Neutral Citation Number: [2020] EWCA Civ 1634

Case No: C1/2019/0204

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Lewis
[2018] EWHC 3392 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/12/2020

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE MOYLAN
and
LORD JUSTICE NEWEY

- -

Between:

THE QUEEN (ON THE APPLICATION OF MP)	**Appellant**
- and -	
SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Respondent**

- -
- -

Jason Coppel QC and Christopher Knight (instructed by **Deighton Pierce Glynn**) for the **Appellant**
Robert Palmer QC and Joseph Barrett (instructed by the **Government Legal Department**) for the **Respondent**

Hearing date: 10 November 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Thursday 03 December 2020 at 10:30am

Lord Justice Newey:

1. The appellant, MP, had the misfortune to learn in 2015 that he was suffering from a form of blood cancer. That same year, he was refused indefinite leave to remain in the United Kingdom despite having lived here for very many years. He has since succeeded in an appeal to the First-tier Tribunal (Immigration and Asylum Chamber), but his immigration status is still subject to a degree of uncertainty because of a pending appeal to the Upper Tribunal by the Home Secretary. The result has been that MP has been viewed as an "overseas visitor" and so asked to pay large sums for treatment he has received from the National Health Service ("the NHS").

2. The present appeal relates to provisions relating to advance payment and the recording of certain information which were included in the National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2017 ("the 2017 Regulations"). It is MP's case that the provisions in question were introduced without due consultation and should be quashed. Lewis J ("the Judge"), in a judgment dated 10 December 2018, dismissed a claim for judicial review, concluding in paragraph 120 that the Secretary of State for Health and Social Care "was not required to consult publicly before amending the relevant regulations and imposing a requirement that advance payment for treatment be made, or requiring that records be kept of chargeable individuals". MP, however, now challenges that decision in this Court.

3. Regulations providing for overseas visitors to be charged for NHS treatment were first introduced in 1982. In 1989, new regulations replaced those of 1982 and consolidated revisions to the 1982 regulations which had been effected in the interim. Over the succeeding years, the 1989 regulations were amended in various respects and, in 2011, they were superseded in their entirety by the National Health Service (Charges to Overseas Visitors) Regulations 2011. Those regulations were in turn replaced in 2015 by the National Health Service (Charges to Overseas Visitors) Regulations 2015 ("the 2015 Regulations").

4. The 2017 Regulations, which are the focus of the present appeal, amended the 2015 Regulations. Both sets of regulations were made pursuant to section 175 of the National Health Service Act 2006 ("the 2006 Act"). That provision empowers the Secretary of State to make regulations providing for the making and recovery of charges for services in respect of persons not ordinarily resident in Great Britain.

5. Several other provisions of the 2006 Act provide for prior consultation. Thus, section 251, which enables the Secretary of State to make regulations in relation to the processing of prescribed patient information, provides by subsection (9) that, before making any regulations under the section, the Secretary of State "must, to such extent as he considers appropriate in the light of the requirements of section 252, consult such bodies appearing to him to represent the interests of those likely to be affected by the regulations as he considers appropriate". Provision for consultation is also to be found in section 25 (relating to the establishment of NHS Trusts) and section 28 (relating to the establishment of Special Health Authorities). In contrast, no such requirement is included in section 175.

6. In their original form, the 2015 Regulations stipulated that a "relevant NHS body" must make and recover charges for any "relevant services" provided to an "overseas visitor" (i.e. "a person not ordinarily resident in the United Kingdom"). By regulation

2, "relevant NHS body" was defined to refer only to an NHS foundation trust, an NHS trust or a local authority exercising public health functions and "relevant services" to mean accommodation, services or facilities under the 2006 Act other than primary medical, dental or ophthalmic services.

7. However, Parts 3 and 4 of the 2015 Regulations provided respectively for certain services and certain "overseas visitors" to be exempt from charges. There was to be no charge, for example, for accident and emergency services, family planning services, services provided for the diagnosis and treatment of a condition listed in schedule 1 or, by regulation 9(b), "services provided otherwise than at, or by staff employed to work at, or under the direction of, a hospital". Overseas visitors exempt from charges included refugees, asylum seekers, "looked after children" and victims of human trafficking. There was also an exemption in respect of services covered by a reciprocal agreement with one of the countries or territories specified in schedule 2.

8. On 7 December 2015, the Government launched a public consultation on the extension of charging overseas visitors and migrants using the NHS in England, with responses to be submitted by 7 March 2016. The paper explained that it was the Government's aim "to further extend charging of overseas visitors and migrants who use the NHS" and that views were sought on how best to do this, including "exploring changes in primary care, secondary care, community healthcare and changing current residency requirements". The paper noted that, when considering how best to extend charging of overseas visitors and migrants to other parts of the NHS healthcare system in England, the Government continued to be mindful of certain overarching principles, one of which was:

> "A system that ensures access for all in need – everybody needs access to immediately necessary treatment irrespective of their means or status. In particular, no person should be denied timely treatment necessary to prevent risks to their life or permanent health".

In that connection, the paper said this:

> "2.2. NHS providers have a statutory obligation to make and recover charges from patients who are deemed chargeable under legislation. However, treatment which is considered by clinicians to be immediately necessary (including all maternity treatment) must never be withheld from chargeable patients, even if they have not paid in advance.
>
> 2.3. Treatment which is not deemed immediately necessary, but is nevertheless classed as urgent by clinicians, since it cannot wait until the overseas visitor can be reasonably expected to return home, should also be provided, even if payment or a deposit has not been secured. Nonetheless providers are strongly encouraged to obtain a deposit ahead of treatment deemed urgent if circumstances allow. However, if that proves unsuccessful, the treatment should not be delayed or withheld for the purposes of securing payment.

> 2.4. Treatment is not made free of charge by virtue of being provided on an immediately necessary or urgent basis. Charges cannot be waived and should be applied. Providers should take a pragmatic approach as to the most appropriate time to discuss financial arrangements with the patient. An invoice should always be raised.
>
> 2.5. Non-urgent or elective treatment should not be provided unless the estimated full charge is received in advance of treatment."

9. One of the proposals on which the consultation paper invited comments was "to standardise the rules so that NHS-funded care is chargeable to non-exempt overseas visitors wherever, and by whomever, it is provided". The paper did not include any proposal to change the law in respect of advance payment for services which were chargeable under the 2015 Regulations nor to introduce any requirement to record status as an overseas visitor against a person's NHS number.

10. The Government published its response to the consultation on 6 February 2017. This explained that the Government intended "to proceed with the extension of charging overseas visitors for most NHS services they can currently access for free, although this will be taken in a staged approach" and detailed ways in which it intended to amend the law from April 2017 in this context. The document then said this:

> "In addition to the proposals set out in our consultation we intend to place the following new statutory requirements on all providers of NHS-funded services:
>
> - to charge overseas visitors upfront and in full for any care not deemed by a clinician to be 'immediately necessary' or 'urgent' and/or cease providing such non-urgent care where payment is not received in advance of treatment beginning
>
> - require relevant NHS bodies to identify and flag an overseas visitor's chargeable status, starting with NHS trusts …."

11. The 2017 Regulations were made by the Secretary of State on 17 July 2017, were laid before Parliament on 19 July and came into force later that year. The Regulations amended the definition of "relevant body" so as to extend to "any other person providing relevant services" and deleted regulation 9(b) from the 2015 Regulations. The charging regime was hence extended to a range of NHS-funded services provided in the community rather than in a hospital.

12. As foreshadowed in the response to the consultation, the 2017 Regulations also included provisions relating to advance payment and the recording of the fact that a person was an overseas visitor liable to be charged. Taking those in reverse order, a new regulation 3A was inserted into the 2015 Regulations to require NHS foundation trusts and NHS trusts to record information against a patient's "consistent identifier". Regulation 3A(1) is in these terms:

> "An NHS foundation trust or an NHS trust that, in meeting its obligations under regulation 3, determines that a person is an overseas visitor must, as soon as it is practicable to do so, record against the overseas visitor's consistent identifier—
>
> (a) the fact that the person has been determined to be an overseas visitor;
>
> (b) the date on which that determination was made; and
>
> (c) whether Part 4 (overseas visitors exempt from charges) provides for no charge to be made."

13. As regards advance payment, regulation 3 of the 2015 Regulations was amended to contain a new regulation 3(1A) as follows:

> "Where the condition specified in paragraph (2) is met, before providing a relevant service in respect of an overseas visitor, a relevant body must secure payment for the estimated amount of charges to be made under paragraph (1) for that relevant service unless doing so would prevent or delay the provision of—
>
> (a) an immediately necessary service; or
>
> (b) an urgent service."

The "condition specified in paragraph (2)" is that:

> "the relevant body, having made such enquiries as it is satisfied are reasonable in all the circumstances, including in relation to the state of health of that overseas visitor, determines that the case is not one in which these Regulations provide for no charge to be made".

14. "Immediately necessary service" and "urgent service" are defined in regulation 3(7) of the 2015 Regulations, as amended by the 2017 Regulations. "Immediately necessary service" means:

> "(a) antenatal services provided in respect of a person who is pregnant;
>
> (b) intrapartum and postnatal services provided in respect of—
>
> (i) a person who is pregnant;
>
> (ii) a person who has recently given birth; or
>
> (iii) a baby; and
>
> (c) any other relevant service that the treating clinician determines the recipient needs promptly—

> (i) to save the recipient's life;
>
> (ii) to prevent a condition becoming immediately life-threatening; or
>
> (iii) to prevent permanent serious damage to the recipient from occurring".

"Urgent service" means:

> "a service that the treating clinician determines is not an immediately necessary service but which should not wait until the recipient can be reasonably expected to leave the United Kingdom".

15. The evidence indicates that the advance payment and recording of information requirements which came to be included in the 2017 Regulations had not been under consideration when the 2015 consultation was launched. Ms Mia Snook of the Department of Health and Social Care has explained in a witness statement that these proposals were developed following an inter-departmental "deep dive" review of best practice in charging overseas visitors which was conducted in July 2016 and the preparation by Ipsos MORI Social Research Institute of a report, "Overseas Visitor and Migrant NHS Cost Recovery Programme, Formative Evaluation – Final Report", which the Department received in draft in August 2016.

16. In November 2017, the Government undertook to conduct a review of matters relating to the 2017 Regulations. Among other things, the review was into "the impact of the Amendment Regulations in respect of upfront charging, patient records, community services and non-NHS providers, with a particular focus on the extent to which there are any unintended consequences on delivery of care in the community for the most vulnerable, and how any such unintended consequences could be addressed". There was engagement with a wide range of organisations, but not a full public consultation. Following the conclusion of the review at the beginning of June 2018, the Secretary of State decided that no changes were required to the 2017 Regulations themselves.

17. Over the years, the Secretary of State has on several occasions given providers guidance on charging. Guidance issued in 2004 included this:

> "Non-urgent treatment – routine elective treatment which could in fact wait until the patient returned home. The patient's chargeable status should be established as soon as possible after the first referral to the hospital. Where the patient is chargeable, the trust should not initiate treatment processes, e.g. by putting the patient on a waiting list, until a deposit equivalent to the estimated full cost of treatment has been obtained. Any surplus which is paid can be returned to the patient on completion of treatment. This is not refusing to provide treatment, it is requiring payment conditions to be met in accordance with the charging Regulations before treatment can commence."

18. Revised guidance issued in 2011 included these passages:

> "Non-urgent treatment should not be provided unless the estimated full charge is received in advance of treatment ….
>
> These questions need to be asked every time a patient begins a new course of treatment at the hospital and is entered onto the relevant NHS body's records for in-patient or out-patient care, either on paper or computer and either by administration or ward staff, in order to comply with the Charging Regulations. The system should allow the questioner to record either that the patient has lived in the UK lawfully for 12 months or that there is some doubt ….
>
> For some cases relating to undocumented migrants, it will be particularly difficult to estimate the return date. Relevant NHS bodies may wish to estimate that such patients will remain in the UK initially for six months, and the clinician can then consider if treatment can or cannot wait for six months, bearing in mind the definitions of urgent and non-urgent treatment given above. However, there may be circumstances when the patient is likely to remain in the UK even longer than six months, in which case a longer estimate of return can be used."

19. It was common ground before us that providers had to have regard to such guidance and to have clear reasons for departing from it (see *R (Fisher) v North Derbyshire Health Authority* [1997] EWHC 675 (Admin), (1997-98) 1 CCL Rep 150, at 163). On the other hand, there was also "discretion to allow treatment to be given when there [was] no prospect of paying for it" (see *R (A) v Secretary of State for Health* [2009] EWCA Civ 225, [2010] 1 WLR 279, at paragraph 77).

The judgment

20. Before the Judge, MP challenged the advance payment and recording of information provisions in the 2017 Regulations on several grounds. For the purposes of the present appeal, only one of the issues which were before the Judge matters. The Judge identified this as follows in paragraph 60 of his judgment:

> "did the defendant act unlawfully by failing to carry out the consultation exercise properly by not including within the consultation two proposals, namely the requirement of advance payment and recording of information, as part of the consultation process it undertook in 2015; and/or did the claimant have a legitimate expectation, arising out of a past practice of public consultation, that there was would be a public consultation on any significant amendments imposing charges including these two proposals?"

21. So far as the first limb of this issue is concerned ("The Way In Which The Consultation Was Carried Out", in the Judge's words), the Judge said this:

> "64. In my judgment, the defendant is correct on this issue. If a public body chooses to consult upon a particular proposal,

> then it must do [so] fairly and in accordance with well-established principles. If a public body chooses to consult on one set of proposals, but not to consult on another, different set of proposals, then, unless it can be shown that there is a legal obligation to consult upon the second set of proposals, it is not obliged to do so because it is consulting on the first set of proposals. Indeed, the claimant recognises that in paragraph 56 of his skeleton argument where he accepts that the fact that a public authority consults on one issue does not of itself mean that it is unfair not to consult upon a completely separate issue which it later decides upon.
>
> 65. The fact that the defendant chose to consult upon a very large number of proposals relating to the charging regulations does not alter the position. The two issues upon which he chose not to consult (advance payment and record keeping requirements) were discrete, self-contained issues. The fact that notice of the decision to make those two changes was contained in the document setting out the response to the consultation exercise does not mean that the proposals were part of, or were linked in some way to the proposals that were consulted upon. The defendant did not fail to carry out the consultation exercise properly. The key question, therefore, is whether there was an obligation to consult upon these two changes."

22. As regards the second limb ("whether there was a legitimate expectation"), the Judge concluded in paragraph 73:

> "Analysing the evidence in the present case, there is not a settled and uniform practice of public consultation before exercising the power to make regulations relating to the making and recovery of charges for services provided to persons not ordinarily resident in the United Kingdom. There was certainly no unequivocal practice of public consultation."

23. After reviewing events from 1982 onwards, the Judge said in paragraph 84:

> "In substance, the claimant has analysed the material from the perspective of seeking to construct from the public consultation exercises that have taken place a practice. He does so by redefining occasions when public consultation did not take place as ones involving 'technical matters' or as involving changes which are to be regarded as beneficial to individuals. A more accurate analysis, in my judgment, would focus on the nature of the power being exercised, that is the power to make regulations relating to charging non-residents for NHS services. That analysis would take account of the fact that there have been occasions when that power has been exercised without consultation. In all the circumstances, therefore, there has not

been a settled and uniform practice of public consultation on changes to the charging regime since 1989, 1995 or later."

24. The Judge continued:

"85. Furthermore, and additionally, it would be difficult to regard any previous practice as giving rise to an unequivocal assurance that the two particular changes in issue in this case would be subject to public consultation. The requirement to record the fact that a person is a non-resident liable to charging, for example, does not of itself involve making any changes to the liability to pay charges (which is set out in the 2015 Regulations). It simply means that a person who is liable to pay charges is readily identifiable. It is difficult to see how the consultation exercises that were carried out in 2003, 2004, 2010 and 2013 gave rise to an unequivocal assurance that changes governing the recording of information would be the subject of consultation. The legitimate expectation that the claimant asserts in his claim form is an expectation, based on past practice, of consultation 'on any significant amendments made imposing charges under the section 175 power'. The recording of the fact that a person is liable to charges is not concerned with imposing charges. In his written submissions dated 14 September 2018, the claimant in effect reformulates the practice and expectation and describes it as 'an established prior practice of consulting on significant changes to the charging scheme which operate to the disadvantage of affected patients'. He then seeks to treat a requirement that liability to charging be recorded as such a change. It would be difficult, in my judgment, to treat the previous consultations as giving rise to an unequivocal assurance that changes relating to the recording of liability to pay charges is something that the defendant would consult upon. That indicates, more generally, that no unequivocal assurance arises out of any previous instances of consultation as to what might be the subject of any future consultation.

86. Similarly, it is it is difficult to see that that changes to the timing of payment for treatment is an amendment imposing charges, the expectation alleged in the claim form. It is only by recasting the practice as a practice of consulting on disadvantageous changes, and then classifying the imposition of a legal requirement to make advance payment as a disadvantageous change, that the second change is brought within the alleged past practice giving rise to a legitimate expectation. That, again, indicates the earlier instances of consultation did not give rise to a clear, unequivocal assurance that certain types of changes to the regulations would be the subject of consultation. In truth, the claimant can only seek to rely upon an alleged past practice both by ignoring instances

> where the exercise of the power to make regulations were not preceded by public consultation and by defining the consultations that did take place as instances where there was consultation on changes disadvantageous to the individual, and then classifying changes to record-keeping and the timing of payment as similarly disadvantageous. That is not, however, the type of situation which the courts have recognised as of a settled and uniform practice, giving rise to an unequivocal assurance, which results in the imposition of an obligation to consult before exercising a statutory power to make regulations. In the circumstances, therefore, the first ground of challenge, fails."

The present appeal

25. Before us, as before the Judge, Mr Jason Coppel QC, who appeared for MP with Mr Christopher Knight, contended that the advance payment and recording of information provisions in the 2017 Regulations should be quashed because the Secretary of State had failed to undertake due consultation before promulgating them. Mr Coppel advanced two alternative arguments. He submitted first that, having chosen to consult on changes to the 2015 Regulations, it was incumbent on the Secretary of State to do so fairly and hence to include in the exercise the proposals on advance payment and recording of information. Secondly, Mr Coppel said that the Secretary of State was anyway under a duty to consult on those proposals because a legitimate expectation of consultation had arisen from previous practice.

26. For his part, Mr Robert Palmer QC, who appeared for the Secretary of State with Mr Joseph Barrett, supported the Judge's decision and maintained that the Secretary of State had had no obligation to consult on the advance payment and recording of information provisions of the 2017 Regulations. He further argued that, even if that were wrong, relief should be denied because section 31(2A) of the Senior Courts Act 1981 would apply and/or relief should be refused as a matter of discretion.

27. There are thus three issues:

    i) Did the fact that the Secretary of State elected to undertake the 2015 consultation mean that he had to consult on the advance payment and recording of information requirements even if he would not otherwise have been obliged to do so?

    ii) Was the Secretary of State under a duty to consult on the advance payment and recording of information requirements because there was a legitimate expectation of consultation?

    iii) Should any relief be granted?

28. I shall take these in turn.

Issue (i): Consulting fairly

29. Where a public body embarks on a consultation, then, whether or not the law required there to be one, the consultation must be carried out properly. That means, as the Court of Appeal explained in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213 at paragraph 108, citing *R v Brent Borough Council, Ex p Gunning* (1985) 84 LGR 168, that:

> "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".

30. Proper consultation may sometimes require disclosure of materials which have come to light only since the consultation was launched. Thus, in *Edwards v Environment Agency* [2006] EWCA Civ 877, [2007] Env.L.R. 9, Auld LJ noted at paragraph 94:

> "Thus, if in the course of decision-making a decision-maker becomes aware of a new factor, as in *Interbrew SA v Competition Commission* [2001] EWHC Admin 367, or some internal material of potential significance to the decision to be made, as in *R. v Secretary of State for Health, Ex p. United States Tobacco International Inc* [1992] Q.B., 353, CA, at 370–371 (per Taylor L.J.) and 376 (per Morland J.), fairness may demand that the party or parties concerned should be given an opportunity to deal with it."

31. We were also referred to *R v East Kent Hospital NHS Trust, Ex p Smith* [2002] EWHC 2640 (Admin), where Silber J had to consider whether there was an obligation to re-consult because the defendants wished to pursue proposals differing from those set out in the consultation document. Silber J said at paragraph 45:

> "So I approach the issue of whether there should have been re-consultation by the defendants in this case, on the proposals now under challenge on the basis that the defendants had a strong obligation to consult with all parts of the local community. The concept of fairness should determine whether there is a need to re-consult if the decision−maker wishes to accept a fresh proposal but the courts should not be too liberal in the use of its power of judicial review to compel further consultation on any change. In determining whether there should be further re-consultation, a proper balance has to be struck between the strong obligation to consult on the part of the health authority and the need for decisions to be taken that affect the running of the Health Service. This means that there should only be re-consultation if there is a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt."

32. The *East Kent Hospital* case was, however, one in which there was a statutory requirement to consult (see paragraph 31). It follows that there was an obligation to consult on the new proposals unless the consultation which had taken place on the original proposals sufficed. For the purposes of the issue I am now considering, in contrast, it is to be assumed that the Secretary of State did not have an independent obligation to consult on the advance payment and recording of information requirements. The *East Kent Hospital* case is not, therefore, directly in point.

33. As I have said, the Judge did not consider the fact that the Secretary of State had chosen to consult on other proposals relating to charging to mean that he had to consult on the advance payment and recording of information requirements, which he said were "discrete, self-contained issues". Mr Coppel challenged this description. The advance payment and recording of information requirements were and are, he submitted, intrinsically linked to the subject of the 2015 consultation and the adoption of those requirements significantly affects the impact of the proposals which were consulted upon. In particular, consultees considering the potential extension of charging to community services were unaware that the charges would have to be paid upfront. Moreover, consultation on the advance payment and recording of information requirements could have been expected to excite considerable interest and opposition. The Judge, Mr Coppel argued, ought to have used fairness as the touchstone, but he failed to do so.

34. In my view, however, the Judge was correct.

35. Where a public body chooses to consult on a set of proposals, it has to conduct the consultation in respect of *those proposals* properly. The public body need not necessarily disclose, let alone consult on, other proposals it has in the same field. The focus is on what is required in the context of the particular proposals on which it has elected to consult. There might well be scope for criticism if a public body failed to disclose a plan it had which significantly affected a proposal on which it was consulting, but that would not be because of failure to consult on the plan as such but because of the plan's implications for the subject matter of the consultation. Moreover, non-disclosure of the plan would be a ground for objecting to implementation of the proposal under consultation rather than the plan itself, at least if the plan did not represent a variant or development of a proposal in the consultation and there had not already been a sufficient opportunity to express views on issues raised by the plan.

36. Reference to fairness may be useful when determining whether proper consultation on a particular set of proposals requires consultees to be told of some different proposal. Fairness cannot of itself, however, act as a freestanding touchstone for when consultation on a proposal is necessary. Summarising the law in *R (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin), [2015] 3 All ER 261, the Divisional Court observed in paragraph 98(2) that there are four main circumstances in which a duty to consult may arise:

> "First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to

> conspicuous unfairness. Absent these factors, there will be no obligation."

Mere fairness is not therefore enough to found a duty to consult on its own, and deciding whether or not it might in the abstract be considered fair to consult on a proposal will not provide a reliable answer to whether the proposal need be the subject of consultation. Nor, of course, does the fact that a proposal might be expected to excite interest and comment without more imply that there is a duty to consult on it.

37. In the present case, it is far from evident that the plans to introduce the advance payment and recording of information requirements needed to be disclosed for the purposes of consultation on the proposals comprised in the 2015 consultation document. Neither requirement was yet under consideration in 2015 so there can be no question of the Secretary of State being vulnerable to criticism for failing to refer to them at that stage. Moreover, the advance payment requirement did not extend the circumstances in which an overseas visitor was to be liable to pay for services but dealt only with when payment was to be made, and even in that respect reflected previous guidance. As for the recording of information requirement, that was limited to NHS foundation trusts and NHS trusts and did not impose any new financial burden at all.

38. In any case, despite Mr Coppel's submission that the additional requirements were and are intrinsically linked to the proposals comprised in the 2015 consultation, there is no challenge to implementation of any such proposal. What we are concerned with is the lawfulness of the advance payment and recording of information requirements. The Secretary of State not having elected to consult on these, it seems to me that the duty to carry out a consultation properly could not avail Mr Coppel unless the requirements could be said to represent variants or developments of proposals in the 2015 consultation. The fact that the Secretary of State had chosen to undertake the 2015 consultation could not otherwise, in my view, affect the lawfulness of the requirements.

39. However, the advance payment and recording of information requirements were not variants or developments of proposals in the 2015 consultation. Even if the requirements could be said to bear on the impact of those proposals, they were not tied to or derived from the proposals but were rather, in the Judge's words, "discrete" and "self-contained". Further, there is no basis on which we could interfere with the Judge's conclusion to this effect. In fact, the requirements were always to apply across the board, not merely where charging was to be extended under the proposals which had been put out to consultation, and the requirements have been imposed even though the Secretary of State ultimately decided against extending charging to anything like the extent that had been contemplated in 2015.

40. In the circumstances, I do not think that the Secretary of State's obligation to consult properly on the proposals which were the subject of the 2015 consultation provides any basis for impugning the advance payment and recording of information requirements.

Legitimate expectation

41. In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 ("*CCSU*"), which concerned the imposition of a bar on trade union membership for staff at GCHQ, Lord Fraser observed at 401 that legitimate expectation "may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue". The test of whether the case before the House of Lords was of the latter type was, Lord Fraser said, "whether the practice of prior consultation of the staff on significant changes in their conditions of service was so well established by 1983 that it would be unfair or inconsistent with good administration for the Government to depart from the practice in this case". Lord Fraser continued:

> "In the present case the evidence shows that, ever since GCHQ began in 1947, prior consultation has been the invariable rule when conditions of service were to be significantly altered. Accordingly in my opinion if there had been no question of national security involved, the appellants would have had a legitimate expectation that the minister would consult them before issuing the instruction of 22 December 1983."

42. The expression "legitimate expectation" had, it seems, first appeared in the domestic case law in the context of procedural fairness (see *United Policyholders Group v Attorney General of Trinidad and Tobago* [2016] 1 WLR 3383, per Lord Carnwath, at paragraph 82) and *CCSU* was a case of that type. Lord Carnwath explained in *United Policyholders Group v Attorney General of Trinidad and Tobago* at paragraph 84 that the extension of legitimate expectation to substantive rather than merely procedural benefits remained controversial for some years, citing in this respect *R v Secretary of State for the Home Department, Ex p Hargreaves* [1997] 1 WLR 906, at 921.

43. In the meantime, Bingham LJ, sitting with Judge J in the Divisional Court, had said in *R v Inland Revenue Commissioners, Ex p MFK Underwriting Agents Ltd* [1989] 1 WLR 1545 ("*MFK*") at 1569 that, if it were to be successfully said that the Inland Revenue had represented that it would forgo tax, "the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification". In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453, Lord Hoffmann cited these words approvingly at paragraph 60, and Lords Bingham, Rodger and Carswell also proceeded on the basis that a legitimate expectation claim depended on a "clear and unambiguous" representation (see paragraphs 73, 115 and 134). In *R (Patel) v General Medical Council* [2013] EWCA Civ 327, [2013] 1 WLR 2801, Lloyd Jones LJ, with whom Lord Dyson MR and Lloyd LJ agreed, accepted at paragraph 40 that the requirement had "certainly not been watered down as the principle of legitimate expectation has developed" and in *R (Badger Trust) v Secretary of State for Environment, Food and Rural Affairs* [2014] EWCA Civ 1405, [2015] Env LR 12 ("*Badger Trust*"), Bean LJ, with whom Davis and Christopher Clarke LJJ agreed, thought it uncontroversial that a "representation or promise which is clear, unambiguous and devoid of relevant qualification" is a requirement for establishing a substantive legitimate expectation (see paragraph 24).

44. Legitimate expectation was subjected to searching analysis by Laws LJ in *R (on the application of Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 ("*Bhatt Murphy*"). Having noted that there were two kinds of legitimate expectation, procedural and substantive, Laws LJ said this about the former:

> "29. There is a paradigm case of procedural legitimate expectation, and this at least is in my opinion clear enough, whatever the problems lurking not far away. 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 ….
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> 30. 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. It is unnecessary for the purpose of these appeals to travel into those issues; I venture only to say that there are in my view significant difficulties in the way of imposing such qualifications. My reason is that in such a procedural case 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. This is an objective standard of public decision-making on which the courts insist …."

45. Going on to comment on substantive expectation, Laws LJ said in paragraph 43:

> "Authority shows that where a substantive expectation is to run the promise or practice which is its genesis is not merely a reflection of the ordinary fact (as I have put it) that a policy with no terminal date or terminating event will continue in effect until rational grounds for its cessation arise. Rather it must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured. Lord Templeman in *Preston* referred (866 - 867) to 'conduct [in that case, of the Commissioners of Inland Revenue] equivalent to a breach of contract or breach of representations'."

46. Lord Wilson cited that last passage in *R (Davies) v Revenue and Customs Commissioners* [2011] UKSC 47, [2011] 1 WLR 2625 ("*Davies*"), in which it was

argued that "the revenue had … raised in the appellants a legitimate expectation that it would determine their claims in respect of the years of assessment by reference to its earlier settled practice" (see paragraph 48). After observing that "unqualified assurances" which were given in a booklet "would readily have fallen for enforcement under the doctrine of legitimate expectation", Lord Wilson, with whom Lords Hope, Walker and Clarke agreed, said at paragraph 49:

> "it is more difficult for the appellants to elevate a *practice* into an assurance to taxpayers from which it would be abusive for the revenue to resile and to which under the doctrine it should therefore be held. 'The promise or practice … must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured': *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755, para 43, per Laws LJ. The result is that the appellants need evidence that the practice was so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment to a group of taxpayers including themselves of treatment in accordance with it."

47. *R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 ("*BAPIO*") and *R (on the application of Brooke Energy Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 2012 (Admin) ("*Brooke Energy*") both involved an attempt to establish a duty to consult from past practice. In the former case, changes to the Immigration Rules were challenged on, among others, the basis that a practice of consultation had given rise to a duty to consult. Rejecting that argument, Sedley LJ said at paragraph 39:

> "While a practice does not have to be unbroken, it has to be sufficiently consistent to be regarded as more than an occasional voluntary act. Like the judge, I do not think that the Home Office's past conduct fitted this description; but even if I did, I would not think it right to upset his judgment on what is an evaluative question of fact."

48. Legitimate expectation contentions also foundered in *Brooke Energy*. Flaux LJ, sitting with Holgate J in the Divisional Court, explained in paragraph 53 that the claimant had contended in its amended statement of facts and grounds for a duty to consult because of an established practice of consultation, but had not pressed the point at the hearing. In this regard, Flaux LJ said:

> "53. … This aspect of the case was not pursued orally by Mr Drabble QC which is scarcely surprising since the evidence does not support the alleged established practice. The alleged practice must be clear, unequivocal and unconditional: see per Laws LJ in *Bhatt Murphy* at [29]; per Mostyn J in *R (on the application of L) v Warwickshire County Council* [2015] EWHC 203 (Admin)] at [17]. The practice must be sufficiently settled and uniform to give rise to an expectation that the claimant would be consulted: see per Stanley Burnton J in *R on the application of BAPIO Action Ltd v Secretary of State for the*

> *Home Department* [2007] EWHC 199 (Admin) at [53]. It is also clear from [17] of *L* and from [28] of *Bhatt Murphy* that there must be unfairness amounting to an abuse of power for the public authority not to be held to the practice.
>
> 54. The evidence shows that there are occasions when the Government has consulted over changes to the RHI scheme and occasions when it has not ….
>
> 55. It follows that there is no settled or uniform practice, let alone one that is unequivocal, such as to give rise to an expectation of consultation and no sense in which it could be said to be unfair for the Department not to have followed any such practice ….”

49. The most recent authority to which we were taken was *R (on the application of Heathrow Hub Ltd) v Secretary of State for Transport* [2020] EWCA Civ 213, [2020] 4 CMLR 17 (“*Heathrow Hub*”). In that case, the appellants argued that the Secretary of State had acted in breach of a legitimate expectation that he would select the “Extended Northern Runway” scheme to provide additional capacity at Heathrow Airport “if he found it to be ‘the most suitable scheme’” (see paragraph 60(2)). The Divisional Court rejected the contention and the Court of Appeal (Lindblom, Singh and Haddon-Cave LJJ) likewise concluded that it was “impossible to spell out … an express or implied promise or any regular pattern of behaviour amounting to a representation … , still less a clear and unambiguous representation devoid of any relevant qualification such as to justify a finding in law of legitimate expectation” (see paragraph 91). Earlier in its judgment, the Court of Appeal had commented on a passage in the Divisional Court’s judgment in which this had been said:

> “The promise relied upon must be clear, unambiguous and devoid of any relevant qualification, but it is well-established that it need not be express. It can be derived from the circumstances of a particular matter.”

The Court of Appeal said this:

> “69. Although we would not disagree with that summary, it is important, in our view, to be clear about the last sentence. That sentence must not be read out of context. In the context of the above passage read fairly and as a whole, what is required is that there must be a practice (even though there is no express promise) which is impliedly tantamount to such a promise. That practice must still give rise to a representation which is clear, unambiguous and devoid of any relevant qualification.
>
> 70. It is important to recall that the origin of the modern doctrine of legitimate expectation lies in the decision of the House of Lords in *Council of Civil Service Unions v Minister for the Civil* Service … (‘*CCSU*’). That was a case concerning a procedural expectation (a suggested duty to consult), but the fundamental ingredients of a legitimate expectation will be the

> same where there is asserted to be a substantive expectation (in effect a promise that a public authority will behave in a certain way on matters of substance and not merely procedure) ….
>
> 72. In the *CCSU* case, at 401, Lord Fraser of Tullybelton said that a 'legitimate … expectation may arise either from an express promise given on behalf of a public authority or from the existence of a *regular practice* which the claimant can reasonably expect to continue' (our emphasis).
>
> 73. Furthermore, as subsequent decisions of the courts have made clear, a legitimate expectation will only be created if there has been some representation which is clear, unambiguous and devoid of relevant qualification: see the seminal decision of the Divisional Court in *R. v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, at 1569 (Bingham LJ).
>
> 74. The position has been recently explained in the Supreme Court decision of *R. (on the application of Gallaher Group Ltd) v Competition and Markets Authority* [2019] AC 96, in which the main judgment was given by Lord Carnwath JSC. Lord Carnwath considered earlier decisions, including the decision of the Court of Appeal in *R. v Inland Revenue Commissioners, ex parte Unilever Plc* [1996] STC 681. At paragraph 37 of his judgment Lord Carnwath referred to the 'principles of legitimate expectation derived from an express or implied promise …', thus recognising that what is required is a promise although it need not be an express one as it may be implied. At [40], Lord Carnwath said:
>
> > '… The decision in *Unilever* was unremarkable on its unusual facts, but the reasoning reflects the caselaw as it then stood. Surprisingly, it does not seem to have been strongly argued (as it surely would be today) that a sufficient representation could be *implied* from the Revenue's *consistent practice* for over 20 years … " (our emphasis).
>
> 75. It is clear therefore, in our view, that, although an express promise is not required to found a legitimate expectation, there must be a consistent practice which is sufficient to generate an implied representation to the same effect."

50. It will be seen that the Courts have used a variety of expressions when describing representations or practices that do, or do not, suffice to give rise to a legitimate expectation. In *CCSU*, Lord Fraser spoke of a "regular practice" that was "so well established … that it would be unfair or inconsistent with good administration … to depart from the practice". In *MFK*, there was reference to a representation needing to be "clear, unambiguous and devoid of relevant qualification", and similar

formulations featured in the *Bancoult*, *Patel*, *Badger Trust*, *Brooke Energy* and *Heathrow Hub* cases. Judges have also referred to a practice having to be "sufficiently consistent to be regarded as more than an occasional voluntary act" (Sedley LJ in *BAPIO*), to an "unequivocal" or "plain" assurance (Laws LJ in *Bhatt Murphy*), to a practice being "so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment" (Lord Wilson in *Davies*), to a practice being "sufficiently settled and uniform" (*Brooke Energy*) and to a "consistent practice" (*Heathrow Hub*).

51. Mr Coppel argued that procedural and substantive legitimate expectation need to be distinguished. On that footing, he submitted that the key authorities in the context of the present appeal are those dealing with the former, such as *CCSU*, *BAPIO* and *Brooke Energy*, and, as regards the last of these, he observed that the case was a bad one on the facts and that there was no reference in the judgments to either *CCSU* or *BAPIO*. The upshot, Mr Coppel maintained, is that a procedural legitimate expectation can be established by showing a "sufficiently settled and uniform practice". There is, he said, no need for a practice to be "unequivocal", and the Judge erred in law in approaching matters on the basis of such a requirement and by ignoring the qualifier "sufficiently" before "settled and uniform practice".

52. In my view, however, the distinction which Mr Coppel sought to draw between procedural and substantive legitimate expectation is not justified. Mr Palmer argued that cases concerned with substantive legitimate expectation are also of relevance when considering procedural legitimate expectation, and I agree. The "clear, unambiguous and devoid of relevant qualification" formula first appeared when it was as yet still controversial whether legitimate expectation extended to substantive rather than merely procedural benefits and it and its analogues have not hitherto been held to apply only to substantive legitimate expectation. In fact, Flaux LJ referred to a practice needing to be "clear, unequivocal and unconditional" in *Brooke Energy*, a consultation case, and the Court of Appeal spoke of the "fundamental ingredients" of procedural and substantive legitimate expectation being the same in *Heathrow Hub*. It is true that in *Badger Trust* Bean LJ said that a "representation or promise which is clear, unambiguous and devoid of relevant qualification" is a requirement for establishing a *substantive* legitimate expectation, but he had no occasion to comment on whether procedural legitimate expectation also requires such a representation or promise.

53. The correct position appears to me to be as follows:

    i) An express promise, representation or assurance needs to be "clear, unambiguous and devoid of relevant qualification" to give rise to any legitimate expectation, whether substantive or procedural;

    ii) A practice must be tantamount to such a promise if it is to found any legitimate expectation. It may be, as Sedley LJ said in *BAPIO*, that a practice does not have to be entirely unbroken, but it does have to be so consistent as to imply clearly, unambiguously and without relevant qualification that it will be followed in the future.

54. In the circumstances, I do not think the Judge can be said to have erred in referring either to "settled and uniform practice" (without adding "sufficiently") or to

"unequivocal practice". Such expressions were apt to describe the sort of practice required to establish a legitimate expectation. For good measure, I do not read the judgment as treating an "unequivocal assurance" as crucial to the decision. Having concluded in paragraph 84 that there had not been a "settled and uniform practice", the Judge went on to say that "[f]urthermore, and additionally, it would be difficult to regard any previous practice as giving rise to an unequivocal assurance that the two particular changes in issue … would be subject to public consultation". Absence of an "unequivocal assurance" was thus an *extra* reason for rejecting legitimate expectation.

55. If, as I consider to be the case, the Judge cannot be said to have applied the wrong legal test, we must be cautious about interfering with the Judge's evaluation. We should do so, as it seems to me, only if the Judge's decision was an unreasonable one or can be seen to be wrong as a result of some identifiable flaw in his reasoning, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion" (see e.g. *R (on the application of R) v Chief Constable of Greater Manchester* [2018] UKSC 47, [2018] 1 WLR 4079, at paragraph 64, and also *Re Sprintroom* [2019] EWCA Civ 932, [2019] BCC 1031, at paragraphs 76 and 77). Absent such a deficiency, it is not for us to make our own assessment (compare in this respect the passage from Sedley LJ's judgment in *BAPIO* quoted in paragraph 46 above).

56. The Judge considered in detail the extent to which the Secretary of State had consulted on regulations relating to the charging of overseas visitors. As he explained, there was public consultation on seven proposed changes to the regulations in 2003, on certain proposals in 2004, on five areas in 2010 and, in 2013, on matters leading to the 2015 Regulations. On the other hand, there was no consultation on the making of the 1982 regulations, on amendments to those regulations effected between 1982 and 1989, on the 1989 replacement regulations, on amendments made between 1989 and 2003, on two further proposals put forward in 2003 or on amendments made in 2006, 2008 and 2009. Moreover, although there was public consultation on five areas in 2010, the departmental response to the consultation indicated that two additional modifications, not consulted upon, would also be made. Thus, as the Judge noted in paragraph 82 of his judgment:

> "Even in 2013, however, all that could be said was that on four occasions (2003, 2004, 2010 and 2013) there had been public consultations on some proposed changes to the regulations. On other occasions, there had not been public consultation. Even when there was consultation in 2003 and 2010, not all the changes made were ones that were consulted upon."

57. With regard, finally, to the 2015 consultation, the Judge said this in paragraph 83:

> "It is not feasible to consider the 2015 consultation exercise itself as evidence of a practice of public consultation for two reasons. First, the question is whether there was a past practice of consultation established by December 2015 such that there was on obligation on the defendant to conduct a public consultation in 2015 on the advance repayment and record keeping requirements. Secondly, the 2015 consultation does not, on analysis, evidence a practice of consulting on any

> change to the regulations, or even any change such as the advance payment requirement which might be seen as disadvantageous to individuals. It does the opposite as the defendant did not consult upon those changes."

58. Mr Coppel did not dispute that changes to the charging regime have been made without consultation, but he pointed out that since 1989 almost all the changes on which there was no consultation have been either technical or to the advantage of patients. He argued that the Secretary of State could be seen to have consulted consistently on changes to the rules which would operate to the disadvantage of patients. Mr Palmer, in contrast, submitted that there is no logical basis on which to have regard to amendments to the regulations relating to overseas charging since 1995, but to ignore all the previous amendments; nor to have regard only to amendments that might be seen as "disadvantageous" to the patients directly affected by them.

59. On balance, it seems to me that we would not be justified in interfering with the Judge's assessment. While it is fair to say that the Secretary of State had in more recent years consulted on changes to the charging regime that were to the disadvantage of overseas visitors, it remained the case that the Secretary of State had not consulted on by any means all amendments to the regime and, more specifically, that "when there was consultation in 2003 and 2010, not all the changes made were ones that were consulted upon". The Judge was, in the circumstances, amply entitled to see the overall picture as mixed and to consider that no legitimate expectation of consultation had arisen.

Relief

60. The conclusions I have reached on the previous issues mean that I do not need to consider the question of relief.

Conclusion

61. I would dismiss the appeal.

Lord Justice Moylan:

62. I agree.

Lord Justice McCombe:

63. I also agree.