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FAIRNESS, CONSULTATION AND THE SUPREME COURT: THERE IS (SOMETIMES) AN ALTERNATIVE

In the last few years Austerity Britain has generated a large number of judicial review challenges to public spending cuts, particularly against local authorities. Many cases allege that the public body has consulted unlawfully. The legal principles involved have been firmly established. However, in October 2014 the Supreme Court in *R(Moseley) v Haringey LBC* [2014] 1 WLR 394 added a new ingredient to the mix, and the courts are still in the process of working out the implications of that decision.

The general approach to the principles of consultation was recently summarised by the Court of Appeal in *R(United Company Rusal PLC) v The London Metal Exchange* [2014] EWCA Civ 1271. Assuming that a public bod is under a duty to consult, the content of that duty to consult is governed by a common law duty to act fairly, and the Court should only intervene if there is a clear reason on the facts of the case for holding that the consultation is unfair: [25]-[27]. The Court of Appeal stressed that the application of the duty of fairness is intensely case-sensitive; and approved the approach of Sullivan J held in *R(Greenpeace Limited) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin): judgments are not to be construed as though they were enactments of general application, and the extent to which judicial dicta are a response to the particular factual matrix of the case under consideration must always be borne in mind.

The principles of fair consultation have been settled for many years. In ***Moseley*** the Supreme Court endorsed [25] the long standing Sedley principles formulated in 1984 by Stephen Sedley QC in argument in *R v Brent LBC ex p Gunning* (1985) 84 LGR 168 (subsequently approved by the Court of Appeal in *R v Devon County Council ex p Baker* [1995] 1 All ER 73 pp 91 and 87 and in *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213 [108]; and see also ***R****(Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* (2012) 126 BMLR 134 [9] where Arden LJ described the Sedley criteria as a 'a prescription for fairne***ss'.***)

In order for consultation to be fair, a public body must ensure:

- that the consultation must be at a time when proposals are still at a formative stage;
- that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response;
- that adequate time is given for consideration and response; and
- that the product of consultation is conscientiously taken into account when finalising the decision.

But the Supreme Court in *Moseley* went a stage further. It decided that a consultation concerning a Council Tax reduction scheme required Haringey to consult not only on its own proposals, but to provide a brief outline of the alternative options the Council had considered and the reasons for their rejection. The principle that a public body must consult on proposals which it has, itself, rejected has radical implications. *Mosley* has, on one view, changed legal landscape; and the courts are now wrestling with what this all means.

The importance of *Moseley* is that anti-cuts campaigners often find the Sedley criteria works as a bit of a legal straightjacket. Many claimants are not hugely interested in debating the actual proposals that a public body puts forward for consultation. Instead, they are more concerned to argue the question of principle- that no service reductions are necessary and that the public body has failed to provide sufficient information to enable consultees to make a case for alternative proposals.

Nevertheless, until *Moseley* the legal principles applying to consultation were firmly established. The decided cases show that the Courts allow public bodies a wide degree of discretion as to the options on which to consult. As the Divisional Court held in the *Vale of Glamorgan Council v Lord Chancellor* [2011] EWHC 1532 (Admin), there is no general principle that a public body must consult on all possible alternative ways in which a specific objective might arguably be capable of being achieved. That would make the process of consultation inordinately complex and time consuming.

That principle was powerfully confirmed by the Court of Appeal, just before judgment was given by the Supreme Court in *Moseley*. In the context of a commercial judicial review case, the Court of Appeal in *Rusal* decided that there is no common law obligation on a public body to consult on options it has discarded, reversing the decision of Philips J who had held that the Defendant had acted unlawfully in failing to do so. According to the Court of Appeal, a consultation process would be unfair for failing to set out alternative options only in exceptional cases.

In *Moseley* itself the Supreme Court was considering a statutory consultation concerning a Council Tax reduction scheme. Lord Wilson (with whom Lord Kerr agreed) emphasised that fairness is a protean concept, but drew on the dicta of Lord Reed in *R(Osborn) v Parole Board* [2014] AC 1115. He observed [67] that fairness 'is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested, that it avoids [68] 'the sense of injustice which the person who is the subject of the decision will otherwise feel', and that consultation reflects the democratic principle at the heart of our society. The critical factual point he stressed was that the Haringey consultation had proceeded on a positively misleading basis. The consultation document presented the proposed reduction in council tax support as if it were the inevitable consequence of the Government's funding cuts, disguising the choice made by Haringey, itself, and misleadingly implying that there were no possible alternatives to that choice: see [17], [19], [21], [22]. Lord Wilson suggested [31] that the driver for the Council's approach was, perhaps, political. Somewhat delphically, he concluded [27] that 'sometimes' (particularly when statute does not limit the subject of the requisite consultation to the preferred option), fairness will require that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options.

Lord Reed's approach in *Moseley* was rather different. He begins his judgment [34] by stating that he was, generally, in agreement with Lord Wilson, 'but would prefer to express my analysis of the relevant law in a way which lays less emphasis upon the common law duty to act fairly, and more upon the statutory context and purpose of the particular duty of consultation with which we are concerned'; and went on to emphasise [36] that the appeal concerned a statutory duty of consultation.

The short judgment of Baroness Hale and Lord Clarke [44] is, again, delphic but appears to be a careful endorsement of Lord Reed:

> We agree that the appeal should be disposed of as indicated by Lord Wilson and Lord Reed JJSC. There appears to us to be very little between them as to the correct approach. We agree with Lord Reed JSC that the court must have regard to the statutory context and that, as he puts it, in the particular statutory context, the duty of the local authority was to ensure public participation in the decision-making process. It seems to us that in order to do so it must act fairly by taking the specific steps set out by Lord Reed JSC, in para 39. In these circumstances we can we think safely agree with both judgments.

There is, therefore, at the very least, an argument that the Supreme Court split 3/2 in favour of Lord Reed's analysis, and rejected the broader views expressed by Lord Wilson and Lord Kerr.

Critically, the proposition that a public body must consult on proposals which it has, itself, rejected has radical implications. *Mosley* has, on one view, changed legal landscape; and there have been a number of recent decisions which provide useful guidance on its impact.

In *R(Robson) v Salford CC* [2015] EWCA Civ 6 (application for permission to appeal to the Supreme Court pending) the Court of Appeal took a restrictive line. The Court of Appeal said that ***Moseley*** is largely an endorsement at Supreme Court level of principles already established at the level of the Court of Appeal, and was based the particular facts of ***Moseley***, itself, that the consultation material conveyed a positively misleading impression that other options were irrelevant. Similarly, in Mostyn J held in *R (L) v Warwickshire CC* that ***Moseley*** did not radically recast legal principles, although permission to appeal is being sought.

In *R(T) v Trafford MBC* [2015] EWHC 369 (Admin) the claimant argued that the *Moseley* case meant that the Council had acted unlawfully in running five concurrent consultation exercises leading up its budget setting meeting on 18 February 2015. The claimant tried to quash the budget by saying that the adult social services consultation breached *Moseley*- by failing to ask consultees whether they wanted an increase in Council Tax or spend the Council reserves.

Stewart J closely scrutinised Lord Wilson's judgment; and pointed out that Lord Wilson had said that, only 'sometimes' fairness will require that interested persons be consulted not only upon the preferred option, but also upon discarded alternative options. He then examined at the authorities Lord Wilson discussed in his judgment, where the failure to spell out alternatives led to real unfairness. For instance, in *R(Medway Council) v Secretary of State for Transport* [2002] EWHC 2516 (Admin) it was procedurally unfair for the Secretary of State to run a consultation process concerning the location of airports in the South East over the next 30 years in which he excluded Gatwick- as a result, the claimants would lose their only real opportunity to present their case for Gatwick, as an alternative solution at a later stage in the decision making process. Stewart J, therefore, decided that ***Moseley*** do not mean that Trafford's budget process was unlawful, because they had not asked consultees about raising Council Tax or drawing on reserves, and dismissed the judicial review case.

The *Trafford* decision (in relation to which the claimant is, again, seeking permission to appeal), therefore, strongly suggests that *Moseley* does not fundamentally re-write the law of consultation. But the debate about the scope of the *Moseley* judgment is far from over.

Richard Clayton QC represented the Council in the ***Trafford*** case.

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