

Local Authority Governance: Hot Topics

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Introduction

- This talk considers three governance “hot topics”:
 - Consultation
 - PSED
 - Green decision-making

Hot Topic 1: Consultation



Consultation: overview

- Lawful consultation starting point is the *Sedley* criteria: set out by Hodgson J in *R v Brent London Borough Council ex p Gunning* (1985) 84 LGR 168:
 - Consultation must be at a time when proposals are still at a formative stage.
 - Proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response.
 - Adequate time must be given for consideration and response.
 - The product of consultation must be conscientiously taken into account in finalising any statutory proposals.

Consultation: overview

- No common law duty for public bodies to consult. However, a duty to consult may arise under certain circumstances (see *R (Plantagenet Alliance) v SSJ* [2014] EWHC 1662, [98]: the Richard III reburial case), e.g.
 - Where there is a statutory duty to consult.
 - Where there has been a promise to consult.
 - Where there has been an established practice of consultation.
 - Where, in exceptional cases, a failure to consult would lead to conspicuous unfairness.
- A public body cannot avoid the legal requirements regarding *how* to consult if it elects to carry out a consultation, even in circumstances where it has no duty to consult: *R v N E Devon HA ex p Coughlan* [2001] QB 213 at [108].
- The following slides will consider 2 recent cases on consultation.

Consultation: AA

- *R. (on the application of AA) v Rotherham MBC* [2019] EWHC 3529 (Admin)
- Case involved the proposed closure of a day centre for adults with learning difficulties.
- No consultation required by statute: however 2 consultation exercises on the closure.
- The claimants alleged the consultation process was unfair because it did not afford the claimant and other consultees the opportunity to make intelligent and informed comment on the Council's proposals. In particular, they argued that fairness required more options to be put before them rather than simply
 1. closure of day centres with no modernisation vs
 2. closure and modernisation.

Consultation: AA

- The High Court rejected the challenge. The judge said at [102]:
 “...whether an open question is sufficient to ensure fairness is again a question of fact and a fact sensitive one. In the [Moseley](#) case it would not have been sufficient because only the most sophisticated and well-informed consultee might be expected to know about the transitional grant option. The factual and legal scenario in this case was by no means as complex and distinct as that in [Moseley](#) and, particularly bearing in mind the interests of the consultees, they could reasonably be expected to appreciate that other, and what might be called hybrid, options could be put forward or that they might comment favourably on one aspect of the proposal whilst commenting unfavourably on another and proposing an alternative.”

Consultation: AA

- And [106]: “it would be wrong, in my view, to come to the conclusion that the consultation was clearly and radically wrong or unfair because some questions might have been even better formulated.”
- This emphasises the fact that lawful consultations do not need to present all the possible options, or “hybrid” options. (This is especially so where the process includes issues of a general policy nature; *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) [2007] Env LR 29, [62].)
- Still, fairness may in some cases require particular options to be consulted on: see *R. (Medway Council) v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 2516 (Admin).

Consultation: AA

- However, the more sophisticated the issue being consulted on is, the more likely it is that a wider range of options is needed, with more detailed explanations.
- AA also re-emphasises the often-repeated point that a flawed consultation is not necessarily an unlawful consultation.

Consultation: AA

- The judge in *AA* also rejected the assertion that consultation responses were not properly taken into account.
- Interestingly the judge accepted that the decision was made partly on the basis of a summary of responses in an officers' report that "did not truly reflect the outcome of the consultation"
- However, the judge found that sufficient information was before the Cabinet in the appendix to the report, particularly in the form of an independent analysis of responses, that it could not be said that Cabinet members were misled by the report itself [124-126].
- This emphasises the fact that a flawed summary of responses provided to a decision-maker does not necessarily render a consultation unlawful, and can be saved by the provision of additional "correcting" information.

Consultation: AA

- It is also worth remembering Lord Woolf MR's comment in *Coughlan* at [112] that it is not necessary to publish everything relied on by the decision-maker:

*“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.”*

Consultation: *Anand*

- *Anand v Kensington and Chelsea RLBC* [2019] EWHC 2964 (Admin)
- Users of a Sikh temple challenged a local authority's imposition of parking restrictions on the grounds of unlawful consultation and breach of PSED.
- The judge rejected the challenge.
- At [58] the judge noted the difficulty faced by the claimants where they had conceded that the statutory consultation was lawful. In those circumstances there was little scope for a challenge based on common law.

Consultation: *Anand*

- At [59] the judge emphasised the comments of Sullivan J in *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] Env LR 29, at [62]:

"62 Even a consultation exercise which is flawed in a number of respects is not necessarily so procedurally unfair as to be unlawful. With the benefit of hindsight, it will almost invariably be possible to suggest ways in which a consultation exercise might have been improved upon. That is most emphatically not the test. It must also be recognised that a decision-maker will usually have a broad discretion as to how a consultation exercise should be carried out...."

Consultation: *Anand*

- The judge went on to note:

“In this case, the Council had a wide discretion as to how to frame the 2019 consultation document, including how much information to provide to consultees about the position of the Gurdwara and other religious institutions. The consultation document contained a link to the report of 17 January 2019, in which the Council informed consultees of the letter of objection received from the faith groups (which were listed), and explained that differing faiths worshipped on different days, including weekday evenings, Saturdays and Sundays.... In my judgment, the Council's decision to summarise the position of the faith groups in this way was not so unfair as to be unlawful, applying the [Greenpeace](#) test.”
- This case emphasises that local authorities are entitled to summarise information and cross-reference to older documents as part of a lawful consultation exercise.

Hot topic 2: Public sector equality duty



- The public sector equality duty has been the subject of detailed consideration by the courts over the years.
- *In R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, [2009] PTSR 809, Dyson LJ. said:

"31. In my judgment, it is important to emphasise that the section 71(1) duty is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to have due regard to the need to achieve these goals. The distinction is vital."
- For a helpful summary of the various PSED principles see also *Moore and Coates v Secretary of State for Communities and Local Government & Ors* [2015] EWHC 44 (Admin), Gilbert J at [109] – [111].

PSED: Anand

- There was also a PSED challenge in the *Anand* case. This too was rejected by the judge.
- The EIA accompanying the decision analysed the impact of the parking restrictions on residents as follows:

PSED: Anand

"There are older and disabled residents who may have to walk long distances from their parking location to their property outside the current hours of parking control on residents' bays. These older and disabled residents must take priority over older and disabled non-residents because:

- 1) Residents have to make more trips to and from the Proposed Area than visitors, on average.*
- 2) Older and disabled residents are less likely to be able to deal with a shortage of parking by being dropped off close to their home by a third party than disabled and older visitors.*
- 3) Older and disabled residents who have difficult making car trips because of parking problems will find that all of their car trips outside the hours of control will be affected whereas for visitors its likely to be only a proportion of all their car trips."*

PSED: Anand

- The judge held that “*this was a rational conclusion which the Council was entitled to reach*” [97].
- At [100] she said “*the public sector equality duty does not require any particular outcome, and does not enable a disappointed party to challenge the merits of the decision... this was "classically a polycentric decision-making context" which was entrusted by Parliament to the Council*”.
- This aspect of the judgment emphasises the fact that as long as the negative impact on protected groups is considered, the PSED does not prevent a certain course of action from being taken.

Hot Topic 3: Green decision-making



Green decision-making

- Increasingly local authorities are under pressure to take positive action to reduce carbon emissions and incorporate carbon reduction targets into decision-making.
- Lawyers from the campaign group ClientEarth have written to 100 authorities, threatening legal action if they do not meet their climate change legal duties.
- E.g. Section 19(1A) of the Planning and Compulsory Purchase Act of 2004 requires that local plans include “*policies designed to secure that the development and use of land in the local planning authority’s area contribute to the mitigation of, and adaptation to, climate change.*”
- Plans might be challenged under this provision on sustainability grounds e.g. poor public transport, site allocations not encouraging sustainable lifestyles etc.

How are local authorities tackling climate change?

- So far, more than half of English and Welsh councils (over 230), and the LGA, have declared a climate emergency.
- Many councils are making climate change action part of the decision-making processes e.g. including climate change targets and strategies in local plans and policy documents
- Co-ordination with Citizens' Assemblies e.g. Camden LBC (see Fiona's talk).
- Lobbying for greater devolved powers e.g. a number of roads are operated by Highways England and TfL, limiting Councils' ability to take action: see LGA statements on climate change.

Legal implications

- If local authorities include climate change action in their policies, plans and strategies, it is likely they will be challenged in court by claimants who argue that they have failed to meet the promised standards.
- Challenges could be brought to a variety of decisions on e.g. material consideration or legitimate expectations grounds, or inadequate consultation in the case of decisions involving Citizens' Assemblies.
- It is important for local authorities to be aware exactly what obligations they are placing on themselves with respect to climate change goals, including what kinds of decisions those obligations apply to: and ensure that relevant decisions are made with those obligations in mind.

Thank you for listening

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