

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

BETWEEN:

**EVELEIGH AND OTHERS
(FORMERLY BINDER AND OTHERS)**

Claimants/Appellants

-and-

**SECRETARY OF STATE FOR
WORK AND PENSIONS**

Defendant/Respondent

SKELETON ARGUMENT FOR THE RESPONDENT

Authorities

- *Binder v Secretary of State for Work and Pensions* [2022] EWHC 105 (Admin) (“*Binder*”)
- *R (Eveleigh) v Secretary of State for Work and Pensions* [2023] EWCA Civ 810 (“*Eveleigh*”)
- *R v Brent LBC ex p Gunning* 84 LGR 168 (“*Gunning*”)
- *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213 (“*Coughlan*”)
- *R (Moseley) v Haringey LBC* [2014] 1 WLR 3947 (“*Moseley*”)
- *R (Plantagenet Alliance) v Secretary of State for Justice* [2015] 3 All ER 261 (“*Plantagenet Alliance*”)
- *R (Association of Personal Injury Lawyers) v Secretary of State for Justice* [2013] EWHC 1358 (Admin) (“*Personal Injury Lawyers*”)

Introduction

1. In response to the Appellant’s two grounds of appeal, it is submitted that:

- (a) Ground 1: The Court of Appeal was right (in §§82-90 and §§95-96 of its judgment) to conclude that the *Gunning* criteria did not apply to the UK Disability Survey (“the Survey”) because of the nature of the exercise.

(b) Ground 2: The Court of Appeal was right to conclude that the *Gunning* criteria do not apply to voluntary consultations.

Submissions on Ground 1

2. The Survey was a broad public engagement exercise to help form an abstract strategy document; it was not an exercise to which the *Gunning* criteria could apply.
3. Varied forms of engagement with the public are “the very warp and woof of democratic government” (*Personal Injury Lawyers* §44). Not every instance of public engagement amounts to formal consultation “with all the baggage inherent in that process”, even where representations from the participants have proved “decisive” in shaping a decision by a public body (§44). The fact that the Survey was occasionally referred to by the government as a “consultation” is legally irrelevant: whether an instance of public engagement amounts to consultation is a question of substance, not form (*Eveleigh* §81; *Binder* §§58-59).
4. The *Gunning* principles apply to consultations over specific decisions that will directly affect particular groups. This has included “closing and merging specific schools”, “closing an NHS facility” and “the adoption of a particular council tax reduction scheme” which might financially harm poorer residents (*Eveleigh* §83).
5. The Survey, in contrast, was a part of a broad and generalised exercise in public engagement around an abstract strategy document covering various areas of government. This exercise involved “a full and appropriate programme of stakeholder engagement” (§33), including “working groups, roundtables, and joint roadshows” (§30) in order to foster a “general conversation with the public” (§42) which would continue even after the National Disability Strategy (“the Strategy”) was published (§§42-43).

6. It is impossible to apply the *Gunning* criteria to an exercise of this generality. The second *Gunning* criterion stipulates that “the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response” (*Moseley* §25). Inherent in this criterion is that there is a proposal of sufficient specificity to “respond” to. The first *Gunning* criterion is that proposals must be at a “formative stage” (§25). Yet the “conversation” over the Strategy was meant to extend, without alteration to the content of the Survey, from before the Strategy was drafted until after it was complete and publicised.
7. To declare the Strategy unlawful because the Survey departed from the *Gunning* criteria would be, in effect, to prohibit public engagement through surveys unless and until there is a specific proposal which might adversely affect a particular group.

Submissions on Ground 2

8. Neither fairness nor rationality requires that voluntary consultation be subject to the same procedural standards as a consultation arising from statutory or common-law duty.
9. Where it arises, the duty to consult ensures procedural fairness in the treatment of persons whose legally protected interests may be adversely affected by a public body’s decision (*Plantagenet Alliance* §94). The *Gunning* principles are an extension of procedural fairness, allowing those interested to understand a decision-maker’s reasoning and make meaningful representations before their interests are affected (*Moseley* §§23, 25).
10. By definition, voluntary consultation concerns situations where persons’ protected interests are not so directly at stake as to trigger a duty to consult. There is therefore no requirement for the kind of meaningful representation ensured by the *Gunning* criteria in order to avoid an “abuse of power” (*Plantagenet Alliance* §98.11; *Coughlan* §89). The common-law duty of procedural fairness does not stretch to eliminating unsatisfying or inefficient interactions with public bodies (*Eveleigh* §96).

11. As to rationality, it is for decision-makers to choose the manner and intensity of their inquiry when informing themselves before making a decision. The court should intervene not merely because further inquiries may have been sensible, but only if no reasonable decision-maker could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (*Plantagenet Alliance* §100.2-100.3).
12. Voluntary consultation which falls short of the *Gunning* standard is perfectly capable of meeting this rationality test (*Binder* §49), even where it is not exemplary or ideal.
13. Voluntary consultation might otherwise depart from the *Gunning* criteria because it is intended to gauge opposition or secure buy-in from stakeholders, rather than strictly to inform decision-making (*Personal Injury Lawyers* §44). These are questions of politics, not a justiciable question of rationality (*Plantagenet Alliance* §148).
14. There is no predictable basis for determining when mere public engagement reaches the threshold of consultation (*Personal Injury Lawyers* §45; *Eveleigh* §81). In holding that the *Gunning* criteria must apply to voluntary consultation, the Court risks incentivising policymakers only to engage the public when strictly compelled to do so, in case a decision based on limited public engagement were to be subsequently quashed as involving substandard “consultation”.

Conclusion

15. For the above reasons, the Court is invited to dismiss the Appeal on both grounds.

Counsel for the Respondent
4 December 2023