

**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**

BETWEEN:

EVELEIGH AND OTHERS (FORMERLY BINDER AND OTHERS)

Appellants

-and-

THE SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

**WRITTEN CASE FOR THE APPELLANTS
6 November 2023**

A. INTRODUCTION

1. The Appellant seeks permission to appeal the decision of the Court of Appeal (**‘the Court’**). This appeal concerns a general point of public importance; namely, the circumstances in which the “Gunning criteria”, derived from *R v Brent LBC ex p Gunning* 84 LGR 168 (“Gunning”), apply to public consultations.
2. Permission to appeal is sought on two grounds:
 - a. First, the Court was wrong to conclude that the Gunning criteria did not apply to the UK Disability Survey (the “Survey”) because of the nature of the exercise.
 - b. Secondly, the Court was wrong to conclude that the *Gunning* criteria do not apply to voluntary consultations.

B. SUBMISSIONS

Ground 1: the nature of the exercise

3. The Court erred in inferring 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].

4. The requirement that a consultation to which the *Gunning* criteria applies must concern a specific decision is arbitrary: there is no principled way of identifying a “specific decision”. Any consultation is inherently open-ended: “consulting about a proposal does inevitably involve inviting and considering views about possible alternatives: *R (Moseley) v Haringey LBC* [2014] 1 WLR 3947 (SC) §29 (“*Moseley*”).
5. Further, the *Gunning* criteria have applied to consultations where they have been broad and/or invited open suggestions on factors a decision-maker should consider.
 - a. In *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213 (CA) (“*Coughlan*”), “the consultation paper itself had an input from the applicant and her adviser [who] had made their view known” [§114].
 - b. In *Moseley*, the form of the consultation document did not prevent consultees from suggesting proposals; for example it included the prompt: “Please use the space below to make any other comments about our draft Council Tax Reduction Scheme” [§21].
6. Where, as in this case, a consultation seeks the views of marginalised or vulnerable individuals a lower degree of specificity is imposed: “the degree of specificity with which, in fairness, the public authority should conduct its consultation exercise may be influenced by the identity of those whom it is consulting” [*Moseley*, §28].
7. As at §5 of this Written Case, the requirement that the consultation is both “sufficiently ‘formative’” and where the “proposal has crystallised sufficiently” [§85] includes consultations seeking proposals or suggestions on a specific topic area. A key part of consultation is for consultees to identify and draw relevant factors to the attention of the decision maker.
8. It is arbitrary to require that a consultation that attracts the *Gunning* criteria must be concerned with a decision adverse to the direct interests of an individual, particularly when a consultation concerns a vulnerable or marginalised community. Formulations of this provision indicate possibility, rather than an absolute requirement: “whose legally protected interests may be adversely affected” (*Moseley* §38). The Court’s own formulation indicates possibility: “(usually adverse) impact” [§§84, 95].
9. Consequently, on a proper construction of the authorities, the following prerequisite factors are evident in the cases where the *Gunning* criteria have applied. The

consultation: (1) is proffered outwardly to affected individuals/ groups; (2) is at a stage where it puts forward specific proposals or requests suggestions on a specific topic; (3) it represents that the responses will inform the relevant decision.

- a. In *Moseley*, the consultation on the council tax reduction scheme was proffered to residents entitled to CTB, it put forward specific proposals on the Council Tax Reduction Scheme and represented that the responses would affect the relevant decision (“We want to know what you think of these proposals before reaching a final decision about the scheme we adopt” [§17]).
- b. In *Coughlan*, the consultation was proffered to the public [§15] and put forward specific proposals. The consultation made clear that the consultation responses would be considered when making the decision: “The health authority has to decide, in the light of all available evidence” [§53].
- c. In *Gunning*, the consultation was proffered to parents who had a “self-evident” interest in the education arrangements [p197]. The document requested suggestions on specific topics, and it was made clear that the recommendations would be considered by the local authority [p169].

10. These cases can be distinguished from *R (Plantagenet Alliance) v Secretary of State for Justice* [2015] 3 All ER 261, where the consultation was not made public; and from *R (Association of Personal Injury Lawyers) v Secretary of State for Justice* [2013] EWHC 1358 (Admin), where there was no indication that the consultation would be taken into account in the decision.

Ground 2: Voluntary consultations should be subject to the same procedural rigour as those arising from a duty

11. It is accepted that there is no *binding* authority on whether the Gunning criteria apply to voluntary consultations. Lord Woolf MR had held in *Coughlan* at §108 that if a consultation ‘is embarked upon, it must be carried out properly [that is, in accordance with *Gunning*]’. However, the equivalence is sound in principle and policy.
12. **First**, it underpins the objectives of the Gunning criteria: to ensure a minimum standard of fairness in public authorities’ consultations and to support the objectives of consultations themselves.

13. Irrespective of how a duty to consult arises in a particular case, the same common law duty of procedural fairness informs the manner in which the consultation should be conducted: *Moseley* §23. If an exercise is a consultation, then the *Gunning* requirements should govern its minimum standard of procedural fairness.
14. That passage dealt with the distinct *duties* to consult: the *Gunning* requirements applied where the duty arose by legitimate expectation as it did where generated by statute. There is no reason a distinction should be drawn where the consultation arises through a public authority's *decision* to consult, rather than by operation of a legal duty.
15. In *Moseley*, the court determined that there are three main purposes underlying the requirement to act fairly in consultations (*Moseley* §24): 1) the quality of decision-making is improved; 2) it avoids a sense of injustice on the part of those subject to the ultimate decision; 3) there is an important democratic purpose. These purposes are no less relevant to voluntary consultation, where an authority will necessarily have taken the view there is benefit in hearing views from the public, and would have agency and discretion in choosing whether to embark on consultation.
16. The *Gunning* criteria were endorsed by the Supreme Court as a "prescription for fairness" (*Moseley* §25). They are conditions for a consultation 'to have a sensible content' (*Gunning*, 189) and have equal force in relation to consultations of all sources.
17. First, the proposals must be at 'formative stage' at the time of consultation as to allow the proposal to be changed depending on the output: no less relevant if voluntary. Second, sufficient reasons must be given for an intelligent response: if an exercise is a genuine consultation by which views are sought in order to influence the decision(s) taken, there can be no objection to providing consultees with such information. Third, if adequate time for response is not allowed, then the consultation is self-defeating. Fourth, the product of consultation must be conscientiously taken into account when the decision is taken: there is otherwise minimal point consulting.
18. Public bodies retain significant discretion as to who, when, how and whether to voluntarily consult, those decisions only subject to rationality and, in appropriate cases, the Tameside duty of reasonable inquiry. It is submitted that where the public authority has embarked on consultation, it must consult fairly. This is not an unwarranted judicialisation of public life as held the Court below [§96].

19. **Second**, this approach has the advantage of simplicity, assisting the administration of justice and enhancing the accessibility and predictability of the law. Distinguishing between the standards of fairness applicable would risk significant amounts of litigation on whether a given consultation arises pursuant to a duty via statute, legitimate expectation or conspicuous unfairness, with procedural safeguards; or voluntary consultation, subject only to review for irrationality.
20. The alternative approach permits a public body to abdicate responsibility for a fair process by taking the line that ‘there was no obligation to consult, therefore there was no need to act fairly’. There is a perverse incentive for a public body to categorise a consultation as voluntary, and thus less susceptible to challenge.
21. **Third**, it is undesirable for various aspects of a single consultation exercise to carry different standards of procedural fairness. Consider that a public authority is carrying out a consultation pursuant to a statutory duty. It considers it necessary to consult more widely than the statutory terms. It enlarges the scope of its consultation to consult on surrounding matters outside the remit of its obligation. If there is a distinction between the standards required of 1) voluntary and 2) duty-driven consultations, *Gunning* applies to parts of the consultation but not to others.
22. The Respondent will submit that the imposition of requirements would disincentivise consultation by public bodies: consultation is beneficial, so this disincentive is detrimental. It is submitted however that the requirements are not onerous. Moreover, it is inconsistent to embark upon a process designed (per *Moseley* at §24) to enhance fairness, without complying with these basic *Gunning* requirements.

C. CONCLUSION

23. This Court is respectfully invited to allow the appeal and reverse the judgment of the Court of Appeal for the following reasons:
 - (1) BECAUSE the Court erred in its assessment of the nature of consultations to which the *Gunning* criteria apply
 - (2) BECAUSE there is no justification for a lower standard of fairness in voluntary consultations than where there is a duty to consult.

**ELENA CASALE
ALEX KANE
6 NOVEMBER 2023**