

CONSULTATION AND LEGITIMATE EXPECTATIONS

Clive Sheldon QC

Consultation: What needs to be done?

1. Whether or not there is in law an obligation to consult, where consultation is embarked upon it must be carried out *fairly*. What is 'fair' will obviously depend on the circumstances of the case and the nature of the proposals under consideration: see R (Edwards) v Environment Agency [2006] EWCA Civ 877 per Auld LJ at [90].
2. The rather open-ended doctrine of fairness means that different judges could reach different views on the lawfulness of the consultation process on the same facts. This raises the possibility that the underlying merits of the decision in question could (subconsciously perhaps?) influence the outcome of any challenge. If so, sensible guidance for decision-makers would be to approach consultation with more care and seriousness when the subject-matter is likely to prove particularly controversial.
3. Unless there are statutorily prescribed procedures, and subject to the overall requirements of fairness, the decision-maker will usually have a broad discretion as to *how* a consultation exercise should be carried out (see R (Greenpeace) v. Secretary of State for Trade & Industry [2007] EWHC 311 (Admin) at [62] per Sullivan J); and *what* should be consulted upon (see The Vale of Glamorgan v. The Lord Chancellor and Secretary of State for Justice [2011] EWHC 1532 (Admin) at [25])(challenge to decision to close Barry Magistrate's Court: 'In a context where [the Lord Chancellor] was rationalising the court estate, he was perfectly entitled to conclude that he would consult only about proposed closures').

- I. The 'Gunning' principles

4. The decision-maker's discretion is not unbounded, however, as it is commonly accepted that certain fundamental propositions must be adhered to. These propositions are known as the *Gunning* (or *Sedley*) principles, having been propounded by Mr. Stephen Sedley QC and adopted by Mr. Justice Hodgson in R v. Brent London Borough Council, ex parte Gunning (1985) 84 LGR 168 at 169. They were subsequently approved by Simon Brown LJ in R v. Devon County Council, ex parte Baker [1995] 1 All.E.R. 73 at 91g-j; and by the Court of Appeal in R v. North and East Devon Health Authority, ex parte Coughlan [2001] QB 213 at [108].

5. The *Gunning* principles are that:
 - (i) consultation must take place when the proposal is still at a formative stage;
 - (ii) sufficient reasons must be put forward for the proposal to allow for intelligent consideration and response;
 - (iii) adequate time must be given for consideration and response; and
 - (iv) the product of consultation must be conscientiously taken into account.
 - (i) 'Proposal at a formative stage'

6. The obvious point of *Gunning* principle (i) is that the decision-maker cannot consult on a decision that it has already made. Otherwise, consultation is not only unfair – the outcome has been pre-determined -- but it is pointless.

7. This principle does not mean that the decision-maker has to consult on all possible options of achieving a particular objective, even options which have at some point been 'developed, crystallised, canvassed and considered' (R v. Worcestershire Health Council, ex parte Kidderminster & District Community Health Council [1999] EWCA (Civ) 1525, per Simon Brown LJ).

8. A decision-maker can consult on a 'preferred option' (see Nichol v Gateshead Metropolitan Council (1988) 87 LGR 435), and even a 'decision in principle', so long as its mind is genuinely ajar. As pithily expressed by Neil Garnham QC (and approved by Owen J) in Royal Brompton & Harefield NHS Foundation Trust v Joint Committee of Primary Care Trusts [2011] EWHC 2986 (Admin) at [16], 'to have an open mind does not mean an empty mind.'

9. In the recent Brent Libraries case, R(Bailey) v Brent LBC [2011] EWHC 2572 (Admin), Ouseley J. stated at [90] that:

I see no conflict between the Council keeping an open mind and its consulting on the preferred route identified by officers and approved by the executive for consultation in November 2010. I accept Ms Laing's submission that the Council was entitled to consult on the proposals which it had approved for consultation, rather than on a series of options which it did not propose. A lawful consultation process does not require that all the anterior phases in the selection of a preferred course be formally and specifically opened to consideration. There was no evidence that the Council was unwilling to reconsider its proposals in the light of the consultation process if a strong enough case had been made. The Council was not obliged to consult on alternative means of achieving the same ends; there is no such general principle and such a requirement would make consultation inordinately time-consuming and complex. Nor could the absence of such consultation show that the council had pre-determined the issues: *Vale of Glamorgan Council v Lord Chancellor* [2011] EWHC 1523 (Admin).

10. Where a decision-maker has formed a provisional view as to the course to be adopted, or is 'minded' to take a particular course subject to the outcome of consultations, it is expected that those being consulted should be informed of this 'so as to better focus their responses' (see R (Sardar) v. Watford Borough Council [2006] EWHC 1590 (Admin) at [29] per Wilkie J).

11. Whether or not a decision-maker will be found to have closed its mind to the outcome of consultation will be a question of fact, based on the evidence. The fact that officer A or employee B may have said that the decision had been made, or words to that effect, will not usually impress the Court that the public body's mind has been made

up, where such officers and employees are not the decision-makers. The situation may be more problematic where the person making the statement *is* the decision-maker. He or she may be seen as having pre-determined the outcome. It is advisable, therefore, that where decision-makers are called upon to talk about the proposal before the formal decision is made (e.g. public meetings to discuss the proposal; correspondence with constituents) they use more nuanced language (e.g. talk about 'if' the decision goes ahead). Similarly, actions that would or might only be taken if a decision has already been made should also be avoided where possible, or at least rationally explained: eg. it is best not to issue notices of dismissal for key workers whilst the public body is consulting on a decision to close the facility where they are working.

12. Although the Court will not ordinarily interfere with the decision-maker's choice as to what is to be consulted on, there are 'exceptional' cases (as explained by the Divisional Court in Vale of Glamorgan), where consultation was found to be too restricted, and it was held that other possible proposals should have been consulted on.
13. In R (Madden) v. Bury MBC [2002] EWHC 1882 (Admin), the Court was considering a challenge to the closure of two local authority residential care homes. The Court held that the reasons given for closing the residential care homes were false or misleading and, in the context of that case, "a proper understanding of the true reasons for the proposed closure would require at the least a comparison with the other home that the council thought it preferable to retain", and there was no indication in the consultation papers that representations could be made about closing the other homes.
14. In R (Medway Council) v. Secretary of State for Transport [2002] EWHC 2516 (Admin), the Government consulted over the future of air transport, and expressly stated that the consultation would not include options for new runways at Gatwick airport. The Court accepted a submission that the question of future runways at

Gatwick would have to be considered at some point in time. If that consideration took place after Government policy about the future of air transport had been formed, it would be far more difficult to overturn that policy. The issue of Gatwick should therefore have been considered at the stage when the general policy about the future of air policy was being considered, so as to ensure that there was a fair and equal playing field between competing proposals. Otherwise, Gatwick was getting an unfair advantage.

(ii) Sufficient reasons to allow for intelligent consideration and response

15. *Gunning* principle (ii) means that consultees should be made aware of the basis on which a proposal for consultation has been considered and will thereafter be considered. Those consulted should be aware of the criteria that will be applied when considering proposals and what factors will be considered ‘decisive’ or ‘of substantial importance’ at the end of the process: R (Capenhurst) v. Leicester City Council [2004] EWHC 2124 (Admin) at [46], approved by the three-judge Divisional Court in Robin Murray & Co. v. The Lord Chancellor [2011] EWHC 1528 (Admin) at [37(4)].

16. A corollary of this principle (as Owen J. explained in the recent Royal Brompton case concerning the reconfiguration of paediatric congenital cardiac services in England¹), ‘the information contained in a consultation document should not be as inaccurate or incomplete as to mislead potential consultees in their responses.’ Inaccurate or incomplete information may have the effect of precluding an ‘informed and intelligent response’ to the disadvantage of a party that may be affected by the decision. This is especially important where that information ‘is outside the knowledge of those consulted, and upon which they are therefore obliged to rely in formulating their response.’ See Royal Brompton at [25].

¹ The challenge was brought by the specialist heart and lung unit at the Royal Brompton Hospital. The target of the claim was the decision of the Joint Committee of Primary Care Trusts (JCPCT) not to include an option contemplating the retention of three, rather than two, paediatric congenital cardiac facilities in London. The preferred option, on which the JCPCT had consulted, was to retain two other providers in London, with the Royal Brompton Unit closing.

17. There is considerable room for argument in any case as to how much information needs to be provided. Where the group to be consulted are particularly expert, then greater detail may be required. Even if not expert, information must be published in a form which consultees can understand: see R (on the application of Breckland District Council) v The Boundary Committee [2009] EWCA Civ 239 (proposals for local government structural and boundary changes from two tiers to a single tier of local government: 'There is, we think, much to be said in favour of the proposition that the financial information was complicated and indigestible').

18. Ordinarily, it is not necessary for the decision-maker to circulate the submissions of those who respond to the consultation to all others who have responded to it: see e.g. R (Smith) v. East Kent Hospital NHS Trust [2002] EWHC 2640 (Admin) at [45]. As Lord Woolf MR reminded us in Coughlan at [112]:

'consultation is not litigation': the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.'

(my emphasis). If submissions or advice are not shared with consultees then the decision maker runs the risk that it will take into account incorrect or irrelevant material. That, however, is a different matter.

19. Although in general there is no obligation on the decision-maker to communicate advice received from officials or internal material or information to consultees, there may be exceptions. In Robin Murray & Co., the Divisional Court explained at [47] that such cases will be 'where the matters which have emerged lead the public authority to wish to do something fundamentally different from the proposals consulted upon, or fairness otherwise requires further consultation on a matter or issue that has been

thrown up. One such situation may be where the internal material undermines the value of the responses that have been made to a consultation.'

20. Similarly in R. (on the application of Edwards) v Environment Agency [2006] EWCA Civ 877 at [103], where Auld L.J. said:

"In general, in a statutory decision-making process, once public consultation has taken place, the rules of natural justice do not, for the reasons given by Lord Diplock in *Bushell*, require a decision-maker to disclose its own thought processes for criticism before reaching its decision. However, if . . . a decision-maker, in the course of decision-making, becomes aware of some internal material or a factor of potential significance to the decision to be made, fairness may demand that the party or parties concerned should be given an opportunity to deal with it."

(iii) Adequate time for consideration and response

21. Unless statutory time requirements are prescribed, there is no necessary time frame within which the consultation must take place. The decision-maker may have adopted a policy as to the necessary time-frame (e.g. Cabinet Office guidance, or compact with the voluntary sector), and if it wishes to depart from that policy it should have a good reason for doing so. Otherwise, it may be guilty of a breach of a legitimate expectation that the policy will be adhered to.

22. Where the need to make a decision is urgent, the Courts will tolerate shorter periods for consultation. In the recent *BSF* litigation, Holman J. could 'see no pressing reason why' the Secretary of State 'could not have given to the seven local authorities who already held post January OBC approval a short opportunity (perhaps only of three weeks or so) to press their case for any one or more of their projects to be saved' (see [2011] EWHC 217 (Admin) at [94]). Of course, as has been pointed out, the Secretary of State gave the local authorities *no* opportunity at all to press their case.

23. In one of the recent library closure cases, R. (on the application of Green) v Gloucestershire CC [2011] EWHC 2687 (Admin), HHJ McKenna rejected at [137],

[141] a submission that the consultation period, which lasted from 15th December 2010 to 14th January 2011, and included the Christmas and New Year breaks, and coincided with very severe weather conditions, was too short for so serious an issue. In ex parte Baker, however, five days was considered too short for consultation on the closure of residential homes.

24. Decision-makers will have to form a judgment as to what period of time is appropriate for the consultation exercise in issue. Where there has been prior discussion about the issue, then it may reasonably decide to limit the time for formal consultation. On the other hand, where the information to be disclosed is complex, or not well known to those consulted upon, it may consider that a greater period of consultation is called for.

(iv) Conscientious consideration of the fruits of consultation

25. The fruits of consultation must be conscientiously considered. This ties in with the first *Gunning* principle which is really a proxy for whether the decision-maker has made up its mind. If the decision-maker does not properly consider the material produced by the consultation, then it can be accused of having made up its mind; or of failing to take into account a relevant consideration.

26. The decision-maker does not have to read personally every response provided in the consultation process. However, where a summary is provided, this will need to be comprehensive and accurate. It is always sensible to make available to the decision-maker all of the underlying materials, so that they can access them if they wish.

II. Who should be consulted?

27. A key question in any consultation process will be to identify the pool of persons or bodies *who* should be consulted.

28. In R (Milton Keynes Council) v Secretary of State for Communities & Local Government [2011] EWCA Civ 1575, the Court of Appeal (per Pill LJ at [32]) recently rejected the submission that ‘a decision-maker can routinely pick and choose whom he will consult. A fair consultation requires fairness in deciding whom to consult as well as fairness in deciding the subject matter of the consultation and its timing.’ There is no ‘general principle that it is for the decision-maker alone to decide whom to consult’.
29. Where there are large numbers of individuals who are affected, it may be appropriate to consult with their representatives (e.g. trade unions, professional bodies). In British Medical Association v. Secretary of State for Health [2008] EWHC 599 (Admin), for instance, a case concerning changes to the way in which doctors’ pension pots would accrue, Mitting J. held that it was sufficient to discharge the consultation obligation for the Minister to have engaged in correspondence with doctors’ leaders. The Court did not say that there needed to be consultation with individual doctors themselves.
30. Similarly, in R. (on the application of Staff Side of the Police Negotiating Board) v Secretary of State for Work and Pensions [2011] EWHC 3175 (Admin) it was accepted by the Claimants that if there had been an obligation to consult on the changes to indexation for public sector pensions from Retail Price Index to Consumer Price Index, this should have taken place with the relevant trade unions and not with each of the millions of affected members of the various pension schemes.
31. In R. v Devon CC Ex p. Baker [1995] 1 All E R 73, a case concerning the closure of a residential home, Simon Brown LJ did not say that residents had to be consulted individually before the decision could be made (at 91e).

III. When is fresh consultation required?

32. A decision-maker is faced with a conundrum where it has genuinely considered consultation responses and wants to adjust its original proposals, or where circumstances have changed since consultation began. Is the decision-maker required to consult again?

33. The issue was discussed by Silber J. in East Kent Hospital NHS Trust. Silber J. observed that 'trivial changes do not require further consideration' (at [43]). The learned judge was mindful of 'the dangers and consequence of too readily requiring re-consultation', noting that in R v. Shropshire Health Authority and Secretary of State ex parte Duffus [1990] 1 Med L R 119, Schiemann J (with whom Lloyd LJ agreed) had stated that

'Each consultation process if it produces any changes has the potential to give rise to an expectation in others, that they will be consulted about any changes. If the courts are to be too liberal in the use of their power of judicial review to compel consultation on any change, there is a danger that the process will prevent any change — either in the sense that the authority will be disinclined to make any change because of the repeated consultation process which this might engender, or in the sense that no decision gets taken because consultation never comes to an end. One must not forget there are those with legitimate expectations that decisions will be taken”.

34. Silber J. concluded that fresh consultation was only required where there was 'a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt'.

35. What is 'fundamental'? In R (Elphinstone) v Westminster City Council, [2008] EWHC 1287 (Admin) at [62], Kenneth Parker QC (then sitting as a Deputy High Court judge) observed that 'a fundamental change is a change of such a kind that it would be conspicuously unfair for the decision-maker to proceed without having given consultees a further opportunity to make representations about the proposal as so changed.'

36. In East Kent Hospital NHS Trust, Silber J. also accepted the proposition that where the amended proposal had itself 'emerged from the consultation process. It was a proposal reflecting the consultation process itself', there was no further obligation to consult: citing R v. London Borough of Islington ex parte East [1996] ELR 74 at 88, per Keene J.

IV. Challenging the consultation

37. An interesting question arises as to when a challenge should be made if consultation is thought to be defective. Should the challenge be made as soon as the consultation commences or before its conclusion, thereby risking a ruling that the claim is premature, or should the challenge await the outcome of the decision being consulted upon running the risk of a ruling that the claim is out of time?

38. The latter risk is likely to be very low. A Court is most unlikely to shut out a challenge after the decision has been made, even if the ground of challenge could have been pursued much earlier. The Court will be persuaded that it made sense for the Claimant to wait and see what happened in the consultation: of course, if the basis of the challenge is that the decision-maker had already made its mind up at the outset of the consultation process, then the Court may be less sympathetic to that challenge (it 'sows the seeds of its own destruction' per Worcestershire Health Council). What was the Claimant waiting for if the decision was pre-ordained?

39. In assessing the fairness of the consultation process, and applying the *Gunning* principles, the Courts will not apply a test of anxious scrutiny. A number of Courts have accepted that it is not their role to determine whether the consultation could have been improved upon, and a conclusion of unfairness should be based on a finding by the Court 'not merely that something went wrong but that something went "clearly and radically" wrong': see R (Greenpeace) v. Secretary of State for Trade & Industry

[2007] EWHC 311 (Admin) at [63], cited with approval in Robin Murray & Co. at [37(3)]. Nevertheless, this phraseology is not universally accepted.

40. In Devon County Council v Secretary of State for Communities and Local Government [2010] EWHC 1456 (Admin) at [70], Ouseley J. accepted that a flawed consultation exercise is not always so procedurally unfair as to be unlawful. Nevertheless, the learned judge expressed reluctance to adopt the phrase “clearly and radically wrong”; observing that this ‘should not become the substitute for the true test which is whether the consultation process was so unfair that it was unlawful’.

V. What if a ‘fair’ consultation process would have made no difference?

41. Where the Court finds that the consultation process was *unfair* (or non-existent) it will be in rare cases that the decision-maker will be able to persuade a Court that consultation would have made ‘no difference’. In most cases, a failure to consult fairly will result in the quashing of the underlying decision. In Shoosmith v. Secretary of State for Education [2011] EWCA Civ 852, the Court of Appeal expressed great reluctance to give weight to the ‘no difference’ principle in a case where one might have thought that the decision would inevitably have been the same whatever opportunity to make representations had been provided to the claimant.

VI. Is Consultation a good thing?

42. Public bodies who are not obliged to consult may shy away from consultation on the grounds that it is administratively burdensome (it can be time consuming, and will involve some expense), and provides an opportunity to be tripped up by prospective Claimants where no other decent argument may have previously been available.
43. On the other hand, there are plenty of reasons to suggest that consultation is a good thing, even if not legally required. I will describe these reasons as ‘political’ and ‘legal’.

44. There are 'political' type reasons for consultation. Consultation with those likely to be affected by a decision increases the transparency of the process. By allowing engagement in the decision-making process, it may lessen the blow for those affected by the decision that is ultimately taken.
45. There are also 'legal' reasons to support consultation, as it may assist the public body in fending off other grounds of challenge. Increasing use is being made in judicial review claims of the proposition established in Secretary of State for Education and Science v. Tameside MBC [1977] AC 1014, at 1065B that, before making a public law decision, the decision-maker must have asked itself the right questions and taken reasonable steps to acquaint itself with the relevant information to answer the questions correctly as part of the decision-making process. Consultation may be a good way of fending off this kind of challenge, as the consultation process itself will frequently elicit the information that it is necessary for the decision-maker to be acquainted with before making its decision.
46. Consultation may also provide the public body with the information that enables it to satisfy the public sector equality duties; an ever-present ground of challenge to administrative law decisions². Even if the formal equality impact assessment documentation is somewhat lacking, where appropriate consultation has taken place over the measure in question – and, in particular, with the relevant population or representative bodies/experts for those with 'protected characteristics' – and their responses are properly identified and reported upon, it is much easier to persuade a Court that the public sector equality duties have been complied with.
47. Thus, in the recent case concerning the change in eligibility thresholds for adult social care -- R (on the application of JM) v Isle of Wight Council [2011] EWHC 2911 (Admin) – there was no free-standing challenge on the basis of a flawed consultation. However, it was contended that the failure to provide adequate information to consultees as to the

² See 'The Public Sector Equality Duty', The Hon Mr. Justice Sales, [2011] JR 1.

effect of the proposal meant that the 'consultation responses did not, and could not, fully reflect the experiences and views of users and their carers'. As a result, it was argued that councillors were deprived of important information as to the potential impact of the proposed changes. This fed into the argument on public sector equalities that 'due regard' was not had to the various public sector equality 'needs' of disabled persons. Lang J. agreed with the analysis, concluding at [140] that the 'Council did not conduct the rigorous analysis and consideration required in order to satisfy the 'due regard' duty under s.49A [Disability Discrimination Act] 1995, principally because it did not gather the information required to do so properly.'

VII. Postscript: two contrasting cases

(i) Capenhurst: what went wrong?

48. A case concerning reduction in grant funding by local authorities that is frequently cited by Claimants is R (Capenhurst) v Leicester City Council (2004) 7 CCLR 557, a decision of Silber J. The case concerned the decision of the local authority to cease funding for six different voluntary organisations: the Turning Point Women's Centre (providing services for women on a large council estate); Shree Sanatan Community Project (providing education and development opportunities mainly to those of South East Asian origin); Ajani Women and Girls Centre (providing services to African Caribbean women to realise their social, economic and personal potential); St. Gabriel's Community Centre (providing facilities for local authorities to meet, and running clubs for the local community); the Chinese Community Centre (providing services to the Chinese community in the area); and Voluntary Action Leicester's Voluntary Bureau (recruitment of volunteers for work with the elderly, young offenders and those with mental illnesses). The groups contended that the cessation of funding would result in their immediate closure.

49. The background to the challenged decisions was a change in political administration following council elections in May 2003. The policy of the new administration was 'to restrict funding to those entities providing services which were judged to be "core" services in the sense that the council was legally obliged or strongly expected to provide those services' ([7]). In November 2003, the council commenced a process of consultation and in December 2003 all funded voluntary bodies were written to, warning them that the council would only 'provide financial support to voluntary sector bodies where they are delivering core services which the council would otherwise wish to provide by direct provision, save for exceptional reasons.' Each of the six projects were written to in early January informing them that the council was minded to cease funding them and set out reasons for this. They were told that comments would be considered by the council's cabinet in February, which would recommend a budget for 25th February 2004.

50. It was contended that the decision-making process was not fairly conducted: (i) failure to explain to the voluntary organisations the case they had to meet; (ii) failure to put to the organisations the key points held against them.

51. The thrust of the complaint by the organisations was that they had not been informed of the criteria by which their projects would be appraised: for five of the organisations, they were told that the council would only finance projects which were "core", but were not told that this meant that they had to meet 'statutory' requirements as opposed to the 'strategic' requirements of the council. As a result, it was contended that the organisations could not respond effectively and intelligently to the council's proposals. Previously, organisations had been funded in light of a combination of statutory and strategic requirements. Silber J. accepted that, on the facts, the materials provided to consultees, whilst referring to 'core' services being protected, did not make clear that this referred to 'statutory' and not 'strategic' services, and did not explain to the consultees the basis upon which they were not regarded as delivering 'core' services.

52. In considering the fairness of the consultation, Silber J. held that the council had to comply with the 'Sedley principles', and also with the observations of Lord Mustill in R v. Secretary of State, ex parte Doody [1994] 1 AC 531, 550 that 'Since the person affected cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer'³.

53. Silber J. held, with respect to the second of the Sedley formulation that:

It is important that any consultee should be aware of the basis on which a proposal put forward for the basis of consultation has been considered and will thereafter be considered by the decision-maker as otherwise the consultee would be unable to give, in Lord Woolf's words in Coughlan, either "intelligent consideration" to the proposals or to make an "intelligent response" to it. This requirement means that the person consulted was entitled to be informed or had to be made aware of what criterion would be adopted by the decision-maker and what factors would be considered decisive or of substantial importance by the decision-maker in making his decision at the end of the consultation process.

I do not think that a consultee would not have been properly consulted if he ought reasonably to have known the criterion, which the decision-maker would adopt or the factors, which would be considered decisive by the decision-maker but that the only reason why the consultee did not know these matters was because, for example, he had turned a blind eye to something of which he ought reasonably to have been aware. Thus, consultation will only be regarded as unfair if the consultee either did not know the criterion to be adopted by the decision-maker or ought not reasonably to have known of this criterion. Of course, what a consultee ought reasonably to have known about the factors, which will be considered decisive by the decision-maker depends on all the relevant circumstances, which may well be different in each case.

[46] – [47]

³ It is questionable whether the Doody principle is applicable in this context. That case concerned the date for review of a life sentence prisoner's period of imprisonment. The House of Lords held that the Home Secretary was required to inform mandatory life sentence prisoners of the minimum period set for their terms of imprisonment by the trial judge on grounds of deterrence and retribution ("the tariff period"), as well as his reasons for departing from that period, so that they could make representations about the appropriateness of continued detention after the expiry of the tariff period.

54. On the facts of the case, Silber J. held that five of the organisations had not been consulted properly with respect to the issue of 'core' services: they did not, or it was reasonable for them not, to understand the criterion that was being applied by the council. (This did not apply to one of the organisations which *had* been informed that its activities were not 'core', 'because they are not deemed essential in order for the council to meet its statutory obligations'. If they had been told this, their argument on this point 'might well have failed': [78]).
55. Silber J. rejected an argument that if the organisations were in any doubt about the criterion used by the council they were free to contact the council's officers. That presupposed, however, that the organisations appreciated that the council had changed its approach to funding (that it had abandoned previous categorisation of services, and was only using the 'statutory' test for determining what was 'core'). Also, it was not decisive that the council was very familiar with the activities of the various organisations. The evidence showed that the council was not totally familiar with the organisations. Further, consultees needed to be able to understand what the criterion was that was being used so that they could disabuse the decision-maker of its provisional views.
56. In addition, the fact that the council offered a chance to discuss funding *after* the decisions had been taken was not an 'adequate substitute'. There is a difference between the position and power to influence a decision before it had been made and afterwards. Similarly, it was not enough that further consultation was allowed after the decision was made as to whether part of their funding could continue.
57. Silber J. also discussed the authorities concerning when a decision will be quashed: observing that 'even if there has been inadequate consultation, there will be cases in which it would not be unfair not to quash the subsequent decision' ([58]). See, R v. Chief Constable of Thames Valley, ex parte Cotton:

“to make good a natural justice challenge an applicant must establish where there is a real, as opposed to purely minimal possibility that the outcome would have been different” (page 348; per Simon Brown J at first instance).

“While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this:—

1. Unless the subject of the decision has had the opportunity to put his case it may not be easy to know what case he could or would have put if he had the chance.
2. As memorably pointed out by Megarry J in *John v. Rees* [1970] Ch 345 at page 402, experience shows that what is confidently expected is by no means always that which happens.
3. It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if a complainant's position became weaker as the decision-maker's mind became more closed.
4. In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.
5. This is a field in which appearances are generally thought to matter.
6. Where the decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied”.

(per Bingham LJ at p.352).

Reference was also made to Ackner LJ in *R v. Secretary of State for the Environment, ex p Brent LBC* [1982] 1 QB 593 (representations re: rate support grants):

“it would of course have been unrealistic not to accept that it is certainly probably that, if the representations had been listened to by the Secretary of State, he would have nevertheless have adhered to his policy. However, we are not satisfied that such a result must inevitably have followed It would in our view be wrong for this court to speculate as to how the Secretary of State would have exercised his discretion if he had heard the representations ... we are not prepared to hold that it would have been a useless formality for the Secretary of State to have listened to the representations ...”.

58. A further point considered by Silber J. was whether the council had made clear in the consultation process that it was no longer prepared to continue funding the

organisations with respect to courses supplied or commissioned by the local education authority if delivery was provided by another entity. Silber J concluded that the council had not made this clear, and the organisations could not have known or have reasonably known of the council's approach. Similarly, with respect to the criterion of 'financial viability', and for one of the organisations a criterion relating to Fair Access to Care Services threshold eligibility criterion.

59. Silber J. assessed the evidence as to what might have happened had proper consultation taken place, and concluded that there was a 'real possibility' that a different outcome might have been reached. The funding decisions were quashed.

60. The decision in Capenhurst provides a salutary reminder to public bodies that Courts may be prepared to involve themselves in the minutiae of the consultation process. The claimants succeeded in that case primarily because there was a palpable lack of information as to the criteria that the council was applying: the council may have assumed that it was obvious, but the organisations were able to persuade the Court that it was not so obvious. Clarity of criteria is crucial.

(ii) Brent Libraries: what went right?

61. In the recent Brent Libraries case (closure of six libraries), Ouseley J. was a little more forgiving of the local authority. One of the grounds of challenge was that the consultation process was flawed in that the local authority explained that it would be prepared to consider alternative business proposals to closure of its libraries, where a 'robust business case' was put forward. A number of proposals were put forward, and these were evaluated by the local authority on the basis of seven factors or criteria: viability of the group making the proposal, viability of the proposal, quality of the proposal, support for diversity and inclusion, delivering the Council's targets, acceptable contract terms and risks to the Council's procurement process. The local authority had not made those factors public during the consultation process. Relying on Capenhurst, it was contended that the local authority had not given consultees

sufficient reasons for and information about the proposals to permit of intelligent consideration and response.

62. Ouseley J rejected this submission, stating at [91] that:

it is obvious that such a case will include the nature and experience of the group in running such a venture, the financial resources available to such a group, the cost to the Council in the light of its warnings that there was no financial support if the savings envisaged were to be made, and its prospects of delivering a worthwhile contribution to the library service. The factors or criteria are not, save for one, more than an elaboration of the test which was fully notified to consultees, and of which I accept any group capable of making a worthwhile contribution would have been aware, without it having to be spelled out to them. The goalposts were not moved. The contribution to diversity and inclusion is not one of which the need to promote a robust business case would necessarily have forewarned a group looking to make a contribution to running a library. But the Claimants should have been aware that any failing in the public sector equality duty, such as that with which they charge the Council, would have been a failing on their part as well. No proposal failed on that one ground anyway: they failed because they were not a viable proposal run by viable groups. . . . They contend that had they known that the groups needed to show that they were capable of running a library, they would have been able to demonstrate that. I am satisfied that any group wishing to run a library, whether at its own expense and even more so if at public expense to some degree, should have realised that its experience and financial capability was an issue to be addressed in the consultation process. I do not think that any failing on the part of proposers to know what case they had to meet can fairly be laid at the door of the Council, nor were negotiations with proposers required on their proposals in order for the consultation process to be fair. There is nothing in this point.

63. This commonsense analysis was upheld recently by the Court of Appeal: [2011] EWCA Civ 1586.

January 2012