

JUDGMENT : MR JUSTICE MAURICE KAY: H.Ct. Admin. 16th April 2003.

1. The Moreton Centre is a residential and day care home for the elderly in St Leonard's-on-sea. It is owned and managed by East Sussex County Council -- ("the Council"). On 18 December 2002, the Council decided to close the Moreton Centre. There are now before the court a number of consolidated applications for judicial review of that decision. They reflect the different categories of persons affected by the decision. The first category comprises the seven permanent residents, one of whom is Clara Dudley. Secondly, there are some 105 people who regularly use the centre for day care: they include Albert Whitbread. Thirdly, there are 21 regular users of the centre for respite care, two of whom are Neoclis Neocleous and Reginald McClean. Finally, there are carers who benefit from the respite care provided for the third category. Two of these carers are Frances Neocleous and Maureen McLean.
2. The Council is fixed with a number of statutory obligations to persons such as those who use the services provided by the Centre. They arise mainly under the National Assistance Act 1948 and the National Health Service and Community Care Act 1990. As nothing in this case turns on the details of the statutory framework, I shall not recite the sections which provide that framework.
3. In October 2001, the Council communicated its intention to review each of its residential homes for older people, and set out a proposed timetable. A year later, on 7 October 2002, John Windebank, the Project Director of the review, wrote to interested parties about the review of the Centre. The letter reads as follows: *"You may recall receiving a letter from David Archibold, Director of Social Services, in October of last year to inform you of the proposal to review each of the County Council residential homes for older people along with a timetable of when each of the homes is to be reviewed. My purpose in writing to you today is to remind you how the review of the Moreton Centre is to be conducted and how you make your views known.*

"The formal period of consultation over the future of the Moreton Centre will take place during October and November with the outcome of the review being reported to the 4th February 2003 meeting of the County Council's Cabinet Committee. During this period, your care needs will be assessed. What this means is that an assessor from the reviewing team will meet with you to discuss the ongoing care that you need and to hear any views that you have about the future of Moreton.

"In addition to the review taking into account the points set out below, you should be aware that in consultation with the local NHS Primary Care Trust, an opportunity has arisen to apply to the Government for funds to extend and develop the Moreton Centre to provide a comprehensive range of rehabilitative services for older people. In the event of the bid being successful and a decision being made to pursue the scheme, it would be necessary to cease operating the home in its current form and for long stay residents and for the respite and day care services to be relocated to alternative accommodation.

"The review will take into account --

- (i) the needs of the service users of Moreton and the views of their near relatives/friends;*
- (ii) the ongoing cost of maintaining the home;*
- (iii) the 'value for money' aspects in respect of the operational cost of running Moreton compared to similar establishments in the independent sector;*
- (iv) whether Moreton is providing a service or services to any service users which cannot be replicated in the independent sector; and*
- (v) the location, suitability and availability of alternative accommodation in the independent sector.*

"On 30th October and the 6th, 8th and 11th of November you will have the opportunity, if you so wish, to meet with Corinne Lane, Operations Manager at the Moreton Centre, to discuss with her your views and wishes about your future and the future of the Moreton Centre. I have also written to your daughter . . . so that she is aware of what is happening. It may be that you wish her to represent your views or to accompany you. To take up the offer to meet with Corinne Lane please contact the home to arrange a suitable time.

"Should you or someone writing on your behalf wish to comment on the review of the future of the Moreton Centre, please write to me at the following address by Friday 29th November."

4. Individual assessments of residents and respite and day care users were undertaken in late October and early November. A considerable number of people made representations in writing. On 21 November, Mr Windebank wrote again to the recipients of his earlier letter. He referred to the opportunity that had arisen to apply to the Government for funding to extend and develop Moreton to provide a wide range of rehabilitative services for older people. The letter continued: *"My purpose in writing to you today is to let you know that we understand the Minister is to announce the details of the successful schemes within the next few weeks. As we do not know when the announcement would be made we thought that whatever the outcome, it was important we kept you informed rather than for you, or your relatives and friends, to hear about it through the media.*

"It is important I stress to you that no decision will be made about the future of Moreton until the Council's Cabinet Committee receives a report on the outcome of the review. As you may remember, the formal period of consultation for the review is October and November, and it was planned that a report on the outcome would be presented to the February 2003 meeting of the Cabinet.

"Having consulted with colleagues, we believe that in the circumstances it would be better to bring forward the report of the review. Therefore it is proposed to report on the outcome of the review along with the results of the bid for money to develop Moreton to the 18 December meeting of the Cabinet."

5. Mr Windeback wrote another letter to the same addressees on 2 December. The relevant part reads as follows: *"My purpose in writing to you today is to let you know that the bid to the government was successful and that £1 million has been allocated to the scheme. It is important that I once again stress to you that no decision will be made about the future of Moreton until the Council's Cabinet Committee receives a report on the outcome of the review at its 18 December meeting. As with my previous letter, I have also written to your daughter so that she is aware of what is happening. Unless I hear from you in the meantime, I will write to you again to ensure that you are aware of the outcome of the review and of the recommendations to be made to the 18th December meeting of the County Council's Cabinet Committee."*
6. A week later, a further letter was sent by Mr Windeback in these terms: *"Please find attached a copy of the letter to your mother which, as you will see, advises of the recommendations being made to the 18th December meeting of the Council's Cabinet Committee. Please be reassured that the staff at Moreton have made every effort to minimise any anxiety and that Mrs Dudley understands that there are suitable alternative local homes that she can move to. Therefore, should the Cabinet Committee uphold the recommendation to cease operating Moreton as a residential care home for long stay residents, Liz Coleman, Senior Practitioner, will be in contact with you to discuss similar alternative arrangements."*
7. The letter to Mrs Dudley, of the same date, informed her that the recommendation was that Moreton would cease to operate as a residential care home for long stay residents by the end of March 2003. That letter continued: *"The review concluded that there is no unique service operated at Moreton that cannot be replicated in the independent sector at a lower price than the current unit costs.*
"If the recommendation for closure is accepted, there is also a proposal, subject to a business case being made to proceed, to initiate discussions with Health and the independent sector to provide a 30-place intermediate care scheme on the Moreton site. If the Cabinet agrees the recommendation it will mean that you and the other residents will need to move to another home. However you can be reassured that there are suitable alternative homes you can move to, and staff will talk with you about alternative arrangements after the meeting of Cabinet on 18 December."
8. On 13 December, solicitors for Mrs Dudley, who now also represent the other claimants, wrote to the Council taking issue with the recommendation and giving notice of judicial review proceedings. The Cabinet meeting on 18 December had before it a report from the Director of Social Services. It explained the background including the capital grant available from central government. It described the consultation process and referred members to the summary assessments of each of the residents. Members were also provided with the written representations that had been received. The report summarised them in this passage: *"The majority of those who commented praised both the staff and the quality of care given at the home. A number of relatives and friends of residents expressed concern that an enforced move could threaten residents' welfare. Four relatives of respite and day care users believed that any*

relocation of services from the Moreton Centre could result in users becoming confused and losing confidence due to the change in their surroundings."

A later part of the report reads as follows: *"As with any review of the future of a residential care home, the major concern of relatives is the possible adverse effect any move would have on the welfare of the residents. Whilst not in any way wishing to minimise this view, care staff are doing all that they can to reduce any anxiety felt by residents and other service users. The assessments have also taken into account residents' anxieties about the future with, in the event of a move, the purpose of minimising any risk to their welfare. In the event of a decision being made to relocate the residents, Social Services staff will call upon experience gained over many years to ensure any move will be as least disruptive as possible.*

"The assessments of the long stay residents and regular users of respite care indicate there is no unique service offered at the Moreton Centre that cannot be replaced in the independent sector at a lower price than the current unit cost. It is therefore recommended Moreton be closed and the residents move to suitable local homes, with every effort made to redeploy the staff. It is also believed that those who are eligible for a respite and/or a day care service could receive it from alternative provision in the Hastings and St Leonards area.

"In addition, if the business case for the acceptance of the £1 million grant is made, and appropriate agreements reached with Health, this could result in the expansion of the Moreton Centre to provide a 30-place comprehensive intermediate care centre for older people and would make a significant impact on delayed hospital discharges."

The recommendations were summarised in the document thus: *"The cabinet is recommended to:*

- (1) agree to cease operating the Moreton Centre as a residential care home for long stay residents by the end of March 2003;*
- (2) agree to the relocation of the long stay residents to alternative local provision, taking into account those residents who have formed special relations who would wish to be moved together to the same home;*
- (3) welcome the allocation from the Department of Health of £1 million to extend and develop the Moreton Centre to provide a 30-place intermediate care scheme and carry out a business case analysis including the conditions of the grant allocation."*

9. What transpired at the Cabinet meeting is described in a letter from the Head of Legal Services to the claimant's solicitor, dated 19 December. It states: *"The Leader of the Cabinet identified at the commencement of the item that the matter would be dealt with in two separate and distinct parts, dealing firstly and only with whether the Moreton Centre should be closed with effect from the end of March 2003 and the residents relocated (recommendations 1 and 2). There was full debate on this and Cabinet was addressed by members of all parties on the issue. Cabinet was informed in detail of the contents of your letter to the Chief Executive dated 13 December. Cabinet was particularly informed of your numbered paragraphs on page 3 (1, 2 and 1 to 3). They considered the actions that had been taken by the authority in preparation for information to be considered by the Cabinet. They were informed of the duties under the Human Rights Act. They were assured that no action would be taken (without the agreement of any individual resident) to begin the process of relocation before mid January 2003. Having considered all the information before them, including the consultation process and the responses received, the individual assessments of the residents including the risk assessments, the Cabinet adopted recommendations 1 and 2."*
10. I can now turn to the applications for judicial review. The grounds of challenge fall to be considered under three headings.

Ground One: the consultation

11. It is common ground that the consultation process was subject to the legal requirements of procedural fairness as spelt out in **R v North and East Devon Health Authority ex parte Coughlan** [2001] QB 213 at paragraph 108, per Lord Woolf MR. *"To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account."*
12. On behalf of the claimants, Mr Skilbeck advances a number of criticisms of the consultation process. First, he complains that the information provided in the letter of 7 October was unclear and

unnecessarily vague. In particular, the language was euphemistic and avoided the word "closure". In my judgment, there is nothing in this criticism. On 7 October no decision had been taken to close the Centre. On the other hand, it is obvious from the letter that closure was at least a possibility. This is clear, not only from the references to the possible replication of the services in the independent sector and the availability of alternative accommodation in that sector, but also from the part of the letter which refers to the application to central government for a grant. Plainly closure was a possibility.

13. Secondly, it is submitted that the Council prejudged the outcome. I do not accept that submission. It may well be that there was a predisposition to closure *if* the grant application were to succeed, but that does not amount to prejudging the issue. Indeed it is apparent from the report to Cabinet after the approval of the grant that the facts were being put fairly and squarely to the members, albeit with an unequivocal recommendation, and that no decision was taken until 18 December.
14. Thirdly, it is said that the consultation process was rushed and foreshortened. It certainly was not foreshortened. The letter of 7 October stated that representations could be made until 29 November. Whilst the date for the decision was brought forward from February 2003 to 18 December 2002, the consultation period remained unchanged. Nor do I consider that it was rushed. It allowed time for individual assessments and for written representations from consultees. Moreover, it is desirable in relation to consultations of this kind, which inevitably generate a degree of uncertainty and anxiety on the part of those affected, that a consultation period is not unduly long.
15. Fourthly, Mr Skilbeck submits that the consultation with the residents was insufficient. I do not agree. The residents and their relatives were written to on 7 October. The residents were individually assessed in late October and November. No one was deliberately excluded, although it may have been impracticable to speak to everyone directly, not least because of their absence in hospital or declining mental faculties. However, every resident and/or an appropriate family member was able to make representations. Indeed, the claimant's solicitor was able to make representations right up until the meeting of 18 December, and those representations were duly considered.
16. Fifthly, there is a criticism of an alleged failure to discuss relocation en masse. As to this, none of the residents or their families appears to have proposed it. In any event, it is a matter which remains undecided and susceptible to further consultation in relation to the implementation of the closure. Also, the report to the committee states: *"The assessments also took into account any special relationships between residents to ensure that if a decision is made to cease operating the Moreton Centre as a home for long stay residents, every effort is made to relocate them together."*
This criticism is unsustainable.
17. Sixthly, Mr Skilbeck submits that there was insufficient consultation with the day care users, the respite users and their families and relevant doctors. Until the day of the hearing, the case for the claimants had been that there was no consultation with any of these groups. That was simply untrue. The fact of the matter is that the Council took steps to consult all the day care users, the respite users and their carers. Moreover, the general practitioners in ten local medical practices were approached. I do not doubt that all appropriate interested parties who had something to say had the opportunity to say it. To this extent, it may well be that the consultation was more extensive than the law requires because in **R v Devon County Council ex parte Baker** [1995] 1 All ER 73, Dillon LJ considered, at page 83, that there were acceptable alternatives to face to face consultation with every individual resident.
18. Finally, there is a complaint to the effect that whilst mention was made of alternative homes, none was actually identified in the consultation process, and, consequently, the claimants were unable to make meaningful representations about the adequacy of the alternatives. I find nothing in this complaint which could amount to a basis for a sustainable challenge. If the claimants had points to make about alternative placements, or the absence of suitable ones, they were free to make them. In addition, I accept the submission of Mr McCarthy QC, on behalf of the Council, that until a decision to close is taken, it is premature to seek to finalise alternative placements: see **Coughlan** at paragraphs 103 to 104. As I am unpersuaded by the seven different ways in which this first ground of challenge is put, it clearly fails.

Ground 2: The Wednesbury Challenge

19. Under this heading, the case for the claimants is that the Council failed to take into consideration four important matters, and that the decision to close is thereby vitiated as irrational. The four matters are: (1) the effect of closure on the mortality rate; (2) the effect on the residents; (3) the recommendations of the **Cowl** report; and (4) relevant government guidance. I shall consider these in turn.
20. (1) Mr Skilbeck submits that the Council failed to take into account evidence which suggests that there was a significant effect on the mortality rate where elderly people are transferred from one home to another. It is not disputed that such a transfer is recognised as a stressful event which is potentially harmful to elderly people; Mr Windebank specifically says so in his witness statement. He refers to a 1997 report which concludes that: "there appears to be an association between the level of disruption and subsequent mortality". He also refers to there being a conflict of evidence. Danny Ryan, the Council's Social Services Operations Manager, states that throughout the review of homes, which began in 2001, one of the principles followed has been the need for a "clear and sensitive awareness of mortality risks and influences in the context of relocating frail and vulnerable older people". The Director of Social Services' report to Cabinet, while not referring in terms to mortality, referred to "the possible adverse effect any move could have on the welfare of residents", and the individual assessments, taking into account the residents' anxieties about the future "with . . . the purpose of minimising any risk to their welfare". Mr Skilbeck's submission is that none of this goes far enough and that the decision was flawed by the failure to take into account research from the early 1960s onwards which clearly establishes a serious risk of increased mortality. It is a fact that none of this material was placed before the Council in the representations, including the representations made by the claimant's solicitor, prior to the decision of 18 December. It emerged only in late January. However, the weakness of Mr Skilbeck's submission became apparent when Mr McCarthy took me through the research papers produced on behalf of the claimants. In a devastating critique he showed how the research evidence is not all one way and, in any event, some of it is concerned with different types of institution: for example, in one case, long stay psychiatric patients in mental hospitals. In two other cases, dementia payments in hospital. I have reviewed all this material in the course of preparing this judgment. In my judgment, it does not significantly add to the approach described by Mr Windebank and Mr Ryan. If anything, what it consistently demonstrates is the need for careful management of transfer, rather than the avoidance of closure. I do not accept that the Council erred by failing to consider it. It was aware, in general terms, of the risks and the evidence does not establish that it failed to have regard to them. I have to say that I find the claimants' reliance on this research material to be massively overstated.
21. (2) Mr Skilbeck's next submission is that the Council did not carry out sufficiently comprehensive care assessments for each resident ahead of the closure decision such as would have enabled the Cabinet to make a properly informed decision. He is particularly critical of a lack of evidence from medical practitioners. He seeks to advance a similar point in relation to the day care and respite users. He also adds a complaint that there was insufficient consideration given to the movement of staff with residents. In my judgment, these criticisms are unsustainable in the light of the consultation which did take place, the individual assessments which were carried out and the evidence of the Council staff who were involved. The evidence of Liz Coleman, the senior social worker responsible for the assessments, is as follows: *"As part of the assessment process, discussions with service users, their family/representative, took place to explore other possible options such as returning to independent living with domiciliary support. However, taking their current level of functioning, physical abilities, cognitive abilities, their history, the circumstances under which they came into residential care and risk factors into account, the service users and others involved concluded that continued residential care was the most appropriate way of meeting their needs. I consulted with other professionals for an assessment and their professional opinion in cases where my assessment indicated that the service users needs may be more appropriately met in other than placement in a residential home registered for older people.*
- "The information to complete my assessments of Moreton residents was gathered through speaking to service users to ascertain their perspective of their abilities and needs and wishes for the future. I met with or spoke via the telephone with their families/representative and where this was not possible, I received information they had*

shared with the Moreton Centre Operations Manager during the consultation process. I got information on their past and current health status, likes/dislikes, daily routine, mood, ability to carry out personal care and daily living tasks and the level of practical and emotional support needed from their family/representative, key worker and other care staff at the Moreton Centre.

"Other information and previous assessment history was available from the East Sussex Social Services Department records. Assessment files and computer records are kept at the assessment team offices and residential records at the Moreton Centre.

"Before taking any future action I will undertake an assessment review involving the service user and other interested parties. I will also seek advice from other professionals, as required, to determine how to best meet the individual service user's needs, taking into consideration their wishes and choice."

22. The assessments were, as I have said, made available to the Cabinet along with the summary contained in the report from the Director of Social Services from which I have already quoted. Whilst the Council must continue to have regard to the welfare of the residents and the other service users in the subsequent implementation of the closure decision, I am unable to accept that it failed to have due regard to such matters prior to the closure decision.
23. (3) Mr Skilbeck relies upon the **Cowl** report. This is the report of the complaints panel, set up by Plymouth City Council, under the chairmanship of His Honour Sir Jonathan Clarke, following **R v Plymouth City Council ex parte Cowl** [2002] 1 WLR 803. Although that was exclusively a Plymouth matter, as is apparent from the panel's terms of reference, Sir Jonathan and his colleagues added an appendix headed, "*Draft guidelines for local authorities when considering and implementing the closure of a residential care home for older people*". The date of the report of the panel was 4 November 2002. Mr Skilbeck submits that these guidelines are highly relevant and should have been taken into account in the present case or, at the very least, they should be seen as firm guidance as to relevant considerations. The report was referred to in the letter from the claimants' solicitor dated 13 December. Whether or not the report is controversial, as Mr McCarthy submits it is, it is clear that a complaints panel set up by Plymouth for Plymouth, does not have the authority, however eminent its composition, to promulgate guidelines for the world at large. After all, neither East Sussex County Council nor any other public authority, apart from Plymouth, had any input into its deliberations. I do not accept that a failure to consider, let alone to follow, the **Cowl** guidelines vitiates the closure decision in the present case. The Council had in place its own procedures. In my judgment, they were appropriate and they were followed in this case.
24. (4) The final item of unconsidered material is "*The transfer of frail older NHS patients to other long stay settings*", which was issued by the Department of Health on 2 April 1998. The Council makes no bones about it. No consideration was given to this document. It is described on its face as: "*guidance to remind health authorities and NHS Trusts, as well as managers, doctors, nurses and therapists of their shared responsibilities for NHS patients who are being transferred to other care settings*". Although the NHS Executive sent copies to all directors of social services, its concern is clearly long stay NHS patients. It is not departmental guidance to residential care homes. There is no such guidance from central government. Prior to the hearing, in his skeleton argument, Mr McCarthy contended that the document is no longer in force even in the National Health Service. Mr Skilbeck has not taken up the challenge to establish that it is. Moreover, it does not seem to have played a part in the **Cowl** report. In my judgment, the admitted failure to take it into consideration in the present case did not vitiate the closure decision. It does not live up to its billing as "*relevant*" government guidance. The fact is that the Secretary of State has chosen not to issue guidance to local authorities in this respect.

Ground 3: Human Rights

25. The final ground of challenge is based on the claimants' human rights; specifically, the right to life pursuant to ECHR Article 2, the right not to be subjected to degrading treatment pursuant to Article 3 and the right to respect for the home pursuant to Article 8. Mr Skilbeck makes wide ranging submissions about this aspect of the case. I observe at once that this is not a case of a public authority proceeding to a decision without consideration of the possible human rights implications.

26. In one of his witness statements, Mr Windebank states: *"In his briefing to the Cabinet at the meeting on 18 December, Helmut Cartwright, Director of Legal and Community Services, made clear to the Cabinet that they must consider the implications of the Human Rights Act in reaching their decision. Mr Cartwright explained in detail the effects on the decision of Articles 2, 3 and 8."*
27. Mr Skilbeck castigates that as mere lip service, but on the totality of the evidence, I do not consider that to be a fair description. The question I have to consider is whether the evidence discloses a violation of human rights. I shall concentrate on the residents because in this context as elsewhere, Mr Skilbeck realistically accepts that if Mrs Dudley's case fails, the other claimants have no prospect. The first sentence of Article 2 states: *"Everyone's right to life shall be protected by law."* I accept that this is to be given an extended meaning. As was said by the Strasbourg Court in **Osman v United Kingdom** [1998] 29 EHRR 245 at paragraph 115: *"Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk."*
28. Although the risk in that case was of criminal acts, the principle is not so limited. However, the evidence does not point to a breach of Article 2 in this case. No particularised medical evidence has been filed showing that the life of any particular resident is seriously at risk. What the claimant needs to establish is that *"the authorities did not do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge"* -- see **Osman**. The claimants have not established that in this case.
29. Article 3 provides: *"no one shall be subjected to torture or to inhuman or degrading treatment or punishment."* The issue here is whether the closure decision crosses the threshold of the minimum level of severity required which depends on the circumstances of the particular case. I accept the submission of Mr McCarthy that the threshold is simply not reached in this case -- see for example **R v North West Lancashire Health Authority ex parte A** [2000] 1 WLR 977 at pages 1000 to 1001, per Buxton LJ: *"Article 3 of the ECHR addresses positive conduct by public officials of a high degree of seriousness and opprobrium. It has never been applied to merely policy decisions on the allocation of resources, such as the present case is concerned with. That is clear not only from the terms of Article 3 itself, and the lack of any suggestion in any of the authorities that it could apply in a case even remotely like the present, but also from the explanation of the breach of Article 3 that has been given by the Convention organs. Thus in Tyrer v United Kingdom [1978] 2 EHRR 1, a case concerned with corporal punishment, the Strasbourg Court held, at paragraphs 30 and 35 of its judgment that:*
- 'in order for a punishment to be 'degrading' and in breach of Article 3, the humiliation or debasement involved must attain a particular level . . . the court finds that the applicant was subjected to a punishment in which the element of humiliation attained the level inherent in the notion of 'degrading punishment'.*
- "More generally, the Strasbourg Commission has on a number of occasions stressed the degree of seriousness of the conduct that Article 3 addresses. For instance, the Commission said in East African Asian v United Kingdom [1973] 3 EHRR 76, 81, paragraph 195:*
- 'The Commission finally recalls its own statement in the first Greek case (1969) 12 YB Eur Conv HR 1 that treatment of an individual may be said to be degrading in the sense of Article 3 'if it grossly humiliates him before others or drives him to act against his will or conscience' . . . the word 'grossly' indicates that Article 3 is only concerned with 'degrading treatment' which reaches a certain level of severity.'*
- "These strong statements clearly demonstrate, if demonstration were needed, that to attempt to bring the present case under Article 3 not only strains language and common sense, but also, and even more seriously, trivialises that Article in relation to the very important values that it in truth protects."*
30. In my judgment, the same considerations apply to the present case.
31. I turn finally to Article 8 which provides:
1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public*

safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

32. I am prepared to assume, without deciding, that Article 8 is engaged. That may be a generous assumption in a case which does not have the **Coughlan** element of a particular home for life, and when the Council will be finding alternative accommodation for the residents. The issue then becomes justification under Article 8(2). In my judgment, the Council has clearly established justification. It is relevant that the East Sussex area contains a higher proportion of residents aged 65-plus than any other local authority. It has also been "zero" rated by the Audit Commission which restricts the level of finance available. That is not a matter for congratulation, but it highlights the circumstances in which the Council was carrying out its review of residential care homes. These are plainly relevant considerations as the Council seeks the most effective ways of fulfilling its various statutory responsibilities within existing financial constraints. It is hardly surprising that it was anxious not to lose the prospect of a £1 million grant from central government. The court is slow to interfere with decisions which "*involve a balance of competing claims on the public purse in the allocation of economic resources*", see Neill LJ in **R v CICB ex parte P** [1995] 1 WLR 845 at 857. This has been reaffirmed in home closure cases since the coming into force of the Human Rights Act. In **R(Phillips & Rowe) v Walsall MBC** [2001] ECHR Admin 789, Lightman J said, paragraph 11: "*I may add that if (contrary to my view) a move such as is presently contemplated could possibly constitute an interference with a fundamental right under Article 8, it would surely be justified as required for the economic well-being of the Council and of those in need of its services. Resources of public authorities are notoriously limited and it must be a matter for elected authorities such as the Council to have leeway in how they are husbanded and applied.*"
33. On the material before me, I am entirely satisfied that the Council have established justification under Article 8(2).

Conclusion

34. To summarise, in my judgment the grounds of challenge in the Dudley case are simply not made out and as I stated earlier, and as Mr Skilbeck accepts, if that case fails, the day care users, respite users and their carers cases must also fail for they are on no firmer ground in respect of any challenge. It follows that all these applications are dismissed. It will now be for the Council to manage the closure and the arrangements necessitated by it. I express the hope that this litigation has not made that important task any more difficult than it would otherwise have been.
35. **MR O'BRIEN:** *My Lord, I appear on behalf of East Sussex today in the place of Mr McCarthy and I would ask your Lordship to dismiss the claims and to make orders as to costs. As I understand it, each of the claimants is publicly funded so the local authority would seek orders which would not be enforced without further assessment.*
36. **MR JUSTICE MAURICE KAY:** *Whatever the current fashionable order is.*
37. **MR O'BRIEN:** *I have discussed that with the associate.*
38. **MR JUSTICE MAURICE KAY:** *Thank you.*
39. **MR SKILBECK:** *My Lord, I do not think there is anything I can say about that other than for the order to be made in the normal terms, to be assessed in the appropriate fashion.*
40. **MR JUSTICE MAURICE KAY:** *Thank you very much. I emphasise the last words I spoke in that judgment about the future. I say this in the hope that it may be helpful. The last thing that anybody wants is for this litigation to be prolonged or for it to have a second phase. If the processes hereafter lead to conflict, I would urge the parties to consider mediation as a means of resolving that conflict. You will remember that there was encouragement in that direction by the Lord Chief Justice in the case of **Cowl**, when it reached the Court of Appeal. Sometimes cost is a disincentive, but the court is aware of the possibility of both low and no cost mediation facilities which are being made available by reputable organisations, and if there should be a need for that in this case, if the parties would wish to write to me I would certainly be more than happy to assist in the location of such a facility. Thank you both very much.*

MR R SKILBECK (instructed by Hossacks) appeared on behalf of the CLAIMANT

MR R MCCARTHY QC (instructed by East Sussex County Council) appeared on behalf of the DEFENDANT