

Court of Appeal confirms correct tests to apply to determine whether: (1) a public body has consulted fairly; and (2) is under a legitimate expectation to consult

The Court of Appeal was asked to consider whether the Secretary of State for Health and Social Care acted unlawfully when introducing certain changes, allegedly without due consultation, to the Regulations providing for overseas visitors to be charged for NHS treatment.

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In *R (On the Application Of) v Secretary of State for Health And Social Care* [2020] EWCA Civ 1634 the Court of Appeal was asked to consider whether the Secretary of State for Health and Social Care acted unlawfully when introducing certain changes, allegedly without due consultation, to the Regulations providing for overseas visitors to be charged for NHS treatment.

The Claimant's case was that, having chosen to consult on certain changes to the existing regulations, it was incumbent on the Secretary of State to do so fairly and hence to include in the consultation exercise the proposals on advance payment and recording of information, which were subsequently included in the amending regulations but not consulted on. It was also argued that the Secretary of State was anyway under a duty to consult on those proposals because a legitimate expectation of consultation had arisen from a previous practice of consulting on changes to the legislative regime.

In relation to the first argument, the Court restated the trite position that where a public body embarks on a consultation, then, whether or not the law required there to be one, the consultation must be carried out properly. That means having regard to the four "Gunning principles" (see *R v Brent Borough Council, Ex p Gunning* (1985) 84 LGR 168), namely: (1) the consultation must be undertaken at a time when proposals are still at a formative stage; (2) it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; (3) adequate time must be given for this purpose; and (4) the product of consultation must be conscientiously taken into account when the ultimate decision is taken.

If some new matter arises during or after the consultation has taken place, then any "re-consultation" should only occur if there is a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt (citing, *R v East Kent Hospital NHS Trust, Ex p Smith* [2002] EWHC 2640 (Admin)). Nor does the public body need not necessarily disclose, let alone consult on, other proposals it has in the same field. The focus is on what is required in the context of the particular proposals on which it has elected to consult.

In this case, the Court of Appeal was satisfied that the advance payment and recording of information requirements were not variants or developments of the proposals that formed part of the consultation exercise. Even if the requirements could be said to bear on the impact of those proposals, they were not tied to or derived from the proposals but were rather "discrete" and "self-contained".

In relation to the second argument, the Court of Appeal confirmed that a legitimate expectation of consultation will arise where there is:

1. An express promise, representation or assurance which is "clear, unambiguous and devoid of relevant qualification"; or
2. A practice that is tantamount to such a promise. Such a practice does not have to be entirely unbroken, but it does have to be so consistent as to imply clearly, unambiguously and without relevant qualification that it will be followed in the future.

Whilst the Secretary of State had in recent years consulted on changes to the charging regime that were to the disadvantage of overseas visitors, the Secretary of State had not consulted on all amendments to the regime. As the overall picture was mixed, it could not be said that any legitimate expectation of consultation had arisen in this case.

For these reasons, the Court dismissed the appeal.

The Court of Appeal's decision provides helpful guidance for public bodies when deciding whether to consult on any new policies and, if so, what any such consultation needs to include. Browne Jacobson regularly advises public bodies on this important area of the law and our public law team has an excellent track record in successfully resisting consultation challenges.

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