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SWALA SEMINAR ON CONSULTATION

29 SEPTEMBER 2015

There is no general duty to consult[1]. The origin of the duty to consult will govern how, when and with whom the consultation should be carried out.

(1) **Statutory duty to consult:** The first way in which a duty to consult can arise is through statute. Express provisions may mandate with whom the authority needs to consult, at what point in the process and on what issues. The obligation can be very specific (for example, the duty on housing authorities under the Housing Act 1985 to consult with secure tenants when effecting changes to their terms and conditions) or it can be a general duty to consult (such as is found in Section 3(2) of the Local Government Act 1999).

(2) Some statutes do not mandate consultation, but mandate the proper exercise of discretion on whether or not to consult. For example, the Public Services (Social Value) Act 2012 provides that where an authority is procuring services, it must consider how what is being procured can improve the social, environmental and economic well-being of the relevant area and, importantly, it must consider whether or not to consult on how those improvements can be made.

(3) There is also an overlap with the Equality Act 2010. Many judicial reviews which involve an objection to service change have pleaded both a failure to consult and breach of the Equality Act 2010. Indeed, in the case of *R (RB) v Devon County Council*[2], the Claimant's case on consultation failed, but succeeded on the basis that, at the time of the decision to appoint Virgin Care as the preferred bidder, the relevant decision-makers had not applied their minds to the impact on groups with protected characteristics. The Courts have held on more than one occasion that in order to discharge its obligations under the PSED, an authority must consult with groups with protected characteristics in order to understand the impact of proposed changes on them.

(4) **Procedural legitimate expectation:** The second way in which a duty to consult can arise is through either an express representation by the authority that it will consult, or conduct by the authority giving rise to the legitimate expectation that it will consult. This is the paradigm case of procedural legitimate expectation. Express representation could arise, for example, if an authority adopts and publishes (perhaps on its website) a code of practice committing to consultation, or if the authority tells a group that it will not change the status quo without first consulting them. In these scenarios, members of the public would have a procedural legitimate expectation of consultation. Secondary procedural legitimate expectation of consultation may also arise through the conduct of

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1 *R (Cheshire East Borough Council) v. Secretary of State for Environment, Food and Rural Affairs* [2011] EWHC 1975 (Admin) at paragraphs [68-82], especially at [72].

2 *R (on the application of RB) v Devon County Council* [2013] Eq. L.R. 113

an authority. If an authority's conduct is sufficiently focused, it can create a procedural legitimate expectation that a benefit will not be taken away without consultation[3].

(5) **Natural Justice:** The third way in which a duty to consult arises is because it would breach the principles of natural justice (in other words, lead to conspicuous unfairness) to do otherwise. The recent case of *R (L&P) v Warwickshire County Council*[4] confirms that the circumstances in which this third duty to consult may arise will be very rare.

Assuming that there is a duty to consult, what principles apply?

(6) Where there is a duty to consult[5], the consultation must be fair. The principles of fair consultation have been settled for many years – as formulated in 1984 by Stephen Sedley QC in argument in *R v Brent LBC ex p Gunning*[6], ("the *Gunning* principles") described by Arden LJ as a "prescription for fairness" in *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts*[7], and indeed, endorsed by the Supreme Court this year in the *Moseley*[8] decision.

(7) The *Gunning* principles provide that consultation must be undertaken at a time when proposals are still at a formative stage. In other words, there must be an opportunity to influence the outcome. The consultation must not be a mere tick box exercise. *R (Sefton Care Association & Ors) v Sefton Council* [9] concerned a decision to freeze rates payable to care homes. The facts of the case were that, following an initial proposal by the Council, providers attempted to put questions to the Council's officers regarding fees at subsequent engagement meetings. However, they were informed that Council's officers could not comment on this issue. The providers pressed the Council for further meetings but were told that it was not possible to discuss the issue of fees. There was no evidence that the views of the providers on this issue were taken into account conscientiously or at all, nor was there evidence that the providers' concerns were ever communicated to the Council's Cabinet. The providers therefore had no opportunity to influence the outcome.

(8) The *Gunning* principles also provide that the consultation must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration to the matter and to produce an intelligent response. In *Breckland District Council & Ors v the Boundary Committee*[10], the Court of Appeal held that publishing large volumes of indigestible financial information about the

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3 *R (Bhatt Murphy & Ors) v The Independent Assessor [2008]* EWCA Civ 755

4 *R (on the application of L and P) v Warwickshire County Council* [2015] EWHC 203 (Admin),

5 Note that there is a line long of authority, beginning with *R v North & East Devon HA, ex p Coughlan* [2001] QB 213 (para 108) that even though a body may be under no duty to consult, if the body decides to embark on consultation, the consultation must comply with the principles of fairness.

6 *R v Brent LBC ex parte Gunning*[6] [1985] 84 LGR 168

7 *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts*[7] (2012) 126 BMLR 134(9)

8 *R (on the application of Moseley) v Haringey LBC* [2014] UKSC 56

9 *R (Sefton Care Association & Ors) v Sefton Council* [2011] EWHC 2676

10 *Breckland District Council & Ors v the Boundary Committee* [2009] EWCA Civ 239

proposal was unlawful if provided without some kind of summary and analysis which would be intelligible to consultees. The Committee had argued that the media were summarising and disseminating the information, however the Court did not accept that this discharged the Committee's duty to do the same. Similarly, the time allowed to respond must be sufficient but will vary from case to case. There is no longer an absolute requirement that every consultation must last for 12 weeks (which was the recommended period in the Government's "Code of Practice on Consultation" published in July 2008 and in force at the time of the case). In *R (Green) v Gloucestershire County Council*[11], the consultation on the proposal to close libraries took place over a 4 week period which included Christmas, New Year and a period of bad weather which brought the area to a halt. Despite these issues, the 4 week period was held to be sufficient. Case law has also established that it is acceptable to consult on a preferred option[12].

(9) The *Gunning* principles also provide that the product of consultation must be conscientiously taken into account when the ultimate decision is taken. In *R (on the application of Friends of the Earth Ltd) v Secretary of State for Energy and Climate Change*[13], a challenge was made to the consultation process on the basis that the Secretary of State for Energy and Climate Change had tried to put forward a proposal to take effect as from a point in time before the consultation period had actually ended. It is also important to be able to evidence that the product of the consultation has been placed before and read by those responsible for the decision-making process.[14] For example, it may not be enough to simply include a link in a briefing paper to the product of the consultation and expect members to read the product of consultation. Authorities should consider whether a summary highlighting the main issues would better direct the attention of members to the relevant issues.

Is consultation used as a means of challenging the underlying merits of policy decisions?

(10) Some consultation judicial reviews may be motivated by an objection to the underlying merits of the decision (with the inadequacy of the consultation being a hook on which to hang the case). However the Courts have consistently declined to become involved in the underlying policy decision itself. Indeed, in *R (L&P) v Warwickshire County Council*[15], a recent case involving budget cuts affecting disabled children, Mostyn J commented that the Claimants were voicing their complaints in the wrong place and that, rather than a court room, these should be raised in Councillors' surgeries and ultimately in the voting booth. Mostyn J made the comment that "as I have said earlier, that is what local democracy is all about." However, do the underlying merits of a decision influence the

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[11] *R (Green) v Gloucestershire County Council & R (Rowe and Hird) v Somerset County Council* [2011] EWHC 2687 (Admin)

[12] *R (Royal Brompton & Harefield NHS FT) v Joint Committee of PCTs & Anor* [2012] EWCA Civ 472

[13] *R (on the application of Friends of the Earth Ltd) v Secretary of State for Energy and Climate Change; R (on the application of Homesun Holdings Ltd) v Secretary of State for Energy and Climate Change; R (on the application of Solar Century Holdings Ltd)* [2011] All ER (D) 190

[14] *R (Hunt) v North Somerset Council* [2013] EWCA Civ 1320

[15] *Mostyn J in R (L & P) v Warwickshire County Council* [2015] EWHC 203 (Admin).

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willingness of the Courts to interfere? It ought not to, but the more extreme the impact of a decision, the more the Courts will expect the decision-maker to have consulted rigorously with those affected.

(11) *Luton v Secretary of State for Education*[16] is an example of a case involving such conspicuous unfairness that it amounted to a gross abuse of power. The facts of this case considered the decision of the coalition government, very shortly after the 2010 election, to cut £7.5bn in funding for the Building Schools for the Future Scheme. Bristol was fortunate in having had its new schools approved, thus avoiding the apparent cull. Other authorities were less fortunate, as they had not been able to reach outline business case approval ("OBC") for their schools in time. Michael Gove, then Secretary of State for Education, stipulated that any school which had not already received its approval by the preceding 1 January would have its funding cancelled. Even if a school had obtained OBC approval on 2 January (1 day after the cut-off) it would still have its funding cancelled. Councils across the country had invested extensive time and resources into procuring contractors to design and build new schools. Over years, Councils had worked intensively with "PfS", the executive agency of the Department of Education, to develop their schemes in the expectation that, provided they met certain criteria, they would obtain OBC approval, followed by FBC approval and ultimately a promissory note.

(12) The Court did not accept that the Secretary of State was acting irrationally, but did accept that, given the magnitude of the impact of the decision, there ought to have been at least some period of consultation.

(13) The Court listed all of the procedural grounds on which the Claimants had brought their case and said "all of them really boil down to the Secretary of State's failure to consult with the Claimants":

a. There was a procedural legitimate expectation of consultation because there had been years of intense and continuous dialogue between the authorities and PfS to the extent that the authorities had bound themselves to contractual commitments with preferred bidders.
b. The Court held that by drawing such an intransigent line in the sand, the Secretary of State had fettered his discretion unlawfully. It was acceptable to have a policy to deal with the multitude of cases, but having drawn up a policy, it was unlawful not to allow any opportunity for the authorities to voice an opinion and to take those representations into account.
c. The Court held that the Secretary of State had failed to discharge his duties under equalities legislation because he had not consulted with those affected by the decision: "the point is that if only the Secretary of State had consulted with them they would have been able (if they wished) to highlight those special equality considerations to him".

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[16] *R (on the application of Luton Borough Council) v Secretary of State for Education; R (on the application of Sandwell Metropolitan Borough Council) v Secretary of State for Education; R (on the application of Kent County Council) v Secretary of State for Education; R (on the application of Newham Local Borough Council) v Secretary of State for Education; R (on the application of Waltham Forest Local Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin)

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(14) In light of the significant impact on pupils and communities, cancelling the scheme without consultation was so unfair as to amount to an abuse of power. The Court remitted the decision back to the Secretary of State to be re-considered, this time following a lawful consultation process.

Emily Heard

29 September 2015