Neutral Citation Number: [2022] EWHC 388 (Admin) Case No: CO3535/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SIITING IN MANCHESTER

Tuesday 22nd February 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

THE QUEEN (on the application of CUMBRIA COUNTY COUNCIL)	**Claimant**
- and -	
SECRETARY OF STATE FOR LEVELLING UP HOUSING AND COMMUNITIES	**Defendant**
-and-	
(1) ALLERDALE BOROUGH COUNCIL	**Interested Parties**
(2) BARROW IN FURNESS BOROUGH COUNCIL	
(3) CARLISLE CITY COUNCIL	
(4) COPELAND BOROUGH COUNCIL	
(5) EDEN DISTRICT COUNCIL	
(6) SOUTH LAKELAND DISTRICT COUNCIL	

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David Forsdick QC (instructed by Anthony Collins Solicitors) for the Claimant
Gayatri Sarathy (instructed by GLD) for the Defendant
Richard Humphreys QC (instructed by Carlisle City Council) **for Interested Parties (1)(3)(4)**
Timothy Straker QC (instructed by South Lakeland DC) **for Interested Parties (2)(5)(6)**

- -

Hearing date: 22.2.22
Judgment as delivered in open court at the hearing

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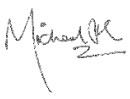
Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment in a remote hearing.

MR JUSTICE FORDHAM:

Introduction

1. This is a case about local government reorganisation for Cumbria. It comes before the Court as a renewed application for permission for judicial review, permission having been refused on the papers by HHJ Stephen Davies ("the Judge") on 14 January 2022. The mode of hearing was by Microsoft Teams. The legal representatives were satisfied, as am I, that this mode of hearing involved no prejudice to the interests of their clients. Nor did it prejudice the open justice principle: the case, its mode of hearing and its start time, together with an email address usable by any member of the public or press who wished to observe the public hearing, were all published in the Court's cause list from yesterday afternoon onwards. The Court has benefited from high quality submissions from all parties, and from a hearing scheduled with a sufficiency of time to be able to be shown by Counsel the key passages and materials in the bundles before the Court. The Court was also able to engage in a targeted pre-reading exercise with the assistance of the signposting given by the parties in their various written representations.

2. The 'target' for judicial review, as identified in the N461 claim form, is the decision announced by the Defendant on 21 July 2021 to proceed, subject to Parliamentary approval, to implement by order a proposal for two unitary councils (West and East) for the county of Cumbria. In some of the documents the Defendant's decision is referred to as having involved a "preliminary" decision. This is explained by the fact that both Cabinet approval, and then the approval of Parliament, were necessary and appropriate. That East/West proposal had been put forward by Allerdale and Copeland Borough Councils, in response to an "Invitation" and "Statutory Guidance", both promulgated by the Defendant on 9 October 2020. The East/West proposal, together with the three other proposals which had been made – including a single unitary council for Cumbria proposed by the Claimant – had been the subject of consultation by the Defendant between 22 February 2021 and 19 April 2021. The applicable statute is the Local Government and Public Involvement in Health Act 2007 ("the 2007 Act"), whose provisions deal with the following: the Invitation (section 2); the proposals (section 3(4)); the Statutory Guidance (section 3(5)); the consultation (section 7(3)); and the substantive decision as to whether to proceed to implementation by order (section 7(1)(a)). The claim for judicial review was commenced on 15 October 2021. A structural change order (pursuant to section 7(1) of the 2007 Act) was laid before Parliament by the Defendant on 24 January 2022 (Cabinet approval having been obtained), on which same day (as it happens) the Claimant gave notice of renewal of the application for the permission for judicial review which the Judge had refused.

3. The 'status quo', so far as concerns local government in Cumbria, features a number of authorities, including the Claimant as a single county council for Cumbria, and the six authorities who are the Interested Parties. Looking at a map of Cumbria as though it were a clockface, and proceeding from 12 o'clock in an anticlockwise direction, the Interested Parties' areas would be encountered in the following sequence: Carlisle City Council; Allerdale Borough Council; Copeland Borough Council; Barrow in Furness Borough Council; South Lakeland District Council; and Eden District Council. The West/East proposal put forward by Allerdale and Copeland would involve drawing a line to unite Carlisle, Allerdale and Copeland (the "West"); as distinct from Barrow, South Lakeland and Eden (the "East"). The single unitary council proposal put forward by the Claimant would include the areas of all six. A North/South proposal put forward

by Carlisle and Eden would have involved drawing a line to unite Carlisle, Allerdale and Eden (the "North"), as distinct from Copeland, Barrow and South Lakeland (the "South"). Barrow and South Lakeland put forward a proposal which broadly speaking would have treated South Lakeland, Barrow and Lancaster as distinct (the "Bay"). All of the Interested Parties resist the claim for judicial review.

4. The Defendant's Statutory Guidance – which accompanied the Invitation on 9 October 2020, which also subsequently accompanied the consultation on 22 February 2021, and which was also included within the schedule to Annex A of the Ministerial Briefing produced for the Defendant on 22 June 2021 – contained (at §1) the identification of three "criteria" (as they have subsequently been described throughout), as follows:

> ***A proposal should seek to achieve for the area concerned the establishment of a single tier of local government, that is the establishment of one or more unitary authorities:***
>
> > ***(a) which are likely to improve local government and service delivery across the area of the proposal, giving greater value for money, generating savings, providing stronger strategic and local leadership, and which are more sustainable structures;***
> >
> > ***(b) which command a good deal of local support as assessed in the round overall across the whole area of the proposal; and***
> >
> > ***(c) where the area of each unitary authority is a credible geography consisting of one or more existing local government areas with an aggregate population which is either within the range 300,000 to 600,000, or such other figure that, having regard to the circumstances of the authority, including local identity and geography, could be considered substantial.***

In the documents before the Court, these (Statutory Guidance §1(a)-(c)) were described as the "first criterion" (sometimes shortened to "improving local government and service delivery across the area"), the "second criterion"; and the "third criterion" (sometimes shortened to "has one credible geography"). The Statutory Guidance went on (at §2) to identify matters to be "taken into account in formulating a proposal". These covered topics such as: the importance of clarity as to how the criteria would be met; the need for supporting evidence and analysis; the relevance of impact on local boundaries and geographies; and (at §2(d)) the relevance of "any wider context … around promoting economic recovery and growth, including possible future devolution deals and Mayoral Combined Authorities" ("MCAs"). MCAs are governed by the Cities and Local Government Devolution Act 2016: see sections 2 and 16-17.

5. The consultation process elicited more than 3,200 responses in relation to the four proposals for Cumbria. Among other things, the process enabled each of the proponents to respond to what was being put forward by the others. A summary of consultation responses was in due course published (22.7.21). So was an economic Analysis of the proposals, with a particular focus on the first criterion, by external Analysts. The Defendant's "Team" – the "Unitary Team", from the Department's "Governance Reform and Democracy" section – produced the Ministerial Briefing. It was in the form of a five page 'Submission' with several Annexes. The first annex (Annex A), as I have explained, set out the terms of the Statutory Guidance (having also set out in terms the 9 October 2020 Invitation). Annex E was a copy of the analysts' financial assessment. Annex B contained the team's "advice" to the Defendant on the various proposals in relation to Cumbria. The Appendices to Annex B comprised: assessments of each of the four proposals (Appendix B1 to B4); a public sector equality duty assessment

(Appendix B5); summaries and analysis of consultation responses (Appendix B6, B6a, B7 and B8); and the four proposals themselves (Appendix B9 to B12). The Team's assessment was that the East/West proposal and the single unitary council proposal could each be considered to meet all three of the substantive "criteria"; but that the North/South and the Bay proposals were assessed to meet only the second of the three criteria. Alongside consideration of the position for Cumbria, there was a parallel process, culminating in decisions by the Defendant, in relation to North Yorkshire and in relation to Somerset. In the context of each of those counties the Team assessed only the single unitary council proposal, for each of those counties, as meeting the three criteria. In the context of those counties, it was those single unitary council proposals which were adopted by the Defendant. Eight grounds for judicial review were originally put forward in a letter before claim (9.8.21); six grounds were put forward accompanying the claim form (15.10.21); four were advanced at the hearing before me.

Ground 1: 'minimum population size'

6. The essence of this ground for judicial review, as I see it, is as follows.

i) There was on 22 July 2019 a statement made by the Defendant's predecessor in Parliament. It referred to the approach that would be taken in assessing "any locally-led unitary proposal". It made reference to "criteria for unitarisation" previously announced in Parliament in 2017, which had subsequently been "used" in decision-making. It constituted a statement of "Government policy". The third of the three criteria, as identified in that statement of Government policy, contained two components namely geography and minimum population. The 'minimum population requirement', identified within that third criterion, was a strong one, being expressed in terms of "expectation". As a matter of the legally correct objective interpretation of that Government policy it constituted, in its effect, a "requirement". A statement of Government policy was needed, in order for the Defendant's section 7 substantive decision-making discretion and judgment properly to be exercised. The statement of Government policy explained that the criteria were such that, subject to Parliamentary approval, a proposal could be implemented if the Defendant concluded (emphasis added):

> ***… that across the area as a whole the proposal is likely to:***
>
> - ***improve the area's local government;***
> - ***command a good deal of local support across the area; and***
> - ***cover an area that provides a credible geography for the proposed new structures, <u>including that any new unitary council's population would be expected to be in excess of 300,000</u>.***

ii) The clear logic, and the necessary inference, from that statement of Government policy was that 'what lay beneath' its promulgation was the recognition of a "minimum sustainable size" in population, in order to secure effective and efficient service-delivery, leadership and other relevant aspects of local governance. That underlying logic and rationale inform the objective interpretation of the Government policy. Having been identified by the Claimant's representatives, in the grounds for judicial review in this case, that underpinning logic and rationale have never been contradicted.

iii) The legal consequences, arising from the existence of a clear statement of Government policy regarding the exercise of the section 7 discretion and judgment, are: that any Statutory Guidance issued by the Defendant for the purposes of section 3(5) of the 2007 Act needed to be consistent with this "extant Government policy"; that any decision-making subsequently undertaken by the Defendant needed also to be consistent with the extant Government policy; unless, that is, there were identifiable "good reason" for a "departure" from the statement of extant Government policy.

iv) In the present case the promulgation on 9 October 2020 of §1(c) of the Statutory Guidance constituted a "departure" from the identified, extant and applicable, Government policy. It did so because (as has been seen), alongside the minimum sustainable size (the 300,000 featuring at the bottom of the "range 300,000 to 600,000"), was this alternative:

> ***… or such other figure that having regard to the circumstances of the authority, including local identity and geography, could be considered substantial.***

No reason was identified, still less a good reason, for that departure from extant Government policy. When the Defendant came to make the substantive section 7 decisions in the application of the third criterion, the Defendant again "departed" without "good reason" from the extant Government policy applicable to section 7 decisions. Since the West (with its population of 274,622) and the East (with its population of 225,390) could not meet the minimum sustainable size identified in extant Government policy, the unjustified "departure" vitiates, in public law terms, the impugned 'target' decision.

7. For the purposes of today's application, the threshold is whether that argument is properly arguable, with a realistic prospect of success. In my judgment it is not. In my judgment, the analysis put forward rests on a false distinction between two 'levels' of 'policy': a primary level for section 7 purposes identified in what the Defendant's predecessor was saying in Parliament; and a secondary level of Statutory Guidance promulgated by the Defendant (here, in the context of the Invitation for Cumbria). In my judgment, the analysis also rests on a false dissonance between the contents of the various statements which have been made; and on a false inference as to what is said to be an irresistibly-inferred 'minimum sustainable population size'.

i) The starting point is with the July 2019 statement to Parliament which the Claimant's argument characterises as "extant Government policy" for the purposes of section 7 decisions. What is clear from that statement is that it is a description of criteria for the purposes of decision-making. The statement expressly refers to 3 criteria, used in the past, and rooted in what had been said to Parliament in 2017. An example of a decision relating to Northamptonshire (arising, as I was shown, in particular circumstances) reveals that those criteria, referable to the decision-making, were always embodied in the Statutory Guidance which Parliament required the Defendant to promulgate. Indeed, the description in July 2019 given to Parliament of the criteria that would be used in assessing proposals was directly referable to the "statutory process as set out under the 2007 Act" – described earlier on the same page – which would involve the Defendant acting "to issue an Invitation to councils to submit proposals". Under the statutory scheme, Parliament – deliberately and carefully – identified

the Statutory Guidance as the instrument promulgated by the Defendant in the context of a particular round of proposals, including (in section 3(5)(a) of the 2007 Act) the Defendant setting out "what a proposal should seek to achieve". No separate or additional "policy" statement features within the statutory scheme, including in the context of section 7. If the July 2019 statement to Parliament had never been made, the relevant "policy" would simply have been embodied, each time, in the Statutory Guidance promulgated where proposals were being invited. In my judgment, beyond argument, it is clear that the governing instrument in the present case – so far as "policy criteria" are concerned – is the Statutory Guidance. In my judgment there is simply no room for the idea that there was, at the same time, both: (a) extant Government policy guidance emanating from the Defendant; and (b) Statutory Guidance criteria emanating from the Defendant which 'departed' from and 'conflicted' with that policy guidance.

ii) Counsel on all sides have assisted the Court in relation to the 'evolution' in the content of the various statements that have been made by the Defendant and his predecessors in relation to decision-making "criteria" for these sorts of decisions. At the heart of the criteria, described in a statement to Parliament in 2017, was the idea of "whether the area itself is a credible geography for the proposed new structures". So far as the context of the July 2019 statement to Parliament is concerned, what is clearly identifiable from the third criterion (as there described) is the significance of "a credible geography for the proposed new structures". Included within that is the reference to a "population … in excess of 300,000". That was expressed as an 'expectation' ("would be expected"). In my judgment, beyond argument, the language of 'expectation' does not strengthen that feature (population in excess of 300,000) so that it hardens into a "requirement"; on the contrary, what it clearly indicates is that the number is an 'indicator', by way of a 'rule of thumb'. As it happens, and by means of the same mode of communication – that is to say, a statement to Parliament – on 29 June 2020 the then Secretary of State had revisited this very topic. On this occasion he referred to the language of a population "substantially in excess of 300k-400k". That description was within a phrase which made clear: first of all, that "the populations… will depend on local circumstances"; and secondly, that "substantially in excess of 300k-400k" was "as a rule of thumb" and in that sense (of a "rule of thumb") was "expected".

iii) Mr Forsdick QC was unable to identify any document in the public domain (or at all) that would support the assertion that, underpinning the statement to Parliament in July 2019, was a recognised requirement of 300,000 as a "minimum sustainable size", such that effective and efficient service delivery and local government leadership and other objectives could, in principle, only viably be delivered above that minimum sustainable size. In my judgment, it is not reasonably arguable that the fact of the description ("population would be expected to be in excess of 300,000") within the July 2019 statement supports the irresistible inference that such a minimum sustainable size was the purpose, logic and rationale. In the end, in my judgment, the argument rests on giving that July 2019 statement a status, and a continued legal impact, as well as an asserted underpinning purpose and rationale, which cannot even arguably be justified on the face of the materials.

iv) In the light of that, the approach taken in the present case, both as regards the promulgation of the Statutory Guidance, and also in terms of the application of the criteria in the substantive decision-making, do not even arguably give rise to a "departure" from an "extant" and applicable "Government policy". Nor would I have accepted, even arguably, that there was – on the face of it – the absence of any "good reason" for a third criterion: focusing on "credible geography"; with a "rule of thumb"; focusing "on local circumstances"; with these culminating in the recognition that based on the particular "circumstances", "including local identity and geography", a population below 300,000 "could be considered substantial" for the purposes of meeting a relevant geography/population-based criterion.

Ground 1: delay

8. A further feature of the arguments adopted by all of the other parties on this part of the case was that the Claimant's claim on ground 1 should fail for delay. That was on the basis that the promulgation of the Statutory Guidance had been on 9 October 2020 and the judicial review was only brought in October 2021, a year later, when it had sought to impugn as its 'target' only the July 2021 substantive decision. I was not impressed by Ms Sarathy's argument that the Claimant's Ground 1 logic, as to the Statutory Guidance as an unlawful "departure" from Government policy, had "only become clear today". In my judgment, the pleaded grounds for judicial review had made clear – within the reasoning – that a point was being made, about "departure" from Government policy, from the promulgation of the Statutory Guidance in October 2020 onwards. Nor was I impressed by Mr Forsdick QC's argument that his clients could not have "seen the problem" that they now identify within their ground 1, from the Statutory Guidance that was promulgated. It was very clear, on the face of the Statutory Guidance, what was being said about the third criterion. That was also, obviously, highly relevant in a context where Cumbria only has a population of 500,000. In the event, however, nothing turns on any of that. The question whether, if the ground 1 point had been arguably a good one in public law terms, I would have shut the case out on this ground by reason of delay simply does not arise.

Ground 2: MCA

9. The essence of the claim on this ground, as I see it, is as follows.

i) A point repeatedly made within the East/West proposal was that its proponents were putting forward the advantages of a "combined authority": an MCA (and other linked combined authorities). This was repeatedly referenced in the proposal. The significance of this, within the proposal's contents, involved two critical points. The first point is that the MCA operated as a "necessary premise" for the proposal being made. In other words, properly understood, the application simply could not – without an MCA – achieve what was being claimed. The proposal could not have met the criteria – or at least produced the virtues and advantages identified – in the absence of an MCA. The second point is that the "reason" why an MCA was repeatedly being emphasised was in order to seek to "avoid disaggregation disbenefits", which disbenefits would otherwise necessarily arise from such an East/West proposal.

ii) When the Defendant came to consider, and then make, the decision it is clear from the documents that the MCA component was "put to one side". To give one reference, from many, the pre-action letter written by GLD for the Defendant (6.9.21) confirms that "the potential desirability of establishing a combined authority was not material to the decision on whether the proposal for unitary local government met the criteria".

iii) Although the MCA theme of the East/West proposal features a number of times in the Ministerial Briefing, what the Team's assessment did was to "lose sight" of the necessity for the MCA as a "necessary premise" for the proposal. The Team also "lost sight" of the "reason" by reference to which the MCA feature was being put forward throughout the proposal. In consequence, there are "gaps" within the Team's assessment, and "yawning gaps" within the Defendant's decision letters. In public law terms, that means that a legal relevancy – arising either as a matter of implication from the statutory scheme or Statutory Guidance, or as an obvious point so relevant that it could not reasonably be ignored – was disregarded. The upshot is that the decision is flawed in public law terms and cannot stand.

10. For the purposes of today the threshold is, again, whether that is reasonably arguable, with a realistic prospect of success. In my judgment it is not.

i) What happened was this. The Team, in the Ministerial Briefing, advised the Defendant about the reliance that was being placed on the MCA, by the proponents of the East/West proposal. The Team also advised the Defendant that the question of establishment of an MCA was not within the scope of the decision. That was because establishing an MCA has a separate statutory process and would involve a separate and distinct decision to be made, on its merits, pursuant to the applicable procedure under the 2016 Act. This meant that the MCA feature, which was properly part of the "wider context" and (as has been seen) had expressly been referenced in §2(d) of the Statutory Guidance, was treated in the Team's assessment as an 'open question' which should not be 'prejudged' or 'assumed'. As the Ministerial Briefing stated:

> ***… the decision as to whether to establish a [MCA] and the powers provided for a combined authority and/or Mayor are negotiated and part of a separate statutory process; and should not be assumed to follow in making the decision on the unitary proposal.***

ii) The question was this. Where did all of that leave the East/West proposal, in particular in the context of the first criterion? The Team assessed the East/West proposal by reference to the first criterion, and all of the relevant sub-features of that criterion. The Team did so on the approach that it had identified. Its advice to the Defendant was that, on that basis, it assessed that the first criterion was met. It explained for the Defendant its reasons for arriving at that conclusion. To take one important illustrative example of that approach, in the context of the first criterion (specifically, strategic leadership), the Team told the Defendant this:

> ***Conclusion. Our assessment is that the fact that seven councils reducing to two will lead to some improvement of strategic leadership. The proposal itself says that substantial improvement would come through having a [Combined Authority],***

> ***however, if there were in future to be a Combined Authority this will need to follow the separate statutory process for the creation of a new Combined Authority: the consent of all the constituent councils and needs to meet statutory tests. The removal of any organisation with responsibility across the area as a whole such as the existing county may weaken strategic leadership and there is potential for competition between the two unitaries for external resources. There is no certainty that a Combined Authority will be established to address these issues and little discussion of how that strategic coherence can be assured if that does not happen (or in the interim period even if it were to be agreed).***

What followed that passage was this sentence (a sentence put into emboldened type in the original):

> ***Our advice, based on the information available to us, is that there is a likelihood that this proposal, if implemented, would improve strategic leadership.***

And then this (which reverted to normal type in the original):

> ***There is scope for further improvement to strategic leadership if, additionally, a Combined Authority were to be created, but as outlined this would be a separate statutory process and run on a separate timescale.***

In my judgment, Ms Sarathy is clearly right in her submission that what that passage demonstrates is that, on the approach that it had properly identified and lawfully took, the Team was recognising that the merits of the East/West proposal could "stand on its own two feet" (as Mr Forsdick QC put it), even if there were no MCA. In other words, for the purposes of the assessment and the advice to the Defendant, the MCA was not a "necessary premise". What the Team did in the Ministerial Briefing was to address each aspect of the first criterion. Repeated reference was made, throughout, to the MCA as featuring within the East/West proposal. So, for example, in the context (earlier in the briefing) of 'improving local government' reference was made by the Team to "significant disaggregation and costs involved in splitting … services". The Team then added: "A case is made that a combined authority will bring coherence to area wide strategic planning and delivery, but that is not within the scope of this decision". The Team continued, again, giving its advice and assessment: "Nevertheless, our advice based on the information available to us is that there is a likelihood that this proposal if implemented would improve local government across the area".

iii) In my judgment, the distinction drawn by Mr Forsdick QC – between (i) the feature of the MCA within the proposal and (ii) the "reason" for it featuring within the proposal – is a distinction which does not begin to bear the weight which he places on it. What the Team was doing for the Defendant was assessing the proposal and the various features of it. To take an example, the phrase "will bring", within the Team's description (to which I have just referred) of the East/West proposal having made the "case" that "a combined authority will bring coherence to area wide strategic planning and delivery" was clearly recognising and referencing the "reason" why reliance was being placed on the MCA. Viewed fairly and overall, in my judgment – beyond argument – it is clear that the Team's assessment for the Defendant had well in mind: the reliance that was being placed on the MCA; the role that it played within the

proposal; and the "reason" or "reasons" for which it played that role in that reliance.

iv) The approach taken, in my judgment – beyond argument – was plainly legally legitimate, including treating the MCA as an 'open question' and making no 'assumptions' or 'prejudgments'. This ground for judicial review collapses into a question about judgment, appreciation and application, for those who were assessing the proposals on their merits. Beyond argument, in my judgment, nothing was disregarded that was a legally material consideration. I should also record that nothing in the grounds for judicial review contends that there was any unreasonableness (irrationality) either on the part of the Team or the Defendant.

Ground 3: Comparative evaluation

11. The essence of this ground for judicial review, as I see it, is as follows. Mr Forsdick QC begins by distinguishing what he says were two distinct stages, within the decision-making process and the thinking of both the Team and the Defendant. His 'stage one' was described as a "sieve". That was a stage which involved considering whether a proposal 'met' the three stated criteria, as both the East/West proposal and the Single Unitary Council proposal were assessed as doing. Following that first sieve, or "filter", stage there was then 'stage two' involving the 'choice' between those proposals which had emerged as eligible from 'stage one'. The argument on ground 3 runs as follows:

i) There were two proposals which met the three criteria for the purposes of the sieve stage (stage one). In those circumstances what clearly needed to happen was a choice being made between those two 'eligible' candidates. It is clear, from the work done by the Team in the Ministerial Briefing and the Team's detailed assessment in the Annexes and appendices to the Briefing, that the Team did not stop at the sieve stage (stage one). Narrative reasons were given in relation to all criteria by the Team for the Defendant. The Team's analysis provided a 'sufficiency of information' for a comparative evaluation to be conducted by the Defendant across the range of applicable criteria. However, that exercise was not performed for the Defendant by the Team. Instead, it was specifically left for the Defendant to perform himself, in the light of the information provided to him. That necessary evaluative exercise, across the range of the criteria, was encapsulated for the Defendant in two passages (which were identical) found at the end of the second page of the Briefing, and then repeated at the end of Annex B. There, the Team said this (as to the choice between the two 'eligible' proposals):

> ***In deciding between these proposals, you will wish to consider the detailed circumstances of each as set out in Annex B, including the financial circumstances and net present values (NPVs), the issues of service delivery and the level of disruption of any transition, support from key stakeholders including local MPs, and the implications of the different geographies. You will also need to consider whether the impact on people with shared protected characteristics could be outweighed by the long-term benefits and issues that could arise if the East West proposal were adopted.***

The Team also explained to the Defendant, in the Briefing, that Annex B and its appendices "set out our detailed assessment" of the proposals "against the three criteria".

ii) What the Defendant needed to do in those circumstances, as a matter of public law obligation – in order to have regard to material considerations (whether constituting implied obligations under the statutory scheme or guidance, or as a matter of their obvious relevance) – was to conduct an evaluation, across the range of relevant factors, of the two 'candidate' proposals. In relation to that comparative evaluation, it is possible to identify a list of some "11 factors" as to which, when viewed across the criteria, the Claimant's single unitary council proposal can be seen to be superior, and the East/West proposal inferior. They are: improving local government; the reasons that made an MCA necessary for the East/West proposal; the 'new additional layer' of governance that such an MCA would entail; gains in leadership from the single unitary council proposal; coherence in planning; disaggregation disbenefits and costs; statutory consultee views; other government views; implications for highways; value for money; and the comparative picture in relation to economies of scale.

iii) What the Defendant could not do, acting consistently with his public law obligations, was to focus only on "one side", or on "one aspect" of the criteria, and choose an eligible candidate by reference to its virtues on that aspect, without having evaluated and weighed up in the balance the other aspects, including comparative disadvantages in other areas of the criteria. To "cherry pick" in that way, to take "the smooth" without balancing against it "the rough", would be to act in the way which – albeit in a very different context – Sullivan J held was an unlawful and vitiating approach in the planning case of R (Chelmsford Car and Commercial Ltd) v Chelmsford BC [2005] EWHC 1705 (Admin) [2006] 2 P & CR 12. That was a case in which competing applications for planning permission, on different sides of the same road, and in the context of the same 'local need' for the same sort of housing, had been considered by the decision-making authority. The authority had taken, and expressed, "the view that a comparative assessment was not required" (§6). What Sullivan J held that this meant in that case was this: that the successful planning applicant's virtues, on those parts of the picture on which it was strong, had been considered in its favour; but without reference to any evaluation of the other aspects on which the other (unsuccessful) applicant for planning permission held the stronger and upper hand. As Sullivan J concluded, (§35) it was not "fair" to "set on one side as immaterial" the respects in which the unsuccessful applicant was contending that its site better complied with relevant policy criteria (see §§2, 5). Although arising in a very different context, the Chelmsford case illustrates exactly what was impermissible in the present case.

iv) The Defendant fell precisely into that legally impermissible approach. What the Defendant did in the decision was: to emphasise a "single element" of "one of the criteria"; to take one part of the overall picture; and to fix on it as the reason for preferring and choosing the East/West proposal. The key passage in the announcement which was made to Parliament on 21 July 2021, and in the decision letters written on that same day, states that as well as meeting all three

criteria the East/West proposal was "more appropriate" to implement, compared to the one unitary proposal which also met all three criteria:

> ***… due to the size and geographical barriers of Cumbria together with the reality of its population.***

That is one part of the picture and one part only. It constitutes "cherry picking" and a failure to evaluate the relative strengths and weaknesses of the two candidate proposals "across the board". The fact that other matters are discussed in the decision letter does not undermine or change that conclusion. In the first place, the reasoning that follows – properly understood – is no more than a description of stage one (the "sieve") in the decision-making. It is therefore no more than a description of the decision which took the two candidates to their position of being 'eligible' candidates. Secondly, even leaving that to one side, there are within the passages in the decision letter conspicuous "gaps" in relation to key aspects on which the relative virtues of the single unitary council have been left out of account and unevaluated in any weighing, balancing exercise. That has the same, unfair and vitiating consequences as was seen in the Chelmsford case.

12. For the purposes of today the threshold is, once again, reasonable arguability with a realistic prospect of success. In my judgment that threshold is not crossed in relation to this third ground for judicial review.

i) The position is as follows. The Team did address whether each proposal 'met' or 'did not meet' the three criteria. It identified the two proposals which could be assessed as 'meeting' all three criteria; and it identified the two others which did not. Within that appraisal exercise the Team used three categories, namely: "not met"; "met"; and "strongly met". The Team identified that the East/West proposal and the single unitary council proposal each "met" all three criteria. The Team did not identify either of those proposals (or either of the other two proposals) as having "strongly met" any of the three criteria. The Team (on the first page of the Briefing) specifically brought to the Defendant's attention the need to consider, not just whether the proposals "meet the three criteria set out in the Invitation (see Annex A)", but "if so, to what extent". I find it impossible to see how that phrase can be a description of a "sieve" at which 'stage one' eligibility is being identified. The description (used in this passage of the Briefing) of a "preliminary" decision is something that I have already explained at the outset of this judgment. But, in any event, the Team went on, in the passage which has been seen (in the Briefing on page two and repeated in Annex B), to explain what the Defendant "will wish to consider", in "deciding between" the two proposals. The Team also told the Defendant in the Briefing that they had in Annex B and its appendices "set out our detailed assessments … against the three criteria", as indeed they had. It is not in dispute that they provided 'adequate information' to the Defendant to be able to make a lawful, reasonable and fair decision. (As it is put in the Claimant's grounds of renewal: "the Ministerial Briefing gave the information necessary for [a] comparative assessment").

ii) In my judgment, beyond argument, it is clear that what the Defendant then did was precisely what he had been told by the Team he would "wish" to do. He did

consider the detailed circumstances of each proposal, based on the detailed assessments which gave him the relevant information on each aspect of each criterion. He arrived at an overall evaluation, having considered all of those features. Having done so he then gave a reason why, in his overall judgment, he regarded the East/West proposal as the "more appropriate to implement". The judgment, on matters of relevance and matters of weight, were questions for the Defendant. The supervisory jurisdiction of the Court is not excluded but there is no reasonableness (rationality) challenge in the present case. Nor, in my judgment, is there the basis for a reasonableness (rationality) challenge. The Defendant's decision letter gave, in my judgment, beyond argument, clear and legally adequate reasons. The letter stated, in terms, that the Defendant had "carefully considered each of the proposals"; and that "he assessed each proposal against the three criteria". The reference to "more appropriate" itself reflects a comparative evaluation. The Defendant's description "for the reasons set out below" is a reference to the passage which follows. In my judgment, it is impossible to read that passage as setting out a "sieve" exercise. It would be odd to the point of absurdity for the Defendant – in a reasoned decision letter to explain "the … decisions" – to devote such detail to the question of a preliminary "sieve". Within the main body of the decision letter in my judgment, beyond argument, reference is made to each of the features which had been found within the paragraph that I have quoted in the Ministerial Briefing in which the Defendant had been told "you will wish to consider the detailed circumstances… including …"

iii) The proof of the pudding, so far as this point is concerned, emerges when one considers one of the key virtues – in comparative terms – put forward by the Claimant for its single unitary council proposal. The Claimant was submitting that its proposal was superior in value for money (VFM) terms. That aspect had been assessed by the Analysts, in their economic Analysis. It was discussed by the Team in the Ministerial Briefing. It features expressly in the decision letter, where reference is made to the Claimant's proposal as the option which "would be likely to be better value for money". In my judgment, beyond argument, that demonstrates that the Defendant was not 'swooping in' to one particular part of the case for the purposes of his evaluative judgment. Rather, the Defendant was having "regard" – as he said in the decision letter he had done – to all of the criteria; to all the matters put forward including "all the representations he received through the consultation"; and to "all the relevant information available to him".

iv) The Defendant was entrusted with making the overall judgment, and in the giving of reasons as to why he regarded one eligible candidate is "more appropriate" than the other. That is what he did. He did so, emphasising the size and geographical barriers of Cumbria together with the rurality of its population. That did not mean he was only weighing in the balance that aspect, but ultimately it was that aspect which led to the choice that, in the exercise of his judgment, he made. In that context it is relevant to have in mind, as Ms Sarathy submits, that that aspect was not simply one part of the third criterion. Rather, it was a feature of the evaluative judgment which was also material in the application of the first criterion. That point can clearly be seen from the Ministerial Briefing itself. In the context of the first criterion the Team set out

as part of its detailed assessment for the Defendant this conclusion as to "whether the East/West proposal would improve service delivery":

> ***Conclusion. Our assessment is that the proposal would be likely to improve service delivery. The proposal's argument that Cumbria is too big and too rural for a single council to provide good and responsive local services, and that two unitaries will ensure efficient and effective service delivery as it can be agile and respond to local need has some substance. Many consultation respondents, such as parishes and other local government organisations, agree with this basic proposition and even those public sector partners who have reservations about the specifics of the two unitary model understand the point about trying to identify a geography that make services more locally accountable.***

Similarly, in the context of the first criterion topic of 'value for money, generating savings and improving sustainability' the Team said this:

> ***The proposal emphasises that smaller councils can deliver flexible agile and efficient services as they can respond to need. Due to the size of Cumbria plus the rurality of its population and the geographical barriers of the lakes and mountains, concerns have been raised by all the district councils that one council for the whole area could be unwieldy…***

Those virtues and points were put, by the Team, alongside the others, in the Team's evaluative exercise ("our detailed assessments … against the three criteria"). That included all of the 11 points which have been identified, by reference to the Team's assessment, in Mr Forsdick QC's submissions. Then of course there was the credible geography (the third criterion) and its implications. On that topic the Team assessment explained (emphasis in the original):

> ***Our assessment of the East/West proposal is that the populations of the councils (225k and 273k) are below the range of council size set out in the Invitation but has established local identity and local economic geography as referred to in the criterion. These populations could be considered substantial in the specific circumstances of a sparsely populated area with lakes and mountains such as Cumbria. It is the split that best aligns with the historic counties of Cumberland and Westmorland. There is also evidence of how the council's boundaries would align with functional economic geographies: especially in relation to the nuclear industry – the proposal has support from nuclear industry stakeholders. West Cumbria has a strong manufacturing, industrial and mining history which is embedded in culture and society; communities in East Cumbria face common challenges of rurality and sparsity which are reflected in culture. Our overall assessment is that the evidence would point to a conclusion that the geography of the two councils will be a credible geography. Our advice therefore is that this East/West proposal can be judged as meeting this criterion.***

v) The Defendant, beyond reasonable argument in my judgment, gave legally adequate reasons for a decision, after a legally permissible evaluative exercise. It cannot be impugned – as it would need to be – on grounds of unreasonableness (irrationality).

Ground 6: Inconsistency

13. Ground 4 (reconsultation) was mentioned but does not require separate analysis since Mr Forsdick QC accepted that it was "parasitic" on ground 2 (MCA). I turn finally to ground 6 which was the subject of brief oral submissions. As it was developed for the purposes of the hearing of this renewed application for permission to appeal, ground 6

invokes as a general principle – accepted for the purposes of today by the Defendant – that "like cases should be treated alike" and the failure to do so can vitiate a decision in public law terms. Mr Forsdick QC showed the Court key passages in the Defendant's decision letter in relation to North Yorkshire. That was reasoning concerning the single unified council proposal which the Defendant adopted in that context. One passage explained the reasons by which that proposal had been assessed, not just as meeting, but as "strongly meeting" the first criterion. The later passage related to the third criterion, again so far as the single unitary council proposal for North Yorkshire was concerned. In essence, Mr Forsdick QC submitted that what the Court could see in these passages were "the very points" which were also "strongly prayed in aid" by the Claimant for a single unitary council for Cumbria. Those points underpinned the decision for a single unitary council for North Yorkshire. Against that reasoning, there is then the "inconsistency" of an adverse decision, for different reasons, in the context of Cumbria. Mr Forsdick QC emphasised, from the passages in the North Yorkshire decision letter: the confirmation from analysts of the savings that the single unitary council for that county would produce, with value for money and improved financial sustainability of local government; and the points made about identity and geography in the passage referable to the third criterion. These points, alongside others – submits Mr Forsdick QC – supports, at least as arguable, the challenge based on "inconsistency".

14. In my judgment, the comparison and consideration of the position in relation to North Yorkshire simply serves – at every stage – to emphasise the fact- and context- specific evaluative assessment and conclusion which these decisions necessarily involved. One thing which is certainly striking is this: it was the same Statutory Guidance, promulgated on the same day; it was the same supporting Team and analysts; it was the same decision-maker (the Defendant), announced on the same day, who was making these different decisions for the counties of Cumbria, North Yorkshire and Somerset. The differences become clear soon as the documents are approached. The passages relied on give reasons relating to North Yorkshire and the single unitary council proposal. It is later passages in the same decision letter that deal with the position of the "two unitary councils proposal" which was assessed in that case is not meeting the first or the third criterion. Unlike Cumbria, North Yorkshire involved a single unitary council proposal which "strongly met" the first criterion, based on the analysts' assessment. In the context of North Yorkshire, the "geography" and "identity" were recognised as being "county-wide", with a "brand" of North Yorkshire, and with the North Yorkshire unitary having "critical mass" to "deliver services effectively to a large rural area and market towns"; with a "proposed geography" which "aligns with arrangements in existing public sector partnerships" allowing "existing relationships and partnership working to be maintained without disruption". By contrast, the "two unitary councils" proposal for North Yorkshire did not "meet the credible geography criterion". That was notwithstanding that each of the two proposed unitary councils was "within the range of population size set out in the" third criterion. The "areas" did not "appear to be based on local identity for either area". The "proposed geography" was assessed to have "no regard for the local identity of York, which would be subsumed into a wider area". And there were "strong views" from "many … public sector partners" that "the proposed geography would create disruption, cut across existing partnership arrangements and would not align to other public sector partners in the area". What, beyond argument, the North Yorkshire materials show is: the same approach, and the same methodology, with the same teams, undertaking the same

evaluation; but with different conclusions. The reason for the different conclusions is precisely because the circumstances and features of the cases were different. The short answer to "like cases treated alike" is, as is so often the case, that these are not "like cases" so far as concerns the merits of the evaluative decisions.

Delay

15. I have already explained that the delay point which was maintained at today's hearing does not arise, given the way in which I have decided ground 1. A general delay point, referable to the 'target' of the 21 July 2021 decision, had been mentioned in Mr Straker QC's summary grounds, but he did not maintain or develop it orally. In the circumstances, nor is it necessary for me to say any more about that point.

Conclusion

16. I referred at the beginning of this judgment to the quality of the submissions, in writing and orally, which have assisted the Court in this case. I have given my reasons, at greater length than I normally would at a renewed judicial review permission hearing. On the other hand, the hearing was itself scheduled as a 'longer than normal' hearing, to allow submissions to be developed at greater length. For the reasons that I have given, I am unable to find in the grounds that are advanced any viable claim for judicial review having any realistic prospect of success, by reference to any of the grounds that are put forward. In those circumstances, and in agreement with the Judge – the thrust of whose reasons is in line with my own analysis, arrived at "afresh" – permission for judicial review is refused.

Costs: AOS

17. So far as costs are concerned, there are two matters with which it is appropriate to deal. The first is to record that the Judge summarily assessed the Defendant's costs of its AOS (Acknowledgment of Service and accompanying summary grounds) in the sum of £15,223.41 and also directed that the Claimant paying a contribution of £7,500 to each of the Interested Party teams in respect of their AOS costs. The costs order made provision for the usual mechanism which would have permitted the Claimant to challenge it if it wished to do so. There being no challenge, and permission for judicial review having been refused, that costs order stands, as everybody recognises.

Costs: oral hearing

18. The second costs matter is that an application for the costs of today has been made. No application is made on behalf of the Defendant and no application is made on behalf of Mr Straker QC's team. Mr Humphreys QC invites the Court to make a costs order in favour of his clients. He recognises that "exceptional circumstances" would need to arise to justify such an order: see §76(5) of R (Mount Cook Land Ltd) v Westminster City Council [2003] EWCA Civ 1346 [2017] PTSR 188. He also recognises that this is not a case where the Court "directed" attendance by the interested parties. His submission focuses on that part of §76(5) of Mount Cook which identifies as a circumstance which may justify a costs order the position where:

> ***… as a result of the deployment of full argument and documentary evidence by both sides at the hearing of a contested application, the unsuccessful claimant has had in effect the advantage of an early substantive hearing of the claim.***

In my judgment, that description is inapt to describe what has happened at this hearing. This was not a case in which the Court accelerated the opportunity for the deployment of "full argument" and "documentary evidence by [all] sides" so as to constitute, in effect, "an early substantive hearing". I have focused on the threshold of arguability. I have done so by reference to summary grounds from all those opposing judicial review, and a skeleton argument on the part of the Defendant. The 'longer than normal' length of the hearing was proportionate for the proper ventilation, against the threshold of arguability, of the grounds for judicial review in this case. There was a considerable body of material, but it only constituted the materials put forward by the Claimant and the materials disclosed by the Defendant at the permission stage, together with a focused set of legal authorities. I have given a judgment at some length, in recognition of the nature of the arguments put forward in the nature of the case. But none of that, in my judgment, has changed the quality or nature of this hearing. It would not in my judgment be just, viewed against the principled framework applicable to permission-stage costs in the Administrative Court, for the Claimant to have to bear a further costs order in relation to this hearing; still less in respect of interested parties, who did not need to file a skeleton argument and who addressed the court succinctly and following on from the Defendant's oral submissions. This case has, as a result of an expedited renewal hearing sought by the Claimant, reached a final determination in this Court more speedily than it would have done. Those who have successfully resisted judicial review, and have chosen to attend this hearing for the purposes of assisting the Court, will have to take their comfort from the Judge's order in relation to costs and from the result of his, and now my, judicial determination on permission for judicial review.

22.2.22