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What counts and will sway the court over time limits and the “no substantial difference test” in light of *R (CU) v Secretary of State for Education*?

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R (CU) v SoSfE [2024] EWHC 638 (Admin)

Two issues identified by Fordham J as “significant”:

- (1) The time limit for bringing claims alleging unlawful consultation
- (2) the “no substantial difference” test in section 31 Senior Courts Act 1981

Time-limits

The practical problem:

- the public body is going to make a decision affecting your client – which may be adverse
- it is consulting / has consulted
- you think the consultation is unlawful
- do you wait for the decision, or challenge now?

CU: the “consultation”

- **Green Paper about changes to the SEND system**
- **It did not tell respondents information about a statutory bar on a Tribunal awarding damages**
- **Said to be a breach of Gunning principle that a “proposer” must give sufficient reasons for a “proposal” to permit of intelligent consideration and response**

CU: what had happened on timing

- **Pre-action letter two months into a three month consultation period**
- **SoS denies claim. No challenge at that stage**
- **Following consultation period a second letter follows after claimant secures legal aid**
- **Challenge brought within three months of end of consultation period (and before any subsequent decision)**

CU: the rival contentions

- **SoS: time started to run (“grounds arose”) on publication of the consultation document (so out of time now)**
- **Claimant: time started to run at the end of the consultation period (so in time now)**

Key points from the judgment

Point one: think about which Gunning principle is invoked.

- **Conscientious consideration?**
- **Not at formative stage**
- **Consultation information defective (/inadequate time for consultation)**

Key points from the judgment

For cases like CU, see esp. para 84:

“If I had to say that as a matter of law there could only be one relevant starting point, then I would – albeit with some hesitation – hold that it ought to be the start of the consultation period since that is, on proper analysis, the date of the decision which is said to be public law unlawful.

However, I would also accept that where the applicant has, during the course of the consultation, asked the public authority to remedy the flaw within a reasonable time of becoming aware of it and has been met with a refusal, then that refusal decision ought itself to be capable of being the subject of a separate challenge.

I would not hold that the applicant should be entitled to await the final decision itself, unless the circumstances are such that there was a proper basis for saying that the final decision included a decision not to remedy the flaw in the prior consultation process”.

Where are we left?

- 1. Judgment in hesitant language “if I had to pick...”. But set-up of case means persuasive.**
- 2. There is no “one-size-fits-all” approach.**
- 3. In a defective consultation document case, reality is need to move quickly**
- 4. NB questions of relief under s.31 different**
- 5. What about other types of staged decision-making?**

NSD: the statutory test

Court has to refuse relief if it appears to it that:

“the outcome for the applicant would not have been substantially different had the conduct complained of not occurred”

Section 31(3D) (refusal of permission)

Section 31(2A) (refusal of relief)

NSD: the arguments

Common ground that claimant well knew the information she was complaining was omitted

- **SoS argument: the “outcome for the applicant” would have been the same, because she was in exactly the same position *qua* respondent to consultation**
- **Claimant argument: “the outcome for the applicant” included the decision following the consultation which SoS might make**

The judgment

R (Cava Bien Ltd) v Milton Keynes Council [2021] EWHC 3003 (Admin) at [52] is a gathering together of principles

(but didn't help).

The judgment

“In my judgment, on the authorities it is at least arguably sufficient that, on the assumptions the court is required to make when applying the no substantial difference question at the permission stage:

- (a) the outcome for the claimant includes an outcome where all those who might wish to respond to Q7 with knowledge of the compensation remedy exclusion can do so, so that all such responses can conscientiously be taken into account;**
- (b) it cannot be said to be highly likely that this would have made no substantial difference to the result of the consultation or thus, in turn, no difference to the claimant insofar as he has a legitimate interest in the consultation being run properly and also – as DV says – in relation to any future disability discrimination claims he might bring as regards his secondary school education”.**

A score draw overall?

- ❖ **Unhelpful for claimants in sense that they need to move quickly**
- ❖ **But not that helpful for defendants: a further “decision” may be able to be drawn and reduces scope for prematurity arguments**

Discrimination in schools

Any questions?

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