

The duty to consult

David Matthias QC discusses the Supreme Court's judgment on what constitutes an unlawful consultation process

In a judgment delivered on 29 October, *R (on the application of Moseley (in substitution of Stirling Deceased)) v LB of Haringey* [2014] UKSC 56, the Supreme Court considered principles applicable to lawful consultation by public authorities.

Consultation has become a key part of much administrative decision making, but until now the principles applicable had not been considered by either the Supreme Court or the House of Lords.

The applicants had been entitled to full council tax benefit (CTB), relieving them of the obligation to pay Council Tax (CT). Local authorities had been reimbursed in full by central government for revenue lost. However, from April 2013, every local authority was required to have made and to operate its own scheme in place of CTB, to be called the council tax reduction scheme (CTRS), with a statutory obligation prior to so doing of consulting "such ... persons as it considers are likely to have an interest in the operation of the scheme".

CTRS was unpopular with local authorities because central government would no longer reimburse, in full, for revenue lost. If relief accorded under CTRS were the same as under CTB, local authorities would be worse off financially and would have to make spending cuts. Broadly, the options were:

- keep relief under CTRS at the same level as relief under CBT and cut spending; or
- reduce relief under CTRS sufficient to maintain spending.

The respondent consulted widely on its chosen solution which

involved reducing the level of relief sufficient to maintain spending. However, the consultation proceeded on the basis that CTB beneficiaries would have to suffer reductions in relief, making no mention of other possibilities involving reductions in spending. This led to the challenge that there was no consultation about what was really the central issue regarding the formulation of the proposed scheme.



The product of consultation must be conscientiously taken into account

Common law duty

Lord Wilson (Lord Kerr concurring) explained that a public authority's duty to consult could be generated by statute or by common law where there was a procedural legitimate expectation of consultation. Either way, however, the same common law duty of procedural fairness should inform the conduct of the consultation.

While the requirements of fairness would be linked to the purposes of the consultation, in general terms he endorsed the formula adopted by Justice Hodgson in *R v Brent London Borough Council, ex parte Gunning* [1985] 84 LGR 168 that: "... consultation must be at a time when proposals are still at a formative stage...the proposer must give sufficient reasons for a proposal to permit of intelligent

consideration and response... adequate time must be given for consideration and response and, finally, ...the product of consultation must be conscientiously taken into account in finalising any statutory proposals."

Two further points were that:

- a greater degree of specificity in a consultation is likely to be required where less sophisticated consultees are concerned; and
- "the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit...".

Lord Reed, however, opined that where there was a statutory duty of consultation, he would emphasise the statutory context and purpose of the duty in question over the common law duty to act fairly. The content of a duty to consult could vary greatly from one statutory context to another. In this case, "The purpose of this particular statutory duty to consult must...be to ensure public participation in the local authority's decision-making process."

Lady Hale and Lord Clarke preferred Lord Reed's approach, but nonetheless (curiously) said they also agreed with Lord Wilson.

Participation prevention

There was unanimity on the outcome – the consultation had been unlawful. Lords Wilson and Reed reached their conclusions in subtly different ways, consistent with their differing approaches; Lord Wilson saying, "it was unfair

and therefore unlawful", while Lord Reed said it undermined the statutory purpose by preventing the public participating meaningfully in the decision-making process through implying there were no options, apart from reducing levels of relief. **SJ**

Pocket notes

For a consultation to be lawful:

- It should occur while proposals are still at a formative stage.
- Sufficient reasons for any proposal should be given to permit of intelligent consideration and response.
- Adequate time should be given for consideration and response.
- Responses should be conscientiously taken into account in finalising proposals.
- For less sophisticated consultees there should be a higher degree of specificity in the consultation.
- A higher degree of fairness will be required where the deprivation of an existing benefit is contemplated.
- Where there is a statutory duty to consult, its purpose should be understood and achieved.



David Matthias is a QC practising from Francis Taylor Building www.ftb.eu.com