Queens's Bench Division: 26 April 1985



Hodgson J.

## REGINA V. BRENT LONDON BOROUGH COUNCIL, *ex parte* GUNNING AND OTHERS

**Education — School — Closure and amalgamation of schools — Proper procedure — Director of education's proposal to close and amalgamate schools — Education committee requiring further report — Education authority releasing proposals for public consultation — Whether authority exercising education function requiring consideration of committee report — Public given three weeks to make representations on consultative document — Education committee recommending further investigation before schools closed or amalgamated — Proposals by education authority different from original proposals — Whether consultation adequate — Whether proposals ultra vires — Education Act 1944 (7 & 8 Geo. VI, c. 31), s. 6, Sch.1, Part II, para. 7.**

The Education Act 1944 provides by section 6:

". . . (2) The local administration of the statutory system of public education shall be conducted in accordance with the provisions of Parts II . . . of Schedule 1."

Schedule 1, Part II, provides, by paragraph 1, for the establishment of education committees by local education authorities.

By paragraph 7:

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

The Education Act 1980 provides by section 12:

"(1) Where a local education authority intend — . . . (*c*) to cease to maintain any county school . . . (*d*) to make any significant change in the character, or significant enlargement of the premises, of a county school; . . . they shall publish their proposals for that purpose in such manner as may be required by regulations made by the Secretary of State and submit to him a copy of their published proposals . . ."

In July 1983, after comprehensive public consultation, a local education authority made proposals relating to the intake of pupils at secondary schools in the area in response to the steadily decreasing number of children requiring secondary education. The proposals involved no structural changes in the education system and were generally believed to have determined the organisation of secondary education in the area for the next

five years. However, in December 1983 after a political change in the administration of the local authority, the chairman of the education committee required the director of education to prepare a report for the consideration of the education committee on future education in the area having regard to likely government action to restrict local government expenditure and new information about the cost of maintaining existing secondary schools. The director's report (55/1984) contained proposals which involved the closure of certain secondary schools and their amalgamation with other schools at the end of the summer term the following year. The only information in the report relating to the cost of the proposals was the expenditure required to maintain two of the secondary schools in the area. The education committee met to consider the report and resolved that the director should be instructed to prepare a new report which, subject to the agreement of the local authority, could be released for consultation. The director prepared a short additional report (2/1984) which contained no further information as to the cost of the proposals. On 10 May 1984 the local authority met to receive and consider the education committee's "report". Apart from the director's original report and his additional report, which the education committee had had no opportunity of considering, the only material considered by the local authority on that occasion was the minutes of the education committee's meeting, which the authority treated as a "report" for the purposes of paragraph 7 of Part II of Schedule I to the Education Act 1944. The local authority resolved that consultation should take place on the basis inter alia of four proposals relating to the amalgamation and closure of certain secondary schools. The director subsequently prepared a brief consultative document which contained no information as to the cost of the proposals other than that contained in his previous reports. The document stated that it would be the subject of a report by the education committee on 5 July and that the committee's recommendations would be considered by the local authority on 12 July; that any decision of the local authority relating to the closure or amalgamation of any school would be the subject of public notices and that there would be a period for further detailed discussions with governors, staff and parents. Copies of the consultative document with covering letters were given to pupils on 24 May 1984, the day before the schools closed for the half-term holidays, to be delivered to their parents. The majority of parents did not receive the document until 4 or 5 June. Public meetings were scheduled to take place on 7 June, and written responses had to be received by the director by 15 June. At its meeting on 5 July, the education committee had before it the director's report (79/1984) on the consultation. The committee noted that the consultation procedure was wholly inadequate in that it failed properly to explain the various proposals or to give the public an adequate opportunity for discussion, and resolved to recommend that the local authority should instigate an investigation into alternative methods of dealing with the problem of falling school rolls, and that there should be no school closures or amalgamations until a report of the investigation was available. The minutes of that meeting were the only documents from the education committee which were before the local authority at its meeting on 12 July. The local authority made proposals at the meeting which involved the closure and amalgamation of four schools, but which differed in material

respects from those on which consultation had taken place. The proposals were published on 20 July for the approval of the Secretary of State purportedly in pursuance of section 12 of the Education Act 1980.

On the applicants' application for judicial review by way of an order of certiorari to quash the local authority's decisions to make the proposals, and a declaration that the decisions and the publication of the proposals were ultra vires, void and of no effect, and that the proposals were not lawfully before the Secretary of State.

*Held,* granting the application, (1) that before exercising an education function a local education authority was obliged under the mandatory procedural requirements of paragraph 7 of Part II of Schedule 1 to the Act of 1944, to consider a report of its education committee, unless the authority specifically decided to dispense with such a report; that failure to comply with the procedural requirements invalidated any subsequent decision of the authority in respect of an education function; that in deciding to release proposals for consultation and to make proposals relating to the closure and amalgamation of schools the local authority in the instant case was exercising education functions, but because the minutes of the education committee meetings did not constitute reports for the purposes of paragraph 7, and because the local authority did not apply its collective mind to the decision to dispense with a report, the authority's decisions to go to consultation and to make proposals were made in breach of the procedural requirements of paragraph 7, and its decisions were accordingly ultra vires and vitiated all that happened thereafter.

*Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* 1948 1 K.B. 223; 45 L.G.R. 635, applied.

*Reg. v. Liverpool City Council, ex parte the Professional Association of Teachers* (1984) 82 L.G.R. 648, followed.

(2) That, on the basis that the decision to consult had been lawfully made, although the applicants had no statutory right to be consulted, nevertheless, having regard in particular to the Department of Education and Science Circular 2/1980 and the exhortations therein to local education authorities to consult with parents before making proposals relating to the closure or amalgamation of schools, they had a legitimate expectation tantamount to a legal right to be properly consulted before proposals were made; that in the present case the content of the consultative document was wholly inadequate and misleading as to the cost of the proposals, the period allowed for consultation was unreasonably short and the authority's decisions made consequent upon the consultation were therefore unlawful and fell to be quashed; and that, furthermore, since the proposals finally made by the authority were materially different from those on which consultation had taken place, the parents of school children in the area were entitled to expect and should have been given a further opportunity to be consulted and the denial of such further consultation was an additional ground for quashing the authority's decision to make the proposals and publish them.

(3) That in arriving at its decision to make proposals the local education authority had neglected to take into account the cost of the closure and amalgamation of the school which was fundamental to its decision and a matter which the local authority was required by law to take into account;

that further, the phasing of the operation was a matter of fundamental importance and something to which the local authority should have applied its mind, preferably with the advice of its education committee; and that since the local authority had failed to take into account those relevant matters, on that ground also its decision must be quashed.

*Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* (*supra*) applied.

APPLICATION for judicial review.

By re-amended notice of application dated 23 April 1985 the applicants, Hugo Gunning, Maureen Parris and Rachel Williams, parents of school children in the London Borough of Brent, sought judicial review of (1) decisions by the local education authority, Brent London Borough Council on 12 July 1984 to propose (*a*) with effect from the end of the summer term 1985 to cease to maintain Sladebrook High School and Willesden High School and from the beginning of the autumn term 1985 to establish a new school, initially using the current premises of the former Willesden and Sladebrook schools but moving in due course to consolidate on the Doyle Gardens site of the current Willesden High School premises; and (*b*) with effect from the end of the summer term 1985 to cease to maintain South Kilburn High School and Brondesbury and Kilburn High School and from the beginning of the autumn term 1985 establish a new school, initially using the current premises of Brondesbury and Kilburn High School and South Kilburn premises but moving in due course to consolidate on the current Brondesbury and Kilburn High School premises. (2) The publication on 20 July 1984 by the local authority of notices in respect of the proposals purportedly pursuant to section 12(1) of the Education Act 1980.

The relief sought was (a) an order of certiorari to quash the decisions of the local authority dated 12 July 1984 and each of them; (b) a declaration (i) that the decisions were ultra vires, void and of no effect; and (ii) that the publication of the proposals on 20 July 1984 was ultra vires, void and of no effect and that the proposals were not lawfully before the Secretary of State for Education and Science; and (c) such further and other relief as might be necessary or appropriate.

The applicants' grounds for relief were, inter alia, that the decisions taken on 12 July 1984 and the publications thereof were ultra vires, void and of no effect for the following reasons: (a) At its meeting on 10 May and 12 July 1984 the local authority had before it from the education committee nothing amounting to a report within the meaning of paragraph 7 of Part II of Schedule 1 to the Education Act 1944, as defined by Forbes J. in *Reg. v. Liverpool City Council, ex parte Professional Association of Teachers* (1984) 82 L.G.R. 648. No consideration was given by the full council of the local authority as to whether or not the matter was urgent.

Furthermore, no reasonable education authority could sensibly have regarded the matters before it as being sufficiently urgent to dispense with such a report. The decision-making process culminating on 12 July 1984 was flawed from the outset. (b) There was no consultation on the published proposals. Furthermore, such consultation as there was on earlier and different proposals was wholly inadequate and required the parents of the schools affected to complete the consultation process and submit written representations over a period of, at most, 10 days. (c) At its meeting on 12 July 1984 the local authority (i) had failed either to consider or lawfully dispense with a report of its education committee; and/or (ii) had failed sufficiently or at all to inform itself in relation to the proposals that it decided upon and the implications of them and in particular the expenditure required on works at Willesden and at Brondesbury and Kilburn Schools; and/or (iii) purported to pass a resolution of which no due notice had been given and which was not lawfully before the local authority. (d) The local authority had failed to exercise its discretion as to the timing of the publication of the proposals under section 12(1) of the Education Act 1980 or to recognise that it had such a discretion. (e) Alternatively, no local education authority, properly having regard to all relevant matters and no others including the fact that the statutory two month period for the lodging of objections to such proposals coincided almost entirely with the school holiday period, could have decided to publish the proposals on 20 July 1984 and ought instead to have delayed the publication to such a date as would have afforded to persons affected by the proposals a reasonable and proper opportunity to consider and respond to them.

The facts are stated in the judgment.

STEPHEN SEDLEY Q.C. and RICHARD ALLFREY for the applicants.

DAVID TURNER-SAMUELS Q.C. and PHILIP ENGLEMAN for the local authority.

*Cur. adv. vult.*

HODGSON J. In this case the applicants seek judicial review of the two decisions of the respondent local authority made on 12 July 1984 and the publication on 20 July 1984 of notices in respect of those decisions. The decisions arrived at by the local authority were to make proposals under section 12 of the Education Act 1980 which, if approved by the Secretary of State, would effectively result in the closure of two schools, Sladebrook High School and South Kilburn High School, and their amalgamation with and accommodation upon the premises of two other schools. The full

details of the proposals are set out in form 86A, as is the relief sought.

The details are:

" 1. (a) With effect from the end of the summer term 1985 to cease to maintain Sladebrook High School and Willesden High School and from the beginning of the autumn term 1985 establish a new school, initially using the current premises of the former Willesden and Sladebrook Schools but moving in due course to consolidate on the Doyle Gardens site of the current Willesden High School premises; (b) with effect from the end of the summer term 1985 to cease to maintain South Kilburn High School and Brondesbury and Kilburn High School and from the beginning of the autumn term 1985 establish a new school, initially using the current premises of Brondesbury and Kilburn High School and South Kilburn premises, but moving in due course to consolidate on the current Brondesbury and Kilburn High School premises. 2. The publication on 20 July 1984 by Brent London Borough Council of notices in respect of the said proposals purportedly pursuant to section 12(1) of the Education Act 1980."

The relief sought is certiorari to quash and two declarations: (1) that the said decisions and each of them were ultra vires, void and of no effect: and (2) that the publication of the said proposals on 20 July 1984 was ultra vires, void and of no effect and that the said proposals were not lawfully before the Secretary of State.

The applicants are all parents of children attending schools affected by the proposals and are all ratepayers in the London Borough of Brent. Mr Gunning is a parent governor of Brondesbury and Kilburn High School and chairman of the Parent Teachers and Friends Association of that school. Mrs Harris is a parent governor of Sladebrook High School and chairwoman of a community nursery which was due to transfer to Sladebrook School in 1985/1986. Mrs Williams is a parent governor at South Kilburn Community School.

The grounds upon which relief is sought are set out in detail and at length. In brief, they amount to allegations of breaches of the requirements of the Education Acts 1944 and 1980, failure to have proper consultation before reaching the decisions and unreasonable behaviour on the grounds set out in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 K.B. 223; 45 L.G.R. 635. There has, it is alleged, been both "procedural impropriety" and "irrationality" of the three category headings set out in the speech of Lord Diplock in *Council of Civil Service Unions v. Minister for Civil Service* [1985] A.C. 374.

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

law at which I have arrived.

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

Section 6 of the Act of 1944 provides:

> "(2) The local administration of the statutory system of public education shall be conducted in accordance with the provisions of Parts II . . ." of Schedule 1.

Paragraph 1 of Part II of Schedule 1 provides for the setting up of education committees by local education authorities. Paragraph 5 provides:

> "Every education committee of a local education authority shall include persons of experience in education and persons acquainted with the educational conditions prevailing in the area for which the committee acts."

Paragraph 6, so far as is material, provides:

> "At least a majority of every education committee of a local education authority shall be members of the authority: . . ."

Clearly, therefore, education committees are autonomous, expert committees containing a mandatory body of expertise. The expert nature of such committees is emphasised by the fact that up to half of the members can be co-opted. In *Reg. v. Liverpool City Council, ex parte the Professional Association of Teachers*, (1984) 82 L.G.R. 648, at p. 654 Forbes J. commented that an education committee was an "important and expert committee" and "one of those very rare committees which does not consist entirely of elected members".

Paragraph 7 of Part II of Schedule 1 is of importance in this case. It reads:

> "Every local education authority shall consider a report from an education committee of the authority before exercising any of their functions with respect to education: Provided that an authority may dispense with such a report if, in their opinion, the matter is urgent . . ."

In that paragraph, the use of the wide word "functions" shows that the legislature intended that education committees should play an important part in all aspects of decision making by a local education authority. Its purpose is clearly to ensure that every local authority which proposes to take a step properly called a function, in its capacity as a local education authority, shall first consider a report of its statutory specialist committee, subject of course to the proviso. The making of a report is a function of the education committee alone and in making it the education committee is acting autonomously. A local education authority cannot call in the report,

alter or rewrite it, although of course it does not need to agree with it. Further, the report which is required to be considered must be one relating to the function which the local education authority is considering exercising. The use of the word "consider" shows that the legislature intended a report to be given full and proper weight. The word used is not "receive".

The question arises whether the procedural requirement as to consideration of a report is mandatory or discretionary. A passage in *de Smith's Judicial Review of Administrative Action,* 4th ed. (1980), p.142, was adopted by Templeman J. in *Coney v. Choyce* [1975] 1 W.L.R. 422, at p. 433. That passage reads:

> "The law relating to the effect of failure to comply with procedural requirements resembles an inextricable tangle of loose ends. Although it would be futile to attempt to unravel or cut all the knots, it is possible to state the main principles of interpretation that the courts have followed and to illustrate their application in a few settings. When Parliament prescribes the manner or form in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done (though in some cases it has been said that there must be 'substantial compliance' with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess the 'importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act'. In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Furthermore, much may depend upon the particular circumstances of the case in hand. Although 'nullification is the natural and usual consequence of disobedience', breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to

be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned."

I have also been referred to *Professor Wade's Administrative Law*, 5th ed. (1982) at pp. 218 and 219.

Mr Sedley emphasises the following features in this case, which he submits point to the procedural requirement in paragraph 7 being mandatory, so rendering a failure to consider a report a "procedural impropriety" within the third of Lord Diplock's categories of grounds for control of administrative action by judicial review. First, local education authorities are not specialist bodies and need have no specialist component, whereas education committees are specially appointed and have a mandatory expert content. The clear purpose, it is submitted, is to protect the public interest in the proper function of the state educational system. Second, the fact that paragraph 7 contains a carefully conditioned power to dispense with a report strongly suggests that barring such dispensation, consideration of a report is intended to be a mandatory procedural requirement. Third, he points to the similarity between the requirement of a report and the categories of due inquiry and consultation which have been held to require mandatory compliance. Fourth, it is submitted that it is difficult to see what countervailing interest would be jeopardised if the court insisted upon due compliance with paragraph 7. Fifth, a decision taken without consideration of a report is irretrievable. A process is set in motion for which no machinery of correction exists.

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

Even if paragraph 7 is not mandatory, it seems to me to be clear that proper consideration of a report is something which, on the principles in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* (*supra*), a local authority must take into account in reaching a decision to exercise a function. If there is no report before a local education authority on a matter upon which it reaches a decision, then, subject to the proviso, the local education authority would be failing to take into account a factor which it ought to take into account. If there is a report, it must be accepted as such and given full consideration as part of the material upon which the local education authority reaches its decision. Put another way a local authority is ordinarily without power to exercise a function as a local education authority unless it receives and considers a report of an education committee on the exercise of that function.

In *Reg. v. Liverpool City Council, ex parte the Professional Association of Teachers* (*supra*) Forbes J. said, at p. 654:

"The matter does not end there, however, because it is quite plain, it seems to me, that the purpose of paragraph 7 of this schedule was to make certain that the education authority did not take any decision before having the views of this important and expert committee in relation to the exercise of any of its functions. Mr Goudie accepts that the appointment of associations to negotiating bodies is one of the functions of a local education authority. So, in deciding whether or not this association was to be accorded negotiating rights, the city council was performing one of the functions of a local education authority. It is quite plain that it cannot do that without first considering a report. There is argument about what a report consists of. Of course, it is very important to decide what a report is. In my view, in the context of this paragraph of this schedule, a report from an education committee should either make some recommendation or should at least, if not making a recommendation, set out the arguments for and against a particular course of action. Otherwise I cannot see how the local education authority are to inform themselves adequately of the views of the education committee before performing one of their functions."

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

Pararaph 39(1) of Part VI of Schedule 12 to the Local Government Act 1972 provides:

"Subject to the provisions of . . . (any enactment in this Act) all questions coming or arising before a local authority shall be decided by a majority of the members of the authority present and voting thereon at a meeting of the authority."

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

Section 12 of the Education Act 1980 replaced the provisions previously contained in section 13 of the Education Act 1944 and provides for the establishment, discontinuation and alteration of schools and the procedures to be adopted by the local education authority. Subsection (1) of section 12, so far as is relevant, provides:

"Where a local authority intend— . . . (*c*) to cease to maintain any county school . . . (*d*) to make any significant change in the character, or significant enlargement of the premises, of a county school . . they shall publish their proposals for that purpose in such manner as may be required by regulations made by the Secretary of State and submit to him a copy of the published

proposals."

It is clear that the adoption of a proposal involves the discharge of a function by a local education authority. Mr Sedley submits that a decision to go to consultation at an early stage is also the discharge of a function. Paragraph 7 of Part II of Schedule 1 to the Act of 1944 therefore applies and, subject to the urgency proviso, a report of an education committee must be considered. I consider later whether a decision to consult and the subsequent consultation are functions.

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

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

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

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

There can be no doubt that, following this decision, the general belief in the borough was that the education organisation of the borough was settled for the next five years or so. Mr Gunning, a parent governor of Brondesbury and Kilburn, understood, along with

the other governors, that this amounted to a guarantee, which is what Mr Grace, the applicants' solicitor, called it, erroneously, in his affidavit. In his report 55/1984, Mr Parsons, the director of education, himself wrote that "the decisions of the education committee" — it was in fact a decision of the local authority — "should have resolved the matter for the foreseeable future".

Considering the delicate political balance in the borough, these expectations were perhaps over optimistic. In December 1983, there was a political change of administration (due, I believe, to one councillor's change of allegiance) and a new chairman of the education committee was appointed. One of his first acts was to direct the newly appointed director of education

> "to prepare a report for the education committee to reconsider the question of the future of education within the borough in the likelihood of further Government action to restrict local government expenditure and in the further light of fresh information about the cost of maintaining the existing secondary school stock."

More importantly, in the opinion of the director, "the downward trend in numbers requiring secondary school places was continuing". Although the director so deposes, I do not accept that this was any new consideration at all. The forecast reduction was common knowledge. The 1983 consultative document began:

> "The years between now and 1995 will see the population of the secondary schools drop to its lowest point between 1988 and 1990 . . ."

Further, in his own report (55/1984) the director wrote: "The downward trend in secondary rolls was identifiable by the late 1970s in Brent".

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

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

schools.

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

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

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

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

I entirely accept that a local education authority is a political organ in which the party system legitimately operates and anything I appear heretofore to have said which might indicate an opposite view is purely historical. I agree entirely that the standard of good administration set by the court should not be such as to be a deterrent to the bona fide and legitimate exercise of an authority's powers and duties. It is quite vital in the exercise of the jurisdiction of this court to keep to the forefront of one's mind that it is only the most extreme examples of bad administration which can successfully attract judicial review of a decision otherwise lawfully arrived at. It follows that the court should not strain to find technical defects which will make the obligations imposed on local authorities

unworkable.

I agree that, in relation to such issues as to whether there has been a report or consultation or whether any other requirement of the law has been complied with, it is, pre-eminently in a matter of local government, the substance of matters not the form which is important. Nor should one, and I do not, forget that councillors are in possession of local knowledge.

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

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

The director prepared his report and it was submitted to the education committee on 2 May. His remit was to take into account the "likelihood" of further Government restrictions on Government spending and "fresh information" as to the cost of maintaining the existing secondary school stock. The first of these two remits seems to have been entirely ignored by the director. The second and much more potentially specified remit relates to "fresh information", which presumably means "fresh" since summer 1983. The previous decision of the local authority was in July 1983. The remit by the new chairman was propounded in December 1983. The only "fresh information" about the cost of maintaining the existing secondary school stock appearing between these two dates, so far as is revealed in the evidence, was

> "the new cause of concern [which] is the report from the director of development [dated September 1983] which identifies significant problems with particular education premises which will require heavy expenditure if they are to remain serviceable for the next 10 to 15 years."

In his report the director added that

> "these are not a matter of normal decorations, nor really related to the low levels of maintenance in recent years. They do however require the committee to consider whether it is most sensible to continue to provide the number of post-eleven plus places it needs spread across all the existing premises."

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

information about the many other schools in the area.

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

In paragraph 12 the director draws the obvious financial conclusions from the factual information as to cost. Paragraph 12.1 reads:

> "Given the new information about the expenditure now seen to be required to put the premises of Neasden and Brondesbury and Kilburn into good order, the committee might wish to take the opportunity to close one or both of these schools, while at the same time accepting a small increase in the number of forms of entry at other schools.
>
> 12.2. If it were decided to close Brondesbury and Kilburn all the pupils could be accommodated by the existing South Kilburn school. Closure of Neasden School could be met by pupils being accommodated at Sladebrook.
>
> 12.3 Such a move could be seen to be advantageous both educationally and financially. Educationally the advantages would arise from the elimination of two small schools, one operating from five sites, and the creation of slightly stronger units elsewhere. The financial benefits would derive from capital receipts if the sites were sold, and, over time, from a reduction in running costs and lower teaching and non-teaching costs; overall the closure would lead to slightly lower unit costs for secondary pupils."

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

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

The options presented to the education committee were carefully considered in the report. They can be most easily followed in the note provided by the applicants. The important things to note about the options presented are, I think, these: (1) of the five options, the first was the maintenance of the status quo and the fourth and fifth were options never seriously considered by anyone. Option c(ii) which was to re-establish 30 as the size of form entry was not seriously considered either; (2) of the remaining options, (b) and (c)

both (not unnaturally in view of the only "cost" information ever available) recommended the closure of Neasden and Brondesbury and Kilburn; (3) option (c), called radical and disruptive in the report, would have added South Kilburn and John Kelly Boys to the list of closures: (4) there was no option offered which involved the closure of Sladebrook; and (5) it was only in the "radical and disruptive" option that South Kilburn, a modern and purpose-built school, which in option (b) was not only to continue to exist but to take in Brondesbury and Kilburn School, appeared as an option for closure.

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

The director's report 55/1984 dealt with the timetable for consultation and decision making. In paragraph 21.2, it was stated:

> "(i) A decision of intent needs to be taken at education committee on 2 May 1984. This could then go to the special council meeting on 10 May 1984."

It is notable that no such decision was in fact taken.

> "(ii) Special meetings of governing bodies and parents meetings would need to be arranged. These could be completed by 15 June. (iii) Consultation with teaching and non-teaching members of schools together with other consultation procedures outlined in the local agreement would need to take place in this period. (iv) A final report containing the results of the consultations and the proposals would need to go to the special education committee on Thursday, 5 July then to a special council meeting on 12 July."

The "local agreement" in (iii) is a reference to an agreement with the Teachers Association, which does not affect this case.

The director was therefore dividing the process into four periods, the last of which dealt with the two dates at which the final report would have to be considered to meet the postulated deadline. At paragraph 27.5 the education committee were asked to respond to three questions:

> "(a) Do they wish to reaffirm their decision of 1983? or (b) do they wish to adopt one of the five lines of action set out in this report either as suggested or amended? or (c) do they wish the director of education to explore other approaches?"

Paragraph 27.6 provided:

> "Should the education committee decide to adopt (b) above action would then follow as detailed in paragraphs 12 and 22."

Paragraphs 22.1 and 22.2, under the heading of

"implementation", read:

> "1. If the education committee adopt either option (b), (c) or (e) a key issue for discussion with both teaching and non-teaching unions will be the method of implementation and an appointment procedure. 2. If the education committee adopt either option (b) or option (c) implementation could be either by simple closure or by merger. Though simple closure might be suitable in the case of option (b) it would not be recommended in the case of options c(i) or c(ii). Closure, though easy to administer, can have traumatic affects on both staff and pupils."

At an early stage, the actual mechanics of closure and amalgamation were being given, and properly given in my judgment, a great importance.

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

The minutes of that meeting are very short, and despite Mr Turner-Samuel's efforts to persuade me to the contrary, they seem to me to be perfectly plain of meaning. Under the heading of "The Future Pattern of Secondary Education in the London Borough of Brent", the minutes record:

> "The committee debated the report from the director of education, No. 55/84 which set out various options for re-organising secondary education in Brent. RESOLVED: that this special education committee instructs the director to prepare a new report after consultation with the Teachers Panel of the Schools J.C.C., to provide options which can ensure a viable comprehensive system of secondary education in Brent and which, subject to the agreement of the council, can be released for consultation keeping to the final dates for the timetable proposed in report 55/84."

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

...I cannot so read it. The reference to "final" dates seems to me to be a quite clear reference to the dates 5 and 12 July in the final paragraph (iv) of the director's report. If all the dates were

considered immoveable, then the adjective "final" would have been quite unnecessary. It is to be noted that of the 10 co-opted members only one, Mr Adams, voted against the motion. It seems to me obvious that what the education committee was doing was deciding to take no decision pending consideration of the new report which would, when prepared, be presented again to the education committee. The reason for mentioning the timetable seems to me obvious, namely, to ensure that the new report was quickly prepared.

It was after that meeting that things, in my judgment, began to go wrong. With commendable expedience, but with scant regard to his remit, the director had his consultation and prepared not a new, but a short additional report, the director's report 2/1984. The Teachers' Panel agreed that the options they thought should be considered were

> "the closure of the present South Kilburn, Brondesbury and Kilburn and Aylestone Schools and the opening of a new community school on the present Aylestone site with a designated maximum intake size of 8 form entry (200)."

It is noticeable that no consideration had been given to the cost of any of these options in the director's report 55/1984, nor was the omission in any way remedied. The only cost information remained that concerning the great cost of retaining Neasden and Brondesbury and Kilburn.

On 4 May 1984 the summons to attend the special council meeting of 10 May was issued. Item 6 read:

> "To receive and consider the report of the special education committee held on 2 May 1984 (to follow)."

In accordance with standing orders, notice of a motion in the name of Mr Anderson was given. Its effect would have been the retention of the status quo.

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

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

Mr Turner-Samuels points to evidence which he says shows that everyone knew that there was urgency about the matter. Whether that be so or not and it is certainly true that the ruling coalition were trying to push closures through before September, there is no suggestion anywhere that the local authority applied its collective mind to the decision whether or not to dispense with a report from the education committee under paragraph 7 of Part II of Schedule 1

to the Education Act 1944.

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

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

Mr Turner-Samuels submits that in coming to the decision to consult and thereafter going through these procedures, the local authority was not exercising functions within the meaning of paragraph 7 of Part II of Schedule 1 to the Act of 1944. He submits that "function" in that paragraph is limited to exercising power or duty or making a statutory proposal; to making a decision which will affect matters finally and, I presume, irreversibly.

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

The first ground upon which the local authority's conduct is attacked is that it decided to consult and subsequently carried out the consultation without considering a report from an education committee and was consequently in breach of paragraph 7 of Part II of Schedule 1 to the Act of 1944 which is cast in mandatory terms and which I have held to be a mandatory requirement. In my judgment that attack succeeds. I hold that the local authority were guilty of grave procedural impropriety in doing what they did.

It is conceded that if I am right in these two conclusions as to the need for a report and the failure to consider one, there being none to consider, then it follows that everything that was done thereafter was ultra vires and must be quashed. If I am wrong then I must go on to consider what happened thereafter because many more attacks are mounted by the applicants.

On the basis that the decision to consult was lawfully made, the next attack made upon the local authority is that the period allowed

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

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

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

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

If this argument is based upon a distinction between a statutory duty to consult and a duty to fulfil a legitimate expectation, it does not appeal to me. I do not think that the requirements differ in the two situations. If it is an argument urged in support of a submission that I should, in the exercise of my discretion, refuse to interfere even though I was convinced that consultation was inadequate, it does not appeal either. In *Port Louis Corporation v. Attorney-General of Mauritius* [1965] A.C. 1111, the Privy Council did not hesitate to lay down the principles upon which the adequacy or

otherwise of a consultation should be judged. That case was concerned with the alterations of boundaries of towns, districts or villages, an exercise plainly comparable with the closure and amalgamation of schools. I need do no more here than refer to the headnote.

> "*Held*, (1) that, since section 73(1) of the Local Government Ordinance, 1962 did not prescribe any set machinery for consultation, the nature and the object of consultation must be related to the circumstances which called for it; that in the situation to which section 73(1) related, a proposal to alter boundaries which must not be made until after consultation with the local authority concerned, the local authority must know what alterations of boundaries were proposed and must be given a reasonable opportunity to state their views or point to problems or difficulties, either orally or in writing, and must be free to say what they thought, but that they were not entitled to demand assurances as to the probable solutions of problems likely to arise from the alterations . . ."

Mr Turner-Samuels puts what I think is much the same argument in a different way relying upon sections 68 and 99 of the Education Act 1944. He submits that so long as a local education authority have done something which amounts to consultation, decision as to its adequacy should be left to the Secretary of State and the exercise of the powers given to him in those two sections. Section 68 gives the Secretary of State powers where local education authorities "have acted or are proposing to act unreasonably with respect to" the exercise of a power or performance of a duty. Section 99 gives the Secretary of State powers where there has been a failure by a local education authority to discharge a duty. He relies upon the decision of the Court of Appeal in *Cumings v. Birkenhead Corporation* [1972] 1 Ch.12; 69 L.G.R. 444. It is not a case I find easy to understand, but I do not think that I need deal with this argument in any greater detail because it is conceded that if there was a legal requirement that there should be consultation and that requirement was not fulfilled, then, in taking a relevant decision, the authority would be acting unlawfully or ultra vires.

I have heard submissions from both counsel as to what amounts to adequate consultation with parents, school governors and other interested parties, when the subject is school closures and amalgamations. Some assistance can be gained from circulars issued by the Department of Education and Science. In Circular 2/1980, one finds, at paragraph 5.1:

> "The Secretary of State regards it as very important that the local education authority should seek the views of local people when planning is still at a formative stage. He therefore expects that appropriate consultations will have taken place with parents, the teaching and other staff and governors of the school or schools

concerned and the teacher associations, before proposals are made under sections 12, 13 or 15. He would also expect such consultations to have taken place within the 12 months immediately before publication of proposals."

In March 1984 a circular in draft form was issued for consultation. This became Circular 4/1984. In paragraph 10, one finds the following passage:

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

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

Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at 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, to which I shall return, that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.

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

After a brief history, although one occupying a fifth of the entire document, there are set out in paragraph 2 what are said to be the reasons for reconsideration. The first is a restatement of what has gone before. It reads:

"Apart from the likelihood of further Government action to restrict local government expenditure, there was certain new

information about the cost of maintaining the existing secondary school stock."

Those consulted were given no inkling at all as to what that new information was. We now know. It was nothing more than the estimate as to the high cost involved in the adoption of any proposal which included the retention of the school buildings at Neasden and Brondesbury and Kilburn. Those consulted were denied even this tiny piece of information as to cost. Worse, they were in my view misled into believing that, in arriving at the specific proposal, the local authority had had before it information of that sort as to the whole of the school stock.

Having dealt briefly with the matter of falling school rolls, the document plunges straight into the options which the local authority had at their meeting decided to canvass. The one thing that emerges with extreme clarity is that the closure of the school premises at Sladebrook was not on the cards. Had those consulted known of the cost situation at Brondesbury and Kilburn, it would have been equally obviously assumed that retention of those buildings was not on the cards either.

Having dealt with the mechanics of consultation and having given a brief glance at the tertiary system, the option of maintaining the status quo and the future use of premises no longer required for schools, the document deals with the "Timetable for Action" in this way:

> "The result of the consultation exercise will be the subject of a report to the special meeting of the education committee on 5 July 1984, whose recommendations will be submitted to a special meeting of the council on 12 July 1984. Decisions resulting in a proposal to close, amalgamate or reorganise any of the secondary schools will be the subject of public notices, which are required in accordance with the Education Act 1980. There will be a period for further detailed conversations with governors, teaching and non-teaching staff and parents, and objections may be addressed to the Secretary of State for Education and Science with whom rests the final decisions relating to any proposed reorganisation involving our schools. If the Secretary of State approves any proposals for changes, there would then be very detailed discussions with governors, staff and parents on their implementation."

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

In my judgment that document, on the most favourable criteria to

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

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

In the director's report 77/1984 to the education committee for its meeting on 5 July, the director wrote:

> "1.3.4. The objections to these proposals of the council which pointed to change have two main components: (1) An expressed belief that the consultation was totally inadequate because of the short time set aside for it, because of the nature of the exercise and because of the brevity of the consultation document. (2) A range of specific comments/objections which I itemise in the following paragraphs."

The dissemination of the gold document was first forecast in a bulletin on 17 May 1984. Under cover of a letter dated 23 May sufficient copies for all parents were sent to all schools. The first paragraph of that letter read:

> "I have sent you sufficient copies of the above documents for all parents. I shall be grateful if you will ensure that one copy, together with the correction slip, is given to each pupil/student to take home before school breaks for the mid-term holiday. I regret the shortness of the time which you are being given for this exercise, but the time scale set by the council makes it unavoidable."

24 May was the day before half term, and it was unrealistic of the director to expect the "pigeon post" method of distribution to be effective before half term. The vast majority of parents who were not school governors did not in fact receive the document until 4 or 5 June. The six public meetings were scheduled for and took place on 7 June. Written responses had to be received by the director by 15 June.

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

In *Lee v. Department of Education and Science* (1967) 66 L.G.R. 211, where the length of time to be given to governors by the Minister under section 17(5) of the Education Act 1944 was in issue, Donaldson J. held that anything less than one month in term time would be unreasonably short. The matter which had to be considered in that case was very much simpler and came within a far narrower compass than was here the case, where fundamental changes in the whole structure of education in Brent were in issue.

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

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

In support of this at first sight ambitious submission he relies upon the decision of the Privy Council in *Calvin v. Carr* [1980] A.C. 574. That was the case where it was held that unfairness displayed at a hearing of a domestic tribunal could be cured by fair appellate proceedings. The Privy Council distinguished the judgment of Megarry J. in *Leary v. National Union of Vehicle Builders* [1971] Ch. 34.

I do not myself think that one can apply to purely administrative procedures of the sort with which we are concerned principles of fairness developed in the quasi-judicial field of domestic disciplinary proceedings. But, if that is wrong, given the choice, I prefer the reasoning of Megarry J. In *Leary,* Megarry J. laid down what he called a general rule. He said (*supra*), at p. 49:

> "If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? . . . . As a general rule . . . I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body."

The Privy Council in *Calvin v. Carr* (*supra*) at p. 593 held that that was too broadly stated and that there were intermediate cases in which it was for the court

> "in the light of the agreements made, and in addition having regard to the course of proceedings, to decide whether at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they joined the association."

The reference to a "fair result" and "fair methods" seems to me to be contrary to fundamental principles of English administrative law. It is not the fairness or reasonableness of the result which can be attacked (save in cases of irrationality), but the legality of the

proceedings. Further, as Mr Sedley points out, such a principle would shut out the control of administrative action by the courts in granting judicial review by way of prohibition because it could be contended that the court should hold its hand until the appeal procedures had been completed.

In my judgment, the correct formulation is that of Megarry J., (*supra*), which allows only for rare exceptions, such as the rustication of stripping undergraduates. But, in any event, in the circumstances of this case, the statutory procedures are themselves fatally flawed by the inadequacies of the previous consultation.

Following the consultation the director wrote his director's report 79/1984 upon it for the education committee. There is no doubt that most of those who made any comments at all, whether at the public meetings or otherwise, were opposed to any closure. It is equally clear that there was a generally expressed belief that the consultation was totally inadequate because of the short time set aside for it, because of the nature of the exercise and because of the brevity of the consultation document. There were also a range of specific comments or objections which the director itemises. There was not a great deal of response to the specific options in the paper recorded, which, as the paper contains no mention of any reasoning behind them, is perhaps not wholly surprising but it is interesting to note one specific recommendation which emerged in respect of one option:

> "concern that the Aylestone premises could not sensibly accommodate the pupils at present going to Aylestone, Brondesbury and Kilburn and South Kilburn and/or as well as the community school aspect."

The director's own views were effectively unchanged as a result of consultation.

On 5 July the education committee met. They had before them the director's report on the consultation. It also had before it a motion in the name of Councillor Mrs Powell. It was in these terms:

> "Following consultation on the reorganisation of secondary education in Brent and taking into account the results thereof, we resolve to publish the following proposals: (i) that we cease to maintain Brondesbury and Kilburn High School and South Kilburn High School; (ii) that we establish and maintain a new six-form entry school, initially to operate on the sites of the existing schools in (i) above and as soon as practicable to be transferred on to the site of the existing Brondesbury and Kilburn High School; (iii) that we cease to maintain Willesden High School and Sladebrook High School; (iv) that we establish and maintain a new six form entry school, initially to operate on the sites of the existing schools in (iii) above as soon as practicable to be transferred on to the Doyle Gardens (part of the) site of the existing Willesden High School; (v) that the staff for the new

schools in (ii) and (iv) above should be drawn as far as possible from the existing staff of the schools respectively in (i) and (iii) above; (vi) that the size of form entry be reaffirmed as 25; (vii) that the foregoing proposals be given effect from September 1985; and (viii) that the officers report in due course on the future of any buildings becoming surplus as a result of the above."

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

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

A number of votes were taken and, in the final result, a substantive motion was evolved which was carried by 17 votes to 12, with two abstentions. Of the co-opted members, six voted for the motion, two (presumably the nominees of the ruling parties) voted against and one abstained. That motion was in these terms:

"Following consultation on the reorganisation of secondary education in Brent, and taking into account the results thereof, we resolve to publish the following proposals: (i) that the size of form entry be reaffirmed as 25; (ii) that we agree that the main concern of this council must be the quality of education; (iii) that we note with concern that the consultation procedure conducted by this council over school closure plans was totally inadequate. It failed to properly explain all options and did not give parents and the community adequate opportunity for discussion; (iv) that this committee recommends to the council to instigate an investigation into the alternative methods of tackling the problem of falling rolls, with a view to producing a long term policy on the structure of education in Brent, and that there be no school closures or amalgamations until the investigation reports."

The meeting lasted for nearly six hours and there must have been a great deal of debate, expression of opinion and comment upon the proposals, particularly, one would expect, from the co-opted "expert" members. The scheme of the legislation plainly, I think,

contemplates that after such a meeting the education committee would report to the local education authority dealing not only with the eventual decision but also with the pros and cons of the other proposals considered.

A week later at the meeting of the local authority on 12 July what happened was as follows:

> "The council received the minutes of the special meeting of the education committee held on 5 July which were presented by the chairman, Councillor Steel. In presenting the report Councillor Steel moved the following amendments to the decisions of the committee which were seconded by Councillor Mrs Powell."

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

Paragraph 7 of Part II of Schedule 1 to the Act of 1944 plainly requires that there should be a report from an education committee. An education committee is an autonomous body and it must, I think, make a decision to report before anything emanating from it becomes a report. Clearly, no decision of that sort was made on 5 July. It is of course perfectly true that a report can take many forms and a decision to adopt and forward as its report the report, say, of the director of education might amount to a report, but that is not what happened in this case.

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

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

Mr Sedley submitted that what happened at and before the meeting was procedurally wrong and that the statutory provisions contained in Schedule 12 to the Local Government Act 1972 and the local authority's own standing orders made under paragraph 42 of the Schedule and subject to the provisions of the Act, had not been complied with. At the hearing that submission and the local authority's response to it came within a fairly narrow compass. However, yesterday, I was asked to hear further argument from Mr Turner-Samuels based upon standing orders to which I had not previously been referred and detailed and complicated consideration was given by both counsel to the procedural requirements of the

standing orders. I do not, I think, need to burden this judgment with a detailed attempt to construe the local authority's standing orders within their statutory framework. It would be a lengthy and detailed exercise and one in which I might easily get some detail wrong or perhaps make more fundamental errors. In the event, because of the other findings I have already made and am about to make, a decision on this point would in no way affect the result of this case and both counsel are content that I should not embark upon the exercise. If there is an appeal from my decision, then it is accepted that it will be open to the applicants to take any points on the procedure followed at the meeting of 12 July which they may wish to do.

I turn then to consider the question whether, in arriving at its decision to make proposals, the local authority neglected to take into account matters which they ought to have taken into account. It is submitted that there are two such matters, cost and the phasing of the reorganisation.

In *Reg. v. Hillingdon Health Authority, ex parte Goodwin* [1984] I.C.R. 800, Woolf J., citing a passage from the judgment of Cook J. in a New Zealand case, *CREEDNZ Inc. v. Governor-General* [1981] 1 N.Z.L.R. 172, pointed to a distinction between relevant matters which an authority is entitled to take into account and those which it is required to take into account.

Clearly, both the matters I have mentioned were relevant to the proposals which the authority decided to publish. The question arises therefore whether, in Woolf J.'s words (*supra*) at p. 808E, they were "so fundamental that it was quite wrong, as a matter of law, for the authority not to have regard to" them.

So far as the cost of the proposals is concerned, I am satisfied that, for a number of reasons, cost was fundamental to the decision and was a matter which the authority was required by law to take into account. My reasons for reaching this conclusion are these. First, that the cost of proposals is actually spelt into the statutory framework. Section 76 of the Act of 1944 provides that authorities:

> "shall have regard to the general principles that, so far as is compatible with . . . the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents."

By section 6(3)(*a*) of the Act of 1980 the duty of an authority in respect of parental preferences does not apply "if compliance with the preference would prejudice . . . the efficient use of resources"; . . . Second, as I have sought to show, the authority's own chosen ground of consultation was financial. The leader of council himself deposed:

> "our first political objective was to ensure that the previous administration's proposals for an increase in rate did not take effect. We were able to secure this primary objective by 7 March 1984 when the council meeting of that date resolved that there

would be no change to the rate. Thereafter we pursued the issue of school closures as a matter of priority and urgency."

Third, I think that it is really self-evident that one of the major concerns was the saving of cost.

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

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

It may well be that there will be no other practical way in which transfers can be achieved and it is certainly not for me to express any opinion one way or the other, but it does seem to me that the phasing of the operation was a matter of fundamental importance and something to which the local authority should have applied its mind preferably with the advice of its education committee. It did not. I hold, therefore, that on these two *Wednesbury* grounds also, the local authority's decision must be quashed.

A further attack is made by Mr Sedley upon the decision. It is that the proposals decided upon by the local authority were so radically different from the specific proposals adumbrated in the gold paper that, even had consultation on the gold paper been adequate, it was still necessary to have further consultation on the new proposals.

The local authority chose to consult both on broad principles and

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

It will be cold comfort to the authority that, in my judgment, the remaining two criticisms which the applicants make fail. The first is that the local authority failed to exercise their discretion as to the timing of the publication of their proposals or to recognise that they had such a discretion. The publication of the proposals on 20 July was designed to ensure that there was compliance with Department of Education and Science Circulars and the timetable, so rigidly adhered to, was decided upon after the director of education had consulted with the Department. The relevant parts of Circulars 2/1981 and the draft Circular of 1984 which became 4/1984 are, in the first: "he", that is the Secretary of State,

> "will also be prepared to approve proposals which have been put forward as the result of a timetable somewhat shorter than that recommended in Circular 2/80, provided he is satisfied, among other things, that consultation with those most concerned has been adequate and that early implementation is compatible with the interest of the pupils concerned."

Second,

> "The Secretary of State's policy on timing was modified in Circular 2/81. This stated in paragraph 22 that he is prepared to approve proposals on a somewhat shorter timetable than that recommended in Circular 2/80 provided he is satisfied, among other things, that consultation with those most concerned has been adequate and that early implementation is compatible with the interests of the pupils concerned. Put at its simplest, the Secretary of State's policy on the timing of proposals for school closures is that there should be at least one term between the date of the decision and the date of closure. In practice, and in view of the current volume of proposals, this means that proposals to discontinue a school at the end of the school year should be published no later than early autumn for a decision by the following Easter. For proposals involving two or more schools a longer period is, if practicable, desirable and may be essential if considerable preparatory work is required."

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

A final point is taken based on section 12(2) of the Act of 1980. It is submitted that the proposals which under section 12(1) are the proposals of the local education authority did not include particulars of the time or times at which it was intended to implement them. It is submitted that implementation means the phasing provisions contained not in the proposals but in the explanatory section added by the officers of the authority. Whilst it would no doubt have come as a surprise to the pupils and perhaps the teachers and parents as well at Sladebrook and South Kilburn to be told in September 1985 that they were now at school at Willesden High School and Brondesbury and Kilburn High School, that would in fact have been the result had the proposal been implemented. Physical transfer, although something which, in my opinion, as I have found, ought to have been considered by the local education authority, was not something which was required to figure in the actual proposal of the authority.

The final, somewhat bizarre, thing that happened in this unhappy saga was this. The next meeting of the education committee took place in October. At that meeting, the education committee was acting under powers delegated to it by the local authority and to it fell the task of sending objections received to the Secretary of State. In doing so, it made observations of the most critical kind, the terms of which are perhaps worth quoting as a tailpiece.

> "The decision of the council on 12 July 1984 was faulty for the following reasons: (a) The proposals adopted had not at any time been recommended by either the director of education or the education committee. (b) The proposals should not even have been considered by the council unless it had also considered at the same time the financial expenditure necessary to put Willesden and Brondesbury and Kilburn into proper structural and decorative order, as the director of education specifically showed to be necessary in his reports to this committee. (c) The council has not considered a thorough examination of its post 16 education to determine whether a tertiary structure might best meet the needs of pupils and the budgetary restraint on the council.
>
> The period for objection to the proposals fell almost entirely over the summer period. Moreover, as a result of the way the

decision was made, no one had sufficient information to make properly reasoned objections or a full assessment of their implications.

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

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

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

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

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

Some part of the report does consist of expressions of opinion. I have not found them helpful because they appear to me to be, in

general terms, opinions as to the law which are matters for me. I think that it will be extremely rare that an expression of opinion as to whether or not there has been maladministration will be relevant and admissible, but I am not prepared to lay down any general rule; nor am I prepared to say that no such situation could ever arise.

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

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