Where is the line between (1) consultation and (2) informal engagement in JR claims and how do you turn the argument in your client's favour?

- James Maurici KC

INTRODUCTION

- This talk focuses on the CA's decision in ***R (Eveleigh) v SSWP*** [2023] 1 WLR 3599 handed down on 11 July 2023. The CA reversed the earlier decision of Griffiths J ([2022] EWHC 105 (Admin)).
- This talk will:
- (1) Begin with a reminder of the law governing consultation generally;
- (2) Look at the facts of, and issues raised in, the ***Everleigh*** case;
- (3) Look at what was decided at first instance and in the CA;
- (4) Examine where the law now stands on these issues, including:
  - When is something a "consultation" to which the ***Gunning*** requirements apply and when it is something else "informal engagement" to which those requirements are inapplicable?
  - Do the ***Gunning*** requirements apply to a voluntary consultation?
- (5) Look at some practical issues around the above matters.

The law on consultation (1) – the requirements

- We have a very clear set of requirements that govern a what is a legally adequate consultation.
- The so-called ***Gunning*** (or Sedley) requirements date back to 1985 and have stood the test of time: see ***R v LB of Bent, ex p Gunning*** (1985) 84 LGR 168:
- (1) the consultation must be at a time when proposals are still at a formative stage.
- (2) the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response.
- (3) adequate time must be given for consideration and response.
- (4) the product of the consultation must be conscientiously into account in finalising any proposals.

These requirements were endorsed by the Supreme Court in ***R (Moseley)v Haringey LBC*** [2014] 1 WLR 3947.

The law of consultation (2) – when is there a duty to consult?

- The law is, or at least was before ***Everleigh***, very clear on what consultation requires when it is undertaken but as to when it is required to be undertaken the law is not as clear … see ***Eveleigh*** at [7]
- There is no general common law duty to consult;
- There are three potential sources of a duty to consult:
- (1) Express or implied statutory duty to consult;
- (2) Legitimate expectation (whether based on a promise or sufficiently consistent past practice); or
- (3) It would be conspicuously unfair not to consult.

The law of consultation (3) – voluntary consultation, must it meet the ***Gunning*** requirements?

- Until the ***Eveleigh*** case the generally accepted view was that voluntary consultation requires compliance with the ***Gunning*** requirements:

  - See ***R v NE Devon HA, ex p Coughlan*** [2001] QB 213 at [108] per Lord Woolf MR:

    " … 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 …".
  - See further the cases cited in Fordham *Judicial Review Handbook* (7ed) at [62.2.10].

The ***Eveleigh*** case (1) – the facts

- In order to obtain information to inform its new National Disability Strategy ("the Strategy"), the Government launched the UK Disability Survey ("the Survey") which invited responses from disabled persons and their carers.
- The Survey involved mostly multiple choice questions. There were 4 comment boxes. There were 113 questions.
- The Government saw this as an information gathering exercise.
- It was agreed that the Survey did not outline the proposed content of the Strategy. Instead, the proposal was that responses would be used to inform the development of the Strategy.
- The Strategy was itself a commitment in the 2019 Conservative manifesto, where it was said that this would "*look at*" ways to improve various things for disabled people including the benefits system.
- Press coverage: https://www.bbc.co.uk/news/disability-66165703

The ***Eveleigh*** case (2) – the challenge

- Following the publication of the Strategy, the claimants brought a claim for JR, contending that the Secretary of State had failed lawfully to consult, via the Survey, before publishing the Strategy, with the result that the Strategy itself was unlawful.
- The judge at first instance (Griffiths J) allowed the claim and quashed the Strategy, holding that the Survey had been a consultation at common law and as such had been required to satisfy the ***Gunning*** *requirements*, and had failed to satisfy the second ***Gunning*** requirement, namely that the proposer of the proposal being consulted on had to have given sufficient reasons for the proposal to permit of intelligent consideration and response.
- The Secretary of State appealed to the CA.

The ***Eveleigh*** case (3) – the grounds of appeal

- The Secretary of State's grounds of appeal were:
- (1) That the Survey was *not* subject to the ***Gunning*** requirements, because what was undertaken was a form of *"engagement"* but was *not "consultation";*
- (2) In the alternative, the received wisdom, based on what is said at [108] of ***Coughlan***, namely that a voluntary consultation would attract the ***Gunning*** requirements was in fact wrong.
- This second ground was raised late and permission to appeal was still in issue for this ground before the CA: [72] and [92].

The ***Eveleigh*** case (4) – Ground 1

- Lead judgment given by Laing LJ; Macur LJ agreed; Bean LJ agreed on all but one point (see below). Laing LJ held:
- *"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":* [82].
- "*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*" [83].

The ***Eveleigh*** case (5) – Ground 1

- *"84. … 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"*

The ***Eveleigh*** case (6) – Ground 1

- The ***Gunning*** criteria also make two assumptions about the stage of the decision-making process at which they apply [85]:

  - (1) 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.
  - (2) 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. (This second assumption, it was said, "*sheds light on what is meant by "formative stage" in this context*").

The ***Eveleigh*** case (7) – Ground 1

- *"86. … 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."*

The ***Eveleigh*** case (8) – Ground 1

- *"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 …"*
- The Court also rejected arguments that people's views were not sought or were sought in the wrong way: [88].

The ***Eveleigh*** case (9) – Ground 1

- *“89. … 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 para 75 (see para 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.”*

The ***Eveleigh*** case (10) – Ground 2

- Left this open …
- Laing LJ (with whom Macur LJ agreed)
- (1*) "I see the force of the Secretary of State's submissions that the passage in para 108 of **Coughlan** [2001] QB 213 … 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*": [91];
- (2) But "*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.*"
- Bean LJ: " … *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.*" [97].
- All obiter, as not necessary to decide and refused permission to argue this ground.

R. (CU) v SSE [2024] EWHC 638 (Admin) – useful summary of ***Everleigh***

"48. The [decision of Laing LJ] may be summarised as follows.

a) The question as to whether, when a public authority engages with the public, that engagement attracts legal obligations is a question of substance, not form.

b) In order for the ***Gunning*** *requirements to apply:*

(i) A public authority must be 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. That is to be distinguished from a general policy commitment 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.

(ii) There is a proposal to make a decision, which, while not inchoate, is at sufficiently formative stage that the views of those consulted might influence it, and has crystallised sufficiently that the public authority 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. That is to be distinguished from an inchoate plan which would take shape as and when information was gathered, and in response to that information

Further, the fact that a self-described consultation document states that the responses would influence the contents of the eventual proposals does not overcome the essential requirement that there must, at this initial consultation stage, be a proposal to which the Gunning requirements could apply. It is not sufficient that respondents were given the opportunity to influence the future proposals with information and their views."

The law of consultation – remaining issues (1)

- (1) The decision on the facts on Ground 1 plainly and obviously correct.
- (2) It is very clear that the exercise in issue was not a "*consultation"* in the ***Gunning*** sense to which those requirements could be remotely sensibly applied.
- (3) The obiter views of the majority on Ground 2, namely that if what is undertaken is a "consultation" proper, then the fact that this is voluntarily undertaken, does not prevent the application of the ***Gunning*** requirements (or an *equivalent*) also seems right.
- (4) There are, however, it seems to me, some issues with parts of the reasoning on Ground 1…

The law of consultation – remaining issues (2)

- **(A) An impact test?**
- The CA's view (see [83] and [84]) that the ***Gunning*** requirements only apply where a public authority was proposing to make a specific decision which was *likely to have a direct (and usually adverse) impact on a person or on a defined group of people* – are troubling.
- The CA said that *"[t]he three main cases concern closing and merging specific schools in the area of a local education authority* ***[Gunning],*** *closing an NHS facility for the long-term care of a very few patients* ***[Coughlan]****, 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* ***[Moseley]****"* [83] and leapt from that to *"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"* [84].

The law of consultation – remaining issues (3)

- This is a *non-sequitur*.
- There are many, many cases to which the ***Gunning*** requirements have been applied by the Courts and that are difficult to reconcile with this the CA's view on the limits of their application e.g. that the decision is likely to adversely affect a person or defined group of persons.
- And it is furthermore questionable whether such a limitation on the application of ***Gunning*** requirements is justifiable in principle
- Take an example. ***R (Laing) v Cornwall Council*** [2024] EWHC 120 (Admin) is a planning case and not actually about consultation. The case involved a JR of a decision to discharge a condition on a PP that required the submission and approval of a landscape and ecological management plan that complied ("*shall comply*") with the recommendations of an earlier ecological appraisal report.
- One of the issues was whether a duty to give reasons.

The law of consultation – remaining issues (4)

- This issue turned on reg. 7 of the Openness of Local Government Bodies Regulations 2014 which requires reasons for certain delegated decisions. One of the specified circumstances is where the decision affects the rights of an individual. The Judge said, *"[t]he decision under challenge relates to the biodiversity of the site and it is not clear how it is said that that affects the claimant's rights as an individual, albeit as a one having an interest in neighbouring property."* [32].
- This chimes with ***Walton v Scottish Ministers*** [2013] PTSR 51 in the context of standing where Lord Hope said at [152] "*Take, for example, the risk that a route used by an osprey as it moves to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any individual's property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? That would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf*".

The law of consultation – remaining issues (5)

- This is all relevant here on consultation because there is much decision-making in the environmental context that may not, as per what was said by Laing LJ in ***Eveleigh,*** have a direct adverse impact on a person or defined group of people, e.g.:
  - It may be something that affects everyone in the World: e.g. an increase in carbon emissions;
  - It may not directly affect any one person as such but rather adversely affect nature, wildlife or ecology as per ***Laing*** and ***Walton*.**

The law of consultation – remaining issues (6)

- In ***R. (Greenpeace Ltd) v Secretary of State for Trade and Industry*** [2007] EWHC 311 (Admin) there was a challenge to a consultation on new build nuclear.
- The consultation was challenged by Greenpeace.
- Earlier publications, including a White Paper, had said there would be "*the fullest public consultation*".
- This was said to give rise to a legitimate expectation that had not been met because the consultation did not invite views on the desirability of new nuclear power stations in principle; it was instead an issues paper.
- The Judge ruled the consultation unlawful. Sullivan J. held that there could be no proper consultation let alone "*the fullest public consultation*" if the substance of the economics of nuclear new build and the disposal of nuclear waste was not consulted upon before a final decision was made.

The law of consultation – remaining issues (7)

- In so holding the Judge:
- (1) applied the ***Gunning*** principles: [55].
- (2) noted the public participation requirements of the Aarhus Convention and said at [51] *"Given the importance of the decision under challenge—whether new nuclear build should now be supported—it is difficult to see how a promise of anything less than "the fullest public consultation" would have been consistent with the Government's obligations under the Aarhus Convention."*
- How does this fit with ***Eveleigh?*** The principle of nuclear new build affects everyone not just a person or defined group of persons.

The law of consultation – remaining issues (8)

- **(B) JR of an engagement exercise.**
- So, we now know there is a difference between the characteristics of a consultation to which the ***Gunning*** requirements apply and some form of *"engagement exercise"* or informal engagement which does not.
- But this does not mean that the latter is not itself subject to JR, it is still subject to JR just not on the basis of non-compliance with the ***Gunning*** requirements.
- But that leaves open the question what are the requirements for a lawful and fair informal engagement exercise?

Some practical issues (1)

- For Defendants:
- (1) How a Defendant describes the exercise is not decisive, BUT much care is still needed in this regard.
- (2) Undertaking an informal engagement means the ***Gunning*** requirements do not apply BUT not that such a process is immune from JR.
- (3) The ***Eveleigh*** case certainly seems to allow a greater discretion to Defendants on how they approach engagement. NB [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*." and *"[e]ven where there is a duty to consult, much about the scope and method of consultation was for the executive to decide, subject to rationality*."
- (4) It is still open (just …) in a future case to argue that a voluntary consultation is not subject to the ***Gunning*** requirements.

Some practical issues (2)

- For claimants:
  - (1) Room to argue in future cases about what the standard and grounds of review are for informal engagement exercises. The Court in ***Everleigh*** ([92]) seemed to leave open - even in consultation proper cases - whether the tests to be applied are based on fairness or rationality;
  - (2) Room to argue that it cannot be correct in all contexts (including the environmental) that for the ***Gunning*** requirements to apply a public authority must be 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;
  - (3) There is a strong case for the ***Gunning*** requirements being applicable to a voluntary consultation, if it is properly a consultation and not informal engagement.

Further cases (1)

- ***R. (National Council for Civil Liberties) v SSHD*** [2024] EWHC 1181 (Admin)
- JR of draft regulations under the Public Order Act 2023.
- Grounds included that consultation on these inadequate – only consulted law enforcement agencies not wider public.
- SSHD argues it was not a consultation but a targeted engagement.
- Div Crt reject that apply ***Eveleigh*** and say ***Gunning*** requirements apply.
- Div Crt hold consultation unfair and quash it.

Further cases (2)

- ***R. (Medical Justice) v SSHD*** [2024] EWHC 38 (Admin)
- *"97. … Ms Anderson pointed out that in **R (Eveleigh & Others) v Secretary of State for Work and Pensions** [2023] EWCA Civ 810, [2023] 1 WLR 3599 at [91], [97] and [98] the Court of Appeal, whilst acknowledging that [108] of **Coughlan** has often been cited in the authorities, left open the question whether it is binding and/or correct.*
- *98. This issue was not fully argued before me and I do not need to decide it given that, in my view, it does not arise. The relevant passages in the **Coughlan** and the Eveleigh cases were concerned with the question whether and in what circumstances the **Gunning** criteria have to be complied with if there is no pre-existing duty to consult. In **Coughlan** Lord Woolf was addressing the position where voluntary consultation is undertaken and in Eveleigh the Court of Appeal decided that the UK Disability Survey was not a process which was required to meet the **Gunning** criteria: in effect, it did not even amount to voluntary consultation. As is very well known, the Gunning criteria are qualitative features of a fair consultation: they require that consultation must be undertaken at a time when proposals are still at a formative stage; that it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; that adequate time must be given for this purpose; and that the product of consultation must be conscientiously taken into account when the ultimate decision is taken. [108] of **Coughlan** and **Eveleigh** were not concerned with the question whether it was fair or rational for* a public body to leave a given party out of a consultation process which it had conducted."

LANDMARK CHAMBERS

Q&A

Thank you

180 Fleet Street
London
EC4A 2HG

clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk
+44 (0)20 7430 1221

Landmark Chambers
@Landmark_LC
Landmark.Chambers
Landmark Chambers