IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)
ELIZABETH LAING, MACUR AND BEAN LJJ
[2023] EWCA Civ 810

B E T W E E N:

EVELEIGH AND OTHERS (FORMERLY BINDER AND OTHERS)

Appellants

-and-

THE SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

SKELETON ARGUMENT FOR THE RESPONDENT

A. INTRODUCTION

1. The Respondent seeks to uphold the decision of the Court of Appeal that: (1) the *Gunning* criteria did not apply to the UK Disability Survey because of the nature of the exercise; and (2) the *Gunning* criteria do not apply to voluntary consultations.

B. SUBMISSIONS

Ground 1: The nature of the exercise

2. There is no magic in the word 'consultation'. It is only when an exercise is characterised as a 'consultation' in law ("**a Consultation**") that it attracts the obligations set out in *R v Brent LBC ex p Gunning* (1985) 84 LGR 168 (**"Gunning criteria").**
3. There are two fundamental approaches to characterisation of an exercise as Consultation.
    a. The High Court's approach was to decide whether public engagement was full Consultation or mere information gathering by considering the history of the exercise to discern the intention of the public body, and then making an evaluative judgement. Here, the finding of consultation was drawn from "the way in which [the Strategy] claimed to be responsive to the Survey"' [§65], the

explicit link between the Survey and the Strategy [§63]; and the impact of the information on the Strategy [§61].

b. Alternatively, the Court of Appeal employed a multi-stage approach. Prior to considering intention, the Court considered as part of the question of whether an exercise is a Consultation, whether there is a proposal on which Gunning can bite.

4. The former approach erred in law, leading to unattractive consequences:
    a. Public bodies will rarely, if ever, seek to collect information not intending to put its output towards development of policy. This approach effectively erodes the public law principle that there is no general duty to consult: *R (Moseley) v LB Haringey* [2014] 1 WLR 3947 [§35].
    b. The evaluative approach to characterisation is unworkable in practice. There is no principled concept of Consultation which allows it to be defined with clarity: *R (Association of Personal Injury Lawyers) v Secretary of State for Justice* [2013] EWHC 1358 (Admin) [§44]. It would lead to significant uncertainty for public bodies seeking to conduct information gathering exercises in both the nature of the obligations to which they are subject and the point of imposition.
    c. It creates a perverse disincentive against engaging the public at an early stage and/or with a fully open mind.
5. The Court of Appeal's approach is realistic, conducive to public involvement, and does not impose an impossible burden on the government.
    a. The first and second *Gunning* requirements conceptually, and indeed textually, require a proposal at a formative stage. This is because the requirement for reasons to be given for a proposal, as to allow for intelligent response, makes no sense unless there is a proposal for which reasons can be given.
    b. The Court of Appeal correctly inferred the following three "self-evident" assumptions from "all [the] cases where [*Gunning*] has applied": (1) a specific decision [§83]; (2) which would or might adversely affect a particular person or group [§83]; (3) at a stage that is both "sufficiently 'formative'" and where the "proposal has crystallised sufficiently" [§85].
6. This approach was criticised by Griffiths J for its circularity. It is however a multi-stage approach. It is appropriate to consider at the characterisation stage whether it is in the realm of *Gunning* at all. It is necessarily circular, but is not detrimental.

7. If characterisation does not take into account whether Gunning *could possibly* apply, then both this exercise, and <u>any</u> exercise in which public views are sought before detailed proposals are developed, would be unlawful per se. There was no way of providing detailed reasons for proposals, for there were no proposals [CA §86]. An obligation should not be imposed at a point where it, by definition, cannot be met.
8. For the reasons outlined by the Court of Appeal [§§84,86] the three assumptions were not present. As Griffiths J held, the Strategy "provided a policy framework within which more specific future policies would be developed and implemented" [HC §48]. The Survey is the inverse of a consultation to which the *Gunning* criteria could feasibly apply: it is an early, open-ended request for information, rather than a request for response to proposals.

Ground 2: The Gunning criteria do not apply to voluntary consultations

9. The common law does not impose a general obligation to consult. This reflects the broad constitutional principle that decisions about the process of government are for the executive, and only subject to challenge on grounds of rationality. The duty to seek out information is narrowly circumscribed: the obligation on the decision-maker is only to take such steps to inform himself as are reasonable: *R (Plantagenet Alliance) v Secretary of State for Justice* [2015] 3 All ER 261 [§100(1)]. When it does arise, it is for the public body, and not the court, to decide on the manner and intensity of the inquiry [*Plantagenet* §100(2)].
10. The three circumstances where a full duty to consult arises – as articulated in *Plantagenet* at §98(2) and affirmed in *Moseley* – are <u>narrow</u> and presuppose a <u>high threshold</u>: where there is a statutory duty to consult; where a legitimate expectation has arisen and "there would be unfairness amounting to an abuse of power for the public authority not to be held to its promise" §98(11); where there would otherwise be conspicuous unfairness.
11. In contrast, the Court of Appeal in *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213 assumed a fourth circumstance: where a public body "voluntarily embark[ed] on a consultation exercise" [§108]. The Respondent submits that this amounted to an unprincipled extension of the law for the following reasons.
12. **<u>First,</u>** the circumstances affirmed in *Moseley* are essentially the application of longstanding grounds of judicial review to consultation (legitimate expectation,

procedural fairness, legality). In contrast, the imposition of a duty to consult where a public body "voluntarily embark[ed] on a consultation exercise" is a novel and wide-ranging carve-out from there being no general obligation to consult. Therefore, it represents an unconstitutional encroachment into the functions of the executive.

a. In practice, even when the "three self-evident assumptions" test is met, the threshold is significantly lower than the thresholds set out in the three *Moseley* circumstances (thereby imposing wide-ranging duties).
b. It would essentially change the *Tameside* duty from one of rationality to a much broader duty, attaching "all the baggage inherent in full consultation" [*APIL* §43] when information is gathered on proposals. The test for a *Tameside* duty is fundamentally different from the test for a duty to consult: *Plantagenet* [§138-139]. Accordingly, the manner in which it seeks out that information including the way it formulates requests for information and the time for responses is properly subject to rationality review only.
c. Similarly it oversteps the high threshold for a finding of legitimate expectation.

13. **Secondly,** applying the *Gunning* criteria to voluntary consultations undermines the underlying rationale for the application of those criteria (the three purposes articulated in *Moseley* at §24): to result in better decisions, to ensure procedural fairness to those whose rights may be affected by a decision, and to promote the rule of law. Application of the Gunning criteria to voluntary consultations could compromise decision-making by acting as a disincentive on public engagement or lead to administrative processes "grinding to a halt" [*APIL* §45].
14. **Finally,** there is an inherent, irresolvable tension between a consultation being "voluntary" and mandating the application of the Gunning criteria. Where a public body does not intend to invoke the Gunning criteria, it cannot be voluntarily embarking on a Consultation. Outside of the three narrow circumstances affirmed in *Moseley*, the standard to which the public body consults should be within its discretion.

C. CONCLUSION

15. The Respondent invites the court to dismiss the appeal and uphold the decision of the Court of Appeal.

ELENA CASALE
ALEX KANE
4 DECEMBER 2023