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Case No: CA-2022-000284

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION (ADMINISTRATIVE COURT AND PLANNING COURT)
Mr Justice Griffiths
[2022] EWHC 105 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 July 2023

Before:

LADY JUSTICE MACUR
LORD JUSTICE BEAN
and
LADY JUSTICE ELISABETH LAING

- -

Between:

SECRETARY OF STATE FOR WORK AND PENSIONS	**Appellant**
- and -	
EVELEIGH AND OTHERS (FORMERLY BINDER AND OTHERS)	**Respondents**

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Sir James Eadie KC, Sarah Hannett KC and Emily Wilsdon (instructed by **The Treasury Solicitor**) for the **Appellant**
Jenni Richards KC, Stephen Broach and Katherine Barnes (instructed by **Bindmans LLP**) for the **Respondents**

Hearing date: 28 June 2023

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Approved Judgment

This judgment was handed down remotely at 11.00am on 11 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. This is an appeal from an order of Griffiths J ('the Judge'). The Judge allowed an application for judicial review of the National Disability Strategy ('the Strategy'), published on 21 July 2021 by the Secretary of State for Work and Pensions ('the Secretary of State'). The Judge held that a UK Disability Survey ('the Survey') which preceded the Strategy, was, at common law, a 'consultation'. The 'consultation' attracted various obligations which the Secretary of State had breached. The Secretary of State now appeals against that order with the permission of Whipple LJ.

2. The Secretary of State was represented by Sir James Eadie KC, Ms Hannett KC and Ms Wilsdon. The respondents (the claimants below) were represented by Ms Richards KC, Mr Broach, and Ms Barnes. Ms Barnes did not attend the hearing. Sir James Eadie told us that she had just had a baby girl. I thank counsel for their oral and written submissions.

3. Paragraph references are to the Judge's judgment, or, if I am referring to an authority, to the paragraph numbers in that authority, unless I say otherwise. I will refer to the claimants below as 'the claimants'. Three cases are referred to repeatedly in the judgment and in the parties' arguments. They are *R v Brent London Borough Council ex p Gunning* (1985) 84 LGR 168 ('*Gunning*'), *R v North East Devon Health Authority ex p Coughlan* [2001] QB 213 ('*Coughlan*') and *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56; [2014] 1 WLR 3947 ('*Moseley*').

4. The issue raised by the first ground of appeal is whether the Judge was right to hold that the decision to use the Survey attracted any legal obligations, and that the Secretary of State not having realised that her conduct had attracted such obligations, she then breached those obligations. A second issue is raised by the Secretary of State's application to amend her grounds of appeal to add a further ground and for permission to appeal on that ground. I will consider that application in paragraphs 91-93, below.

5. For the reasons given in this judgment I have decided that the Judge was wrong to decide that the Survey was subject to the requirements first described in *Gunning* ('the *Gunning* requirements'). He was therefore also wrong to hold that the Secretary of State acted unlawfully by not complying with those requirements, and wrong to quash the Strategy.

6. This judgment, and my summaries of the Judge's judgment, and of the parties' submissions will be easier to understand if I start by considering some general principles which were not in dispute, and the three authorities to which I have just referred in paragraph 3, above.

The general principles and the authorities

7. The parties agree that the common law does not impose a general obligation to 'consult'. There are three potential sources of obligations to 'consult'. A public body will be obliged to consult if there is a statutory duty to do so, if there is a legitimate

expectation that it will do so (whether because of a promise, or a sufficiently consistent past practice), and if it would be conspicuously unfair not to consult.

Gunning

8. The subject of *Gunning* was the publication of a proposal by a local education authority to close four schools and to merge them with other schools. The authority's decision was challenged on many grounds, most of which were upheld by Hodgson J. One aspect of the challenge related to consultation. Parents were sent a brief consultation document which had very limited information about the costs of the proposal. Most parents received the document on 4 or 5 June. They were required to respond to it by 15 June. The authority's education committee noted that the consultation was wholly inadequate because it had not explained the proposal or given the public a proper opportunity to consider it. The committee recommended that the authority consider alternatives. The proposals adopted by the authority on 12 July differed from the proposals which had been the subject of the consultation. The proposals were published for the approval of the Secretary of State and the applicants applied to quash them.

9. At page 189, Hodgson J recorded the submissions of counsel for the applicants, Mr Stephen Sedley QC (as he then was). He submitted that four 'basic requirements were essential if the consultation process is to have a sensible content'. They were that, first, 'the consultation must be at a time when the proposals are still at formative stage'. Second, 'the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response'. Third, 'adequate time must be given for consideration and response'. Fourth, 'the product of the consultation must be conscientiously taken into account in finalising any statutory proposals'.

10. Hodgson J held that although the authority did not have a statutory obligation to consult parents, they did have a legitimate expectation that they would be consulted. He held that the consultation document was inadequate and misleading, and that the period for the consultation was unreasonably short. He also held that because the proposals which were adopted differed materially from the proposals which were the subject of the consultation, the parents should be consulted again. He described the consultation process as 'woefully deficient'. He did not expressly adopt Mr Sedley's submissions, but it is clear from the judgment that they influenced his approach.

Coughlan

11. In *Coughlan*, a local health authority decided to close a small home in which patients with serious chronic conditions were supported by the NHS. Those patients had been promised a 'home for life' there. They had also been promised that they would be consulted about proposals to close the home and to move them into the care of a local authority. Lord Woolf MR gave the judgment of this court. Sedley LJ (as he had by then become) was part of the constitution.

12. Paragraphs 108-117 of the judgment are headed 'Consultation'. In paragraph 108, Lord Woolf said, 'It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon, it must be carried out properly'. He then explained what was needed for a consultation to 'be proper'. He adopted the four tests which were part of Mr Sedley's argument in *Gunning* and referred to that decision. He then considered what he described as 'the machinery of

consultation' in Ms Coughlan's case. He explained that Hidden J had held, at first instance, that 'none of the four *Gunning* criteria were met'. Lord Woolf examined the points which had impressed Hidden J and concluded that although the consultation could be criticised, 'it was not flawed by significant non-compliance with the *Gunning* criteria'.

13. In paragraph 112, Lord Woolf accepted the authority's submission that there was no requirement to consult the claimant about material which had been elicited during the consultation. He added, '…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'.

Moseley

14. Section 13A of the Local Government Finance Act 1992 ('the 1992 Act') replaced council tax benefit with council tax reduction schemes, which were to be decided on locally by each billing authority. Paragraph 3(c) of Schedule 1A to the 1992 Act obliged a billing authority, before it made a scheme, to consult 'such other persons as it considers are likely to have an interest in the operation of the scheme'. The billing authority published and consulted on a draft scheme. During the consultation period, the government announced a transitional grant scheme ('the TGS') for authorities whose schemes met certain criteria. After the end of that period, officers recommended that the authority should not adopt a scheme which complied with the criteria in the TGS. The authority adopted the draft scheme. The claimant challenged the scheme, arguing that the consultation was unfair and unlawful because consultees had not been told that there were alternatives to the draft scheme and that they should have been told about the availability of the TGS. The challenge was dismissed by the Divisional Court and by this court.

15. The Supreme Court allowed the appeal. Lord Wilson gave a judgment with which Lord Kerr agreed. Lord Reed gave a judgment with which Baroness Hale and Lord Clarke agreed (see further, paragraph 23, below).

16. Lord Wilson described the consultation in paragraphs 16-22. He rejected the authority's submissions about how the first and fifth questions in the consultation document were to be interpreted. In paragraphs 23-28 he summarised the legal position. In paragraph 23, he said 'a duty to consult those interested before taking a decision can arise in a variety of ways'. It can be imposed by statute, or by a common law duty 'to act fairly'. No matter the source of 'the duty to consult…that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted'.

17. The requirements of fairness 'in this context' must 'be linked to the purposes of the consultation'. He described two purposes of procedural fairness in paragraph 24. A third democratic purpose was particularly relevant in a case like the present, where the question was not whether or not to close a care home or a school, but whether a

scheme which applied to everyone who lived in the authority's area should be made in the terms proposed by the authority. In paragraph 25, he referred to Mr Sedley's submissions in *Gunning*. They had been expressly endorsed by this court in two cases (one of which is *Coughlan*). He cited paragraph 112 of *Coughlan* (see paragraph 13, above). He then endorsed 'the Sedley criteria'. They were 'a prescription of fairness'.

18. Lord Wilson made two further points. First, the specificity with which a public authority should consult 'may be influenced by the identity of those whom it is consulting. Second, the demands of fairness might be 'somewhat higher' when an authority is considering depriving a person of an existing benefit than when the person was 'a bare applicant for a future benefit' (paragraph 26). Sometimes the authority may be required not just to consult on its preferred option, but also on 'arguable yet discarded alternative options' (paragraph 27). Even when the subject of a consultation is the preferred option, 'fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options' (paragraph 27).

19. He held, in paragraph 29, that in this context 'fairness demanded' the consultation document to refer briefly to 'other ways of absorbing the shortfall and to the reasons why (unlike 58% of local authorities in England…) [the authority] had concluded that they were unacceptable'. In paragraph 30 he explained why that would not be onerous. The authority had not acted unlawfully, however, in not referring to the TGS (paragraph 32).

20. Lord Reed said that he agreed generally with Lord Wilson, but that he would emphasise fairness less, and emphasise more the statutory context and purpose of the duty to consult in that case (paragraph 34). There was a general common law duty of fairness, but no general common law duty to consult. There is such a duty usually only where an authority has created a legitimate expectation of consultation (paragraph 35). The current case concerned a statutory duty of consultation. Such duties vary a great deal (paragraph 36). He did not consider that the current case was about fairness at all (paragraph 37).

21. A wide-ranging consultation of all the people who live in an authority's area was 'far removed' from the situations in which the common law had recognised a duty of procedural fairness. The purpose of the current duty to consult was not to 'ensure procedural fairness in the treatment of persons whose legally protected interests may be adversely affected...' It 'must…be to ensure public participation in the local authority's decision-making process' (paragraph 38). In order to achieve that objective, the authority had to give consultees not only information about the draft scheme, but an outline of realistic alternatives, 'and an indication of the main reasons for the authority's adoption of the draft scheme'. He also cited paragraph 112 of *Coughlan* (paragraph 39).

22. In paragraph 40 he said that an authority was not always required to provide information about rejected options. If the statutory provision did not give the answer, the question would usually be whether 'the provision of such information is necessary in order for the consultees to express meaningful views on the proposal'. An authority was not required to discuss the alternatives or the reasons for their rejection in any detail. Public consideration documents should be 'clear and understandable…not unduly complex or lengthy' (paragraph 41).

23. Baroness Hale and Lord Clarke agreed with both judgments. They thought that there was 'very little between them as to the correct approach'. They agreed with Lord Reed that the statutory context was important and that in the current context, 'the duty of the local authority was to ensure public participation in the decision-making process'. To do that, it had to act fairly, by taking the steps described by Lord Wilson in paragraph 39. In 'those circumstances' they thought that they could 'safely agree' with both judgments (paragraph 44).

The judgment

The issue

24. The Judge said that the claim was that the Secretary of State 'failed to consult lawfully, via its [sic] UK Disability Survey ("the Survey") before publishing [the Strategy], and that, consequently, the Strategy itself is unlawful' (paragraph 2). The claimants asked for a declaration that the Strategy was unlawful. In paragraph 3, the Judge recorded their expectation that, if such a declaration were made, the Secretary of State would 'carry out further appropriate consultation with a view to revising the Strategy, if appropriate'.

25. The claimants asked the Judge to consider three grounds (paragraph 5). Only one ground is live on the appeal. Ground 1 was that common law 'consultation fairness requirements' applied because 'in carrying out the Survey and/or engaging stakeholders' the Secretary of State 'voluntarily embarked on a consultation exercise.'

26. The parties agreed a list of issues for the hearing (paragraph 6). One is relevant to this appeal. That question was whether the Survey was a voluntary 'consultation' to which 'the *Gunning* principles' applied as 'encapsulated' by this court in *Coughlan* [2001] QB 213 and approved by the Supreme Court in *Moseley*. In paragraph 7 the Judge said that the claimants re-formulated their claim at the hearing. The issue was said to be whether the Secretary of State 'engaged in a consultation as a matter of substance as part of her development of the Strategy'. The Judge decided that the relevant question was whether the Secretary of State 'voluntarily embark[ed] upon a consultation and, if she did, what if any consultation duties were thereby created' (paragraph 9).

The facts

27. I have taken the facts from the Judge's summary (paragraphs 10-42).

28. The Conservative Party manifesto in 2019 promised that, if elected, they would 'publish a National Strategy for Disabled People by the end of 2020'. This would 'look at' ways to improve various things for disabled people, such as the benefits system and opportunities. It would include existing commitments, for example to increase SEND funding. Delays caused by the pandemic meant that the Strategy was not published until 28 July 2021. Work on the Strategy was co-ordinated by a cross-departmental team in the Cabinet Office, the Disability Unit.

29. On 28 January 2020, the Director of the Disability Unit wrote to the Disability Charities Consortium ('the DCC') before a discussion planned for 3 February 2020.

The letter described 'the key policy themes' for the Strategy. The letter said that the Disability Unit planned to 'take forward parallel strands of work' for the Strategy and said what those were. They included the collection and analysis of evidence and data, engagement with disabled people and stakeholders, engagement with relevant government departments, 'policy iteration and development' and communication. The letter added that the Disability Unit 'envisage[d]' having meetings with the DCC roughly once a month on different aspects of the Strategy, mainly with officials, but occasionally with ministers. There were 12 such meetings between 3 February 2020 and 25 May 2021.

30. Other groups were chosen to take part in 'a number of other engagement sessions, working groups, roundtables, and joint roadshows in various parts of the UK on various dates in 2020 and 2021'. There were, for example, 12 meetings of 'Regional Stakeholder Network Chairs'. According to a press release on 2 April 2020, that network was set up by the Disability Unit to 'help build a picture of the lived experience of disabled people in England'. One of its purposes was to 'help develop the [Strategy]' (paragraph 14).

31. The Disability Unit received written submissions from people and organisations during 2020 and 2021 in response to the announcement of 'the forthcoming Strategy' (paragraph 15).

32. In paragraph 16, the Judge referred to a press release dated 2 April. It is not clear whether this is the same press release as he referred to in paragraph 14. It was headed 'A National Strategy for Disabled People to remove barriers and increase participation'. It said that the Disability Unit was 'working across government and with disabled people to develop' the Strategy. The Disability Unit was working with 'government colleagues, disabled people, disabled people's organisations, charities, and businesses to achieve practical changes that will remove barriers and increase participation'. The development of the Strategy was 'the key focus'. The Judge quoted the next sentence, and underlined part of it: 'The strategy will build on evidence and data, <u>and critically on insights from the lived experience of disabled people</u>.'

33. The press release added that the Strategy would include existing commitments (for example, increasing funding for special educational needs) and would identify 'further opportunities to improve things'. The press release listed the 'objectives' for the Strategy. These included developing 'a positive and clear vision on disability which is owned right across government', making practical changes to policies which would 'strengthen disabled people's ability to participate fully in society', strengthening 'the ways in which we listen to disabled people and disabled people's organisations, using these insights to drive real change', and improving 'the quality of evidence and data' and its use 'to support policies and how we deliver them'. The Judge underlined two passages in two further objectives. One was '<u>ensure lived experience underpins policies by identifying what matters most to disabled people</u>.' The other said that as the government's priority was the pandemic, they were 'reviewing plans for the development of the strategy. They wanted enough time to 'get this right' <u>and 'undertake a full and appropriate programme of stakeholder engagement. People's views and insights will be crucial as we work with colleagues across government, disabled people and other stakeholders on possible solutions</u>'.

34. Work continued in government. There were 'challenge sessions' between the Disability Unit and other government departments between August and September 2020. 'Cross-cutting' groups had meetings between August and October 2020. There were four meetings of a 'Disabled people's Organisations Forum' between July and November 2020.

35. The Disability Unit published a blog post on the GOV.UK domain on 2 December 2020. It said that the Strategy would be 'built on' improved data and evidence, engagement with disabled people and 'insight from lived experiences'. This described the progress which had been made with the Strategy. Again, I underline the passage which the Judge thought was important, as he underlined it. The post said that early discussions with 'disability stakeholders' had 'highlighted a number of major themes that sit across the departmental responsibilities'. Those 'themes' were then listed. This was said not to be a complete list: 'We are continuing to listen to stakeholders to find the right areas to build a strategy that makes a real difference to the lives of disabled people'.

36. The post then explained how the government would 'deliver' the Strategy. The Disability Unit was 'stepping up' its 'engagement with stakeholders'. The post described the ways in which the Disability Unit would use technology to 'collect thoughts directly from people who are not represented by existing groups'. The 'stakeholder groups' had been giving 'insight on key issues for disabled people'. The Disability Unit was having regular meetings, in different regions, to ensure that the voices of people with a range of different disabilities were heard. Four 'stakeholder groups' were listed. Their insights were valued. They provided 'lived experience and expert views to guide [the Strategy]'. This programme of engagement would continue even after the Strategy was published. The post said that the Disability Unit would spend the next few months 'gathering thoughts, testing approaches and ensuring that we loop in views from the widest possible range of stakeholders and citizens'.

37. In paragraph 23, the Judge recorded that the Secretary of State 'accepts that none of the engagement elicited views on detailed policy proposals, because no such proposals had been finalised or agreed within government'. The Secretary of State's case was that 'during most of the information gathering phase which this engagement exercise represented, "there was no draft Strategy (bringing those proposals together in a single framework), nor were the proposals sufficiently concrete to make it possible to discuss them externally."' He added that 'It [sic] concedes that "Details of the emerging policy proposals from Government departments were not shared" during the information gathering phase'.

38. Between September 2020 and January 2021 the Disability Unit designed the Survey. It was published on 15 January 2021. The deadline for responses was changed twice. It was changed from 13 February 2021 to 28 February and then to 23 April 2021. During the first two periods, the responses would 'inform the Strategy'. During the third period, they would 'inform the implementation of the Strategy'. There was a press release when the Survey was launched. This public Survey was to 'gather views and experiences' for the Strategy.

39. The Judge quoted just under a page from the press release in paragraph 25, again underlining the passages which he thought were important. The Disability Unit was said to be working with the government and with disabled people, organisations representing them, charities and businesses, 'to develop and deliver' the Strategy, which it intended to publish in Spring 2021. The Strategy would have 'expert advice and the lived experience of disabled people at its heart'. There would be practical changes to policies to help disabled people to 'participate fully in society'. Opportunity would be 'level[led] up. We want to place the lived experiences of disabled people at the centre of our approach, as well as views from across the country including those caring for and related to disabled people, as well as the general public. Today we are launching a public survey to gather views'. The Survey continued engagement across government during 2020 and which had continued in the current year. That engagement was described. The Survey was said to be on 'Citizen Space. If you share your views by 28 February your views will inform the development of [the Strategy]' but the Disability Unit would 'continue to listen' after that. It would be open until 23 April and 'your views will be used to inform the delivery of the plans we set out'. The Survey was fully accessible.

40. In paragraph 26, the Judge quoted nearly two pages from a blog post which was published on GOV.UK site, also on 15 January 2021. Its title was 'Tell us your thoughts for our [Strategy]'. Again, the Judge underlined the passages which he thought were important. The Strategy was 'an ambitious piece of work' designed to support disabled people 'in all aspects and phases' of their lives. 'The Disability Unit is working with many groups of people to develop [the Strategy]'. Some of the groups were listed. 'By putting your lived experience first, we want to understand and dismantle the barriers holding disabled people back'. The government wanted to do practical things through policies which would 'make a real difference to' the lives of disabled people. The government wanted a Strategy which 'drives positive change with your voice at the heart of the process. Therefore we want to have lived experience of disabled people at the centre of our strategy.'

41. Under the heading 'How can I join in?' the post continued, 'We are initially launching an on-line survey to gather these views and we would like you to contribute'. The Survey would cover different topics which were important to disabled people. The post then said, 'This is part of our ongoing consultation and marks the start of our insight gathering'. In another underlined passage, the post said that the Disability Unit would like as many people as possible to contribute, as the more people the Disability Unit heard from 'the better our [Strategy] will reflect the needs of disabled people…' The views of people were important and engagement would continue as the Strategy was launched 'as listening to your views is important to us throughout the process'.

42. The post continued, under the heading 'A structured conversation', by saying that the Disability Unit's aim was 'to lead' such a conversation 'to hear about people's lives. This will inform our [Strategy] with the lived experience of the people most affected'. The Disability Unit wanted to help to dismantle stereotypes and to 'have a general conversation with the public about their interaction with disability issues and disabled people'. As the Disability Unit gathered 'insight', it hoped to 'collect a range of viewpoints and opinions from a variety of different people. One way we can do this is through our survey'. The Disability Unit would also hold focus groups or workshops.

The 'conversations' would continue after the Survey was published. The Survey would be accessible.

43. Under the heading 'What's next?' the post said that this was the first opportunity to ask people for their views. The Disability Unit would continue to ask for people's views, even after the Strategy was published. To achieve lasting change, 'our commitment must be ongoing and collaborative.'

44. The Judge noted (paragraph 27) that the Survey was put on the Disability Unit's website in a section labelled 'Consultation Hub'. The Survey was listed there as one of its 'Open Consultations'. 'The Consultation Hub explained itself at the top of the page as follows: "Consultation Hub Welcome to Citizen Space. This site will help you find and participate in consultations which interest you"'.

45. In paragraph 28, the Judge quoted part of the Survey. It said that the Disability Unit was 'developing [the Strategy]'. The Survey continued 'To help the government with understanding the barriers that disabled people face and what it may need to focus on to improve the lives of disabled people, we need to hear about your views and know more about your experiences'. The Survey would ask respondents about their 'life experiences either as a disabled person, a carer or parent or as someone who had an interest in disability issues'. There would be an opportunity at the end to say whether the respondent's life had changed 'notably' because of Covid. The Survey would be open until 23 April 2021. 'Responses received before 28 February 2021 will inform development of [the Strategy], while those received after this date used to inform its delivery'.

46. The Judge described the Survey in paragraphs 29 and 30. The questions were mostly multiple choice questions. There were only four comment boxes. There were 113 questions; which questions were relevant to a respondent would depend on whether the respondent was a disabled person, a carer, or a member of the general public. The Judge listed the questions asked above the four comment boxes, and their word limits, in paragraph 30. These questions concerned the impact of Covid, what three changes would most change the respondent's life, any barriers which the respondent felt that the Survey had missed, and, based on the respondent's 'experience or insights' suggested 'solutions to issues raised or how to remove barriers'.

47. He recorded, in paragraph 31, by reference to the pleadings, the claimants' case that the Survey 'did not outline the proposed content of the Strategy and it did not allow comment on any specific policy proposals'. He also recorded that the Secretary of State 'concede[d]' that that was so. In paragraph 32 he quoted a passage from the evidence filed on behalf of the Secretary of State. The effect of that passage was that none of the elaborate engagement was 'intended to elicit views on detailed policy proposals'. It would have been 'practically impossible to do' because of the scope of the discussions 'across a great range of Government business'. The purpose of the activity was to 'gather information so that the DU and the Government more generally, could assess whether the commitments to be included in the Strategy would be likely to meet the concerns and priorities of disabled people, and therefore whether to pursue or amend them'.

48. The Judge said, in paragraph 34, that a pre-action letter 'challenging the lawfulness of the *consultation*' (my emphasis) was sent by the claimants' solicitors on 8 February 2021. The Secretary of State replied on 22 February 2021. On 25 March 2021, the Disability Unit made a ministerial submission described as a 'Policy Stocktake' for the Strategy. In paragraph 36 the Judge said that this submission made it clear that the Survey and other 'components of the insight gathering phase…were being used to cross-check work in relation to the…Strategy'. He quoted the first paragraph to support that conclusion. The submission added that the Survey and roundtables had 'enriched our understanding of the daily realities and priorities for disabled people in many areas'. There were 'gaps' in the Strategy when it was seen against the 'issues highlighted by disabled people and other stakeholders and in the evidence base'. Officials would 'draw on the further insights and evidence for the next draft Strategy', which they aimed to produce by the end of March. Officials said that the Survey and the roundtables had been 'an extremely useful source of additional and mainly confirmatory information' on issues facing disabled people and their carers 'in everyday life'. Officials had further analysed 'our core evidence, ethnographic research, stakeholder submissions and the outputs from other…engagement work'. All those sources had been compared. They provided 'a consistent picture of disabled people's lives, needs and experiences'. They planned to publish a full analysis by June 2021.

49. The application for judicial review was issued on 29 March 2021. At that stage, the 'decision to be judicially reviewed' was described in section 3 of the claim form as 'The Defendant's consultation (referred to, in part at least, as the UK Disability Survey) ("the Consultation") on its proposed [Strategy]'. The claim form was amended twice. On 17 August 2021, it was amended a second time. 'and the [Strategy] published on 28 July 2021' was added in section 3. The date of the first decision was said to be '15 January 2021 (the date the Survey opened)'.

50. As foreshadowed, the Survey closed on 23 April 2021. The Disability Unit did another 'policy stocktake' in May 2021. The draft Strategy was discussed with 'Regional Stakeholder Network Chairs' and leaders of the DCC. There was more internal work. The Judge added 'It is not suggested that this phase constituted *Gunning* compliant consultation if that was required' (paragraph 39).

51. The Strategy was published on 28 July 2021. It is over 100 pages long. The foreword referred to 'the biggest listening exercise with disabled people in recent history'. 14,000 people had responded to the Survey. The Strategy had been 'informed by what we have heard'. In the section headed 'About this Strategy' there were statements about the relationship between the Survey and the Strategy. The attempts to gather information were described, and the Survey. The authors said that they were grateful 'to everyone who has taken time to share their thoughts on what we should include in [the Strategy] whether through completing the [Survey], attending meetings or events, or engaging through social media and correspondence. Their expertise and insights have been integral to the development of the [Strategy].'

52. The executive summary described the three parts of the Strategy. There were 'immediate commitments' in Part 1. Part 2 described 'ambitious changes to how government works with and for disabled people into the future'. They would be put 'at the heart of government policy-making and service delivery…' Part 3 summarised

the actions which each government department would take to improve the daily lives of disabled people.

The Judge's reasoning

53. The first question which the Judge considered was whether the Secretary of State had a duty to consult (whether because it was 'conspicuously unfair' not to consult, or because it was 'irrational' not to) (paragraphs 43-54). He observed, correctly, that the common law does not impose any general duty on decision makers to consult 'before they take decisions'. It was not enough that it might be 'a good idea', or 'sensible'. He said (paragraph 44) that 'For this reason, in many cases, the duty to consult, if any, is imposed by statute'. Sometimes a duty to consult before making a decision was part of the duty to act fairly. In paragraph 46, he said that there was no statutory obligation to consult in this case. Nor was it suggested that there was a promise to consult, or a legitimate expectation based on any representation or assurances that there would be consultation of the kind now sought. Nor was it suggested that there was an established practice of consultation.

54. In paragraph 48, the Judge said that '…the preliminary and general nature of the Strategy' meant that 'consultation was not legally required in order to avoid conspicuous unfairness or irrationality…' The Strategy, he continued 'did not immediately make any changes to law or detailed policy. It essentially provided a policy framework within which more specific future policies would be developed and implemented. The lack of specifics is, in fact, one of the criticisms made of it in the claimants' evidence…' The claimants were very interested in it 'but the same might be said of many general government policy documents and there is, nevertheless, no general common law duty to consult. It was not as a matter of fact conspicuously unfair to publish [the Strategy] without full consultation…neither the content of the Strategy, nor its potential impact, made it one of those exceptional cases in which full consultation would be required'.

55. For the same reason, 'the level of consultation represented by the Survey and other elements of [the Secretary of State's] information gathering phase was sufficient to meet' the obligation imposed by *Secretary of State for Education v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065, per Lord Diplock (paragraph 49).

56. The Judge then considered whether the Secretary of State had 'voluntarily' consulted, and, if so, 'what if any consultation duties were thereby created' (paragraphs 55-78). He cited paragraph 108 of the judgment of Lord Woolf in *Coughlan*. He had said that 'whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly'. Lord Woolf then relied on *Gunning* for a statement of the requirements.

57. He recorded that the Secretary of State did not 'accept that a consultation was embarked upon in this case which carried with it the *Gunning* requirements'. The Secretary of State's evidence was that the Survey was not a consultation. It was not intended to be a formal consultation exercise on any particular proposal. The Survey and the Disability Unit's other activities were 'listening and insight gathering exercises…to understand more about the lived experience of disabled people'

(paragraph 56). That evidence, said the Judge, was relied on to 'distinguish it from a consultation exercise properly so-called' (paragraph 57).

58. Whether 'a public body has embarked on consultation for these purposes is a matter of substance, not form. If, without using the term, the decision-maker embarks on an exercise that is in substance consultation, this principle applies'. He cited a passage from the judgment of Simler J (as she then was) in paragraph 99 of *R (FDA, PSCU and PROSPECT) v Minister for the Cabinet Office* [2018] EWHC 2746 (Admin) (paragraph 58). The use of the word 'consultation' was not decisive, as the question was one of substance, not form. A consultation (in substance) was different from an exchange of information (paragraph 59).

59. The Judge was 'satisfied' that the Survey was 'a consultation in the *Gunning/Coughlan* sense'. This was a question of substance, not form. He based his 'assessment…on what was said and done at the time'. He referred to his summary in paragraphs 10 to 41 (see paragraphs 28-52, above). He added 'I consider the passages I emphasised in those paragraphs particularly relevant to this point'.

60. At the start, the documents were 'consistent with an information-gathering exercise in which there was no commitment to linking that exercise to specific content in the Strategy, or about what impact, if any, the information will have on the Strategy.' Nevertheless, by the time of the 2 April press release, such a link 'clearly began to be made'. The Strategy would 'build on evidence and data' and on 'insights from the lived experience of disabled people'. There was also an assurance that the Disability Unit wanted 'enough time to get this right' and to have full and appropriate engagement with stakeholders. The 2 December blog post said that the Disability Unit was 'continuing to listen to stakeholders to find the right areas to build a strategy which makes a real difference to the lives of disabled people'.

61. When the Survey was launched, the link between the two was made 'perfectly explicit'. The word 'consultation' was used '('The survey…is part of our ongoing consultation')' According to the Judge, 'the substance of' the press release and of the blog post 'fully justified that word'. That, said the Judge, was particularly clear from the passages he had underlined in paragraphs 25 and 26 (see paragraphs 39 to 43, above). In paragraph 64, he added that the Survey was put on the Consultation Hub and described as an 'Open Consultation'. It was said that responses received before 28 February 2021 would 'inform the development of the…Strategy'.

62. In paragraph 65, the Judge said that when the Strategy was 'finally' published, 'the way in which it claimed to be responsive to' the Survey 'further demonstrated that' it was 'intended in substance to be, and was not merely described as, a consultation'. The foreword referred to 'the biggest listening exercise… in recent history'. It claimed, as a result, the Strategy was 'far more wide-ranging than approaches of the past'. The Survey 'was said to have "shaped the development of this Strategy", the responses were said to have "inform[ed]" the Strategy'; those who filled in the Survey 'were described as sharing their thoughts on "what we should include" in the Strategy and "Their experience and expertise have been integral to the development of the [Strategy]"'.

63. The Judge's conclusion '[c]onsequently' was that he was' satisfied that the Secretary of State had voluntarily embarked on a consultation to which the *Gunning/Moseley* principles should be applied'. He was also satisfied that the Survey was 'at the heart of that consultation'. He had described the Strategy as 'preliminary and general', but it was not 'lacking in any substance'. His analysis of the Strategy was to repeat his reference to the three parts of the Strategy as they were described in the Executive Summary (see paragraph 52, above), although he added, 'A perusal of the Strategy justifies these claims. It was capable of attracting, if [the Secretary of State] chose to assume it, a consultation obligation' (paragraph 66).

64. The Judge then asked what 'consultation duties' were involved. He cited paragraph 23 of the judgment of Lord Wilson in *Moseley*, and the '*Gunning* principles' as endorsed by Lord Wilson in paragraph 25. The claimants relied, in particular, on the third 'requirement' that 'the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response'. In paragraph 71, the Judge cited paragraph 112 of the judgment of Lord Woolf in *Coughlan*.

65. The claimants' case (in paragraph 73 of their statement of facts and grounds) was that the Secretary of State 'breached the second *Gunning* criterion' because there was not enough information in the 'consultation documentation' and/or the 'consultation document was designed in such a way that it precluded proper and effective response'. The claimants' third alternative was that 'the questions posed by the consultation document were irrational because they did not correspond to the purpose of the consultation'.

66. In paragraph 74 the Judge said that he did not understand the Secretary of State 'substantially to dispute' that if 'the second *Gunning* criterion applied, it was not met'.

67. The Judge noted that the Secretary of State accepted that she had not 'advise[d]' anyone 'what she was proposing to include in the Strategy'. That made it 'impossible meaningfully to respond' in the Survey to 'those proposals before they were finalised and published in the Strategy'. The Survey was presented, as he had shown, as 'a way in which the Strategy could be shaped, would be shaped and (eventually) was shaped, but the information provided made that impossible. It therefore failed to achieve its stated purpose'. Respondents to the Survey were not told '"in clear terms what the proposal is and exactly why it is under positive consideration", as required by *Coughlan* and *Moseley*'. The Survey was presented as a 'consultation', the Strategy was said to be a response to the 'consultation', but neither the Survey 'nor any other form of consultation enabled the "intelligent consideration and response" required by the second *Gunning* principle of lawful and fair consultation' (paragraph 75).

68. The claimants criticised other aspects of the Survey. The Judge agreed with those criticisms. He observed that the word limit for the free-text boxes had not been enforced. Nevertheless, the multiple-choice questions and the word limit 'did not allow for a proper response even to the issues canvassed in' the Survey. Its design 'forced [the Secretary of State's] own analysis on the respondents, without providing enough leeway for the required "intelligent response" from the respondents themselves' (paragraph 76).

69. He acknowledged the Secretary of State's argument that her failure to comply with that second requirement was 'another basis for saying that there had been no duty to consult in the first place…the Survey was so obviously not allowing comment on' what would or might be included in the Strategy that it 'could not have been understood as a consultation'. That was a 'circular argument. Failure to comply with a duty to consult does not in itself prove that no such duty was imposed. I am satisfied on the evidence that [the Secretary of State] was purporting to consult in a way, which required compliance with the principles which I have identified, notwithstanding the deficiencies in doing so. The failure to consult lawfully was therefore a breach of the duty' (paragraph 78).

The Judge's order

70. In his order, the Judge allowed the application for judicial review on the grounds that 'in carrying out the Survey [the Secretary of State] voluntarily embarked on a consultation exercise' and that the Secretary of State 'breached the second *Gunning* criterion because the information provided to the respondents as part of the consultation documentation was insufficient and because the consultation document was designed in such a way that it precluded proper and effective response'. He declared that the Survey was 'a consultation to which the common law requirements of fair consultation applied' and that the Strategy was unlawful 'because the consultation which informed it failed to comply with the common law requirement that the proposer must give sufficient information to permit of intelligent consideration and response'.

The Judge's refusal of permission to appeal

71. The Judge refused permission to appeal on the grounds that the appeal did not argue that he had erred in law but challenged findings of fact. Such findings are hard to challenge on an appeal, even in an application for judicial review. Much of the challenge went to weight. He added that 'cases are fact-specific and it is unlikely that a freestanding definition of "consultation" is necessary or appropriate'. The issue was whether there had been consultation, and the decision, on the facts, was that there had been.

The grant of permission to appeal

72. The Secretary of State's initial ground of appeal was that the Judge erred in law in declaring that the Strategy was unlawful, because of his conclusion that the Survey was a consultation to which the principles in *Gunning* applied. Whipple LJ gave permission to appeal on 28 October 2022. The Secretary of State later applied, in December 2022, for permission to amend the grounds of appeal and to appeal on a further ground. The second ground was even if the Survey was a 'consultation', it was voluntary, and therefore it did not entail the application of the *Gunning* principles. The only appropriate legal control was rationality. Whipple LJ adjourned that application to the hearing of the appeal. She refused the claimants' application for permission to cross-appeal.

The submissions

73. Sir James Eadie submitted that decisions about the process of government are for the executive to make, and that they are only subject to the control of the courts by means

of the principle of rationality. Whether, and if so how, the executive chooses to engage with the public, is for it to decide, subject to that principle. He drew attention to the limited circumstances in which there is a legal duty to consult, which imposes more onerous obligations. Even where there is a duty to consult, much about the scope and method of consultation was for the executive to decide, subject to rationality.

74. The issue on the first ground of appeal was how the engagement in this case, which was voluntary, could attract the duties described in *Gunning*. The authorities acknowledge that there is a difference between 'engagement' and 'consultation'. He submitted that *Gunning* cannot apply if there is no 'proposal'. He added that 'The further back from a proposal you are, the less likely you are to be at a *Gunning* point'. The proposal must be concrete, and specific enough, to be capable of being responded to intelligently. There was no 'proposal' here, and nothing to which an intelligent response could be made.

75. The received wisdom, based on paragraph 108 of *Coughlan*, is that a voluntary consultation attracts the *Gunning* requirements. Ground 2, which was not argued below, was that that received wisdom is wrong. The point has been assumed to be correct in many authorities, but has never been the subject of argument, or decision. This court should say so, he argued, and decide that a voluntary consultation is only subject to control via the principle of rationality.

76. Ms Richards urged us to read the witness statements of the claimants. I have done so. A common theme is that the claimants did not understand how the questions in the Survey could inform the Strategy. Some found the multiple-choice questions infantile or patronising, or that they did not give respondents an opportunity to give detailed answers. At least one felt that she was given 'no opportunity to give [her view] on the barriers that affect my life, or suggest ways in which my life as a disabled person could be improved or transformed. I do not understand how the Secretary of State could know what policies are needed to transform my life without asking. I would have wanted to discuss the barriers I face every day as a disabled person…'

77. Ms Richards took us through some of the documents on which the Judge had relied, and showed us others to which he had not referred. The Survey had used the word 'consultation' several times. A repeated theme was that respondents' views would 'inform the Strategy'. The phrase 'lived experience' was used repeatedly. She submitted that there was no indication of what issues might form part of the Strategy.

78. She accepted that the Judge's conclusions were not 'pure findings of fact' and that, in ordinary language, the word 'consultation' can be used to describe the gathering of information, as, for example, when a local authority puts a Survey on its website asking residents for their views on aspects of its services. She agreed that it was necessary to distinguish between that use of the word, and its technical legal meaning. She did not accept that there could only be a 'consultation' in that technical sense if the public body has a proposal on which it wishes to seek the views of respondents. If views were gathered to 'inform an anticipated decision-making process' that was a consultation in the technical sense. In this case, it was what the Secretary of State had said she was doing, and why she said she was doing it which made the Survey a 'consultation'. Yet the Survey did not identify what issues might be part of the Strategy.

79. A lawful consultation would have provided the respondents with some information about what was contemplated and what initiatives the Secretary of State had in mind. It would not have been necessary to attach a draft of the Strategy. The questions ought also to have permitted 'intelligent response'. The questions in the Survey were not designed to do that and there were only four free-text boxes. The consultation was not fair. It was permissible to collect information in general, but if the information was being used in order to inform the development of a policy or decision-making, that was a consultation. Bean LJ asked Ms Richards to suppose that the Disability Unit had put a one-page document on the website which said that the Secretary of State was in the early stages of developing the Strategy, which asked respondents to say whether they were a disabled person, or a carer, and the nature of any relevant disability, and then asked for up to three ideas which would really improve their lives. Her 'provisional' immediate response when asked about that hypothesis was that that would not be a 'consultation' and would not be unfair. It would be 'information gathering'. She confirmed that answer later in the hearing having reflected further on the question.

80. As there was no legal definition of 'consultation', it was open to the Judge, having analysed the materials, to conclude that the Survey was a 'consultation'. The context was that the information was to be used to 'shape policy'. The references in the Survey to people's 'views' were important in distinguishing the Survey from information gathering. Yet respondents were not provided with the information which was necessary to enable them to respond meaningfully. There was no authority which said that there cannot be a 'consultation' if there is no proposal. 'Proposal' should be construed widely. To suggest that there was no consultation because there was no proposal was to put things the wrong way round. The Judge had been right to decide that to hold that there was no consultation because there was not enough information to enable the Secretary of State to escape a legal requirement by relying on her own breach of that requirement. The Judge was not plainly wrong to decide that the Survey was a 'consultation'.

Discussion

Ground 1

81. As Ms Richards accepted, there is no magic in the word 'consultation'. It is a word which in ordinary usage has a range of meanings. The mere use of that word cannot entail legal consequences, especially if that word is used by people who are not lawyers. For that reason, the repeated use by the Disability Unit of the word 'consultation' and the fact that the Survey was put on the Consultation Hub are legally irrelevant. As Simler J recognised in paragraph 99 of the *FDA* case, in a statement which the Judge quoted (see paragraph 58, above) whether, when a public authority engages with the public, that engagement attracts legal obligations is a question of substance, not form.

82. As Bean LJ pointed out during oral submissions, the Judge did not expressly explain what test he applied in deciding that the Survey was a consultation which attracted legal obligations. In my judgment, the *Gunning* criteria are based on self-evident assumptions about the characteristics of the exercise to which they are able, and are intended, to apply. If the exercise in question does not have those characteristics, the

Gunning criteria cannot apply to it. It is therefore necessary to spell out those assumptions, as, contrary to Ms Richards' submissions, they do tell us a great deal about the characteristics of the exercise to which they are intended to apply.

83. All the cases in which the *Gunning* criteria have been held to apply are cases in which a public authority contemplated making a specific decision which would or might adversely affect a particular person or group of people. The three main cases concern closing and merging specific schools in the area of a local education authority, closing an NHS facility for the long-term care of a very few patients, and the adoption of a particular council tax reduction scheme which might make poor residents in the area of a billing authority even poorer than they were already.

84. Unsurprisingly, it might be thought, the *Gunning* criteria therefore assume that a public authority is proposing to make a specific decision which is likely to have a direct (and usually adverse) impact on a person or on a defined group of people. The Strategy is not comparable with those proposed decisions. It is a different thing altogether: a series of general policy commitments which are at such a high level of abstraction that it is not easy to see their direct negative (or positive) impact on a particular person or group of people. So the Strategy is not obviously the type of intended decision to which the *Gunning* criteria can, or are intended to, apply.

85. The *Gunning* criteria also make two assumptions about the stage of the decision-making process at which they apply. The first is that there is a proposal to make a decision, which, while not inchoate, is at a sufficiently 'formative' stage that the views of those consulted might influence it. But the second assumption, which sheds light on what is meant by 'formative stage' in this context, is that the proposal has crystallised sufficiently that the public authority also knows what the proposed decision may be, and is able to explain why it might make that proposed decision, in enough detail to enable consultees to respond intelligently to that proposed course of action. In some cases, as is clear from *Moseley*, the public authority may also be obliged to give information about arguable discarded alternatives, and the reasons why it has preferred its preferred option.

86. In my judgment, the Strategy had not reached a stage at which it could conceivably have been the subject of a 'consultation' complying with the *Gunning* criteria. It is not suggested that, at the time of the Survey, the Disability Unit had a secret draft of the Strategy locked in a drawer. The purpose of the Survey was to find out information and views which might 'inform' the Strategy. That suggests to me that the potential Strategy was no more than an inchoate plan which would take shape as and when information was gathered, and in response to that information. The references to respondents' views shaping or informing the Strategy, far from showing, as the Judge seems to have thought, that the Survey was a 'consultation', tend to show, instead, that there was not, at that stage, a concrete proposal to which the *Gunning* criteria could apply.

87. The claimants' complaint that they were not told enough about the Strategy to enable them to respond to it 'meaningfully' underlines this point. They could not be given that information because it did not exist. A linked complaint is that the Survey did not ask for their views about any proposals. But that was because there were none at that stage. Rather, their views were being sought as information which might be relevant

to the contents of the Strategy, once it was formulated. That is what the repeated references to the views of respondents 'informing' the Strategy mean. The Survey is 67 pages long and asks a range of questions about such things as housing and employment. The questions are, broadly, about the practical impact of disability on people's lives and about people's 'lived experience'.

88. The complaint that people's views were not sought, or were sought in the wrong way, has no force. Views were sought in four free-text boxes. One concerned the impact of Covid. There were three at the end of the Survey. They asked about the 'top 3 changes that would make your life better…', what, if any 'barriers' the Survey had missed, and 'building on your experience or insights, can you suggest any solutions to issues raised or how to remove barriers?'. Those were opportunities for respondents to influence, or to 'inform' the contents of the Strategy with their views, by drawing attention to what mattered to them. They were not opportunities to comment on the Strategy, because the Strategy was not at that stage ready for comment. When it was eventually published, the Strategy was over 100 pages long. With commendable pragmatism, Ms Richards did not submit that the entire Strategy should have been attached to the Survey. But, if one assumes, against my clear view, that the Secretary of State should have 'consulted' on the Strategy, it is difficult to see how that could have been done in a manageable way. It is difficult to see how it could have been summarised so as to comply with the *Gunning* criteria, or how, if the Secretary of State was also, as she might well have been, obliged to consult on arguable discarded alternatives, and on her reasons for preferring her proposal, she should have complied with that obligation, either. These, admittedly, are forensic points, but they underline the difficulties of the Judge's approach.

89. Finally, there are two short further points about the Judge's reasoning. A theme is that the Survey made an explicit link between the information and views which it sought and the eventual contents of the Strategy, and that link was legally significant. I do not accept that reasoning. The fact that the Disability Unit said that the views gleaned from the Survey would influence the contents of the Strategy is not enough to overcome the basic difficulty for the claimants, which is that there was, at the stage of the Survey, no proposal to which the *Gunning* requirements could apply. If anything, this theme underlines, rather than overcomes, that difficulty. Second, I consider that, in paragraph 75 (see paragraph 67, above), he misunderstood the purpose of the Survey. It was not to enable respondents to respond to proposals (there were none) but to give the respondents to the Survey the opportunity to influence the future content of the Strategy with information and their views.

90. For these reasons, I do not accept the submission that it was open to the Judge to find, on these facts, that the Survey was a 'consultation' to which the *Gunning* criteria could, or did, apply. I consider that he was wrong to decide that, for the reasons I have just given.

Ground 2

91. In the light of my decision on ground 1, anything I were to say about ground 2 would not be necessary to my decision. I see the force of the Secretary of State's submissions that the passage in paragraph 108 of *Coughlan* (see paragraph 12, above) was not the subject of argument or reasoned decision in that case and has not been since, however

many times it has been repeated in the authorities. I therefore also see the force of the argument that it is not a binding decision that the *Gunning* criteria apply to voluntary consultations, and that point has not been the subject of any binding decision since. There is a further question, however, which is, binding or not, whether that passage is nevertheless correct. Since it is not necessary for me to decide that issue, I decline to do so.

92. Precisely because I have held that the *Gunning* criteria could not apply in this case, I find the counter-factual assumption (that they do apply) impossible to make on these facts. That is a further reason for not considering ground 2. Finally, if it is to be assumed that a public authority has freely decided to consult on the sort of decision to which the *Gunning* criteria are capable of applying, I also find it difficult to see, whether the test is fairness, or rationality, why the *Gunning* criteria, or an equivalent, should not apply to that exercise.

93. I would therefore refuse the Secretary of State permission to appeal on this further ground.

Conclusion

94. For those reasons I would allow the Secretary of State's appeal on ground 1 and refuse permission to appeal on ground 2.

Lord Justice Bean

95. I agree with the judgment of Elisabeth Laing LJ. In particular I agree with her that the *Gunning* criteria only apply where a public authority is proposing to make a specific decision which is likely to have a direct (usually adverse) impact on a person or on a defined group of people. The proposal must be at a sufficiently formative stage that the views of those consulted might influence it, but also must have crystallised sufficiently that the public authority knows what the proposed decision might be, and can explain it in enough detail to enable consultees to respond intelligently to the proposed course of action.

96. The Disability Survey fails all these tests. It was seeking respondents' "lived experiences" and their views on what measures might improve the lives of disabled people. I respect the opinions of the individual claimants who say that the Survey could have been better designed or asked more sophisticated questions, but it is not the function of the courts on judicial review to award marks out of ten for the design of a survey. To extend the principles set out in *Gunning* and *Coughlan* to a general survey of this kind would in my view represent an unwarranted judicialisation of public life.

97. I too would allow the appeal of the Secretary of State on Ground 1. As for Ground 2, which was not raised below and is unnecessary to our decision, I too would refuse permission to appeal. I only add that it is far from obvious to me that a voluntary consultation should be subject to the same rules as one which the public authority is legally obliged to conduct. But that interesting question, on which there is no binding

authority, will have to wait for another case in which it is raised at first instance, argued on both sides, and is essential to the decision.

Lady Justice Macur

98. I too agree that the appeal is to be allowed on Ground 1, and agree with the judgments of Elisabeth Laing and Bean LJJ in that regard. I would also refuse permission to appeal on what would have become Ground 2. Any additional comment is superfluous, but for what it is worth and discerning a different perspective between Elisabeth Laing LJ and Bean LJ, I tend to agree with Elisabeth Laing LJ that if "a public authority has freely decided to consult on the sort of decision to which the *Gunning* criteria are capable of applying, … it [is] difficult to see, whether the test is fairness, or rationality, why the *Gunning* criteria, or an equivalent, should not apply to that exercise." However, as Bean LJ notes, "that interesting question, on which there is no binding authority, will have to wait for another case in which it is raised at first instance, argued on both sides, and is essential to the decision".