Response to ExA's Second Written Questions:
Principal Issue 6 Development Consent Order

August 2015

The Infrastructure Planning (Examination Procedure) Rules 2010
A14 Cambridge to Huntingdon improvement scheme

Development Consent Order Application
Response to ExA’s Second Written Questions:
Principal Issue 6 Development Consent Order

HE/A14/EX/84
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6 Development Consent Order

Question 2.6.1

Can the applicant please confirm that all the matters to be submitted for Deadline 7, discussed at the first DCO hearing on 15 July and referred to in HE’s written submission following the hearing (REP5-028) have been submitted to the ExA?

Response

1. Highways England can confirm that it has submitted at Deadline 7 those matters discussed at the Issue Specific Hearing on the Development Consent Order held on 15 July 2015 and recorded in Written Summary of Highways England’s Oral Submissions put at Issue Specific Hearing on the Draft Development Consent Order and Post Hearing Documents (Applicant reference HA/A14/EX/66, PINS reference REP5-028). For the avoidance of doubt, this comprises:

   - a document setting out what it considers to be integral to the scheme and what it considers to be "associated development" or ancillary matters (Applicant reference HE/A14/EX/107);
   - a further revised draft Development Consent Order (Applicant reference HE/A14/EX/96);
   - consideration of the involvement of community forums and similar (please see Highways England’s response to written question 2.6.4);
   - drafts of the proposed protective provisions to be included in the DCO (please see the Appendix 2.1 to Highways England’s response to written question 2.2.2);
   - further details on borrow pits (Applicant reference HE/A14/EX/104);
   - an update to the relevant representations report (Applicant reference HE/A14/EX/103); and
   - an updated Book of Reference (Applicant reference HE/A14/EX/100).

2. Highways England and Cambridgeshire County Council have also set out the current position in respect of de-trunking in the Statement of Common Ground between the parties submitted at Deadline 7 (Applicant reference HE/A14/EX/98).
Question 2.6.2
At the first DCO hearing the ExA raised the matter of discharge of requirements and whether local planning authorities would be better placed to discharge requirements. The applicants response is captured in its written submission (REP5-028). Do the local authorities wish to comment?

Response

3. Whilst this written question has been labelled as being addressed to Highways England, the wording seeks views from the local authorities. Therefore, Highways England does not propose to make any submissions on this at this time. It will comment on any responses to this written question at Deadline 8, as appropriate.
Question 2.6.3

At paragraph 2.7 (REP5-028) the applicant refers to case law being clear that the views of other parties being ‘taken into account’ is implicit. Please provide the relevant case law.

Response

4. The relevant case law in respect of consultation is a 'body' of cases which has made clear the parameters of consultation. Highways England attaches at Appendix 6.1 three cases which it considers best illustrate this point: R v Brent London Borough Council, ex p Gunning (1985) 84 LGR 168; R. v North and East Devon HA ex p Coughlan [2001] Q.B. 213; and R. (on the application of Moseley) v Haringey LBC [2014] UKSC 56. Within each case, the sections most relevant to this question are highlighted yellow.

5. As Hodgson J stated in Gunning, the requirements for a proper consultation include that the 'product' of the consultation must be conscientiously taken into account in finalising proposals.

6. Highways England has not provided case summaries at this point, although it can do so for Deadline 8 if it would assist the Examining Authority.
Question 2.6.4

Please confirm what progress has been made with consideration of a ‘public register of requirements’ referred to at the first DCO hearing in July and at para 2.8 (REP5-028)?

Response

Register of Requirements

7. As alluded to at the first Issue Specific Hearing on the Development Consent Order (DCO) on 15 July 2015, Highways England has been considering how transparency could best be incorporated into the process of the Secretary of State for Transport being the discharge authority in respect of the Requirements, as proposed by the draft DCO.

8. Whilst the precise process for the discharge of Requirements is still under development, key aspects for each Requirement would include:

- relevant consultations by Highways England's A14 Project Team with key stakeholders and interested parties, as necessary and appropriate;
- submission of required information by Highways England's A14 Project Team to Highways England's Chief Highways Engineer's Directorate (which sits separately from the Project Team) for approval, prior to submission to the Secretary of State for approval; and
- submission to the Secretary of State for approval by Highways England's A14 Project Team (where it is anticipated the approval process would also include consultation with key stakeholders and interested parties by the Secretary of State, although that is expected largely to take the form of confirming that prior consultation has already taken place).
9. The outcomes of these processes and events would be recorded in a publicly available form, the precise details of which will depend on the overall process for discharge of the Requirements. This would allow members of the public to track where each Requirement has got to in its 'discharge journey'.

Local forums

10. On a separate but related note, Highways England has also given further consideration to the concept of forums in connection with detailed design and landowner engagement, again following comments made by the ExA at the first Issue Specific Hearing on the DCO that took place on 15 July 2015. This is in the context of the specific circumstances of the A14 scheme (particularly its scale and complexity) and so the below proposal should not be treated as a Highways England 'standard'.

11. It is proposed that on-going engagement should be continued during the detailed design and construction stages (following the making of the DCO, if the application is granted) by way of a Community & Environment Forum and a Landowner Forum (or similar bodies). One to one discussions will also take place where an open forum approach is not considered appropriate.

12. The Community & Environment Forum would engage with local communities and other interested parties (such as parish councils and wildlife interests) in respect of the detailed design, implementation and establishment of the scheme. The Landowner Forum would maintain engagement with landowners, in order that they are fully informed around detailed design, compulsory acquisition and temporary possession matters (including timing, extent and duration and other matters).

13. The forums would be engaged on those detailed design issues relevant to the community (such as the design of the Great Ouse crossing) and to landowners but would not cover technical highway design issues.

14. The forums could be supported by an interactive web-based tool, linked to the A14 project's dedicated website, supporting face to face meetings. The intention would be to help make effective engagement as simple as possible for key stakeholders and interested parties, with ready access to critical information such as key consultations and meeting records.
Question 2.6.5

At paragraph 4.52 of HEs written submission following the first DCO hearing (REP5-028), the applicant refers to noise issues being ‘fundamentally a trunk road design issue’ and that ‘this matter is not something that it is appropriate for the local authorities to be consulted on prior to the mitigation details being approved by the Secretary of State.’ Do the local authorities wish to comment?

Response

15. Whilst this written question has been labelled as being addressed to Highways England, the wording appears to seek views from the local authorities. Therefore, Highways England does not propose to make any submissions on this at this time. It will comment on any responses to this written question (or indeed written question 2.10.11) at Deadline 8, as appropriate.
Question 2.6.6

At paragraph 5.7 of HEs written submission (REP5-028) the applicant comments that ‘except to the extent already covered by the proposed requirements... detailed design issues such as the River Great Ouse crossing including its structures, were intended to be approved by the applicant itself.’ Do Interested Parties wish to comment?

Response

16. Whilst this written question has been labelled as being addressed to Highways England, the wording seeks views from Interested Parties. Therefore, Highways England does not propose to make any submissions on this at this time. It will comment on any responses to this written question at Deadline 8, as appropriate.
Question 2.6.7

How would reasonable costs associated with the discharge of requirements be determined? If the local planning authorities were to have a role in the discharge if requirements, what arrangements could be put in place to provide funding for this to take place in association with the scheme?

Response

17. In line with its previous submissions (see, for example, the commentary given by Highways England in its written summary of the Issue Specific Hearing on the Development Consent Order (Applicant reference HE/A14/EX/66, PINS reference REP5-028) Highways England considers that the local planning authorities are not the most appropriate body to discharge requirements. Notwithstanding this, a consultation role in respect of certain elements of requirements is included within the drafting of the Development Consent Order (the latest version of which has been submitted at Deadline 7 (Applicant reference HE/A14/EX/96)).

18. Highways England is aware that most made Development Consent Orders to date have not made provision for funding the role of local planning authorities in the process of discharging requirements. Therefore, Highways England does not consider it necessary or appropriate to include any such provision in the draft Development Consent Order, particularly in light of the proposal that the Secretary of State actually discharges the requirements rather than the local planning authorities (and, indeed, Highways England considers this principle applies to other bodies that have a consultation role in the discharging of the requirements).
Question 2.6.8

How would the appeal process for non-determination of requirements operate?

Response

19. Highways England's current position is that the most appropriate body to discharge requirements is the Secretary of State. Therefore, it is not considered appropriate for there to be any mechanism for appeal in the case of non-determination.

20. Instead, Part 2 of Schedule 2 to the draft Development Consent Order (Applicant reference HE/A14/EX/59, PINS reference REP4-021) makes provision for the deemed discharge of requirements if decisions are not made within eight weeks of the Secretary of State receiving the details for approval, eight weeks following the receipt of any further information requested or a longer period agreed between the parties. Precedent for this approach is found in the Progress Power (Gas Fired Power Station) Order 2015.

21. Paragraph 14(3) of Part 2 of Schedule 2 also prescribes those circumstances where the Secretary of State is deemed to have refused the application should the timescales set out above be exceeded.

22. On this basis, Highways England considers these provisions satisfactory address the issue raised in respect of non-determination and that no further provisions are required in relation to an appeal process.
Question 2.6.9

Cambridgeshire County Council's suggested revised wording for Requirement 3 (now 4) (WR para. 9.2.1 REP3-006) would mean that no part of the authorised development could take place until written details of the CoCP for that part, together with the CEMP and LEMP were submitted to and approved by the Secretary of State, following consultation with the relevant planning authority. In its response to Written Representations (REP4-011) and its written response to oral questions at the DCO Hearing (REP5-028) the applicant indicated that it is not required because the CoCP is proposed to be secured through a Requirement in the draft DCO and would become a certified document. Furthermore, the applicant considers that the CEMP and LEMP which would be produced in response to the CoCP would provide extensive opportunities for engagement with relevant local authorities and therefore no need to include a consultation obligation within the Requirement. What has the applicant concluded, having given further consideration to the wording of this Requirement, on the basis of other DCOs? Would the local authorities wish to comment?

Response

23. Highways England considers that its position in respect of the Code of Construction Practice (CoCP) requirement should remain unchanged. It is aware that other Development Consent Orders have included separate requirements in respect of Construction Environmental Management Plans and, in some cases, Local Environmental Management Plans. However, Highways England considers that the effect of those requirements is captured by the wording contained in the CoCP (Applicant reference HE/A14/EX/64, PINS reference REP4-026). The CoCP requires these various plans to be complied with and to include certain elements and for certain consultation to take place before they are finalised, echoing the wording of requirements found elsewhere.

24. Highways England is warry of pulling out elements of the CoCP into requirements within the Development Consent Order (Applicant reference HE/A14/EX/59, PINS reference REP4-021), as there would then be a question of where the 'line' is drawn in terms of which elements should remain in the CoCP and which should be subject to a separate requirement. Instead, it considers the CoCP mechanism to be an efficient, clean and clear method of securing the various obligations, providing a useful 'one stop shop' reference document. In this context, Highways England would be open to suggested amendments that could be made to the CoCP that would alleviate local authority concerns, rather than adding any new requirements.
Question 2.6.10

The County Council suggested an amendment to Requirement 10 (now 11) (Written Representation para. 9.2.1 (REP3-006)) which would have prevented excavation until the details of works, including aftercare proposals, were submitted to and approved in writing by the Secretary of State following consultation with the relevant planning authority. The applicant rejected the proposed amendment in its response to Written Representations (REP4-011) on the basis that the borrow pits restoration plan would be developed during the Examination and be secured under a Requirement. In the light of its comment in its written response to oral questions at the DCO Hearing (REP5-028) could the applicant indicate what progress has been made in the development of the borrow pits restoration plan? Would the local authorities wish to comment?

Response


26. The Deadline 7 submission (contained at Applicant reference HE/A14/EX/104) provides additional graphical illustrations and explanation of the proposed restoration details submitted with the DCO application and refers to recent survey and investigation findings. It also contains an overall timeline for the completion and subsequent updating of the proposed restoration and aftercare documentation for the borrow pits. This gives Cambridgeshire County Council an on-going role in providing input to restoration design details and in monitoring restoration and aftercare works.

27. The Deadline 7 submission sets out a proposed approach for how future details would be delivered and the outline document structure for:

   a. an overarching ‘Borrow Pits Restoration and Aftercare Strategy’;
   and

   b. ‘Borrow Pit Restoration and Aftercare Plans’ for each borrow pit.

28. The overarching Strategy would be at strategic level, and applicable to all borrow pits to set out the overall approach, principles and commitment. It is intended that the document is developed and finalised during the Examination in dialogue with Cambridgeshire County Council.
29. It will not be possible to finalise the detail of the Borrow Pit Restoration and Aftercare Plans until completion of detailed design following the making of the DCO (if the application is granted) and in some respects until the sites are excavated. The Plans would be site specific to a common format to establish the detail of activities post extraction to bring the individual borrow pits to the proposed after use. The Plans would be prepared in consultation with Cambridgeshire County Council and other key stakeholders when more detailed information on such matters as engineering methods, materials handling arrangements and operational phasing becomes available. The form, timing and mechanics for preparation and finalisation of these detailed Plans would be included and secured within the overarching Strategy, and would include consultation obligations with key stakeholders.

30. The revised draft DCO submitted at Deadline 7 (Applicant reference HE/A14/EX/96) includes an amended requirement at paragraph 11 of Part 1 of Schedule 2, which requires the restoration and aftercare of the borrow pits to be undertaken in accordance with the Borrow Pits Restoration and Aftercare Strategy. This requirement therefore secures the methodology for finalising the detailed plans, as this will be contained in the Strategy.

31. A meeting was held on 5 August 2015 with Cambridgeshire County Council. Agreement was reached on the proposed approach for production of an overarching Strategy and detailed site specific Borrow Pit Restoration and Aftercare Plans, including on-going engagement over the content of these documents.
Question 2.6.11

Borrow Pit number 6 (near Dry Drayton) is located within a geologically sensitive area due to the underlying Woburn Sands aquifer. EA requests that the DCO provides a requirement for the EA to retain a role in assessing any design and monitoring information for the borrow pit in this location (should also include the production of a scheme for dewatering to be incorporated within the borrow pit design plans.) Baseline monitoring data is also required for hydrocarbons. The applicant advises that this will be secured through protective provisions to be included in the DCO. Should this be a requirement or a protective provision?

Response

32. Highways England considers that this matter is more appropriately dealt with in the protective provisions for the benefit of the Environment Agency. Please see the response to written question 2.2.2 which includes at Appendix 2.1 a draft of the proposed protective provisions. Protective provisions are commonly considered the appropriate way to deal with matters such as this, which directly relate to the statutory functions of a body such as the Environment Agency.

33. As is evident from the draft submitted at Appendix 2.1, it is proposed that the protective provisions will encompass matters affecting the Environment Agency's general functions, including an approval role where proposals may affect the flow, purity or quality of groundwater. This includes the ability for the Environment Agency to impose conditions on such approval which could encompass any monitoring or dewatering schemes required. This matter will be discussed further between the parties, with a view to Highways England addressing any residual concerns of the Environment Agency.
**Question 2.6.12**

Can the EA and the applicant provide an update in relation to EAs request for an Accident Management or Emergency Plan.

**Response**

34. As outlined within reference 3.1 of the *Statement of Common Ground between Highways England and the Environment Agency*, as submitted at Deadline 7 (Applicant reference HE/A14/EX/98), it is agreed that during the detailed design phase, after the making of the DCO (if the application is granted), Highways England will develop an Accident Management Plan in consultation with the Environment Agency and emergency services. This will accord with the *Code of Construction Practice* (CoCP) (Applicant reference, HE/A14/EX/64 PINS reference, REP4-026). It would then be included in the Construction Environmental Management Plan and Local Environmental Management Plans.

35. This is secured by section 5.8 of the CoCP which requires the inclusion of measures to manage the risks of, and respond to pollution incidents (paragraphs 5.8.1-3) and to develop emergency procedures (paragraphs 5.8.5). These procedures are required to be developed in consultation with, among others, the Environment Agency and the emergency services respectively.

36. Compliance with CoCP is secured by paragraph 4 (Code of construction practice) of Part 1 of Schedule 2 to the revised draft *Development Consent Order* (Applicant reference HE/A14/EX/59, PINS reference REP4-021).
Question 2.6.13

Can the applicant confirm that the DCO will be in the form of the template for validated SIs. In particular, has the applicant followed necessary drafting conventions including where applicable, footnotes, gender neutral references, a preamble which recites statutory powers, avoids ambiguous wording and archaic language?

Response

37. Highways England can confirm that the revised draft Development Consent Order (DCO) (Applicant reference HE/A14/EX/96) is already in the form of the template for statutory instruments. Highways England can also confirm that the relevant drafting conventions have been followed, and this is being kept under review as the DCO is amended through the examination.
Question 2.6.14

Article 36 – Who would undertake the tree survey that would form part of the detailed design process referred to in the CoCP? How would this survey be undertaken and at what time of the year? How would the findings of the tree survey be disseminated and consulted upon and with whom?

Response

38. Tree surveys would be carried out in accordance with paragraphs 10.2.7 and 10.3.2 of the Code of Construction Practice (CoCP) (Applicant reference HE/A14/EX/64, PINS reference REP-026)), as also set out in Item L1 of the Register of Environmental Actions and Commitments (contained in the Environmental Statement, Appendix 20.01, Applicant reference 6.3, PINS reference APP-751): “undertake detailed survey of trees next to scheme boundary (15m either side) at detailed design stage to inform detail design and construction planning. Compliance with BS5837:2012”.

39. Highways England-appointed designers and contractors will develop the detailed design and progress pre-construction activity in relation to the section between Ellington and Swavesey, and the Swavesey to Milton section. The tree surveys would be carried out as a pre-construction activity by appropriately qualified arboriculturists employed by the above contractors.

40. The surveys would be undertaken in accordance with British Standard 5837:2012 Trees in relation to design, demolition and construction.

41. Tree surveys would be undertaken at the earliest practicable time during the detailed design stage to inform detailed design. The specification and implementation of tree removal and protection proposals would be undertaken in accordance with paragraphs 10.2.7 and 10.3.2 of the CoCP.

42. It is possible for an appropriately qualified arboriculturist to survey a tree at any time of year, therefore the determining factor on programming of the tree surveys will be agreement from landowners for land access. The tree surveys would be undertaken as follows:

- Trees with a stem diameter greater than 0.075m measured at 1.5m above ground level would be recorded either as individual specimens or as groups within 15m either side of the scheme boundary.

- Aluminium numbered tags would be fixed to individually recorded trees and to the trees at the start and end points of tree groups (subject to landowner agreements). The locations of all the surveyed trees would be plotted using GPS hand held computers.
Where trees are recorded as groups, measurements would be taken from the largest tree within the group for the purposes of establishing data for the tree survey drawings. This approach complies with the requirements of British Standard 5837:2012, which states that “trees growing as groups or woodland should be identified and assessed as such”. The British Standard defines the term group as “trees that form cohesive arboricultural features either aerodynamically (e.g. trees that provide companion shelter), visually (e.g. avenues or screens) or culturally including for biodiversity (e.g. parkland or wood pasture)”.

Trees would be identified and inspected from ground level.

43. The findings of the tree surveys would be presented in the form of existing trees and vegetation drawings in accordance with paragraph 10.1.2 bullet point 1 of the CoCP, and supported by an arboricultural impact assessment report.

44. In accordance with paragraph 10.3.3 of the CoCP, measures to protect trees would be the subject of discussion between the main contractors and the local authority prior to implementation. These discussions would be informed by the existing trees and vegetation drawings and arboricultural impact assessment report. The detailed design emerging from the tree surveys would be publicised using the forum process proposed in the answer to written question 2.6.4.
Question 2.6.15

Schedule 9 includes a list of trees subject to Tree Preservation Orders. This includes works to be carried out and the work number to which that tree relates. Would the findings of the tree survey for the detailed design process have any effect on the trees listed in this schedule? If not, why not?

Response

45. Tree surveys would be undertaken to inform the detailed design process in accordance with paragraphs 10.2.7 and 10.3.2 of the Code of Construction Practice (CoCP) (Applicant reference 6.3 ES Appendix 20.02), as also set out in Item L1 of the Register of Environmental Actions and Commitments (Applicant reference ES Appendix 20.01): “undertake detailed survey of trees next to scheme boundary (15m either side) at detailed design stage to inform detail design and construction planning. Compliance with BS5837:2012.”

46. The tree surveys would include trees listed in Schedule 9 of the draft Development Consent Order (DCO) where those trees occur within 15m either side of the scheme boundary. The tree surveys would also include all trees to be retained within the application boundary in order to inform paragraphs 10.2.7 and 10.3.2 of the CoCP.

47. The surveys would record tree data in accordance with BS5837:2012 and these results would not directly affect the status of trees within Schedule 9. This data would inform the detailed design, and the specification and implementation of tree removal and protection proposals in accordance with paragraphs 10.2.7 and 10.3.2 of the CoCP. Detailed design would assist in confirming the retention or removal of trees occurring 15m either side of the scheme boundary, including trees listed in Schedule 9. The survey would also provide further detail for the specification of tree surgery to retained trees.

48. As outlined in Highways England’s Response to ExA’s First Written Questions: Report 9 Landscape and Visual Effects (Applicant reference HE/A14/EX/36, PINS reference RE2-010), a worst case approach has been assumed in respect of limits of deviation. One of the purposes of detailed design would be to determine the precise alignment of the road within the limits of deviation and this in turn would enable greater certainty regarding potential to successfully retain existing vegetation whether subject to a Tree Preservation Order or otherwise.
Appendix 6.1
In this case the applicants seek judicial review of two decisions of the respondent local authority made on 12th July 1984 and the publication on 20th July 1984 of notices in respect of those decisions. The decisions arrived at by the local authority were to make proposals under section 12 of the Education Act 1980 which, if approved by the Secretary of State, would effectively result in the closure of two schools, Sladebrook High School and South Kilburn High School, and their amalgamation with and accommodation upon the premises of two other schools. The full details of the proposals are set out in form 86A, as is the relief sought.

The details are as follows: “1. (a) With effect from the end of the summer term 1985 to cease to maintain Sladebrook High School and Willesden High School and from the beginning of the Autumn Term 1985 establish a new school, initially using the current premises of the former Willesden and Sladebrook Schools but moving in due course to consolidate on the Doyle Gardens site of the current Willesden High School premises; (b) With effect from the end of the summer term 1985 to cease to maintain South Kilburn High School and Brondesbury and Kilburn High School and from the beginning of the Autumn Term 1985 establish a new school, initially using the current premises of Brondesbury and Kilburn High School and South Kilburn premises, but moving in due course to consolidate on the current Brondesbury and Kilburn High School premises.

2. The Publication on 20th July 1984 by the London Borough of Brent of Notices in respect of the said proposals purportedly pursuant to section 12(1) of the Education Act 1980."

The relief sought is certiorari to quash and two declarations: (1) That the said declarations and each of them were ultra vires, void and of no effect; and (2) the publication of the said proposals on 20th July 1984 was ultra vires, void and of no effect and that the said proposals were not lawfully before the Secretary of State.
The applicants are all parents of children attending schools affected by the proposals and are all ratepayers in the London Borough of Brent. Mr Gunning is a parent governor of Brondesbury and Kilburn High School and chairman of the Parent Teachers and Friends Association of that school. Mrs Harris is a parent governor of Sladebrook High School and chairwoman of a community nursery which was due to transfer to Sladebrook School in 1985/86. Mrs Williams is a parent governor at South Kilburn Community School.

The grounds upon which relief is sought are set out in detail and at length. In brief, they amount to allegations of breaches of the requirements of the Education Acts 1944 and 1980, failure to have proper consultation before reaching the decisions and unreasonable behaviour on Wednesbury grounds as set down in Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223, [1947] 2 All ER 680. There has, it is alleged, been both "procedural impropriety" and "irrationality" of the three category headings set out in the speech of Lord Diplock in Council of Civil Service Unions v Minister of Civil Service [1984] 3 All ER 935, [1984] 3 WLR 1174.

The documentation in the case is enormous, stretching to well over 700 pages. To compress the facts into manageable size is not easy. But before I come to consider the way in which these decisions came to be made and the proposals published, it may be helpful if I set out the statutory framework and some of the conclusions as to the law at which I have arrived.

The respondent is an outer London Borough and is also a local education authority for the purposes of the Education Act 1944 (section 30 London Government At 1963). The council is therefore both an organ of local government and the authority for education but, whilst its composition in both these capacities is the same, its functions in each are different and differently circumscribed.

Section 6 of the 1944 Act provides that "(2) The local administration of the statutory system of public education shall be conducted in accordance with the provisions of Part II" of the first Schedule. Paragraph 1 of the Schedule provides for the setting up of education committees by local education authorities. Paragraph 5 provides: "Every education committee of a local education authority shall include persons of experience in education and persons acquainted with the educational conditions prevailing in the area for which the committee acts."

Paragraph 6, so far as is material, provides: "At least a majority of every education committee of a local education authority shall be members of the authority."

Clearly, therefore, education committees are autonomous expert committees containing a mandatory body of expertise. The expert nature of such committees is emphasised by the fact that up to half of the members can be co-opted. In R v Liverpool City Council, ex parte Professional Association of Teachers, 82 LGR 648, Mr Justice Forbes commented that an education authority was an "important and expert committee" and "one of those very rare committees which does not consist entirely of elected members".

Paragraph 7 of the first Schedule is of importance in this case. It reads: "Every local education authority shall consider a report from an education committee of the authority before exercising any of their functions with respect to education: Provided that an authority may dispense with such a report if, in their opinion, the matter is urgent . . ."

In that paragraph, the use of the wide word "functions" shows that the legislature intended that education committees should play an important part in all aspects of decision making by a local education authority. Its purpose is clearly to ensure that every local authority which proposes to take a step properly called a function, in its capacity as a local education authority, shall first consider a report of its statutory specialist committee, subject of course to the proviso. The making of a report is a function of the education committee alone and in making it the education authority is acting autonomously. A local education authority cannot call
in the report, alter or rewrite it, although of course it does not need to agree with it. Further, the report which is required to be considered must be one relating to the function which the local education authority is considering exercising. The use of the word “consider” shows that the legislature intended a report to be given full and proper weight. The word used is not “receive”.

The question arises whether the procedural rules as to consideration of a report are mandatory or discretionary. A passage in de Smith's Judicial Review of Administrative Action (4th Edition) was adopted by Mr Justice Templeman in Coney v Choyce [1975] 1 All ER 979, [1975] 1 WLR 422 and 433. That passage read: “The law relating to the effect of failure to comply with procedural requirements resembles an inextricable tangle of loose ends. Although it would be futile to attempt to unravel or cut all the knots, it is possible to state the main principles or interpretation that the courts have followed and to illustrate their application in a few settings.

"When Parliament prescribes the manner or form in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done (though in some cases it has been said that there must be 'substantial compliance' with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act. In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Furthermore, much may depend upon the particular circumstances of the case in hand. Although ‘nullification is the natural and usual consequence of disobedience', breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned." I have also been referred to Professor Wade's book on Administrative Law (5th Edition) at pages 218 and 219.

Mr Sedley emphasises the following features in this case, which he submits point to the procedural requirement in paragraph 7 being mandatory, so rendering a failure to consider a report a "procedural impropriety" within the third of Lord Diplock's categories of grounds for control of administrative action by judicial review.

First, local education authorities are not specialist bodies and need have no specialist component, whereas education committees are specially appointed and have a mandatory expert content. The clear purpose, it is submitted, is to protect the public interest in the proper function of the state education system.

Second, the fact that paragraph 7 contains a carefully conditioned power to dispense with a report strongly suggests that barring such dispensation, consideration of a report is intended to be a mandatory procedural requirement.

Third, he points to the similarity between the requirement of a report and the categories of due inquiry and consultation which have been held to require mandatory compliance.

Fourth, it is submitted that it is difficult to see what countervailing interest would be jeopardised if the court insisted upon due compliance with paragraph 7.
Fifth, a decision taken without consideration of a report is irretrievable. A process is set in motion for which no machinery of correction exists.

I would add also that the very terms of paragraph 7 are cast in a mandatory form. If that is right, it follows that if an authority performs a function without considering or dispensing with a report, it acts without power and the authority’s ultra vires conduct will vitiate subsequent acts which are dependent upon or flow from the ultra vires act.

Even if paragraph 7 is not mandatory, it seems to me to be clear that proper consideration of a report is something which, on Wednesbury principles as set out in Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223, [1947] 2 All ER 680, a local authority must take into account in reaching a decision to exercise a function. if there is no report before a local education authority on a matter upon which it reaches a decision, then, subject to the proviso, the local education authority would be failing to take into account a factor which it ought to take into account. If there is a report, it must be accepted as such and given full consideration as part of the material upon which the local education authority reaches its decision. put another way a local authority is ordinarily without power to exercise a function as a local education authority unless it receives and considers a report of an education committee on the exercise of that function.

In R v Liverpool City Council, ex parte the Professional Association of Teachers 82 LGR 648, Mr Justice Forbes said, at page 654: “The matter does not end there, however, because it is quite plain, it seems to me, that the purpose of paragraph 7 of this schedule was to make certain that the education authority did not take any decision before having the views of this important and expert committee in relation to the exercise of any of its functions. Mr Goudie accepts that the appointment of associations to negotiating bodies is one of the functions of a local education authority. So, in deciding whether or not this association was to be accorded negotiating rights, the city council was performing one of the functions of a local education authority. It is quite plain that it cannot do that without first considering a report.

“There is argument about what a report consists of. Of course, it is very important to decide what a report is. In my view, in the context of this paragraph of this schedule, a report from an education committee should either make some recommendation or should at least, if not making a recommendation, set out the arguments for and against a particular course of action. Otherwise I cannot see how the local education authority are to inform themselves adequately of the views of the education committee before performing one of their functions.”

The proviso in paragraph 7 permits a local education authority to dispense with a report. In order to come to a decision to dispense with a report, it must first form an opinion that the matter is urgent and thereafter decide that, accepting the fact of urgency, it will dispense with the report.

Section 39(1) of Part IV of Schedule 12 of the Local Government Act 1972 provides: “Subject to the provisions of any enactment in this Act, all questions coming or arising before a local authority shall be decided by a majority of the members of the authority present and voting thereon at a meeting of the authority.”

There must, before a report is dispensed with be, in my judgment, a collective consideration of the demands of time and the question of what would be gained and what lost by dispensing with a report. There must be a conscious decision to proceed or not proceed in the absence of a report.

Section 12 of the Education Act 1980 replaced the provisions previously contained in section 13 of the 1944 Act and provides for the establishment, discontinuation and alteration of schools and the procedures to be adopted by the local education authority. Subsection (1) of section 12, so far as is relevant, provides: “Where a local authority intend . . . (c) to cease to maintain any county school . . . (d) to make any significant change in the character, or significant enlargement of the premises, of a county school . . . they shall publish their
proposals for that purpose in such manner as may be required by regulations made by the Secretary of State and submit to him a copy of the published proposals."

It is clear that the adoption of a proposal involves the discharge of a function by a local education authority. Mr Sedley submits that a decision to go to consultation at an early stage is also the discharge of a function. Paragraph 7 of Part II of the first Schedule to the Education Act 1944 therefore applies and, subject to the urgency proviso, a report of an education committee must be considered. I consider later whether a decision to consult and the subsequent consultation are functions.

Since the 1970s, the respondent authority has been faced with a steadily decreasing number of children requiring education. Over the years, a number of reports have been made to the Brent Education Committee. On 14th April 1980 the committee resolved that a consultative document should be prepared. In May 1980 one was published. It stretches to 38 pages. It is a very full and detailed document. It allowed something between one and two months for comments to be made and there was wide public consultation. After considering a report from the education committee, the authority published proposals which, because they did not comply with the guidelines in Departmental Circular 2/1981, were not approved by the Secretary of State.

I have been referred by both counsel to the report of a study by the Audit Commission, "Obtaining Better Value in Education: Aspects of Non-Teaching Costs in Secondary Schools". It was made after the events with which I am concerned were over but, in it, the criteria for proper consultation were considered in great detail. With many of those criteria the 1980 consultative document complied.

Following this refusal, a working party was set up and a further consultative document was published in February 1982. This document took a slightly different form because, in addition to encouraging "organisations" to hold meetings, there was also included a questionnaire which individuals were invited to answer. This document also was a very full examination of the situation and set out the arguments for and against a number of options in some detail. Between one and two months was allowed for responses. That period the education committee called a "short time".

As well as the individual responses, further public consultations, on the evidence, took place. The education committee considered the outcome of this consultation. It reported to the local education authority. The recommendation was that there should be no structural changes in the education system in the borough, but that the number of pupils admitted per form should be reduced from 30 to 25. This recommendation was considered by the local education authority and accepted.

There can be no doubt that, following this decision, the general belief in the borough was that the education organisation of the borough was settled for the next five years or so. Mr Gunning, a parent governor of Brondesbury and Kilburn, understood, along with the other governors, that this amounted to a guarantee, which is what Mr Grace called it, erroneously, in his affidavit (see also the affidavit of Mr Heusch and the evidence at bundle A, page 88). In his report 55/1984, Mr Parsons himself wrote that "the decisions, of the Education Committee" -- it was in fact a decision of the local education authority -- "should have resolved the matter for the foreseeable future".

Considering the delicate political balance in the borough, these expectations were perhaps over optimistic. In December 1983, there was a political change of administration (due, I believe, to one councillor's change of allegiance) and a new chairman of the education committee was appointed. One of his first acts was to direct the newly appointed director of education "to prepare a report for the education committee to reconsider the question of the future of education within the borough in the likelihood of further Government action to restrict local government expenditure and in the further light of fresh information about the cost of maintaining the existing secondary school stock". More importantly, in the opinion of Mr Parsons, "the downward trend in numbers requiring secondary school places was continuing". Although Mr Parsons so deposes, I do not accept that this was any new consideration at all. The forecast reduction was common knowledge. The 1983
consultative document began: "The years between now and 1995 will see the population of the Secondary Schools drop to its lowest point between 1988 and 1990..." Further, in his own report (55/1984) Mr Parsons wrote: "The downward trend in secondary rolls was identifiable by the late 1970s in Brent."

It follows that the two things in the light of which the director of education was being asked by the chairman of the education committee -- not the education committee itself -- to report were (1) the likelihood of further Government action to restrict local government spending and (2) fresh information about the cost of maintaining the existing secondary school stock. These are both purely economic considerations. They are none the worse or better for that of course, but it is perhaps important to bear this fact in mind when considering what happened thereafter.

Chronologically, what happened next took place within the now majority coalition. In February or March Councillor Johnston "our (that is the Liberal Group) representative on the Education Committee" had discussions with the director of education. Mr Hammond was told that the councillor "was told of the falling school rolls" and "of the timetable necessary to give effect to the school closures". It is perhaps pertinent to note again that the "falling school rolls" was a fact commonly known and that no consideration had yet been given, except by a Conservative/Liberal caucus, to the closure of schools.

The leader of the council, who is also leader of the Conservative members of the council, and the leader of the Liberal Group on the council have sworn affidavits. From them it is clear that the two ruling groups had decided to push through school closures in September 1985 if they could. They were advised that proposals for closure would have to be published by July 1984 at the latest. This timetable and its rigid implementations coloured everything that followed.

The annual meeting of the council took place on 2nd April. This is the meeting which fixes the annual schedule of council and committee meetings. Because, for some reason, the ruling coalition was unable to secure the election of a Conservative mayor, it was impossible to decide the annual schedule. Accordingly, it was necessary to defer the presentation of the amended schedule of meetings to the Policy Resources Urgency Sub-Committee, which met on 18th April. At that meeting, the ruling coalition proposed a schedule of meetings to comply precisely with the report 55/1984 of the director. That report had not as yet, of course, been published at all. It was a report to the education committee and no one else. They had not even seen it. The committee was required by the decision of the urgency sub-committee to meet on 2nd May.

As we are not approaching the stage at which attack is mounted against the respondents on grounds both of procedural impropriety and irrationality, it will be as well if I remind myself of some general principles which Mr Turner-Samuels has seen that I do not forget.

I hope I do not need reminding that the onus of establishing error is upon the applicant; nor that in this case there is no allegation of mala fides, none having been made. Nor, I again hope, do I need reminding that a local education authority is not a tribunal, nor that there is nothing here resembling a lis inter parties. I hope that I appreciate by now, great though the temptation may sometimes be, that I am not concerned with the merits of an administrative decision.

I entirely accept that a local education authority is a political organ in which the party system legitimately operates and anything I appear heretofore to have said which might indicate an opposite view is purely historical. I agree entirely that the standard of good administration set by the court should not be such as to be a deterrent to the bona fide and legitimate exercise of an authority's powers and duties. It is quite vital in the exercise of the jurisdiction of this court to keep to the forefront of one's mind that it is only the most extreme examples of bad administration which can successfully attract judicial review of a decision otherwise lawfully arrived at. If follows that the court should not strain to find technical defects which will make the obligations imposed on local authorities unworkable.
I agree that, in relation to such issues as to whether there has been a report or consultation or whether any other requirement of the law has been complied with, it is, pre-eminently in a matter of local government, the substance of matters not the form which is important. Nor should one, and I do not, forget that councillors are in possession of local knowledge.

I am further exhorted to bear in mind that we all have high and perhaps unreasonable expectations in relation to the education of our children and that we may, in the context of education, be unrealistic. That may be true, but I am here primarily concerned not with the rationality or otherwise of the parents' response to consultation, but with the question whether the way in which they were consulted was fair.

I am asked to accept that "that which required political judgment in an unpopular field requires courage which is not unnecessarily to be deterred". In the context of this case, that seems to me to be inapplicable. That which pleased not the parents might be caviar to the ratepayers or vice versa.

The director prepared his report and it was submitted to the education committee on 2nd May. His remit was to take into account the "likelihood" of further Government restrictions on Government spending and "fresh information" as to the cost of maintaining the existing secondary school stock. The first of these two remits seems to have been entirely ignored by the director. The second and much more potentially specific remit relates to "fresh information", which presumably means "fresh" since summer 1983. The previous decision of the local education authority was in July 1983. The remit by the new chairman was propounded in December 1983. The only "fresh information" about the cost of maintaining the existing secondary school stock appearing between these two dates, so far as is revealed in the evidence, was "the new cause of concern [which] is the report from the Director of Development [dated September 1983] which identifies significant problems with particular education premises which will require heavy expenditure if they are to remain serviceable for the next 10 to 15 years." In his report Mr Parsons added that "these are not a matter of normal decorations, nor really related to the low levels of maintenance in recent years. They do however require the committee to consider whether it is most sensible to continue to provide the number of post-eleven plus places it needs spread across all the existing premises."

The report of the director of development was attached to the report as Appendix C. It shows expenditure needed at Brondesbury and Kilburn as £206,800 and at Neasden High School as £100,000. These are round figures of course. The report contains no information about the many other schools in the area.

Appending that appendix to the report is the only "cost" consideration given to the problem by the director of education in his report. No information was given as to the expenditure which would be needed if any other school were retained, though I fail to see how such information would be any more difficult to glean than that in relation to the two specifically mentioned school sites.

In paragraph 12 the director draws the obvious financial conclusions from the factual information as to cost. Paragraph 12.1 reads: "Given the new information about the expenditure now seen to be required to put the premises of Neasden and Brondesbury and Kilburn into good order, the Committee might wish to take the opportunity to close one or both of these schools, while at the same time accepting a small increase in the number of forms of entry at other schools.

"12.2 If it were decided to close Brondesbury and Kilburn all the pupils could be accommodated by the existing South Kilburn school. Closure of Neasden School could be met by pupils being accommodated at Sladebrook.

12.3 Such a move could be seen to be advantageous both educationally and financially. Educationally the advantages would arise from the elimination of two small schools, one operating from five sites, and the creation of a slightly stronger units elsewhere. The financial benefits would derive from capital receipts if the
sites were sold, and, over time, from a reduction in running costs and lower teaching and non-teaching costs; overall the closure would lead to slightly lower unit costs for secondary pupils."

I do not think I need refer to the report of the director further until we reach his consideration of "The Future". He first of all sets out the "new matters" which are said to have negated the decision which was to have "re-solved the matter for the foreseeable future". They are, in addition to the two which I have mentioned, the change of administration.

These reiterate the remit to the director by the new chairman of the education committee. None is further elaborated in the report, which goes on to place before the education committee a number of options including maintenance of the status quo.

The options presented to the education committee were carefully considered in the report. They can be most easily followed in the note provided by the applicants and numbered Exhibit A1. The important things to note about the options presented are, I think, these: (1) of the five options, the first was the maintenance of the status quo and the fourth and fifth were options never seriously considered by anyone. Option c(ii) which was to re-establish 30 as the size of form entry was not seriously considered either; (2) of the remaining options, (b) and (c) both (not unnaturally in view of the only "cost" information ever available) recommended the closure of Neasden and Brondesbury and Kilburn; (3) option (c), called radical and disruptive in the report, would have added South Kilburn and John Kelly Boys to the list of closures; (4) there was no option offered which involved the closure of Sladebrook; and (5) it was only in the "radical and disruptive" option that South Kilburn, a modern and purpose-built school, in option (b) not only to continue to exist, but to take Brondesbury and Kilburn School, appeared as an option for closure.

I appreciate that in so summarising the options suggested in 55/1984, I may appear to be equating a school with its topographical location. I do not intend to do so, but the reality of education in a London borough surely gives to the site upon which the school in fact exists an immense importance. No doubt on amalgamation each school takes with it into the amalgamation its own identity, but that can only really happen if the amalgamation is immediate, once for all and not gradual.

Report 55/1984 dealt with the timetable for consultation and decision making. In paragraph 21.2, it was stated: "(i) A decision on intent needs to be taken at Education Committee on 2nd May 1984. This could then go to the Special Council Meeting on 10th May 1984." It is notable that no such decision was in fact taken. "(ii) Special Meetings of Governing Bodies and Parents meetings would need to be arranged. These could be completed by 15th June. (iii) Consultation with teaching and non-teaching members of schools together with other consultation procedures outlined in the local agreement would need to take place in this period. (iv) A final report containing the results of the consultations and the proposals would need to go to the Special Council Meeting on 12th July." The "local agreement" in (iii) is a reference to an agreement with the Teachers Association, which does not affect this case.

Mr Parsons was therefore dividing the process into four periods, the last of which dealt with the two dates at which the final report would have to be considered to meet the postulated deadline. At paragraph 27.5 the committee was asked to respond to three questions: "(a) Do they wish to reaffirm their decision of 1983 or (b) Do they wish to adopt one of the five lines of action set out in this report either as suggested or amended or (c) Do they wish the Director of Education to explore other approaches?"

Paragraph 27.6 provided: "Should the Education Committee decide to adopt (b) above action would then follow as detailed in paragraphs 12 and 22."
Paragraphs 22.1 and 22.2, under the heading of "implementation", read: "1. If the Committee adopt either option (b), (c) or (e) a key issue for discussion with both teaching and non-teaching unions will be the method of implementation and an appointment procedure.

"2. If the Committee adopt either option (b) or option (c) implementation could be either by simple closure or by merger. Though simple closure might be suitable in the case of option (b) it would not be recommended in the case of options ci or cii. Closure, though easy to administer can have traumatic affects on both staff and pupils." At an early stage, the actual mechanic of closure and amalgamation were being given, and properly given in my judgment, a great importance.

Report 55/1984 was considered by the education committee on 2nd May 1984. The meeting was attended by 10 co-opted members. Mr Hammond is recorded as having attended as an observer, as is Mr Lacey. Mr Hammond appears to have forgotten this, and Mr Lacey makes no mention of the meeting in his affidavit.

The minutes of that meeting are very short, and despite Mr Turner-Samuel's efforts to persuade me to the contrary, they seem to me to be perfectly plain of meaning. Under the heading of "The Future Pattern of Secondary Education in the London Borough of Brent", the minutes record: "The Committee debated the report from the Director of Education, No 55/1984 which set out various options for re-organising Secondary Education in Brent. RESOLVED: that this Special Education Committee instructs the Director to prepare a new report after consultation with the Teachers Panel of the Schools JCC, to provide options which can ensure a viable comprehensive system of secondary education in Brent and which, subject to the agreement of the Council, can be released for consultation keeping to the final dates for the timetable proposed in report 55/1984."

It is, I think, obvious that what the education committee was doing was responding to the questions posed by Mr Parsons by answering only the third and answering that question in the affirmative. Mr Turner-Samuels submits that what that resolution means is that the education committee was deciding that the matter should go direct to the local education authority after Mr Parsons had had the consultation with the Teachers' Panel and he says that the fact that the new report had to be capable to being released for consultation, "keeping to the final dates for the timetable" shows that that was the intention.

I cannot so read it. The reference to "final" dates seems to me to be a quite clear reference to the dates 5th and 12th July in Mr Parsons' final paragraph (iv). If all the dates were considered immoveable, then the adjective "final" would have been quite unnecessary. It is to be noted that, of the 10 co-opted members only one, Mr Adams, voted against the motion. It seems to me obvious that what the education committee was doing was deciding to take no decision pending consideration of the new report which would, when prepared, be presented again to the education committee. The reason for mentioning the timetable seem to me obvious, namely, to ensure that the new report was quickly prepared.

It was after that meeting that things, in my judgment, began to go wrong. With commendable expedience, but with scant regard to his remit, Mr Parsons had his consultation and prepared not a new, but a short additional report, 2/1984. The Teachers' Panel agreed that the options they thought should be considered were "the closure of the present South Kilburn, Brondesbury and Kilburn and Aylestone Schools and the opening of a new community school on the present Aylestone site with a designated maximum intake size of 8 form entry (200)."

It is noticeable that no consideration had been given to the cost of any of these options in 55/1984, nor was the omission in any way remedied. The only cost information remained that concerning the great cost of retaining Neasden and Brondesbury and Kilburn.
On 4th May 1984 the summons to attend the special council meeting of 10th May was issued. Item 6 read, “To receive and consider the report of the Special Education Committee held on 2nd May 1984 (to follow),” In accordance with standing orders, notice of a motion in the name of Mr Anderson was given. Its effect would have been the retention of the status quo.

The local education authority had before it at the meeting of 10th May the minutes of the education committee meeting on 2nd May, the report 55/1984 and the report 2/1984 which had never been seen by the education committee. Mr Turner-Samuels submits that the minutes of the education committee constituted a report.

I am quite unable to see how they could be so construed, no matter how one might strain to give effect to administrative procedure. What the education committee clearly had decided was not to report at that stage. On 10th May I hold without hesitation that the local education authority had no report before it from the education committee.

Mr Turner-Samuels points to evidence which he says shows that everyone knew that there was urgency about the matter. Whether that be so or not and it is certainly true that the ruling coalition were trying to push closure through before September, there is no suggestion anywhere that the local education authority applied its collective mind to the decision whether or not to dispense with a report from the education committee under paragraph 7.

At the meeting, the local education authority resolved that consultation should take place on the basis of eight proposals. Of these proposals, 1 to 4 were specific proposals for amalgamation and closures. Other proposals were framed in general policy terms.

The decision to go to consultation and the contents of the consultation document were thus decided without the education committee giving the matter any consideration whatsoever and without the 10 co-opted members having any say in the matter at all and partly on the basis of a report not even seen by the education committee. That decision meant that considerable expenditure would be incurred in the preparation and dissemination of the consultative document, that meetings of school governors would have to be convened and serviced by the council and that public meetings would have to be arranged and held; and that a report on the results of the consultation would have to be prepared for submission to the education committee on 5th July 1984.

Mr Turner-Samuels submits that in coming to the decision to consult and thereafter going through these procedures, the local education authority was not exercising functions within the meaning of paragraph 7 of Part II of the first Schedule of the 1944 Act. He submits that “function” in that paragraph is limited to exercising power or duty or making a statutory proposal; to making a decision which will affect matters finally and, I presume, irreversibly.

I am unconvinced by this, as it seems to me, wholly artificial meaning of the word “function”. The content and conduct of consultation on an educational matter seem to me to be pre-eminently matters upon which the legislator considered it necessary, save in circumstances of exceptional urgency, that a local education authority should have the advice and assistance of its expert education committee.

The first ground upon which the respondents’ conduct is attacked is that it decided to consult and subsequently carried out the consultation without considering a report from an education committee and was consequently in breach of paragraph 7 which is cast in mandatory terms and which I have held to be a mandatory requirement. In my judgment that attack succeeds. I hold that the respondents were guilty of grave procedural impropriety in doing what they did.
It is conceded that if I am right in these two conclusions as to the need for a report and the failure to consider one, there being none to consider, then it follows that everything that was done thereafter was ultra vires and must be quashed. If I am wrong then I must go to consider what happened thereafter because many more attacks are mounted by the applicants.

On the basis that the decision to consult was lawfully made, the next attack made upon the respondent authority is that the period allowed for consultation was far too short, particularly in respect of the parents, and that the consultative document was wholly inadequate as a basis for consultation. In its evidence, the respondent authority makes a great deal of the wide dissemination of the consultative document eventually produced and the number of meetings held to consider it. That there was wide dissemination the applicants do not dispute, but they contend that you cannot cure an inadequate consultation by giving it wide dissemination; nor lack of time by efficient distribution in that too short time. I am of the opinion that the applicants are, in this respect, clearly correct.

The parents had no statutory right to be consulted, but that they had a legitimate expectation that they would be consulted seems to me to be beyond question. The interest of parents in the educational arrangements in the area in which they live is self-evident. It is explicitly recognised in the legislation (see for example section 6 of the Education Act 1980). The legislation places clear duties upon parents, backed by draconian criminal sanctions. Local education authorities habitually do consult on these matters. In 1980 and 1983 this authority itself had had comprehensive consultations which had led to the decision in 1983 to retain all school sites. Local education authorities are exhorted by the Secretary of State to consult, and the results of the consultations are something which he takes into account. On any test of legitimate expectation, it seems to me that these parents qualify (see Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935, [1984] 3 WLR 1174).

If I am right that the parents had this legitimate expectation, then they have the same legal right to consultation as they would have had if it had been given to them specifically by statute.

Before I deal with the form of consultation needed, I should refer to an argument propounded by Mr Turner-Samuels. He submits that because consultation is not a statutory requirement, a local authority can, at its risk, choose its own area of consultation and with that choice (however limited it may be), the courts should not interfere. The reasoning behind this argument is that the local authority can take the risk that the Secretary of State will not be satisfied with the consultation and refuse to approve the proposal, and that he is in a better position to judge whether the consultation is adequate than is the court.

If this argument is based upon a distinction between a statutory duty to consult and a duty to consult and a duty to fulfil a legitimate expectation, it does not appeal to me. I do not think that the requirements differ in the two situations. If it is an argument urged in support of a submission that I should, in the exercise of my discretion, refuse to interfere even though I was convinced that consultation was inadequate, it does not appeal either. In Port Louis Corporation v Attorney-General of Mauritius, [1965] AC 1111, [1965] 3 WLR 67, the Privy Council did not hesitate to lay down the principles upon which the adequacy or otherwise of a consultation should be judged. That case was concerned with the alterations of boundaries of towns, districts or villages, an exercise plainly comparable with the closure and amalgamation of schools. I need do no more here than refer to the headnote. "Held, (1) that, since section 73(1) of the Local Government Ordinance, 1962 did not prescribe any set machinery for consultation, the nature and the object of consultation must be related to the circumstances which called for it; that in the situation to which section 73(1) related, a proposal to alter boundaries which must not be made until after consultation with the local authority concerned, the local authority must know what alterations of boundaries were proposed and must be given a reasonable opportunity to state their views or point to problems or difficulties, either orally or in writing, and must be free to say what they thought, but that they were not entitled to demand assurances as to the probable solutions of problems likely to arise from the alterations . . ."
Mr Turner-Samuels puts what I think is much the same argument in a different way relying upon sections 68 and 99 of the Education Act 1944. He submits that so long as a local education authority has done something which amounts to consultation, decision as to its adequacy should be left to the Minister and the exercise of the powers given to him in those two sections. Section 68 gives the Secretary of State powers where local education authorities "have acted or are proposing to act unreasonably with respect to" the exercise of a power or performance of a duty. Section 99 gives the Secretary of State powers where there has been a failure by a local education authority to discharge a duty. He relies upon the decision of the Court of Appeal in Cummings v Birkenhead Corporation [1972] 1 Ch 12, [1971] 2 All ER 881. It is not a case I find easy to understand, but I do not think that I need deal with this argument in any greater detail because it is conceded that if there was a legal requirement that there should be consultation and that requirement was not fulfilled, then, in taking a relevant decision, the authority would be acting unlawfully or, in Latin, ultra vires.

I have heard submissions from both counsel as to what amounts to adequate consultation with parents, school governors and other interested parties, when the subject is school closures and amalgamations. Some assistance can be gained from Circulars issued by the Department of Education and Science. In Circular 2/1980, one finds at paragraph 5.1: "The Secretary of State regards it as very important that the local education authority should seek the views of local people when planning is still at a formative stage. He therefore expects that appropriate consultations will have taken place with parents, the teaching and other staff and governors of the school or schools concerned and the teacher associations, before proposals are made under sections 12, 13 or 15. He would also expect such consultations to have taken place within the 12 months immediately before publication of proposals."

In March 1984 a Circular in draft form was issued for consultation. This, I think, became Circular 4/1984. In paragraph 10, one finds the following passage: "As was made clear in paragraph 5 of the Circular 2/80 and paragraph 22 of Circular 2/81, the Secretary of State regards the adequacy of consultation as a material factor in considering proposals which fall to him to decide. He remains firmly committed to this policy. He acknowledges that local circumstances sometimes impose a tight timetable but he is, nevertheless, convinced that local people have a right to sufficient information to make a judgment on the need for, and purpose of, proposals at a stage when their views can influence the final decision of the proposers. Experience shows that inadequate consultation frequently results in a greater volume of objections."

The use of the word "proposals" in that paragraph should be noted. It is not, of course, to be confused with statutory proposals made under section 12 of the Education Act 1980, but it does point to the desirability that consultation should be upon proposals of some specificity into which those consulted can get their teeth, whether the proposals be framed in general policy terms or in terms of specific options.

Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third, to which I shall return, that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.

Following the decision to consult taken at the meeting on 10th May, the director prepared a consultative document which, because of the colour of its paper, became known as the gold document. A cursory reading of this document shows how sparse of information and reasoning it is in comparison with the 1980 and 1983 documents. Nor was any attempt made to include in the report material from the previous documents which could easily have been done.

After a brief history, although one occupying a fifth of the entire document, there are set out in paragraph 2 what are said to be the reasons for reconsideration. The first is a restatement of what has gone before. It read: "Apart from the likelihood of further Government action to restrict local government expenditure, there
was certain new information about the cost of maintaining the existing secondary school stock." Those consulted were given no inkling at all as to what that new information was. We now know. It was nothing more than the estimate as to the high cost involved in the adoption of any proposal which included the retention of the school buildings at Neasden and Brondesbury and Kilburn. Those consulted were denied even this tiny piece of information as to cost. Worse, they were in my view misled into believing that, in arriving at the specific proposals, the authority had had before it information of that sort as to the whole of the school stock.

Having dealt briefly with the matter of falling school rolls, the document plunges straight into the options which the local education authority had at its meeting decided to canvass. The one thing that emerges with extreme clarity is that the closure of the school premises at Sladebrook was not on the cards. Had those consulted known of the cost situation at Brondesbury and Kilburn, it would have been equally obviously assumed that retention of those buildings was not on the cards either. Having dealt with the mechanics of consultation and having given a brief glance at the tertiary system, the option of maintaining the status quo and the future use of premises no longer required for schools, the document deals with the "Timetable for Action" in this way: "The result of the consultation exercise will be the subject of a report to the special meeting of the Education Committee on 5th July 1984, whose recommendations will be submitted to a special meeting of the Council on 12th July 1984. Decisions resulting in a proposal to close, amalgamate or reorganise any of the secondary schools will be the subject of Public Notices, which are required in accordance with the 1980 Education Act. There will be a period for further detailed conversations with governors, teaching and non-teaching staff and parents, and objections may be addressed to the Secretary of State for Education and Science with whom rests the final decisions relating to any proposed reorganisation involving our schools. If the Secretary of State approves any proposals for changes, there would then be very detailed discussions with governors, staff and parents on their implementation."

It seems to me that there is contained in that paragraph a clear promise that there will be, after the projected meeting of 12th July, a further opportunity for consultation. A "conversation" can only take place if there is more than one person involved. It is clear on the evidence that this promise was not fulfilled, the response of officials being that, after publication, all they could do was accept objections.

In my judgment that document, on the most favourable criteria to the respondents, was wholly inadequate, and it is clear from the evidence that, at the public meetings, no real attempt was made to flesh it out. On the question of cost it was, in my judgment, positively misleading. In suggesting in paragraph 2 that there was any new information since 1980 as to falling rolls it was also misleading; there was none. The trend had been present and known for years. In making the specific proposal in paragraphs 1 to 4, it was also, in the light of the events which followed consultation, positively misleading.

Mr Turner-Samuels seeks to flesh out the gold document by reference to the previous consultation documents. That seems to me to be an impossible submission. Whilst it might have some relevance to the considerations given to the proposals by the governing bodies of schools, it can have none in respect of ordinary parents. It is clear from the evidence that the manifest inadequacy of this document was deeply resented by the parents, a resentment which was vociferously and publicly expressed.

In his report 77/1984 to the education committee for its meeting on 5th July, the director wrote: "1.3.4 The objections to these proposals of the Council which pointed to change have two main components: (1) An expressed belief that the consultation was totally inadequate because of the short time set aside for it, because of the nature of the exercise and because of the brevity of the consultation document. (2) A range of specific comments/objections which I itemise in the following paragraphs."

The dissemination of the gold document was first forecast in a bulletin on 17th May 1984. Under cover of a letter dated 23rd May, sufficient copies for all parents were sent to all schools. The first paragraph of that letter read: "I have sent you sufficient copies of the above documents for all parents. I shall be grateful if you will ensure that one copy, together with the correction slip, is given to each pupil/student to take home before school breaks for the mid-term holiday. I regret the shortness of the time which you are being given for this exercise, but the time scale set by Council makes it unavoidable."
24th May was the day before half term, and it was unrealistic of the director to expect the "pigeon post" method of distribution to be effective before half term. The vast majority of parents who were not school governors did not in fact receive the document until 4th or 5th June. The six public meetings were scheduled for and took place on 7th June. Written responses had to be received by the director by 15th June.

For consultation upon the fundamental change of a policy thought, with reason, to have been finally decided upon for the foreseeable future in the previous year, the period for consultation seems to me to have been wholly inadequate.

In Lee and Others v Department of Education and Science, 66 LGR 211, where the length of time to be given to governors by the Minister under section 17(5) of the Education Act 1944 was in issue, Mr Justice Donaldson (as he then was) held that anything less than one month in term time would be unreasonably short. The matter which had to be considered in that case was very much simpler and came within a far narrower compass than was here the case, where fundamental changes in the whole structure of education in Brent were in issue.

I am left in no doubt that the consultation process was woefully deficient, both as to content and timing and, on that ground also, in my judgment, any decision based upon the consultation should be struck down.

But Mr Turner-Samuels has submitted that this conclusion is wrong because any defects in consultation can and will be cured by the procedures for objections and their consideration provided for by statute in section 12(3), (4) and (6) of the Education Act 1980.

In support of this at first sight ambitious submission he relies upon the decision of the Privy Council in Calvin v Carr [1980] AC 574, [1979] 2 All ER 440. That was the case where it was held that unfairness displayed at a hearing of a domestic tribunal could be cured by fair appellate proceedings. The Privy Council distinguished the judgment of Mr Justice Megarry (as he then was) in Leary v National Union of Vehicle Builders [1971] Ch 34, [1970] 2 All ER 713.

I do not myself think that one can apply to purely administrative procedures of the sort which are concerned principles of fairness developed in the quasi-judicial field of domestic disciplinary proceedings. But if that is wrong, given the choice, I prefer the reasoning of Mr Justice Megarry. In Leary, Mr Justice Megarry laid down what he called a general rule. He said: "If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? . . . As a general rule . . . I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body."

The Privy Council held that that was too broadly stated and that there were intermediate cases in which it was for the court "in the light of the agreements made, and in addition having regard to the course of proceedings, to decide whether at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they joined the association." The reference to a "fair result" and "fair methods" seems to me to be contrary to fundamental principles of English administrative law. It is not the fairness or reasonableness of the result which can be attacked (save in cases of irrationality), but the legality of the proceedings. Further, as Mr Sedley points out, such a principle would shut out the control of administrative action by the courts in granting judicial review by way of prohibition because it could be contended that the court should hold its hand until the appeal procedures had been completed.

In my judgment, the correct formulation is that of Mr Justice Megarry, which allows only for rare exceptions, such as the rustication of stripping undergraduates. But, in any event, in the circumstances of this case, the statutory procedures are themselves fatally flawed by the inadequacies of the previous consultation.
Following the consultation the director wrote a report 79/1984 upon it for the education committee. There is no doubt that most of those who made any comments at all, whether at the public meetings or otherwise, were opposed to any closure. It is equally clear that there was a generally expressed belief that the consultation was totally inadequate because of the short time set aside for it, because of the nature of the exercise and because of the brevity of the consultation document. There were also a range of specific comments/objections which the director itemises. There was not a great deal of response to the specific options in the paper recorded, which, as the paper contains no mention of any reasoning behind them, is perhaps not wholly surprising but it is interesting to note one specific recommendation which emerged in respect of one option: “Concern that the Aylestone premises could not sensibly accommodate the pupils at present going to Aylestone, Brondesbury and Kilburn and South Kilburn and/or as well as the community school aspect.” The director’s own views were effectively unchanged as a result of consultation.

On 5th July the education committee met. It had before it the director’s report on the consultation. It also had before it a motion in the name of Councillor Mrs Powell. It was in these terms: “Following consultation on the reorganisation of secondary education in Brent and taking into account the results thereof, we resolve to publish the following proposals: (i) that we cease to maintain Brondesbury and Kilburn High School and South Kilburn High School; (ii) that we establish and maintain a new six form entry school, initially to operate on the sites of the existing schools to be transferred on to the site of the existing Brondesbury and Kilburn High School; (iii) that we cease to maintain Willesden High School and Sladebrook High School; (iv) that we establish and maintain a new six form entry school, initially to operate on the sites of the existing schools in (iii) above and as soon as practicable to be transferred on to the Doyle Gardens (part of the) site of the existing Willesden High School; (v) that the staff for the new schools in (ii) and (iv) above should be drawn as far as possible from the existing staff of the schools respectively in (i) and (iii) above; (iv) that the size of form entry be reaffirmed as 25; (vii) that the foregoing proposals be given effect from September 1985; and (viii) that the officers report in due course on the future of any buildings becoming surplus as a result of the above.”

When and by whom these proposals were formed does not appear. It does not seem that the director of education was consulted. The proposals are, in a number of respects, surprising and it is difficult, if not impossible, to see how they arise from any previous proposals or from any input from consultation.

The only financial information available was in respect of the cost involved in retaining Neasden and Brondesbury and Kilburn (in total over £300,000) and, less specifically, Willesden. Yet the Powell proposals involved the retention of all three of these sites. Save perhaps for the decision not to move any schools to Aylestone, the proposals bore little or no relation to the proposals previously considered. They would involve the closure of two modern and purpose-built schools at Sladebrook and South Kilburn. There was no information available as to the comparative cost of these proposals in relation to any of the previously considered specific proposals and the moves of South Kilburn to Brondesbury and Kilburn and Sladebrook to Willesden High School were merely stated to be “as soon as practicable”.

A number of votes were taken and, in the final result, a substantive motion was evolved which was carried by 17 votes to 12, with two abstentions. Of the co-opted members, six voted for the motion, two (presumably the nominees of the ruling parties) voted against and one abstained. That motion was in these terms: “Following consultation on the reorganisation of secondary education in Brent, and taking into account the results thereof, we resolve to publish the following proposals: (i) that the size of form entry be reaffirmed as 25; (ii) that we agree that the main concern of this Council must be the quality of education; (iii) that we note with concern that the consultation procedure conducted by this Council over school closure plans was totally inadequate. It failed to properly explain all options and did not give parents and the community adequate opportunity for discussion; (iv) that this Committee recommend to the Council to instigate an investigation into the alternative methods of tackling the problem of falling rolls, with a view to producing a long term policy on the structure of education in Brent, and that there be no school closures or amalgamations until the investigation reports.”
The meeting lasted for nearly six hours and there must have been a great deal of debate, expression of opinion and comment upon the proposals, particularly, one would expect from the co-opted “expert” members. The scheme of the legislation plainly, I think, contemplates that after such a meeting the education committee would report to the local education authority dealing not only with the eventual decision but also with the pros and cons of the other proposals considered.

A week later at the meeting of the local education authority on 12th July, what happened was as follows: “The Council received the Minutes of the Special Meeting of the Education Committee held on 5th July which were presented by the Chairman, Councillor Steel. In presenting the report Councillor Steel moved the following amendments to the decisions of the Committee which were seconded by Councillor Mrs Powell.”

After lengthy debate and a number of amendments the local education authority purported to resolve to publish Mrs Powell's proposals with some additions, which are immaterial to this case.

Paragraph 7 plainly requires that there should be a report from an education committee. An education committee is an autonomous body and it must, I think, make a decision to report before anything emanating from it becomes a report. Clearly, no decision of that sort was made on 5th July. It is of course perfectly true that a report can take many forms and a decision to adopt and forward as its report, say, the director of education might amount to a report, but that is not what happened in this case.

Mr Turner-Samuels urges me to look at the substance not the form and certainly, unlike what was before the local education authority on 10th May, one can cobble together from all the information eventually presented to the local education authority an amalgam which would contain enough together to form a report, but I do not think that an exercise of that sort can be said to amount to a report when the education authority clearly did not decide to make one.

I find, therefore, that there was no report before the local education authority at its meeting on 12th July. If that finding is correct, then it is conceded that any further action was ultra vires. If am wrong, then I must go on to consider what happened after 5th July, on the assumption that what was before the local education authority on 12th July amounted to a report.

Mr Sedley submitted that what happened at and before the meeting was procedurally wrong and that the statutory provisions contained in the Local Government Act 1972 Schedule 12 and the authority's own standing orders made under paragraph 42 of the Schedule and subject to the provisions of the Act, had not been complied with. At the hearing that submission and the authority's response to it came within a fairly narrow compass. However, yesterday, I was asked to hear further argument from Mr Turner-Samuels based upon standing orders to which I had not previously been referred and detailed and complicated consideration as given by both counsel to the procedural requirements of the standing orders. I do not, I think, need to burden this judgment with a detailed attempt to construe the authority's standing orders within their statutory framework. It would be a lengthy and detailed exercise and one in which I might easily get some detail wrong or perhaps make more fundamental errors. In the event, because of the other findings I have already made and am about to make, a decision on this point would in no way affect the result of this case and both counsel are content that I should not embark upon the exercise. If there is an appeal from my decision, then it is accepted that it will be open to the applicants to take any points on the procedure followed at the meeting of 12th July which they may wish to do.

I turn then to consider the question whether, in arriving at its decision to make proposals, the authority neglected to take into account matters which they ought to have taken into account. It is submitted that there are two such matters, cost and the phasing of the reorganisation.
In R v Hillingdon Authority, ex parte Goodwin [1984] ICR 800, Mr Justice Woolf, citing a passage from the judgment of Mr Justice Cook in a New Zealand case, Creednz v Governor-General [1981] 1 NZLR 172, pointed to a distinction between relevant matters which an authority is entitled to take into account and those which it is required to take into account.

Clearly, both the matters I have mentioned were relevant to the proposals which the authority decided to publish. The question arises therefore whether, in Mr Justice Woolf's words, they were "so fundamental that it was quite wrong, as a matter of law, for the authority not to have regard to" them.

So far as the cost of the proposals is concerned, I am satisfied that, for a number of reasons, cost was fundamental to the decision and was a matter which the authority was required by law to take into account. My reasons for reaching this conclusion are these. First, that the cost of proposals is actually spelt into the statutory framework. Section 76 of the 1944 Act provides that authorities "shall have regard to the general principles that, so far as is compatible with . . . the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents". By section 6 of the 1980 Act the duty of an authority in respect of parental preferences does not apply if "compliance with the preference would prejudice . . . the efficient use of resources". Second, as I have sought to show, the authority's own chosen ground of consultation was financial. The leader of council himself deposed, "our first political objective was to ensure that the previous administration's proposals for an increase in rate did not take effect. We were able to secure this primary objective by the 7th March 1984 when the Council meeting of that date resolved that there would be no change to the rate. Thereafter we pursued the issue of school closures as a matter of priority and urgency." Third, I think that it is really self-evident that one of the major concerns was the saving of cost.

Did the authority consider cost at all? The only fact about the cost of either of the options proposed before the authority was the information in appendix C to the director's report, the vague information about the dilapidated state of the Pound Lane annex at Willesden and the self-evident fact that to close any school will result in a saving. The proposals involved the retention of all the sites where substantial expenditure was known to be necessary and the sacrificing of two modern and purpose-built schools. There is no indication that comparative costs were ever considered and no effort was made to discover what cost would be incurred if other sites than those mentioned were retained. It is, I think, really quite clear that no consideration of cost was attempted because and only because everything was subordinated to the attempt to get the proposals approved for implementation in September 1985. I hold that, in failing to take into account the question of cost, the authority failed to take into account something which by law they were required to take into account.

The second Wednesbury ground as set out in Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223, [1947] 2 All ER 608 is less self-evidently one which the authority was required to take into account. It is not disputed that all the authority decided, as recorded in its minutes, was that the transfer of pupils should be done as soon as practicable and that the way in which the transfer should take place was left for the director of education to decide. Nor can it, I think, be denied that the way in which it was decided pupils should be transferred would have caused extreme disruption to the pupils then at Sladebrook and South Kilburn. Over a period of three years, pupils at these two schools would have no new pupils arriving and a steady stream of older pupils crossing over to the new premises until at last a tiny and under privileged rump remained.

It may well be that there will be no other practical way in which transfers can be achieved and it is certainly not for me to express any opinion one way or the other, but it does seem to me that the phasing of the operation was a matter of fundamental importance and something to which the authority should have applied its mind preferabably with the advice of its education committee. It did not. I hold, therefore, that on these two Wednesbury grounds also, the authority's decision must be quashed.
A further attack is made by Mr Sedley upon the decision. It is that the proposals decided upon by the authority were so radically different from the specific proposals adumbrated in the gold paper that, even had consultation on the gold paper been adequate, it was still necessary to have further consultation on the new proposals.

The authority chose to consult both on broad principles and on specific proposals. I have already stated my opinion that no one looking at the gold paper or attending the meeting could have thought that the eventual statutory proposals were even on the cards. The proposals, as I have also shown, would have quite dramatic effect upon the pupils of the schools involved. I consider that parents had a legitimate expectation that, if entirely different proposals were made from those consulted upon, they would be again consulted. Of course, the authority were in no way constrained to adopt without modification one or more of the proposals actually contained in the gold paper, but there is, in my judgment, a limit and, in this case, that limit was exceeded. There was in my opinion no consultation upon the statutory proposals and for that reason also they must be struck down.

It will be cold comfort to the authority that, in my judgment, the remaining two criticisms which the applicants make fail. The first is that the respondent failed to exercise its discretion as to the timing of the publication of its proposals or to recognise that it had such a discretion. The publication of the proposals on 20th July was designed to ensure that there was compliance with Department of Science Circulars and the timetable, so rigidly adhered to, was decided upon after the director of education had consulted with the Department. The relevant parts of Circulars 2/1981 and the draft Circular of 1984 which became 4/1984 are, in the first: "he", that is the Secretary of State, "will also be prepared to approve proposals which have been put forward as the result of a timetable somewhat shorter than that recommended in Circular 2/80, provided he is satisfied, among other things, that consultation with those most concerned has been adequate and that early implementation is compatible with the interest of the pupils concerned." Second, "The Secretary of State's policy on timing as modified in Circular 2/81. This stated in paragraph 22 that he is prepared to approve proposals on a somewhat shorter timetable than that recommended in Circular 2/80 provided he is satisfied, among other things, that consultation with those most concerned has been adequate and that early implementation is compatible with the interests of the pupils concerned. Put at its simplest, the Secretary of State's policy on the timing of proposals for school closures is that there should be at least one term between the date of the decision and the date of closure. In practice, and in view of the current volume of proposals, this means that proposals to discontinue a school at the end of the school year should be published no later than early autumn for a decision by the following Easter. For proposals involving two or more schools a longer period is, if practicable, desirable and may be essential if considerable preparatory work is required."

The authority’s proposals involved four schools and therefore publication before early autumn was advised. The criticism made is that the two month period for objection fell, to a large extent, during school holidays. However, had there been a full and proper consultation that could not, in my judgment, have been a fatal flaw. The issues would have been already fully canvassed and the information upon which objections could be founded would have been readily available and fresh in people's minds. Had all gone well before, I do not think objection could properly be taken to the publication date of 20th July.

A final point is taken based on section 12(2) of the Education Act 1980. It is submitted that the proposals which under section 12(1) are the proposals of the local education authority did not include particulars of the time or times at which it was intended to implement them. It is submitted that implementation means the phasing provisions contained not in the proposals but in the explanatory section added by the officers of the authority. Whilst it would no doubt have come as a surprise to the pupils and perhaps the teachers and parents as well at Sladebrook and South Kilburn to be told in September 1985 that they were not at school at Willesden High School and Brondesbury and Kilburn High School, that would in fact have been the result had the proposal been implemented. Physical transfer, although something which, in my opinion, as I have found, ought to have been considered by the local education authority, was not something which was required to figure in the actual proposal of the authority.
The final, somewhat bizarre, thing that happened in this unhappy saga was this. The next meeting of the education committee took place in October. At that meeting, the education committee was acting under powers delegated to it by the local education authority and to it fell the task of sending objections received to the Minister. In doing so, it made observations of the most critical kind, the terms of which are perhaps worth quoting as a tailpiece. "The decision of the Council on 12th July 1984 was faulty for the following reasons: (a) The proposals adopted had not at any time been recommended by either the Director of Education or the Education Committee. (b) The proposals should not even have been considered by the Council unless it had also considered at the same time the financial expenditure necessary to put Willesden and Brondesbury and Kilburn into proper structural and decorative order, as the Director of Education specifically showed to be necessary in his Reports to this Committee. (c) The Council has not considered a thorough examination of its post 16 education to determine whether a tertiary structure might best meet the needs of pupils and the budgetary restraint on the Council.

"The period for objection to the proposals fell almost entirely over the summer period. Moreover, as a result of the way the decision was made, no one had sufficient information to make properly reasoned objections or a full assessment of their implications.

The character and quantity of the objections received makes it clear that the best course of action for the education authority to take would be to withdraw the current proposals for closures and amalgamations.

This Committee therefore resolves, in its capacity as the local education authority acting under delegated powers, to forward to the Secretary of State as its observations on the objections received, this motion together with the letter and appendices of the Director of Education as amended by this Committee."

It is perhaps finally worth noting that the reason for the difference of opinion between the education committee and the local education authority was not, as deposed to by Mr Parsons, a reflection of the different political balance on the two committees. The difference between the two committees arose because there were co-opted "expert" members on the education committee. The actual political balance on the education committee was, I think, marginally more favourable to the ruling coalition than that on the council, in that two of the co-opted members were their nominations, whereas only one was an opposition nomination.

It only remains for me to consider one question more. The applicants filed evidence of a Professor Kogan, who holds the Chair of Government and Social Administration at Brunel University. He exhibited to his affidavit a report prepared by himself and two colleagues. Mr Turner-Samuels objected to the admissibility of this evidence. I read the report de bene esse. The only assistance I gained from it consisted in some saving of note taking because Mr Sedley adopted two paragraphs in the report. I think Mr Turner-Samuels' main concern is that a practice may develop in public law cases of expert evidence being led and I have been invited to make some general observations on the matter.

It seems to me that there may be two situations in which evidence of this sort might be material and helpful. The first is where it becomes material, as it may, to consider what the generally accepted practice is in any situation. In putting in extracts from answers to questions in Parliament as to the dates at which proposals under section 12 have been published by other authorities, Mr Turner-Samuels was himself doing just that. Such evidence would not be expert evidence, the distinguishing mark of which is that evidence of expert opinion becomes admissible. It would be factual evidence, although perhaps most cogently given by an expert in the field. Subject to the ordinary rules as to relevance and materiality, I cannot see any objection to the admission of such evidence.

Some part of the report does consist of expressions of opinion. I have not found them helpful because they appear to me to be, in general terms, opinions as to the law which are matters for me. I think that it will be extremely rare that an expression of opinion as to whether or not there has been mal administration will be
relevant and admissible, but I am not prepared to lay down any general rule; nor am I prepared to say that no such situation could ever arise.

I conclude with an expression of my genuine gratitude to counsel for the great clarity and, despite apparent indications to the contrary, economy with which they have made their submissions. I thank them.

*Application allowed*
With regard to the defendants’ application to amend the defence I make no definitive ruling but indicate that it is likely to succeed. It may also be helpful to suggest that on the basis of the proposed amended defence any award of damages to the plaintiff is likely to be very small.

Order accordingly.

Solicitors: Bindman & Partners; Olswang.

Reported by SHARENE P DEWAN, Barrister

Court of Appeal

Regina v North and East Devon Health Authority, Ex parte Coughlan

1999 May 17, 18, 19, 20; July 16

Lord Woolf MR, Mummery and Sedley LJJ

Judicial Review — Applicant’s expectation — Health authority — Severely disabled applicant moved from hospital to purpose-built National Health Service facility — Authority’s clear promise that facility would be home for life — Subsequent decision to close facility — Applicant’s care transferred to local authority but no alternative placement identified — Whether contrary to applicant’s legitimate expectation — Whether unfairness amounting to abuse of power

National Health Service — Health authority — Provision of nursing care — Health authority transferring long-term nursing care of severely disabled patient to local authority — Whether lawful — Whether health authority having sole responsibility to provide nursing care — National Assistance Act 1948 (11 & 12 Geo 6 c 29), s 21 (as amended by Local Government Act 1972 (c 70), ss 195(6), 272(1), Children Act 1989 (c 41), s 108(5) and National Health Service and Community Care Act 1990 (c 19), ss 42, 66)¹ — National Health Service Act 1977 (c 49), ss 1, 3²

The applicant, who was severely injured in a road accident in 1971, was tetraplegic, doubly incontinent, partially paralysed in the respiratory tract and suffered from recurrent headaches. In 1993 she and seven comparably disabled patients were moved with their agreement from a hospital which the health authority wished to close to Mardon House, a National Health Service facility for the long-term disabled, which the health authority assured them would be their home for life. In 1996 the health authority published its eligibility criteria for long-term NHS care, based on guidance issued by the Department of Health, which indicated that “specialist” nursing services should be provided by the NHS but that “general” nursing care should be purchased by local authorities. Subsequently, the health authority concluded that the applicant and other Mardon House residents did not

¹ National Assistance Act 1948, s 21, as amended: see post, p 231A–E.
² National Health Service Act 1977, s 1: see post, p 229E–G.
S 3: see post, pp 229G–230A.
meet those criteria. In 1998, following public consultation, the health authority decided to close Mardon House and to transfer the long-term general nursing care of the applicant to the local authority, although no alternative placement for her was identified. On an application for judicial review of the closure decision, the judge quashed the decision to close Mardon House, holding that the applicant and other patients had been given a clear promise that Mardon House would be their home for life and the health authority had not established an overriding public interest which justified it in breaking that promise, that the closure decision was flawed because no alternative placement for the applicant had been identified, that all nursing care was the sole responsibility of the NHS and, therefore, it had not been open to the health authority to transfer responsibility for the applicant's long-term general nursing care to the local authority and that the health authority's eligibility criteria for long-term health care were correspondingly flawed.

On appeal by the health authority—

*Held,* dismissing the appeal, (1) that pursuant to sections 1 and 3 of the National Health Service Act 1977 the Secretary of State for Health, in fulfilling his duty to promote a comprehensive free health service, could take into account available resources and conclude that it was not necessary to provide some nursing services through the NHS; that those services could then be provided in connection with accommodation provided by the local authority to a person in need of care and attention under section 21 of the National Assistance Act 1948; that the distinction between nursing care which could and could not be so provided was one of degree which depended on the facts of a particular case and it could not be based solely on whether the care was "general" or "specialist"; that, in general, nursing services could be provided under section 21 of the 1948 Act if they were merely incidental or ancillary to the provision of accommodation under section 21 and of a nature which it could be expected that a local authority whose primary responsibility was to provide social services could be expected to provide; that the applicant's needs were primarily health needs for which the health authority was responsible; and that, accordingly, the closure decision was unlawful because it depended on a misinterpretation by the health authority of its responsibilities under the 1977 Act and on eligibility criteria which placed a responsibility on the local authority which went beyond the terms of section 21 of the 1948 Act (post, pp Z30C-G, Z31F-H, 232F-G, Z33A-G, 236C-D, 238C-F, 260B-F, G).

(2) That if a public body exercising a statutory function made a promise as to how it would behave in the future which induced a legitimate expectation of a benefit which was substantive, rather than merely procedural, to frustrate that expectation could be so unfair that it would amount to an abuse of power; that, in such circumstances, the court had to determine whether there was a sufficient overriding interest to justify a departure from what had previously been promised; that in view of the importance of the promise to the applicant, the fact that it was limited to a few individuals and that the consequences to the health authority of honouring it were likely to be financial only, the applicant had a legitimate expectation that the health authority would not resile from its promise unless there was an overreaching justification for doing so; and that, in the circumstances, including the fact that the quality of the alternative accommodation to be offered to the applicant was not known, the closure decision was an unjustified breach of that promise which constituted unfairness amounting to an abuse of power (post, pp 242B-C, E, 242H-243B, 254A-C, 260F-G).

*Per curiam.* Most cases of an enforceable expectation of a substantive benefit are likely to be cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract (post, p 242G-H).

The following cases are referred to in the judgment of the court:

**B**

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA

Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629; [1983] 2 WLR 735; [1983] 2 All ER 346, PC

British Oxygen Co Ltd v Board of Trade [1971] AC 610; [1970] 3 WLR 488; [1970] 3 All ER 163, HL(E)

Colman v Eastern Counties Railway Co (1846) 10 Beav 1


Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; [1984] 3 WLR 1174; [1984] 3 All ER 935, HL(E)

Findlay, In re [1985] AC 318; [1984] 3 WLR 1159; [1984] 3 All ER 801, HL(E)

HTV Ltd v Price Commission [1976] ICR 170, Mocatta J and CA

Hughes v Department of Health and Social Security [1985] AC 776; [1985] 2 WLR 866, HL(E)

Krisse v Johnson [1898] 2 QB 91, DC

Laker Airways Ltd v Department of Trade [1977] QB 643; [1977] 2 WLR 234; [1977] 2 All ER 182, CA

Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997; [1968] 2 WLR 924; [1968] 1 All ER 694, CA and HL(E)

R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168


R v Devon County Council, Ex p Baker [1995] 1 All ER 73, CA

R v Dover Magistrates’ Court, Ex p Pamment (1994) 15 Cr App R(S) 778, DC

R v Grice [1977] 66 Cr App R 167, CA

R v Hull University Visitor, Ex p Page [1993] AC 682; [1992] 3 WLR 1112; [1993] 1 All ER 97, HL(E)

R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545, DC


R v Inland Revenue Comrs, Ex p Preston [1985] AC 835; [1985] 2 WLR 836; [1985] 2 All ER 327, HL(E)

R v Inland Revenue Comrs, Ex p Unilever plc [1996] STC 681, CA

R v Ministry of Agriculture, Fisheries and Food, Ex p Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714


R v Reilly [1982] QB 1208; [1982] 3 WLR 149; [1982] 3 All ER 27, CA

R v Secretary of State for Social Services, Ex p Hincks [1980] 1 BMLR 93, CA


R v Secretary of State for the Home Department, Ex p Asif Mahmood Khan [1984] 1 WLR 1337; [1985] 1 All ER 40, CA

R v Secretary of State for the Home Department, Ex p Hargreaves [1997] 1 WLR 906; [1997] 1 All ER 397, CA
The following additional cases were cited in argument:

R v Secretary of State for the Home Department, Ex p Ruddock [1987] 2 All ER 518


The following cases, although not cited, were referred to in the skeleton arguments:

Jinmietz v Germany (1992) 16 EHRR 97

Pepper v Hart [1993] 1 All ER 42, HL(E)

R v Secretary of State for the Home Department, Ex p McQuillan [1995] 4 All ER 400

R v Secretary of State for the Home Department, Ex p Urmaza [1996] COD 479

R v Somerset County Council, Ex p Fewings [1995] 1 WLR 1037; [1995] 3 All ER 20, CA

R v Wandsworth London Borough Council, Ex p Beckwith [1996] 1 WLR 60; [1996] 1 All ER 129, HL(E)


By notice of application dated 3 November 1998 the applicant, Pamela Coughlan, sought judicial review of the decision of the North and East Devon Health Authority dated 7 October 1998 to cause Mardon House, a purpose-built facility for the severely disabled, to be closed. On 11 December 1998 Hidden J allowed the application and quashed the decision.

By a notice dated 4 February 1999 and with the leave of Schiemann LJ the health authority appealed on the grounds, inter alia, that the judge erred in law and/or made findings contrary to the evidence in concluding that (1) the health authority’s eligibility criteria for continuing health care were outwith the guidance issued by the Department of Health in HSG(95)8/LAC(95)5; (2) the health authority was under an obligation to identify alternative placements for the applicant prior to the closure decision; (3) the health authority had failed to establish that there was an overreaching public interest which entitled it to break its promise that Mardon House would be the applicant’s home for life; (4) the health authority’s consultation process had been unlawful; and (5) the health authority had acted unfairly and...
irrationally and in breach of article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969).

The Secretary of State for Health and the Royal College of Nursing were given leave to intervene on the appeal.

The facts are stated in the judgment of the court.

James Goudie QC and Siobhan Ward for the health authority. The authority's duty to provide nursing services is not absolute and unqualified. It is limited by reference to those nursing services which the Secretary of State considers necessary to meet all reasonable requirements: see section 3(1) of the National Health Service Act 1977. It is implicit in the qualification contained in section 3(1) that the Secretary of State must exercise judgment in the prioritisation of resources: see R v Cambridge Health Authority, Ex p B [1995] 1 WLR 898 and R v Gloucestershire County Council, Ex p Barry [1997] AC 584. [Reference was also made to R v East Sussex County Council, Ex p Tandy [1998] AC 714.]

The Secretary of State has expressed his judgment of the kinds of nursing services which he considers health authorities should provide free of charge by means of guidance issued under the 1977 Act. In HSG (95)8; LAC (95)5, “NHS Responsibilities for Meeting Continuing Healthcare Needs” (“the 1995 guidance”), the Secretary of State has made it plain that he considers that basic or non-specialist nursing care should not be the responsibility of health authorities. The Secretary of State is empowered by section 3(1) to make that distinction. Since it is lawful for the Secretary of State to exclude certain nursing services from the responsibilities of health authorities, it must follow that section 3(1) does not contain any implied prohibition on any other public body providing such nursing services.

The prohibition in section 21(8) of the National Assistance Act 1948 on local authorities providing services “authorised or required to be” provided under the 1977 Act does not apply to the provision of those nursing services which the Secretary of State has considered it unnecessary for the NHS to provide. To construe the statutory provisions so that health authorities were the only public bodies empowered to provide any kind of nursing care, or accommodation in connection with such nursing care, would be plainly contrary to the legislative purpose of section 21 of the 1948 Act by which it was envisaged that local authorities would provide residential accommodation for the elderly, the ill, the disabled and anyone else in need of care.

Therefore, in certain circumstances, social services have power to fund the nursing care element of the placement of an individual in a residential care home or nursing home under section 21 of the 1948 Act. Section 21 envisages that where the nursing care is incidental to the provision of accommodation to the person in need of care, which would invariably be the case if the individual concerned needed basic or non-specialist nursing care, the local authority would have power to provide both the accommodation and the nursing care. Conversely, if the primary need was for health care, as would be the case when the individual required specialist health care, the combined effect of section 3(1) of the 1977 Act and section 21(8) of the 1948 Act would be to require the health authority to fund both the nursing and the accommodation elements of the placement.
The 1995 guidance was a lawful expression of those nursing services which the Secretary of State considered should, and those which should not, be provided by health authorities, with the aim of defining as exactly as possible the division between the responsibilities of the health service and social services for continuing care. The legislation, the 1995 guidance and the White Paper “Caring for People: Community Care in the Next Decade and Beyond” (Cm 849) (November 1989) all justified the treatment by the health authority of non-specialist nursing services as the responsibility of social services.

The word “specialist” in the 1995 guidance should be given its plain, ordinary meaning, i.e., the opposite of general, basic or non-specialist. To construe the word “specialist” as a synonym for “professional” would be incorrect. The guidance does not give the word any technical or special meaning which would justify giving it a meaning other than its accepted ordinary meaning.

The health authority’s eligibility criteria distinguish expressly between general, or non-specialist, nursing services and specialist nursing services. In making that distinction the eligibility criteria reflected and were within the 1995 guidance.

Alternatively, even if the health authority acted under a misconception of the relevant law, that did not impugn or otherwise affect the lawfulness of the closure decision. The eligibility criteria were irrelevant to that decision since the authority had undertaken to fund the applicant’s care irrespective of whether or not she satisfied those criteria and irrespective of where that care might be provided. The authority’s decision not to admit further long-term patients to Mardon House was a formal acknowledgement of the lack of demand for long-stay residential services there. Neither the eligibility criteria nor the decision not to admit further long-stay residents could be challenged since any challenge had long since been time-barred.

It was wholly impracticable and unrealistic in the vast majority of closure cases for multi-disciplinary assessments to be undertaken and alternative placements identified prior to arriving at a closure decision (and, a fortiori, prior to consulting upon a possible closure decision). In any event, any failure to undertake such an assessment was due to the applicant’s unwillingness to co-operate. It would be contrary to principle to permit an applicant for judicial review to generate by her own action, or inaction, grounds for a judicial review challenge.

There were overriding and compelling reasons which entitled the authority to break its “home for life” promise. The authority was entitled to decide that those reasons pointed inexorably to the closure decision.

[Reference was made to R v Secretary of State for the Home Department, Ex p Asif Mahmood Khan [1984] 1 WLR 1337; R v Inland Revenue Comrs, Ex p Preston [1985] AC 835; R v Jockey Club, Ex p RAM Racecourses Ltd [1993] 2 All ER 225 and R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545.]

The authority did not prejudice the outcome of the closure decision. An express preference for closure in the light of all the relevant factors in favour of closure did not amount to prejudgment of the issue.

In all the circumstances, the authority acted fairly, rationally and lawfully and there was no breach of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969).
A Nigel Fleming QC and Steven Kovats for the Secretary of State for Health. Care which includes an element of nursing care can be provided by, or on behalf of, the National Health Service. A local authority, too, can provide such care itself or purchase it from another authority or the private sector, pursuant to the local authority’s function to make arrangements for providing residential accommodation to certain persons in need of care and attention which was not otherwise available under section 21 of the National Assistance Act 1948. It is for the Secretary of State to decide which types of cases should result in nursing care being provided under the NHS. It is for local authorities to decide whether to make arrangements to provide residential accommodation with appropriate care. The Secretary of State has issued guidance to health authorities and to local authorities as to the division of responsibilities in respect of nursing requirements.

B Since the inception of the NHS at the latest, there has been a division between specialist medical services and general care services. The former are the responsibility of the Secretary of State, acting through health authorities. They are, with certain limited exceptions, free at the point of delivery. The latter have been provided by different bodies over the years and are currently the responsibility of both local authorities (see section 21 of the 1948 Act) and the Secretary of State (see section 31(e) of the National Health Service Act 1977). There is, inevitably, an area of overlap between the two different types of service and that is recognised in section 31(e) of the 1977 Act. In practice, as provided by the legislation and recognised by official guidance, there is a degree of nursing care involved in both specialist medical services and general care services. [Reference was made to the National Health Service Act 1946; the National Assistance Act 1948; the Health Services and Public Health Act 1968; the Local Government Act 1972; the National Health Service Reorganisation Act 1973; the National Health Service Act 1977; the National Health Service and Community Care Act 1990 and the Community Care (Residential Accommodation) Act 1992.]

The guidance issued by the Secretary of State distinguishes between specialist and general services. There is nevertheless bound to remain substantial scope for debate about whether a particular case is more appropriate for free NHS treatment or chargeable local authority arrangements. The allocation exercise will involve judgments at local and, by formulation of ministerial guidance, national level: see R v Cambridge Health Authority, Ex p B [1995] 1 WLR 898, 906-907 and R v Secretary of State for Social Services, Ex p Hincks (1980) 1 BMLR 93. [Reference was also made to R v Secretary of State for Health, Ex p Hammersmith and Fulham London Borough Council (1997) 96 LGR 277.]

A local authority, as a creature of statute, can only do that which it is expressly or by necessary implication permitted to do by statute. Therefore, section 21(8) of the 1948 Act can only have been intended to prevent a local authority carrying out functions which could be carried out by it under other statutes. The express reference to the 1977 Act can only have been a reference to functions carried out by local authorities under the 1977 Act. Section 21(8) of the 1948 Act does not prevent local authority social services from making arrangements to provide residential accommodation with nursing care (since that function is expressly allowed by section 26(1B) and, in any event, is within the phrase “such other services” in section 21(7)(b)) but rather prevents social services from providing under section 21 such
services as may be provided under Schedule 8 to the 1977 Act or under other related statutes.

Alternatively, if section 21(8) is intended to prevent social services from making arrangements for the provision of medical services described in the 1977 Act, there is no statutory prohibition against the provision of nursing services, for the reasons advanced by the health authority.

Richard Gordon QC, Tim Ward and Jennifer Richards for the applicant. There are clear legal boundaries to the duty to provide a comprehensive national health service and the duty to provide health services in sections 1 and 3 of the National Health Service Act 1977 which preclude the Secretary of State from reaching a judgment that general nursing, or any other prescribed health service, for which there is a demand falls outside the scope of the National Health Service. The boundaries are that (i) nursing services are expressly required to be, and must be, provided as part of the comprehensive NHS under section 3(1)(c); (ii) there is no legal division, whether express or implied, of those services into specialist and general; (iii) nursing services must be provided free save where there is express statutory provision to the contrary (section 1(2)) and therefore the Secretary of State may not reach a judgment under section 3 as to which services are the responsibility of the NHS in order to bypass, or with the effect of bypassing, the protection afforded to patients under section 1(2); (iv) where a reasonable requirement for nursing services is identified by the Secretary of State he cannot lawfully direct social services to meet it by issuing directions to trigger section 21 of the National Assistance Act 1948 functions; (v) if there is a reasonable requirement, the place where the service is to be provided is irrelevant as a matter of law, still less may the Secretary of State refuse to meet a reasonable requirement for nursing services in nursing homes where, by definition, people are generally likely to be more in need of health services than, for example, in their own homes or in a residential care home.

Whilst resources may form part of the judgment under section 3 of the 1977 Act as to whether there is a reasonable requirement for a service, the Secretary of State may only take his own resources into account; he may not look to the resources of the service user. If he acts on the basis, or with the effect, that the recipient or social services will pay (because he purports to trigger section 21 of the 1948 Act functions) he has acted for an improper purpose—avoidance of the charging protection under section 1(2) of the 1977 Act. If he has ignored this consequence, then he has failed to take a material consideration into account.

Further, even if a judgment has been made under section 3 of the 1977 Act, that cannot, of itself, have the effect of placing the responsibility for nursing on social services. Such a judgment is merely indicative of that which the Secretary of State is bound to provide under the Act. More is required to transfer the responsibility for what has been excluded under section 3 to social services. The creation of an obligation on social services to provide that which has formerly been the remit of the NHS must, in any event, be effected by separate lawful means. For the purposes of section 21 of the 1948 Act, social services can only have obligations placed on them by means of directions. Not only do social services lack an inchoate power or duty under section 21 itself to provide nursing, but the directions and
approvals that have been issued do not even purport to trigger such a power or duty. [Reference was made to Congreve v Home Office [1976] QB 629; and Attorney General v Wilts United Dairies Ltd (1922) 38 TLR 781.]

Further, the guidance issued by the Secretary of State to health authorities necessarily conflicts with the Secretary of State’s obligation under section 1 of the 1977 Act to provide a comprehensive health service because guidance, of its nature, is not binding. In any event the particular guidance is far too imprecise either to express the Secretary of State's judgment or to discharge his duty to provide a comprehensive health service without variation in scope between different health authorities.

Further, social services do not have a power or a duty under section 21 of the 1948 Act to provide nursing services. Social services can only do that which the Secretary of State approves or directs under section 21. Thus, the Secretary of State has (i) a duty to provide health services under the 1977 Act; and (ii) a power to direct social services to perform functions under the 1948 Act. The Secretary of State cannot use the latter to strip the former of its content.

There is no ambiguity in the legislation and, therefore, no need to look at Hansard. [Reference was made to Three Rivers District Council v Bank of England (No 2) [1996] 2 All ER 363.]

Even if the Secretary of State is entitled to issue guidance so as to effect a wide-ranging delimitation of the NHS and even if such guidance is rational and lawful and can lawfully be implemented by health authorities, the authority’s eligibility criteria are wholly outside anything envisaged in such guidance and are unlawful and irrational.

In any event, the “home for life” promise was freely given by the health authority and the applicant and other residents relied upon it. The authority could only lawfully break the promise if an overriding public interest demanded that it should do so: see R v Secretary of State for the Home Department, Ex p Asif Mahmood Khan [1984] 1 WLR 1337, 1344. To break the promise in any other circumstances would be so unfair, would so strip the promise of its moral significance, that it would be an abuse of power: see R v Inland Revenue Comrs, Ex p Preston [1985] AC 835, 866-867. An individual promise can be distinguished from a policy, which conveys no assurance that it will last forever: see R v Secretary of State for the Home Department, Ex p Hargreaves [1997] 1 WLR 906 and In re Findlay [1985] AC 318. In determining whether the overriding public interest demanded the breaking of a promise, the burden fell upon the authority: see R v Jockey Club, Ex p RAM Racecourses Ltd [1993] 2 All ER 225. Since the closure decision engaged the applicant’s fundamental right to a home under article 8(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, more than usual justification was required for a breach of the promise: see R v Ministry of Defence, Ex p Smith [1996] QB 517, 554. The authority failed to consider whether the overriding public interest demanded that its promise be broken and it failed, in any event, to give the promise the high status that such interest required by both diluting its meaning and failing to take relevant factors into account. [Reference was also made to R v Inland Revenue Comrs, Ex p Unilever plc [1996] STC 681, 695; Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 410; R v Devon County Council, Ex p Baker [1995] 1 All ER 73; R v Inland Revenue Comrs,
Even if the authority did not misconstrue the promise made to the applicant and other residents, it was in no position to decide whether the overriding public interest demanded that the promise be broken as it was wholly ill-informed as to the consequences of the decision to do so. The authority relied upon a consultation process which was hopelessly flawed. A lawful consultation must (a) take place at a time when proposals are still at a formative stage, (b) give reasons for any proposal so as to permit intelligent consideration and response, (c) give adequate time for consideration and response and (d) give the product of the consultation conscientious consideration: see R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 1:68. Further, the authority failed to carry out any lawful assessment of the residents’ needs, or of the risks to them posed by the move. In the absence of any such assessment, it could not have come to any lawful conclusion as to whether the high test for breaking the promise was satisfied. The authority also failed to identify suitable alternative placements for the residents. In the light of the “home for life” promise the identification of alternative suitable homes ought to have been of paramount importance.

Under the Convention, the issue is whether a breach of the applicant’s right to a home is “necessary in a democratic society” for any of the reasons set out in article 8(2). That test is reflected in the English common law under which the home for life promise could only be broken if the overriding public interest demanded that it should be. Accordingly, the closure decision was a breach both of English common law and of the Convention.

The closure decision was irrational in the Wednesbury sense: see Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223.

Phillip Havers QC and Kristina Stern, for the Royal College of Nursing, adopted the submissions of the applicant.

Goudie QC replied.

Pleming QC replied.

Cur adv vult

16 July. LORD WOOLF MR handed down the following judgment of the court. This is the judgment of the court to which all members of the court have contributed.

Introduction

1 The critical issue in this appeal is whether nursing care for a chronically ill patient may lawfully be provided by a local authority as a social service (in which case the patient pays according to means) or whether it is required by law to be provided free of charge as part of the National Health Service (“the NHS”). If local authority provision is lawful, a number of further important questions arise: as to the propriety of the process by which eligibility for long-term health care on the NHS, instead of as a social service, is determined; as to the effect of an assurance given by the Exeter
Health Authority, the predecessor of the appellant, the North and East Devon Health Authority ("the health authority"), to the respondent to this appeal (the applicant for judicial review), Miss Coughlan, that she should have a home for life at Mardon House, an NHS facility; and as to the process by which Miss Coughlan has been assigned to local authority care.

Normally where a person is assigned to local authority care she will, subject to a means test, be liable to meet the cost of that care. For reasons to which we will come, Miss Coughlan will not in any event be called upon to pay for her care; but, in hearing her claim, which he decided in her favour, Hidden J did not consider that this made the issues and, in particular, the critical issue academic. Now that all issues have been decided in her favour both the health authority and (on this appeal) the Secretary of State for Health plainly have a proper interest in challenging the judgment.

Miss Coughlan was grievously injured in a road traffic accident in 1971. She is tetraplegic; doubly incontinent, requiring regular catheterisation; partially paralysed in the respiratory tract, with consequent difficulty in breathing; and subject not only to the attendant problems of immobility but to recurrent headaches caused by an associated neurological condition. In 1993 she and seven comparably disabled patients were moved with their agreement from Newcourt Hospital, which it was desired to close, to a purpose-built facility, Mardon House. It is a decision of the health authority made on 7 October 1998 to close Mardon House which is the immediate cause of the present litigation.

In a reserved judgment delivered on 11 December 1998 Hidden J reached the following conclusions. (a) Miss Coughlan and the other patients had been given a clear promise that Mardon House would be their home for life, and the health authority had established no such overriding public interest as justified it in breaking the promise. (b) The process by which the decision to close Mardon House was arrived at was flawed by a want of proper assessment of Miss Coughlan, by a bias in favour of closure in the materials laid before the health authority, and because no alternative placement for Miss Coughlan had been identified. (c) The bias was in part due to a consultation process which was vitiated by prejudgment, non-disclosure of materials and inadequate time for response. (d) In law, all nursing care was the sole responsibility of the NHS acting through the health authority. It was therefore not open to the health authority to transfer the responsibility for long-term general nursing care of a patient such as Miss Coughlan to the social services department of the local authority. (e) The eligibility criteria adopted and applied by the health authority for long-term health care were correspondingly flawed. Hidden J accordingly granted an order of certiorari quashing the closure decision.

Intervention on the appeal: the Secretary of State and the Royal College of Nursing

Upon the health authority’s appeal two further parties have sought to be heard. For reasons mentioned above, the Secretary of State for Health applied and was given leave to be heard. It is appropriate that he should be
treated for all purposes as a party. He was represented by Mr Nigel Pleming. Thereafter the Royal College of Nursing applied to be heard and was given leave to put in a written submission on two issues of particular concern to it: whether nursing care is required to be provided free of charge in nursing homes, as it is in the patient's own home and in hospitals; and whether the distinction made by the health authority between specialist and general nursing care is contrary to law. We have taken into account that written submission and the evidence in support of it, as well as the Secretary of State's response to it. We have briefly heard Mr Philip Havers on behalf of the Royal College. Its intervention has been of assistance, but it has rightly not sought to do more than intervene for a limited purpose.

Nursing care for Miss Coughlan at Mardon House

6 From the time of her accident until the events with which this appeal is concerned, Miss Coughlan's care, which has always included, but has not been confined to, nursing care, was accepted as the responsibility of the NHS acting through the Exeter Health Authority and, more recently, the health authority. The health authority does not dispute that Miss Coughlan and her fellow long-term patients accepted the move from Newcourt Hospital to Mardon House in 1993 on the basis of a clear promise that Mardon House would be their home for life. Although both Mr James Goudie for the health authority and Mr Richard Gordon for Miss Coughlan have based their arguments upon a clear promise to this effect, it will be necessary later in this judgment to look at its precise terms because Mr Gordon contends that when it took the closure decision the health authority was presented with a diluted version of the promise.

7 For the first year the John Grooms charity was engaged to run Mardon House, which was leased to the charity and registered as a nursing home under the Registered Homes Act 1984. By the summer of 1994, however, this arrangement had failed and the premises reverted to the local NHS trust. Section 21(3) of the Registered Homes Act 1984 excludes NHS hospitals from registration as nursing homes. By section 128(1) of the National Health Service Act 1977 a "hospital" includes any institution for the reception and treatment of persons suffering from illness, so that Mardon House could no longer be registered as a nursing home, albeit this was the description which most nearly fitted it.

8 Mardon House, although purpose-built for the long-term disabled, had other health service functions as a rehabilitation—or "reablement"—unit. For reasons which we do not have to analyse, the health authority by 1995 was having to consider whether the reablement service could realistically be kept at Mardon House. This in turn threw up the question whether, if the reablement service were to go, Mardon House could be maintained as a home for younger chronically disabled patients together with some alternative health service use or uses.

NHS changes: legislation, policy and guidelines

9 Alongside these difficulties of health service provision changes were taking place in health service policy. On 1 April 1993 the National Health Service and Community Care Act 1990 came into force. Among the purposes set out in the long title were:
“to make further provision about health authorities and other bodies constituted in accordance with the [1977 Act]; to provide for the establishment of National Health Service trusts . . . to make further provision concerning the provision of accommodation and other welfare services by local authorities . . .”

Mr Gordon’s initial charge that this legislation was mistakenly taken by the NHS to permit long-term nursing care to be handed over to local authorities has been defused by Mr Pleming's acceptance, adopted by Mr Goudie, that no material change was introduced by the 1990 Act and that all the material powers are to be found in the 1977 Act, the successor to the originating National Health Service Act 1946. It will be necessary to consider in detail the history and significance of those statutory provisions which adjust the relationship between NHS and local authority provision for persons who are ill.

The coming into force of the 1990 Act was accompanied by a guideline document, HSG(92)50, issued by the NHS Management Executive to district health authorities. It is captioned “Local authority contracts for residential and nursing home care: NHS related aspects” and begins:

“This guidance sets out district health authority and local authority responsibilities, from April 1993, for funding community health services for residents of residential care and nursing homes who have been placed in those homes by local authorities.”

The guidance drew a distinction between “specialist” nursing services, which were to continue to be provided by the NHS, and “general nursing care”, which the guidance proposed should be for the local authority to purchase. It said:

“3. Full implementation of the White Paper ‘Caring for People’ will mean that local authorities will have responsibilities for purchasing nursing home care for the great majority of people who need it and who require to be publicly supported. When, after April 1993, a local authority places a person in a nursing home after joint health authority/local authority assessment, the local authority is responsible for purchasing services to meet the general nursing care needs of that person, including the cost of incontinence services (e.g. laundry) and those incontinence and nursing supplies which are not available on NHS prescription. Health authorities will be responsible for purchasing, within the resources available and in line with their priorities, physiotherapy, chiropody and speech and language therapy, with the appropriate equipment, and the provision of specialist nursing advice, e.g. continence advice and stoma care, for those people placed in nursing homes by local authorities with the consent of a district health authority. Health authorities can opt to purchase these services through directly managed units, NHS trusts, or other providers including the nursing home concerned. Health authorities continue to have the power to enter into a contractual arrangement with a nursing home where a patient’s need is primarily for health care. Such placements must be fully funded by the health authority.”
In March 1993 the Secretary of State gave approvals and directions under section 21(1) of the National Assistance Act 1948—to which we will come—directing local authorities to make arrangements to provide residential accommodation for persons who were unable through illness to take care of themselves, and to enable such people to obtain nursing attention so long as this did not impinge upon statutory NHS provision.

In 1995 further guidance was issued by the Secretary of State for Health, directed both to NHS bodies and to local authorities (HSG(95)8; LAC(95)5, “NHS Responsibilities for Meeting Continuing Healthcare Needs”). It sought to delineate in further detail the appropriate division of responsibility between the NHS and local authorities for those in need of continuing health care. It made clear that access to specialist medical and nursing services should be available and provided at the expense of the NHS for those persons who were no longer eligible for in-patient care. It called on health authorities to develop and publish policies and eligibility criteria for the purchase of continuing health care as from April 1996.

The health authority published policies and eligibility criteria in conjunction with its twin Devon Health Authority and Devon social services. The published document builds upon the distinction made in the 1992 guidelines between specialist and general nursing care, setting out a definition of specialist nursing which Mr Gordon and Mr Havers have submitted is idiosyncratic. It relates specialisation not to qualification but to employment, and it lists as examples of specialist nursing continence care, stoma, diabetic, paediatric, palliative, tissue viability and breast care. It distinguishes these from what it calls core nursing: the work of district nurses, health visitors, practice nurses, community psychiatric nurses, community mental handicap nurses and midwives. Of those areas identified as specialist, none is recognised as such by the United Kingdom Central Council for Nursing. Those listed as non-specialist are arguably all examples of specialist nursing. It is not for us to resolve this difference of approach, but it is relevant to note that the notion of specialist nursing, introduced by way of policy guidance and not by statute, is, on any view, elusive. As to nursing home care the document says:

“Many people regard care in a nursing home as health care, and therefore the purchasing responsibility of the NHS. However, under the National Health Service and Community Care Act 1990, social services were given a new responsibility for purchasing nursing home beds. As with the previous arrangement through the Department of Social Security this is subject to a means test. The regulations governing this are laid down nationally. It is anticipated that the majority of placements in nursing homes in Devon will continue to be made through social services. Under the terms of the government’s guidance it is open to health authorities to purchase care from nursing homes as NHS continuing care (although they do not have to do so if they can meet these responsibilities in other ways i.e through contracting for hospital beds). Patients eligible for NHS purchased nursing home care would need to meet the criteria for in-patient care. The care required would be at a higher level than that normally provided by nursing homes. Health and social services purchasers are working together to describe more clearly social services ‘normal’ expectations of nursing homes and how an NHS purchased
A placement would differ from this. NHS in-patient care is free at the point of need but social services are obliged by law to charge for care; this is decided by Parliament. The question of charging cannot be taken into account in these eligibility criteria nor in decisions on care for individuals, since these are based on consultants’ clinical judgments.”

The policy statement goes on to say:

“The National Health Service Executive recommend that the following services are to be regarded as standard, i.e., not specialist, in nursing homes: general physical and mental nursing care, artificial feeding, continuous oxygen therapy, wound care, pain control, administration of drugs and medication, catheter care, bladder washouts, suction, tracheotomy care, tissue viability.”

In spite of counsel’s best endeavours it has proved impossible to locate the source of the recommendation upon which this passage of the policy is expressly based. Their best guess—that it is HSG(92)50—is insufficient because only the broad division between general and specialist nursing care is to be found there. Those instructing Mr Goudie have been able to tell us that from their recollection some recommendations were conveyed in meetings convened by the South West Regional Office of the National Health Service Executive. Mr Pleming has been able to ascertain nothing about these meetings from the departmental end, and neither party has been able to produce a single memorandum or note relating to them. In this situation, which in the experience of the court is unusual, we will take the policy at face value and infer that the allocation of functions is not the work of the health authority alone but derives from central NHS guidance.

Closure of Mardon House

In the first months of 1996 a review was instituted by the health authority of the options for the placement and care of Miss Coughlan and her two fellow patients. It was based upon the eligibility criteria for NHS care and concluded that Miss Coughlan did not meet these. (Nor, it was considered, did her fellow patient Ross Bentley, who was immobile, unable to communicate, and doubly incontinent.) In January 1998, a week after Devon County Council had assessed Mardon House as “ideally suited” to Miss Coughlan’s physical and psychological needs, the health authority issued a consultation paper which set out five options, of which its board approved the fifth, which involved the closure of Mardon House. In April 1998, after public consultation, the health authority approved option 5. Option 5 did not include an alternative placement for Miss Coughlan or her fellow patients, but the health authority was satisfied that one would be found.

Following the grant of leave by Laws J on 3 June 1998 the health authority agreed to rescind its decision and to go out again to consultation. A new consultation paper was issued on 2 September 1998. Through her solicitors Miss Coughlan responded to it. It took time to reach those representing other Mardon House residents, but they responded by 22 September, two days before the consultation period ended. Meanwhile the health authority had bespoken and received a report from Dr Clark which was not disclosed as part of the consultation process. It supported the
closure proposal. Accordingly, on 7 October 1998 the health authority took
a fresh decision to withdraw services from Mardon House, which would
inevitably result in its closure. The consultation process, which has been the
subject of a discrete head of challenge, will be examined in more detail later
in this judgment. The Form 86A was amended accordingly and the
proceedings, for which leave had already been granted, continued.

Grounds of challenge

17 Miss Coughlan’s case that the decision to close Mardon House is
flawed is put on a number of different grounds by Mr Gordon. Any one of
those grounds, if established, is sufficient to render the decision unlawful.
We shall deal with the points in the following order.

A. Nursing as health care and as social care (paragraphs 18-31).
B. Eligibility criteria (paragraphs 32-49).
C. The promise of a home for life (paragraphs 50-89).
D. Human rights (paragraphs 90-93).
E. Assessment and placement (paragraphs 94-107).
F. Consultation (paragraphs 108-117).

A. Nursing as “health care” and as “social care”

18 Before Hidden J the question of the legality of nursing care being
provided by a local authority was not the primary issue raised by Mr Gordon
on behalf of Miss Coughlan. The decision of the judge has made it the most
important issue on this appeal. As to this issue the judge said:

“I accept Mr Gordon’s submissions on the question of nursing care
that nothing in either the 1990 Act or in HSG(95)8 altered the
statutory responsibilities of health authorities to provide health services
including nursing care. As a result both general and specialist nursing
care remain the sole responsibility of the health authorities. Thus the
health authority was clearly wrong in law in assuming that the law had
changed and that it was no longer entitled or empowered to provide or
arrange long-term general nursing care in an NHS setting and/or that
there had been a transfer to social services departments of such
responsibility as a result of ‘new legislation.’ Those assumptions were
wholly misconceived and led to the authority taking account of
irrelevant matters . . . I conclude that nursing is ‘health care’ and can
never be ‘social care’ and that. . . HSG(95)8 did not make any change
to any NHS responsibility for health care services including nursing.”
(Emphasis added.)

19 If the judge’s decision is right on this issue, his decision will have
significant adverse financial consequences for the Secretary for State and the
health authority. In addition it will mean that the policy of the Secretary of
State as to the provision of nursing care, which has existed for a number
of years, has been unlawful. It will, on the other hand, improve the position
of those in a similar situation to that of Miss Coughlan. If the judge is right,
those who receive nursing care while residing in the community in a nursing
or similar home provided by a local authority will be entitled to have that
care provided free of charge. This would be the same position as would
apply if they were living in their own homes. If the judge is wrong, it means
that the nursing services will have to be paid for, unless the financial resources of the person concerned have been nearly exhausted. In these circumstances it is not surprising that a substantial proportion of the argument on this appeal has been devoted to this issue.

20 The answer to this issue depends on the correct interpretation of three sections: sections 1 and 3 of the 1977 Act and section 21 of Part III of the 1948 Act. The language of the sections today can be readily traced back to the original legislation which founded the welfare state after the last war. Their legislative history reflects the changes in the manner in which health and care services have been provided since that time. We have, therefore, had the legislative history of the three sections explained to us in depth. (The 1977 Act is a descendant of the National Health Service Act 1946. The 1948 Act has been substantially amended since 1948.) In the end, however, this issue has to be determined by construing the provisions in their current form.

21 In examining the language of the sections it is desirable to start with the 1977 Act because, as the 1948 Act makes clear, the 1977 Act is the dominant Act. This dominance is consistent with the long standing role of local authorities under Part III of the 1948 Act of only being required to provide assistance for those in need who have no other way of obtaining that assistance. In that sense, assistance under the 1948 Act is provided as a last resort.

The 1977 Act

22 The 1977 Act is a consolidating Act. Section 1(1) places upon the Secretary of State a duty to continue to promote a comprehensive health service. It sets out the target which the Secretary of State should seek to achieve in the following terms:

“(1) It is the Secretary of State’s duty to continue the promotion in England and Wales of a comprehensive health service designed to secure improvement—(a) in the physical and mental health of the people of those countries, and (b) in the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services in accordance with this Act.”

It will be noted that section 1(1) does not place a duty on the Secretary of State to provide a comprehensive health service. His duty is “to continue to promote” such a service. In addition the services which he is required to provide have to be provided “in accordance with this Act”. Section 1(2) makes clear that those services are in general to be provided free. Section 1(2) provides: “The services so provided shall be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment, whenever passed.” Moving to section 3, it is only necessary to refer to section 3(1). That subsection states:

“It is the Secretary of State’s duty to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements—(a) hospital accommodation; (b) other accommodation for the purpose of any service provided under this Act; (c) medical, dental, nursing and ambulance services; (d) such other facilities for the care of expectant and nursing mothers and young children as he considers are
appropriate as part of the health service; (e) such facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service; (f) such other services as are required for the diagnosis and treatment of illness."

23 It will be observed that the Secretary of State's section 3 duty is subject to two different qualifications. First of all there is the initial qualification that his obligation is limited to providing the services identified to the extent that he considers that they are necessary to meet all reasonable requirements. In addition, in the case of the facilities referred to in (d) and (e), there is a qualification in that he has to consider whether they are appropriate to be provided “as part of the health service”. We are not concerned here with this second qualification since nursing services would come under section 3(1)(c).

24 The first qualification placed on the duty contained in section 3 makes it clear that there is scope for the Secretary of State to exercise a degree of judgment as to the circumstances in which he will provide the services, including nursing services, referred to in the section. He does not automatically have to meet all nursing requirements. In certain circumstances he can exercise his judgment and legitimately decline to provide nursing services. He need not provide nursing services if he does not consider they are reasonably required or necessary to meet a reasonable requirement.

25 When exercising his judgment he has to bear in mind the comprehensive service which he is under a duty to promote as set out in section 1. However, as long as he pays due regard to that duty, the fact that the service will not be comprehensive does not mean that he is necessarily contravening either section 1 or section 3. The truth is that, while he has the duty to continue to promote a comprehensive free health service and he must never, in making a decision under section 3, disregard that duty, a comprehensive health service may never, for human, financial and other resource reasons, be achievable. Recent history has demonstrated that the pace of developments as to what is possible by way of medical treatment, coupled with the ever increasing expectations of the public, mean that the resources of the NHS are and are likely to continue, at least in the foreseeable future, to be insufficient to meet demand.

26 In exercising his judgment the Secretary of State is entitled to take into account the resources available to him and the demands on those resources. In R v Secretary of State for Social Services, Ex p Hincks (1980) 1 BMLR 93 the Court of Appeal held that section 3(1) of the 1977 Act does not impose an absolute duty to provide the specified services. The Secretary of State is entitled to have regard to the resources made available to him under current government economic policy.

The 1948 Act

27 To ascertain whether local authorities can provide any nursing services as part of their care services pursuant to their Part III responsibilities it is now necessary to turn to the third of the trio of sections, namely section 21 of the 1948 Act, as amended by sections 195(6) and 272(1) of the Local Government Act 1972, section 108(5) of the Children Act 1989
sections 42 and 66 of the National Health Service and Community Care Act 1990. The section provides:

“(1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing—
(a) residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them; and
(aa) residential accommodation for expectant and nursing mothers who are in need of care and attention which is not otherwise available to them.

“(2) In making any such arrangements a local authority shall have regard to the welfare of all persons for whom accommodation is provided, and in particular to the need for providing accommodation of different descriptions suited to different descriptions of such persons as are mentioned in the last foregoing subsection . . .

“(5) References in this Act to accommodation provided under this Part thereof shall be construed as references to accommodation provided in accordance with this and the five next following sections, and as including references to board and other services, amenities and requisites provided in connection with the accommodation except where in the opinion of the authority managing the premises their provision is unnecessary.

“(7) Without prejudice to the generality of the foregoing provisions of this section, a local authority may. . . (b) make arrangements for the provision on the premises in which accommodation is being provided of such other services as appear to the authority to be required.

“(8) . . . nothing in this section shall authorise or require a local authority to make any provision authorised or required to be made (whether by that or by any other authority) by or under any enactment not contained in this Part of this Act or authorised or required to be provided under the National Health Service Act 1977.”

The following points should be noted in relation to section 21.

(a) The requirements for approval and directions by the Secretary of State in section 21(1) give the Secretary of State considerable control over both what and how services are provided by local authorities under Part III. (The necessary directions were given in 1993 in an appendix to guidance issued by the Secretary of State on 17 March 1993 (LAC(93):i:o).)

(b) Under section 21 the primary service provided is accommodation. But the express reference to age, illness and disability as being among the characteristics of the person who is seeking accommodation, which amount to a qualification for the grant of the accommodation, indicate that in many cases there is likely to be a need for nursing services as part of the care provided.

(c) The words in section 21(5), “board and other services”, are readily capable of being construed as including nursing services and there appears to be no reason why they should not be so construed. If there were any doubt as to this, it would be removed by the reference in section 26(1B) to “residential accommodation where nursing care is provided”.

(d) The nursing services would, however, as section 21(5) requires, have to be “provided in connection with the accommodation”.

So far the language of the three sections creates no particular difficulty as long as it is subjected to detailed analysis. Section 21(8) remains to be
considered. It provides the key to this issue. How are the words “or authorised or required to be provided under” the 1977 Act to be applied?

28 Each word is of significance. The powers of the local authority are not excluded by the existence of a power in the 1977 Act to provide the service, but they are excluded where the provision is authorised or required to be made under the 1977 Act. The position is different in the case of “any other enactment”, where it is sufficient if there is an authority or requirement to be made by or under the enactment.

29 The references in section 21 to the 1977 Act were added by the National Health Service and Community Care Act 1990. The amendment was made in part by section 42 of Part III of that Act. Part III introduced the new arrangements for community care. The same section also added the provision which is now section 26(1B) of the 1948 Act to which we have already referred. It was clearly contemplated that services which could be provided might include nursing services. Section 21(8) was added to by section 66 and paragraph 5(3) of Schedule 9, entitled “Minor and Consequential Amendments”. The section should not be regarded as preventing a local authority from providing any health services. The subsection’s prohibitive effect is limited to those health services which, in fact, have been authorised or required to be provided under the 1977 Act. Such health services would not therefore include services which the Secretary of State legitimately decided under section 3(1) of the 1977 Act it was not necessary for the NHS to provide. It would have been remarkable if a minor and consequential amendment of section 21(8) of the 1948 Act had had the effect, as Mr Goudie contended, of reducing the Secretary of State’s important public obligations under the 1977 Act. The true effect is to emphasise that 1948 Act provision, which is secondary to 1977 Act provision, may nevertheless include nursing care which properly falls outside the NHS.

Conclusion

30 The result of the detailed examination of the three sections can be summarised as follows.

(a) The Secretary of State can exclude some nursing services from the services provided by the NHS. Such services can then be provided as a social or care service rather than as a health service.

(b) The nursing services which can be so provided as part of the care services are limited to those which can legitimately be regarded as being provided in connection with accommodation which is being provided to the classes of persons referred to in section 21 of the 1948 Act who are in need of care and attention; in other words as part of a social services care package.

(c) The fact that the nursing services are to be provided as part of social services care and will have to be paid for by the person concerned, unless that person’s resources mean that he or she will be exempt from having to pay for those services, does not prohibit the Secretary of State from deciding not to provide those services. The nursing services are part of the social services and are subject to the same regime for payment as other social services. Mr Gordon submitted that this is unfair. He pointed out that if a person receives comparable nursing care in a hospital or in a community setting, such as his or her home, it is free. The Royal Commission on Long Term Care, in its report, “With Respect to Old Age” (Cm 4192-I) (March
A. 1999), chapter 6, pp 62 et seq, not surprisingly agrees with this assessment and makes recommendations to improve the situation. However, as long as the nursing care services are capable of being properly classified as part of the social services responsibilities, then, under the present legislation, that unfairness is part of the statutory scheme.

(d) The fact that some nursing services can be properly regarded as part of social services care, to be provided by the local authority, does not mean that all nursing services provided to those in the care of the local authority can be treated in this way. The scale and type of nursing required in an individual case may mean that it would not be appropriate to regard all or part of the nursing as being part of “the package of care” which can be provided by a local authority. There can be no precise legal line drawn between those nursing services which are and those which are not capable of being treated as included in such a package of care services.

(e) The distinction between those services which can and cannot be so provided is one of degree which in a borderline case will depend on a careful appraisal of the facts of the individual case. However, as a very general indication as to where the line is to be drawn, it can be said that if the nursing services are (i) merely incidental or ancillary to the provision of the accommodation which a local authority is under a duty to provide to the category of persons to whom section 21 of the 1948 Act refers and (ii) of a nature which it can be expected that an authority whose primary responsibility is to provide social services can be expected to provide, then they can be provided under section 21. It will be appreciated that the first part of the test is focusing on the overall quantity of the services and the second part on the quality of the services provided.

(f) The fact that care services are provided on a means tested contribution basis does not prevent the Secretary of State declining to provide the nursing part of those services on the NHS. However, he can only decline if he has formed a judgment which is tenable and consistent with his long-term general duty to continue to promote a comprehensive free health service that it is not necessary to provide the services. He cannot decline simply because social services will fill the gap.

31 It follows that we do not accept the judge’s conclusion that all nursing care must be the sole responsibility of the NHS and has to be provided by the health authority. Whether it can be provided by the local authority has to be determined on an assessment of the circumstances of the individual concerned. The Secretary of State accepts that, where the primary need is a health need, then the responsibility is that of the NHS, even when the individual has been placed in a home by a local authority. The difficulty is identifying the cases which are required to be placed into that category on their facts in order to comply with the statutory provisions. Here the needs of Miss Coughlan and her fellow occupants were primarily health needs for which the health authority is as a matter of law responsible, for reasons which we will now explain.

B. Eligibility criteria

32 Mr Pleming, on behalf of the Secretary of the State, submitted that since the inception of the NHS there has been a broad division between specialist medical services, which are always the NHS’s responsibility, and general care services, which can be the responsibility of local authorities.
A reflection of this distinction was to be found in section 21(7) of the 1948 Act prior to its amendment. The section excluded from the services which could be provided by local authorities “specialist services or services of a kind normally provided only on admission to a hospital . . .”. He also contended that there can be an overlap between the categories of services which can be provided by the NHS and local authorities and that therefore a method needs to exist to determine an individual’s eligibility for NHS services for which there would be no charge. The selected method is a combination of guidance by the Secretary of State, to be implemented by health authorities and local authorities, and eligibility criteria drawn up by health authorities in accordance with that guidance. The next issue which has to be determined is whether the guidance and eligibility criteria which have been adopted and applied by the twin health authorities and Devon social services were flawed. The eligibility criteria could be flawed because they reflected guidance of the Secretary of State, which itself was flawed or they could be flawed, because the health authorities, in laying down the eligibility criteria, misunderstood, misapplied or failed to follow that guidance.

33 We have already referred to the documents that contained the formal guidance, namely HSG(92)50 and HSG(95)8. Those documents could not and, as the judge accepted, did not alter the legal responsibilities of the NHS under the 1977 Act. They did, however, reflect a change of policy in relation to those who needed long-term care. Although the policy change is not directly relevant to the outcome of this appeal, it probably explains how the legal problems to be resolved by this case arose and some of the confusion on the part of the health authority as to its responsibilities.

34 At the request of this court, Mr Pleming, on behalf of the Secretary of State, prepared a helpful note as to how the present policy in relation to long-term care evolved. In general there has been a shift from in-patient hospital care to community provision. This has coincided with advances in the way health and social services treatment and care are provided. Community care can offer improvements in terms of the quality of life it provides over long-term residence in institutions, such as hospitals. We also recognise that, because of that improvement, the scale of health care which is needed may be reduced. However, subject to this, the fact that a patient is being treated in one setting rather than another will not affect their health care needs.

35 In keeping with this change of approach an announcement was made in the House of Commons on 12 July 1989 indicating that the aim of the policy would be to enable people to live as full and independent a life as is possible in the community for so long as they wished to do so. This statement was considered to be in accord with the report by Sir Roy Griffiths in 1988, “Community Care: Agenda for Action”. The report accepted the distinction between health and social care and did not alter what should be the responsibility of the NHS for health care. It was, however, intended that local authorities should normally assume responsibility for the care element of public support for people in private and voluntary residential care and nursing homes. A text of the statement was issued under cover of circular HN(89)18/LASSL(89)6. Paragraph 25 of the statement confirmed:
“Community care is no longer primarily about providing an alternative to long-stay hospital care. The vast majority of people needing care have never been, nor expect to be in such institutions. The policy aim is to now strike the right balance between home and day care on the one hand, and residential and nursing home care on the other, while reserving hospital care for those whose needs truly cannot be met elsewhere. The changes we propose will for the first time ensure that all public moneys are devoted to the primary objective of supporting people at home whenever possible.”

36 The policy was developed and implemented by a White Paper, “Caring for People: Community Care in the Next Decade and Beyond” (Cm 849) (November 1989) and the National Health Service and Community Care Act 1990 which was brought into force in April 1993. The Act was accompanied by policy guidance “Caring for People: Community Care in the Next Decade and Beyond”. Again it was not intended to alter the responsibilities of the NHS. So far as funding was concerned, the change which occurred in April 1993 is that, whereas previously funding for residential nursing home care had been met by central social security funding, after April 1993 this became the direct responsibility of the local authorities. This was intended to induce a more responsible approach on the part of local authorities as to how the resources were deployed.

37 It is accepted, however, that the NHS continued to be responsible for (a) funding placements for nursing home residents requiring continuing in-patient care and (b) meeting the specialist health care needs of residents of nursing homes for whom the local authority was generally responsible. As we will see, the category (a) responsibility is of significance. It involves the recognition that there will be residents of nursing homes who, while they do not require in-patient care in hospital, do need NHS care in the community.

38 As a result of a report by the Health Service Commissioner in 1994, it was accepted by the then Secretary of State and the chief executive of the NHS that the NHS had withdrawn too far from its responsibilities in relation to continuing health care. This was followed by the issue of guidance HSG(95)8/LAC(95)5 which was intended to address the concerns which had been expressed in the Commissioner’s report. This was followed by further guidance on 26 September 1995 provided in HSG(95)45. The annex to that circular states in paragraph 4.1:

“In respect of people being discharged from long stay institutions, the NHS is responsible for negotiating arrangements with local authorities, including any appropriate transfer of resources which assist the local authority meeting the community care needs of such people and of their successors who may otherwise have entered the institution.”

It is stated in paragraph 5.1 that health authorities are also responsible for the purchase and provision of: “(ii) specialist or intensive medical or nursing support for people in nursing homes...” (Emphasis added).

39 We have no difficulty with the Secretary of State adopting a policy of treatment in the community where in-patient treatment in a hospital is not required. In determining what health services are to be provided by the NHS, the Secretary of State may take into account what services are and can be lawfully provided by local authorities as care provision. However, the
question remains as to whether the correct boundary has been identified between what is the proper responsibility of the NHS and what is the proper responsibility of local authorities.

40 The Secretary of State does not suggest that the NHS need not fund those health services which would not be an appropriate part of the package of care which a local authority can provide under section 21 of the 1948 Act. We recognise that what services can be appropriately treated as responsibilities of a local authority under section 21 may evolve with the changing standards of society. It is always going to be difficult to identify the limits of those services. In the case of the circulars published by the Secretary of State, despite Mr Gordon's submissions on behalf of Miss Coughlan to the contrary, we do not find that they improperly place any responsibilities on local authorities or remove any responsibilities of health authorities. In fact both the judge and Mr Gordon accepted that these circulars had made no change to the responsibilities for health care of the NHS.

41 What Mr Gordon particularly complained of was the distinction which the circulars adopted between general and specialist nursing care. We have already indicated why a dividing line based on this distinction can be described as idiosyncratic. Certainly the expressions should not be regarded as giving anything more than the most general indication of what is and is not health care which the NHS should provide. The distinction between general and special or specialist services does provide a degree of non-technical guidance as to the services which, because of their nature or quality, should be regarded in any particular case as being more likely to be the responsibility of the NHS. Where the issue is whether the services should be treated as the responsibility of the NHS, not because of their nature or quality, but because of their quantity or the continuity with which they are provided, the distinction between general and specialist services is of less assistance. The distinction certainly does not provide an exhaustive test. The distinction does not necessarily cater for the situation where the demands for nursing attention are continuous and intense. In that situation the patient may not require in-patient care in a hospital under the new policy, but the nursing care which is necessary may still exceed that which can be properly provided as a part of social services care provision. We read Circular HSG(95)8 as recognising that there can be such cases: see paragraph 21. But the shortcoming of the circular is that it associates such cases only with in-patient treatment and does not make clear whether the in-patient treatment to which it refers has to be in a hospital. What the circulars do not contain are clear statements that the fact that a case does not qualify for in-patient treatment in a hospital does not mean that the person concerned should not be a NHS responsibility. The importance of there being clear statements as to this arise because of the increased emphasis being placed on care in the community. This could result in it being assumed that, because patients who would previously have been treated as in-patients in hospital no longer qualify for such treatment, they are automatically disqualified from receiving care on the NHS. This is not what is permitted.

42 On this aspect of the case, two things are clear. First, the fact that the resident at a nursing home does not require in-patient treatment in a hospital does not mean that his or her care should not be the responsibility of the NHS. Secondly, as the judge points out, at one time the health authority was totally confused as to what the proper division of responsibility between
the health authority and the local authorities was. Dr Gillian Morgan, the chief executive of the health authority, in her first affidavit accepts that this was the position. In paragraph 39 of her first affidavit she apologises for the confusion which she and other officers of the authority were under and appear to have caused by their statements. This could be the result of the shortcomings of the circulars.

43 The fact that there is this background of possible confusion makes it important that any eligibility criteria should be drawn up with particular care. They need to identify at least two categories of persons who, although receiving nursing care while in a nursing home, are still entitled to receive the care at the expense of the NHS. First, there are those who, because of the scale of their health needs, should be regarded as wholly the responsibility of a health authority. Secondly, there are those whose nursing services in general can be regarded as being the responsibility of the local authority, but whose additional requirements are the responsibility of the NHS.

44 As to the second of those two categories, in her affidavit Dr Morgan states:

"Nursing homes do not generally divide their charges between accommodation and care. In my view, it would be very difficult, if not impossible, to distinguish between the elements of nursing care and what might otherwise be called social care—for example help with eating or washing. The difficulty is particularly acute in the context of work carried out by nursing auxiliaries or other carers under the supervision of qualified nurses. This will generally parallel the equivalent arrangements in NHS hospitals where care is delivered by a range of individuals including nursing auxiliaries and others who are not professional nurses. I therefore seriously doubt whether a coherent and consistent division could be maintained between what is a nursing task and what is a carer’s task if it were proposed that there should be a different funding regime for the two types of care."

45 We are not in a position to comment on the correctness of this view of Dr Morgan. However if she is correct, then the position can be remedied by the health service taking responsibility for the whole cost. Either a proper division needs to be drawn (we are not saying that it has to be exact) or the health service has to take the whole responsibility. The local authority cannot meet the costs of services which are not its responsibility because of the terms of section 21(8) of the 1948 Act.

46 Mr Gordon contended that it would be absurd for those who do not meet the health authority’s eligibility criteria for in-patient care not to be entitled to “general” nursing care services free if they are entitled to “specialist” health care services free. As we have already indicated, there are clearly grounds for saying that for there to be a different regime with regard to payment dependent upon the location where a person is receiving nursing services is unfair, but, that point apart, if a portion of nursing care can still be provided as a service for which the local authority is responsible, then we do not see anything improper in those services being charged for under the local authority regime. Other services for which the NHS is responsible can still be provided on health service terms.

47 It is criterion 1 of the eligibility criteria of the twin health authorities and social services which is relevant to the issues in this case. It commences
by recognising in extremely guarded terms that patients will be eligible for continuing health care "possibly exceptionally in nursing home settings". This follows an introduction which indicates that usually the need for on-site care from doctors (i.e., not nurses) is a reliable test for eligibility. There are also examples given of "the characteristics which are likely to apply" in cases for which the NHS has a continuing responsibility and they are extreme cases. Core nursing is given the definition which we have already cited. This indicates that nursing is not specialist nursing not because of what nursing services are rendered but because of the title of the nurse, such as district nurses or midwives, who provides the care. This is followed by the statement said to be that of the NHS Executive already quoted.

48 It is for the health authority to decide what should be the eligibility criteria in its area in the co-operative framework envisaged by the circulars. In doing so it can take account of conditions in its area. We do not accept the argument that there cannot be variations between the services provided by the NHS in different areas. However, the eligibility criteria cannot place a responsibility on the local authority which goes beyond the terms of section 21. This is what these criteria do. Cases where the health care element goes far beyond what the section permits were being placed upon the local authority as a result of the rigorous limits placed on what services can be considered to be NHS care services. That this is the position is confirmed by the result of the assessment of Miss Coughlan and her fellow occupants. Their disabilities are of a scale which are beyond the scope of local authority services.

49 The relevance of our upholding Miss Coughlan's complaint as to the eligibility criteria is that this could be a factor contributing to the decision to close Mardon House due to lack of support. She argued that, if the proper approach had been adopted as to who qualifies for NHS care, there would not have been this lack of support. Mardon House was an imaginatively conceived NHS facility in part for those who were unfortunate enough to have a similar degree of disability to Miss Coughlan. We agree that the closure decision is called into question by the erroneous view of the health authority as to its general legal obligations towards patients, such as Miss Coughlan.

We turn next to its specific legal obligations owed to her personally.

C. The promise of a home for life

50 The health authority appeals on the ground that the judge wrongly held that it had failed to establish that there was an overriding public interest which entitled it to break the "home for life" promise. In particular, the judge erred in concluding that the health authority had applied the wrong legal test in deciding whether the promise could or should be broken and that it had wrongly diluted the promise and treated it as merely a promise to provide care. It contends that it applied the correct legal test and that the promise had, in the decision-making process, been plainly and accurately expressed and given appropriate prominence.

51 It is also contended that the judge failed to address the overwhelming evidence on the urgent need to remedy the deficiencies of the reablement service and of the serious and acute risks to the reablement service if the status quo at Mardon House were maintained. If he had addressed that issue
he would and should have concluded that the health authority was entitled to decide that such consideration pointed inexorably to the closure decision.

It has been common ground throughout these proceedings that in public law the health authority could break its promise to Miss Coughlan that Mardon House would be her home for life if, and only if, an overriding public interest required it. Both Mr Goudie and Mr Gordon adopted the position that, while the initial judgment on this question has to be made by the health authority, it can be impugned if improperly reached. We consider that it is for the court to decide in an arguable case whether such a judgment, albeit properly arrived at, strikes a proper balance between the public and the private interest.

The facts

In order to determine this issue it is necessary to set out the facts in more detail than we have so far. They are as follows.

(a) From the date of her tragic accident in 1971 until 1993 Miss Coughlan lived in and received nursing care in Newcourt Hospital for the chronically sick and disabled. It was a large old house with communal wards. It was considered unacceptable for modern care. A decision was taken to discharge the residents "to a setting which would be more clinically and socially appropriate".

(b) On 15 March 1993 Miss Coughlan moved to Mardon House along with other patients and the majority of the staff from Newcourt. Mardon House was a purpose-built NHS facility costing £1.5m. It was designed to house young, long-term, severely disabled, residential patients. It had been proposed as early as 1989 as a replacement for Newcourt. There were 20 beds. There were 17 purpose-built, individual flatlets each designed to have a bedroom, sitting room, interconnecting bathroom and a designated kitchenette area. They were individually tailored for the needs of those moving into them. The residents of Newcourt had been involved in discussions about the nature and design of the building and its services. They chose their flatlets and the decor. Intensive reablement services and respite care were also to be provided there. There was a mix of residential/nursing home care and active acute treatment.

(c) The Newcourt patients were persuaded to move to Mardon House by representations on behalf of the health authority that it was more appropriate to their needs. The patients relied on an express assurance or promise that they could live there "as long as they chose". Nursing care was to be provided for them in Mardon House. It was the "new Newcourt".

(d) Mardon House was let by the Exeter and District Community Health Service NHS Trust to a charity, the John Grooms Association, and it was registered as a nursing home. John Grooms withdrew in June 1994, as they felt that the evolving service was so heavily weighted in favour of acute clinical work that the unit would be unregistrable under the terms of the Registered Homes Act 1984. It ceased to be a registered nursing home and became the responsibility of the NHS trust. It reverted to being solely a NHS facility. No new long-term patients were admitted from mid-1994.

(e) On 7 October 1998 the decision was taken by the health authority to withdraw services from Mardon House and to close the facility. It was minuted in these terms:
"Option II. Move reablement to Heavitree Hospital, Exeter Community Trust to sell Mardon House and the residents to move to nursing/residential homes/community care settings. The authority unanimously voted to support this option."

Three patients, all ex-Newcourt including Miss Coughlan, are left living there. They are all chronically sick and disabled and are considered by the health authority to require "generalist nursing care".

(f) The decision was preceded by a consultation paper (DHA 98/109) dated 25 August 1998 on the options for the future of services for people with physical disability currently provided at Mardon House. Section 2 of the paper deals with "Promise to the residents" as follows:

"(1) When Mardon House opened in 1993 several of the residents expressed their desire to stay at Newcourt Hospital. Verbal assurances were given by senior officers of the former Exeter Health Authority and the Exeter Community Unit that Mardon House would be expected to be the residents 'home for life'. (2) In June 1994, the general manager of the former Exeter Health Authority wrote to the residents for whom Exeter and North Devon Health Authority were responsible (two of the current three residents) assuring them that he would ask the Exeter Community Trust to ensure that Mardon House would be their permanent home, for as long as they wished to remain there. (3) The authority needs to give due recognition and weight to this promise in taking any decisions about the future configuration of services. (4) The authority has previously recognised this commitment and accepted continuing responsibility for funding the residents' care."

The section headed "Considerations" identifies this as one of the issues to be discussed:

"the authority needs to consider carefully the 'promise for life' given to residents, its implications and whether this outweighs any considerations for the acute service. Is an ongoing commitment to fund care, i.e., to maintain the residents in continuing NHS funded continuing care fair or appropriate?"

(g) The consultation paper and a further paper, "Responses from the Consultation" (DHA 98/127) were placed before the health authority at the meeting on 7 October 1998. There was included a "Response by the residents". In the section "Decision-making process" 3.1 states that: "The starting point is the promise to the residents that Mardon House would be a home for life." The "Conclusions" section 5 states that:

"The health authority has to decide, in the light of all available evidence, either to support the Exeter Community Trust in running a residential home which may not be viable, or to assist the residents to move whilst 'in breach of the original promises' or to move alternative NHS services into Mardon House with a less than satisfactory outcome both financially and from the point of clinical compatibility."

Various options were then set out in section 6, including retaining the status quo at Mardon House (option 1) and option 11, which was eventually taken.
On this issue the ground of review relied on was that the health authority had acted unlawfully “in breaking the recent and unequivocal promise given by it that the applicant and other patients could live there for as long as they chose”.

The judgment

It is also helpful to set out the views of the judge on this issue. The judge regarded as “the proper starting point” the question of what effect did the “promise for life” have in law. He held that it was a clear promise to Miss Coughlan and the other patients that Mardon House would be a permanent home for them; that a decision to break it, if unfair, would be equivalent to a breach of contract; that a public authority could reasonably resile from such a promise where the overriding public interest demanded it; and that the health authority had failed to discharge the burden of establishing that there were “compelling circumstances” amounting to an overreaching public interest. The health authority had concluded that, in its scale of priorities, reablement came higher than Miss Coughlan and her fellow patients. The “promise for life” was a relevant consideration. The judge concluded as follows:

“Consideration of the promise had to start with a proper understanding of the promise. It was a promise to provide care at Mardon House but the health authority wrongly treated it as merely a promise to provide care. That meant that the authority’s attitude to the place where care was to be provided was flawed from the start.”

Legitimate expectation—the court’s role

In considering the correctness of this part of the judge’s decision it is necessary to begin by examining the court’s role where what is in issue is a promise as to how it would behave in the future made by a public body when exercising a statutory function. In the past it would have been argued that the promise was to be ignored since it could not have any effect on how the public body exercised its judgment in what it thought was the public interest. Today such an argument would have no prospect of success, as Mr Goudie and Mr Gordon accept.

What is still the subject of some controversy is the court’s role when a member of the public, as a result of a promise or other conduct, has a legitimate expectation that he will be treated in one way and the public body wishes to treat him or her in a different way. Here the starting point has to be to ask what in the circumstances the member of the public could legitimately expect. In the words of Lord Scarman in In re Findlay [1985] AC 318, 338, “But what was their legitimate expectation?” Where there is a dispute as to this, the dispute has to be determined by the court, as happened in In re Findlay. This can involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.

There are at least three possible outcomes. (a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on Wednesbury grounds.
Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223). This has been held to be the effect of changes of policy in cases involving the early release of prisoners: see In re Findlay [1985] AC 318; R v Secretary of State for the Home Department, Ex p Hargreaves [1997] 1 WLR 906. (b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontroversial that the court itself will require *the opportunity for consultation* to be given unless there is an overriding reason to resile from it (see Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629) in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires. (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.

58 The court having decided which of the categories is appropriate, the court’s role in the case of the second and third categories is different from that in the first. In the case of the first, the court is restricted to reviewing the decision on conventional grounds. The test will be rationality and whether the public body has given proper weight to the implications of not fulfilling the promise. In the case of the second category the court’s task is the conventional one of determining whether the decision was procedurally fair. In the case of the third, the court has when necessary to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised.

59 In many cases the difficult task will be to decide into which category the decision should be allotted. In what is still a developing field of law, attention will have to be given to what it is in the first category of case which limits the applicant’s legitimate expectation (in Lord Scarman’s words in In re Findlay [1985] AC 318) to an expectation that whatever policy is in force at the time will be applied to him. As to the second and third categories, the difficulty of segregating the procedural from the substantive is illustrated by the line of cases arising out of decisions of justices not to commit a defendant to the Crown Court for sentence, or assurances given to a defendant by the court: here to resile from such a decision or assurance may involve the breach of legitimate expectation: see R v Grice (1977) 66 Cr App R 167; cf R v Reilly [1982] QB 1208, R v Dover Magistrates’ Court, Ex p Pamment (1994) 15 Cr App R(S) 778, 782. No attempt is made in those cases, rightly in our view, to draw the distinction. Nevertheless, most cases of an enforceable expectation of a substantive benefit (the third category) are likely in the nature of things to be cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract. We recognise that the courts’ role in relation to the third category is still controversial; but, as we hope to show, it is now clarified by authority.

60 We consider that Mr Goudie and Mr Gordon are correct, as was the judge, in regarding the facts of this case as coming into the third category.
(Even if this were not correct because of the nature of the promise, and even if the case fell within the second category, the health authority in exercising its discretion and in due course the court would have to take into account that only an overriding public interest would justify resiling from the promise.) Our reasons are as follows. First, the importance of what was promised to Miss Coughlan (as we will explain later, this is a matter underlined by the Human Rights Act 1998); second, the fact that promise was limited to a few individuals, and the fact that the consequences to the health authority of requiring it to honour its promise are likely to be financial only.

The authorities

Whether to frustrate a legitimate expectation can amount to an abuse of power is the question which was posed by the House of Lords in R v Inland Revenue Comrs, Ex p Preston [1985] AC 835 and addressed more recently by this court in R v Inland Revenue Comrs, Ex p Unilever plc [1996] STC 681. In each case it was in relation to a decision by a public authority (the Crown) to resile from a representation about how it would treat a member of the public (the taxpayer). It cannot be suggested that special principles of public law apply to the Inland Revenue or to taxpayers. Yet this is an area of law which has been a site of recent controversy, because while Ex p Preston has been followed in tax cases, using the vocabulary of abuse of power, in other fields of public law analogous challenges, couched in the language of legitimate expectation, have not all been approached in the same way.

There has never been any question that the propriety of a breach by a public authority of a legitimate expectation of the second category, of a procedural benefit—typically a promise of being heard or consulted—is a matter for full review by the court. The court has, in other words, to examine the relevant circumstances and to decide for itself whether what happened was fair. This is of a piece with the historic jurisdiction of the courts over issues of procedural justice. But in relation to a legitimate expectation of a substantive benefit (such as a promise of a home for life) doubt has been cast upon whether the same standard of review applies. Instead it is suggested that the proper standard is the so-called Wednesbury standard which is applied to the generality of executive decisions. This touches the intrinsic quality of the decision, as opposed to the means by which it has been reached, only where the decision is irrational or (per Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 410) immoral.

This is not a live issue in the common law of the European Union, where a uniform standard of full review for fairness is well established: see Schwarze, European Administrative Law (1992), pp 1134-1135 and the European Court of Justice cases reviewed in R v Ministry of Agriculture, Fisheries and Food, Ex p Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714, 726-728. It is, however, something on which the Human Rights Act 1998, when it comes into force, may have a bearing.

It is axiomatic that a public authority which derives its existence and its powers from statute cannot validly act outside those powers. This is the familiar ultra vires doctrine adopted by public law from company law (Colman v Eastern Counties Railway Co (1846) 10 Beav 1). Since such
powers will ordinarily include anything fairly incidental to the express remit, a statutory body may lawfully adopt and follow policies (British Oxygen Co Ltd v Board of Trade [1971] AC 610) and enter into formal undertakings. But since it cannot abdicate its general remit, not only must it remain free to change policy; its undertakings are correspondingly open to modification or abandonment. The recurrent question is when and where and how the courts are to intervene to protect the public from unwarranted harm in this process. The problem can readily be seen to go wider than the exercise of statutory powers. It may equally arise in relation to the exercise of the prerogative power, which at least since R v Criminal Injuries Compensation Board, Ex p Lain [1967] 2 QB 864, has been subject to judicial review, and in relation to private monopoly powers: R v Panel on Take-overs and Mergers, Ex p Datafin plc [1987] QB 815.

The court's task in all these cases is not to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate interests or expectations of citizens or strangers who have relied, and have been justified in relying, on a current policy or an extant promise. The critical question is by what standard the court is to resolve such conflicts. It is when one examines the implications for a case like the present of the proposition that, so long as the decision-making process has been lawful, the court's only ground of intervention is the intrinsic rationality of the decision, that the problem becomes apparent. Rationality, as it has developed in modern public law, has two faces: one is the barely known decision which simply defies comprehension; the other is a decision which can be seen to have proceeded by flawed logic (though this can often be equally well allocated to the intrusion of an irrelevant factor). The present decision may well pass a rationality test; the health authority knew of the promise and its seriousness; it was aware of its new policies and the reasons for them; it knew that one had to yield, and it made a choice which, whatever else can be said of it, may not easily be challenged as irrational. As Lord Diplock said in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014, 1064:

"The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred."

But to limit the court's power of supervision to this is to exclude from consideration another aspect of the decision which is equally the concern of the law.

In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process. The present class of case is visibly different. It involves not one but two lawful exercises of power (the promise and the policy change) by the same public authority, with consequences for individuals trapped between the two. The policy decision may well, and often does, make as many exceptions as are proper and feasible to protect individual expectations. The departmental decision in Ex p Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714 is a good example. If it does not, as in Ex p Unilever plc [1996] STC 681, the court is there to ensure that the power to make and alter policy has not been abused by unfairly
frustrating legitimate individual expectations. In such a situation a bare rationality test would constitute the public authority judge in its own cause, for a decision to prioritise a policy change over legitimate expectations will almost always be rational from where the authority stands, even if objectively it is arbitrary or unfair. It is in response to this dilemma that two distinct but related approaches have developed in the modern cases.

One approach is to ask not whether the decision is ultra vires in the restricted Wednesbury sense but whether, for example through unfairness or arbitrariness, it amounts to an abuse of power. The leading case on the existence of this principle is Ex p Preston [1985] AC 835. It concerned an allegation, not in the event made out, that the Inland Revenue Commissioners had gone back impermissibly on their promise not to reinvestigate certain aspects of an individual taxpayer's affairs. Lord Scarman, expressing his agreement with the single fully reasoned speech (that of Lord Templeman) advanced a number of important general propositions. First, he said, at p 851:

"... I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law."

Second, Lord Scarman reiterated, citing the decision of the House of Lords in R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617, that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or "have abused their powers or acted outside them". Third, that "unfairness in the purported exercise of a power can be such that it is an abuse or excess of power".

It is evident from these passages and from Lord Scarman's further explanation of them that, in his view at least, it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view public law today reaches it. The same approach was taken by Lord Templeman, at p 862:

"Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers."

Abuses of power may take many forms. One, not considered in the Wednesbury case [1948] 1 KB 223 (even though it was arguably what the case was about), was the use of a power for a collateral purpose. Another, as cases like Ex p Preston [1985] AC 835 now make clear, is reneging without adequate justification, by an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. There is no suggestion in Ex p Preston or elsewhere that the final arbiter of justification, rationality apart, is the decision-maker rather than the court. Lord Templeman, at pp 864-866, reviewed the law in extenso, including the classic decisions in Laker Airways Ltd v Department of Trade [1977] QB 643; Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997; Congreve v Home Office [1976] QB 629 and HTV Ltd v Price
Commission [1976] ICR 170 (“It is a commonplace of modern law that such bodies must act fairly. . . and that the courts have power to redress unfairness”: Scarman LJ at p 189.) He reached this conclusion, at pp 866–867:

“In principle I see no reason why the [taxpayer] should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the [taxpayer] because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy. There may be cases in which conduct which savours of breach of [contract] or breach of representation does not constitute an abuse of power; there may be circumstances in which the court in its discretion might not grant relief by judicial review notwithstanding conduct which savours of breach of contract or breach of representation. In the present case, however, I consider that the [taxpayer] is entitled to relief by way of judicial review for ‘unfairness’ amounting to abuse of power if the commissioners have been guilty of conduct equivalent to a breach of contract or breach of representations on their part.”

The entire passage, too long to set out here, merits close attention. It may be observed that Lord Templeman’s final formulation, taken by itself, would allow no room for a test of overriding public interest. This, it is clear, is because of the facts then before the House. In a case such as the present the question posed in the HTV case [1976] ICR 1.70 remains live.

This approach, in our view, embraces all the principles of public law which we have been considering. It recognises the primacy of the public authority both in administration and in policy development but it insists, where these functions come into tension, upon the adjudicative role of the court to ensure fairness to the individual. It does not overlook the passage in the speech of Lord Browne-Wilkinson in R v Hull University Visitor, Ex p Page [1993] AC 682, 701, that the basis of the “fundamental principle . . . that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully” is the Wednesbury limit on the exercise of powers; but it follows the authority not only of Ex p Preston [1985] AC 835 but of Lord Scarman’s speech in R v Secretary of State for the Environment, Ex p Nottinghamshire County Council [1986] AC 240, 249, in treating a power which is abused as a power which has not been lawfully exercised.

Fairness in such a situation, if it is to mean anything, must for the reasons we have considered include fairness of outcome. This in turn is why the doctrine of legitimate expectation has emerged as a distinct application of the concept of abuse of power in relation to substantive as well as procedural benefits, representing a second approach to the same problem. If this is the position in the case of the third category, why is it not also the position in relation to the first category? May it be (though this was not considered in In re Findlay [1985] AC 318 or Ex p Hargreaves [1997] 1 WLR 906) that, when a promise is made to a category of individuals who have the same interest, it is more likely to be considered to have binding effect than a promise which is made generally or to a diverse class, when the interests of those to whom the promise is made may differ or, indeed, may be
A in conflict? Legitimate expectation may play different parts in different aspects of public law. The limits to its role have yet to be finally determined by the courts. Its application is still being developed on a case by case basis. Even where it reflects procedural expectations, for example concerning consultation, it may be affected by an overriding public interest. It may operate as an aspect of good administration, qualifying the intrinsic rationality of policy choices. And without injury to the Wednesbury doctrine it may furnish a proper basis for the application of the now established concept of abuse of power.

B A full century ago in the seminal case of Kruse v Johnson [1898] 2 QB 91 Lord Russell of Killowen CJ set the limits of the courts' benevolence towards local government byelaws at those which were manifestly unjust, partial, made in bad faith or so gratuitous and oppressive that no reasonable person could think them justified. While it is the latter two classes which reappear in the decision of this court in the Wednesbury case [1948] 1 KB 223, the first two are equally part of the law. Thus in R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545 a Divisional Court (Bingham LJ and Judge J) rejected on the facts a claim for the enforcement of a legitimate expectation in the face of a change of practice by the Inland Revenue. But having set out the need for certainty of representation, Bingham LJ went on, at pp 1569-1570:

C "In so stating these requirements I do not, I hope, diminish or emasculate the valuable, developing doctrine of legitimate expectation. If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness."

D 73 This approach, which makes no formal distinction between procedural and substantive unfairness, was expanded by reference to the extant body of authority by Simon Brown LJ in R v Devon County Council, Ex p Baker [1995] 1 All ER 73, 88-89. He identified two categories of substantive legitimate expectation recognised by modern authority:

E "(1) Sometimes the phrase is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him. It was used in this sense and the assertion upheld in cases such as R v Secretary of State for the Home Department, Ex p Asif Mahmood Khan [1984] 1 WLR 1337 and R v Secretary of State for the Home Department, Ex p Ruddock [1987] 1 WLR 1482. It was used in the same sense but unsuccessfully in, for instance, R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545 and R v Jockey Club, Ex p RAM Racecourses Ltd [1993] 2 All ER 225. These various authorities show that the claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with
the statutory duties imposed upon it. The doctrine employed in this sense is akin to an estoppel. In so far as the public body's representation is communicated by way of a stated policy, this type of legitimate expectation falls into two distinct sub-categories: cases in which the authority are held entitled to change their policy even so as to affect the claimant, and those in which they are not. An illustration of the former is R v Torbay Borough Council, Ex p Cleasby [1991] COD 142, of the latter Ex p Asif Mahmood Khan. (2) Perhaps more conventionally the concept of legitimate expectation is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or, some would argue, attain). Here, therefore, it is the interest itself rather than the benefit that is the substance of the expectation. In other words the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision. Of the various authorities drawn to our attention, Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149, O'Reilly v Mackman [1983] 2 AC 237 and the recent decision of Roch J in R v Rochdale Metropolitan Borough Council, Ex p Schemet [1993] 1 FCR 306 are clear examples of this head of legitimate expectation."

Simon Brown LJ has not in that passage referred expressly to the situation where the individual can claim no higher expectation than to have his individual circumstances considered by the decision-maker in the light of the policy then in force. This is not surprising because this entitlement, which can also be said to be rooted in fairness, adds little to the standard requirements of any exercise of discretion: namely that the decision will take into account all relevant matters which here will include the promise or other conduct giving rise to the expectation and that if the decision-maker does so the courts will not interfere except on the basis that the decision is wholly unreasonable. It is the classic Wednesbury situation, not because the expectation is substantive but because it lacks legitimacy.

74 Nowhere in this body of authority, nor in Ex p Preston [1985] AC 835, nor in In re Findlay [1985] AC 318, is there any suggestion that judicial review of a decision which frustrates a substantive legitimate expectation is confined to the rationality of the decision. But in Ex p Hargreaves [1997] 1 WLR 906, 921, 925 Hirst LJ (with whom Peter Gibson LJ agreed) was persuaded to reject the notion of scrutiny for fairness as heretical, and Pill LJ to reject it as “wrong in principle”.  

75 Ex p Hargreaves concerned prisoners whose expectations of home leave and early release were not to be fulfilled by reason of a change of policy. Following In re Findlay [1985] AC 318 this court held that such prisoners' only legitimate expectation was that their applications would be considered individually in the light of whatever policy was in force at the time: in other words the case came into the first category. This conclusion was dispositive of the case. What Hirst LJ went on to say, at p 919, under the head of “The proper approach for the court to the Secretary of State's decision” was therefore obiter. However Hirst LJ accepted in terms the
submission of leading counsel for the Home Secretary that, beyond review on Wednesbury grounds, the law recognised no enforceable legitimate expectation of a substantive benefit. In relation to the decision in Ex p Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714, he said [1997] 1 WLR 906, 921:

“Mr Beloff characterised Sedley J’s approach as heresy, and in my judgment he was right to do so. On matters of substance (as contrasted with procedure) Wednesbury provides the correct test.”

A number of learned commentators have questioned this conclusion (see e.g P P Craig, “Substantive legitimate expectations and the principles of judicial review” in English Public Law and the Common Law of Europe, ed M Andenas (1998); T R S Allan, “Procedure and substance in judicial review” [1997] CLJ 246; Steve Foster, “Legitimate expectations and prisoners’ rights” (1997) 60 MLR 727).

Ex p Hargreaves [1997] 1 WLR 906 can, in any event, be distinguished from the present case. Mr Gordon has sought to distinguish it on the ground that the present case involves an abuse of power. On one view all cases where proper effect is not given to a legitimate expectation involve an abuse of power. Abuse of power can be said to be but another name for acting contrary to law. But the real distinction between Ex p Hargreaves and this case is that in this case it is contended that fairness in the statutory context required more of the decision-maker than in Ex p Hargreaves where the sole legitimate expectation possessed by the prisoners had been met. It required the health authority, as a matter of fairness, not to resile from their promise unless there was an overriding justification for doing so. Another way of expressing the same thing is to talk of the unwarranted frustration of a legitimate expectation and thus an abuse of power or a failure of substantive fairness. Again the labels are not important except that they all distinguish the issue here from that in Ex p Hargreaves. They identify a different task for the court from that where what is in issue is a conventional application of policy or exercise of discretion. Here the decision can only be justified if there is an overriding public interest. Whether there is an overriding public interest is a question for the court.

The cases decided in the European Court of Justice cited in Ex p Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714 all concern policies or practices conferring substantive benefits from which member states were not allowed to resile when the policy or practice was altered. In this country R v Secretary of State for the Home Department, Ex p Ruddock [1987] 1 WLR 1482 and R v Secretary of State for the Home Department, Ex p Asif Mahmood Khan [1984] 1 WLR 1337 were cited as instances of substantive legitimate expectations to which the courts were if appropriate prepared to give effect. Reliance was also placed, as we would place it, on Lord Diplock’s carefully worded summary in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 408-409 of the contemporary heads of judicial review. They included benefits or advantages which the applicant can legitimately expect to be permitted to continue to enjoy. Not only did Lord Diplock not limit these to procedural benefits or advantages; he referred expressly to In re Findlay [1985] AC 318 (a decision in which he had participated) as an example of a case concerning a claim to a legitimate expectation—plainly a substantive one, albeit that the claim failed. One can
readily see why: Lord Scarman’s speech in *In re Findlay* is predicated on the assumption that the courts will protect a substantive legitimate expectation if one is established; and Taylor J so interpreted it in *Ex p Ruddock* [1987] 1 WLR 1482. None of these cases suggests that the standard of review is always limited to bare rationality, though none developed it as the revenue cases have done.

78 It is from the revenue cases that, in relation to the third category, the proper test emerges. Thus in *Ex p Unilever plc* [1996] STC 681 this court concluded that for the Crown to enforce a time limit which for years it had not insisted upon would be so unfair as to amount to an abuse of power. As in other tax cases, there was no question of the court’s deferring to the Inland Revenue’s view of what was fair. The court also concluded that the Inland Revenue’s conduct passed the “notoriously high” threshold of irrationality; but the finding of abuse through unfairness was not dependent on this.

79 It is worth observing that this was how the leading textbook writers by the mid-1990s saw the law developing. In the (still current) seventh edition of *Wade & Forsyth’s Administrative Law* (1994) the authors reviewed a series of modern cases and commented, at p 419:

“...These are revealing decisions. They show that the courts now expect government departments to honour their statements of policy or intention or else to treat the citizen with the fullest personal consideration. Unfairness in the form of unreasonableness is clearly allied to unfairness by violation of natural justice. It was in the latter context that the doctrine of legitimate expectation was invented, but it is now proving to be a source of substantive as well as of procedural rights. Lord Scarman [in *Ex p Preston* [1985] AC 835] has stated emphatically that unfairness in the purported exercise of power can amount to an abuse or excess of power, and this may become an important general doctrine.”


80 In *Ex p Unilever plc* [1996] STC 681, 695 Simon Brown LJ proposed a valuable reconciliation of the existing strands of public law:

“...Unfairness amounting to an abuse of power’ as ... in *Preston* and the other revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, nor principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power. As Lord Donaldson MR said in *R v Independent Television Commission, Ex p TSW Broadcasting Ltd* The Times, 7 February 1992: ‘The test in public law is fairness, not an adaptation of the law of contract or estoppel.’ In short, I regard the MFK category of legitimate expectation as essentially but a head of *Wednesbury* unreasonableness, not necessarily exhaustive of the grounds upon which a successful substantive unfairness challenge may be based.”
81 For our part, in relation to this category of legitimate expectation, we do not consider it necessary to explain the modern doctrine in *Wednesbury* terms, helpful though this is in terms of received jurisprudence (cf Dunn LJ in *R v Secretary of State for the Home Department, Ex p Asif Mahmood Khan* [1984] 1 WLR 1337, 1352: "an unfair action can seldom be a reasonable one"). We would prefer to regard the *Wednesbury* categories themselves as the major instances (not necessarily the sole ones: see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410, per Lord Diplock) of how public power may be misused. Once it is recognised that conduct which is an abuse of power is contrary to law its existence must be for the court to determine.

82 The fact that the court will only give effect to a legitimate expectation within the statutory context in which it has arisen should avoid jeopardising the important principle that the executive's policy-making powers should not be trammelled by the courts: see *Hughes v Department of Health and Social Security* [1985] AC 766, 788, per Lord Diplock. Policy being (within the law) for the public authority alone, both it and the reasons for adopting or changing it will be accepted by the courts as part of the factual data—in other words, as not ordinarily open to judicial review. The court's task—and this is not always understood—is then limited to asking whether the application of the policy to an individual who has been led to expect something different is a just exercise of power. In many cases the authority will already have considered this and made appropriate exceptions (as was envisaged in *British Oxygen Co Ltd v Board of Trade* [1971] AC 610 and as had happened in *Ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714), or resolved to pay compensation where money alone will suffice. But where no such accommodation is made, it is for the court to say whether the consequent frustration of the individual's expectation is so unfair as to be a misuse of the authority's power.

*Fairness and the decision to close*

83 How are fairness and the overriding public interest in this particular context to be judged? The question arises concretely in the present case. Mr Goudie argued, with detailed references, that all the indicators, apart from the promise itself, pointed to an overriding public interest, so that the court ought to endorse the health authority's decision. Mr Gordon contended, likewise with detailed references, that the data before the health authority were far from uniform. But this is not what matters. What matters is that, having taken it all into account, the health authority voted for closure in spite of the promise. The propriety of such an exercise of power should be tested by asking whether the need which the health authority judged to exist to move Miss Coughlan to a local authority facility was such as to outweigh its promise that Mardon House would be her home for life.

84 That a promise was made is confirmed by the evidence of the health authority that:

"the applicant and her fellow residents were justified in treating certain statements made by the health authority’s predecessor, coupled with the way in which the authority’s predecessor conducted itself at the time of the residents’ move from Newcourt Hospital, as amounting to an
assurance that, having moved to Mardon House, Mardon House would be a permanent home for them.”

And the letter of 7 June 1994 sent to the residents by Mr Peter Jackson, the then general manager of the predecessor of the health authority, following the withdrawal of John Grooms stated:

“During the course of a meeting yesterday with Ross Bentley’s father, it was suggested that each of the former Newcourt residents now living at Mardon House would appreciate a further letter of reassurance from me. I am writing to confirm therefore, that the health authority has made it clear to the community trust that it expects the trust to continue to provide good quality care for you at Mardon House for as long as you choose to live there. I hope that this will dispel any anxieties you may have arising from the forthcoming change in management arrangements, about which I wrote to you recently.”

As has been pointed out by the health authority, the letter did not actually use the expression “home for life.”

85 The health authority had, according to its evidence, formed the view that it should give considerable weight to the assurances given to Miss Coughlan; that those assurances had given rise to expectations which should not, in the ordinary course of things, be disappointed; but that it should not treat those assurances as giving rise to an absolute and unqualified entitlement on the part of the Miss Coughlan and her co-residents since that would be unreasonable and unrealistic; and that:

“if there were compelling reasons which indicated overwhelmingly that closure was the reasonable and—other things being equal—the right course to take, provided that steps could be taken to meet the applicant’s (and her fellow residents’) expectations to the greatest degree possible following closure, it was open to the authority, weighing up all these matters with care and sensitivity, to decide in favour of the option of closure.”

Although the first consultation paper made no reference to the “home for life” promise, it was referred to in the second consultation paper as set out above.

86 It is denied in the health authority’s evidence that there was any misrepresentation at the meeting of the board on 7 October 1998 of the terms of the “home for life” promise. It is asserted that the board had taken the promise into account; that members of the board had previously seen a copy of Mr Jackson’s letter of 7 June 1994, which, they were reminded, had not used the word “home”; and that every board member was well aware that, in terms of its fresh decision-making, the starting point was that the Newcourt patients had moved to Mardon on the strength of an assurance that Mardon would be their home as long as they chose to live there. This was an express promise or representation made on a number of occasions in precise terms. It was made to a small group of severely disabled individuals who had been housed and cared for over a substantial period in the health authority’s predecessor’s premises at Newcourt. It specifically related to identified premises which it was represented would be their home for as long as they chose. It was in unqualified terms. It was repeated and confirmed to
A reassure the residents. It was made by the health authority's predecessor for its own purposes, namely to encourage Miss Coughlan and her fellow residents to move out of Newcourt and into Mardon House, a specially built substitute home in which they would continue to receive nursing care. The promise was relied on by Miss Coughlan. Strong reasons are required to justify resiling from a promise given in those circumstances. This is not a case where the health authority would, in keeping the promise, be acting inconsistently with its statutory or other public law duties. A decision not to honour it would be equivalent to a breach of contract in private law.

87 The health authority treated the promise as the "starting point" from which the consultation process and the deliberations proceeded. It was a factor which should be given "considerable weight", but it could be outweighed by "compelling reasons which indicated overwhelmingly that closure was the reasonable and the right course to take". The health authority, though "mindful of the history behind the residents' move to Mardon House and their understandable expectation that it would be their permanent home", formed the view that there were "overriding reasons" why closure should nonetheless proceed. The health authority wanted to improve the provision of reablement services and considered that the mix of a long stay residential service and a reablement service at Mardon House was inappropriate and detrimental to the interests of both users of the service. The acute reablement service could not be supported there without an uneconomic investment which would have produced a second class reablement service. It was argued that there was a compelling public interest which justified the health authority's prioritisation of the reablement service.

88 It is, however, clear from the health authority's evidence and submissions that it did not consider that it had a legal responsibility or commitment to provide a home, as distinct from care or funding of care, for the applicant and her fellow residents. It considered that, following the withdrawal of the John Grooms Association, the provision of care services to the current residents had become "excessively expensive," having regard to the needs of the majority of disabled people in the authority's area and the "insuperable problems" involved in the mix of long-term residential care and reablement services at Mardon House. Mardon House had, contrary to earlier expectations, become:

"a prohibitively expensive white elephant. The unit was not financially viable. Its continued operation was dependent upon the authority supporting it at an excessively high cost. This did not represent value for money and left fewer resources for other services."

The health authority's attitude was that:

"It was because of our appreciation of the residents' expectation that they would remain at Mardon House for the rest of their lives that the board agreed that the authority should accept a continuing commitment to finance the care of the residents of Mardon for whom it was responsible."

But the cheaper option favoured by the health authority misses the essential point of the promise which had been given. The fact is that the health authority has not offered to the applicant an equivalent facility to replace what was promised to her. The health authority's undertaking to fund her
care for the remainder of her life is substantially different in nature and effect from the earlier promise that care for her would be provided at Mardon House. That place would be her home for as long as she chose to live there.

89 We have no hesitation in concluding that the decision to move Miss Coughlan against her will and in breach of the health authority's own promise was in the circumstances unfair. It was unfair because it frustrated her legitimate expectation of having a home for life in Mardon House. There was no overriding public interest which justified it. In drawing the balance of conflicting interests the court will not only accept the policy change without demur but will pay the closest attention to the assessment made by the public body itself. Here, however, as we have already indicated, the health authority failed to weigh the conflicting interests correctly. Furthermore, we do not know (for reasons we will explain later) the quality of the alternative accommodation and services which will be offered to Miss Coughlan. We cannot prejudge what would be the result if there was on offer accommodation which could be said to be reasonably equivalent to Mardon House and the health authority made a properly considered decision in favour of closure in the light of that offer. However, absent such an offer, here there was unfairness amounting to an abuse of power by the health authority.

D. Human rights

90 One further element must be considered by the court. Mardon House is Miss Coughlan's home, and by article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969): "Everyone has the right to respect for...his home..." Once the Human Rights Act 1998 is in force it will be the obligation of the court as a public authority to give effect to this value, except to the extent that statutory provision makes this impossible. In the interim between the enactment and the coming into force of the Act it is right that the courts should pay particular attention to them. Article 8(2) provides:

"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of...the economic well-being of the country..."

91 Not one but two policy decisions were in play. The first, which we have considered separately, was to let Miss Coughlan's nursing care be provided by the local social services authority. The second was to evict Miss Coughlan from the home which had been promised to her for life in order to make better and more economic use of the premises. For reasons which we have given we do not consider that the kind of nursing care needed by Miss Coughlan could lawfully be provided by the local authority under section 21 of the 1948 Act; but this need not have affected the second decision, since the health authority has in any case been prepared to pay for Miss Coughlan's future nursing care wherever she is located. So the health authority's decision to move Miss Coughlan from Mardon House falls to be matched, irrespective of the larger health care provision issue, against its promise that this would not happen. To consider this properly the health authority needed to be in a position, which it was not, to compare what...
Mardon House offered with what the alternative accommodation would offer Miss Coughlan.

92 The extent to which the public cost was going to be reduced by moving Miss Coughlan to local authority care was not dramatic. The local authority and the health authority between them would still be paying for the whole of her care—for we have no doubt that the undertaking to pay was rightly given. The saving would be in terms of economic and logistical efficiency in the use respectively of Mardon House and the local authority home. The price of this saving was to be not only the breach of a plain promise made to Miss Coughlan but, perhaps more importantly, the loss of her only home and of a purpose-built environment which had come to mean even more to her than a home does to most people. It was known to the health authority, as it is known to this court, that Miss Coughlan views the possible loss of her accommodation in Mardon House as life-threatening. While this may be putting the reality too high, we can readily see why it seems so to her; and we accept, on what is effectively uncontested evidence, that an enforced move of this kind will be emotionally devastating and seriously anti-therapeutic.

93 The judge was entitled to treat this as a case where the health authority’s conduct was in breach of article 8 and was not justified by the provisions of article 8(2). Mardon House is, in the circumstances described, Miss Coughlan’s home. It has been that since 1993. It was promised to be just that for the rest of her life. It is not suggested that it is not her home or that she has a home elsewhere or that she has done anything to justify depriving her of her home at Mardon House. By closure of Mardon House the health authority will interfere with what will soon be her right to her home. For the reasons explained, the health authority would not be justified in law in doing so without providing accommodation which meets her needs. As Sir Thomas Bingham MR said in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554: “The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable . . .” or, we would add, in a case such as the present, fair.

E. Assessment and placement

94 Miss Coughlan’s case on this issue was that there had been no multi-disciplinary assessment of her individual needs and no risk assessment of the effects of moving her from Mardon House. These assessments were required both by the guidance in both HSG(95)8 (paragraphs 17-20) and HSC 1998/C 048 and also by the general obligation to take all relevant factors into account in making the closure decision. There should be assessment or consideration by the health authority of the patients’ health and social needs, including emotional and psychological needs; whether their needs are met at Mardon House; whether and to what extent their needs can be met elsewhere; and what would be the effect on each patient of a forced move from Mardon House. All this should be viewed against the background of the home for life promise.

95 Mr Gordon submitted that the only clinical assessments that were made were directed to the different issue of whether she and the other patients met the health authority’s eligibility criteria for continuing in-patient NHS care. Those criteria were unlawful for other reasons: see
paragraphs 32–49. There was a social services assessment of the applicant on 8 January 1998 which concluded that Mardon House was ideally suited to her needs. In the absence of proper multi-disciplinary and risk assessments the health authority could not make a lawful decision to close Mardon House. Further, the health authority and the social services department were required to identify an alternative placement in which her needs could be as, or more, appropriately met before they were in a position to balance the individual interests of Miss Coughlan against the reasons for closing Mardon House and make a lawful decision to close. No alternative placements were ever identified. A place in, for example, a geriatric nursing home would not be a suitable alternative placement. Against the background of the home for life promise the identification of alternative suitable homes for Miss Coughlan and the other residents should have been of paramount importance, but it was impossible to consider suitable alternative placements without the information which would have been derived from a multi-disciplinary assessment. In the absence of such consideration the health authority was in no position to consult properly on the closure of Mardon House or to reach a lawful decision whether the home for life promise should be broken. Furthermore our decision as to what nursing services have to be provided by the health authority may result in greater demand for places at Mardon House.

96 The judge held that the health authority had failed, prior to consultation and a decision on closure, to conduct any lawful and rational multi-disciplinary assessment of the needs of Miss Coughlan and the other patients or of the risk in relation to their health. The health authority had also failed to identify any alternative placement to Mardon House.

97 The health authority relies on the fact that it had identified 43 potential alternative new care settings prior to making the closure decision and had to the extent practicable investigated their suitability. To the extent that the health authority had failed to identify alternative placements, Mr Goudie submits that the judge ought to have held that Miss Coughlan ought not to be permitted to rely on such failure since she was unwilling to co-operate with the health authority in any collaborative process aimed at identifying an alternative placement for her.

98 The health authority appeals on the ground that the judge was wrong to hold that it was required to carry out a multi-disciplinary assessment before consulting on and arriving at its closure decision. Under the 1995 guidance what was required was such an assessment of the patient’s needs before any decision was made about the discharge of the patient from NHS care or on how their continuing care needs might best be met. The closure decision was not, as Miss Coughlan contended, a collective decision to discharge the individual patients. Under the 1998 guidance there were four distinct stages in the transfer process, the first of which was the closure decision and it was only after that that the detailed transfer procedures operated. It was submitted that it would be impracticable and unrealistic in the vast majority of cases to carry out the assessments and to identify alternative placements prior to a closure decision, let alone prior to consultation on a proposed closure. Funds for the development of alternative facilities might only become available after the closure decision is taken; only then would the range of alternative available placements become clear; large closure programmes might take years to implement, in which
case assessments and alternative facilities considered at the time of consultation or closure would change over time; and in practice the necessary co-operation of individual patients for effective assessments and alternative placements might be more difficult to obtain before rather than after a final decision has been taken on closure. Mr Goudie submitted that these issues are of great practical importance for health and social services authorities throughout the country.

The health authority contended that, in any event, the judge was wrong in holding that multi-disciplinary assessment of Miss Coughlan’s needs had not been undertaken in accordance with the 1995 guidance. Prior even to consultation on the closure there had been three clinical assessments of Miss Coughlan as well as a social services assessment.

To the extent that the required assessments had not been carried out in accordance with the guidance, the health authority submitted that the judge had failed to address the question whether this was the result of Miss Coughlan’s unwillingness to co-operate in the assessment with the health authority and the social services in the manner and to the extent contemplated by the guidance. This was disputed by Miss Coughlan, who contended that she co-operated with the assessments that were made and that she would have fully co-operated with any multi-disciplinary assessment had it been offered. It was also pointed out that this criticism has not been made of the other two residents.

The health authority also contended that the judge was wrong to hold that it was under an obligation to identify alternative placements for Miss Coughlan prior to the closure decision. Reliance was placed on the stages of the transfer procedure referred to above. It was submitted that the obligation to consider the options for where care might best be provided only arose at the third stage of the four-stage process. The new care setting for each individual patient was only identified at the fourth stage of the transfer process.

In our judgment the health authority’s handling of the assessments and the finding of suitable alternative placement was not established as a separate ground for challenging the decision to close Mardon House.

The concerns of the health authority about the practical implications of the judge’s decision on these two points are well understood. In the absence of special circumstances, normally we would expect it to be unrealistic and unreasonable, on grounds of prematurity alone, for the health authority in all cases to make assessments of patients and to take decisions on the details of placement ahead of a decision on closure. Neither the statutory provisions nor the guidance issued expressly require assessments to be made or decisions on alternative placements to be taken before a decision to close can be lawfully made.

If and when a decision is taken to discharge Miss Coughlan and to place her in alternative accommodation, it may be open to her, on the grounds of the alleged shortcomings in the assessment procedures and in the consideration of alternative placements, to challenge the lawfulness of those decisions.

It is, however, unnecessary to say more generally about the timing of those decisions in view of the special circumstances of this case, namely the impact of both the promise of a home for life issue and the unlawfulness of the eligibility criteria on the assessment and placement issues.
If, as we hold, the promise of a home for life at Mardon House rendered the decision to close it at this stage an abuse of power, there is no need to address the question of whether a suitable alternative placement could be found offering conditions similar to those available at Mardon House.

Further, if, as we hold, the eligibility criteria were in themselves unlawful, it follows that those assessments of Miss Coughlan (and the other patients) which have been made on the basis of the criteria cannot fairly be treated as assessments for the purpose of making a decision, whether it be before closure, as she contended it should be, or after closure, as the authority contended it should be, to discharge Miss Coughlan from Mardon House or to place her elsewhere.

F. Consultation

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. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v Brent London Borough Council, Exp Gunning* (1985) 84 LGR 168.

We have dealt separately with the impact of the “home for life” promise and with the assessments made of the applicant. These had a bearing, of course, on the content of the consultation process, but we are concerned here with the machinery of consultation. Central to Miss Coughlan’s successful critique of it was the report of Dr Clark, which is summarised in paragraph 16 above. Hidden J held:

“the decision process ended with the board considering the ethical decision-making paper which said that ‘Professionals advise that leaving the residents isolated will do particular harm to two residents.’ Next to that sentence was the further information that ‘Professionals advise that not moving the acute service will do harm to other disabled people.’ Such a combination of arguments in favour of the decision to close Mardon House . . . were unseen by the applicant and therefore not something upon which she could comment or which she could refute. They are far from the stuff of which true consultation is made. The same is true of the report of Dr Clark which was commissioned by the health authority and seen by the board who drew comfort from it but not seen by the applicant and the other consultees who would have wished to refute it.”

Hidden J was also impressed by the letter from the health authority commissioning Dr Clark’s report. It anticipated a judicial review hearing following the “final decision”, suggesting an anticipation that the decision would be in favour of closure. He rejected the health authority’s reason—lack of time—for the non-disclosure of Dr Clark’s report; and he went on to deduce from it that the consultation process had been too hurried to meet the *Gunning* standard. He concluded that none of the four *Gunning* criteria was met.
Although the notice of appeal does not contest every one of the judge’s findings about consultation, Mr Goudie attacks his conclusion in relation to three critical issues: Dr Clark’s report, the length of the consultation period and the question of prejudgment.

Miss Coughlan’s solicitor received Dr Clark’s report only two working days before the board met on 7 October, a date well after the end of the consultation period, which had run only to 24 September 1998. Although Mr Goudie’s skeleton argument focuses upon the substance of Miss Coughlan’s opportunity to respond, he has taken in oral argument a point which seems to us to be sound and to bypass this debate: there was, he submits, no need to consult on Dr Clark’s report, which was external advice on the opinions of local clinicians and was therefore itself a response to the consultation, albeit one solicited by the health authority. It has to be remembered that 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.

We accept, too, Mr Goudie’s submission that the letter went from an officer of the authority and not from any of its decision-makers. It did undoubtedly reveal an anticipated outcome, but the mind was not that of a decision-maker. It may well be, as Mr Gordon suggests, that Dr Clark would have had little difficulty in deducing which way Mrs Jefferies, who wrote the letter to him, would prefer his advice to go; but this is a long way from a case of prejudgment in either the authority or the adviser.

The formal consultation period lasted just over three weeks, from 2 to 24 September 1998. It had, however, been preceded by an eight-week consultation period in the first months of the year, leading to the first closure decision which was quashed by consent. Among the effects of the shortage of time identified by Mr Gordon is the loss of a proper opportunity to comment on Dr Clark’s report. Mr Goudie relies not only on the prehistory of consultation but on the fact that the consultation paper itself had an input from the applicant and her advisers: they had had it in draft some weeks before the beginning of the consultation period, and had made their view known. There seems to us to be strength in the health authority’s position in this regard.

Mr Gordon, however, defends Hidden J’s conclusion by reference to a number of other aspects of the consultation. It turned out when the consultation was over that the health authority had had before it a paper on ethical decision-making which Miss Coughlan and her advisers would have wanted an opportunity to comment on. The paper, it seems to us, is of the same character as Dr Clark’s report. It was not a part of the proposal and not necessary to explain the proposal. The risk an authority takes by not disclosing such documents is not that the consultation process will be insufficient but that it may turn out to have taken into account incorrect or irrelevant matters which, had there been an opportunity to comment, could have been corrected. That, however, is not this case.
There is, it is true, a further list of flaws with which Mr Gordon submits the consultation process was riddled. Without reciting these, we consider that all are points which within the admittedly modest time available were fully capable of being pointed out to the health authority before it met to take its decision. To draw attention to them now is not to the point.

We conclude therefore that although there are criticisms to be levelled at the consultation process, and although it ran certain risks, it was not flawed by any significant non-compliance with the Gunning criteria.

Conclusions

It follows that, although we disagree with some of the reasoning of the judge, Miss Coughlan was entitled to succeed and we dismiss the appeal.

Our conclusions may be summarised as follows.

(a) The NHS does not have sole responsibility for all nursing care. Nursing care for a chronically sick patient may in appropriate cases be provided by a local authority as a social service and the patient may be liable to meet the cost of that care according to the patient’s means. The provisions of the 1977 Act and the 1948 Act do not, therefore, make it necessarily unlawful for the health authority to decide to transfer responsibility for the general nursing care of Miss Coughlan to the local authority’s social services. Whether it was unlawful depends, generally, on whether the nursing services are merely (i) incidental or ancillary to the provision of the accommodation which a local authority is under a duty to provide and (ii) of a nature which it can be expected that an authority whose primary responsibility is to provide social services can be expected to provide. Miss Coughlan needed services of a wholly different category.

(b) The consultation process adopted by the health authority preceding the decision to close Mardon House is open to criticism, but was not unlawful.

(c) The decision to close Mardon House was, however, unlawful on the grounds that: (i) the health authority reached a decision which depended on a misinterpretation of its statutory responsibilities under the 1977 Act; (ii) the eligibility criteria adopted and applied by the health authority for long-term NHS health care were unlawful and depended on an approach to the services which a local authority was under a duty to provide which was not lawful; and (iii) the decision was an unjustified breach of a clear promise given by the health authority’s predecessor to Miss Coughlan that she should have a home for life at Mardon House. This constituted unfairness amounting to an abuse of power by the health authority. It would be a breach of article 8 of the European Convention on Human Rights.

(d) In these circumstances assessments of Miss Coughlan and other patients on the basis of the eligibility criteria were also similarly flawed.

Appeal dismissed with costs.

Solicitors: Bevan Ashford, Bristol; Mackintosh Duncan; Solicitor, Department of Health; Director of Legal Services, Royal College of Nursing.
JUDGMENT

R (on the application of Moseley (in substitution of Stirling Deceased)) (AP) (Appellant)

v

London Borough of Haringey

(Respondent)

before

Lady Hale, Deputy President
Lord Kerr
Lord Clarke
Lord Wilson
Lord Reed

JUDGMENT GIVEN ON

29 October 2014

Heard on 19 June 2014
Appellant
Ian Wise QC
Jamie Burton
Samuel Jacobs
(Instructed by Irwin Mitchell LLP)

Respondent
Clive Sheldon QC
Heather Emmerson
(Instructed by Legal Services, The London Borough of Haringey)
LORD WILSON (with whom Lord Kerr agrees)

Introduction

1. When Parliament requires a local authority to consult interested persons before making a decision which would potentially affect all of its inhabitants, what are the ingredients of the requisite consultation?

2. Until 1 April 2013 there was a scheme in England for the payment of Council Tax Benefit (“CTB”) for the relief, in whole or in part, of certain persons from their annual obligation to pay council tax. The scheme was made by the Department for Work and Pensions and the duty of local authorities was only to operate it. From 1 April 2013, however, local authorities were required to operate a new scheme, entitled a Council Tax Reduction Scheme (“CTRS”), which they were required to have made for themselves. Before making a CTRS, local authorities were required to consult interested persons on a draft of it. Between August and November 2012 the London Borough of Haringey (“Haringey”) purported to consult interested persons on its draft CTRS, following which it made the scheme in substantial accordance with its draft.

3. In these proceedings two single mothers, who were resident in Haringey and who until 1 April 2013 had been in receipt of what I will describe as full CTB (by which I mean at a level which had relieved them entirely of their obligation to pay council tax), applied for judicial review of the lawfulness of the consultation which Haringey had purported to conduct in relation to its draft CTRS. The women asked the court to quash the decision which on 17 January 2013 Haringey had made in the light of the consultation; and my reference in paragraph 8 below to the “default scheme” will explain why the quashing of the decision would have been very much in their interests. On 7 February 2013 Underhill J dismissed their application: [2013] EWHC 252 (Admin); [2013] ACD 62. The judge had allowed them to be anonymised as “M” and “S”. The latter appealed to the Court of Appeal, which ruled that she was not entitled to anonymity and should be referred to by name, Ms Stirling. On 12 February 2013, with astonishing alacrity referable no doubt to the deadline of 1 April 2013, the court heard the appeal. On 22 February 2013, by a judgment of Sullivan LJ with which Sir Terence Etherton, the Chancellor of the High Court, agreed, and by a judgment of Pitchford LJ in which he disagreed with one aspect of the reasoning of Sullivan LJ but concurred in the proposed result, the court...
dismissed her appeal: [2013] EWCA Civ 116; [2013] PTSR 1285. Ms Stirling appealed to this court against the dismissal of her appeal but unfortunately she became ill and unable to give instructions, with the result that, by consent, the court substituted Ms Moseley as the appellant; and since then, sadly, Ms Stirling has died. Like the other two women, Ms Moseley is a single mother, resident in Haringey, who until 1 April 2013 had been in receipt of full CTB.

The Surrounding Facts

4. For the period prior to 1 April 2013 a means-tested scheme set by central government identified those entitled to CTB. Local authorities were obliged to apply it to residents in their area. Although reference is conveniently made to payment of CTB, it was not, in the usual sense of that word, paid to those entitled to it. Instead it provided them with a credit, in whole or in part, against what they would otherwise owe to their local authority in respect of council tax. Central government reimbursed local authorities, pound for pound, for what they forewent as a result of being obliged to grant the benefit.

5. In the final year in which it was payable, namely the year to 1 April 2013, about 36,000 households in Haringey, namely about one third of all of its households, were entitled to CTB. Of those, 25,560 were entitled to full CTB.

6. In its Spending Review back in 2010 central government announced that, as part of its programme for reduction of the national deficit, it would from April 2013 transfer to each local authority the responsibility for making, as well as for operating, a scheme for providing relief from council tax; and that in 2013-2014 the reimbursement by central government to each local authority in respect of whatever it provided by way of relief from council tax would be fixed at about 90% of the amount which the government would have paid to it in that regard in 2012-2013.

7. Section 33(1)(e) of the Welfare Reform Act 2012 duly abolished CTB with effect from 1 April 2013. Section 13(A)(2) of the Local Government Finance Act 1992 (“the 1992 Act”), as substituted by section 10(1) of the Local Government Finance Act 2012 (“the 2012 Act”), duly obliged each local authority to make a CTRS for those whom it considered to be in financial need.
8. Schedule 1A to the 1992 Act [“the schedule”], which was added by Paragraph 1 of Schedule 4(1) to the 2012 Act and given effect by section 13A(3) of that Act, made provisions about a CTRS. Paragraph 2 of the schedule, together with regulations made under subparagraph 8 of it, specified requirements for a scheme, including that pensioners who would have been entitled to CTB should be granted relief at the same level. Paragraph 3 of the schedule, entitled “Preparation of a scheme”, provided:

“(1) Before making a scheme, the authority must (in the following order)-

(a) consult any major precepting authority which has power to issue a precept to it,
(b) publish a draft scheme in such manner as it thinks fit, and
(c) consult such other persons as it considers are likely to have an interest in the operation of the scheme.

(2) …

(3) Having made a scheme, the authority must publish it in such manner as the authority thinks fit.

(4) The Secretary of State may make regulations about the procedure for preparing a scheme.”

The title of the paragraph puts beyond doubt that the procedure for preparing a scheme, which can be the subject of regulations under subparagraph (4), includes the procedure for the consultation required by subparagraph (1)(c). In the event, however, no such regulations were made. Paragraph 4 of the schedule required the Secretary of State to prescribe a “default scheme” so as to provide for relief from council tax in and after 2013-2014 for households in the area of any local authority which had failed to make a scheme by 31 January 2013. The default scheme, set out in the Council Tax Reduction Schemes (Default Scheme) (England) Regulations, SI 2012/2886, provided that, notwithstanding the reduction in reimbursement by central government, a local authority should grant relief against council tax after 1 April 2013 at the same level as had previously been granted by way of CTB. Paragraph 5 of the schedule provides that, for each year subsequent to 2013-2014, a local authority must consider whether to revise its CTRS and that, if it resolves to do so, it should again comply with the provisions for preparation of a scheme in paragraph 3.

9. Mr Ellicott, Head of Revenues, Benefits and Customer Services in Haringey, was the main author of a report for consideration by Haringey’s Cabinet on 10 July 2012. In it he identified the need for Haringey to make a CTRS by 31 January 2013. He explained that reimbursement by central government to Haringey in respect of relief from council tax was to be
reduced by about 10% in 2013-2014 but that, were Haringey’s CTRS to provide relief at a level equivalent to CTB, the shortfall would rise to about 17-18%, mainly because of the trend in Haringey for an annual increase in the number of households eligible for relief. In his introduction to the report Councillor Goldberg, Haringey’s Cabinet Member for Finance, wrote:

“Needless to say it is my belief that this represents one of the most appalling policies of the government and it is not insignificant that the unemployed will now be facing the prospect of having to pay 20% local taxation levels, which they last were subjected to paying under the Poll Tax.”

There was nothing wrong with Councillor Goldberg’s expression of indignation. But it did betray an assumption that the shortfall would have to be reflected by provisions in the CTRS which reduced the level of relief below the level previously provided by way of CTB rather than that Haringey should absorb it in other ways. It is true that in the body of the report Mr Ellicott proceeded to refer to the option of absorbing the cost and then rejected it on the ground that it would require a reduction in services. He also identified, and rejected, options for exempting each of four classes of claimant for relief from any reduction below its existing level. In the end he recommended that Haringey’s CTRS should provide that the shortfall be met by a percentage reduction in the amount of CTB payable to all claimants other than, of course, to pensioners; and that, because pensioners would not be meeting their share, the percentage reduction for other claimants would have to rise to between 18% and 22%. Those who were then in receipt of full CTB, other than pensioners, would therefore, for example, be required to pay between 18% and 22% of their council tax liability.

10. On 10 July 2012 Haringey’s Cabinet approved the recommendation in Mr Ellicott’s report. Haringey thereupon proceeded to prepare its draft scheme. Pursuant to paragraph 3(1)(a) of the schedule, it consulted the Greater London Authority, which has power to issue a precept to local authorities in London for a contribution to the cost of funding the Metropolitan Police and fire and transport services. Then, on 29 August 2012, Haringey published its draft scheme pursuant to paragraph 3(1)(b) and purported to embark on the consultation required of it by paragraph 3(1)(c).

11. In that the terms by which it conducted its consultation are at the centre of this appeal, Haringey’s consultation exercise deserves separate consideration in the next section of this judgment.
12. Haringey’s consultation exercise was expressed to continue until 19 November 2012. Meanwhile, however, on 16 October 2012 a government minister announced the introduction of a “Transitional Grant Scheme” (“TGS”). The scheme, set out in a circular published two days later, was that central government would make a grant, not likely to be extended beyond 2013-2014, to each local authority which introduced a CTRS for that year in accordance with three criteria. Of these the most important was that those currently in receipt of full CTB should pay no more than 8.5% of their council tax liability. An annex to the circular revealed that the grant referable to Haringey would be £706,021. Haringey concluded, however, that the grant would not cover the difference between a recovery from those currently in receipt of full CTB of 8.5% of their liability, on the one hand, and of 18-22% of their liability, on the other; and that the scheme would therefore leave Haringey with an unacceptable net shortfall in its receipts of council tax. So it resolved not to amend its draft CTRS so as to comply with the TGS criteria and not to bring the TGS to the attention of those likely to be interested in the operation of its CTRS by means of any enlarged consultation exercise.

13. Haringey’s full Council met on 17 January 2013. Before it was a report substantially drafted by Mr Ellicott. Annexed to the report was an elaborate analysis of the responses to Haringey’s consultation exercise, including numerous quotations from them, often in vivid language. It was suggested in the report:

(a) that the effect of the default CTRS would be to leave Haringey with a shortfall of £3.846m;
(b) that adoption of a CTRS which complied with the TGS criteria would leave Haringey with a net shortfall of £1.489m;
(c) that in the light, among other things, of responses to the consultation exercise, it would be appropriate for the disabled to join pensioners as the two groups exempt from reduction in support below current CTB levels; and
(d) that, in the light of (c) above and of clarification by central government of the precise amount to be paid by it in respect of council tax reduction in 2013-2014, Haringey’s CTRS should provide for a reduction of relief below current CTB levels of 19.8% across the board other than for those two groups; and that, subject to difficulties of collection, such a reduction would render Haringey not out of pocket as a result of the move from CTB to a CTRS.

14. The full Council adopted the suggestion in the report. Thus it was that, prior to 31 January 2013, Haringey made a CTRS which provided for a reduction of relief in 2013-14, below the 2012-2013 CTB level, of 19.8% other than
for pensioners and the disabled. Its CTRS came into operation on 1 April 2013 (and has not been revised for 2014-2015).

15. Of the 326 local authorities in England, about 25% allowed the default CTRS to take effect in 2013-2014; they thus entirely absorbed the shortfall in central government’s funding by means other than the reduction of relief from council tax below the current level of CTB. About 33% of them adopted a CTRS which complied with the TGS criteria; they thus partially absorbed the shortfall by means other than such a reduction. The remaining 42%, like Haringey, adopted a CTRS which entirely translated the shortfall into an increase in liability for council tax above the amount, if any, which in 2012-2013 recipients of CTB were liable to pay; and they thus had no need to absorb the shortfall by other means.

The Consultation

16. Haringey’s statutory obligation, set out in paragraph 3(1)(c) of the schedule, was to consult “such… persons as it considers are likely to have an interest in the operation of the scheme”. One could argue that even those residents who were not entitled to CTB had a financial interest in the operation of the scheme, namely that it should indeed come into operation rather than that a scheme which addressed the shortfall in other ways, likely to be prejudicial to them, should do so. But those who most obviously had an interest in the operation of the scheme were those who would be adversely affected by it, namely those who were entitled to CTB, other than any group proposed to be excluded from the scheme, being (at the time of the consultation exercise) only the pensioners. It is agreed that, in this regard, Haringey directed its consultation in accordance with paragraph 3(1)(c). For, while it posted a consultation document online and invited all residents to respond to it, Haringey delivered hard copies by hand to each of its 36,000 households entitled to CTB, together with a covering letter signed by Mr Ellicott.

17. In the covering letter Mr Ellicott explained that he was writing it because the recipient was receiving CTB and that the government was abolishing CTB and requiring local authorities to replace it with a CTRS. He continued:

“At present the Government gives us the money we need to fund Council Tax Benefit in Haringey. We will receive much less money for the new scheme and once we factor in the increasing number of people claiming benefit and the cost of
protecting our pensioners, we estimate the shortfall could be as much as £5.7m.

This means that the introduction of a local Council Tax Reduction Scheme in Haringey will directly affect the assistance provided to anyone below pensionable age that currently involves council tax benefit.

The attached booklet provides all the information you need to understand the changes the Government are making. It sets out the proposed Council Tax Reduction Scheme and explains how this is likely to affect you. Please read this information carefully.

We want to know what you think of these proposals before reaching a final decision about the scheme we adopt. Once you have looked at the information please complete the attached questionnaire and return it in the FREEPOST envelope by 19th November 2012. Be heard – have your say.”

For present purposes the importance of Mr Ellicott’s letter surrounds the paragraph of it which he chose to print in bold. Note its opening words, namely “This means that…”. Mr Ellicott was there stating that the shortfall in government funding meant that Haringey’s CTRS would provide less relief against council tax than recipients of the letter, other than pensioners, were receiving by way of CTB. But the shortfall did not necessarily have that consequence. Why was Mr Ellicott not there recognising that at least there were other options, albeit not favoured by Haringey, for meeting the shortfall? Note also Mr Ellicott’s use of the indefinite article, in his reference to “the introduction of a local [CTRS] in Haringey”. It suggests that any CTRS introduced in Haringey, not just the scheme proposed, would need to meet the shortfall by a reduction from existing levels of CTB.

18. The “booklet” attached to Mr Ellicott’s letter was the consultation document, comprising in part the provision of information and in part the questionnaire. So I turn to see whether the information reasonably dispelled the impression given in the letter that the shortfall had inevitably to be met by a reduction of relief against council tax below CTB levels.
19. The document was entitled “The Government is abolishing Council Tax Benefit”. It referred to the reduction in government funding and proceeded as follows:

“Early estimates suggest that the cut will leave Haringey with an actual shortfall in funding of around 20%. This means Haringey claimants will lose on average approximately £1 in every £5 of support they currently receive in [CTB].” [Italics supplied]

There is no doubt that Haringey’s proposed scheme meant that its claimants would suffer a loss of that order. But the reduction in government funding did not inevitably have that effect. Then, under the subheading “What’s changing?”, Haringey, adopting almost the same terms as those in Mr Ellicott’s letter, said:

“At present the Government gives us the money we need to fund [CTB] in Haringey. From next April we must implement a new [CTRS]. We’ll receive much less money for the new scheme and once we factor in the increasing number of people claiming benefit and the cost of protecting our pensioners, we estimate the shortfall could be as much as £5.7m next year and this could rise in later years.

Although pensioners will move on to the new [CTRS], they will receive the same amount of support they would have received under the current [CTB] regulations.

That means that the introduction of a local [CTRS] in Haringey will directly affect the assistance provided to everyone below pensionable age that currently receives [CTB].” [Italics supplied]

In the consultation document there was no reference to options for meeting the shortfall other than by a reduction in relief from council tax, namely to the options of raising council tax or of reducing the funding of Haringey’s services or of applying its deployable reserves of capital (which amounted to £76.8m in March 2012); and it follows that there was no explanation of why Haringey was not proposing to adopt any of those three options.
20. In the document Haringey thereupon set out its proposals. It stated its belief that the fairest way in which to apply the government cut was to reduce all relief to working age claimants by about 20% from CTB levels. It added:

“We also have to decide if certain groups should be protected from any changes we make and continue to get the same level of support as they do now. Doing this would mean that other claimants would get even less support.”

21. Then followed Haringey’s questionnaire. There were five main questions. The first was:

“To what extent do you agree we should apply the Government’s reduction in funding equally to all recipients of working age?

This means that every household of working age will have to pay something towards their council tax bill.”

I consider, contrary to Haringey’s contention, that the reader of the first question was in effect presented with an assumption that the shortfall in government funding would be met by a reduction in the relief from council tax afforded to recipients of working age, rather than that it should be met in other ways so that the level of their relief might be preserved. The gist of the first question was in my view whether, upon that assumption, all such recipients should suffer the reduction in equal proportions. The fifth question, again cast upon that assumption, presented the alternative possibility as follows:

“Should some groups of people continue to get the same support as now even if doing this would mean that other claimants would get less support?”

A reader who answered “Yes” to the fifth question was then offered a box in which to identify the groups whom he or she considered should be protected. The second, third and fourth questions related to other, less significant, departures from CTB rules proposed in Haringey’s draft CTRS. Following the five main questions there was a second box, above which Haringey wrote:
“Please use the space below to make any other comments about our draft Council Tax Reduction Scheme.”

22. In response to its consultation exercise Haringey received 1251 completed questionnaires and 36 letters and emails. Of those who completed the questionnaire, 43% agreed or strongly agreed with the first question and 44% disagreed or strongly disagreed with it. Suggestions were made in at least ten of the responses that Haringey should meet the shortfall by cutting services and in at least 11 of them that it should meet it by increasing council tax. One of the 36 letters and emails was an email sent to Haringey by The Reverend Paul Nicolson, a prominent anti-poverty campaigner, on 29 October 2012. He wrote:

“I write to oppose your proposals on the grounds that the 25,560 households who now pay no council tax will not be able to pay 20%, or around £300 pa, from April 2013...[B]enefits are paid... to our poorest fellow citizens to provide the necessities of life; they are already inadequate...”

On 6 November 2012 Haringey responded:

“We have asked for comments around protecting groups in addition to Pensioners, however protecting additional groups will have an impact on the remaining recipients who will have to pay a higher amount to cover the shortfall. Your email below is unclear as to which group you are suggesting we protect and how we then make up the shortfall.”

In his response dated 7 November 2012 The Rev. Nicolson observed:

“I am aware that central government has cut its council tax benefit grant to... Haringey and all other councils by 10%. Other councils are absorbing the cut and continuing [to] implement the current CT benefit scheme. Why cannot Haringey do the same? There is no consultation taking place about that central issue.”

On 10 December 2012, following the end of the consultation, The Rev. Nicolson wrote a letter of protest to the Leader of Haringey Council, which ended as follows:
“I am shocked that no alternative to hitting the fragile incomes of the poorest residents of Haringey … was included in the recent consultation.”
23. A public authority’s duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation; such was the source, for example, of its duty to consult the residents of a care home for the elderly before deciding whether to close it in *R v Devon County Council, ex parte Baker* [1995] 1 All ER 73. But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted.

24. Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In *R (Osborn) v Parole Board* [2013] UKSC 61, [2013] 3 WLR 1020, this court addressed the common law duty of procedural fairness in the determination of a person’s legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement “is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested” (para 67). Second, it avoids “the sense of injustice which the person who is the subject of the decision will otherwise feel” (para 68). Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not “Yes or no, should we close this particular care home, this particular school etc?” It was “Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our Borough, should we make one in the terms which we here propose?”

25. In *R v Brent London Borough Council, ex p Gunning*, (1985) 84 LGR 168 Hodgson J quashed Brent’s decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. He said at p 189:
“Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third,… that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.”

Clearly Hodgson J accepted Mr Sedley’s submission. It is hard to see how any of his four suggested requirements could be rejected or indeed improved. The Court of Appeal expressly endorsed them, first in the Baker case, cited above (see pp 91 and 87), and then in R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213 at para 108. In the Coughlan case, which concerned the closure of a home for the disabled, the Court of Appeal, in a judgment delivered by Lord Woolf MR, elaborated at para 112:

“It has to be remembered that 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.”

The time has come for this court also to endorse the Sedley criteria. They are, as the Court of Appeal said in R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472, 126 BMLR 134, at para 9, “a prescription for fairness”.

26. Two further general points emerge from the authorities. First, the degree of specificity with which, in fairness, the public authority should conduct its consultation exercise may be influenced by the identity of those whom it is consulting. Thus, for example, local authorities who were consulted about the government’s proposed designation of Stevenage as a “new town” (Fletcher v Minister of Town and Country Planning [1947] 2 All ER 496 at p 501) would be likely to be able to respond satisfactorily to a presentation of less specificity than would members of the public, particularly perhaps
27. Sometimes, particularly when statute does not limit the subject of the requisite consultation to the preferred option, fairness will require that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options. For example, in *R (Medway Council and others) v Secretary of State for Transport* [2002] EWHC 2516 (Admin), [2003] JPL 583, the court held that, in consulting about an increase in airport capacity in South East England, the government had acted unlawfully in consulting upon possible development only at Heathrow, Stansted and the Thames estuary and not also at Gatwick; and see also *R (Montpeliers and Trevors Association) v Westminster City Council* [2005] EWHC 16 (Admin), [2006] LGR 304, at para 29.

28. But, even when the subject of the requisite consultation is limited to the preferred option, fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options. In *Nichol v Gateshead Metropolitan Borough Council* (1988) 87 LGR 435 Gateshead, confronted by a falling birth rate and therefore an inability to sustain a viable sixth form in all its secondary schools, decided to set up sixth form colleges instead. Local parents failed to establish that Gateshead’s prior consultation had been unlawful. The Court of Appeal held that Gateshead had made clear what the other options were: see pp 455, 456 and 462. In the *Royal Brompton* case, cited above, the defendant, an advisory body, was minded to advise that only two London hospitals should provide paediatric cardiac surgical services, namely Guys and Great Ormond Street. In the Court of Appeal the Royal Brompton Hospital failed to establish that the defendant’s exercise in consultation upon its prospective advice was unlawful. In its judgment delivered by Arden LJ, the court, at para 10, cited the Gateshead case as authority for the proposition that “a decision-maker may properly decide to present his preferred options in the consultation document, provided it is clear what the other options are”. It held, at para 95, that the defendant had made clear to those consulted that they were at liberty to press the case for the Royal Brompton.

*Application of the law to the facts*

29. Paragraph 3(1)(c) of the schedule imposed on Haringey the requirement to consult. The requirement was to consult “such other persons as it considers
are likely to have an interest in the operation of the scheme”. So the subject of the consultation was Haringey’s preferred scheme and not any other discarded scheme. It is, however, at this point in the analysis that the division of opinion arose in the Court of Appeal. Sullivan LJ, with whom Sir Terence Etherton agreed, concluded, at para 18, that:

“In this statutory context fairness does not require the Council in the consultation process to mention other options which it has decided not to incorporate into its published draft scheme; much less does fairness require that the consultation document contain an explanation as to why those options were not incorporated in the draft scheme.”

Pitchford LJ, by contrast, agreed with Underhill J who, at para 27, had concluded that:

“consulting about a proposal does inevitably involve inviting and considering views about possible alternatives.”

It is clear to me that the latter conclusion is correct. It is substantially in accordance with the decisions in the Gateshead and the Royal Brompton cases referred to in para 28 above. Those whom Haringey was primarily consulting were the most economically disadvantaged of its residents. Their income was already at a basic level and the effect of Haringey’s proposed scheme would be to reduce it even below that level and thus in all likelihood to cause real hardship, while sparing its more prosperous residents from making any contribution to the shortfall in government funding. Fairness demanded that in the consultation document brief reference should be made to other ways of absorbing the shortfall and to the reasons why (unlike 58% of local authorities in England: see para 15 above) Haringey had concluded that they were unacceptable. The protest of The Rev. Nicolson in his letter dated 10 December 2012 was well-directed.

30. It would not have been onerous for Haringey to make brief reference to other ways of absorbing the shortfall. The CTRS proposed by Birmingham City Council was, like that proposed by Haringey, for the shortfall to be met by a reduction in council tax support, although Birmingham favoured sparing households with children aged under six and therefore reducing support more severely for the remainder. In its consultation document dated September 2012 Birmingham nevertheless wrote:
“We could decide to provide support at the same level as Council Tax Benefit, but this would mean

- raising Council Tax in the region of 4.4%;
- reducing Council services and using the compensatory savings to fund Council Tax Support; or
- a combination of [the two].

...

[But] we already have to plan the Council’s finances on the basis that there may be a rise in Council Tax of around 1.9% and that all service areas will have to make savings this year.”

Part of Birmingham’s first question was:

“If you... think the Council should make an additional contribution from its own finances to the [CTRS], how do you think this should be funded? In particular, should the Council increase Council Tax, or cut other Council services, or both?”

Birmingham’s presentation was fair.

31. Underhill J and Pitchford LJ nevertheless proceeded to conclude, as did Sullivan LJ and Sir Terence Etherton on the assumption that they were wrong to discern an absence of need to refer to other options, that Haringey’s consultation exercise had been lawful because the other options would have been reasonably obvious to those consulted. It is clear that no conclusion to that effect can be drawn from the fact that, from the 36,000 households to which a hard copy of the consultation document was delivered, there were at least ten responses that services should be cut and at least 11 responses that council tax should be increased. On the contrary the apparently infinitesimal number of such responses arguably runs the other way. Assuming, however, that Underhill J and the Court of Appeal were entitled to conclude that the other options would have been reasonably obvious to those consulted, two matters arise. The first is to question whether it would also have been reasonably obvious to them why Haringey was minded to reject the other options. I speak as one who, even after a survey of the evidence filed by Haringey in these proceedings, remains unclear why it was minded to reject the other options. Perhaps the driver of its approach was political. At all events I cannot imagine that an affirmative
answer can be given to that question. The second matter is the need to link
the assumed knowledge of those consulted with the terms of Haringey’s
presentation to them in the consultation document and the covering letter.
With respect to them, Underhill J and the Court of Appeal gave insufficient
attention to the terms both of the document and of the letter, which, as I
have demonstrated in paras 17 to 21 above, represented, as being an
accomplished fact, that the shortfall in government funding would be met
by a reduction in council tax support and that the only question was how,
within that parameter, the burden should be distributed. This limited
approach to the relevant question was entirely consistent with Mr Ellicott’s
report in July 2012 (see para 9 above) and, Haringey’s response dated 6
November 2012 to The Rev. Nicolson (see para 22 above). Haringey’s
message to those consulted was therefore that other options were irrelevant
and in such circumstances I cannot agree that their assumed knowledge of
them saves Haringey’s consultation exercise from a verdict that it was
unfair and therefore unlawful.

32. A separate ground of Ms Moseley’s appeal relates to the TGS. The
contention, rejected by Underhill J and the Court of Appeal, is that,
following the announcement of the TGS on 16 October 2012, Haringey,
even though not minded to propose a scheme in accordance with it, acted
unlawfully in failing to enlarge its consultation exercise so as to refer to it.
But adoption of a scheme in accordance with the TGS would have left
Haringey with a net shortfall in its receipts of council tax and have therefore
required its absorption in other ways. Granted that reference should in any
event have been made to other ways in Haringey’s consultation exercise,
the TGS did not add any substantially different dimension to the relevant
possibilities. In the light also of the practical consideration that the
announcement of the TGS was made on a date when Haringey’s
consultation exercise was less than five weeks short of completion, I also
consider that it was not unlawful for Haringey to fail to refer to the TGS. In
its argument on this ground, however, Haringey makes an illuminating
concession, namely that, had it known of the TGS when it commenced its
consultation exercise, it would have referred to it. The need for brief
reference to other discarded options which would have required absorption
of the shortfall in ways other than by reduction of council tax support is
indeed the basis of my earlier conclusion.

33. In addition to the declaration to which in my view she is entitled, Ms
Moseley aspires, albeit with little apparent enthusiasm, to persuade the
court to order Haringey to undertake a fresh consultation exercise, in
accordance with the terms of its judgments, in relation to its CTRS for the
forthcoming year 2015-2016. Paragraph 5(5) of the schedule requires it to
comply with paragraph 3, including therefore to undertake the consultation
exercise mandated by paragraph 3(1)(c), only if it is minded to revise its CTRS. It is unclear whether it is so minded but, if so, no doubt it will undertake its exercise in accordance with the terms of this court’s judgments. The proposed mandatory order would therefore have practical effect only in the event that Haringey was not minded to revise its CTRS. My conclusion is that it would not be proportionate to order Haringey to undertake a fresh consultation exercise in relation to a CTRS which will have been in operation for two years and which it is not minded to revise.

**LORD REED**

34. I am generally in agreement with Lord Wilson, but would prefer to express my analysis of the relevant law in a way which lays less emphasis upon the common law duty to act fairly, and more upon the statutory context and purpose of the particular duty of consultation with which we are concerned.

35. The common law imposes a general duty of procedural fairness upon public authorities exercising a wide range of functions which affect the interests of individuals, but the content of that duty varies almost infinitely depending upon the circumstances. There is however no general common law duty to consult persons who may be affected by a measure before it is adopted. The reasons for the absence of such a duty were explained by Sedley LJ in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139; [2008] ACD 20, paras 43-47. A duty of consultation will however exist in circumstances where there is a legitimate expectation of such consultation, usually arising from an interest which is held to be sufficient to found such an expectation, or from some promise or practice of consultation. The general approach of the common law is illustrated by the cases of *R v Devon County Council, Ex p Baker* [1995] 1 All ER 73 and *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, cited by Lord Wilson, with which the *BAPIO* case might be contrasted.

36. This case is not concerned with a situation of that kind. It is concerned with a statutory duty of consultation. Such duties vary greatly depending on the particular provision in question, the particular context, and the purpose for which the consultation is to be carried out. The duty may, for example, arise before or after a proposal has been decided upon; it may be obligatory or may be at the discretion of the public authority; it may be restricted to particular consultees or may involve the general public; the identity of the consultees may be prescribed or may be left to the discretion of the public authority; the consultation may take the form of seeking views in writing, or holding public meetings; and so on and so forth. The content of a duty to
consult can therefore vary greatly from one statutory context to another: “the nature and the object of consultation must be related to the circumstances which call for it” (Port Louis Corporation v Attorney-General of Mauritius [1965] AC 1111, 1124). A mechanistic approach to the requirements of consultation should therefore be avoided.

37. Depending on the circumstances, issues of fairness may be relevant to the explication of a duty to consult. But the present case is not in my opinion concerned with circumstances in which a duty of fairness is owed, and the problem with the consultation is not that it was “unfair” as that term is normally used in administrative law. In the present context, the local authority is discharging an important function in relation to local government finance, which affects its residents generally. The statutory obligation is, “before making a scheme”, to consult any major precepting authority, to publish a draft scheme, and, critically, to “consult such other persons as it considers are likely to have an interest in the operation of the scheme”. All residents of the local authority’s area could reasonably be regarded as “likely to have an interest in the operation of the scheme”, and it is on that basis that Haringey proceeded.

38. Such wide-ranging consultation, in respect of the exercise of a local authority’s exercise of a general power in relation to finance, is far removed in context and scope from the situations in which the common law has recognised a duty of procedural fairness. The purpose of public consultation in that context is in my opinion not to ensure procedural fairness in the treatment of persons whose legally protected interests may be adversely affected, as the common law seeks to do. The purpose of this particular statutory duty to consult must, in my opinion, be to ensure public participation in the local authority’s decision-making process.

39. In order for the consultation to achieve that objective, it must fulfil certain minimum requirements. Meaningful public participation in this particular decision-making process, in a context with which the general public cannot be expected to be familiar, requires that the consultees should be provided not only with information about the draft scheme, but also with an outline of the realistic alternatives, and an indication of the main reasons for the authority’s adoption of the draft scheme. That follows, in this context, from the general obligation to let consultees know “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”: R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213, para 112, per Lord Woolf MR.
40. That is not to say that a duty to consult invariably requires the provision of information about options which have been rejected. The matter may be made clear, one way or the other, by the terms of the relevant statutory provisions, as it was in *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472; [2012] 126 BMLR 134. To the extent that the issue is left open by the relevant statutory provisions, the question will generally be whether, in the particular context, the provision of such information is necessary in order for the consultees to express meaningful views on the proposal. The case of *Vale of Glamorgan Council v Lord Chancellor and Secretary of State for Justice* [2011] EWHC 1532 (Admin) is an example of a case where such information was not considered necessary, having regard to the nature and purpose of that particular consultation exercise, which concerned the proposed closure of a specific court. In the present case, on the other hand, it is difficult to see how ordinary members of the public could express an intelligent view on the proposed scheme, so as to participate in a meaningful way in the decision-making process, unless they had an idea of how the loss of income by the local authority might otherwise be replaced or absorbed.

41. Nor does a requirement to provide information about other options mean that there must be a detailed discussion of the alternatives or of the reasons for their rejection. The consultation required in the present context is in respect of the draft scheme, not the rejected alternatives; and it is important, not least in the context of a public consultation exercise, that the consultation documents should be clear and understandable, and therefore should not be unduly complex or lengthy. Nevertheless, enough must be said about realistic alternatives, and the reasons for the local authority’s preferred choice, to enable the consultees to make an intelligent response in respect of the scheme on which their views are sought.

42. As Lord Wilson has explained, those requirements were not met in this case. The consultation document presented the proposed reduction in council tax support as if it were the inevitable consequence of the Government’s funding cuts, and thereby disguised the choice made by Haringey itself. It misleadingly implied that there were no possible alternatives to that choice. In reality, therefore, there was no consultation on the fundamental basis of the scheme.

43. I therefore concur in the order proposed by Lord Wilson.

LADY HALE AND LORD CLARKE
44. We agree that the appeal should be disposed of as indicated by Lord Wilson and Lord Reed. There appears to us to be very little between them as to the correct approach. We agree with Lord Reed that the court must have regard to the statutory context and that, as he puts it, in the particular statutory context, the duty of the local authority was to ensure public participation in the decision-making process. It seems to us that in order to do so it must act fairly by taking the specific steps set out by Lord Reed in his para 39. In these circumstances we can we think safely agree with both judgments.