Neutral Citation Number: [2025] EWHC 96 (Admin)

Case No: AC-2024-CDF-000082

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

Bristol Civil and Family Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 24th January 2025

Before:

MR JUSTICE EYRE

- -

Between :

THE KING
(on the application of)

1) SONIA GOULD **Claimants**

2) ALICE JEFFERY

- and -

DEVON COUNTY COUNCIL **Defendant**

-and-

DEVON PARTNERSHIP NHS TRUST

Interested Party

- -
- -

Stephen Broach KC and Eleanor Leydon (instructed by **Rook Irwin Sweeney LLP**) for the **Claimants**
Jonathan Auburn KC and Oliver Jackson (instructed by **Devon County Council Legal Services**) for the **Defendant**
David Gardner (instructed by **Browne Jacobson LLP**) for the **Interested Party**

Hearing dates: 8th – 9th October 2024
Further written submissions: 12th, 20th, and 25th November 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.00am Friday 24th of January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Mr Justice Eyre:

Introduction.

1. The North Devon Link Service ("the Service") was set up in 1992. By that service the Defendant provided drop-in facilities for adults with mental health difficulties. The Service was funded by the Defendant and managed on its behalf by the Interested Party. The Service operated from centres the Defendant owned in Barnstaple, Bideford, and Ilfracombe.

2. By a cabinet decision of 13th March 2024 ("the Decision"), the Defendant resolved to close the Service and to work with the Interested Party and the Devon Mental Health Alliance ("the Devon MHA") to support service users in moving to the use of alternative community services. In making the Decision the cabinet based its approach on a report ("the Report") from the Defendant's Director of Integrated Adult Social Care, Tandra Forster.

3. The Decision was made for two principal reasons. First, the pressures on the Defendant's budget caused it to review the extent to which it was able to continue to provide services which it was not required by statute to provide. In that regard although the Claimants say that the Decision was neither lawful nor rational they do not contend that the Defendant had a statutory duty to provide the Service. Second, the Defendant says that changes since the Service came into being mean that other public bodies are now providing alternative services which meet the needs that the Service was intended to meet. It is not appropriate, the Defendant says, for its funds to be used to duplicate provision which is also being made by others using public funds. The Claimants say that, in truth, the alternative provision is not an adequate substitute for the Service.

4. The Claimants were users of the Service (with the First Claimant attending the centre in Bideford and the Second Claimant that in Barnstaple). They challenge the Decision on two grounds (the first of which has two parts). Ground 1(a) asserts a failure by the Defendant to take account of its statutory duties under sections 2, 3, and 5 of the Care Act 2014 and under section 2B of the National Health Service Act 2006. I will consider below the basis on which that failure is put. Ground 1(b) asserts a failure by the Defendant to take account of a number of its policies and strategies. The Claimants say that the Defendant was required to have regard to the One Devon Five Year Integrated Care Strategy ("the ICS") by reason of section 116B of the Local Government and Public Involvement in Health Act 2007. Alternatively, they say that the ICS and/or two other policies were so obviously material to the Decision that it was irrational for the Defendant not to have regard to them. Ground 2 alleges irrationality contending that the Decision was outside the range of rational decisions open to the Defendant in the circumstances. Ground 2 further alleges that the process by which the Decision was reached was demonstrably flawed by reason of a failure to consider the various policies already mentioned. It will be seen that the second limb of ground 2 replicates the second limb of ground 1(b).

5. The Defendant denies that it was required by statute to have regard to the various statutory duties or to the policies and denies that they were so obviously material to the Decision that a failure to consider them was irrational. Alternatively, the Defendant says that it is to be treated as having considered the duties and policies in substance. It denies that the Decision was irrational as alleged in ground 2. Finally, the Defendant

invokes section 31(2A) of the Senior Courts Act 1981 saying that the court should find that it was highly likely that the outcome for the Claimants would not have been substantially different if the conduct in question (namely the failure to have regard to the statutory duties and the policies invoked by the Claimants) had not occurred.

6. The parties had agreed a list of issues and matters developed further in the course of submissions. The headline issues which fall to be determined are:

   i) The approach to be taken to the factual issues.

   ii) Whether the Defendant's understanding of the role and function of the Service was wrong.

   iii) The nature of the Claimants' pleaded case and, as a consequence, the case which it is now open to them to advance.

   iv) The correct legal test and, in particular, the proper interpretation and effect of the decision of Elisabeth Laing J (as she then was) in *R (DAT) v West Berkshire Council* [2016] EWHC 1876 (Admin).

   v) Whether the Defendant was required to have regard to the sundry statutory duties invoked by the Claimants. My conclusion as to the case open to the Claimants will determine the approach to be taken to this issue. Depending on that conclusion it will either require consideration both of a potential statutory obligation to have regard to these duties and of an obligation arising by reason of their obvious materiality or just the latter.

   vi) Whether the Defendant is to be taken as having had regard to those duties.

   vii) Whether the Defendant was required to have regard to the sundry strategies and policies, and in particular the ICS, either as a matter of statute or because they were obviously material to the Decision.

   viii) Whether the Defendant is to be taken as having had regard to those policies.

   ix) Whether the Decision is liable to be struck down as having been irrational.

   x) Whether section 31(2A) of the Senior Courts Act 1981 precludes relief.

The Procedural History.

7. The claim was issued on 24th May 2024. At that time there were three claimants, and three grounds were advanced, the second of which was that the Decision had been taken in breach of the public sector equality duty derived from section 149 of the Equality Act 2010. The Claimants sought interim relief in the form of an order preventing the Defendant from taking any further steps to implement the Decision pending final determination of the claim.

8. On 28th May 2024 HH Judge Keyser KC directed expedition and imposed an expedited timetable. At a hearing on 13th June 2024 (by an order sealed on 17th June 2024), I granted permission on all three grounds but refused the application for interim relief.

9. Since then, the former Second Claimant, Eamonn Mullane, has discontinued his claim and the former second ground (the breach of the public sector equality duty) has been abandoned.

10. At the start of the hearing, I gave the Claimants and the Defendant permission to adduce a number of further witness statements. I indicated then that the statements appeared unlikely to advance matters and that assessment was confirmed in the course of the hearing.

11. The Interested Party acknowledged service and stated that it did not intend to contest the claim. It has taken no part in the proceedings save that Mr Gardner attended the hearing with a watching brief and in order to protect the Interested Party's interests. Mr Gardner was satisfied that as the arguments had developed, there was no need for him to make submissions on the Interested Party's behalf.

The Factual Background.

12. Much of the factual background was uncontroversial. The Service was set up in 1992. It was designed to provide support and guidance to adults with mental health difficulties but who did not require specialist NHS care. That support took the form of facilities for social and leisure activities and educational opportunities. The three centres provide a drop-in service. The Bideford centre is open from 10.30am to 3.30pm on three days a week and from 2.00pm to 6.00pm on Fridays. The Ilfracombe centre is open four days a week for periods ranging from three hours on Fridays to six hours on Tuesdays. The Barnstaple centre is open five days a week for periods ranging from four to six hours. Those attending the three centres have opportunities to take part in choirs, drawing and painting and other "arts and crafts" activities or gardening. In addition, there is the opportunity for social interaction at coffee mornings and similar occasions. The Bideford and Barnstaple centres have games rooms with a dartboard, pool table, and table tennis table. Each centre has a quiet room. In the week to 31st March 2024, there were 38 total attendances at Bideford; 29 at Ilfracombe; and 11 at Barnstaple. Those figures show a reduced attendance from 2023, the figures for which were, in turn, down on those for 2022. A degree of caution is required in relation to those figures. That is because when the Service reopened after the lockdowns imposed to address the Covid-19 pandemic, those permitted to attend were limited to those who had attended previously and to new referrals made by the North Devon Mental Health Social Work team (a team operating under the auspices of the Interested Party). Before that, users had been able to refer themselves or could be referred by a health or social care professional. It is, therefore, possible that there are other persons who would make use of the Service if the former referral arrangements were to be restored.

13. As will be seen, the Claimants say that this bald summary of the purpose of the Service and of the facilities offered does not reflect either the Service's true value or the important role it plays in practice.

14. The Defendant does not provide or operate a similar service to the Service anywhere else in Devon. The Service formerly also operated from a centre in Holsworthy. In 2022, the Defendant ended the operation of the Service in Holsworthy. The activities formerly provided by the Service in Holsworthy have since then been provided by the Holsworthy Coffee Lounge. Although this activity takes place in council-owned premises, the local community youth centre, it is provided by a local voluntary body,

the Holsworthy Youth and Community Hub. At the Coffee Lounge that body offers a range of community support sessions without input from the Defendant or from the Interested Party. The Defendant believes that the change in Holsworthy has been successful and that the former users of the Service there have benefited from the change. The Claimants did not address in terms the consequences of the closure of the centre in Holsworthy. Understandably, they were not in a position to comment on the success or otherwise of the arrangements which were in place there and which had replaced those provided by the Service. The focus of their evidence was on their needs (and those of other users of the Service); the role which the Service played in meeting those needs; their concerns as to the consequences of the closure of the Service; and the perceived inadequacy of the alternative provision.

15. It was common ground that there have been changes generally in the services available to those with mental health difficulties since the Service was set up in 1992. The Defendant pointed in particular to the introduction of the National Community Mental Health Framework for Adults and Older Adults by NHS England in September 2019. National funding from the NHS is available under this framework and it led to the establishment in 2022 of the Devon MHA. This is a partnership between six voluntary, community, and social enterprise organisations using NHS funding to provide services for those with mental health difficulties. In addition, GP practices are now parts of Primary Care Networks and consequently have access to multi-agency Mental Health and Wellbeing teams. The appendix to the Report listed a number of other bodies providing services for or available to those with mental health difficulties.

16. The Defendant said that the changes meant that the position was wholly different from that which it had been in 1992 and there was now provision, funded at least in part by public money from NHS England, from a number of sources of services of the kind which formerly had been only available through the Service. The continuation of the Service would, the Defendant said, amount to a degree of duplication of facilities.

17. The Claimants accept that there have been a number of changes and did not dispute the existence of the new services to which the Defendant pointed. However, they say that in practice those new services are either not available in North Devon or do not in reality replicate the service which is in fact provided by the Service.

18. There was disagreement between the Claimants and the Defendant as to the severity of the problems suffered by the Claimants and other users of the Service and the role actually performed by the Service. The Claimants sought to characterise the situation as being one in which the Defendant had misunderstood the role played by the Service and so had proceeded on a false basis. There is, however, a genuine dispute between the parties as to the true nature of the Service and the role it played. I can only conclude that the Defendant proceeded on a false and mistaken basis if I am satisfied that the Claimants' case as to the true factual position is correct.

19. I adopt the approach to be taken to the determination of disputes of fact in judicial review proceedings summarised thus by Chamberlain J in *R(F) v Surrey County Council* [2023] EWHC 980 (Admin), [2023] 4 WLR 45 at [50]:

> "In my judgment, the correct approach is as follows:
>
> (a) If invited to resolve a dispute of primary fact, the court should consider carefully whether any pleaded ground of challenge really requires resolution of the dispute. In

> most cases, the answer will be that the resolution of the dispute was for the decision-maker, not the court: the court's supervisory function does not require it to step into the shoes of the decision-maker and therefore does not require it to resolve the issue for itself.
>
> (b) Where the resolution of a dispute of primary fact is necessary, the court usually proceeds on written evidence: see e g *Talpada*, para 2. The court will generally do so if—as here—no application to cross-examine has been made before the start of the substantive hearing.
>
> (c) There is no absolute rule that the court must accept in full every part of the statement of a witness who has not been cross-examined, whether the statement is adduced for the claimant or the defendant. The court can reject evidence in a witness statement if it `cannot be correct' *Safeer*, paras 16–19 and *Singh*, para 16). That might be so if it is contradicted by 'undisputed objective evidence … that cannot sensibly be explained away': *S v Airedale*, para 18. But there are also examples of courts rejecting evidence given in witness statements as, on balance, inconsistent with other written evidence: see e g *Talpada*, para 48.
>
> (d) In some cases, the court may be unable to resolve a conflict of written evidence on a question of primary fact. In that situation, 'the court will proceed on the basis that the fact has not been proved': *Talpada*, para 2. This will be to the disadvantage of whichever party asserts the fact. That will generally be the claimant, because in judicial review the claimant generally bears the burden of proving all facts necessary to show that the decision challenged is unlawful. Thus, the principle that the defendant's evidence is to be preferred, save where it 'cannot be correct', arises because of the difficulty of satisfying the burden of proof where there is a conflict in written evidence, not because evidence adduced on behalf of a defendant is inherently more likely to be true than that adduced on behalf of a claimant."

20. Large parts of the various witness statements were not material to the issues I have to decide. The statements in support of the Claimants' case were wide-ranging and included criticisms of the merits of the Decision. As I emphasised at the hearing, the court is concerned with the lawfulness of the Decision and not with its merits. In addition, large parts of the evidence submitted on behalf of the Claimants amounted to non-expert opinion evidence which also did not advance matters.

21. The core of the Claimants' evidence related to their needs and to those of other service users and to the role performed by the Service. They said that many of the users have complex mental health needs and have attended the centres for a number of years. They emphasised that the staff in the centres are skilled and experienced in meeting those needs. There was a difference between the Claimants and the Defendant as to the level of skill of the staff. The Claimants say that, in reality, the staff are skilled in dealing with users who have mental health difficulties. They say that, at the least, the Defendant underestimates the value of the experience of the staff and their knowledge of the needs of the particular users. That contention is related to the central point made by the Claimants which is that, regardless of the intention when the Service was created, it now operates as a life-line for users who have real mental health difficulties. In practice, it operates to prevent those users from going into crisis. As such it performs an important role in reducing the risk of suicide or self-harm. The Claimants say that the work of the Service is essential in enabling them to be safe and to function in the community. The Claimants express deep scepticism about the adequacy or equivalence of the facilities which it is said they will be able to access following the closure of the

Service and express a consequent concern about the potentially grave consequence of the Decision for their well-being and safety.

22. Much of the heat in the competing evidence was generated by the criticism by Tandra Forster of the evidence of the Claimants and in particular of the First Claimant. Ms Forster contended that the First Claimant had over-stated the severity of her mental health problems and the effect which they have on her life. Ms Forster also criticised Sonia Gould's behaviour in other respects. The First Claimant has responded to those criticisms denying any deliberate exaggeration and countering the allegations made about her behaviour.

23. The First Claimant has not been cross-examined about those matters and they are not material to the issues I have to decide. However, I make it clear that that I do not find that the Defendant has established any deliberate exaggeration on the part of the Claimants or their witnesses. It is understandable that service users with mental health problems will be very conscious of the impact which those problems have on their lives. Their perception of that impact is genuine, but it cannot be conclusive and is inevitably not a detached or objective assessment of that impact. It is also understandable that the Defendant has a wider field of vision and will be aware of others with more serious problems. That wider perspective does, however, mean that the Defendant is at risk of minimising the impact of the service users' problems on their daily lives.

24. In her second statement, at [50] and following, Ms Forster gives evidence of the pressure which is placed on council members and officers pointing out that such pressure can take the form of threats and harassment. Ms Forster does not say in terms that the Claimants have engaged in such conduct, and I make it clear that no such involvement has been established. It is common ground that the First Claimant posted Facebook comments in harsh terms about Cllr Hellyer. Those comments were expressed in unattractive language and the First Claimant accepts that she posted them in anger. The comments amounted to robust criticism of the actions of Cllr Hellyer in supporting the Decision. Such criticism may very well have been unfair and was not expressed in balanced or polite terms, but the posting of those comments was far removed from the kind of threatening conduct to which Ms Forster has referred.

25. Ms Forster has also made allegations about the First Claimant's behaviour towards other users at the Bideford Centre. Ms Gould denies those allegations and in the absence of oral evidence and cross-examination, they are not established. They are, moreover, irrelevant to the matters I have to decide. If the Claimants have a valid public law challenge to the Decision, then the fact that Ms Gould had engaged in the behaviour alleged against her would not detract from the validity of that challenge. Conversely, if the challenge is not well-founded, the claim will fail even if the First Claimant's behaviour is beyond reproach.

26. I come back to the difference between the parties as to the role performed by the Service. As I have noted above, the Claimants say that it operates in reality to prevent users moving into crisis and thereby reduces the risk of self-harm and suicide. Ms Forster's evidence sets out the Defendant's different perception of the Service. In that evidence Ms Forster explains the purpose of the Service and the kind of activities which it provides emphasising that it provides neither clinical nor specialist mental health support. The staff at the centres are not employed as mental health specialists and the centres are neither designed nor equipped to provide a crisis service. Ms Forster points

to the development of community mental health services in the period since the Service was set up in 1992. In particular, she emphasises the establishment of the Devon MHA in 2022. Ms Forster describes this as "a partnership between six specialist voluntary community and social enterprise organisations supported by dedicated funding from the NHS". The Devon MHA provides some services itself and in addition seeks to connect those with mental health problems with other services which can assist them. Ms Forster also referred to the perceived success of the arrangements which had replaced those of the Service in Holsworthy.

27. For the Claimants Mr Broach KC was critical of Ms Forster's evidence and contended that it failed to establish that the Service had the limited role which she asserted. He argued that there had been a failure to understand the role actually performed by the Service and the skills which the staff had. Mr Broach also made some criticism of the terms in which Ms Forster's evidence was expressed and suggested that there was a lack of the detail or supporting evidence which would be needed if the points made were to be established.

28. As I indicated above, Ms Forster's criticism of the First Claimant did not advance matters. However, the substance of Ms Forster's evidence about the Service and the reasoning behind the Decision was adequately detailed and addressed matters which were within Ms Forster's knowledge in light of her role. The account which she gave cannot be dismissed as either inherently unreliable or as being inconsistent with undisputed evidence. The Claimants' evidence shows that the service users (or at least some of them) view matters differently from the Defendant, but that falls far short of establishing that the Defendant's understanding of the role of the Service is wrong. The Claimants assert that the Defendant's understanding was mistaken and that in reality the function of the Service was different from that on which the Defendant relied in making the Decision. The Claimants are contending that although the Service was created to provide social and related support it operated in practice to prevent users falling into crisis and played a significant role in reducing the risk of self-harm and suicide. The burden of establishing that proposition lies on the Claimants and, applying the *R(F) v Surrey County Council* approach as set out above, they have failed to do so. The Claimants' perception and belief, real and genuine though they are, do not establish that proposition and matters are not advanced by the non-expert opinion evidence contained in the supporting evidence. It follows that I am to proceed on the basis that the Defendant's understanding of the role and function of the Service was correct. At the very least the Claimants have failed to show that it was not properly open to the Defendant to approach the Decision on the basis of its understanding of the role and function of the Service.

29. In light of that assessment, I return to the Decision and the events leading up to it.

30. The Decision had been preceded by two rounds of consultation. Of particular note for current purposes is the fact that concern was raised in the consultation that the ending of the Service would create an increased risk of suicide and of the service users going into crisis.

31. The Report recommended:

> "To close the North Devon Link Service Drop-in services that run from the Link Centres in Barnstaple, Bideford and Ilfracombe.

> To note that the closure would include ceasing the short-term enabling support to those service users in receipt of Care Act 2014 eligible services. The Council and Devon Partnership Trust will assist those people to access alternative equivalent support.
>
> To work with Devon Partnership NHS Trust and the Devon Mental Health Alliance to support all service users in their transition to alternative community support over a period of 3 months minimum."

32. By way of "Background" the Report summarised the foundation of the Service. It noted, at 2.2, that the Defendant did not make any equivalent provision elsewhere in the county and said that the Service was "inconsistent with service delivery across the county". At 2.5 it said:

> "The recommendation within this report means that people with eligible needs as defined within the Care Act will continue to have their eligible needs met."

33. Under the heading "Main Body" section 3 of the Report addressed the reasoning underlying the recommendation. At 3.1 – 3.3 it said:

> "In 2022, national Community Mental Health Framework funding was used to establish the Devon Mental Health Alliance which has been working with local partners to develop services for local people, both directly and through wider community development. As a result, local people in North Devon can now access mental health support services in ways they could not previously. These new services are accessed through GP practices and the wider primary care team, and they are developing in reach and number.
>
> During the consultation in February 2023, service users described themselves as having severe mental health needs or that their mental health needs are too complex to be managed in primary care, but not severe enough for secondary care. They reported that they felt the drop-ins were the only support available to them.
>
> While the Council acknowledges the strength of feeling on this matter, the service is commissioned to meet social care needs, it is not commissioned to provide support for mental health needs that are too complex to be managed in primary care."

34. At 3.4 – 3.6 the Report referred to the establishment of the Devon MHA and to the access by GPs to Multi-Agency Mental Health teams and referred to the services they could provide. Then, at 3.7, it said:

> "These services were not available at the time the Link Service started, and that forms an important part of the rationale for proposing the Link Service closure. With specific national funding provided to the NHS to develop community health and wellbeing support, and the new model of multi-agency teams and links with primary care, it is reasonable to question whether Council funding should be used to fund very similar services."

35. At 3.8 reference was made to the cessation of the Service at Holsworthy and to the "successful transfer" of that service to the Holsworthy Youth and Community Hub.

36. At 3.10 the Report said:

> "The recommendation does not affect peoples' right to support under the Care Act 2014. Where it is identified that people have eligible care and support needs that require a Care Act 2014 assessment, we will ensure that one is carried out. In addition, all service users are entitled to request a care needs assessment."

37. At section 4, the Report set out five options scoring them against five criteria. One of the criteria was "service provision for people with Care Act 2014 eligibility". The commentary in respect of that criterion for the closure option said, "people currently using the service with Care Act 2014 eligibility will receive support in a different way".

38. Section 5 of the Report summarised the consultation process and the responses thereto. This was said about the concern raised as to an increased risk of suicide:

> "Concern about increased risk of suicide or crisis were expressed, but the North Devon Link Service is not a crisis service and is not commissioned to provide that support. DPT has a dedicated 24/7 urgent mental health service, which is the gateway for families and professional to access appropriate crisis support and intervention if someone is experiencing mental health distress, or for people worried amount someone else's emotional state."

39. Under the heading "Strategic Plan" the Report identified a number of the Defendant's policies which were said to be relevant and provided hyperlinks to the policies.

40. The Report then summarised the cost of the Service and referred to the pressure which there would be on the Defendant's resources if the Service were to continue in its current form.

41. The next section of the Report briefly addressed "Legal Considerations" and included this statement as part of 8.2:

> "The recommendations within this report mean that people with eligible needs as defined within the Care Act will continue to have their eligible needs met."

42. In the Summary, the Report again referred to the establishment of the Devon MHA and of GP access to Multi-Agency Mental Health teams and said:

> "These services were not available at the time the Link Service started, and that forms an important part of the rationale for proposing the Link Service closure. With specific national funding provided to the NHS to develop community health and wellbeing support, it is reasonable to question whether Council funding should be used to fund very similar services.
>
> The financial challenge facing the Council mean difficult decisions to cease services and funding must be considered. The starting point is to protect services that contribute to meeting our statutory duties. Although DCC Integrated Adult Social Care has funded the Link service for over 30 years, the vast majority of people who attend do not have eligible needs under the Care Act 2014."

43. The Report was accompanied by an appendix. This was a document prepared by the Devon MHA and intended to be provided to service users. It introduced the work of the Devon MHA and then gave a list with hyperlinks of other resources which were said to be available for those who had been users of the Service. The introductory passage had said "we can't guarantee that we'll find something that fits your needs, but we'll try our best".

44. The Report was also accompanied by an impact assessment. In large part the contents of this were replicated in the Report but the following passages are of note:

45. In describing the Service, the impact assessment said:

> "The service provides a traditional drop-in day service together with some enabling support. The groups offer social interaction and activity rather than any evidenced-based model of mental health service delivery. The service was designed to provide a range of social, leisure, support, guidance, and educational opportunities for adults with mental health issues."

46. The recommendation was set out and the impact assessment then said that "in line with its statutory responsibility [the Defendant] will continue to provide adult social care support to people who are eligible under the Care Act 2014".

47. In addressing the reasons for the change, reference was again made to the impact assessment said:

> "These services were not available at the time the Link Service started, and that forms an important part of the rationale for proposing the Link Service closure. With specific national funding provided to the NHS to develop community health and wellbeing support, it is reasonable to question whether Council funding should be used to fund very similar services.
>
> The successful transfer of the Holsworthy Link service to Holsworthy Youth and Community Hub, a community-led centre which offers a wide range of community support, also helped inform this proposal. It is a community-led centre which works with other organisations in the town and offers a wide range of community support sessions.
>
> The recommendation does not affect peoples' right to support under the Care Act 2014. Where it is identified that people have eligible care and support needs that require a Care Act 2014 assessment, we will ensure that one is carried out. In addition, all service users are entitled to request a care needs assessment."

48. The impact assessment included an equality analysis and under the heading of "Disability" it said:

> "The service is for adults covered by the disability protected characteristic, as they will be affected by mental health issues.
>
> The proposal to close the North Devon Link service, will mean that people with a wellbeing need or mental health need, diagnosed or undiagnosed, will not be able to access the service.
>
> Potential mitigation of that impact will come from effective access to the wider mental health services across Northern Devon. The Link Service is part of the health and care system supporting mental health needs across Northern Devon. Other services include Community Mental Health Teams, Mental Health Social Work Teams, a mental health ward and crisis services such The Moorings (Crisis Café), a 24-hour support phone line from Mental Health Matters and DPT's First Response Service. The Link Service does not provide urgent or crisis support.
>
> National investment, in recent years, in the development of community mental health services has improved accessibility to mental health services and increased the range of support available with the introduction of Devon Mental Health Alliance.
>
> Devon Mental Health Alliance is funded to provide support to 1500 people each year across Devon, and their staff are visiting the Link Centres to listen to service users about what they need in order to help inform their offer in North Devon. The Alliance is not expecting to replicate the Link Service, but it can provide drop-in group sessions and one to one support. They can also support people to access other mental health services offered in the local area, using a process referred to as a "warm handover" where they accompany people to help them settle in. They also provide advice and training for people who run

> their own formal and informal peer support networks, and have recently offered that to a Link Centre Service user who has set up their own peer support group. Every GP surgery, as part of a Primary Care Network, has a Mental Health Multi Agency Team (MAT) which can offer support in the first instance and refer people to Devon Mental Health Alliance or other community-based services.
>
> These services were not available at the time the Link Service started.
>
> The Council will work with Devon Partnership NHS Trust and the Devon Mental Health Alliance to support all service users in their transition to alternative community support over a period of 3 months minimum.
>
> The recommendation does not affect peoples' right to support under the Care Act 2014. Where it is identified that people have care and support needs that required a Care Act 2014 assessment, we will ensure that one is carried out. In addition, all service users are entitled to request a care needs assessment.
>
> Service users already receiving other mental health support will continue to do so. People who are not in receipt of additional services through Devon Partnership NHS Trust can access mental health support through voluntary and community sector, including the Devon Mental Health Alliance, as well as urgent or crisis response if needed, regardless of any proposal or decision on the future of the Link Service."

49. As will have been noted, there were a number of references to those users of the Service who had eligible needs as defined in the Care Act, indicating that their needs would continue to be met albeit other than through the operation of the Service. Ms Forster says that only a very few of those who have used the Service have been assessed as eligible for care and support under the Care Act. Ms Forster says that only 12 of the 161 people who had used the Service since July 2012 had been so assessed and that their eligible needs had been met in way which did not include the Service. This is borne out by the Claimants' evidence. Thus, both the Claimants had been assessed as eligible for care and support under the Care Act, but the Service had not formed part of the support which they received pursuant to that assessment. The thrust of the Claimants' case is not that the Service formed part of the care and support provided under the Care Act, but rather that the support provided by the Service acted as a preventative and ensured that the conditions of those using it did not deteriorate to the level at which care and support under the Care Act would be needed.

50. The Decision was made in the terms of the recommendation in the Report.

51. The Decision was called in by the Defendant's Health and Adult Care Scrutiny Committee. On 21st March 2024, that committee resolved that it was satisfied with the Decision, noting in doing so the provision in the Decision for support to facilitate the move to alternative services by those using the Service.

52. On 9th May 2024, those using the Service were sent a joint letter from the Defendant and the Interested Party informing them of the planning closure date of 26th July 2024. This gave the contact details of the urgent mental health helpline provided by the First Response Service. It also said:

> "If you feel you or your carer have a need for care and support, and you haven't already been offered a Care Act, 2014 assessment:
>
> • If you are open to a DPT Community Mental Health Team, please contact your Recovery Co-ordinator.

> • If you are not open to a DPT Community Mental Health Team, please contact Devon County Council's Care Direct on 0345 155 1007"

53. The Service was closed pursuant to the Decision on 26th July 2024.

The Legislative and Policy Framework.

54. Section 2B was inserted in the National Health Service Act 2006 by section 12 of the Health and Social Care Act 2012 and provides, in part, that:

> "(1) Each local authority must take such steps as it considers appropriate for improving the health of the people in its area.
>
> …
>
> (3) The steps that may be taken under subsection (1) or (2) include—
>
> (a) …
>
> (b) providing services or facilities designed to promote healthy living (whether by helping individuals to address behaviour that is detrimental to health or in any other way);
>
> …
>
> (g) making available the services of any person or any facilities."

55. Section 116B of the Local Government and Public Involvement in Health Act 2007 provides, in part, that:

> "(1) A responsible local authority and each of its partner integrated care boards must, in exercising any functions, have regard to the following so far as relevant—
>
> …
>
> (b) any integrated care strategy prepared under section 116ZB in relation to an area that coincides with or includes the whole or part of the responsible local authority's area
>
> …"

56. Section 2 of the Care Act set out what Mr Broach described as "the preventative duty" in these terms:

> "(1) A local authority must provide or arrange for the provision of services, facilities or resources, or take other steps, which it considers will—
>
> (a) contribute towards preventing or delaying the development by adults in its area of needs for care and support;
>
> (b) contribute towards preventing or delaying the development by carers in its area of needs for support;
>
> (c) reduce the needs for care and support of adults in its area;
>
> (d) reduce the needs for support of carers in its area.
>
> (2) In performing that duty, a local authority must have regard to—
>
> (a) the importance of identifying services, facilities and resources already available in the authority's area and the extent to which the authority could involve or make use of them in performing that duty;
>
> (b) the importance of identifying adults in the authority's area with needs for care and support which are not being met (by the authority or otherwise);

(c) the importance of identifying carers in the authority's area with needs for support which are not being met (by the authority or otherwise)."

57. Section 3(1) of that Act addresses the integration of services thus:

"(1) A local authority must exercise its functions under this Part with a view to ensuring the integration of care and support provision with health provision and health-related provision where it considers that this would—

(a) promote the well-being of adults in its area with needs for care and support and the well-being of carers in its area,

(b) contribute to the prevention or delay of the development by adults in its area of needs for care and support or the development by carers in its area of needs for support, or

(c) improve the quality of care and support for adults, and of support for carers, provided in its area (including the outcomes that are achieved from such provision)."

58. Section 5 sets out "the marketplace duty" in these terms:

"(1) A local authority must promote the efficient and effective operation of a market in services for meeting care and support needs with a view to ensuring that any person in its area wishing to access services in the market—

(a) has a variety of providers to choose from who (taken together) provide a variety of services;

(b) has a variety of high-quality services to choose from;

(c) has sufficient information to make an informed decision about how to meet the needs in question.

(2) In performing that duty, a local authority must have regard to the following matters in particular—

(a) the need to ensure that the authority has, and makes available, information about the providers of services for meeting care and support needs and the types of services they provide;

(b) the need to ensure that it is aware of current and likely future demand for such services and to consider how providers might meet that demand;

(c) the importance of enabling adults with needs for care and support, and carers with needs for support, who wish to do so to participate in work, education or training;

(d) the importance of ensuring the sustainability of the market (in circumstances where it is operating effectively as well as in circumstances where it is not);

(e) the importance of fostering continuous improvement in the quality of such services and the efficiency and effectiveness with which such services are provided and of encouraging innovation in their provision;

(f) the importance of fostering a workforce whose members are able to ensure the delivery of high-quality services (because, for example, they have relevant skills and appropriate working conditions).

(3) In having regard to the matters mentioned in subsection (2)(b), a local authority must also have regard to the need to ensure that sufficient services are available for meeting the needs for care and support of adults in its area and the needs for support of carers in its area."

59. In ground 1(b) the Claimants assert an unlawful failure by the Defendant to take into account three of its policies.

60. Public Health Devon takes the lead on suicide prevention issues for the Defendant. In July 2023, it published the Devon Suicide Prevention Statement and Action Plan 2023-24. The Introduction to this plan states:

> "Suicide can have a devastating impact upon families, friends, neighbours, work colleagues and whole communities. Being bereaved by suicide can increase the risk of a person ending their own life by suicide, therefore suicide prevention is a priority.
>
> Suicide prevention is everyone's business. Whilst local government have the responsibility to produce and deliver an annual action plan to prevent suicide, they need to do this in partnership with Health, Blue light, statutory services, the voluntary sector and communities.
>
> To achieve this, Public Health facilitate a Devon – wide Strategic Group to oversee the delivery of the Suicide Prevention Action Plan".

61. The plan recognised that the suicide rate for Devon was significantly higher than that for England as a whole and slightly higher than that for the South-West of England. Reference was made to the One Devon 5-Year Forward Plan Strategy to which I will refer below and to the strategic goal of that plan to reduce suicides across all age ranges and to regard every suicide as preventable.

62. The plan included a number of points from a progress report on suicide prevention planning in England prepared by the Samaritans and the University of Exeter. The Claimants drew attention to the second of those which said (with the Claimants' emphasis):

> "Local Authorities and multi-agency groups should avoid spreading their resources too thinly by trying to cover all areas of the national strategy too soon. Those at the earlier stages of their response may benefit from embedding and improving the quality of activity already taking place rather than implementing multiple new activities. Similarly, it may be helpful to begin by playing to local strengths and focusing efforts on strategy areas where there is already effective partnership working before tackling national strategy areas that prove more difficult to implement in the local context"

63. The plan identified a number of priorities for 2023 - 24. These included the following:

> "Loneliness and Isolation:
>
> - Evidence shows that social isolation, as well as life events including relationship breakdown and bereavement, are risk factors for suicide. We will work with key partner organisations to look at additional support around wellbeing and Suicide Prevention to target those who are/at risk of experiencing loneliness and isolation."

64. A tabular action plan was annexed to the plan. This identified 32 actions under 8 headings.

65. Devon's Integrated Care Partnership, known as "One Devon", is an umbrella body in which the local councils and National Health Service bodies serving the county of Devon collaborate.

66. The ICS is the principal policy on which the Claimants relied in ground 1(b). There is a 7-page summary document with a detailed 154-page document underlying it.

67. The ICS identified 12 challenges of which the eleventh was "poor mental health, social isolation and loneliness". In the executive summary in the detailed document the expansion of this challenge said "suicide rates and self-harm admissions are above the national average, anxiety and mood disorders are more prevalent, there are poorer outcomes and access to services for people with mental health problems and a higher proportion are affected by loneliness".

68. In the summary document, suicide prevention was identified as one of the nine pillars of work to be undertaken, although in the fuller document it appears to have been subsumed into the first of the four pillars of work identified there (namely work on mental health). The first goal under the heading of "improving outcomes in population health and healthcare" was stated as:

> "Every suicide will be regarded as preventable and we will work together as a system to make suicide safer communities across Devon and reduce suicide deaths across all ages.
>
> The suicide rate for all areas of Devon will see a consistent downward trajectory and by 2028 the suicide rate in each local authority area will be in line with or below the England average."

69. The reference to "suicide safer communities" was hyperlinked to the website of the Every Life Matters charity.

70. The fuller document said that:

> "Some elements of the Strategy will be delivered by other partners. The Partnership will look to local authorities, VCSE, independent sector and NHS England to also set out how they will exercise their functions to deliver the Strategy."

71. The One Devon 5-Year Joint Forward Plan Strategy was published in June 2023. This reaffirmed the need for work on suicide prevention and, identified it as one of the nine programmes to be undertaken, saying under that heading that the work to be done was:

> "Suicide Prevention:
>
> • Reduce the rate of suicides towards or below the national average
>
> • Develop and deliver local partnership action plans informed by data, research insight and needs assessment, aligned to the national and local evidence base and policy.
>
> To allow us to do this, we will need, for example, to:
>
> • Move funds into prevention
>
> • Ensure Devon's health and care services are inclusive and accessible to everyone
>
> • Develop as an 'Anchor organisation', ie become the mainstay of wellbeing for local people."

72. In each of those policy documents the actions to be taken were described in general terms. None of them referred expressly to the Service nor even to drop in facilities of the kind provided by the Service.

The Case which the Claimants are entitled to advance on Ground 1(a).

73. As I will consider more fully below, it is a public law failure if a decision maker fails to take account of either a consideration to which it is required to have regard by the

statute which is the source of the power being exercised (a *CREEDNZ* category 1 consideration) or a consideration which is so obviously material to the decision that it was irrational for the decision maker not to take it into account (a *CREEDNZ* category 3 consideration). There is disagreement as to the case which it is open to the Claimants to advance in relation to ground 1(a). The Defendant says that the Claimants are limited to arguing that the existence of the duties under the Care Act were *CREEDNZ* category 3 considerations. It says that the Claimants are not entitled to argue that the existence of the duties was a *CREEDNZ* category 1 consideration to which the Defendant was to have regard as a matter of statutory obligation. It says that it is still less is open to the Claimants to argue that the Defendant was performing duties under sections 2 and 5 of the Care Act such that it was required by those sections to have regard to the considerations set out in subsections 2(2) and 5(2). The Claimants disagree and contend that all those points are open to them. However, I note that their primary contention in respect of the *CREEDNZ* category 1 argument is that for the Defendant to have regard to the existence of the duties required it to consider the matters set out in the subsections and markedly less emphasis was placed on the argument that duties under the sections were being performed. The duty under the National Health Service Act forms part of the same ground but for these purposes I will focus, as the parties did, on the Care Act duties.

74. In his oral submissions, Mr Broach submitted that these duties were a *CREEDNZ* category 1 consideration with the contention that they were a *CREEDNZ* category 3 consideration being put in the alternative. Mr Auburn KC submits that until the hearing the Claimants' case had been put solely on the footing that the existence of the duties was a *CREEDNZ* category 3 considerations. In those circumstances he submitted that the contentions that their existence was a *CREEDNZ* category 1 consideration or that the Defendant was performing section 2 or section 5 duties was putting the claim on a different and additional basis which it was not open to the Claimants to advance.

75. Those arguments were developed further in a series of written submissions made after the hearing. Those submissions were expressed in unnecessarily acrimonious terms. I will address the substance of the arguments without engaging in a consideration of the criticisms which each side made of the other's post-hearing conduct.

76. It is necessary for there to be proper procedural rigour in judicial review proceedings as in other categories of claim. Moreover, fairness requires that a party should not be required to answer a case which has not been properly advanced previously without there being formal application and permission given for the altered case. The question, therefore, is the nature of the Claimants' case as advanced in the Statement of Facts and Grounds.

77. I will turn to analyse the case which the Claimants were advancing in the Statement of Facts and Grounds shortly. Before I do so, it is to be noted that there is an element of artificiality in this debate and it is less significant for the proper approach to the case than either party appeared to believe. The Claimants' argument as to categorisation is influenced by the propositions which Mr Broach said flowed from the decision in *DAT* while the Defendant's argument was influenced by the distinction which Mr Auburn made between substantive duties and target duties. It will be seen that I did not fully adopt the conclusions for which either side argued in those regards. In addition, if the existence of the Care Act duties is an obviously material consideration in *CREEDNZ* category 3 then proper account would need to be taken of them and an adequate

explanation of their nature and extent given to the cabinet members. In order to be adequate, such an explanation would have to make reference to the matters in sections 2(2) and 5(2). Conversely, if the existence of the duties is not an obviously material consideration, then the court is unlikely to conclude that the Decision involved the Defendant exercising those duties so that the matters set out in sections 2(2) and 5(2) became mandatory considerations by reason of the Care Act.

78. The starting point is the Statement of Facts and Grounds. Was it being said there that in making the Decision, the Defendant was performing duties under the Care Act and in particular under sections 2 and 5 such that it was required by that Act or by other legislation to have regard to the matters in sections 2(2) and 5(2)? Alternatively, is the Defendant right to say that the case being advanced was that it was the existence of the Care Act duties which was an obviously material consideration and that it was irrational for the Defendant to fail to take account of those duties when making the Decision?

79. The considerations to which the Defendant is said to have failed to have regard were listed at paragraph 3. At 3(1)(a) those were said to include the duties under the Care Act which are described simply as the duties under sections 2, 3, and 5 which are then said to be "the 'prevention duty', 'integration duty', and 'marketplace duty'". At paragraph 64, the Claimants said that in exercising functions under the Care Act a local authority must have regard to the matters set out in section 1(3) of the Act. In the following paragraphs the terms of sections 2, 3, and 5 were set out (including sections 2(2) and 5(2)).

80. At paragraph 84 the Claimants said:

> "The Claimants contend that sections 2, 3 and 5 of the Care Act 2014, and section 12 of the Health and Social Care Act 2012, are relevant statutory duties which apply where local authorities are making decisions in relation to the provision of health and social care in their area, and in particular decisions about what services, facilities or resources to provide. Each of these duties was plainly material to the Decision."

81. In paragraph 85, the Claimants said that in the absence of express reference to these duties or consideration of their substance the Defendant "could not have considered how the Decision might affect the discharge of these duties" and that "the Decision was therefore unlawful in precisely the same way as the local authority's decision was unlawful in the *West Berkshire* case". Then in paragraph 87 they said:

> "The statutory duties relied on were plainly material to the Decision which the Defendant had to make: per *DAT* at [48], they were mandatory relevant considerations, to which the Defendant's Cabinet's attention ought to have been drawn."

82. The emphasis on the relevance of the existence of the Care Act duties was continued in the Claimants' skeleton argument. Thus, at paragraph 30, the Claimants say that the statutory duties were "plainly relevant to the Decision". At paragraph 48 and following the Claimants' case on ground 1 was set out. The passage was headed "failure to take into account mandatory relevant considerations". Emphasis was then placed on the approach which the Claimants contend flows from *DAT*. The Claimants repeatedly referred to the duties under the Care Act as being "plainly relevant" to the Decision. There was a difference of emphasis in paragraphs 57 and 63 of the skeleton argument. Those are not free from ambiguity but are best read as contending that the Defendant was exercising its Care Act functions and that the Defendant had to have regard to the

duties and to the factors in sections 2(2) and 5(2) by virtue of the Act and as being *CREEDNZ* category 1 considerations. As Mr Auburn rightly says it was not open to the Claimants simply by the terms of the skeleton argument to put the claim on a different basis from that advanced in the Statement of Facts and Grounds and for which permission was given.

83. There is an element of ambiguity in the language used by the Claimants in the Statement of Facts and Grounds. The references to the duties under the Care Act being "plainly relevant" or "plainly material" are most naturally read as invocations of *CREEDNZ* category 3. However, their description as "mandatory relevant considerations" could be seen as an assertion that they are in *CREEDNZ* category 1. That ambiguity is to be contrasted with the Claimants' case in relation to the ICS which was advanced clearly as being in *CREEDNZ* category 1. Thus, in paragraph 88 of the Statement of Facts and Grounds this was said in terms to be a "statutory mandatory consideration" with the statutory obligation flowing from section 116B of the 2007 Act. Similarly, in paragraph 64 of the Claimants' skeleton argument it was said that there was "a statutory obligation" (original emphasis) to have regard to the ICS.

84. The position is resolved when it is remembered that the focus of ground 1(a) was the contention that it was the existence of the Care Act duties to which the Defendant should have had regard rather than the particular considerations in sections 2(2) and 5(2) (although I do not forget that reference was made to those). That is most naturally read as being a contention that the existence of those duties was an obviously relevant consideration in *CREEDNZ* category 3 such that it was irrational for the Defendant not to have regard to it. Account must, however, be taken of the Claimants' repeated invocation of the approach in *DAT*. The mandatory requirement is said to flow from the approach in that case rather than the terms of the legislation itself and in referring to "mandatory relevant considerations" the Claimants are adopting the term used there by Elisabeth Laing J. The argument that the application of the approach derived from that decision meant that these duties had to be considered is plainly open to the Claimants and was at the forefront of the case set out in the Statement of Facts and Grounds. The Claimants are, therefore, entitled to argue that the existence of these duties fell to be considered by reason of the approach in *DAT* and, alternatively, that they were obviously material considerations in *CREEDNZ* category 3 such that it was irrational for the Defendant not to take them into account. However, if the argument based on *DAT* fails, it is not open to the Claimants otherwise to argue that the Defendant was performing the Care Act duties such that it was required by sections 2 and 5 to have regard to the matters in sections 2(2) and 5(2).

The Approach to be taken as a matter of Law.

85. The principles to be applied when a decision is challenged on the ground of a failure to take relevant matters into account are well-settled and can be stated shortly.

86. In *R (Friends of the Earth) v Secretary of State for Transport* [2020] UKSC 52, [2021] PTSR 190 at [116] and following Lords Hodge and Sales (with whom the other members of the court agreed) approved the summary set out by Simon Brown LJ in *R v Somerset County Council ex p Fewings* [1995] 1 WLR 1037, which was in turn derived from the decision of Cooke J in *CREEDNZ Inc v Governor General* [1981] NZL 172. The three categories of consideration are:

> "First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision- maker may decide just what considerations should play a part in his reasoning process."

87. A failure to take into account a consideration in the third category can only be challenged if that failure was irrational with the test being that of obvious materiality. A challenge will not succeed unless the consideration was so obviously material to the decision being taken that the failure to take it into account was irrational. As Holgate J, as he then was, explained in *R (Wildfish Conservation) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWHC 2285 (Admin), [2024] Env L R 15 at [149] "the test is not to be applied at large but in the context of the nature, scope and purpose of the legislation in question". In addition, the factual circumstances in which the decision is made are a significant part of the context and will be highly relevant to the question of whether a particular consideration is obviously material to the decision in question. It is also to be remembered that a consideration will not be material at all if it would have no potential for influencing the decision one way or the other if it were to be taken into account.

88. Each side sought to add a gloss to the principles I have just summarised. As I will now explain each gloss had some force, but I do not accept either in its entirety and neither had the significance for which the party advancing it contended.

89. The Defendant argued that the duties under the Care Act and the NHS Act were target duties and Mr Auburn submitted that significant consequences flowed from this and from the fact that they were substantive rather than "have regard" duties. Mr Auburn's argument was that a statutory duty is an obligation which must be performed with the consequence that a failure to perform the duty is a breach but that there is no basis for imposing a separate requirement on a public body to consider the existence of a statutory duty of which no breach is alleged. Mr Auburn submitted that for the court to adopt the approach sought by the Claimants would be to ignore the nature of the duties as target duties which do not give enforceable rights to an individual.

90. The Defendant was right to point out that there is "a fundamental difference in public law between a duty to provide benefits or services for a particular individual and a general or target duty which is owed to a whole population" (per Lady Hale in *R (Ahmad) v Newham LBC* [2009] UKHL 14, [2009] PTSR 632). As Popplewell LJ explained in *R (AA) v NHS Commissioning Board* [2023] EWCA Civ 902, [2023] PTSR 2001 at [52] "a general duty to the population, not enforceable as an individual duty, is a paradigm characteristic of a target duty as distinct from an absolute duty". Such a duty does not create a duty to make particular provision for a given individual. That does not, however, mean that a breach of such a duty cannot give rise to a judicial review claim nor that such a claim cannot be brought by an individual. Thus, in *R (Care England) v Essex County Council* [2017] EWHC 3035 (Admin) the relevant decision was challenged, *inter alia*, on the ground that it was made in breach of the duty under section 5 of the Care Act. At [50], Lavender J noted that "although the duty imposed by subsection 5(1) is general in character, it was common ground that it [is] capable of being enforced in an appropriate case, albeit only as a general duty, rather than one

conferring individual rights". Lavender J clearly accepted that the position as agreed between the parties in that regard was correct.

91. The question is what relevance, if any, that fundamental distinction has to the question of the matters to which the Defendant should have given consideration when making the Decision. The Claimants say that the decisions in *DAT* and in *R (TS) v London Borough of Hackney* [2023] EWHC 3063 (Admin) show that general or target duties are capable of being relevant factors with the consequence that it can be a public law error for a decision maker not to take them into account.

92. I will consider *DAT* and *TS* further below and explain why they do not, in my judgement, have the wide-ranging consequences which the Claimants appeared to attribute to them. The Defendant is, moreover, right that the nature of a duty as a target duty is a matter of fundamental importance such that the court must be on guard against a move to convert such a duty into a specific duty owed to an individual. It is also right that an individual cannot bring a claim based on such a duty by reason of a failure to achieve a particular outcome in his or her case. However, it does not follow from those matters that the existence of a target duty can never be a relevant consideration in respect of a particular decision, nor does it follow that a failure to take the existence of such a duty into account can never be an irrational failure to take account of an obviously material consideration.

93. In placing such emphasis on the absence of an allegation of a breach of the Care Act duties, the Defendant fell into the same trap as Mr Broach fell into as counsel in *DAT* and which Elisabeth Laing J identified at [47] as appears below. Judicial review is an exercise in which the court upholds the rule of law and where it is engaged in considering the lawfulness rather than the merits of the actions which are being challenged. The challenge being made in ground 1 is to the Defendant's decision-making process. That is an entirely proper basis for a public law challenge. I am concerned with the lawfulness and rationality of the Decision not with its objective merits. If a public body's decision is not made in a lawful manner, then it falls to be quashed (subject to the potential application of section 31(2A) of the Senior Courts Act 1981) even if the ultimate decision does not involve a breach of that body's duties. The lawfulness of the way in which a decision was made is a prior question to that of whether the decision, as made, involves a breach of duty. That is a fundamental principle of public law and is the point which Elisabeth |Laing J made in *DAT* at [47].

94. The facts that the duty said to be a relevant matter to be considered is a broad target duty and that no breach of that duty is alleged do not, without more, mean that a public body is not required to have regard to the existence of that duty when making a decision. It is conceivable (although it is likely to be a rare case) that a statute may expressly or impliedly identify the existence of target duty under a different statute as a consideration to which regard must be had when exercising the powers under the former statute such as to make it a *CREEDNZ* category 1 consideration. Similarly, there is no reason of principle why the existence of a target duty cannot be an obviously material consideration within *CREEDNZ* category 3. Whether it is such a consideration in a particular case will depend on the nature of the exercise in which the public body is engaged and on the nature of the duty in question. Clearly, the broader the duty then the less likely that it will be so obviously material to a particular decision that rationality will require its consideration. In that regard, the cautionary notes sounded in [87] above will also come into play. In addition, the nature of the duty will potentially have an

impact on the extent of the analysis of it which the decision-maker must undertake. It is to be remembered that the test for *CREEDNZ* category 3 purposes is one of rationality. As Elisabeth Laing J explained in *DAT* the decision-maker must have sufficient material to enable a proper decision to be made and must be properly alerted to the consideration in question. In assessing the sufficiency of the material, it is to be remembered that "it is for the decision-maker and not the court, subject again to *Wednesbury* review, to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor …" (per Laws LJ in *R (Khatun & others) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37 at [35]). In addition, the extent of the risk that the ultimate decision will be in breach of a target duty is likely to be relevant to the question of whether the existence of the duty is an obviously material consideration. The greater the degree of risk of such a breach then the more likely the duty is to be a material consideration and *vice versa*. Nonetheless, provided regard is had to those qualifications, it will be open to the court to conclude in an appropriate case that the existence of a target duty was a consideration which was obviously material to the decision being taken such that a failure to take account of that duty's existence was irrational.

95. The Claimants placed considerable emphasis on the decisions in *DAT* and in *TS*. However, save to the extent that they are illustrative of the points I have just set out, I do not regard them as advancing matters.

96. In *DAT*, Elisabeth Laing J was dealing with a challenge to decisions which the defendant had made cutting funding to voluntary sector organisations which provided short breaks for disabled children. For current purposes, it is relevant that the court was considering whether the defendant had taken into account "the questions posed by and/or the requirements of the statutory provisions which apply to short breaks". The relevant statutory provisions were in reality "have regard" duties (it being accepted that in the light of subsequent authority Elisabeth Laing J's guarded conclusion as to the application of section 27 of the Children and Families Act 2014 is not to be followed). In the circumstances where the funding for short breaks was being cut, it was necessary for the defendant to take account of the legislative material relating to the provision of such breaks and to the considerations which that material required to be taken into account.

97. The issue on the question of legality was whether the "members were given the help they needed on the legal issues which they had to consider before making a cut to the funding for short breaks" (see at [42]).

98. It was in that context that Elisabeth Laing J said at [47] and [48]:

> "47. Mr Broach's submission on the legality issue was that the Council had breached the various duties imposed by the provisions he relied on. I do not consider that that is the real question on this issue. The question, rather, as I have suggested, is whether members were given the help which they needed to answer the questions posed by those provisions in the context of this case. I appreciate that, just as some people can utter prose without realising that that is what they are doing, it is possible for members to comply with the law, as it were, unconsciously, if their minds have been directed to the issues, in substance, which the law requires them to consider: cf per Lord Bingham in *R v Somerset County Council ex p Fewings* [1995] 1 WLR 1037 at p 1046B-H. But as he recognised in that passage, that conclusion is difficult to reach if members' minds have not been directed to the relevant statutory language, and thus to the question which they

> should address. A paraphrase of the statutory test which includes some, but not all, relevant matters is not enough. Express reference to the statutory test (or an accurate paraphrase or summary, as the case may be) ensures a focus on all the factors which Parliament or (in the case of delegated legislation) the executive, with the necessary Parliamentary sanction, has prescribed.
>
> 48. There is no trace in the materials given to members of any reference to the express language, or to the substance, of regulations 3 and 4 of the 2011 regulations, or of section 27(2) of the 2014 Act. The Council had to consider, for example, in reducing the funding to voluntary sector organisations, whether the provision which remained would, in short, be sufficient, either simpliciter, or so far as was reasonably practicable. I do not say that, if that was officers' view, and it had been conveyed to members, they could not so have concluded. But there is no trace in the report and appendices of any guidance for members about any of the issues posed by regulations 3 and 4, or by section 27(2). There is no reference, either, to the duty imposed by section 11 of the 2004 Act, or the best value guidance, to which the Council was required to have regard. In other words, members' attention was not drawn to mandatory relevant considerations. I conclude that on those grounds, also, decision 1 was unlawful."

99. I do not understand Elisabeth Laing J to have been doing anything there other than enunciating and giving effect to the following classic public law propositions:

i) The court is typically concerned with the lawfulness and not the merits of the decision under challenge.

ii) Where there are considerations which are to be taken into account either by reason of a statutory obligation or in order for a decision to be made rationally then failure to take such considerations into account is of itself a public law ground of challenge to the decision.

iii) Where there has been such a failure it is not necessary for the court to consider whether the decision ultimately made was itself a breach of the relevant public body's duties. The relevant unlawfulness consists in the failure to take account of those considerations.

iv) The considerations to which regard must be had can include statutory duties or the issues, in substance, which the law requires considered and when they do the issue of whether those duties or their substance were considered as a matter of process is a prior question to that of whether the decision was in breach of those duties. The judge's comment at [47] as to "the real question" is to be understood in the light of this and the preceding propositions.

v) Where a consideration is one to which the body is required to have regard there must be a proper consideration in the sense that the decision-maker must be provided with sufficient material to be able to understand the consideration and to take it into account. Where the relevant consideration is a statutory duty, the material must be such as to enable the decision-maker to understand the applicability of the duty and its nature and extent. This will normally require there to be express reference to the statutory material and to the questions arising from it or at least for there to have been an accurate and complete paraphrase of the provisions.

100. I do not understand the decision in *DAT* to establish more than that by way of general application. In particular, it does not assist with the circumstances in which the existence of a particular statutory duty will be a consideration to which a decision-maker must have regard either as a matter of express statutory obligation or as a prerequisite for a rational decision-making.

101. In *TS,* the court was concerned with a challenge to an assessment made in respect of a disabled child. The contention was that the assessment and the subsequent panel decision were flawed by reason of a failure to have regard to the defendant's duty under section 20(1) of the Children Act 1989. The claimant said that by analogy to the approach in *DAT,* the failure to have regard to that duty "was itself a public law error" (see at [77]). However, as the deputy judge made clear at [82] there was no dispute before him that a failure to consider that duty would be a public law failure. Rather, the issue was whether there had in fact been consideration of the duty. The deputy judge held that the defendant had not considered the duty. The decision does not, therefore, assist with the question of when consideration of a particular statutory duty is a mandatory requirement.

102. Against that background, I turn to the grounds.

Ground 1(a): The Failure to take into Account the Statutory Duties under Sections 2, 3, and 5 of the Care Act and Section 2B of the National Health Service Act.

Was the Defendant required to have regard to the sundry Duties by reason of Statute or as a Consequence of the Approach articulated in *DAT*?

103. The foregoing analysis means that issue of whether these statutory duties were *CREEDNZ* category 1 considerations can be addressed shortly.

104. I have already explained that it was not open to the Claimants to advance their case on the basis that in making the Decision or in providing the Service the Defendant was performing duties under the Care Act or the National Health Service Act. It follows that it was not open to the Claimants to argue that the former Act required the Defendant to have regard to the matters set out in sections 2(2) or 5(2). The contention that these duties were a *CREEDNZ* category 1 consideration turns, therefore, on the Claimants' argument as to the effect of the decision in *DAT*. I have set out my understanding of the effect of that decision above. In short, it provides guidance as to what is necessary for the proper consideration of a particular factor when such consideration is required. It does not, however, provide guidance as to whether consideration of a particular statutory duty is required as part of the decision-making process. It certainly does not provide any basis for the conclusion which the Claimants seek to draw from it that these duties fall for consideration under *CREEDNZ* category 1.

105. For completeness, I will briefly explain the conclusion I would have reached if it had been open to the Claimants to argue that the Defendant was performing duties under the Care Act and was, therefore, required to have regard to the matters in subsections 2(2) and 5(2), and to exercise its functions with a view to promoting integration in accord with section 3.

106. The argument would fall at the first hurdle because I am satisfied that neither in providing the Service, nor in making the Decision, was the Defendant performing duties under the Care Act. The provision of the Service was avowedly a non-statutory

provision made by the Defendant and was not regarded by the Defendant as being undertaken pursuant to any statutory duty. In particular, the Defendant was not proceeding on the footing that the Service had been provided pursuant to sections 2, 3, or 5 of the Care Act. This is of note in respect of the first two sections which are concerned with cases where a local authority is taking such steps as "it considers will" achieve a particular result (section 2) or where it "considers [integration] would" have certain effects (section 3). As the Defendant was not purporting to act in exercise of those duties, it was not suggesting that the Decision would be a discharge of such duty as it had under the Care Act. It is of note here that the Claimants' case was not that the closure of the Service meant that needs under the Care Act were not being met, nor did they argue that the Service had been provided in discharge of the section 2, 3 or 5 duties. Instead, they argued that the Service had the effect of reducing the risk of the users of the Service getting to a state such that they needed care and support under the Care Act and so had a preventative effect. That is potentially relevant to the argument that these duties were *CREEDNZ* category 3 considerations or to the challenge to the rationality of the Decision but does not advance the potential argument that they were category 1 considerations. In that regard, it is also of note that the duties under the Care Act are to be seen in the context of that Act as a whole. There "needs for care and support" are not abstract terms but are a reference to needs ascertained in the light of an assessment made in accordance with the eligibility criteria set out in the regulations made pursuant to the Act (see section 13(1) and (7)). Similarly, the general duty under section 1 to promote an individual's wellbeing is in the context of a local authority exercising its functions under the Act.

107. The Claimants did not put the duty under section 2B of the National Health Service Act at the forefront of their contention that these duties were *CREEDNZ* category 1 considerations. Rightly so. It cannot be said that the general duty under that section was such a consideration in the context of a decision relating to the closure of a service which was not provided pursuant to any statutory duty even when that service was providing facilities for those with mental health difficulties.

Were the Statutory Duties obviously material to the Decision?

108. In determining whether a consideration was obviously material such that a failure to have regard to it was irrational the nature of decision in question and of the consideration are of central importance. Obviousness and materiality are both necessary and the requirement is that the failure to have regard to the consideration be irrational. A public body is likely to be subject to a number of statutory duties. As I have explained above, I accept that it is possible for such a duty and even for a duty expressed in general terms to be a *CREEDNZ* category 3 consideration, but care is needed before finding that a particular duty was such a consideration in relation to a particular decision. When that approach is applied to the duties invoked by the Claimants in the context of the Decision the contentions that they were obviously material, and that rationality required that they be taken into account fails for the following reasons.

109. The potential relevance of the duties under sections 2, 3, and 5 of the Care Act and section 2B of the National Health Service Act depends very much on the view taken as to the role performed by the Service. The Claimants' argument is predicated on their assertion that the Service played an important role in preventing the users going into crisis and so operated as a protection against the onset of suicidal ideation. I have already explained why, at the very least, the Defendant was entitled to proceed on the

basis of its understanding of the role performed by the Service. The force of the Claimants' argument is greatly diminished once it is established that the Defendant was entitled to address the Decision on the footing that the Service had a limited role, and that this role did not include crisis prevention.

110. A related point is that the Service was not addressing the needs of those who had assessed needs for care and support under the Care Act. The Report made it clear that consideration was being given to those needs and that Defendant would continue to meet those needs after the closure of the Service. Paragraph 3.10 of the Report set out a reasoned explanation of why the Defendant's obligations to those with such assessed needs were not relevant to the Decision.

111. The fact that the Defendant did not provide services equivalent to the Service elsewhere in Devon is significant. The Decision brought the arrangements in those parts of North Devon where the Service operated into line with the position in the rest of the county. There would have been more scope for an argument that the section 2, 3, and 5 duties were relevant if the effect of the Decision had been to end a service which had been provided throughout the county. That was not the case and there was markedly less scope for those duties being said to be material in that context.

112. The duties were expressed in general terms and no breach of the duties was alleged by the Claimants. Those are not determinative matters and, as explained in *DAT*, the issue of whether there was a public law requirement for the duties to be considered before the Decision was made is separate from and logically prior to the question of whether there was a breach of the duties. Nonetheless, the scope for a breach of the duties is relevant to the question of materiality. If there is a risk that the ultimate decision will involve a breach of a particular duty, then that duty is highly likely to be a material consideration. Conversely, the less likely it is that the ultimate decision will involve such a breach, then the less scope there is for the duty to be a material consideration.

113. The Decision provided for the closure of the Service but did so in the context of the assessment that the changes since the Service had been established meant that the Service's role and the function it performed could and would, if the Service closed, be met in other ways. The closure was not taking place in a vacuum. The Claimants are critical of the adequacy of the alternative provision, but that criticism is relevant to the overall rationality of the Decision rather than to the question of whether these statutory duties were obviously material considerations.

114. The issue here is one of procedure and not of the merits of the Decision. The Decision would be vulnerable to challenge if obviously material considerations had not been considered regardless of whether it was otherwise meritorious or unmeritorious. However, it remains necessary to assess whether a consideration which it is said should have been taken into account was obviously material and that requires an assessment of its potential impact on the ultimate decision. The context here was, in summary, that the Decision was being made on the basis that the Service was not being provided pursuant to a statutory obligation; that the closure of the Service would bring the North Devon position into line with the rest of the county; that there were alternative services which would address the needs met by the Service; and that the Service, at least to some extent, duplicated that provision. That context strongly supports the assessment that the existence of these statutory duties were not obviously material to the Decision.

115. It follows that ground 1(a) fails.

Is the Defendant to be treated as having had regard to the Duties?

116. If I had accepted that the Defendant should have had regard to the statutory duties on which the Claimants relied, I would not have accepted the Defendant's contention that the cabinet was to be treated as having had regard to those duties in making the Decision.

117. The Defendant's argument was based on the decision of the Divisional Court in *R (Hollow) v Surrey CC* [2019] EWHC 618 (Admin), [2019] PTSR 1871. The Defendant said that the approach taken in that case was applicable here and that these duties were matters of which the cabinet was to be taken to have had "a high degree of `institutional knowledge'" (adopting the language of Sharp LJ per curiam at [72]).

118. I do not accept that argument. The context in which the cabinet was found to have such knowledge in *Hollow* was of crucial importance. The challenge there was to the setting of the council's revenue and service budget. The budget had included reductions in the budget for services for those with special educational needs. The reference to institutional knowledge was in the context of the court's consideration of whether the council had had regard to various factors raised by the claimant as relevant to the special educational needs provision. Sharp LJ referred to the cabinet's institutional knowledge after having set out the process which had led up to the budget decision and when explaining that the allegation that there had been a failure to consider those matters was not made out on the evidence.

119. The Divisional Court was not saying that a council or its cabinet is always to be taken to have institutional knowledge of its legal obligations and so to be assumed to have had regard to them. The decision is simply not authority for such a proposition. The proposition in those terms would run counter to the well-established principle, of which the articulation by Elisabeth Laing J in *DAT* was an example, that when account is to be taken of a duty the nature and effect of the duty must be explained to members in sufficient detail for them to be able to understand what it is they have to consider. Although the court in *Hollow* expressed its disagreement with some aspects of the judgment in *DAT* it did not take issue with that proposition.

120. Whether a council or a committee of a council is to be taken to have institutional knowledge of a particular obligation such that it is to be taken to have had regard to it even when this is not spelt out will depend on the particular circumstances. It will be necessary to consider the nature of the duty in question; the nature of the decision; and the process leading up to it.

121. The position in this case was wholly different from that in *Hollow* where the pressures on the special educational needs service was said to have been well-known and where there had been express references to those and to the relevant factors at earlier stages in the budget planning process. Here although the members of the cabinet were doubtless aware in general terms that the Defendant had duties under the Care Act they could not be taken to have been aware of the duties under sections 2, 3, and 5 and to have taken them into account when making the Decision. This is particularly so as the Report made reference to the Defendant's duties to those with assessed needs under the Care Act. That was to be seen as an indication that other duties under that Act were not relevant.

122. There is more force in the Defendant's argument that the duties were addressed in substance. It was said this formed part of the consideration of the work being undertaken by the Devon MHA and the extent to which it would replace the provision made through the Service. However, if the duties had been material considerations, then that aspect of the decision-making process would not have amounted to a consideration of them in substance. That is because the consideration was not on the footing of the Defendant having statutory obligations in respect of the duties and it is that which if the Claimants' argument had succeeded would have been the material consideration.

Ground 1(b): The Failure to take into Account the Suicide Prevention Statement and Action Plan; the ICS; and the Forward Plan

123. The Defendant's obligation under section 116B of the 2007 Act was to have regard to the ICS "so far as [it was] relevant" to the function being exercised. The Claimants say that the ICS was relevant to the Decision and that it together with the Suicide Prevention Statement and Action Plan and the 5-year Forward Plan Strategy were obviously material considerations such that the failure to take them into account was irrational.

124. The relevance of the ICS or otherwise for the purposes of section 116B is an objective question for determination by the court. Either the ICS was relevant or it was not. In practice, however, the court's consideration of relevance for the purposes of section 116B and its assessment of obvious materiality are likely to lead to the same conclusion. Although it is conceivable (because the questions are being addressed from differing starting points) that the questions could be answered differently, it will be a rare case in which the court concludes that a consideration (whether it be the ICS or any other potential consideration) which was not obviously material was nonetheless relevant to the local authority's exercise of the particular function for the purposes of section 116B.

125. Here the Claimants' arguments as to the relevance of the ICS and as to the obvious materiality of that and the other policies are based on the same grounds. The contention is that the Service in fact operated to reduce the risk of suicide on the part of the service users. It follows, the Claimants say, that policies emphasising the importance of addressing and reducing the high suicide rates in Devon were both relevant and obviously material.

126. The principal difficulty for the Claimants' contention is the conclusion I have set out above that they have failed to establish that the Defendant was wrong in its view that the Service played no real part in suicide prevention. The Defendant addressed the point made in the consultation about the suicide risk and came to a reasoned conclusion on the question. I have explained above that the Defendant was entitled to proceed on the basis of its understanding of the function of the Service. That is highly significant even for the purposes of section 116B, where the question of relevance is an objective one for determination by the court. That is because the relevance is pertinent to the function being exercised by the local authority in question. It follows that if a local authority is entitled rationally to exercise the function on a particular factual basis, then the question becomes one of relevance to the function as exercised on that basis.

127. Account is also to be taken of the terms of the ICS and of the two policies. They are expressed in high level terms. None of them make reference to the Service nor to drop-in services of a kind similar to the Service. The position might have been different if any of the documents had in terms identified the Service as playing an important role

in the work of reducing suicide risk. This would also have been so if the documents had said that drop-in services had such a role and that their work was to be maintained or expanded as part of the task of reducing the number of suicides. There was no such reference.

128. In those circumstances, the ICS was not relevant to the Decision for the purposes of section 116B and neither it nor the two policies were obviously material with the consequence that ground 1(b) fails.

129. Here again the Defendant advanced a fall-back position that even if the policies were obviously material considerations the cabinet was to be regarded as having taken account of them by reason of its knowledge of the applicable policies in general terms. If the Claimants' argument as to obvious materiality had succeeded, I would not have accepted this fall-back argument. In short, since the Report set out a number of policies to which the cabinet were referred and which were said to be relevant, there would be no basis for a finding that the cabinet had also taken account of other policies which were not mentioned and to which its attention was not drawn.

Ground 2: Rationality.

130. The core of the Claimants' argument on the first limb of this ground is that the Decision was based on a misunderstanding as to the practical work and value of the Service. It is said that if the Defendant had taken proper account of the work done and the benefit actually provided by the Service then the Decision was outside the range of rational conclusions. This argument was coupled with points as to the lack of certainty as to the adequacy of the replacement provision. It is said that it was not rational to close the Service when the Defendant could not properly be confident that the alternative arrangements were an adequate replacement.

131. The central part of this argument falls away in light of my conclusion that the Defendant was entitled to proceed on the basis of its understanding of the nature of the Service. There are several other factors which also come into play, and which demonstrate that the Decision was rationally open to the Defendant.

132. First, it is to be remembered that the Service was a non-statutory provision made by the Defendant. The Defendant was not required to provide the Service as one of the activities which it had a duty to undertake. That is a significant factor in light of the pressures on the Defendant's resources and the Defendant was entitled to take the view that its expenditure should be focused on those tasks which it was legally required to perform.

133. A further and related point is that the Defendant was not closing the Service in circumstances where there was no alternative provision available. It was doing so having taken account of developments since 1992. There was no dispute that there were services available at the time of the Decision which had not been available when the Service was established. The Defendant was entitled to take account of those. It was also entitled to take account of the fact that they were funded with public money and that there was an element of duplication between the Service and that provision.

134. It is of note that the Service was not replicated elsewhere in Devon. The Decision brought the arrangements in the relevant part of North Devon into line with those in the rest of the county. The Defendant was entitled to take the view that the arrangements

which it had in the rest of the county were appropriate and that it was legitimate to have the same arrangements throughout the county. The Decision was not the introduction of a pilot scheme or experiment to part of the county but was the converse and was the ending of an exceptional arrangement.

135. Both the Report and the Impact Assessment stressed the successful closure of the operation of the Service in Holsworthy with the effective transition of the service users to the alternative arrangements. That was, indeed, a relevant consideration to which the Defendant was entitled to attach weight.

136. Finally, it is relevant that the Defendant recognised that the users of the Service would need support in moving to the alternative arrangements and that this would take time. In this regard, the Claimants' case involved a misunderstanding of the Decision. The Claimants criticised the Decision on the basis that the Defendant could not properly be confident that a three month period would suffice for the transition. However, the Decision is clear that the three month period was a minimum. The proposal was not that the support to service users would cease after three months, but was an acknowledgement that support would be needed over that period as a minimum.

137. Considering those matters, the contention that the Decision was outside the range of conclusions properly open to the Defendant fails.

138. The second limb of ground 2 duplicates the arguments already advanced as to the obvious materiality of the various considerations and fails for the same reasons.

The Applicability of Section 31(2A) of the Senior Courts Act 1981.

139. In light of the conclusions I have reached, neither the Defendant's argument invoking this provision nor the Claimants' invocation of section 31(2B) arise. It suffices to say that if I had found that the statutory provisions on which the Claimants relied were obviously material considerations, I would not have accepted the Defendant's argument that the outcome would have been substantially the same if they had been considered. Although the factual matrix would have remained unaltered, it cannot be said that consideration of the provisions would have made no difference given that the assessment would have to be made on the footing (contrary to my conclusion) that those were material considerations. At an even greater remove I would have rejected the Claimants' invocation of section 31(2B). Important though the lawfulness or otherwise of any decision is it cannot be said that there were reasons of exceptional public interest which would require the Decision to be quashed even if I had concluded that any failings had not affected the outcome for the Claimants.

Conclusion.

140. It follows that the claim is to be dismissed.