CONSULTATION: RECENT CASES AND ISSUES

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1. This paper summarises significant cases on consultation from 2012. In doing so we will also give a brief introduction to consultation principles generally.

Overview of basic principles of consultation

2. ‘Consultation’ is the term generally applied to the process by which a decision-maker seeks the views of the public, or a section of the public, on a proposal that may have a general impact, before it decides whether to implement that proposal. It differs from the process by which an individual or a small number of individuals are afforded a fair opportunity to make representations in relation to a decision that may have a direct impact on them personally. However, there is no fixed definition of consultation, and it can be difficult to distinguish between the situations in which one type of process or the other should be followed. This difficulty is exacerbated by the fact that the courts are on occasions inconsistent in the terminology that they use and by the fact that the courts do not always articulate principled reasons as to why one type of process or the other is required in a particular case.

3. There is no general duty to consult. An obligation to consult might arise by way of an express or implicit statutory duty, or consultation might be required in order to give effect to a legitimate expectation of consultation.

4. Consultation may take many different forms including, for example, seeking and receiving views in writing, or doing so at a public meeting. The content of the duty to consult varies from case to case, but the courts have identified a number of basic features of a fair consultation process, and these will apply in most cases. These include the following:

   a. Consultees are given sufficient notice of the consultation process.

   b. There is usually a proposal to comment on. That is, a decision the public body is minded to take, subject to the information it receives during the consultation process.
c. Consultation is conducted at a time when the proposal is at formative stage. This is consistent with the public body already having decided the course it is minded to take.

d. The information provided to consultees must be –

   i. sufficiently detailed as to enable consultees to understand the proposal and make meaningful representations on it,

   ii. accurate, and

   iii. be provided in a form that is comprehensible to the general audience of consultees.

e. Consultees are afforded sufficient time to consider the proposal and provide their views.

f. The public body gives genuine and conscientious consideration to the responses received.

5. Those familiar with this area will recall that the most frequently cited formulation of the principles of consultation, the Gunning principles, consists of four principles, whereas the list above has more.

6. Where there is a duty to consult, a failure to do so, or to do so properly, will usually render the ultimate decision unlawful. However, as in all cases, the courts retain a discretion as to the remedies it grant in respect of any such unlawfulness, and in a number of circumstances a remedy may be refused.

**The existence of the duty to consult: when is there no duty to consult?**

7. In *R (Harrow Community Support Ltd) v Secretary of State for Defence* [2012] EWHC 1921 (Admin), the claimants, who were residents of a tower block in Leytonstone, sought judicial review of the SSD’s decision to deploy air defence missiles on the roof of their building during the Olympics. The grounds for review included the failure to carry out an adequate consultation process, in addition to challenges based on the public sector equality duty, A8 and A1P1 ECHR. The claimants failed on every ground, the court having accepted the government’s evidence that there was no alternative location for the missiles and that disruption and risk to the claimants would be minimal. On the issue of consultation, the court summarised the law in the following terms:
28. [...] When decisions will have a specific impact on a definable group, fairness and natural justice may entail a duty to consult with those affected by the decision depending on the context of the decision. [...] 

29. A duty to consult does not arise in all circumstances. If this were so, the business of government would grind to a halt. There are four main circumstances where consultation will be, or may be, required. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors there will no obligation to consult. 

30. The general law will be slow to require a public body to engage in consultation if there is no obligation or promise so to consult. [...] 

8. The fact that Article 8 was said to be engaged made no difference to the latter proposition, in the context of a case involving decisions of national security. 

9. There was no statutory duty to consult the claimants. If anything, the court held, the statutory scheme militated against consultation, either by bypassing the need for planning permission for the proposed deployment, or alternatively automatically granting such permission. 

10. Finally, the court said there could never be ‘conspicuous unfairness’ in not consulting in the arena of military operational deployment and national security. 

11. The modern trend in consultation cases has been to expand the scope of situations in which the duty to consult applies. To that extent this decision goes against the grain. While the case was analysed according to established principles of the law of consultation, another explanation, which is perhaps more reflective of the true dynamic of the case, is that the decision related to a very important military deployment such that it (ie the decision), was either not justiciable or was of such a nature that the court gives the Secretary of State for Defence an extremely wide discretionary area of judgment. 

12. Challenges to high-level decisions concerning national defence have traditionally been regarded as non-justiciable: Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL, 418 per Lord Roskill (‘defence of the realm’). These include decisions relating to the taking of military action or the deployment of military forces: R (Gentle) v Prime Minister [2006] EWCA Civ 1689, [2007] QB 689, paras 26–34. Also R v Secretary of
13. Finally, it is also worth noting that this case endorses the line of authority, which began with the Coughlan case, concerning voluntary consultation. This is the proposition that even though a body is under no duty to consult, if that body embarks on a process of consultation, it will then be taken to be subject to a duty to comply with the full requirements of lawful consultation. See para 28 of the Harrow Community Support Ltd case. This is despite the fact that there had been no promise that there would be a consultation process, no past practice of consulting before making such decisions, and a refusal to consult would not be considered to be conspicuously unfair (cf para 29, ibid). Although this proposition from Coughlan (R v North & East Devon HA, ex p Coughlan [2001] QB 213, para 108) is frequently cited, the principled basis for this legal rule has never been articulated by the courts. If a public body wishes to properly contest the point in an appropriate case, it may be that the legal foundations for this concept of “voluntary” enforceable consultation are rather shakier than they at first appear.

The nature of the duty to consult: second consultation on the same issue

14. R (Milton Keynes Council) v Secretary of State for Communities and Local Government [2011] EWCA Civ 1575, [2012] JPL 728 concerned a challenge to the government’s decision to implement new regulations making it possible to convert a dwelling house into a house of multiple occupation without requiring planning permission. There had been a previous consultation process in which three options were considered relevant to the issue of HMOs. 92% of respondents preferred the second option, and only 1% the third option. Statutory instruments were duly created which implemented the second option. One month later, after the general election of 2010, the new government decided that the third option was preferable. No new consultation was carried out, but the government decided that ‘it would be sensible to give key partners, representing the full range of interests in this policy area, one last opportunity to express any views in relation to Option 3 so that they could inform the detailed implementation of the policy in due course.’ New questions were sent to a short list of ‘key partners’ requesting a response within three weeks.

15. The claimant local authority argued that a new consultation exercise should have been conducted, in circumstances where the responses to the previous consultation had strongly opposed option 3, and there had been no material change in the issues. The SSCLG
contended that this was a ‘macro-political’ decision and that the claimants had had their say in the earlier consultation. In any event, the statutory instruments had been challenged in Parliament unsuccessfully and the court should defer to that.

16. The Court of Appeal held that while a decision-maker cannot routinely pick and choose whom he will consult, on the facts of the case, and in light of the very full earlier consultation, the new government was ‘entitled to conduct a more limited consultation, but as to the identity of the consultees and the content and duration of the consultation’ (paragraph 33). Even though it was local authorities who were best able to answer the questions posed in the supplementary consultation, the failure to consult them did not render the consultation process as a whole unfair. The supplementary consultation was ‘conducted mainly as a public relations exercise’ but it was ‘still capable of being fair’ as it left open the possibility that new issues would be identified which would need to be further consulted on (although no such new issues were ever identified).

38... That recent and comprehensive consultation in 2009 is in my judgment the key to the decision in the present situation. The Secretary of State was minded to make the orders challenged notwithstanding the strong, articulated objections to them by local planning authorities, of which he was aware. The decision to make them was a political decision which the Secretary of State was entitled to make. In the circumstances, he was then entitled, first, to make the consultation a limited one and, secondly, to decide that there was no evidence of significant new issues arising, which required fuller consultation.

17. It is neither novel nor surprising for the court to say that the content of the duty to consult is more limited here due to the fact that there was a consultation on the same issue the year before. That circumstance can obviously influence factors such as the length of time provided to consultees to submit their representations, and perhaps the amount of information provided to consultees on the second occasion. What is interesting is that the court held that this circumstance (ie the fact that there was a consultation on the same issue the year before) also influenced the scope of consultees who had to be contacted. This could give rise to both conceptual and practical difficulties. If fairness required that, in one year, all of X, Y and Z had to be consulted, then why, in year 2, is it fair and lawful to consult X and Y but not Z? Might it be the case that the events of year one gave Z a legitimate expectation that he would be consulted when the same proposal was next put forward?

Who to consult: whether to consult representative groups
18. *R (Staff Side of the Police Negotiating Board) v Secretary of State for Work and Pensions* [2011] EWHC 3175 (Admin), [2012] Pens LR 31, DC was the challenge to the government’s change of indexes for measuring inflation. It was accepted that the obligation to consult contended for, in relation to changes on the indexation of public sector pensions, ought ‘at least’ to have extended to consultation with the relevant trade unions.

19. There is no fixed rule as to whether consultation must take place with representative groups. On some occasions public bodies wish to discuss their proposals only with the individuals affected and not any representative. However if in any doubt it is obviously much safer to include the representative group in the consultation process.

**Timing: how long must the consultation period be?**

20. A question which public bodies frequently want to know the answer to is: how much time do we have to give for the consultation? Unfortunately there is no fixed answer to this simple question. A shorter period may be sufficient where, for example, the consultees are already familiar with the issues and information, or where there has already been consultation on the same or similar issue: See eg *R v Secretary of State for Education and Employment, ex p M* [1996] ELR 162, CA, 209–210 per Simon Brown LJ; *R (Newsum) v Welsh Assembly (No 2)* [2005] EWHC 538 (Admin), [2006] Env LR 1 (p 1), paras 70–71 per Richards J. A similar approach may be adopted if the proposal, and the reasons for it, have been in the public domain, or were otherwise available to consultees, prior to the commencement of the consultation period: See eg *R v Secretary of State for Education and Employment, ex p M* [1996] ELR 162, CA, 209–210 per Simon Brown LJ.

21. In *R (Green) v Gloucestershire CC* [2011] EWHC 2687 (Admin), [2012] Eq LR 225, a consultation period of four weeks for a consultation on closure of libraries and reorganisation of library services was held to be lawful, even though it fell over the Christmas and New Year period, and there had been severe weather during that time.

22. Some of the court’s reasoning is a little surprising. Judge McKenna’s reasons for finding that the consultation process had been a fair one notwithstanding the relatively short consultation were –

   a. that there was no duty to consult in the first place,
   b. that there is no statutory minimum period for such consultation, and
   c. that a large number of responses were provided.
23. However all of these reasons are problematic. As to reason (a) (no duty), this runs counter to the manner fundamental point underlying the Coughlan voluntary consultation concept, namely that if despite being under no duty to consult a consultation process is embarked upon, it must be carried out lawfully. Either the duty exists or it does not. It has never previously been suggested that the duty may exist (in a Coughlan sense) but have a lesser content. It is also contentious to propose that the source of the duty bears upon its content. Reason (b) (no statutory minimum period) does not take us far: most consultation cases concern the common law duty, in which there is no pre-defined consultation period. Reason (c) (large number of responses) also has little logical connection to the conclusion. Consultees may be rushed into providing what they regard as rushed and half-baked responses to the consultation. The fact they managed to send their half-baked response in on time does not render the process a fair one.

24. Rather than the factors considered by the court, factors that would have been truly relevant would have included matters such as:

   a. what sorts of things did the claimants or other consultees say they wished to do but were not able to do due to lack of time;

   b. whether attempts were made by the claimants or other consultees to obtain an extension of time; and

   c. the extent to which consultees did attempt within the time available to provide detailed information in their consultation responses, as opposed to merely expressing their displeasure with the broad thrust of the proposal.

These are just three possible factors. The list of potential factors is endless. The point is that in these three factors there may be some logical relationship between the factor identified and the fairness of the length of time given for consultation. In the factors cited by the court in the Green case, that logical relationship is less easy to see.

25. As to the period of four week in itself, this is about on the borderline of lawful periods. While it is not possible to lay down any general rules as to what will, or will not, constitute an adequate period in a particular case—

   a. consultation periods of a few days are unlikely to be sufficient: see eg R v Secretary of State Education and Employment, ex p National Union of Teachers [2000] Ed CR 603, QBD, 628–629 per Jackson J (four days wholly inadequate for consultation on complex regulations concerning teachers’ pay and conditions); R v Devon CC, ex p
The provision of information

26. Information presented to consultees, such as in a consultation document, must be clear and present the issues in a form which consultees can understand and which facilitates an effective response. So, for example, the presentation of financial information in an overly complicated format, which is not comprehensible to most consultees, may lead to a consultation process being unlawful: *R (Breckland DC) v The Boundary Committee* [2009] EWCA Civ 239, paras 56–58, 69.

27. *R (South West Care Homes Ltd) v Devon CC, EHRC intervening* [2012] EWHC 2967 (Admin) was a challenge to a local authority’s setting of fees it would pay private care homes over the next year. The grounds of claim included a consultation challenge, on the basis that the information had not been provided in a sufficiently comprehensible form, to enable consultees to understand and engage with the proposal.

28. The information considered in the fee-setting exercise involved highly complex financial calculations and projections. These financial calculations and projections were barely explained in the consultation process itself, and key elements were not disclosed. What was interesting though was that, in parallel to the consultation exercise, the local authority was working up a detailed explanation of each of the key financial calculations and projections. This explanation was never provided to consultees during the consultation process. It is plain from the chronology that the local authority was holding it back to use in defence of a future judicial review claim. The information in this pack was exactly the sort of information that would have been very useful to consultees, to explain to them key elements of the decision being made, in a clear and comprehensible form.
29. The consultation challenge was rejected, but the reasons for so deciding are not clearly expressed, and the judgment of the Deputy Judge is unsatisfactory. It recounts the chronology of events in some detail, but all it says in terms of reasons on the consultation issue is that, while the presentation to consultees was “perhaps oversimplified and not readily understood then by many attending”, the remainder of the consultation process was substantially fair and provided “sufficient opportunity for a meaningful response”.

30. It is unfortunate that the Deputy Judge failed to engage with the actual challenge made to the consultation process, in particular that the decision-maker in fact possessed a thorough, clear and extremely useful account of the key elements of the proposal, but never provided that to consultees, and that the difference between that and what was provided was very significant. While the claimant was successful on the lead ground of challenge in that case (a public sector equality duty challenge), it has nonetheless brought a cross-appeal to the dismissal of the consultation challenge.

31. This issue concerning the nature of the information provided to consultees also arose in *R (Brompton & Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472, (2012) 126 BMLR 134, para 9, which he considered further below. In that case the court noted that information presented to consultees, such as in a consultation document, must be clear and present the issues in a form which consultees can understand and which facilitates an effective response.

**Remedies and the role of the court**

32. As in all cases where a court finds that a decision is unlawful, where such unlawfulness arises as a result of a breach of a duty to consult, the court has a discretion as to what remedy, if any, to grant. A failure to consult at all in a case where there was a duty to consult is normally viewed as a serious matter, and the court will normally quash the resulting decision. A court will be more likely to exercise its discretion not to quash a decision where the unlawfulness arose out of inadequacies in a consultation exercise that was carried out, particularly if the inadequacy is one that is capable of being remedied within the consultation process itself. However, even in this context, the courts are likely to be reluctant to allow the resulting decision to stand.
33. The recent decisions in this area illustrate differing approaches to the granting of remedies for breaches of consultation requirements.

34. *R (Brompton & Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472, (2012) 126 BMLR 134, para 93 concerned a challenge to a decision as to which hospitals should no longer perform paediatric heart surgery. The Court of Appeal stated that courts should avoid the danger of stepping in too quickly and impeding the natural evolution of a consultation process through the grant of public law remedies, particularly if the court may be being led into areas that are properly for the professional judgement of the decision-maker, and that courts should, in general, only quash if there is some ‘irretrievable flaw’ in the consultation process.

35. However, this strong statement from the Court of Appeal should be read with care. It was made in the context of a highly specialized area of decision-making, and where the decision was to be made by experts in the field based on a large volume of evidence and the application of expert judgement. Not all flaws in consultation processes can be described as open to ‘self-correction’.

36. In *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2012] EWHC 2579 (Admin), the court tackled the issue of appropriate relief in somewhat unusual circumstances. The CPAG challenged the failure of the coalition government to establish a Child Poverty Commission and consult it for advice, these arrangements having been set out in primary legislation passed shortly before the election in 2010. The court found that the coalition government had unlawfully decided not to comply with its obligations under that legislation. Its decision had resulted in a new strategy and policy being drawn up without seeking the advice of the Child Poverty Commission, as prescribed in the legislation, as the Commission had never been established. The claimants could not however persuade the court that this new strategy was irrational. The court was therefore faced with an unlawful decision to disregard primary legislation, but a subsequent strategy document which was lawful. What relief was appropriate in those circumstances? Referring to the use of the test of proportionality mentioned in *Hurley* (above), the court held that, had a quashing order been sought in respect of the decision not to implement the Child Poverty Commission and take advice from it, the quashing order would not have been granted. By the time of the hearing, new primary legislation was in place which provided for the implementation of a different strategy, with no Child Poverty Commission. How could the government retake its decision when the relevant legislation and the duty to consult the CPC for advice which was no longer in force?
37. The court noted that the same arguments could apply equally in respect of granting a declaration, since ‘in substance, a declaration will often have - because it is intended to have and is perceived to have - the same effect as a quashing order. This is because we are a society governed by the rule of law. By constitutional convention in this country, if a court makes a declaration the executive expects, and is expected, to comply with it without the need for a coercive order in most circumstances.’ Nonetheless, a modified declaration was granted, that in producing its new strategy, the government had not discharged the duties imposed on it by the earlier legislation.

38. Discretionary relief will not necessarily be granted if any illegality that is established in a decision-making process had no causal effect on the eventual decision. The question of whether consultation would have made any difference to the outcome arose in R (Vieira) v Camden LBC [2012] EWHC 287 (Admin). The case concerned a very poorly-made decision by a local planning authority to grant retrospective planning permission. The claimants objected to the development. The court found that there had been an unlawful failure to consult them at one stage of the decision-making process, as well as numerous other flaws. The local authority submitted that relief should be refused as the prospects of the claimants successfully arguing against the retrospective grant of planning permission was low, even if the decision was taken properly. The court rejected that submission, noting (paragraph 115, emphasis added):

A quashing order should only be refused if it is inevitable that the outcome would have been the same had the correct procedures been followed [...]

39. This threshold is consistent with that applied in other consultation cases, eg R (Smith) v North Derbyshire Primary Care Trust [2006] EWCA Civ 1291, [2006] 1 WLR 3315, para 10 per May LJ; R (Copeland) v Tower Hamlets LBC [2010] EWHC 1845 (Admin), [2011] JPL 40, paras 36, 37 per Cranston J; R (Vieira) v Camden LBC [2012] EWHC 287 (Admin), para 115 per Lang J. It is also consistent with the approach applied more generally in procedural fairness cases.

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