LEGITIMATE EXPECTATION AND THE DUTY TO CONSULT
An overview of recent case law

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I. INTRODUCTION

“A very broad summary of the place of legitimate expectations in public law might be expressed as follows. The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. If it has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation). If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation). If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation). To do otherwise, in any of these instances, would be to act so unfairly as to perpetrate an abuse of power.”

- Lord Justice Laws, Bhatt Murphy, paragraph 50

1. The principle of a legitimate expectation, entitling an individual or group of individuals to a particular procedural or substantive benefit, is one that has received a perhaps disproportionate amount of attention from the Courts, and yet its reach remains uncertain, and cases in this area continue to be decided with surprising conclusions.
2. The notion that ‘stakeholders’ should be consulted by government and public bodies before decisions which affect their interests are taken is one which has gained ground in recent years. The content and timing of such consultations, statutory or otherwise, is also a topic which has been, and continues to be, much-litigated. Such claims are often entwined with claims based on legitimate expectations.

3. The purpose of this paper is to consider the recent case-law in relation to circumstances in which an individual or group of individuals may legitimately expect to be consulted on a particular change in policy and when they may challenge the decision of a public body if it fails to do so.

*R (Bhatt Murphy) v Secretary of State for the Home Department* [2008] EWCA Civ 755

4. There is a recent and important decision of the Court of Appeal in *R (Bhatt Murphy) and others v Secretary of State for the Home Department* [2008] EWCA Civ 755. In this case the Court of Appeal was called upon to consider, as it now has on at least twelve occasions since the beginning of the decade, the principles which underpin the notion of legitimate expectation. The Court of Appeal used the case to provide a general overview of the case-law in this area, and as such is worth looking at in some detail.

5. *Bhatt Murphy* concerned the Secretary of State’s powers to compensate individuals who had been the victims of miscarriages of justice. There were in fact two parallel schemes, one statutory and one discretionary.

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6. On 19 April 2006 the Secretary of State delivered a ministerial statement, announcing two particular changes to the system in place:

(i) The discretionary scheme would be abolished with immediate effect, save as regards applications already received;

(ii) The costs payable to successful applicants for compensation would, with immediate effect, be paid by reference to the fees for publicly funded civil cases as per the Legal Help scheme contained in the Community Legal Service (Funding) Order 2000. Only work already done in respect of cases already received would be excluded from the change. Whereas previously the figures arrived at for costs were based on the private fee rates of the solicitors instructed, this being some three to five times the Legal Help rate substituted by the new decision.

7. The first decision was significant in particular in that the statutory scheme excluded cases where the Claimant’s conviction was quashed on an appeal brought within time. In those cases, a Claimant would have to rely on the discretionary scheme. The Home Secretary (then Douglas Hurd) had described this scheme by formal statement in 1985 to the effect that compensation could be paid to people who “have spent a period in custody following a wrongful conviction or charge, where I am satisfied that it has resulted from serious default on the part of a member of a police force or of some other public authority.”, or “in exceptional circumstances including where facts emerge that completely exonerate the accused person. However, the discretionary scheme would not provide compensation simply because at the trial or an appeal the prosecution was unable to sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought.”

8. The Court of Appeal heard that the Home Secretary now considered the existence of the discretionary scheme to be “confusing and anomalous” and could not be
justified in circumstances where it cost over £2m per year to operate, but benefited only between 5 and 10 applicants annually.

9. The second decision was to some extent ‘softened’ by a concession on the part of the Secretary of State (operating through the Legal Assessor) that the Assessor would be prepared to receive and consider representations that a particular case might merit the payment of solicitors’ costs above the Legal Help rate. This concession was directed particularly at the situation where work was done on the assumption that a higher rate would apply, which would not otherwise have been done.

10. The claimants fell into two groups: alleged victims of miscarriages of justice who had not yet lodged their claims under the discretionary scheme and would therefore be without remedy and, second, firms of solicitors who specialised in this form of work, which would become uneconomic under the new funding arrangements.

11. Both groups argued that the decisions were flawed for lack of a consultation of which they had a legitimate expectation.

12. The Court of Appeal used the case as an opportunity to review the case-law relating to legitimate expectations. As indicated above, the subject is one that has been considered by that Court on more occasions than might perhaps be desirable.

13. In Bhatt Murphy, Lord Justice Laws began by stating that:

“Legitimate expectation is now a well-known public law headline. But its reach in practice is still being explored. In one of the leading cases, Ex p Coughlan [2001] QB 213, Lord Woolf MR as he then was, giving the judgment of the court, described it as “still a developing field of law” (paragraph 59). The cases show that put broadly (there are refinements) it encompasses two kinds. There is procedural legitimate expectation, and there is substantive legitimate expectation. But in certain types of case these terms are more elusive than they appear. These
appeals therefore call for some account of the material principles, however well trodden the ground. I acknowledge that much of the ground is at the foothills. But the path falters a little further up.”

14. Laws LJ then proceeded to give a detailed overview of the subject from which it might be hoped that Courts subsequently might not need to revisit the same ground to the same degree. The outline given by Laws LJ in *Bhatt Murphy* can be summarised as follows.

*Procedural legitimate expectation*

(i) The ‘paradigm case’

15. There remains an important distinction between procedural legitimate expectation and substantive legitimate expectation.

16. Within procedural legitimate expectation, Laws LJ drew a further distinction between the “paradigm case” and the “secondary case” of procedural legitimate expectations. The ‘paradigm case’ arises where a public authority has provided an unequivocal assurance, whether by means of an express promise or an established practice, that it will give notice or embark upon consultation before it changes an existing substantive policy.

17. In the paradigm case the court will not allow the decision-maker to effect the proposed change without notice or consultation, unless the want of notice or consultation is justified by the force of an overriding legal duty owed by the decision-maker, or other countervailing public interest such as the imperative of national security (as in *CCSU*). There may be questions such as whether the claimant for relief must himself have known of the promise or practice, or relied on it.

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2 see *CCSU* [1985] AC 374 at 408G – H (Lord Diplock’s category (b)(ii)), *Ex p Baker* [1995] 1 AER 73 at 89 (Simon Brown LJ’s category 4, acknowledged by him to equate with Lord Diplock’s category (b)(ii): see p. 90), *Ex p Coughlan* at paragraph 57, p.242A – C: Lord Woolf’s category (b))
18. It is however more difficult to impose such limitations in a procedural case, as “the unfairness or abuse of power which the court will check is not merely to do with how harshly the decision bears upon any individual. It arises because good administration (“by which public bodies ought to deal straightforwardly and consistently with the public”: paragraph 68 of my judgment in Ex p Nadarajah [2005] EWCA Civ 1363) generally requires that where a public authority has given a plain assurance, it should be held to it.

Procedural legitimate expectation
(ii) The secondary case

19. There is then what Laws LJ referred to as the ‘secondary’ case of procedural legitimate expectation. This is in circumstances where there has been no previous promise or practice of notice or consultation. An example (given in Ex p Baker) is the case of Ex p Schemet [1993] 1 FCR 306 where the claimants were the parents of two children who went to a school outside the local authority’s district. The local authority had paid for the elder child’s travel costs, but then changed their policy. They stopped paying for the elder child’s travel, and never paid for the younger’s. There had been no promise or practice of notice or consultation. The Court nevertheless held that the claimants enjoyed a legitimate expectation that the benefit would continue in relation to the elder child until there had been communicated to them some rational ground for withdrawing it on which they had been given an opportunity to comment.

20. The second example referred to in ex p Baker is the Ex p Unilever case ([1996] STC 681). Unilever concerned the Inland Revenue’s treatment of a taxpayer’s claims for loss relief against corporation tax. A time limit for making such claims was stipulated in the legislation, but (as was common ground) the Revenue enjoyed a discretion to entertain late claims. On thirty occasions over a period of more than 20 years Unilever submitted late claims and the Revenue accepted them. But then for the accounting years 1986, 1987 and 1988, with no prior
notice, warning or consultation, Unilever’s claims were refused on the ground that they were not made within the statutory time limit. Sir Thomas Bingham MR as he then was said (691g):

“On the history here, I consider that to reject Unilever’s claims in reliance on the time-limit, without clear and general advance notice, is so unfair as to amount to an abuse of power.”

21. It is plain both from Sir Thomas Bingham’s judgment and that of Simon Brown LJ (Hutchison LJ added no reasoning of his own) that the court regarded the Revenue’s conduct as outrageous (see for example Simon Brown LJ at 697c: “so outrageously unfair that it should not be allowed to stand”).

22. Laws LJ’s view was that this, secondary, case of legitimate expectation will not often be established. Where there has been no assurance either of consultation (the paradigm case of procedural expectation) or as to the continuance of the policy (substantive expectation), there will generally be nothing in the case save a decision by the authority in question to effect a change in its approach to one or more of its functions. And generally, there can be no objection to that, for it involves no abuse of power.

23. In identifying the circumstances in which this secondary case of procedural expectation will run, Laws LJ indicated that the key feature will be that the impact of the authority’s past conduct on potentially affected persons must, “be pressing and focussed”:

“… One would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit: not necessarily for ever, but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult.”
24. This paper is primarily concerned with the duty to consult and with procedural legitimate expectations, and will not dwell on the issue of substantive legitimate expectations. A substantive legitimate expectation arises where the court allows a claim to enforce the continued enjoyment of the content or substance of an existing practice or policy, in the face of the decision-maker’s ambition to change or abolish it. Laws LJ in Bhatt Murphy distinguished the two by noting that in the procedural case we find a promise or practice of notice or consultation in the event of a contemplated change. In the substantive case we have a promise or practice of present and future substantive policy. In such cases there will either be an authoritative representation of what the relevant policy is and will continue to be, or the simple fact of a policy being settled and established in practice.

25. Review of the authorities, as carried out in Bhatt Murphy shows that where a substantive expectation is to run, the promise or practice on which it is based must be more than a simple assumption that a policy with no terminal date will continue in effect until rational grounds for its cessation arise. According to Laws LJ it must rather “constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy’s continuance is assured.” Two “concrete instances” of this type were said to be Ex parte Khan [1985] 1 AER 40 and ex p Coughlan [2001] QB 213.

26. The focus in this paper is however on cases where there it is alleged that there is a procedural legitimate expectation.

Cabinet Office Code of Practice on Consultation

27. In Bhatt Murphy, in relation to their claim for procedural legitimate expectation, the Claimants ran a bold argument based on the Cabinet Office Code of Practice and certain statements made on the Home Office website. The reason for this was no doubt that if they could show that this effectively constituted a ‘promise’, then they would bring themselves into the ‘paradigm case’ of procedural legitimate
expectation and stand a better chance of persuading the Court that a legitimate expectation had been created.

28. The point was potentially of very wide application, as the Cabinet Office Code of Practice (now covered by the Department for Business, Enterprise & Regulatory Reform) applies across all government departments, and is also followed by a large number of non-governmental and arms-length public bodies. There is a published list of departments and agencies following the code.

29. The guidance in relation to the code states as follows:

“This Code sets out the approach the Government will take when it has decided to run a formal, written, public consultation exercise. It supersedes and replaces previous versions of the Code. The Code does not have legal force and cannot prevail over statutory or mandatory requirements. The Code sets out the Government’s general policy on formal, public, written consultation exercises. A list of the UK departments and agencies adopting the Code is available on the Better Regulation Executive’s website. Other public sector organisations are free to make use of this Code for their consultation purposes, but it does not apply to consultation exercises run by them unless they explicitly adopt it.”

30. The list of departments and agencies following the code is available at:
http://www.berr.gov.uk/whatwedo/bre/consultation-guidance/page44420.html

31. The Code had been summarised by May LJ at first instance in Bhatt Murphy as follows:

“23. The Prime Minister’s Foreword introduced [the Code] with a statement that effective consultation is a key part of the policy making process. The first of six criteria adverts to wide consultation throughout the process allowing a minimum of twelve weeks for written consultation at least once during the development of the policy. The Introduction states that the Code and the criteria apply to all public consultations by government departments and
agencies... The Code states that it does not have legal force but should generally be regarded as binding on United Kingdom departments and their agencies unless Ministers conclude that exceptional circumstances require a departure from it. Ministers retain their existing discretion not to conduct a formal written consultation exercise under the terms of the Code, for example where the issue is very specialised and where there is a very limited number of so-called stakeholders who have been directly involved in the policy development process.”

32. Laws LJ added two further citations from the Code, the first also from the Prime Minister’s Foreword:

“[The original Code] has been effective in raising both the quality and quantity of consultation carried out by government. We consult more extensively now than ever before.”

33. The Claimants also relied on the Home Office website, which at the relevant time contained the following:

“About us

Consultations – have your say

Before changing policy, the Home Office publishes consultation papers.

These set out Government proposals on a particular issue and ask for responses from people and organisations with specialist knowledge in that area. We also value responses from the general public.

The responses received help to ensure that any proposed changes to the law will have a real, practical impact.

All Home Office open consultation papers are available in the current consultations section of this website. We welcome your views.”

34. The Court of Appeal however wholly rejected these arguments. As to the Code of Practice, the Court took the view that the Code is to apply whenever it is decided
as a matter of policy to have a public consultation, and does not stipulate the circumstances in which such consultation must occur. Further, that Ministers retain their existing discretion not to conduct a formal written consultation exercise under the terms of the Code. The Court found that it was not possible to read this document as any form of governmental promise or undertaking that policy changes will never be made without consultation. “It would be very surprising if it could be so read, not least because a decision in a particular case whether to consult is itself a policy decision. Rather the Code prescribes how generally public consultation should be conducted if there is to be public consultation.” (following May LJ at first instance in Bhatt Murphy)

35. The Court gave equally short shrift to the statement on the Home Office website, ruling that “in context”, the sentence is no more than an explanation of the nature and function of the consultation papers made available in that section of the website.

36. As they were not able to bring themselves this within the “paradigm case” for a procedural legitimate expectation, the Claimants in Bhatt Murphy had to fall back upon the “secondary” type of legitimate expectation discussed above.

Secondary case of procedural legitimate expectation in Bhatt Murphy

37. The argument made, based on Ex p Schemet [1993] 1 FCR 306, was that a beneficiary of a public authority’s policy enjoys a legitimate expectation that the policy will continue in being until rational grounds for its withdrawal have been communicated to him and he has been given an opportunity to comment. The Court of Appeal felt itself able to reject giving such a broad interpretation to Schemet, and that decision must now be considered as effectively doubted.

38. A success in relation to the secondary class of procedural expectation would in Laws LJ’s view be an exceptional case. Bhatt Murphy did not fall within this exceptional class. Such cases “will occur only where the impact of the authority’s past conduct on potentially affected persons is “pressing and focussed”, and in reason such person or persons have substantial grounds to expect that the
substance of the relevant policy will continue to enure for their particular benefit.”
Nothing of the kind was considered to exist in *Bhatt Murphy*.

Consequence of the decision to consult, and the decision in *Capenhurst*

39. *Bhatt Murphy* shows the difficulty that public bodies can be put in when they are placed under pressure to carry out consultation. In the absence of a clear promise (a paradigm case) there will often be a good argument that there is no duty to consult that arises. Nevertheless, the question of whether consultation is required in a secondary case of procedural legitimate expectation will often be difficult, with a risk of a finding that there was legitimate expectation of consultation.

40. As a result, there is sometimes an assumption that it is safer for the body to agree to demands that it consults. However, by so doing the chances of a successful challenge may in fact improve, as it is well-established that irrespective of whether a public was in fact required to consult, if it decides to do so, it must do so “fairly”, an obligation which can become onerous. This follows from dicta in *ex p Coughlin*.

41. A very good example is the case of *R(Capenhurst) and ors v Leicester City Council* [2004] EWHC 2124 (Admin), which like *Bhatt Murphy* concerned a reduction in a level of funding previously provided. The case concerned applications to quash six decisions by the Council to stop funding six voluntary organisations. This arose as a result of a change in political control of the Council and a consequent change in policy so as to restrict funding to those entities providing services that the Council was itself legally obliged or strongly expected to provide itself (“core services”). The effect of the new policy was that all six organisations were deemed to be providing "non-core" services. Five of the organisations came under the Council’s education department, and the sixth came under the social care and health department.

42. The Council informed the six organisations that it was minded to cease funding them and sought their comments. The organisations in turn made representations as to why funding should continue. The Council considered those responses but in all cases confirmed its provisional decision to cease funding. The case advanced
by the organisations was that the Council’s decision-making process had been unfair because although the Council had endeavoured to consult with the organisations before making the decisions, it failed to do so properly since it did not explain the criteria which it would apply before making its final decision whether to continue funding.

43. The Court upheld these complaints. Silber J noted that “irrespective of the Council was obliged to consult the …organisations, if it did actually consult those bodies, the Council had to do so fairly”. The Court then held the Council to a high standard of fairness in relation to the consultation that it undertook, and concluded that it had not reached that standard in respect of any of the organisations, indeed finding that the Council had made a number of separate failures.

44. With the five organisations funded by the education department, the Council had failed to consult properly with them because it did not make clear the change from funding core services to funding statutory but not strategic services. The services provided by these organisations were “potentially core” so that there was a real possibility that they could have altered the Council's decisions and accordingly the decisions to discontinue funding had to be quashed. Two of those organisations were also entitled to have the decisions quashed, applying Coughlan and Doody, because the Council had failed to explain that when determining whether to continue funding it was only concerned with the number of adults enrolled on courses supplied or commissioned by the local education authority. Further, four of those organisations were entitled to have the decisions quashed because the Council failed to make clear that it was considering their financial viability as part of the decision-making process. There was a real possibility that the Council would have reached a different decision if the organisations had known that and been able to make representations.

45. The change of funding policy (to statutory and not strategic services) had been explained to the sixth organisation (funded by the social care department). However, that organisation also succeeded in having the decision in its case quashed because the Council did not explain that a critical test for determining what was a core service for the purpose of eligibility for funding in that
organisation’s area was the fair access to care services criterion. Proper consultation was required for the organisation to appreciate that this criterion was being used. If it had been informed about the significance of that point there was a real possibility that the outcome might have been different.

_LB Hillingdon v Lord Chancellor_

46. The recent decision in _London Borough of Hillingdon (and ors) v Lord Chancellor and ors_ [2008] EWHC 2683 (Admin) (6.11.08, a decision of a strong Divisional Court of Dyson LJ, Bennett J and Pitchford J) presents another useful example of the nature of the obligation in similar circumstances, and a further limitation on its exercise.


48. The Orders came into force on 1 May 2008, and put into effect the Lord Chancellor’s prior decision that the principle of “full cost recovery” in setting court fees should be applied to public law family proceedings. The effect was described by Lord Justice Dyson as “truly striking”. They raised the fees for public law child care applications from £150 to £4825 and the fees for placement order applications from £100 to £400.

49. The claimants argued that the Fees Orders were unlawful on grounds including that they were made without any consultation as to the principle of whether court fees paid in public law family proceedings should be increased to “full-cost” levels. They accepted that the Lord Chancellor was not under a statutory obligation to consult the affected local authorities before taking the decision. Instead, they relied on the common law duty to act fairly and/or the doctrine of procedural legitimate expectation. Underpinning both arguments was the contention that the introduction of the principle of full cost recovery of court fees in public law family cases deprived the affected local authorities of a benefit that they had previously enjoyed.
50. The Claimants accepted that there was no promise of consultation in this case. Nor could they rely on any established practice of consultation prior to the making of decisions of this kind. They relied solely on the fact that the local authorities had enjoyed the benefit of subsidised court fees since the 1989 Act came into force. The argument was that this long-standing enjoyment itself gave rise to a legitimate expectation that they would be consulted before a decision was taken to remove it.

51. This argument was rejected by the Divisional Court. As to the challenge of lack of consultation on the proposal, the starting point was said to be s.92 of the Courts Act 2003, which both conferred on the Lord Chancellor the power to prescribe court fees and, in s.92(5), set out a list of persons with whom he was under a duty to consult before doing so.

52. Subsection (5) provides that before making an order under the section, the Lord Chancellor “must consult” the Lord Chief Justice, the Master of the Rolls, the President of the Queen’s Bench Division, the President of the Family Division, the Chancellor of the High Court, the Head of Civil Justice and the Deputy Head of Civil Justice (if there is one). Subsection (6) provides that before making an order in relation to civil proceedings, the Lord Chancellor must consult the Civil Justice Council. Subsection (7) provides that the Lord Chancellor must take such steps as are reasonably practicable to bring information about fees to the attention of persons likely to have to pay them.

53. The provisions of the statute were considered by the Court to militate strongly against the idea that there should co-exist a common law duty to consult more widely.

54. Parliament, said Dyson LJ, is to be presumed to have considered that the degree of consultation specified in section 92 of the 2003 Act was sufficient. He noted in particular that one of the consultees was the President of the Family Division. He concluded that there was no authority for the proposition that, where Parliament has prescribed the nature and extent of consultation, a wider duty of consultation
may exist at common law (in the absence of a clear promise or an established practice of wider consultation by the decision-maker).

*Statutory duty to consult*

55. The *Hillingdon* decision shows how a statutory duty to consult can constrain the common law duty and forestall the creation of a legitimate expectation. More commonly, the effect of a statutory duty is to create a duty to consult where none would otherwise exist. Below are examples to show how the statutory obligation can be used as the basis for a challenge in different contexts.

*R(Breckland District Council & Ors) v The Boundary Committee & Ors* [2009] EWCA Civ 239

56. In this case, the challenge by way of judicial review was brought by local authorities against proposals for reorganisation of local government into a unitary authority by the defendant, the Boundary Committee, a parliamentary commission. The claim was that the boundary committee had failed to comply properly with its statutory duty to consult on its proposals for a unitary local authority in Devon and Norfolk. The duty arises under s.6 of the Local Government and Public Involvement in Health Act 2007.

57. The Secretary of State had invited local authorities to submit proposals for local government structural and boundary changes from two tiers to a single tier local government. Thereafter, she had requested the Boundary Committee to advise whether there might be alternative unitary solutions for Norfolk and Devon respectively. The Committee drafted a proposal for Norfolk and one for Devon under the impression that it was only entitled to submit one alternative proposal. The documents set out stages of review, which included inviting representations on the Committee's draft proposals.

58. The Boundary Committee decided to carry an assessment of the affordability of its draft proposals once it had reached a conclusion on the draft proposals and had published them for public comment. It did not anticipate publishing the financial
information needed from the local authorities to carry out the affordability assessment for public comment. Later, the Committee made financial information in the form of workbooks, which were relevant to the issue of affordability, available on its website. The local authorities challenged the Boundary Committee’s process by way of judicial review.

59. The main issues were the extent of the Committee’s duty to consult on its draft proposals and, in particular, whether there was a duty to consult on affordability; whether the consultation could be carried out in stages; whether the Committee had sufficiently consulted on affordability; whether the Committee could consult on more than one alternative draft proposal; whether it had been wrong to exclude a comparison of any proposed unitary scheme with the benefits of the two tier structure and whether it was obliged to compare any alternative proposals with the original proposals submitted to the secretary of state.

60. The High Court refused the challenge at first instance (2008) EWHC 2929 (Admin), (2008) NPC 131 and (2009) EWHC 4 (Admin), (2009) 2 EG 81 (CS). On appeal, the Court of Appeal made the point that when consultation is carried out, it must be carried out properly (as per ex p Coughlan, and discussed above). However, the Boundary Committee had a degree of flexibility as to how consultation should be carried out. The flexibility derived from the nature of the subject matter and the words "take such steps as they consider sufficient" in s.6(4)(b) of the Act.

61. The key conclusions of the Court of Appeal for the purposes of this paper were that:

(i) The critical parts of s.6(4) were the requirement to publish a draft of the alternative proposal and the requirement to enable "persons who may be interested" to be informed of the draft proposal so that they may make representations about it.
In order to enable effective representations to be made, it was necessary to publish a summary of the reasons why a change was proposed and in particular why the proposed change was considered to meet the secretary of state's criteria.

It was a matter for the Boundary Committee how it structured the draft proposal but it was required to publish a draft of the whole proposal, not just part of it.

Given the nature of the subject matter, the words "persons who may be interested" included the public as a whole.

Consultation included publishing enough material to enable all those interested to respond intelligently. That in turn required the information to be published in a form which members of the public may understand.

Consultation could proceed in stages. Although s.6(4) might suggest that the draft of the full proposal would be the subject of a single publication, the section did not compel that rigid interpretation. If publication was to be in stages, the full package had to be sufficiently identified as part of the final stage of publication, and there had to be adequate time after the publication of the final part of the package for the package to be considered as a whole and for representations to be made.

The appeal was allowed only on the narrow basis that the Boundary Committee promoted their original draft proposals for Norfolk and Devon upon the mistaken legal basis that it was only open to them to consult upon and recommend a single proposal; and that their consultation in the Autumn of 2008 on affordability was not then adequate because it did not give those consulted adequate time to consider and make representations about duly formulated financial materials.
63. The Court however rejected the argument that these errors were so fundamental that the Boundary Committee should be required by the court to start all over again, noting that it would be unusual for the court to “quash” part of an incomplete process. What had been done was not “broken beyond repair”, and the priority was for the Committee to address consideration of further possible alternative proposals, with proper consultation if any of them is to be recommended as an alternative proposal; and to give adequate time for local authorities and the public to make representations on the affordability of the existing alternative proposals after appropriate publication of financial information in a sufficiently digestible form.

Healthcare consultations

64. Breckland concerned a specific statutory duty to consult imposed on the Boundary Committee under s.6 of the Local Government and Public Involvement in Health Act 2007. A more frequent basis for challenges over lack of consultation arises in the health sector from the obligations formerly in s.11 of the Health and Social Care Act 2001 and now in s.242 of the NHS Act 2006. Those provisions create statutory duties on all NHS bodies to have in place arrangements for patients and carers to be involved in, and consulted on, the planning and development of NHS services and on decisions affecting the operation of those services. In contrast to the broadly-defined duties on the Boundary Committee (to “take such steps are they consider sufficient”) the duties in healthcare cases are extensive. Indeed, a frequent dispute in such cases is whether ostensibly short-term clinical decisions (temporarily reducing the number of beds on a ward, for example) may trigger obligations under the section. The section is supplemented by guidance from the Department of Health, which NHS bodies will also be expected to follow.

65. The section is also different in that it gives rise to a whole set of related issues. The necessary involvement used often to be assisted by Patient & Public Involvement Forums (PPIFs), but mere engagement with the forum did not by itself satisfy the statutory requirements. The Forums have now been abolished.
and their replacement takes the form of a new type of body, LINks (Local Involvement Networks). There is also a separate but connected, statutory obligation imposed upon NHS bodies by Section 244 of the Act to consult with Local Authorities Overview & Scrutiny Committees, which are local Government organisations rather than NHS bodies.

66. As a result, the case-law in this area tends to be particularly fact-specific. Nevertheless, it provides some general guidance which is relevant to the subject of this paper. Of the recent cases:

(i) **Bullmore & Anor v West Hertfordshire Hospitals NHS Trust** [2007] EWHC 1636 (Admin), dealing with the obligations under the Health and Social Care Act 2001, Walker J noted that the general principles applied that:

- As per *ex parte Coughlan*, consultation must be undertaken at a time when proposals are still at a formative stage. It must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.

- As per *R v Secretary of State for Social Services ex parte Association of Metropolitan Authorities* [1986] 1 WLR 1, at p 4: ‘In any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice.’; and

- In conclusion, Walker J noted that “there is an overriding need for fairness in any consultation process. The outcome of consultation must be taken into account with a receptive mind. There is, however, no duty to obtain the agreement or consensus of the consultees before acting.”
(ii) Enfield Borough Council, R (on the application of) v Secretary of State for Health & Ors [2009] EWHC 743 (Admin). Geraldine Andrews QC, sitting as a High Court Judge, adopted the guidance in R v Brent LBC, ex parte Gunning [1985] 84 LGR 168 (approved in Coughlan) that there are four necessary elements to statutory consultation:

a. it must take place at a time when proposals are still at a formative stage;
b. the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response;
c. adequate time must be given for consideration and response; and
d. the product of consultation must be conscientiously taken into account in finalising any statutory proposals.

67. Enfield is also an illustration of another feature of consultation cases of this type, namely of the paramount importance of a timely challenge, and difficulties in calculating when time will start to run for the purposes of limitation.

68. At the heart of its complaint in Enfield was the allegation that a decision was taken by the PCTs to discontinue specific NHS services, i.e. the full Accident & Emergency service and the consultant-led maternity service provided at Chase Farm Hospital, without carrying out the prior consultation of those liable to be affected by it as required by s.242.

69. Briefly, the sequence of events had been as follows. A Project Board had considered the potential reconfiguration of services, and shortlisted four possible reconfiguration scenarios. Following a meeting between the Chief Executive of PCT, the Enfield Overview and Scrutiny Committee and certain Enfield Councillors, a fifth option was added (Option E), involving keeping the same services on the site. The project Board then considered the five scenarios with
input from specialist consultants, and concluded that they would continue to consider only 2 of the options (not including Option E). It was decided that consultation would only take place in relation to those two options. The Joint Scrutiny Committee thereafter decided to refer the question to the Secretary of State. Ultimately the Secretary of State decided that he was content with the proposals. The challenge by way of JR was not brought until the last day of the three months after that decision.

70. The potentially important point is that the Court indicated that the reference to the Secretary of State by the Joint Scrutiny Committee was not an alternative to judicial review: i.e. that JR should have been launched within 3 months of the PCT’s decision if it was felt that the consultation was unlawful, rather than awaiting the outcome of the Secretary of State’s determination. Further, and the point that was to prove fatal to the Claimants, having waited for the Secretary of State’s decision, the decision then must have been challenged as soon as possible, and waiting until the end of the three months was unjustifiable.

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