

Judicial Review Law & Practice: Shaping New Developments into Solution-Focused Answers for Your Clients

Consultation

What counts and will sway a Court over consultation - or lack thereof - in a Judicial Review claim following Binder and Ors v SSWP [2022]?

2023 Consultation Cases

1. Better Streets for Kensington and Chelsea & Anor, R (On the Application Of) v Royal Borough of Kensington and Chelsea [2023] EWHC 536 (Admin)

URL: <https://www.bailii.org/ew/cases/EWHC/Admin/2023/536.html>

“there is no general duty to consult at common law and that the government of the country would grind to a halt if every decision-maker were required in every case to consult everyone who might be affected by his decision.”

“in the case of a democratically-elected public authority, such as the defendant, the courts will be particularly cautious about inferring that a duty to consult has arisen.”

“Even where, in a rare case, a common law duty to consult arises, the public authority will have considerable leeway to decide the nature of the consultation exercise.”

“a finding that a consultation exercise was unlawful by reason of unfairness will be based upon a finding by the court, not merely that something went wrong, but that something went 'clearly and radically' wrong”.

“the controversial nature of the proposal in question - which the removal of the cycle lanes undoubtedly was - is not a touchstone for deciding whether conspicuous unfairness has arisen as a result of a failure to consult. Indeed, the more controversial the proposal, the more likely it is that the subject matter lies in the political realm, where the courts are rightly cautious to intervene.”

“in order for the fairness principle to impose a duty of consultation on a public authority, there must be something fundamentally wrong with what the authority has done. It must be something which would put the authority firmly

beyond the range of behaviour that is expected of it as a public body and thus threaten the rule of law, if left uncorrected.”

R (Moseley) v London Borough of Haringey [2014] UKSC 56

URL: <https://www.bailii.org/uk/cases/UKSC/2014/56.html>

In R (L) and another v Warwickshire County Council and another [2015] EWHC 203 (Admin), Mostyn J

URL: <https://www.bailii.org/ew/cases/EWHC/Admin/2015/203.html>

“an action founded on an alleged breach of a promise to consult must demonstrate "not just... a broken promise but there must also be shown to be unfairness amounting to an abuse of power for the public authority not to be held to it”

“an action founded on an alleged established practice of consultation, the practice "must be clear, unequivocal and unconditional and, again, there must also be shown to be unfairness amounting to an abuse of power". As regards the exceptional case where a failure to consult would lead to conspicuous unfairness, "the unfairness must be of a very high level”

2. Fire Brigades Union & Ors, R (On the Application Of) v His Majesty's Treasury & Anor [2023] EWHC 527 (Admin)

URL: <https://www.bailii.org/ew/cases/EWHC/Admin/2023/527.html>

“the size and importance of the affected class or the importance of the proposed change to that class does not mean that a failure to consult is necessarily conspicuously unfair.”

“Almost every decision of an authority or change in policy is likely to have an adverse effect on some, but that fact alone cannot give rise to a duty to consult in respect of every such decision or change.”

“there is no authority for the proposition that a decision to consult on one topic means that there must be consultation on a related one. Were that not the case then the scope of any consultation could be ratcheted up to include all related matters thereby imposing, in effect, a duty to consult on everything. That clearly cannot be correct.”

3. HL, R (On the Application Of) v Secretary of State for Health And Social Care [2023] EWHC 866 (Admin)

URL: <https://www.bailii.org/ew/cases/EWHC/Admin/2023/866.html>

*“there can be no suggestion that the Defendant made an **unequivocal** promise that he would always consult in relation to an appeals system under s 72”... “And I am unable to discern from the history something which establishes the necessary established practice of consultation”.*

*“True, there had been consultations before, but there was nothing to suggest that the full consultation of the type for which the Claimant contends would **always be carried out.**”*

“there has been no unfairness, let alone unfairness of the necessary cogency, which could properly lead me to intervene.”

4. Swalcliffe Park School, R (On the Application Of) v Workingham Borough Council & Anor [2023] EWHC 1451 (Admin)

URL: <https://www.bailii.org/ew/cases/EWHC/Admin/2023/1451.html>

“Consultation is a process of dialogue”

“consultation requires dialogue and engagement, and the evidence before me does not demonstrate that there was a good reason why, following the 26 November letter, there could not have been more dialogue and it instead had to proceed directly to a decision”.

R (Binder and others) v Secretary of State for Work and Pensions [2022] EWHC 105 (Admin)

URL: <https://www.bailii.org/ew/cases/EWHC/Admin/2022/105.html>