



Neutral Citation No. [2024] EWCA Civ 367

Case No: CA-2024000592

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE SWIFT

The Royal Courts of Justice
Strand, London, WC2A 2LL

Friday, 22 March 2024

Before:

LADY JUSTICE NICOLA DAVIES
LORD JUSTICE DINGEMANS
LORD JUSTICE LEWIS

Between:

**SECRETARY OF STATE FOR THE HOME
DEPARTMENT
- and -**

Appellant

**POLICE AND CRIME COMMISSIONER
FOR THE WEST MIDLANDS**

Respondent

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MR A PAYNE KC and MR J ANDERSON (instructed by Government Legal Department)
appeared on behalf of the Appellant

MR J STANSFELD and MS E FOUBISTER (instructed by Kingsley Napley) appeared on
behalf of the Respondent

Judgment
Approved

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LORD JUSTICE DINGEMANS:

Introduction

1. This is the judgment of the court which I am giving on an ex tempore basis because of the urgency of the matter. I have handed out a draft of this judgment but the perfected transcript of these remarks will be the official record of the judgment.
2. This hearing raises issues about the adequacy of a statutory consultation undertaken on behalf of the appellant Secretary of State for the Home Department (“the Secretary of State”) before he made an order dated 6 February 2024, the order under section 107F of the Local Democracy Economic Development and Construction Act 2009 (“the 2009 Act”). The order transferred the powers of the Police and Crime Commissioner for the West Midlands (“the PCC”) to the Mayor of West Midlands (“the Mayor”). This hearing has been expedited. This is because the election for the Mayor will be called on 26 March 2024, four days from now. The proceedings below were also expedited.
3. The Secretary of State's decision to make the order was made on 6 February 2024. The PCC sought judicial review of the decision to make the order on five grounds. The claim was resisted by the Secretary of State. A rolled up hearing of the PCC's claim was heard by Swift J (“the Judge”) on Tuesday, 12 March 2024 and by a written judgment dated Monday 18 March 2024, the Judge granted permission to apply for judicial review.
4. The claim for judicial review was allowed so that the Secretary of State's decision of 6 February 2024 to make an order under section 107F of the Local Democracy Economic Development and Construction Act 2009 was quashed.
5. The claim for judicial review was allowed on the ground that sufficient information was not given in the consultation documentation to permit appropriate consideration and response. Two other grounds of challenge made by the PCC were rejected relating to whether the consultation was taken with an open mind, and one ground was not determined being the *Tameside* obligation.
6. The Secretary of State filed an appellant's notice on Tuesday, 19 March 2024 seeking an expedited, rolled up hearing of the application for permission to appeal and if permission was granted, the appeal to be listed on Thursday, 21 March 2024. That application was

resisted by the PCC and the PCC also sought in the alternative an order for a rolled up hearing on the PCC's grounds of appeal. I gave directions on Tuesday, 19 March 2024 providing for a rolled up hearing of the application for permission to appeal and any appeal if permission was granted on the grounds set out in the appellant's notice and the grounds relied on by the PCC.

7. At the end of the oral hearing, the court retired to consider the position. We returned and announced our decision to refuse permission to appeal to the Secretary of State. These are the reasons for that decision.

The relevant background

8. The Police Reform and Social Responsibility Act 2011 provided for elected Police and Crime Commissioners to take over responsibilities previously exercised by police authorities. The first Police and Crime Commissioner for the West Midlands was elected in 2012. In January 2016, the 2009 Act was amended by the Cities and Local Government Devolution Act 2016 ("the 2016 Act") to provide for the creation by order of the Home Secretary of elected mayors. Each Mayor is responsible for the area of a combined authority.
9. The West Midlands Combined Authority ("the WMCA") was established in 2016 by an order made in exercise of powers under the 2009 Act, the Transport Act 1985 and the Local Transport Act 2008. Its constituent members include Birmingham City Council, City of Wolverhampton Council, Coventry City Council, Dudley Metropolitan Borough Council, Sandwell Metropolitan Borough Council, the Solihull Metropolitan Borough Council and Walsall Metropolitan Borough Council.
10. In September 2016, the Home Secretary made an order under section 107A of the 2009 Act providing for the election of a Mayor for the new area for the WMCA. The first Mayor of the West Midlands was elected in May 2017.
11. The 2016 Act also created a power under section 107F for the Secretary of State to provide for the Mayor to exercise the powers of the PCC. There were, however, seven statutory preconditions to meet. These included the consent of the Mayor and the appropriate authorities which, in the relevant area, was the WMCA.

12. In 2019, the Board of the WMCA decided against making a proposal for a transfer of the PCC's powers to the Mayor.

13. In 2022, the government published a White Paper, *Levelling Up the United Kingdom*. That included a passage providing that the government would take steps to remove barriers to combined authorities taking on public safety functions, noting that:

"Where there are existing or planned mayoral combined authorities with coterminous boundaries to PCCs and Fire and Rescue authorities, the UK government will look to transfer the functions to the mayor."

14. Further amendments to the 2009 Act were made by the *Levelling Up and Regeneration Act 2023* ("the 2023 Act") which came into effect on 26 October 2023. This, among other matters, removed the requirement for the consent of the appropriate authorities. Section 113 of the 2009 Act was also amended to provide that before exercising powers to order the transfer pursuant to section 107F of the 2009 Act, the Secretary of State must carry out a public consultation.

15. On 2 November 2023, following the change in the law, the Mayor wrote to the Secretary of State requesting that the PCC's powers be transferred to him. A written submission dated 22 November 2023 was sent to the Secretary of State. On 6 December 2023, the Secretary of State wrote letters to the PCC and the Mayor purporting to take a decision to transfer the PCC's functions to the Mayor. Draft Statutory Instruments were circulated by email on that date. This was referred to as the "false start" because the Secretary of State had no power to make that transfer without having carried out a public consultation. It appears, from submissions made to Swift J, that the requirements in section 113 had been applied to the section 107F order by mistake. It is obvious that making numerous amendments to an Act can lead to mistakes in drafting being made. But section 113 as amended was the law passed by Parliament. It is common ground that a court is not in a position to enquire into the possibility that mistakes were made in Parliament and must apply the provisions of the Act.

16. The failure to carry out a public consultation was pointed out by legal representatives acting on behalf of the PCC in a letter to the Secretary of State dated 8 December 2023. That mistake was acknowledged in a submission dated 11 December 2023. In paragraph 5 of that document, it was noted that advice had not been given to the Secretary of State on the new statutory test because of the error in not identifying the public consultation. A number

of ways of dealing with the mistake were identified including making a further amendment to section 113 of the 2009 Act. The Secretary of State adopted the option of a public consultation.

17. The Secretary of State then carried out a public consultation. A consultation document dated 20 December 2023 was published and this provided for a consultation that began on 20 December 2023 and ended on 31 January 2024. The consultation document provided, with paragraph numbers added by the judge for ease of reference, as follows:

"Background

(1) The Police Reform and Social Responsibility Act 2011 established directly elected PCCs in 41 forces, replacing Police Authorities. The first PCC for West Midlands was elected in 2012.

(2) PCCs are responsible for holding the Chief Constable of their police force to account for the full range of their responsibilities. They are directly accountable to the electorate through the ballot box and their decisions are scrutinised by the local Police and Crime Panel.

(3) The Cities and Local Government Devolution Act 2016 amended by the Local Democracy, Economic Development and Construction Act 2009 to enable PCC functions to be transferred to combined authority mayors, creating one directly elected leader accountable for both combined authority and PCC functions. Part 1 of the government's review into the role of the PCC cemented the view that bringing public safety functions under the leadership of a combined authority mayor has the potential to offer wider levers and a more joined up approach to preventing crime. Under the mayoral PCC model, the democratic accountability of the PCC model is preserved as mayors who exercise these functions remain directly accountable to the electorate via the ballot box. The Levelling Up White Paper outlines the key leadership role that combined authority mayors have in public safety and in improving public health. It sets out the government's aspiration to have combined authority mayors take on the PCC role where feasible.

(4) There are currently two combined authority mayors that exercise PCC functions, the Greater Manchester Mayor who took them on in 2017 and the West Yorkshire Mayor who took them on in 2021. The Mayor of London also exercises functions equivalent to a PCC. As part of the York and North Yorkshire Devolution Deal, the first directly elected mayor of the York and North Yorkshire Combined Authority will exercise the functions of a Police, Fire and Crime Commissioner from May 2024 onwards.

(5) The Levelling Up and Regeneration Act 2023 places new requirements on the Home Secretary when making a decision to transfer the functions of a PCC to a combined authority mayor. The Home Secretary must, before making an order to enable such a transfer: conduct a public consultation (unless one has been conducted by the Combined Authority as part of their proposal for an order); consider that the transfer is likely to improve the economic, social and environmental wellbeing of some or all of the people who live and work in the area; and consider that it is appropriate, having regard to the need to secure effective and convenient local government and to reflect the identities and interests of local communities.

(6) The Home Secretary is therefore gathering views to allow him to make a decision on whether to lay an order before Parliament to transfer PCC functions to the Mayor of the West Midlands from the point of the next mayoral election in 2024. This will maintain democratic accountability by ensuring that PCC functions are only exercised by a mayor who is elected on that basis.

(7) This transfer presents opportunities to align police and crime priorities with transport, regeneration and skills and to improve outcomes for the public. Joining police and crime functions with oversight of other public services in the Mayoral Combined Authority would also promote further collaboration within the region. The Mayor would become the elected local policing body. A Mayor exercising police and crime functions continues to provide a single, directly accountable individual who is responsible for securing an efficient and effective police service in the West Midlands."

The consultation note then went on to identify the PCC's functions which would be exercised by the Mayor if a transfer took place and the legislation required.

18. The responses to the consultation were analysed on an ongoing basis as part evidenced by a document dated 24 January 2024 on the consultation which we were shown this morning. In the witness statement of Kayleigh Chapman, Deputy Director for the Police Strategy and Reform Unit in the Home Office, it was noted that there were 7,103 responses and that 96 per cent of those were able to form a view.
19. On 5 February 2024, a submission was sent to the Secretary of State. This recommended that the Secretary of State agree to the transfer of PCC functions to the Mayor. The timing was noted to be immediate, within 24 hours. The relevant background was set out and the statutory tests were identified.
20. A Home Office assessment against the statutory tests was annexed to the submission, also dated 5 February 2024. That showed that further work on the way in which the mayoral

model worked had been done although as Mr Payne KC noted in submissions, this could have been done beforehand. In that assessment, the question whether the transfer of PCC functions was likely to improve the economic, social and environmental wellbeing of some or all of the people who live or work in the area was addressed. The assessment recorded the potential economic benefit of combining the PCC and mayoral roles because the PCC salary of £100,000 would no longer be paid and there was no automatic uplift of the Mayor's allowance, although it was recorded that mayors with PCC functions had higher allowances, of £105,000 and £110,000, than other mayors. Potential amalgamation of office and IT systems was also identified. The advantages of placing responsibilities under a single, directly accountable individual were identified.

21. The PCC's response identified the risks of transferring the setting of the West Midlands police annual budget to a Mayor who was susceptible to pressure. The National Police Chiefs' Council referred to the significant additional cost of policing arising from the transfer of PCC functions to the Mayor in the West Yorkshire police area.
22. The Secretary of State then exercised his powers pursuant to section 107F of the 2009 Act to transfer the PCC's functions to the Mayor and sent a letter dated 6 February 2024 to the PCC recording the decision. That was the decision which was the subject of the challenge before the judge.

The judgment below

23. The judge set out the relevant background and facts and statutory provisions. The judge recorded the grounds of challenge, namely that the consultation was not undertaken lawfully: (a) because it was not undertaken at a formative stage but only at a time when the Home Secretary had a closed mind, having already decided to make an order under section 107F (Ground 1); (b) because when the consultation took place no sufficient information was provided to permit the public a fair opportunity to participate (Ground 2); and (c) because the responses to the consultation were not conscientiously considered (Ground 3). The judge recorded that points (a) and (c) were connected since the contention that underlies both is that grounds notwithstanding the consultation undertaken in December 2023 and January 2024, the decision made on 6 February 2024 was a foregone conclusion because of the decision already contained in the 6 December 2023 letters.

24. The PCC had also contended that when taking his decision in February 2024, the Home Secretary had failed to comply with the obligation summarised in the speech of Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 ("*Tameside*") at page 1065B to the effect that the decision makers must take reasonable steps to acquaint themselves with the relevant information; (Ground 5).
25. The judge dismissed grounds 1 and 3 and found that the consultation was taken with an open mind. The judge summarised some relevant authorities which had dealt with the issue of bias and recorded that the fair minded and informed observer would recognise that previous position towards a specific outcome, for example, of support for a general policy, was not of itself evidence of predetermination. The PCC had relied on documents and emails written in the period from 11 to 15 December and the fact that the Secretary of State had not formally withdrawn his decision dated 6 December 2023 and had produced and circulated a draft of the necessary Statutory Instrument. The judge considered that looking at all the evidence warranted the conclusion that the Secretary of State had not undertaken the consultation with a closed mind or that there was a real possibility that he had.
26. In relation to the second ground, the judge referred to section 113 of the 2009 Act and recorded that the Secretary of State needed to be of the view that the transfer of functions to the PCC was likely to improve the economic, social and environmental wellbeing of some or all of the people who live or work in the area and that the transfer of functions was appropriate having regard for the need to "secure effective and convenient local government and ... to reflect the identities of and the interests of local communities" which is set out in section 113(1)(aa) of the 2009 Act. The judge found that there was an obvious connection between the conditions attaching to the Home Secretary's exercise of his powers to transfer functions and the obligation to consult, concluding that "whatever else the consultation might cover, it ought to provide the occasion for consideration of and comment on the Home Secretary's reasons why the conditions at sections 113(1)(a) and (aa) are met".
27. The judge then turned to the consultation document published on 20 December 2023. The judge said that he did not consider that the information provided was sufficient for the purposes of the consultation envisaged and required by section 113 of the 2009 Act. The information ought to have explained why the Secretary of State considered the section 113 conditions were met and why the Secretary of State considered a transfer would be

appropriate for the purposes of effective and convenient local government and reflecting the identities and interests of communities in the area. The judge accepted that the breadth of economic, social and environmental wellbeing could embrace almost every aspect of the lives of those in the area and that breadth meant that the Secretary of State had significant latitude to choose what matters to include but that the information provided “falls well short of this mark”. The judge recorded that the Secretary of State did have information which could have been provided for in the consultation as evidenced by a document dated 5 February 2024 providing an assessment against the statutory tests.

28. The judge also recorded the PCC's submissions that the consultation document did not mention that WMCA would lose the costs of central government contributions to PCC elections which could be held at the same time as the Mayor's election or that the consultation document provided insufficient information about an unelected deputy Mayor for policing and crime exercising the PCC's function. The judge held that whether or not to include such information was for the Secretary of State.
29. The judge rejected the Secretary of State's fallback submission relying on section 31(2A) of the Senior Courts Act 1981. The judge said that he was unable to say that it was “highly likely” that on conscientious consideration of further submissions that might have been made, the Secretary of State would have reached the same conclusion.
30. The judge then turned to the ground of challenge relating to the *Tameside* duty. The PCC had submitted that the Secretary of State should have regard to the costs of the mayoral elections which would not be shared with national government and the fact that West Yorkshire police had seen costs increase because there was no contribution from Gain Share funding once the PCC's role was transferred to the Mayor. The judge recorded that the assessment document had addressed the issue of the economic well-being of persons working or living in the West Midlands by focusing exclusively on efficiency saving. The judge considered that to be a very narrow approach to the issue, but that if that was taken then the points about costs to the police of the transfer might be relevant. The judge concluded that “I would be reluctant to reach such a conclusion as it might tend to endorse an approach to the section 113(1)(a) condition that is far too narrow. Should he come to reconsider this decision, the Home Secretary may wish to consider whether the notion of economic well-being for the purposes of section 113(1) is so narrowly confined.” For these reasons the judge allowed the PCC's claim and quashed the Secretary of State's decision.

The issues on this hearing

31. The Secretary of State seeks permission to appeal, and for the appeal to be allowed on the ground of appeal identified in the grounds of appeal. This was that the judge was wrong to hold that the consultation was unlawful on the grounds that insufficient information was given to consultees to permit appropriate consideration in response. This was said to be wrong for five reasons: (1) The judge was wrong to have concluded that the Secretary of State was required to form a view as to whether the conditions in section 113 were met prior to consultation, set out the reasons for that conclusion or the information underlying the Secretary of State's reasons; (2) the judge was wrong to conclude that the Secretary of State had failed to provide sufficient information concerning the benefits of the transfer, having regard to the fact that the benefits of the proposed transfer could not be measured by reference to specific monetised benefits, or specific “economic, social or environmental” factors, and that the Secretary of State could consult by reference to the broad benefits which combining the role of the PCC with the Mayor would bring; (3) the judge was wrong to require the Secretary of State to express a view on the experience of Greater Manchester or West Yorkshire in having the PCC functions transferred to the Mayor; (4) the judge was wrong to conclude that the consultation was inadequate because it did not provide links to documents referred to within it; and (5) the judge erred in failing to consider the evidence relating to the consultation process and outcome in concluding that inadequate information was provided. The summary of responses showed that many had addressed the substance of some or all of the statutory criteria.

32. Mr Payne reformulated the grounds in his skeleton argument into two grounds as follows: first that the judge erred in imposing a three stage consultation process which is not provided or required by the 2009 Act; and secondly, that the judge erred in concluding that the Secretary of State had provided insufficient information so as to enable informed participation in the consultation. In oral submissions this morning, Mr Payne confirmed that the reformulated grounds encapsulated the grounds set out in the appellant's notice.

33. Mr James Stansfeld on behalf of the PCC submitted that the judge was right to find that the limited information provided for the consultation “falls well short of the mark”. The PCC also sought permission to appeal and to uphold the judge's order quashing the consultation process, on three grounds of cross-appeal. These were: (1) the judge erred in dismissing the PCC's grounds 1 and 3 of challenge, in that he failed to apply the test of a “fair minded

and informed observer” when reaching his decision and erred in his conclusion that the consultation was conducted at a formative stage; (2) even if the judge applied the correct test, he erred in concluding on all the material before him that the consultation was conducted at a formative stage; and (3) had the judge decided the *Tameside* ground of challenge, he would have concluded that the Secretary of State failed in the discharge of his duty by failing to make enquiries into (a) the costs of the transfer incurred by the WMCA and (b) the costs of the transfer that would be incurred by the West Midlands police.

34. We are very grateful to Mr Payne, Mr Stansfeld and their respective legal teams for their helpful written and oral submissions and for all the excellent work in preparing for this hearing at such short notice. By the end of the written and oral submissions before the court, it became apparent that the following matters would be in issue: (1) Whether the Secretary of State should be granted permission to appeal; (2) if so, whether the Secretary of State's appeal against the judge's finding that insufficient information was given in the consultation document on the grounds that: (a) the judge erred in imposing a three way consultation process; or (b) the judge had erred in concluding that the Secretary of State had failed to provide sufficient information to enable informed participation in the consultation should have been allowed; (3) if so, whether the PCC should be granted permission to appeal; (4) if so, whether the appeal should be dismissed because the judge should have applied the test of a fair-minded and informed observer and erred in concluding that the consultation was carried out at a formative stage, and that the judge should have found an infringement of the *Tameside* duty.

Relevant statutory provisions

35. Section 107F (1), (2), (3), (4), (5), (6) and (7) of the 2009 Act as amended now provides:

“Functions of mayors: policing

(1) The Secretary of State may by order provide for the mayor for the area of a combined authority to exercise functions of a police and crime commissioner in relation to that area.

(2) The reference in subsection (1) to functions of a police and crime commissioner is to any functions conferred on police and crime commissioners by or under:

- (a) Part 1 of the Police Reform and Social Responsibility Act 2011, or
- (b) any other Act (whenever passed).

(3) In this Part references to “PCC functions”, in relation to a mayor for the area of a combined authority, are to the functions of a police and crime commissioner that are exercisable by the mayor by virtue of subsection (1).

(4) An order under subsection (1) may be made in relation to an existing mayoral combined authority only with the consent of the mayor of the authority.

(5) If an order is made under subsection (1) in relation to a combined authority's area:

(a) the Secretary of State must by order provide that there is to be no police and crime commissioner for that area as from a specified date;

(b) the Secretary of State may by order provide that any election of a police and crime commissioner for that area that would otherwise take place (whether before or after the specified date) by virtue of section 50(1)(b) of the Police Reform and Social Responsibility Act 2011 is not to take place.

(6) An order under subsection (5) may include provision:

(a) for the term of office of a police and crime commissioner to continue until the date specified under subsection (5)(a) (in spite of section 50(7)(b) of the Police Reform and Social Responsibility Act 2011);

(b) for an election to fill a vacancy in the office of a police and crime commissioner, which otherwise would take place under section 51 of that Act, not to take place if the vacancy occurs within a period of six months ending with the specified date.

(7) Schedule 5C contains further provision in connection with orders under this section."

36. Section 112A of the 2009 Act provides for a combined authority to make a proposal for the making by the Secretary of State of an order section 107F. There is a requirement for that combined authority to carry out a public consultation under section 112(3). There was some discussion in the submissions before us this morning about the terms of any such consultation by the combined authority and whether it required some consideration of the statutory criteria in section 113(1)(a) and (aa), but it is not necessary to determine that issue to answer the issues before us and we do not do so. It can be fairly said that various provisions in this statute appear to have been added in without apparent regard for how they might work together.

37. Section 113 of the 2009 Act, as amended, now provides:

“Requirements in connection with changes to existing combined arrangements

(1) The Secretary of State may make an order under section 104, 105, 105A, 106, 107, 107A, 107D or 107F in relation to an existing combined authority only if - (a) the Secretary of State considers that to do so is likely to improve the economic, social, and environmental well-being of some or all of the people who live or work in the area; (aa) the Secretary of State considers that to do so is appropriate having regard to the need - (i) to secure effective and convenient local government, and (ii) to reflect the identities and interests of local communities, (ab) where a proposal for the making of the order has been submitted under section 112A, the Secretary of State considers that making the order will achieve the purposes specified under subsection (9) of that section, and (b) any consultation required by subsection (2) has been carried out.

(1A) If a proposal for the making of the order has been submitted under section 112A, the Secretary of State must have regard to the proposal in making the order.

(2) The Secretary of State must carry out a public consultation unless - (a) a proposal has been prepared under section 112A, (b) a public consultation has been carried out in connection with the proposal and the Secretary of State has been provided with a summary of the consultation responses, and (c) the Secretary of State considers that no further consultation is necessary.

(2A) Subsection (2B) applies where the Secretary of State is considering whether to make an order under section 106 and - (a) part of the area to be created is separated from the rest of it by one or more local government areas that are not within the area, or (b) a local government area that is not within the area to be created is surrounded by local government areas that are within the area.

(2B) In deciding whether to make the order under section 106, the Secretary of State must have regard to the likely effect of the change to the combined authority's area on the exercise of functions equivalent to those of the combined authority's functions in each local government area that is next to any part of the area to be created by the order.

....

(4) This section does not apply to an order under section 106(1)(b) that is made as a result of the duty in section 105B(5) or 107B(4)."

Some relevant requirements of the law for a public consultation

38. The material provisions of the law were common ground between the parties. In *R v Brent London Borough Council ex p Gunning* [1985] 84 LGR 168 ("*Gunning*") Hodgson J stated that the requirements for a lawful consultation were as follows:

"First, that the 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."

39. The *Gunning* requirements for lawful consultation have been applied in many cases involving the lawfulness of consultations. In *R v North and East Devon Health Authority ex p Coughlan* [1999] EWCA Civ 1871 [2001] QB 213 at paragraph 112 Lord Woolf, Master of the Rolls, stated that the body carrying out the consultation had an obligation:

"... 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."

40. In *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56 [2014] 1 WLR 3947 ("*Moseley*") the Supreme Court expressly approved the dicta of Hodgson J in *Gunning*. In that case the council had consulted the right people about a proposal to reduce council tax following funding changes from central government, but the council had not set out any alternative proposals and the reasons for their rejection. Those other options included raising council tax, reducing services and using reserves. Lord Wilson, with whom Lord Clarke agreed and Lord Reed was generally in agreement, noted that it was no answer to record that some of those consulted had made suggestions about those alternatives. That was because it would not have been apparent to those consulted why the council had rejected those options and because it gave the impression that other options were irrelevant.

41. In his judgment in *Moseley* Lord Reed, with whom Baroness Hale and Lord Clarke agreed, emphasised the need where (as in this case) the obligation to consult arose from statute to have regard to the statutory context. It is necessary to identify the purpose of the statutory provision and to judge from that whether the consultation undertaken met that purpose, see generally paragraphs 36 to 38. At paragraph 39 Lord Reed identified that in that case, meaningful public participation required that those consulted be provided with "information about the draft scheme but also with an outline of the realistic alternative and an indication of the main reasons for the authority's adoption of the draft scheme".

42. In *R (Bloomsbury Institute Limited) v Office for Students* [2020] EWCA Civ 1074 the test for quashing a consultation was considered. At paragraph 69 the Court of Appeal confirmed that the test to be applied when considering whether consultation was lawful

was, "whether the process was so unfair that it was unlawful." It was common ground between the parties that this is the test to be applied.

43. It might be noted because it is relevant to one of the grounds of appeal relied on by the Secretary of State, that the *Gunning* requirements for a lawful consultation envisaged a number of steps to be taken by the party which is carrying out the consultation.

Should the Secretary of State have permission to appeal on the grounds that the Judge was wrong: (a) to impose a three stage consultation process; and (b) to find that insufficient information had been given in the consultation document to permit appropriate consideration and response (issue one)

44. In order to decide whether to grant the Secretary of State permission to appeal, it is necessary to consider whether the Secretary of State has a real prospect of succeeding on any of the grounds of appeal. This requires us to consider the merits of those grounds.

45. Section 113(2) says the Secretary of State must carry out a public consultation save in the specific circumstances set out in section 113(2)(a), (b) and (c). In this case, it is common ground that a public consultation had to be carried out. In our judgment, the purpose of the public consultation must have been to ensure that the public "who live and work in that area" (section 113(1)(a)) could participate in the Secretary of State's decision making process by responding to the consultation.

46. Section 113(1) specifies the requirements, namely that the Secretary of State considers that the transfer is: "... likely to improve the economic, social and environmental wellbeing of some or all of the people who live or work in the area," and the Secretary of State considers that the transfer is appropriate having regard to the need to: "... secure effective and convenient local communities and to reflect the identities and interests of local communities." The public consultation is on the proposed transfer of the PCC's functions to the Mayor which must be consistent with the statutory criteria.

47. Mr Payne submitted that for this public consultation, what needed to be consulted on was the general benefits that the Secretary of State perceived to arise from the transfer, which had been done. There was no need for the Secretary of State to form any view about the statutory criteria in section 113(1)(a) and section 113(1)(aa)(i) and (ii). Identifying in the consultation document the Secretary of State's view of benefits of a transfer was sufficient

so long as it was combined in the document with identification of the statutory criteria on which the public could then comment for themselves.

48. In our judgment, it is clear that in order to carry out a lawful consultation under this particular statutory scheme the Secretary of State has set out why the Secretary of State considered on a provisional basis that the statutory criteria set out in section 113(1)(a) and (aa) were satisfied. Without such information, members of the public would have no genuine opportunity to take part in the Secretary of State's decision making.
49. As to the ground of appeal that the judge had erred in opposing a three stage consultation process, as we have already noted above, the *Gunning* requirement for a lawful consultation, as approved by the Supreme Court in *Moseley*, envisaged a number of steps to be taken by the party which has carried out the consultation. We are unable to say that the judge was wrong in paragraph 23 of the judgment in setting out the steps for a lawful consultation in the particular circumstances of this case although different judges might have expressed themselves in different ways. It might fairly be noted that when the judge identified the steps, he introduced that passage by saying he was putting what he had already said in another way. This ground of appeal does not have a real prospect of success.
50. As to the ground that the judge erred in concluding that the Secretary of State had failed to provide sufficient information to enable informed participation in the consultation, in our judgement, this is not a ground of appeal which has a real prospect of succeeding. As appears from the whole of the consultation document and in particular at paragraph 5, there was nothing other than a record of what the Secretary of State needed to be satisfied about. Further, and although Mr Payne said that this was not a major part of the reason for the decision, it is apparent from the later documentation that the Secretary of State identified cost savings from not paying for a PCC. The consultation document did not even share this narrow view taken of economic benefits subsequently set out in the assessment against the criteria. There was no information about that nor any consideration of the matters that might be thought to point in the other direction so far as people living in the area were concerned, namely, the loss of central government funding for the election and the increased cost to be borne by the police under current funding arrangements. The Secretary of State did not give sufficient information to permit intelligent consideration and response and this meant that the process was so unfair as to be unlawful.

51. We do not consider that it was an answer to the failure that some responses to the consultation mentioned economic benefits and disadvantages. The judge was right to find that members of the public were not afforded the opportunity to express intelligent and informed opinion because they were not told why the transfer of functions should take place in compliance with the statutory criteria. They were therefore denied the opportunity to become involved in the decision making.
52. In this respect, although Mr Payne is right to note that *Moseley* was a case where alternatives to the proposal consulted on might have been set out, we record that it was no answer in *Moseley* to say that some of those who had been consulted inadequately had replied suggesting that the council adopt different options. The reason is the same, namely that those consulted did not have the opportunity to comment on the decision maker's provisional reasons for making the proposal. This means that we do not need to consider Mr Stansfeld's point this morning about the actual detail of the consultation responses. It is sufficient to say that in our judgment, the judge was entitled on the materials before him to find that sufficient information had not been provided in the consultation.
53. It is only fair to those who produce the consultation document to record that because of the earlier error made about the statutory requirements for making an order transferring the PCC's function to the Mayor, the consultation document had to be put together in a very limited time. This was always going to be challenging, given the statutory scheme set out in the 2009 Act as amended. This was particularly so in circumstances where, as Mr Payne pointed out, the Secretary of State had not been advised about the statutory requirements in section 113(1) before the consultation document had been produced.
54. As this is still an application for permission to appeal, we should address a reason relied on by the Secretary of State to show compelling reasons why an appeal should be heard, namely, that it was important to deliver the policy objective of transferring functions from the PCC to the Mayor. As to that point, Parliament legislated for preconditions to be satisfied before a transfer could take place. It is the duty of any court, if asked, to see if those preconditions have been satisfied. If they have not been satisfied, the court is required to say so and in that respect, give effect to the laws passed by Parliament. For the reasons set out above, there was no lawful consultation as required by section 113(2) of the 2009 Act.

55. In this case, we can see no other compelling reason to grant permission to appeal. The matter has been heard orally on an expedited basis because of the urgency of the matter but the grounds of appeal have no real prospect of success.

Conclusion

56. For all these reasons, we refuse permission to appeal.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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