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

APPLICATION FOR PERMISSION TO APPEAL

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. On behalf of the Appellant, permission to appeal is sought on two grounds:

   (a) Ground 1: The Court of Appeal was wrong (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 wrong to conclude that the *Gunning* criteria do not apply to voluntary consultations.

Submissions on Ground 1

2. The Court of Appeal identified two essential reasons why the *Gunning* criteria ought not to apply to the Survey and related public engagement feeding into the National Disability Strategy ("the Strategy"): (i) the type of decision in question, and (ii) the stage of development of the intended decision at the point when responses were sought. On both of these points, it is respectfully submitted, the Court of Appeal adopted an unduly narrow interpretation of the application of the *Gunning* criteria.

The type of decision

3. First, the Court of Appeal adopted an overly narrow definition of the type of decision to which the *Gunning* criteria could apply.

4. There is no settled basis "for determining when [a] process amounts to consultation and when it involves discussions falling short of that" (*Personal Injury Lawyers*, §45). Laing LJ attempted to provide such a basis (*Eveleigh* §83) by analysing "[a]ll the cases in which the *Gunning* criteria have been held to apply", namely *Gunning* itself, *Coughlan* and *Moseley*. In Laing LJ's judgement the present case is "a different thing altogether", given the comparative abstraction of the decision being taken, so the *Gunning* criteria should not apply.

5. The facts of *Gunning, Coughlan* and *Moseley* are not, however, so homogeneous as the Court of Appeal supposed. Nor are they so easily distinguished *en bloc* from the present case. Giving judgement in *Moseley*, Lord Wilson contrasted that case with *Gunning* and *Coughlan*, given the less precise nature of the question addressed and the vastly larger pool of consultees (*Moseley* §24). Even within *Gunning* itself, Hodgson J held that what Brent Council had consulted on was a mixture of "broad principles" and "specific

proposals", which did not include the proposal ultimately chosen (*Gunning* pp. 197-198).

6. Nor should a narrow model of relevant facts be established. Duties about consultation grow out of the broader requirement of fairness in the exercise of public functions (*Moseley* §23). Fairness is "a protean concept", and a "mechanistic approach to the requirements of consultation" should therefore be avoided (*Moseley* §§24 and 36, per Lords Wilson and Reed JJSC). It is the multivalent demands of fairness which can explain the dramatic variation in what the law of consultation has required in particular cases, including fluctuating degrees of specificity (*Moseley* §26) and the relevance or otherwise of alternative options (*Moseley* §27).

7. Reasoning narrowly by analogy to the factual details of three past cases is therefore an inappropriate method to establish the possible scenarios in which the requirement of fairness will invite application of the *Gunning* criteria.

8. The present case is a scenario in which the *Gunning* criteria should indeed apply as a "prescription for fairness" (*Moseley* §25).

    i. The Strategy was a major policy decision which might adversely affect a specific group of people, whose "crucial" views (*Eveleigh* §33) the government was concerned to solicit so that they might "inform" (§39) its decision, with their "voice at the heart of the process" (§40).

    ii. While use of the word "consultation" does not magically create a consultation in law, neither is it "legally irrelevant" (§81). The conduct of the Disability Unit created a legitimate expectation among 14,000 people that what was being undertaken was a consultation, on which they relied in filling out the Survey. It was unfair to foster that expectation in order to induce disabled people to take part, only to insist that the Survey and related engagements were not a consultation (*Plantagenet Alliance*, §98.10-11).

The stage of development

9. Second, the Court of Appeal applied an improper test in finding that the decision was not at the appropriate stage of development to trigger the *Gunning* criteria.

10. The *Gunning* criteria include that "proposals are still at a formative stage" and "the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response" (*Moseley* §25).

11. The Court of Appeal departed significantly from the wording of the *Gunning* criteria in holding that there must be a "proposal [which] has crystallised sufficiently that the public authority also knows what the proposed decision may be, and is able to explain why it might make that proposed decision, in enough detail to enable consultees to respond intelligently to that proposed course of action" (§§85, 95). The effect was to invent an additional criterion, namely that the public authority knows what decision it may take. On that basis, the Court of Appeal decided that a relevant proposal "did not exist" (§87).

12. If the *Gunning* criteria had been applied without departing from their formulation by the Supreme Court in *Moseley*, it would have been clear that there was in fact a proposal at a formative stage to which those criteria should have applied. The Strategy did not remain inchoate throughout the period of consultation. According to the press release of 15 January 2021, responses submitted by 28 February would "inform the development" of the Strategy (§39), while responses submitted between 28 February and 23 April would "inform the delivery of the plans we set out". The same press release stated: "We intend to publish the Strategy in Spring 2021" (*Binder* §25). A specific plan was being drafted during the period of consultation and published shortly afterwards. If this does not constitute a "formative stage", it is hard to envisage what could.

13. While Laing LJ noted this evidence in her judgement (*Eveleigh* §39), it does not seem to have informed her conclusion that at no point did anything approaching a proposal at a formative stage exist, since there was no "secret draft of the Strategy locked in a drawer"

(§86). In reaching this conclusion, Laing LJ substituted her own criterion (a known probable decision) for the *Gunning* criterion (a proposal at a formative stage).

Submissions on Ground 2

14. The Court of Appeal was wrong to hold that the *Gunning* criteria do not apply to voluntary consultations. The duty of procedural fairness entails that once legitimate expectations have been created by an express decision to consult, consultation must be carried out in a manner permitting fair and useful participation.

15. Absent statutory or common-law obligations, public decision-makers retain discretion over whether to launch a consultation or to take a different approach to formulating policy (*Plantagenet Alliance* §§98.1, 98.3). Nor must every exercise of information-gathering or public engagement amount to consultation, with all the baggage inherent in that process (*Personal Injury Lawyers* §44).

16. However, once a decision-maker has announced their intention to follow a certain procedure, such as a consultation, "good administration requires that it should be bound by its undertaking as to procedure provided that this does not conflict with the authority's statutory duty" (*Plantagenet Alliance* §98.8). An "express representation that there will be consultation" may create legitimate expectations, including about the seriousness of the exercise, which it would be unfair to disappoint (*Plantagenet Alliance* §98.10-11; *Moseley* §35). The *Gunning* criteria distil what serious consultation requires.

Conclusions

17. For the above reasons, the Court is respectfully invited to grant permission to Appeal.

Counsel for the Appellant
6 November 2023