Neutral Citation Number: [2019] EWHC 3162 (Admin)

Case No: CO/1126/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2019

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

- -

Between :

THE QUEEN

- on the application of –

BRITISH BLIND AND SHUTTER ASSOCIATION **Claimant**

- and -

SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT **Defendant**

- -
- -

Andrew Singer QC and Sarah Reid (instructed by **Chadwick Lawrence LLP**) for the **Claimant**
David Manknell (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 23 October 2019

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Approved Judgment

Mrs Justice Steyn :

Introduction

1. The British Blind and Shutter Association ("the Association") seeks to challenge the lawfulness of regulation 2(2) of the Building (Amendment) Regulations 2018 (2018/1230) ("the 2018 Regulations"), insofar as it introduced regulation 2(6)(b)(ii) of the Building Regulations 2010 (2010 No.2214) ("the 2010 Regulations").

2. The Association's concern is that the regulation has the effect of banning the use of external shutters, awnings and blinds on relevant buildings with a storey over 18m high, if the materials used do not meet the standard required by reg.7(2). The Association's uncontested evidence is that it is not currently possible to manufacture fabrics for various products sold by members of the Association (such as awnings, canopies and roller blinds) which meet the required standard. They contend the decision to make the challenged regulation was unlawful.

3. Permission to bring this judicial review claim was granted on the papers by Martin Spencer J on 23 May 2019.

4. The issues are:

   i) Whether the Secretary of State failed, in breach of Section 14 of the Building Act 1984, to consult the Association.

   ii) Whether the consultation which was undertaken was inadequate.

   iii) Whether the Secretary of State's decision to make the relevant regulation was unlawful by reason of:

      a) Failure to take into account material considerations; or

      b) Irrationality.

   iv) Whether the Court should exercise its discretion and quash the relevant provision of the Regulations.

The facts

5. The Defendant set up the "Building Safety Programme" following the Grenfell Tower fire, with the aim of ensuring that such a tragedy does not occur again. Since the fire, a number of advice notes have been issued by the Defendant to building owners, following discussions with the Independent Expert Advisory Panel appointed to advise the Department on building safety matters. The advice was that where cladding systems posed a risk to safety, when judged against the current building regulation requirements, they should be removed.

6. Following the appointment of the Rt Hon James Brokenshire MP as Secretary of State in April 2018, in early discussions with officials and the Housing Minister at the time (Dominic Raab MP), concern was expressed by the Secretary of State that not enough was being done by building owners - particularly in the private sector - to ensure that buildings were being made safe, despite the advice notes that had been issued; and

that a risk remained that the requirements set by the building regulations could be misinterpreted and thereby result in the installation of unsafe materials on the external walls of buildings. The Secretary of State considered that, to reduce potential fire safety risks, further action should be taken to ensure that unsafe cladding could not be used on new buildings in future.

7. The Independent Review of Building Regulations and Fire Safety ("the Hackitt report") was published in May 2018. The Hackitt report emphasised that the problem was with enforcement of existing regulations. This report identified the use of combustible external cladding (which caused the fire to spread across the external surfaces of the building) as an issue relating to the effectiveness and enforcement of current building and fire safety regulations. It did not call for further regulation, advising that "*prescriptive regulation and guidance were not helpful in designing and building complex buildings, especially in an environment where building technology and practices continue to evolve, and will prevent those undertaking building work from taking responsibility for their actions*".

8. Nevertheless, the Secretary of State was aware that Dame Judith Hackitt had indicated, in a letter to the Chair of the Communities and Local Government Select Committee on 5 March 2018, her view that, for the future, the lower risk option was to use products that are non-combustible or of limited combustibility.

9. On 17 May 2018, the day the Hackitt report was published, the Secretary of State announced in Parliament that "*the Government will consult on banning the use of combustible materials in cladding systems on high-rise residential buildings*". He stated,

> "Let me be clear: the cladding believed to be on Grenfell Tower was unlawful under existing building regulations. It should not have been used. I will ensure that there is no room for doubt over what materials can be used safely in cladding of high-rise residential buildings."

10. Mr Robert Ledsome (the Deputy Director responsible for leading the Technical Policy Division in the Building Safety Programme) has given evidence that the announcement was picked up widely by the press, including the BBC and a number of national newspapers. The media reports he has exhibited bear the headlines: "*Grenfell Tower: Government will consult on cladding ban*"; "*'We'll consult': Government won't commit to banning flammable cladding after fury over Grenfell review*"; and "*Grenfell-style cladding could be banned on tower blocks, government says*". Such headlines accord with the evidence of the Company Secretary of the Association, Mr Andrew Chalk, that prior to the consultation "*press and industry comment was predominantly concerned with the combustibility of cladding on the external walls of high-rise residential buildings*".

11. On 11 June 2018, the Secretary of State made a further statement in Parliament:

> "… I recently welcomed Dame Judith Hackitt's final, comprehensive report following her independent review of building regulations and fire safety. In response, I committed to bringing forward legislation to reform the system of fire safety

> and give residents a stronger voice. Having listened carefully to concerns, the Government intend to ban the use of combustible materials on the external walls of high-rise residential buildings, subject to consultation. We will publish the consultation next week."

12. On 18 June 2018, the Defendant published a press release with the headline "*James Brokenshire publishes consultation on banning combustible cladding*". The press release stated, "*The Housing Secretary has announced a consultation on banning the use of combustible materials on the external walls of high-rise residential buildings*". This was accompanied by a link to a consultation paper entitled, "*Banning the use of combustible materials in the external walls of high-rise residential buildings*" ("the Consultation Paper").

13. In a written ministerial statement dated 19 July 2018 the Secretary of State referred to this consultation in these terms:

> "I am clear we will not hesitate to go further than the Hackitt recommendations where we deem it necessary. Not only have we launched a consultation on proposals to restrict or ban the use of so-called desk top studies (assessments in lieu of tests) for cladding materials, as recommended by Hackitt, but we have also launched a consultation on proposals to ban the use of combustible materials in the exterior wall construction of high-rise buildings."

14. Mr Chalk has given evidence that the Association was founded in 1919 and it is "*the only trade association for blinds, awnings, shutters and associated services such as motors, controls, software and blind cleaning in the United Kingdom*". Mr Chalk states:

> "The BBSA represents approximately 400 companies involved in the manufacture, sale and installation of all types of blinds, awnings and shutters. The BBSA's members employ around 5,000 individuals and I estimate the BBSA is responsible for over 50% of all blinds and shutters installed in the United Kingdom. The shading industry in the UK has an annual turnover of around £800m and directly employs approximately 16,000 individuals."

15. Mr Chalk's role included working "*on all government consultations of relevance*" to the Association's members and the wider industry. At the time, Mr Chalk did not see the Secretary of State's statements of 27 May 2018 or 11 June 2018 and he was not aware of the Department's intention to consult. Nor did he see the press release of 18 June 2018.

16. However, Mr Chalk has explained that he monitors the publication of consultations, making a regular weekly check for those of relevance to the Association. He states:

> "I review the title of the consultation and, if there is a suggestion that it might have some impact upon BBSA

> members, then review the consultation paper. Government consultations are published as a list on the Government website. Dependent on what else I am doing, I usually review the list of consultations on a Monday. Therefore, it is likely that I first saw the consultation title, "Banning the use of combustible materials in the external walls of high-rise residential buildings" during the period immediately following its publication on, I believe, 18 June 2018. I saw the consultation title and that influenced me not to read the Consultation Paper because I did not consider it affected our members. Our members' products have never been considered to be "combustible materials in the external walls of high-rise residential buildings".

17. The consultation period ran for eight weeks, closing on 14 August 2018. The Government received 460 responses to the Consultation Paper. The Association did not respond to the Consultation Paper. Mr Chalk's evidence is that, having reviewed the names of those who responded to the consultation,

> "I and colleagues cannot identify a response from any person or body with a direct interest in the products that are relevant to BBSA's members, specifically blinds, shutters and awnings".

18. On 28 November 2018, the government response to the consultation was published. The Building (Amendment) Regulations 2018 were made the same day and then laid before Parliament on 29 November 2018. The Building (Amendment) Regulations 2018 were published on the website www.legislation.gov along with an Explanatory Memorandum. The Regulations were subject to the negative resolution procedure. They came into force on 21 December 2018.

The legal framework

19. Section 14(3) of the Building Act 1984 provides:

> "Before making any building regulations containing substantive requirements, the Secretary of State shall consult the Building Regulations Advisory Committee for England and such other bodies as appear to him to be representative of the interests concerned."

20. Section 14(4) of the Building Act 1984 provides:

> "Before making any building regulations containing provision of the kind authorised by paragraph 11(1)(c) of Schedule 1 to this Act, the Secretary of State shall consult –
>
> (a) the Building Regulations Advisory Committee for England,
>
> (b) such persons or bodies as appear to him to be representative of local authorities in England, and

> (c) such other bodies as appear to him to be representative of the interests concerned."

21. Schedule 1, paragraph 11(1)(c) provides:

> "Building regulations may repeal or modify –
>
> (c) any provision of a local Act passed before the day on which the Deregulation and Contracting Out Act 1994 is passed".

22. Regulation 2(2) of the 2018 Regulations amended regulation 2 of the 2010 Regulations (an interpretation provision) by adding subparagraph (6). Regulation 2(6)(b) of the 2010 Regulations reads:

> ""specified attachment" means –
>
> (i) a balcony attached to an external wall;
>
> (ii) a device for reducing heat gain within a building by deflecting sunlight which is attached to an external wall; or
>
> (iii) a solar panel attached to an external wall."

23. Regulation 2(7) of the 2018 Regulations amended regulation 7 of the 2010 Regulations by (inter alia) regulation 7(2) which provides:

> "Subject to paragraph (3), building work shall be carried out so that material which become part of an external wall, or specified attachment, of a relevant building are of European Classification A2-s1, d0 or A1, classified in accordance with BS EN 13501-1:2007+A1:2009 entitled "Fire classification of construction products and building elements. Classification using test data from reaction to fire tests" (ISBN 978 0 580 59861 6) published by the British Standards Institution on 30th March 2007 and amended in November 2009." (emphasis added)

GROUND (1): ALLEGED FAILURE TO CONSULT THE ASSOCIATION IN BREACH OF S.14 OF THE BUILDING ACT 1984

The parties' submissions

24. The Association contends that s.14(3) of the Building Act 1984 imposed an express statutory obligation on the Secretary of State to consult the Association before making regulation 6(2)(b) of the 2010 Regulations. This obligation arose because the 2018 Regulations effectively banned the use of materials outside class BS EN 13501 in respect of relevant building works on relevant buildings if the materials become part of a "specified attachment". The definition is such that the ban applies to external shutters, awnings and blinds, and so it directly affects the Association's members who sell such products.

25. The Association submits that the Secretary of State failed to comply with that statutory obligation. The Association does not take issue with the Secretary of State's decision to carry out a public consultation: it was open to him to consult more widely than required by the statute. But the Association submits that the Secretary of State's decision to carry out a public consultation should not have detracted from the express statutory requirement to consult such bodies as appear to him to be representative of the interests concerned.

26. Mr Singer QC, on behalf of the Association, submitted that by failing to put the Association on notice that the interests that it represents were affected by the proposed changes, the Secretary of State failed to consult the Association, in breach of s.14(3) of the Building Act 1984. His submission was that carrying out a public consultation did not fulfil the obligation to consult the Association in circumstances where the Association was treated in the same way as any individual member of the public and not specifically notified of the consultation.

27. Mr Singer relied on the judgment of Donaldson J (as he then was) in *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 WLR 191 ("*Aylesbury Mushrooms*"). That case concerned the duty to consult contained in s.1(4) of the Industrial Training Act 1964 which provided:

> "Before making an industrial training order the Minister shall consult any organisation or association of organisations appearing to him to be representative of substantial numbers of employers engaging in the activities concerned and any organisation or association of organisations appearing to him to be representative of substantial numbers of person employed in those activities; and if those activities are carried on to a substantial extent by a body established for the purpose of carrying on under national ownership any industry or part of an industry or undertaking, shall also consult that body."

28. Before making an industrial training order the Minister sought to consult by circulating copies of the draft order to a large number of addressees, including the Mushroom Growers' Association (an unincorporated body for which Aylesbury Mushrooms Ltd were the nominal party), inviting comments. The consultation was also publicised by means of a press notice. It later emerged that the Mushroom Growers' Association had never received a copy of the draft order and had no knowledge of the consultation.

29. Counsel for the Board submitted that posting the letter to the Mushroom Growers' Association constituted consultation, despite the fact that it was never received. Donaldson J rejected that submission at 194H-195B:

> "There is a little more to be said for his submission that the mere sending of the letter of April 26, 1966, constituted consultation in that the Shorter Oxford English Dictionary gives as one definition of the verb "to consult" "to ask advice of, seek counsel from; to have recourse to for instruction or professional advice." However, in truth the mere sending of a letter constitutes but an attempt to consult and this does not

> suffice. The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice: see *per* Bucknill LJ, approving a dictum of Morris J in *Rollo v Minister of Town and Country Planning* [1948] 1 All ER 13, 17. If the invitation is once received, it matters not that it is not accepted and no advice is proffered. Were it otherwise organisations with a right to be consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding, there can be no consultation." (emphasis added)

30. Mr Singer submitted that the statutory duty under consideration in *Aylesbury Mushrooms* was very similar to that in issue in this case, and there had been a similar failure to communicate the invitation to respond to the consultation. He submitted that the interests of the Association's members were substantially prejudiced by this failure because, if the Association had been consulted, they would have drawn attention to (i) the lack of any evidence, so far as they are aware, that products relevant to the Association's members had been implicated in vertical fire spread; (ii) the benefits of sun shading in respect of reducing fire risk and overheating; and (iii) the financial impact of banning such products.

31. The Association also sought to draw support from the "Consultation Principles 2018" published by the Cabinet Office. Principle F is "*Consultations should be targeted*". The guidance under Principle F states:

> "Consider the full range of people, business and voluntary bodies affected by the policy, and whether representative groups exist. Consider targeting specific groups if appropriate. Ensure they are aware of the consultation and can access it. …"

32. On behalf of the Secretary of State, Mr Manknell submitted that the Secretary of State complied with s.14 of the Building Act 1984 by undertaking a full, well-publicised public consultation. There was no entitlement for any person with an interest to be given individual notice of the consultation.

33. Mr Ledsome has addressed the decision to undertake a full public consultation at paragraphs 19-21 of his first statement. At paragraph 19 he states:

> "Section 14 of the Building Act 1984 requires the Secretary of State before making regulations to consult with BRAC and such persons or bodies as appear to him to be representatives of local authorities and such other bodies as appear to him to be representative of the interests concerned."

34. This paragraph reflects the terms of s.14(4) of the Building Act 1984. Perhaps because of the error in Mr Ledsome's evidence, initially in his oral submissions Mr Manknell suggested that the statutory duty in issue in this case is contained in s.14(4). He subsequently clarified, and it was common ground, that the duty in issue is that which is contained in s.14(3) (as is apparent from the preamble to the 2018 Regulations), not s.14(4).

35. Mr Ledsome's first witness statement continues:

> "20. Given the technical complexities associated with specifying the scope of the ban and implementing it, and the wide range of parties with an interest in the policy detail, it was decided to carry out a full public consultation, in line with usual practice when changes are made to the building regulations. This involved publishing the consultation paper and giving anyone with an interest the opportunity to comment on our proposed approach.
>
> 21. It is acknowledged that the Department was aware of BBSA and had met to discuss the benefits of their products to address overheating in homes in 2017. Subsequent to the consultation the BBSA contacted the Department with a question relating to whether there were requirements in the Fire Safety Order (FSO) on fire retardant materials which was referred to the Home Office as the Department responsible for the FSO. However, the Department works with a large number of industry bodies on a wide range of issues. As noted above, due to the number of interested parties the Department did not selectively choose consultees on the policy, but rather carried out a fully public consultation that was well-publicised."

36. Mr Manknell's primary submission in respect of ground 1 was that "the bodies who appeared to the Secretary of State to be representative of the interests concerned" were the public at large. The interests engaged were so broad as to encompass everyone within s.14(3). It was not disputed that the Association had a right to be consulted, but Mr Manknell submitted that the Association had no greater right than, for example, a person who lived in, or who had a relative or friend who lived in, a high-rise building. In circumstances where the Secretary of State consulted with everyone, he contended it was undeniable that the Secretary of State consulted with the Association and the real issue was as to the adequacy of the consultation.

37. Mr Manknell submitted that I should either distinguish *Aylesbury Mushrooms* or decline to follow it on the grounds that it is wrong. The distinction he relied upon was that in *Aylesbury Mushrooms* those who should have been but were not consulted were not bound by the order (see 194B). Mr Manknell suggested that this different mechanism may perhaps explain why the court took the approach it did to the communication of an invitation to respond to a consultation.

38. The foundation for his argument that *Aylesbury Mushrooms* is wrong is its age. Mr Manknell submitted that the case pre-dates modern technology (such as the internet) which has affected the ways in which consultations can be publicised. And *Aylesbury Mushrooms* pre-dates modern guidance regarding consultation. In particular, he referred to the requirements of consultation, known as the "Sedley criteria", namely: (i) consultation must be at a time when proposals are still at a formative stage; (ii) the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response; (iii) adequate time must be given for consideration and response; and (iv) the product of consultation must be conscientiously taken into account in finalising any statutory proposals. The Sedley criteria were accepted by

Hodgson J in *R v Brent London Borough Council ex parte Gunning* (1985) 84 LGR 168, adopted by the Court of Appeal in various cases, including *R v North East Devon Health Authority, ex parte Coughlan* [2001] QB 213, and more recently endorsed by the Supreme Court in *R (Moseley) v London Borough of Haringey* [2014] UKSC 56, [2014] 1 WLR 3947.

39. Mr Manknell submitted that a requirement to give individual notice of a consultation does not exist unless the statute so provides, or the claimant can establish a legitimate expectation to that effect. In support of this proposition he relied on *R v Secretary of State for the Environment ex parte Kent* (1989) 57 P & CR 431, per Pill J at 438:

> "The issue appears to me to be whether there is a general requirement or duty, as part of the requirement or duty to act fairly, to notify individually those likely to be substantially affected by planning proposals. My conclusion is that there is no such requirement. Had Parliament intended such a general requirement, I would have expected to find it specified in the statute along with other requirements which have been included. I bear in mind the importance of finality and the difficult questions which would arise as to whether a particular interest was affected by a particular proposal to the extent that individual notification ought to have been given."

40. Mr Manknell also relied on *Performance Retail Limited Partnership v Eastbourne Borough Council & others* [2014 EWHC 102] (Admin) in which Mr C M G Ockelton (sitting as a Judge of the High Court) considered the claimant's contention that he was entitled to individual notice that a consultation process was running, in circumstances where the local authority sent out a number of letters to various individuals and bodies inviting representations, mistakenly omitting to send such a letter to the claimant. Mr Ockelton held at [54]:

> "Publication on the website was a process of consultation used by the Council, and the notifications actually given of the consultation in this case are clearly in general terms adequate. The claimant says that it was entitled to an individual notice that a consultation process was running. That entitlement would have to be derived from the law, or a promise, or a legitimate expectation. There was no legal requirement to notify the claimant individually, and there was no express promise to do so."

41. In any event, Mr Manknell submitted that the Association cannot complain that they were not consulted in circumstances where Mr Chalk saw the announcement of the consultation at the outset of the consultation period. Mr Chalk chose to read no further after he had read the title, but he could not reasonably expect the full scope of the consultation to be expressed in its title and it would not have taken long to read the Consultation Paper, the main body of which spanned less than 10 pages.

42. Mr Manknell submitted that it was reasonable to take the view that the consultation should encompass the public at large. The methods used for publicising the consultation were reasonable. And the Association could not point to any particular

entitlement on their part, derived from statute or a legitimate expectation, to be notified directly of the consultation.

Discussion

43. This case is concerned with a statutory duty of consultation. The duty is contained in s.14(3) of the Building Act 1984. It is a mandatory duty, as is made clear by the words "shall consult". Only one consultee is identified by name, that is, the Building Regulations Advisory Committee ("the BRAC"). Beyond the named consultee, the group who must be consulted is limited to "bodies" (other than the BRAC) which appear to the Secretary of State to be "representative of the interests concerned". The interests concerned can be ascertained by considering the circumstances in which the s.14(3) duty arises, namely, before the Secretary of State makes building regulations "containing substantive requirements".

44. The 2018 Regulations introduced substantive requirements which effectively ban products that the Association's members sell, namely external shutters, awnings and blinds. Mr Chalk's uncontested evidence is that:

> "There are no awnings, shutters, blinds or moveable (dynamic) shading products which would meet the requirements of non-combustibility under the changes to the Building Regulations. It is not currently possible to manufacture a blind fabric to the classes specified in BS EN 13501. There are many fabrics (textiles) that meet the varying national flame retardancy standards but there has been no commercial reason to manufacture blinds, awnings and shutters to the level of fire proofing now required. Further, this British safety standard is not a test of the complete product but an assessment of its components. A mechanical product requires certain elements for it to function that are combustible but they represent such a small proportion of the product as a whole as to have a minimal effect on fire spread. Therefore the Amended Regulations now constitute a ban on such products on all relevant buildings."

45. Unsurprisingly, given the changes made by the 2018 Regulations and the Association's status as the only trade association for blinds, awnings, shutters and associated services in the UK, the Secretary of State has not suggested that the Association did not appear to him to be a body representative of the interests concerned. It is accepted that it was and the statutory duty to consult applied.

46. However, the Secretary of State's position is that the duty was owed to the public at large. If that were right, it would have an impact on the nature of the consultation and any notification requirements.

47. In my judgment, the Secretary of State's decision that there was a duty to consult the public at large pursuant to s.14(3) of the Building Act 1984 was based on a misreading of the statutory provision.

48. First, as I have said, Mr Ledsome's evidence cited the requirements of s.14(4) rather than s.14(3). It was evident that this reflected an omission on the part of the Secretary

of State to focus on the terms of the statutory duty, having decided to carry out a full public consultation.

49. Secondly, s.14(3) (unlike s.14(4)) does not make any reference to "persons". It is concerned to ensure that "bodies", which appears to be "representative" of the interests concerned, are consulted. An individual who has a friend or family member who lives in a high-rise building may be interested, as Mr Manknell suggested, in provisions designed to avoid the use of combustible materials in or attached to external walls. Nevertheless, such a person cannot sensibly be said to be a representative body to whom the statutory consultation duty is owed.

50. Thirdly, the public at large encompasses many people who are not themselves, and have no connection to anyone who might be, affected by the substantive changes to the 2018 Regulations. Such individuals obviously do not fall within the group of representative bodies that Parliament has determined the Secretary of State must consult before making substantive changes to building regulations.

51. This does not, of course, mean that the Secretary of State was precluded from conducting a public consultation. He was free to go beyond what was required by way of statutory consultation and to conduct a wider consultation. But in assessing whether a representative body such as the Association has been consulted, or adequately consulted, the requirements cannot be diminished by reference to the Secretary of State's choice to conduct a full public consultation.

52. Section 14 does not specify what steps should be taken to make consultees aware of the consultation or how they should be consulted. What is required has to be ascertained having regard to the nature and purpose of the statutory consultation and the circumstances which give rise to it. It follows from the language of s.14(3) that:

    i) The circumstances giving rise to the statutory duty to consult were proposed substantive changes to the building regulations;

    ii) The nature and purpose of the statutory consultation was to seek advice from representative bodies before making any such changes and to enable such bodies to make representations on behalf of those whose interests would be affected by the proposed changes.

53. I do not accept the Secretary of State's submission that *Aylesbury Mushrooms* is out-dated and wrong. In my judgment, the development of the requirements of consultation since *Aylesbury Mushrooms* is consistent with the view expressed by Donaldson J that the "essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice" (emphasis added), a view endorsed by Webster J in *R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities* [1986] 1 WLR 1 at 4G. The Sedley criteria do not expressly refer to notification of consultees (lack of notification not having been an issue in *Gunning*). But there is a 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*": see *Coughlan*, per Lord Woolf MR at [112] and the endorsement of this passage in *Moseley* by Lord Wilson at [25] and by Lord Reed at [39]. Although that obligation is, perhaps, most relevant when considering the content and adequacy of the

consultation, it also gives rise to the existence of the duty to take positive steps to make consultees aware of the invitation to express their views.

54. The duty to take such positive steps will not necessarily entail a duty to give a consultee direct notice of a statutory consultation. Whether it does will depend on the context. In cases such as *ex parte Kent* and *Performance Retail Limited Partnership*, where there was no right to notification, the context was the applicable planning legislation and the important public interest in certainty and finality when planning permissions which attach to the land concerned are granted: see *ex parte Kent* at 436 and 438.

55. If a consultee is expressly identified by the statute, as the BRAC is in s.14(3), it can readily be inferred that direct notification of the statutory consultation is required. If the group of consultees are not expressly identified by the statute, as is the case in respect of the other bodies referred to in s.14(3), the duty to make statutory consultees aware of the invitation to express views involves a combination of taking proactive steps to identify consultees, so that those identified can be notified of the consultation, and otherwise taking adequate steps to bring it to the attention of bodies representing the interests concerned (for example through publicising the consultation in specialist media).

56. In this case, the consultation was published on the government website, referred to in Parliament and it was the subject of publicity in the national media. These were steps designed to publicise the consultation generally and bring it to the attention of the public at large. As a result of the misinterpretation of the s.14(3) to which I have referred, the Secretary of State did not take steps to identify statutory consultees. Nor is there evidence that the Secretary of State took any other steps designed to bring the invitation to the attention of bodies representing the specific interests concerned in the proposed changes which are the subject of this challenge.

57. Nevertheless, the steps taken to publicise the consultation were in fact sufficient to bring the Consultation Paper to the attention of the Association at the beginning of the consultation period. Although no one at the Association realised the relevance of the consultation to their members' interests, the invitation to respond to the consultation was both communicated to and received by the Association. It seems to me that the question whether and to what extent the relevance of the consultation to the interests of its members was brought to the Association's attention falls to be considered in the context of assessing the adequacy of the consultation.

GROUND (2): ADEQUACY OF CONSULTATION

The parties' submissions

58. The Association emphasised that the essential 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*": see paragraph 53 above.

59. In respect of the degree of specificity demanded by fairness, the Association relied on the judgment of Lord Wilson in *Moseley* at [26], where he said:

> "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. …Second, in the words of Simon Brown LJ in the *Baker* case, at p.91, "the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit.""

60. Mr Singer submitted that, even if the consultation undertaken saves the Secretary of State from a finding that he *wholly* failed to consult the Association, the consultation was inadequate because the Consultation Paper did not tell the Association in clear terms that it was proposed to extend the ban to external blinds, awnings and shutters.

61. Mr Manknell emphasised the breadth of the Secretary of State's discretion as to how to consult. In *Moseley*, Lord Reed said at [36], "*A mechanistic approach to the requirements of consultation should … be avoided*". In respect of consultation documents, all that is required is that "*a consultation document presents the issues in a way that facilitates an effective response*": *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472 at [9].

62. Mr Manknell submitted that mere errors are insufficient to vitiate a consultation process. The test is whether the process was so unfair as to be unlawful. He contended that this substantial hurdle is unlikely to be met unless the Court finds that "*something has gone clearly and radically wrong*", albeit he recognised this is not a substitute test: see *R (JL and AT Baird) v Environment Agency and Arun District Council* [2011] EWHC 939 (Admin), per Sullivan LJ (sitting in the High Court) at [50] - [51].

63. Mr Manknell drew attention to the section of the Consultation Paper which begins at paragraph 19 and, especially, to paragraph 24 which he described as the critical paragraph. He referred to the words "*We consider that a ban should also include … attachments to the external face*" and submitted that it was, on a fair reading, sufficiently clear from the consultation that a ban on combustible materials in all attachments to the external face was under consideration.

64. He also sought to draw support from the terms in which eight consultees responded to the consultation, cited by Mr Ledsome in his first statement at paragraph 30:

    i) The Greater London Authority: "To ensure the highest standards of fire safety are achieved the ban must be as comprehensive as possible. It should cover more than just the surface of a wall and any insulation materials. Instead, the ban should include the entire wall construction from the internal face of the wall through to its external face. This should include balconies, spandrels, brise soleil and any other attachment to the external face of the building."

    ii) The Local Government Association: "… it is important the ban covers the entire wall construction and all the materials used on the external walls and not just rainscreen cladding panels or insulation."

iii) An individual (fire sector member): "The current guidance is silent on significant or continuous attachments to the building. As these elements could all aid fire spread vertically to multiple floors these elements should be included."

iv) A Fire Safety Officer, UCL: "noting the issues with fires on balconies recently, in the UK and elsewhere, all external elements should be required to be non-combustible".

v) The Chair of Building Control Alliance: "BCA would recommend that consideration is given to the impact of the proposed ban on all components and elements which may be fitted to the external face of the external wall. Items that would need consideration would be winter gardens, living walls, green and brown roofs, warm deck terracing etc."

vi) Fire and Rescue and London Fire Brigade and National Fire Chiefs Council: "…Whilst we agree all principle elements of external walls should be covered, we are further of the opinion that elements which are attached to the building but not ordinarily considered part of the wall should also be of limited combustibility…"

vii) Avon Fire and Rescue Service: "Any items further added to walls should also be subject to consideration."

viii) MD Insurance Services Ltd: "…the wording needs to be more specific about what is included rather than stating 'similar building elements'. A more extensive list, compiled with the help of the industry, should be incorporated that also includes elements such as soffits, overhangs, horizontal and vertical decorative features such as fins and columns, podium roofs, etc."

65. Mr Manknell submitted that these responses illustrate that the potential scope of the ban was reasonably apparent.

Discussion

66. The Consultation Paper bore the title "*Banning the use of combustible materials in the external walls of high-rise residential buildings*" (emphasis added). A table headed "*Scope of the consultation*" follows immediately after the contents page. The "*Topic of this consultation*" is described in these terms:

> "This consultation seeks views on the proposed ban of combustible materials. The proposal is in line with the Secretary of State's commitment in Parliament on 11 June 2018 to consult on banning the use of combustible materials in the external walls of high-rise residential dwellings." (emphasis added)

67. The background section explained that there were two ways for external walls to meet the requirements of the building regulations (Consultation Paper, paragraph 3):

> "The first is for each individual component of the wall (surface, insulation, filter, etc) to meet the required standard for combustibility.
>
> The second is to ensure that all the combined elements of a wall, when tested as a whole installed system, adequately resist the spread of fire in accordance with the (British Standard) BS 8414 test." (emphasis added)

68. The Consultation Paper stated that the Government agreed with the advice of the Expert Panel that, "*systems which have passed the BS 8414 test and have been correctly installed and maintained and therefore meet Building Regulations guidance, provide a safe way to ensure that wall system will resist the spread of fire*" (paragraph 10). The Consultation Paper continued:

> "11. However, the Government also recognises the concerns that the BS 8414 test does not offer as straightforward a way of meeting the requirements of the Regulations as would a ban on the sue of combustible materials. We also note Dame Judith's view that using products which are non-combustible or of limited combustibility is undoubtedly the lower risk option. The Government therefore considers it right to consult on a ban which would as a consequence remove the flexibility offered to cladding design by the BS 8414 test on high-rise residential buildings.
>
> 12. We are minded to make the change through legislation by amending the Building Regulations to include a specific ban. …" (emphasis added)

69. The key section begins with the heading above paragraph 19, "*Defining the scope of a ban on "cladding"*". This section consists of six paragraphs, followed by a question.

70. Paragraph 19 of the Consultation Paper states:

> "Cladding is the layering of a number of materials to form the external fabric of a building. In construction, cladding is used to provide a degree of thermal and acoustic insulation and weather resistance, and to improve the appearance of buildings. This can be placed on a building during its construction or during a refurbishment."

It is common ground, and in any event clear, that attachments to an external wall, such as external shutters, blinds and awnings, are not part of the cladding.

71. The Consultation Paper continues:

> "20. The proposal is to ban the use of materials which do not meet class A1 or A2 from use in the walls of residential buildings which are 18m or over. The external wall in such buildings is usually separate from the structural frame. The ban

> would cover the complete wall assembly, including the inner leaf, insulation and the façade or cladding which provides the outermost layer of the external wall.
>
> 21. There is a wide range of technologies used in the construction of external walls for tall buildings which might not always be considered to be cladding. Each technology presents different potential mechanisms for fire spread.
>
> 23. We have considered limiting the ban to the following products:
>
> - Banning Aluminium Composite Material with a polythene core.
> - Banning combustible "rainscreen" products (panels used to form the external face of the wall).
> - Banning combustible insulation products (whether behind a rainscreen or otherwise incorporated into a wall).
>
> 23. However, each of these options would still allow the use of other combustible materials with the potential significantly to contribute to fire spread. This would not meet the policy intention. We therefore consider that for a ban to be effective it should cover more than just the surface of a wall and any insulation materials and instead cover the entire wall construction from the internal face of the wall through to its external face." (emphasis added)

72. The paragraphs above made clear that the proposal was for the ban to cover the entire wall assembly from the inner leaf to the outermost layer of the wall. It was not suggested by the Secretary of State that any of these paragraphs brought attachments to the external wall within the scope of the proposed ban, and it is plain that these paragraphs only address the wall itself.

73. The critical passage of the Consultation Paper states:

> "24. Moreover, there have been situations where the materials used in the construction of balconies and window spandrels have been implicated in vertical fire spread. We consider that a ban should also include similar components of the external wall/façade and attachments to the external face.
>
> **Question 6.**
>
> **a. Do you agree that a ban should cover the entire wall construction?**

> **b. If no, what aspects of the wall should it cover?**
>
> **c. Should a ban also cover window spandrels, balconies, brise soleil and similar building elements?**"

74. In my judgment, insofar as the Secretary of State sought to consult the Association on extending the proposed ban to cover what is defined in regulation 6(2)(b)(ii) as "*a device for reducing heat gain within a building by deflecting sunlight which is attached to an external wall*", the consultation process was so unfair as to be unlawful.

75. First, the context in which paragraph 24 and question 6 must be considered is this:

    i) The Association had an express statutory right to be consulted before regulation 6(2)(b)(ii) was made. For the reasons I have already given, the group of statutory consultees did not encompass the public at large. It was a limited (albeit potentially large) group of representative bodies.

    ii) Regulation 6(2)(b)(ii) deprived the Association's members of an existing right to sell products which were effectively banned when the regulation came into force. The demands of fairness are somewhat higher in this context than when the claimant is a bare applicant for a future benefit.

    iii) The focus of the publicity in national and industry press regarding the consultation was on the proposal to ban combustible cladding. The Secretary of State's statements and the press release similarly focused on the proposal to ban the use of combustible materials in the external walls of high-rise residential buildings.

    iv) Nothing in the title of the Consultation Paper, description of the scope of the consultation, or explanation of the background indicated that it was proposed the ban should extend to the devices covered by regulation 6(2)(b)(ii).

    v) The Secretary of State's answer to the significant matters which the Association contends should have been, but were not, taken into account (i.e. Ground (3)) was that the consultation was the safeguard: if the Association were concerned, they should have responded to the consultation. This underlines the importance of ensuring that the consultation was fair.

76. Secondly, paragraph 24 and question 6 of the Consultation did not make clear that products such as external shutters, blinds and awnings were within the scope of the proposed ban:

    i) Paragraph 24 refers to evidence that materials used in balconies and window spandrels have been implicated in vertical fire spread. By reference to this evidence regarding balconies and window spandrels, the Consultation Paper explains the proposal to include within the ban "*similar components of the external wall/façade and attachments to the external face*". This naturally reads as indicating that the proposal extends to balconies, window spandrels

and "similar" components of or attachments to the external wall. Read in context, it would be unfair to expect a consultee to understand that the proposal extended to any attachment to the external wall.

ii) The Secretary of State's submission that the proposal in paragraph 24 applied to all attachments to the external face, unqualified by the word "*similar*", is inconsistent with question 6(c) which was expressly limited to window spandrels, balconies, brise soleil and "*similar building elements*". The fact that a very small number of those who responded to the consultation advised that the ban *should* extend to all attachments does not demonstrate that that is how the proposal should fairly have been understood.

iii) There was no reference to external shutters, blinds or awnings. Nor was there any reference to devices for reducing heat gain within a building by deflecting sunlight which are attached to external walls.

iv) There was no reference to any evidence that the use of combustible materials in products such as external shutters, blinds and awnings has been implicated in vertical fire spread, and the Association is not aware of any such evidence.

v) I accept the evidence of Mr Chalk regarding the quite distinct nature of brise soleil, balconies and window spandrels compared to external blinds, awnings and shutters: Chalk first statement paragraphs 5-6, 21-22 and Chalk second statement paragraph 10. In any event, the reference to similar components, attachments or building elements was vague. It was wholly insufficient to fulfil the Secretary of State's duty to consult fairly regarding a proposal that effectively banned the use of the Association's members' products on relevant buildings.

77. The reality is that the Association (and its members) were taken by surprise when they discovered that the ban covered products sold by their members. I conclude that the consultation failed to comply with the requirement to "*let those who have a potential interest in the subject matter know in clear terms what the proposal is*" and the consultation in respect of regulation 6(2)(b)(ii) was so unfair as to be unlawful.

GROUND (3): MATERIAL CONSIDERATIONS AND IRRATIONALITY

The parties' submissions

78. Ms Reid, who addressed this ground orally for the Association, submitted that the Defendant failed to take into account the following material considerations:

i) The absence of evidence that external shutters, blinds and awnings give rise to a fire risk;

ii) The financial impact of the ban on the Association's members; and

iii) The benefits of using the Association's members' products, namely:

a) The potential to reduce fire risk; and

b) The public health benefits of reducing overheating.

79. The Association put the first of these points in two ways: (i) the absence of evidence that external shutters, blinds and awnings contribute to fire spread was a material consideration which the Secretary of State failed to take into account and (ii) it was irrational to ban such products in the absence of any such evidence.

80. Mr Chalk's evidence was that that:

> "40. The new classification for external '*sun shading'* products (blinds, shutters and awnings) is disproportionate. The risks posed by sun shading products is so minimal that it is disproportionate to ban their use as a significant proportion of the materials of an external sun shading system are non-combustible metals such as aluminium and steel which are deemed compliant to Class A1 without testing by commission decision 96/603/EC.
>
> …
>
> 54. As the products of BBSA members are made of thin materials, the ability for them to retain fire is not likely. They would certainly not have the problem of heat build-up and retention seen on Grenfell Tower. There has never been an issue requiring CE Marking on our members' products but adequate consultation would have given time for testing and assessment, if required.
>
> 55. Unlike the cladding on Grenfell Tower – or brise soleil, balconies, window spandrels, photovoltaic panels and green walls – our members' products are not façade covering in the same way and so fire spread is reduced, especially when fitted to normal cill height where there would be an effective fire break of at least a metre."

81. Ms Reid explained that the suggestion that Association's members' products are not "façade covering in the same way" was a reference to the lesser proportion of an external wall that is covered by such products.

82. Ms Reid submitted that there was nothing in the Defendant's evidence to explain why it was thought there was a risk of fire spread from the Association's members' products. Mr Ledsome said at paragraph 16 of his first statement:

> "Through this development work, it quickly became apparent that this objective would not be met if the ban only covered combustible materials in cladding systems. This is because materials used in other parts of the wall system could lead to fire spread. In particular <u>there was strong evidence that attachments to the external wall could exacerbate fire spread and undermine compliance with requirement B4 of Schedule 1 to the Building Regulations. The Building Research Establishment had published a report on this in 2016</u>. There had

> been a significant balcony fire in Manchester in December 2017 and a fire at a London hotel." (emphasis added)

83. The Building Research Establishment report to which Mr Ledsome referred is entitled "*Fire safety issues with balconies*". Reference was made in the report to "*24 fires which have started on balconies in the UK since 2005*". The report advised that the most common cause of those fires had been "*arson, careless disposal of smoking material and misuse of barbeque*". Ms Reid drew my attention to the causes of the fires and the extent of fire spread described in each of the four case studies described in the report and submitted that the report was concerned with fires on balconies (started deliberately or by careless disposal of cigarettes) which spread due to the cladding used on the buildings.

84. Ms Reid also submitted that the scope of the ban is irrational because awnings which constitute advertising are not caught whereas awnings for the purpose of shading are caught.

85. As regards the financial impact, Ms Reid submitted that the Cabinet Office's Consultation Principles make clear that this is a material consideration, principle C stating:

> "Give enough information to ensure that those consulted understand the issues and can give informed responses, include validated impact assessments of the costs and benefits of the options being considered when possible; this might be required where proposals have an impact on business or the voluntary sector."

86. Ms Reid drew attention to paragraph 33 of the Consultation Paper where it was recognised that the proposed ban "*could have a number of impacts which should be considered. These include the costs involved in meeting the proposed standard…*" The impact assessment published in November 2018 purported to assess the cost of compliance, but Ms Reid submitted it ignored the impact on the Association's members, their supply chains or the reputational impact in terms of the knock-on effect of a ban in the UK.

87. Ms Reid referred to the evidence of Mr Chalk which I have quoted in paragraph 44 above that there are no awnings, shutters, blinds or moveable shading products which would not be caught by the ban. She submitted that this was clearly an important and material consideration for the Secretary of State in determining the scope of exemptions from the ban, as demonstrated by paragraphs 71-72 of the Government's response:

> "71. The scope of the police includes all elements of the wall construction from the outer to the inner faces. However, it was agreed by the majority of respondent that some exemptions would be required for components where non-combustible alternative are currently not available.
>
> 72. The exemptions are based on the collation of responses provided during the consultation. The products included in the

> list include products for which a Class A1 or Class A2-s.1,d0 does not exist or is not readily available. …"

88. Ms Reid also drew attention to the fact that the non-acceptance (in the Defendant's skeleton argument) of the Association's "*assertions … in respect of the impossibility of non-combustible shading products*" was not supported by evidence, unlike the Association's position.

89. The third consideration relied on by the Association concerns the benefits of their members' products. Mr Chalk's evidence is that "*in the last 5 years there are reported to have been 125 fires caused by the sun's rays refracting from mirrors or glass and it is our contention that had external blinds, awnings or shutters been fitted and operated, then they could have prevented such fires*". In addition, the Association relies on the benefit of preventing overheating which is reported to cause about 2,000 deaths p.a. in England and Wales. Mr Chalk refers to the latest report of the Committee on Climate Change which, he says, "*highlights that some 4.5 million homes are overheating*" and notes that nearly 700 more deaths than average were recorded during the 15 day peak of the heat wave in June and July 2018. Mr Chalk states:

> "External shading is recognised as one of the most effective means of controlling overheating by preventing the solar gain from reaching the windows."

90. Ms Reid submitted that the Secretary of State has not disputed in respect of any of these considerations that they are material nor that they have not been considered.

91. Insofar as the Association relied on an alleged failure to take into account material considerations, Mr Manknell submitted that this ground has to be considered on the assumption that the consultation conducted was lawful. It is not the Association's case that the Secretary of State ignored any matters that were brought to his attention. The safeguard was the consultation: the Association could have raised the matters it now relies on in response to the Consultation Paper.

92. As regards the allegation of irrationality, Mr Manknell submitted that respect for the role of Parliament in making the Regulations has the effect that the threshold for judicial intervention is particularly high. He relied on *R (Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin), where the Divisional Court said:

> "153. Under our constitution policy-making at the national level is the responsibility of democratically-elected Governments and Ministers accountable to Parliament. As Lord Hoffmann said in *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2001] UKHL 23; [2003] 2 AC 295 at [69] and [74]:
>
> > "It does not involve deciding between the rights or interests of particular persons. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires."

> 161. As we have described, section 5(4) and 9 of the PA 2008 requires an NPS to be scrutinised by parliament before designation… In one of the authorities to which [Counsel] referred us, *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449 at [94], Lord Reed JSC reiterated the observation of Lord Sumption JSC in *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 39; [2014] AC 700 at [44] that where Parliament has reviewed a statutory instrument, respect for Parliament's constitutional function calls for "considerable caution" before the courts will hold it to be unlawful on a ground falling within the ambit of Parliament's review. In a challenge to the introduction of a cap on welfare benefits for claimants in non-working households raising discrimination arguments as between men and women, Lord Reed said that proportionality issues involving controversial issues of social and economic policy with major implications for public expenditure were pre-eminently the function of the democratically elected institutions. The need for the court to give due weight to the considered assessment made by those institutions meant that it had to respect their view unless "manifestly without reasonable foundation". Consistently with that principle, the Supreme Court also decided that the court could properly have regard to any consideration by Parliament of the issues raised in the proceedings for judicial review (see [93]-[95])."

93. Mr Manknell submitted that it was not remotely irrational for the Secretary of State to choose to take a precautionary approach to reducing the risk of fire spread in high-rise buildings. The regulations were brought in urgently and one of the purposes of the review is to enable the Defendant to consider whether there are any ways in which the ban may need to be relaxed (or made more stringent). He did not contest the Association's evidence that there are not available, currently, external shutters, blinds and awnings which would not be caught by the ban, but he submitted that the Secretary of State was entitled to anticipate that the industry would adapt and develop new products.

94. Mr Manknell referred to some of the responses to the consultation (see paragraph 64 above) which, he submitted, show that significant organisations were advising that including attachments within the ban was the right approach.

95. He also relied on the evidence of Brian Martin, the Head of Technical Policy within the Technical Policy Division in the Building Safety Programme. Mr Martin referred to the principal benefit of the proposals being "*to make compliance clearer which reduces the risk of unintentional non-compliance*" (Martin statement, paragraph 6). At paragraph 13 Mr Martin stated:

> "The Regulations were prepared with the knowledge that some product which may be used safely in some configurations will no longer be permitted, but it was also decided that this was outweighed by the need for clear and unequivocal requirements

> providing the industry with a clear way forward and delivering the necessary level of public safety."

96. Mr Martin stated:

> "8. The policy was developed on a careful consideration of what materials would pose a specific risk within the external wall and the elements which could be attached to the external wall of a building. The Department was aware of a number of incidents where attachments to a wall had resulted in fire spread over that wall, thus undermining the intent of requirement B4.
>
> 9. Question 6 in the consultation asked, "Should a ban also cover window spandrels, brise soleil and similar building elements?" Balconies and brise soleil are both elements that are fixed to and project from the building. We see no difference in terms of the risk of fire spread from BBSA's products.
>
> …
>
> 11. The risk from attachments to a wall does not directly relate to their intended function, rather the risk of fire spread relates to the location arrangement and materials used in their construction."

97. Mr Manknell submitted that the decision to make regulation 6(2)(b)(ii) in the terms in which it was made was rational approach to the implementation of the important policy aim of reducing the risk of fire spread.

Discussion

98. Where it is alleged that in exercising a discretionary power conferred by statute, the decision-maker has failed to take into account a relevant consideration, it is well-established that the court will only hold the decision to be unlawful on this ground if the consideration is expressly or impliedly required to be taken into account. In *Re Findlay* [1985] AC 318 the House of Lords recognised that "*in certain circumstances, notwithstanding the silence of the statute, 'there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers … would not be in accordance with the intention of the Act.'*": see per Lord Scarman at 333G-334C, approving statements of these principles by Cooke J in *CREEDNZ Inc. v Governor-General of New Zealand* [1981] NZLR 172, at 183.

99. Section 1(1)(a) of the Building Act 1984, read together with s.1(1A), gives the Secretary of State the power to make regulations with respect to the design and construction of buildings for the purpose of securing, inter alia, the health, safety and welfare of persons in or about buildings, or who may be affected by them. The statute provides no lexicon of the matters to be treated as relevant.

100. As discussed above, s.14(3) of the Building Act 1984 required the Secretary of State to consult the BRAC and such other bodies as appear to him to be representative of the interests concerned prior to making substantive changes to the building regulations. If the Association (or any other person or body) had raised the matters which are now relied on in a response to the Consultation Paper, the Secretary of State would have been obliged to take them into account. But that did not happen because the Association did not realise that the Consultation Paper was relevant to the interests of their members.

101. In my judgment, the financial impact of the ban on the Association's members and the benefits of using the Association's members' products, are matters that cannot be said to have been so obviously material to the Secretary of State's decision that he was required to take them into account, in circumstances where they were not raised during the consultation. However, accepting the Secretary of State's submission that the safeguard was the consultation serves to reinforce my conclusion that the consultation was unfair (see paragraph 75.v) above).

102. As regards the fire risk, in the absence of a response from the Association (or any other person or body) suggesting that the use of combustible materials in external shutters, blinds and awnings does not give rise to a fire risk, the real issue is whether the Secretary of State's decision to bring such products within the scope of the ban was rational.

103. In my judgment, the Secretary of State's decision to make regulation 6(2)(b)(ii) and so bring the Association's members' products within the scope of the ban, subject to the promised review, was not irrational. He was entitled to be guided by the view of his technical experts, including Mr Martin, that the risk of fire spread relates to the location arrangement and materials used in the construction of any attachment, not to its intended use. The Secretary of State's decision, on the information before him at the time, to take a precautionary approach and so preclude the use of combustible materials in any significant attachments to the external wall cannot be castigated as irrational.

ISSUE (4): DELAY AND RELIEF

104. For the reasons that I have given, I have concluded that the consultation which the Secretary of State was required to undertake by s.14(3) of the Building Act 1984 was so unfair that it was unlawful, and consequently regulation 6(2)(b)(ii) was made unlawfully. It is common ground that it is a matter of discretion whether to quash the regulation and that regulation 6(2)(b)(ii) is severable, therefore any decision to quash the regulation should be limited to that provision.

105. The Secretary of State submits that I should refrain from quashing the regulation on the grounds that:

    i) The claim was grossly out of time;

    ii) The 2018 Regulations were made on 28 November 2018, laid before Parliament on 29 November, have been in force since 21 December 2018, and those involved in planning and construction have been working to them since then;

iii) A procedural failing in respect of consultation does not justify jeopardising public safety by removing a regulation which ensures that combustible materials are not used in attachments;

iv) The Secretary of State has already committed to reviewing the exemption list in regulation 7(3) and has expressed his willingness to consider the Association's submissions.

106. As regards timing, the claim form must, of course, be filed "*promptly; and in any event not later than 3 months after the grounds to make the claim first arose*" (CPR 54.5(1)). In this case, the claim form was filed on 20 March 2019. The Association submitted in its Summary Grounds:

> "81. The Regulations came into force on 21st December 2018. That is the date where the Claimant's rights were affected (paragraph 44 *Burkett*). That is also the date when it was clear that Parliament would not intervene and the Regulations would take effect against the Claimant (paragraph 50 *Burkett*). The 3 month period should be calculated from that date.
>
> 82. Further, any claim that the Claimant has not acted promptly is wholly misconceived in light of the actions of the Defendant. In particular, the Defendant itself completely failed to respond to the Claimant's pre-action correspondence on 30th January 2019. The Claimant then issued a Pre Action Protocol letter on 20th February which, it is noted, was in any event within 3 months of the Government's first publication of its response to the Consultation (29th November 2018). It was the Defendant who expressly asked for an additional 7 days to provide its response to the Claimant's letter before action. The Claimant specifically agreed to that extension of time on the basis that no point would be taken against it for doing so. At no point did the Defendant raise concerns as to the time taken to issue the Claim, or as to the requirements of good administration. Further, the Defendant did not produce its 5 page response until the last day of the extended period requested by it (7th March 2019). The Claimant has acted expeditiously in lodging the Claim thereafter. Any delay in issuing proceedings is as a result of the Defendant's failure to respond timeously to the Claimant's pre action correspondence. Further and in any event, any point taken that the Claimant has failed to act "promptly", or that the same is detrimental to good administration, is wholly unconvincing in the circumstances."

107. When granting permission, Spencer J observed:

> "I consider that the claim is not brought out of time for the reasons stated in paragraphs 81-82 of the Claimant's Grounds. If wrong, I would have granted an extension of time in the circumstances of this case."

108. I have considerable sympathy with the Secretary of State's submission that the target of the Association's third ground was the decision of 28 November 2018 to make the 2018 Regulations; and it may be said that the grounds to challenge the adequacy of the consultation arose earlier, when the Consultation Paper was published. But it is precisely because the consultation was unfair that the Association did not become aware that its members were affected by the consultation or the regulations until December 2018. The conclusions that I have reached on the merits of the claim tend to reinforce the finding that, in the circumstances, an extension of time was warranted.

109. The fact that those involved in planning and construction have been working to the 2018 Regulations since they came into force on 21 December 2018 would be an important factor if there were any question of quashing the 2018 Regulations as a whole. It is far less significant where the question is limited to whether I should quash regulation 6(2)(b)(ii).

110. I do not accept the Secretary of State's submission that, unless I find that extending the ban to cover the Association's members products was irrational, it would be contrary to the public interest to quash the regulation. The Secretary of State's decision was based on the evidence before him. There is no evidence before the Court that the use of combustible materials in such products creates a fire risk. On the contrary, the evidence regarding attachments exacerbating fire spread related to fires starting on balconies and spreading as a result of combustible cladding: it is in no way suggestive of a fire risk from shutters, blinds or awnings.

111. The Explanatory Memorandum stated that the Regulations would be subject to an annual review. Mr Ledsome's evidence is that the "process and exact timing of that review is being considered".

112. In my judgment, the appropriate remedy is to quash reg.2(2) of the 2018 Regulations, insofar as it introduced reg.2(6)(b)(ii) of the 2010 Regulations. Section 14(3) of the Building Act 1984 required the Secretary of State to consult the Association before making that regulation and such consultation was required to be fair. That reflects the public interest in the Secretary of State receiving advice from representative bodies and hearing their representations before making a substantive change such as the introduction of a ban on the use of certain products in relevant buildings. The Association's evidence demonstrates the importance of that safeguard and the promised review is not an adequate substitute.

CONCLUSION

113. For the reasons that I have given, the claim is allowed. I will hear the parties as to the precise terms of the order.