction if it were not able to determine such a claim, even in a clear case.

(c) The court, and not the ECNI, is constitutionally better suited to determine certain issues, of which this case is an example. That is because the ECNI's investigative powers under Schedule 9 to the NIA do not impose any duty of candour upon the relevant public body (as engagement in judicial review proceedings does); and, unlike the court, the ECNI has no powers to compel

the production of documents or require officials to give an account of their actions.

[113] The applicant accepted that the further bases upon which it advanced its section 75 challenge – that the Department had irrationally refused to consider equality implications even though it accepted that the decision would lead to "changes" under the category of religious belief and irrationally failed to further inform itself in those circumstances – were, in isolation, less clearly justiciable; but submitted that these were inextricably linked to its first complaint that no effort had been made to assess equality implications in advance of the actual decision-making.

[114] Albeit the consequence of the Court of Appeal's analysis in the *McMinnis* case may render section 75 NIA a dead letter insofar as judicial review challenges against public authorities which are subject to it are concerned, this court is plainly bound by the decision of the Court of Appeal and bound to apply its reasoning. I accept the respondent's submission that all aspects of the applicant's section 75 complaint amount, in substance, to a complaint that the Department did not comply with its equality scheme as it ought to have. Each element of this limb of the applicant's case amounts to a criticism that the Department did not conduct the type of assessment required by its own equality scheme before taking the impugned decision.

[115] I cannot then be faithful to the import of the Court of Appeal's decision in *McMinnis* without concluding, in retrospect, that leave should not have been granted on this ground and that the court should not purport to authoritatively determine it. The entire thrust of the judgment is that these matters should be left to the ECNI for investigation and determination (albeit Schedule 9 NIA does not provide a power of 'determination' per se, merely a power to investigate and make recommendations). Further, there are similarities between the complaint in the present case and those made in the *McMinnis* case, namely that the public authority had 'side-stepped' proper equality-proofing of its decision by wrongly and irrationally screening the decision out, thereby evading the need to consider undertaking a full EQIA. There is no proper basis upon which, if "the diagnosis of deficiencies of this nature was plainly a matter for the Commission and not the court" in *McMinnis* (see para [142] of the Court of Appeal's decision), I can conclude that it is a matter for the court in this case. The applicant's claim that the screening exercise was conducted after the decision had in substance been taken is simply another species of complaint that the Department failed to comply with its equality scheme, albeit a more glaring such failure.

[116] However, in case I am wrong about the above and/or the matter is relevant to a question of costs or becomes relevant in some way upon appeal, and in light of the detailed submissions I have heard on the issues (leave having been granted on this ground before the Court of Appeal's judgment in *McMinnis*), I can indicate the outcome of my analysis as follows. I would have been inclined to accept the applicant's argument that the section 75 exercise was conducted, in substance, *after* the key decision-making in this case and therefore could not represent discharge of

the obligation imposed by section 75; but, leaving that aside, would not have been inclined to accept that the screening exercise (had it been conducted at the correct time and been taken into account by the actual decision-maker) was irrationally conducted. I explain briefly my reasons for these views below.

[117] In the course of his oral submissions, Mr McLaughlin described as a key document a communication from the DfC Permanent Secretary to the DoF Permanent Secretary in early November 2022 setting out proposed costs-saving measures. This proposed a saving of some £6m by means of reduction in the RSG budget, although noting that there was a "risk to council service delivery and potential for legal challenge." There was then a meeting on 7 November between DoF, DfC and the NIO, in which it was made clear to the Department that additional funding would not be made available: in simple terms, there was no more money. Mr Carleton's initial evidence on oath was that, after this meeting, "The Department therefore *committed* to delivering these top three ranked saving options proposed, albeit it elected to do so with a smaller reduction in RSG of £3m in FY22/23" [my emphasis]. This was a central element of the evidence on the basis of which the applicant made the case that, in substance, the decision to drastically reduce the RSG budget was made at that point. Indeed, there was then a submission on 11 November 2022 providing the DfC Permanent Secretary with draft correspondence to DoF confirming that DfC would "endeavour to deliver the proposed savings options (1-3) as required and live within the proposed Resource allocation of £848.314m" (the budget later formally determined by the SSNI).

[118] At the hearing, Mr McLaughlin accepted that the state of the evidence then provided by the respondent was unsatisfactory as to precisely when and how the final decision was taken fixing the RSG budget. There was no clear paper trail in relation to this. Mr McLaughlin relied upon the fact that, at the December meeting of the Finance Working Group (on 8 December) the RSG allocation had not been confirmed by that point. This submission was made on the basis that the minutes of that meeting noted that the budget allocation had still not been confirmed; that the Department would provide details on this as soon as it had been agreed; and that the Department was working on allocations which would go to the Permanent Secretary. Mr McLaughlin relied upon this to suggest that, on that date, no decision had yet been taken. The applicant was, unsurprisingly, critical of the fact that the Department itself could not show how, when and by whom the decision had been taken. It maintained that the decision was effectively taken well in advance of the equality screening form being completed in mid-December; and also complained that the respondent had not discharged its duty of candour by explaining clearly to the court – either on affidavit or through disclosure of documents – how and when the final decision had come to be taken.

[119] This led to the provision of Mr Carleton's second affidavit sometime *after* the hearing had concluded. It provided further details about the final stages of decision-making and exhibited a range of additional documents which had not previously been put before the court. In particular, it exhibited a draft RSG

screening document for 2022/23 – dating back to April 2022 – which had been prepared by an official in anticipation of the budget being reduced and which was to be considered "should the budget be reduced for 2022/23." On 9 December 2022, the Departmental official who had originally sent this draft (Ms Dickson) forwarded her email of April to Mr Lewis within the Department asking that it be progressed "now that we have been notified of the RSG budget 2022/23 and there is a reduction on grant." (The respondent says that this was a reference to the budget proposals which emerged following the meeting of the TLT on 6 December 2022.) In turn, this email was forwarded by Mr Lewis to Mr Glass on 9 December, referring again to the budget reduction having been "agreed." Mr Glass's speaking notes for the Finance Working Group meeting the day before (also disclosed after the hearing as an exhibit to Mr Carleton's second affidavit) had noted that the RSG budget was "[Likely to be £8.924m but not for sharing with councils yet]." When providing these draft speaking notes to Departmental colleagues on 7 December, Mr Glass had noted that:

> "In relation to RSG it looks like it will be £8.924m. We will need to prepare a quick sub to Colum Boyle [the Permanent Secretary] outlining that SOLACE had indicated that they expected £3m cut in RSG and the allocation for each council. RSG can then be notified to councils after Colum approves Sub."

[120] On 12 December, Mr Lewis asked Ms Dickson to send the draft screening document to the Department's Equality Unit. It responded the next day stating that it had no comments on the screening document which was "cleared for publishing once signed off." The 'quick' submission referred to in Mr Glass's email above was that of 16 December 2022 asking the Permanent Secretary to approve the RSG budget (see para [15] above) and approved by way of a short email from the Permanent Secretary's office shortly after receipt.

[121] Looking at all of the evidence, there seems to me to be force in the applicant's submission that it shows that, in substance and reality, the decision in relation to the reduction in the RSG grant was made before the screening document was considered and signed, notwithstanding that "final" sign-off or approval from the Permanent Secretary followed shortly after the screening document having been approved by Messrs Glass and Carleton. Indeed, it seems clear that the decision or commitment had been made to drastically reduce the RSG budget in November 2022, well in advance of the equalities screening exercise having been undertaken by the relevant officials. It is entirely natural that the decision would have been made at this point given that it was then that the Department was informed that there was no real hope of any additional monies becoming available. However, there is no evidence that the screening exercise informed or preceded the working up of the option to drastically reduce RSG, nor informed or preceded the commitment being made to DoF that significant savings would be delivered by this means. Rather, the evidence suggests it was prepared by an official and held on file to be signed off if, at a later point, a decision was made to reduce the budget by an as-then-unknown amount.

[122] It is further clear that the decision to significantly reduce RSG was treated as having been confirmed in early December, albeit a final sign-off from the Permanent Secretary was required: see the content of the internal emails discussed at para [119] above. The completion of the equality screening form before the Permanent Secretary's final approval was given was treated as a formal requirement – in effect a box-ticking exercise – before the agreed position was finalised. This is not what section 75 NIA requires, nor indeed the respondent's Equality Scheme (which indicates at para 4.5 that screening is to be completed "at the earliest opportunity in the policy development/review process"). A separate concern is that the Permanent Secretary – the decision-maker – was told that the decision had been 'screened out' for equality purposes but does not appear to have ever himself seen the screening form or engaged with its contents. I also note that the Court of Appeal in *McMinnis* held, contrary to the respondent's submission in this case, that the guidance in the English authorities in relation to the PSED (some of which are discussed above: see paras [81]-[82]) should apply when considering section 75 in this jurisdiction given the strong parallels between the two statutory regimes (see para [150] of the Court of Appeal judgment).

[123] I would not go so far as to endorse the submission made on behalf of the applicant that the completion of the screening form was a "pretence." I have seen nothing to suggest that any Departmental officials acted in bad faith or considered that they were doing anything other than discharging their obligations. The process adopted was, however, considered as something of a necessary formality (as with the Permanent Secretary's final approval of the 'quick sub') long after all of the actual consideration of the reduction in the RSG budget had been undertaken.

[124] Had the equality screening form been completed and considered by the decision-maker at an earlier stage in the process, such as to properly inform the matter under consideration, I would not have concluded that there was any breach of section 75. The yardstick in this regard is irrationality (as set out by the Court of Appeal at para [151] of *McMinnis*). Although a persuasive argument can be made that the respondent could have conducted some more meaningful analysis of the likely impact upon section 75 groups, particularly in light of the likelihood of district-wide service disruption across councils in receipt of RSG and in view of the matters mentioned at para [94] above, I do not consider that it was irrational for the Department to take the view that the remote and contingent nature of the relevant effects was such that a full EQIA would be of little assistance. The approach taken in the *Dudley MBC* case (see para [101] above) supports this analysis.

[125] The Court of Appeal in *McMinnis* also appears to have concluded that it was insufficient for irrationality to have been identified in the screening exercise, provided it was not also irrational for the authority concerned to have decided not to undertake further enquiry by means of an EQIA (see para [151] of the Court of Appeal judgment, read alongside the finding of irrationality at para [178] of the judgment below). Mr McLaughlin contends that this case is an excellent example of

a particular issue which ought properly to be considered and determined by the ECNI, given its expertise, since it involves the issue of equality assessment of a multi-authority decision-making process. I agree with that submission. In any event, it would not have been irrational for the respondent to decline to undertake a full EQIA on the basis on which it did if it had addressed its mind to the issue properly at the correct time.

[126] In summary, it is not appropriate for this court to rule on the section 75 challenge in light of the exclusion of this court's jurisdiction on the issue or, in the alternative, in light of the other remedy which was available to the Council by way of complaint to the ECNI. Had it been appropriate to determine this issue, I would have considered there to be force in the applicant's submission that the consideration of equality impacts in this case was post hoc and therefore insufficient to discharge the respondent's obligations; but I would not have upheld the other aspects of the applicant's challenge given the high threshold for intervention set out by the Court of Appeal. In any event, for the reasons given, these matters do not fall to this court for determination and therefore, should a complaint to the ECNI remain outstanding or still be possible, these views should not be considered binding upon it.

Failure to consult

[127] Finally, the applicant contended that the Department's decision was unlawful for want of consultation with the Council in breach of the respondent's common law duty to consult. (An initial reliance upon a legitimate expectation of consultation on the part of the applicant was not pursued).

[128] The respondent relies upon the fact that there is no duty to consult in such a case because there is no statutory requirement to consult; it made no promise to consult or to follow a particular procedure; and there was no consistent practice of consultation in this context. The applicant accepts this but, nonetheless, contends that an obligation to consult affected councils arose, exceptionally, as a matter of fairness. The applicant relied in particular upon the *Bhatt Murphy* case (*R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755) at paras [42] and [47]-[49].

[129] The Council argued that the facts of this case are exceptional; that RSG is itself a form of exceptional support for less wealthy councils; that the Department's failure to tell councils what RSG was going to be ahead of the date by which they had to set rates put them in a highly invidious position "since their rates and budgets had to be based on informed guesswork"; that the lateness of the overall budget being set at Westminster was all the more reason to seek councils' views; that the Department was at all material times aware from the Council's rates return that it had budgeted on receiving RSG of some £3.4m; that the drop in RSG was very severe and without precedent; that the number of affected parties to be consulted would have been very small, so that discharging an obligation of consultation would not have been onerous; and that the Department has (rightly) not made the case that consultation

would inevitably have made no difference. The applicant also relies upon the fact that the Department has consulted about RSG for the 2023/24 financial year.

[130] At paras [41]-[42] of his judgment in *Bhatt Murphy*, Laws LJ gave the following general summary:

> "41. There is first an overall point to be made. It is that both these types of legitimate expectation are concerned with exceptional situations… Nor will the law often require such a body to involve a section of the public in its decision-making process by notice or consultation if there has been no promise or practice to that effect. There is an underlying reason for this. Public authorities typically, and central government *par excellence*, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel. All this is involved in what Sedley LJ described (*BAPIO* [2007] EWCA Civ 1139 paragraph 43) as the entitlement of central government to formulate and re-formulate policy. This entitlement – in truth, a duty – is ordinarily repugnant to any requirement to bow to another's will, albeit in the name of a substantive legitimate expectation. It is repugnant also to an enforced obligation, in the name of a procedural legitimate expectation, to take into account and respond to the views of particular persons whom the decision-maker has not chosen to consult.
>
> 42. But the court will (subject to the overriding public interest) insist on such a requirement, and enforce such an obligation, where the decision-maker's proposed action would otherwise be so unfair as to amount to an abuse of power, by reason of the way in which it has earlier conducted itself. In the paradigm case of procedural expectations it will generally be unfair and abusive for the decision-maker to break its express promise or established practice of notice or consultation. In such a case the decision-maker's right and duty to formulate and re-formulate policy for itself and by its chosen procedures is not affronted, for it must itself have concluded that that interest is consistent with its proffered promise or practice. In other situations – the two kinds of legitimate

> expectation we are now considering – something no less concrete must be found. The cases demonstrate as much. What is fair or unfair is of course notoriously sensitive to factual nuance. In applying the discipline of authority, therefore, it is as well to bear in mind the observation of Sir Thomas Bingham MR as he then was in *Ex p Unilever* at 690f, that '[t]he categories of unfairness are not closed, and precedent should act as a guide not a cage.'"

[131] In the present case, there was no express promise or established practice of consultation of councils before the Department set the RSG budget. The question, therefore, is whether, exceptionally, there was a requirement on the part of central government to consult in this case. I do not consider this can arise as a result of (what is referred to in *Bhatt Murphy* as) the secondary case of procedural expectation, namely where the respondent was required, before effecting a change of policy, to afford potentially affected persons an opportunity to comment on the proposed change (in the absence of a previous promise or practice of notice or consultation). Laws LJ considered that this type of procedural legitimate expectation would not often be established (see para [49] of his judgment). The key issue, however, is that the previous level of RSG grants cannot properly be described as a previous continuous policy which is being changed. That is because of the statutory background, which requires a fresh decision to be made each financial year as to the level of budget to be allocated and distributed. Put another way, councils were not entitled to rely on the continuance of RSG funding each year at any particular level. Rather, an independent decision as to the appropriate level of funding has to be made by the Department each year and even a sharp reduction of funding in one year does not represent the abandonment of a 'policy' or practice, properly understood. The reduction in funding in such circumstances from a previous year or years without consultation does not in my judgment amount to unfairness which represents an abuse of power.

[132] I have also had regard to the extremely helpful summary of principles in relation to duties to consult contained in the judgment of Hallett LJ in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 at para [98], particularly in the above context those set out at sub-paras (3)-(5) and (8) of her summary of principles. I reproduce that summary below:

> "The following general principles can be derived from the authorities:
>
> (1) There is no general duty to consult at Common Law. The government of the country would grind to a halt if every decision-maker were required in every case to consult everyone who might be affected by his decision. *Harrow Community Support Limited) v. The Secretary of State for Defence* [2012]

EWHC 1921 (Admin) at paragraph [29], *per* Haddon-Cave J).

(2) There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult (*R (Cheshire East Borough Council) v. Secretary of State for Environment, Food and Rural Affairs* [2011] EWHC 1975 (Admin) at paragraphs [68-82], especially at [72]).

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

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

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

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

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

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

(9) The doctrine of legitimate expectation does not embrace expectations arising (merely) from the scale or context of particular decisions, since otherwise the duty of consultation would be entirely open-ended and no public authority could tell with any confidence in which circumstances a duty of consultation was be cast upon them (*In Re Westminster City Council* [1986] AC 668, HL, at 692, *per* Lord Bridge).

(10) A legitimate expectation may be created by an express representation that there will be consultation (*R (Nadarajah) v Secretary of State for the Home Department* [2003] EWCA 1768 Civ), or a practice of the requisite clarity, unequivocality and unconditionality (*R (Davies) v HMRC* [2011] 1 WLR 2625 at paragraphs [49] and [58], *per* Lord Wilson).

(11) Even where a requisite legitimate expectation is created, it must further be shown that there would be unfairness amounting to an abuse of power for the public authority not to be held to its promise (*R (Coughlan) v. North and East Devon Health Authority* [2001] 1 QB 213 at paragraph [89] *per* Lord Woolf MR)."

[133] In the absence of a secondary procedural legitimate expectation of consultation arising from the councils having substantial grounds to expect that the substance of the relevant policy would continue to ensure for their benefit, there is

little if any scope in this context for fairness to require notification and advance consultation. The context is the exercise of a statutory power by central government, with no statutory obligation of consultation, rather than an administrative or adjudicative decision determining an individual's rights or obligations. Moreover, as the respondent submitted, the setting of the RSG budget is but one aspect of the wider setting of its overall budget. Any alteration in the proposed RSG budget would have knock-on effects for other allocative decisions in the budget process. In those circumstances, there would arguably be a similar obligation to consult other third parties which may be affected by reallocations within the Departmental budget, in a manner without clearly defined limits.

[134] The applicant prayed in aid the fact that it was required to strike its rate without knowing what its RSG allocation for the forthcoming year would be (and, indeed, in circumstances where the Department was aware that the Council was assuming an RSG allocation which was likely to be much too optimistic). It is obviously best practice and much to be encouraged from a commonsense perspective for the Department to provide councils with details of funding to be made available by it as early as practicable and, if at all possible, before they strike the rate for the relevant financial year. However, it would be wrong to elevate this into a legal obligation. Although section 27 of the 2011 Act requires an annual grant to be made, it does not prescribe the timing of this grant, nor the amount or timing of any payments. On this basis, the allocation can be made at any stage in the year. As noted above (see paras [23] and [24]) both DRG and TFG are also payable at such time as the Department shall determine. There is nothing to tie the determination of these funding streams to any particular point in, or before, the relevant financial year. This is one reason why the 2011 Act makes clear that councils must set their budget on the basis of *estimates*. Mr McLaughlin also pointed to section 28, which provides for reductions in grant allocations in certain circumstances, and to section 3(3)(b) of the 2011 Act, which allows councils to incur expenditure which was not previously authorised in accordance with its budget estimates, provided these are otherwise previously authorised by the council. In short, although it is desirable for the amount of grants made by the Department to be known to councils in advance of setting the budget, this is not statutorily required. Councils will frequently, perhaps always, have to strike their rate with some degree of uncertainty as to how the financial picture would or may later change. Indeed, the applicant's evidence accepts that, even in a 'normal' year (particularly where the RSG budget is topped up late in the financial year), assumptions have to be made in setting the council's budget and striking a rate.

[135] In the above circumstances, I do not consider that there was a legal obligation upon the Department, as a matter of fairness or otherwise, to consult with the applicant or other councils before fixing the RSG budget for the 2022/23 financial year. The mere fact that the Department since decided that it *would* consult in relation to the setting of its budget for the 2023/24 financial year does not alter this position.

[136] For completeness, I would add that, had I held there to be a legal obligation upon the Department to consult, I would not have considered this obligation to have been discharged or rendered impracticable in the circumstances of the case, each of which were advanced as fall-back submissions by the respondent.

[137] In particular, I do not accept the respondent's suggestion that there was no time to consult. Specifically, the suggestion that consultation could only have occurred after the budget was confirmed by statute on 8 February 2023 is misplaced. It is of note that the Department had notified councils of the RSG distribution on 22 December 2022 and clearly did not feel compelled to await the confirmation of the budget by statute before (even on its case) finally making the relevant decision. More importantly, there were months before the decision was made when the issue was under consideration and significant cuts to the opening budget were being proposed. There was in my view adequate time for some process of consultation during that period.

[138] The respondent also placed some reliance upon a letter of 24 August 2022 from SOLACE to the Department's Permanent Secretary. In that correspondence, it was stated that SOLACE assumed "a 25% reduction in the rates support grant for 22/23, which equates to approx £3m." On this basis, the respondent suggested that the applicant was aware of the likely level of reduction in the opening RSG budget and had the opportunity to make whatever representations it wanted. The applicant's riposte was that SOLACE does not speak for it, or indeed for local authorities, operating instead simply as a forum for the 11 Chief Executives of the district councils to meet and discuss matters of common interest. Mr Tohill further says that the Department issues correspondence regarding RSG allocations to the Chief Executives and Finance Officers of individual councils; and that, for instance, he is not consulted over correspondence sent by SOLACE, which could not in any event purport to bind individual councils. He takes issue in his evidence with certain aspects of the SOLACE letter relied upon by the Department, which he avers he had not seen until after these proceedings had commenced. There is also limited, if any, evidence in these proceedings about how this assumption on the part of SOLACE came to be made. Departmental engagement with SOLACE is, of course, to be welcomed and no doubt serves a range of useful purposes. However, what was relied upon in this case could not in my view have been sufficient to discharge a legal obligation to consult with individual councils, if such an obligation arose. That would require the Department to formally and transparently set out for the relevant consultees what it was proposing to do, with some detail of its thinking in that regard, and invite formal responses from those wishing to make representations.

Candour

[139] I do not wish to leave this case without saying something about the respondent's compliance with its duty of candour. As appears from the discussion above, the primary submissions made at the oral hearing of this case were made in the absence of important documents which were relevant to the decision under

challenge. Mr McLaughlin was inclined to accept at the hearing that the state of the evidence was unsatisfactory, since it was not entirely clear from the relevant documents exhibited to Mr Carleton's evidence exactly when, how and by whom the impugned decision was taken. This led the applicant to develop its case in a way which might not otherwise have been open to it, including by alleging a lack of candour. The position was remedied relatively promptly after the hearing by the provision of Mr Carleton's second affidavit, which exhibited a range of plainly material documents, including those which immediately preceded the 'final' decision of the Permanent Secretary to endorse the recommended RSG allocation. It is common case that these documents ought properly to have been exhibited before the hearing of the case.

[140] Regrettably, the explanation contained in Mr Carleton's second affidavit as to how this situation arose is also not particularly satisfactory. Mr Carleton avers that, since the conclusion of the hearing and in response to the criticism of the Department's candour, further searches were undertaken in order to ascertain the existence or otherwise of any further documents or information which may shed light upon the criticisms which had been made by the applicant and the disclosure of which may be necessary. Some further documents had been identified in this way. Mr Carleton apologised on behalf of the Department that this documentation was not placed before the court sooner. He explained that "its potential significance was not fully appreciated" at the time when he swore his first affidavit on behalf of the Department, nor was it anticipated that the applicant would press (in the terms which it did) the question of the precise date upon which the RSG decision was finally settled. Two of the significant documents then disclosed – the submission to the Permanent Secretary about the budget dated 20 December 2022 and his email response of 21 December 2022 – had, Mr Carleton explained, been provided by the Department to its lawyers before his first affidavit was sworn. However, due to the large volume of documentation supplied, these documents were inadvertently overlooked and not ultimately included in the evidence placed before the court. A number of other relevant documents were exhibited to Mr Carleton's second affidavit which were not similarly said to have been provided to the Department's lawyers at an earlier stage.

[141] The court is grateful for, and unreservedly accepts, the apology offered on behalf of the Department and its representatives for the late provision of relevant evidence. I also wish to emphasise that there is no suggestion on anyone's part that the non-disclosure of evidence was intentional, in bad faith, or anything other than a genuine error or oversight. However, the effect of the oversight was to give rise to additional time and cost in the conduct of the litigation.

[142] The Administrative Court Judicial Review Guide (2024 edition) published by the Courts and Tribunals Judiciary in England and Wales summarises the duty of candour (at para 15.1.2) in the following terms:

> "However, in judicial review proceedings there is a special duty which applies to all parties: the "duty of candour." This requires the parties to assist the Court by ensuring that information relevant to the issues in the claim is drawn to the Court's attention, whether it supports or undermines their case."
>
> [underlined emphasis added]

[143] The obligation, as it applies to respondent public authorities and their representatives, is further explained in section 15.3 of the Judicial Review Guide, with supporting case-law cited in footnotes and in terms which I do not consider to materially depart from the substance of the obligation in this jurisdiction (albeit a number of differences persist between the procedure for judicial review here and in England and Wales). Amongst other things, the Guide emphasises the particular obligation upon legal representatives acting for public authorities to ensure that the authority's duty of candour and cooperation with the Court is fulfilled; that what is required to discharge the duty at the substantive stage of the proceedings will be more extensive than what is required before leave has been granted; that the duty of candour is a continuing one; that public authorities must not be selective in their disclosure of documents; and that the evidence must not mislead by omission, for example by non-disclosure of material documents. There is accordingly an ancillary obligation to devote adequate resources to the preparation and presentation of the respondent's evidence and case to ensure that a mishap such as occurred in the present case does not arise. (This is appropriately recognised in the Treasury Solicitor's 'Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings' in England and Wales, which identifies as a 'golden rule' for a relevant disclosure exercise the need to "devote sufficient resources from the outset to ensure that the process can be, and is, conducted on time and properly".) Where, for some reason, this does not appear possible – either at all or in the time available – that should be brought to the attention of the court and the other parties as soon as practicable for the giving of further directions.

Conclusion

[144] For the detailed reasons given above, the applicant's claim for judicial review succeeds on the ground of failure to have due regard to rural needs; but the grounds relating to irrationality, section 75 NIA and want of consultation are dismissed.

[145] I will hear the parties briefly on the issue of relief, bearing in mind the respondent's point that, even by the time of the hearing in this case, the relevant financial year had ended, with final budget allocations to all departments having been made and all monies spent. I will also hear the parties on the issue of costs.