

Managing Cuts: Lawful decision-making, PSED and consultation

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Introduction

1. In recent years there have been an increased number of challenges to local authority decisions made under the pressure of increasingly tight and potentially unmanageable financial constraints. Many of these legal challenges have centred on alleged failures to comply with the Public Sector Equality Duty (PSED) together with alleged deficiencies in the consultation process. As financial pressures continue, and further cuts are required, this paper discusses the lessons to be learned from the cases so far, and offers practical tips for lawful decision-making in these difficult times.

The Public Sector Equality Duty (PSED)

2. The PSED is a standalone statutory obligation, separate and distinct from any duty to consult. It is set out in section 149 of the Equality Act 2010:

“149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to —

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it;

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

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(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are-

age;
disability;
gender reassignment;
pregnancy and maternity;
race;
religion or belief;
sex;
sexual orientation.”

3. In November 2013, the Court of Appeal handed down judgment in two cases which emphasised the heavy burden that is placed upon public authorities in discharging the PSED: *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 and *Hunt v North Somerset Council* [2013] EWCA Civ 1320.

4. **Bracking** concerned a decision of the Minister of State for Disabled People to close the Independent Living Fund (ILF), the consequence of which was likely to be that a significant number of people would be unable to continue living independently.
5. In the lead judgment, McCombe LJ summarised the duties and requirements placed on public authorities by the PSED in the following terms:

“(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).

(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.

(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a “rearguard action”, following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at [23 – 24].

(5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:

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

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

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

iv) The duty is non-delegable; and

v) Is a continuing one.

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

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

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

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At paragraphs [77–78]

“[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in *Baker* (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

[78] The concept of ‘due regard’ requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making.”

(ii) At paragraphs [89–90]

“[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in *Brown* (para [85]):

‘...the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons’ disabilities in the context of the particular function under consideration.’

[90] I respectfully agree....”

6. In *Bracking* the appellants argued that the Minister had failed to comply with these requirements in that: there was nothing in the papers that showed that he personally had a full appreciation of the real threat to independent living for ILF users, and no indication that he specifically considered this threat “through the prism” of the particular provisions of section 149 of the Equality Act 2010.
7. McCombe LJ (and Kitchin LJ) agreed, rejecting the respondent’s submissions that “due regard” could be inferred from the general circumstances of the decision and the Minister’s position as Minister *for Disabled People*: what was put before the Minister did not give to her an adequate flavour of the responses received in the consultation indicating that independent living might well be put seriously in peril for a large number of people, and there was nothing to identify a focus on the specific provisions of the Act. McCombe LJ said:

“59 In the end, drawing together the principles and the rival arguments, it seems to me that the 2010 Act imposes a heavy burden upon public authorities in discharging the PSED and in ensuring that there is evidence available, if necessary, to demonstrate that discharge. It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude.

60 It is for this reason that advance consideration has to be given to these issues and they have to be an integral part of the mechanisms of government, to paraphrase slightly the words of Arden LJ in the *Elias* case. There is a need for

a “conscious approach” and the duty must be exercised “in substance, with rigour and with an open mind” (per Aikens LJ in *Brown*). In the absence of evidence of a “structured attempt to focus upon the details of equality issues” (per my Lord, Elias LJ in *Hurley & Moore*) a decision maker is likely to be in difficulties if his or her subsequent decision is challenged.

61 In this case, I have come to the conclusion (admittedly with some reluctance) that too much of the Respondent's case depends upon the inferences that Ms Busch invites us to draw from the facts as a whole rather than upon hard evidence. In my view, there is simply not the evidence, merely in the circumstance of the Minister's position as a Minister *for Disabled People* and the sketchy references to the impact on ILF fund users by way of possible cuts in the care packages in some cases, to demonstrate to the court that a focussed regard was had to the potentially very grave impact upon individuals in this group of disabled persons, within the context of a consideration of the statutory requirements for disabled people as a whole.

62 It seems to me that what was put before the Minister did not give to her an adequate flavour of the responses received indicating that independent living might well be put seriously in peril for a large number of people.”

8. Elias LJ agreed that there was no material on which one could properly infer that the Minister appreciated and addressed the full scope and import of the matters which she was obliged to consider pursuant to the PSED: “a vague awareness that she owed legal duties to the disabled would not suffice”. It was necessary to have regard to the specific requirements of section 149 which should have been read in accordance with the United Kingdom’s obligations under the UN Convention on the Rights of Persons with Disabilities (which included a requirement to take effective and appropriate measures to facilitate the right for the disabled to live in the community, a duty which would require where appropriate the promotion of independent living).

“72 Any government, particularly in a time of austerity, is obliged to take invidious decisions which may exceptionally bear harshly on some of the most disadvantaged in society. The PSED does not curb government's powers to take such decisions, but it does require government to confront the anticipated consequences in a conscientious and deliberate way in so far as they impact upon the equality objectives for those with the characteristics identified in section 149(7) of the Equality Act 2010.”

9. When the decision was retaken to cut ILF, a further High Court challenge was brought in *R (Aspinall) (formerly Bracking) v Secretary of State for Work and Pensions* [2014] EWHC 4144 (Admin). The court acknowledged that the first challenge (referred to as *Bracking No. 1*) had succeeded on the basis that there had been an unlawful failure

to comply with the PSED. However, the court was clear that this time round, there had been no breach of the PSED. Rather, according to Mrs Justice Andrews at [127]:

“...the Minister had a focussed regard to the potentially very grave impact upon individuals in this specific group of disabled persons, within the context of a consideration of the statutory requirements for disabled people as a whole. What was put before the Minister did give him “an adequate flavour of the responses received” [from the consultation] “indicating that independent living might well be put seriously in peril for a large number of people”. He did not need to know how large that number was likely to be in order to discharge his duty, so long as he knew or assumed (as he did), that it was most (or a substantial number of) ILF users.”

10. The judgment in *Bracking (No. 1)* was handed down on the same date as the decision of a differently constituted Court of Appeal in *Hunt v North Somerset Council*. This case concerned a budgetary decision to cut funding for youth service. As in *Bracking*, an argument by the public authority that “due regard” could be inferred from the circumstances was rejected. The local authority carried out Equality Impact Assessments (EIAs), but only summaries of the EIAs were put before council members in advance of the meeting at which a final decision was made to approve the cuts. They were told how to access the full EIAs in an appendix to the document that they received, but they were not expressly directed to consider them. The court was not prepared to infer that the full assessments had been read, and the failure of the decision-makers to consider the full EIAs breached the PSED:

“82 The judge's finding of fact as to the members' consideration of the EIAs themselves was a secondary finding based on primary evidence of an exclusively written nature. We have before us the same material as he did. In principle, therefore, whilst this court will ordinarily respect the inference that he drew from the material before him, it is open to it, if satisfied that that inference was wrong, to take a different view.

83 For our part, and again with respect, we are unable to agree with the judge that the inference that he drew was one that was available on the evidence. We have no difficulty, nor was the contrary suggested, in accepting that if council members are provided with a particular set of materials for the purpose of a meeting, they can, absent positive evidence to the contrary effect, be taken to have read all such materials and also to have read any additional materials to which they were expressly referred and to which they were told they needed to have regard for the purposes of the meeting. If, for example, they had been told that a key document was too bulky and expensive to copy and circulate, but was available at a given website address, and they were further told in appropriate

terms that this document was required reading for the purposes of the meeting, we consider that they must be taken to have accessed and read it.

84 In the present case, however, we do not interpret the language of Appendix 6 as indicating to the Council members any need or requirement to read the EIAs themselves. Whilst they were told how to access the EIAs, they were not told, either expressly or impliedly, that they must or should consider them before the meeting. The fact that they were summarised in Appendix 6 itself suggests that a reference to the documents themselves was not essential: why bother to summarise a document which must anyway be read in full? Moreover, the terms of paragraph 12 of the officers' report to members (see paragraph 46 above) also suggested that Appendix 6 told the Council members all they needed to know for PSED purposes.

85 If there were no more, we would not therefore be prepared to conclude that the members had read the relevant EIA. There was, however, a little more. First, Councillor Lake had read the EIAs in full before the meeting, and the judge concluded, therefore, that so also had 'all responsible councillors'. We are not sure what the word 'responsible' was thought to add: we presume the judge simply meant 'all councillors'. We do not, however, regard Councillor Lake's evidence about what he did as providing any indication as to what all the other councillors did or were likely to have done. Councillor Lake was in the special position that his portfolio of responsibilities included the Council's approach to equality related issues, and he explained in his evidence that he had received training in relation to decision making in compliance with PSED. It is, therefore, if we may say so, fairly obvious that he would have read the EIAs, and it would have been surprising if he had not. The range of his responsibilities shows why he would have had a special interest in them. The same cannot, however, be said of the Council members generally.

86 The second matter is the input from Ms Thornton, in particular her written submission sent to members before the meeting. She was, however, an objector to the proposal. We can well see that a consideration of her submission might have provoked some members into looking at the EIAs. Where we respectfully part company with the judge is that we cannot see that it is legitimate to regard the receipt of a submission such as that from Ms Thornton as raising a presumption that all the Council members would have done so. That is a presumption that has no sufficient justification. As for what Ms Thornton said at the meeting, that might have caused members to consider that a reading of the EIAs would be of value. But for those who by then had not already done so, it was too late. The resolution was passed on the same day.

87 We therefore also differ from the judge in his finding that the PSED was discharged.”

11. This case acts as a salutary reminder to those acting for, and advising, public bodies of the importance of placing sufficiently full information before the ultimate decision-maker. Where a document is placed before the decision-maker specific evidence of his consideration of that particular document will not generally be required: the court had

no difficulty in accepting that if council members are provided with a set of materials for the purpose of a meeting, they can, absent positive evidence to the contrary effect, be taken to have read all such materials and also to have read any additional materials to which they were expressly referred and to which they were told they needed to have regard for the purposes of the meeting.

12. Since **Bracking**, there have been a number of high profile judgments which might be seen as rowing back somewhat from the approach in **Bracking**, but decisions in this field are notoriously fact specific.

13. **R (MA) v Secretary of State for Work and Pensions** [2014] EWCA Civ 13 was a challenge to the “bedroom tax”. The claimants argued that the history of the evolution of the policy disclosed no focused analysis such as section 149 requires. In particular, there was no evidence that during the legislative process the Secretary of State ever had his attention drawn to the need to advance equality of opportunity, an obligation that is distinct from the obligation to have due regard to the need to eliminate discrimination. Express reliance was placed by the claimants on **Bracking**.

14. Lord Dyson MR rejected their submissions:

“91... I agree that it is insufficient for the decision-maker to have a vague awareness of his legal duties. He must have a focused awareness of each of the section 149 duties and (in a disability case) their potential impact on the relevant group of disabled persons. In some cases, there will be no practical difference between what is required to discharge the various duties even though the duties are expressed in conceptually distinct terms. It will depend on the circumstances. I am not persuaded that on the facts of this case there was any practical difference between what was required by the various duties.”

15. On the facts Lord Dyson MR was not persuaded that there was any *practical* difference between what was required by the various duties in the circumstances of this case. Subsequent cases have adopted a similar pragmatic approach, focusing on the substance of the decision making process not on the form of words used in its course.

16. In **Flatley v Hywell Dda University Health Board** [2014] EWCA Civ 1353, the Court of Appeal upheld a refusal of permission to apply for judicial review in relation to a challenge on PSED grounds to a decision to make certain changes affecting accident

and emergency services at two hospitals in Wales. The appellants argued that the decision makers had failed to give adequate consideration to the transport difficulties which the proposed changes might create for patients with protected characteristics, because some services might only be available at hospitals a greater distance from where they lived. The changes were implemented without measures to address transport difficulties having been fully worked out because the decision-makers were satisfied that such measures would be put in place and, as the judge at first instance held, none of the service changes would go forward without the local health board being satisfied that appropriate and safe transportation arrangements were in place.

17. The appellant’s argument that this was not good enough because the consideration which appeared from the evidence was not expressly conducted in terms of the language of the provisions of the 2010 Act was given short shrift. Underhill LJ held that the submission promoted “form over substance”. He stated that it is important always to consider the application of the Act in relation to the particular issues which have, or might have, an impact on persons with protected characteristics. What mattered was that the decision-maker had considered the transport difficulties that would be faced by those who would have to travel further as a result of the changes, which would include those with protected characteristics; and had satisfied itself that appropriate safe transport arrangements would be in place before proposals were implemented. The fact that those arrangements remained to be worked out in detail did not mean that due regard had not been had.

18. In recent first instance cases, *R (Essex County Council) v Secretary of State for Education* [2014] EWHC 2424 (Admin) and *R (Sumpter) v SSWP* [2014] EWHC 2434 (Admin), the courts have placed significant emphasis on the subject matter of the decision under consideration.

19. The *Essex County Council* case was a challenge to a decision on funding for childcare provision. The equality impact assessment considered disability and gender at length, but did not address age. The claimants argued, with express reference to *Bracking*, that this was inadequate given that the decision was likely to have an adverse impact on young children. Cranston J rejected this argument holding that it was “highly unrealistic” to contend that the Secretary of State failed to have regard to the protected

characteristic of age when the whole decision was about provision for young children.

He said at [23]:

“23 While I am mindful of the decision in *R (on the application of) Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 (Admin), mentioned in Mr Sharland's written submissions, it seems to me to be highly unrealistic to contend that the Secretary of State failed to have regard to the protected characteristic of age. This decision was concerned with the allocation of funding as regards childcare and nursery provision. Obviously, the interests of young people were being taken into account in its making. It was a decision about children. Clearly the Secretary of State has not ignored the position of young children in making the decision.”

20. In *Sumpter* – a challenge to the government’s decision to replace the Disability Living Allowance – Hickinbottom J held that a PSED challenge added little to the consultation challenge, noting that the whole decision was about disabled people and it was simply not arguable that the Secretary of State was not aware of the impact of the proposed reforms on disabled people.

21. Where challenges have been successful in the last year they have been so in circumstances where the claimants identified very particular and significant facts or issues that were not properly taken into account by the relevant decision-makers. For example, in *R (Blake) v Waltham Forest* [2014] EWHC 1027 a challenge to the local authority’s decision to terminate the licence of a soup kitchen succeeded on the grounds that there was no evidence that the local authority had any contemporaneous regard to the possibility of the soup kitchen closing. Mrs Justice Simler said:

“59 The requirement imposed by the PSED is that the decision-maker should be clear precisely what the equality implications are when he puts them in the balance, and that these equality implications should be given due consideration side by side with all the other pressing circumstances relevant to the decision. There must be a structured attempt to focus on the measure's effects, including undertaking any due enquiry where that is necessary. Here, while very high numbers of people are not directly affected by the impugned decision, there is nevertheless an identifiable group of particularly vulnerable people, many (or most) of whom depend on the soup kitchen for their only hot meal each day, and who are therefore, potentially gravely affected by it. This group was correctly identified by the Council as potentially directly affected by the revocation decision, and the Council (again correctly) assumed that its decision would have a disproportionately adverse effect on this group which includes elderly, disabled and other vulnerable people. Although the Council did not provide the soup kitchen service itself, and was under no duty to support or

facilitate it, the fact is that for more than 20 years, it did facilitate this service by allowing it to use Mission Grove without a fee.

60 What the Council failed to do however, having recognised and identified a potentially affected vulnerable group, is follow its own guidance requiring that “negative impacts must be fully and frankly identified so the decision-maker can fully consider their impact” so that the impact assessment is “evidence based and accurate”. It failed to identify in clear and unambiguous terms, the most likely adverse impact this vulnerable group might face as a consequence of the decision proposed; and failed to engage with mitigating measures to address that impact, by failing to engage with the very real prospect that the soup kitchen would close altogether...”

22. ***R (Rotherham) v Secretary of State for Business Innovation and Skills*** [2014] EWHC 232 (Admin) concerned regional allocation of EU structural funds. The Secretary of State accepted that there was no consideration of the PSED prior to making the decisions under challenge. The judge held that there had been a breach of the PSED as the allocations were final and the fact that individual regions would themselves have to consider the PSED when deciding how to use the funds allocated to them could not absolve the Secretary of State from the PSED. The conclusion was upheld on appeal to the Court of Appeal [2014] EWCA Civ 1080 but an appeal to the Supreme Court is outstanding on points of EU law.
23. In ***R (Cushnie) v Secretary of State for Health*** [2014] EWHC 3626 Regulations that provided for the free treatment of former asylum seekers only if they were receiving accommodation and support from the Home Office pursuant to certain statutory provisions were found to have been made in breach the PSED as the Secretary of State had not addressed the impact on disabled people accommodated by local authorities under the National Assistance Act 1948. The fact that nobody during the consultation process had drawn this issue to his attention could not excuse the failure to comply.
24. Most recently, in ***R (Refugee Action) v Secretary of State for the Home Department*** [2014] EWHC 1033 (Admin) it was argued that the Secretary of State had breached the PSED when deciding that the level of cash support to be provided to asylum seekers in 2013/14 would remain frozen at the 2011 rate. The court avoided having to decide the PSED point as the challenge succeeded on grounds of a failure to take into account relevant considerations. However, the court raised a potential conflict between the principles set by McCombe LJ in ***Bracking*** and the earlier decision of ***R (FDA) v***

Secretary of State for Work and Pensions [2012] EWCA Civ 332. In that case Elias LJ had been a member in the Divisional Court and said at [89]:

“...On usual principles under *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560, a Minister may rely on workings and a review of effects carried out within his department to satisfy the ‘due regard’ requirement in section 76A(1) or similar provisions, without having personally to read an impact assessment, so long as the task has been assigned to officials at an appropriate level of seniority or expertise. Equally, in our view, the ‘due regard’ duty can be discharged by a Minister if he can be satisfied that the relevant equality assessment has been carried out by another Government department as well or better placed than his own to undertake the task, particularly where that other department has policy responsibility in relation to the effects under review. In such a situation, the obligation to have ‘due regard’ to the relevant matter will have been satisfied as a matter of substance, as required by section 76A (1)...”

25. This is seemingly at odds with what McCombe LJ said in *Bracking*:

“3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.”

26. This issue therefore remains unresolved. Mr Justice Popplewell in *Refugee Action* recognised the potential inconsistency but preferred to leave the question for a future case in which it requires resolution.

27. As funding cuts continue to bite there can be little doubt that the PSED will continue to be raised alongside consultation challenges as an important ground for judicial review. The success or otherwise of these challenges is likely to depend primarily on whether there are substantive flaws in decision making process or in the documents evidencing the same. The cases decided over the last year reflect a pragmatic focus by the courts on substance over form.

Consultation

28. The classic exposition of the duty consult is contained in *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168 and are known as the four *Gunning* criteria:

“First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third ... that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.”²

29. The *Gunning* criteria apply regardless of the source of the duty to consult, which may be statutory or derived from the common law by way of the principle of fairness, or legitimate expectation.³ They are a ‘*prescription for fairness*’⁴. The *Gunning* criteria were recently endorsed in the Supreme Court case of *Moseley* demonstrating that the criteria have stood the test of time and continue to prevail.

30. A number of recent cases have looked at issues relating to the second *Gunning* criterion – the information that must be provided to consultees. *Gunning* only refers to a requirement to include ‘*sufficient reasons for the proposal to permit of intelligent consideration and response*’. This has been expanded in some case to include not only the reasons for the proposal, but also the options that are not proposed and the reasons they were discarded, as well as background evidence or expert analysis in support of the particular proposal.

31. In the recent consultation decision, *R (Moseley) v LB Haringey* [2014] UKSC 56, the Supreme Court considered whether a local authority’s consultation about changes to the payment of Council Tax Benefit was lawful. From 1 April 2013, local authorities were required to develop schemes concerning relief from council tax, and at the same

² At p 189

³ In another recent case, *R (Whitston) v SSJ* [2014] EWHC 3044 Admin, the court took the view that where the Secretary of State had decided to carry out a statutorily mandated review by first conducting a consultation exercise, the *Gunning* criteria did not apply because ‘*the Lord Chancellor was not engaged in a consultation of interested parties about a set of proposals*’. However, the consultation process was found to be unlawful because it did not allow for a proper and informed review to be undertaken. It is questionable whether the court was right to say that the *Gunning* criteria did not apply, particularly in light of the approach taken by Lady Hale and Lord Clarke in *Moseley*.

⁴ *R (Royal Brompton and Harefield NHS Foundation Trust v Joint Committee of PCTs)* [2012] EWCA Civ 472 at para 9

time, central government made clear that the funds available for such schemes would be cut. LB Haringey proposed a scheme under which all CTB recipients other than pensioners would have to pay a greater amount towards their council tax than previously. This included a new liability to pay a contribution on the part of individuals, such as the two claimants, who had previously been completely exempt. The local authority was required to consult ‘*such other persons as it considers are likely to have an interest in the operation of the scheme*’ by virtue of the statutory provisions that gave rise to its obligation to create a council tax relief scheme. A public consultation was duly conducted, with an online consultation document and a letter sent to every household in receipt of CTB.

32. The central issue in the proceedings was whether the local authority had unlawfully failed to include in the consultation options the possibility of making the necessary financial savings in other areas, in order to preserve Council Tax Benefit at its previous levels. The local authority’s actual consultation proceeded on the basis that ‘*the introduction of a local Council Tax Reduction Scheme in Haringey will directly affect the assistance provided to anyone below pensionable age that currently involves council tax benefit.*’ As the Supreme Court held, the consultation did not include reference to other options for meeting the funding shortfall (such as raising council tax or applying the local authority’s reserves) and thus no explanation of why such alternative options were not favoured by the local authority.

33. The Supreme Court held that the consultation had been unlawful: ‘*consulting about a proposal does inevitably involve inviting and considering views about possible alternatives*’ (per Lord Wilson). Given that the proposed scheme affected ‘*the most economically disadvantaged*’ residents in the local authority’s area, and the fact that it would not have been onerous to ‘*make brief reference to other ways of absorbing the shortfall*’, ‘*fairness demanded that the local authority identify the alternative options and explain why the local authority had concluded they were unacceptable.*’

34. The following principles can be found in the speech of Lord Wilson (with whom Lady Hale and Lord Clarke agreed), drawing together previous authorities:

- a. The duty to act fairly applies irrespective of the source of the duty to consult.
- b. The requirements of fairness in any case are linked to the purpose of the consultation. Where a consultation concerns a decision affecting a wide group of people (in contrast, for example to a decision to close a particular care home or school), the '*democratic principle at the heart of our society*' provides an important backdrop against which the question of fairness is determined.
- c. The features of the consultees are relevant in deciding what degree of specificity is required in the information provided. Well informed statutory bodies will manage with less specificity than members of the public, '*particularly perhaps the economically disadvantaged*'.
- d. Where what is proposed involves depriving people of an existing benefit, the demands of fairness will be higher.
- e. Where there are no statutory restrictions on the content of a consultation, '*sometimes...fairness will require that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options.*' Even where the consultation is limited to the preferred option, '*passing reference to arguable yet discarded alternative options*' may be required.

35. The latter point was of particular relevance on the facts of the case, since the statutory duty to consult was expressed as relating to '*the operation of the scheme*', in other words, the proposed option. Nevertheless, the Supreme Court held that to be fair, such consultation did need to include reference to the arguable yet discarded alternatives. In doing so, the court also rejected the argument that these other options would have been reasonably clear to consultees in any event. The fact that only 21 responses from a pool of 36,000 consultees proposed alternative options not included in the consultation could not ground a conclusion that the other options were reasonably obvious, and there was certainly no basis for suggesting that the reasons against those other options were self-evident. Further, since the terms of the consultation were clear that alternative options were irrelevant, even if they had been known to the consultees, this would not have been enough to make the consultation lawful.

36. Lord Reed, who came to the same conclusion as Lord Wilson, preferred to base his analysis on the specific statutory basis of the duty to consult in this case. He noted that *‘the content of a duty to consult can....vary greatly from one statutory context to another’* and took the view that rather than the common law duty of fairness being in play, the issue was whether the local authority had fulfilled the purpose of the statutory consultation, which was *‘not to ensure procedural fairness in the treatment of persons whose legally protected interests may be adversely affected’* but *‘to ensure public participation in the local authority’s decision-making process.’*
37. Lord Reed went on to say that the question whether discarded options should be included would be dictated by the statutory provisions giving rise to the duty to consult, and that the key issue would be whether *‘the provision of such information is necessary in order for the consultees to express meaningful views on the proposal’*. Where a scheme of general application was being proposed, as in this case, it was difficult to see how members of the public could *‘express an intelligent view’* when the other options had been left out of the consultation.
38. A similar issue arose in ***R (Draper) v Lincolnshire County Council*** [2014] EWHC 2388, which concerned library closures. The local authority consulted about its proposed arrangements apparently with an open mind as to whether there should be a particular reduction in service, but its consultation documents gave the opposite impression. As in *Moseley*, there was a failure to put forward other ways of making financial savings, although this was not a particular focus of the claimant’s challenge. The court quashed the decision by reason of the flaws in the consultation process, coupled with the council’s failure to properly consider an expression of interest from a third party in taking over the running of the county’s library services, made pursuant to s.81 of the Localism Act 2011.
39. A further case concerning the content of consultation was ***R (London Criminal Courts Solicitors Association) v The Lord Chancellor*** [2014] EWHC 3020 (Admin), a successful judicial review of new arrangements for criminal legal aid, in which the claimants argued that the consultation process was unfair by reason of a failure to disclose expert reports the defendant had commissioned on which proposals in the consultation document were based. The court was happy to look in detail at the

consultation, noting that ‘*The impact of a decision is a material factor in deciding what fairness demands or requires in any particular case*’ and the impact of the proposed changes was profound and posed a threat to the continued existence of many firms.

40. The court referred to *Eisai v NICE* [2008] EWCA Civ 438, noting that ‘*the mere fact that information is significant does not necessarily mean it must be disclosed*’, and also that it would be relevant to ask whether the information was internally generated. In this case, although the reports were from independent experts, the defendant did not rely on that factor, and the court observed that ‘*the fact that the assumption ... amounted to an uncertain judgemental prediction of future behaviour of those likely to be most directly affected by the decisions would, to my mind, tend to suggest not only that those very people should be asked, but also that any resulting decision would be better informed if they were.*’
41. In the circumstances, the refusal to permit respondents to see the reports and the assumptions on which the proposals had been formulated, was ‘*so unfair as to result in illegality*’.
42. In *R (LH) v Shropshire Council* [2014] EWCA Civ 404, the Court of Appeal decided that a consultation in relation to day centre closures had been unlawful. The local authority had argued (successfully at first instance) that although the specific day centres earmarked for closure had not been identified in the two public consultation exercises concerning reconfiguration of services that had been carried out, the consultation had not been unfair, as the respondents had known that some day centres would close. The Court of Appeal held that the consultations that had been conducted were not sufficiently concrete to satisfy the requirements of fairness. While the day centre users were not facing either the complete withdrawal of a service, nor the closure of their homes, there was no distinction to be drawn between this case and the care home closure cases, which had clearly demonstrated that consultation on the particular proposed closure was required.
43. *R (Robson) v Salford City Council* [2014] EWHC 3481 (Admin) concerned a similar decision by a local authority, this time concerning the provision of transport for disabled people. The local authority had consulted service users about using other forms of

transport, but had not said in terms that the existing council-run service would be withdrawn from them. The court however held that it would have been ‘*impossible... for any sensible reader [of the consultation booklet] not to have understood that this proposal would involve the withdrawal of the...service from those who were assessed as being able to use alternative transport arrangements.*’ It was not therefore possible to say that the whole consultation process was unfair.

44. A similar conclusion was reached in the earlier decision of ***R (LB Islington and ors) v The Mayor of London and ors*** [2013] EWHC 4142 (Admin), in which the court concluded that although more information could usefully have been included in a consultation process, and more informed responses would thereby have been obtained, the defects were not sufficient to render the entire consultation unlawful.
45. In ***R (Sumpter) v Secretary of State for Work and Pensions*** [2014] EWHC 2434, the claimant challenged the consultation process relating to the replacement of Disability Living Allowance with Personal Independence Payments. A large consultation had taken place over a sustained period of time, which included new criteria by which the ability to move around would be measured. After the consultation was carried out, the Secretary of State decided to alter the criteria such that there was a 20 metre threshold that had relevance to assessing the ability to walk or move unaided, rather than the 50 metre threshold that had been consulted on. After proceedings for judicial review were issued pointing out that this was unlawful, and permission was granted, the Secretary of State decided to carry out a further consultation directed at the 20 metre threshold. Perhaps unsurprisingly, the overwhelming majority of respondents expressed the view that the shorter distance should not be adopted. The 20 metre threshold was nevertheless retained.
46. The consultation challenge failed, because the second consultation was found to have been carried out with an open mind, and because it had been apparent throughout that the move to PIPs would result in a shift in favour of support for non-physically disabled people. The court suggested, however, that the earlier consultation would not have been found lawful, because of its failure to include clear information about the possible move away from a 50 metre threshold.

47. The question of whether to hold a second consultation can be very difficult. On the one hand, the decision-maker cannot become trapped in a never-ending cycle of consultation, modifying the proposal in light of responses, but then consulting again on the modified version. On the other, a high-level consultation, or one which the consultees criticise as opaque or deficient in other fundamental respects, will be at risk of successful challenge.

48. More recently, a consultation challenge was brought in ***R (Thomas) v Hywel Dda University Health Board*** [2014] EWHC 4044 (Admin) in respect of a decision to cease providing in-patient beds at Cardigan Hospital. The consultation challenge failed on the basis that there was no requirement to consult at all. Mr Justice Hickinbottom at [109] said:

“109 In this case, I agree with Mr Patel: as there was no statutory requirement to consult, there is no scope to read in any additional common law obligation to consult, unless the duty of procedural fairness required it. In this case, no foundation for such an additional duty has been suggested: it is not suggested that there was a legitimate expectation in the form of a promise or established practice to consult, or that a failure to consult would result in conspicuous unfairness, or that there has been any breach of the common law duty of fairness at all.”

49. Finally, there was a consultation challenge to the decision to close a school in ***R (McCann) v Bridgend County Borough Council*** [2014] EWHC 4332 (Admin). The Claimant placed reliance on *Moseley* as well as the statutory requirements for consultation. The claim succeeded on the basis that insufficient information had been provided during the consultation process. The judge found that it was “*clear that the defendant failed to set out in the consultation document the alternatives that had been considered and the reasons why they had been discounted. The defendant's argument at the hearing of this claim boiled down to saying that the alternatives had not been realistic or viable and therefore did not have to be identified in the consultation.*” (para 80) The judge therefore held that insufficient information about alternative options rendered the consultation unlawful. Rather, what the local authority should have done was this:

“The reasons why the alternative was rejected should have been stated in the consultation document. Another possible option would be to make provision on alternative sites. The defendant did not provide particulars of the alternatives it

had considered; it did not even state in terms that it had considered alternative sites, and even now it is a matter of inference only that all sites considered have been identified in the course of these proceedings. Nor did the defendant even claim in the course of the statutory process that there were no other feasible or realistic options; it simply claimed that its proposal was the best option—apparently because its officers had reached that conclusion. That is not what the statutory process requires, and it undermines the clear purposes inherent in that process, because it removes from the wider public sphere the opportunity for constructive engagement with alternatives that have not been included in the proposal...”

50. What is important is that, following *Moseley*, local authorities should ensure that sufficient information regarding possible alternative options is provided in the consultation documents. It is also possible to draw from the above cases a general rule that where there is specific information of direct relevance to a decision, whether that is in the form of expert analysis or details of the particular service to be altered, it would be prudent to include such information in the consultation materials to avoid a successful challenge. Where, however, consultation documents are produced to a consultation audience that is already well-informed, the court will be less likely to interfere provided the essential information would have been obvious to those consulted.

Concluding Remarks / Practical Tips

51. The precise requirements of a lawful consultation will of course depend on the facts and circumstances of the consultation. However, the cases do provide some indication of what constitutes lawful or unlawful decision-making. Local authorities should bear in mind the following:

- a. Make conscious reference to equality duties and emphasise the importance of such duties.⁵
- b. Keep good records of every step of the decision-making process. The courts will be reluctant to infer that “due regard” has been given to equality duties.⁶

⁵ *Hunt v North Somerset Council* [2013] EWCA Civ 1320

⁶ *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345

- c. Make all relevant considerations explicit. The court will not readily assume that they have been taken into account.⁷
- d. Gather as much relevant information as is reasonably possible and be open about the material relied on as background to the consultation.⁸
- e. If relevant material is not available, there is a duty to acquire it and this may entail further rounds of consultation.⁹
- f. Provide sufficient information about other alternative options, including those that have been discarded, in consultation documents.¹⁰

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⁷ *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345

⁸ *R (London Criminal Courts Solicitors Association) v The Lord Chancellor* [2014] EWHC 3020 (Admin)

⁹ *R (Sumpter) v Secretary of States for Work and Pensions* [2014] EWHC 2434

¹⁰ *R (Moseley) v London Borough of Haringey* [2014] UKSC 56, *R (Draper) v Lincolnshire County Council* [2014] EWHC 2388