



Michaelmas Term  
[2014] UKSC 56  
*On appeal from: UKSC 2013/0116*

## **JUDGMENT**

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

**v**

**London Borough of Haringey  
(Respondent)**

**before**

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

**JUDGMENT GIVEN ON**

**29 October 2014**

**Heard on 19 June 2014**

*Appellant*  
Ian Wise QC  
Jamie Burton  
Samuel Jacobs  
(Instructed by Irwin  
Mitchell LLP)

*Respondent*  
Clive Sheldon QC  
Heather Emmerson  
  
(Instructed by Legal  
Services, The London  
Borough of Haringey)

## **LORD WILSON (with whom Lord Kerr agrees)**

### *Introduction*

1. When Parliament requires a local authority to consult interested persons before making a decision which would potentially affect all of its inhabitants, what are the ingredients of the requisite consultation?
2. Until 1 April 2013 there was a scheme in England for the payment of Council Tax Benefit (“CTB”) for the relief, in whole or in part, of certain persons from their annual obligation to pay council tax. The scheme was made by the Department for Work and Pensions and the duty of local authorities was only to operate it. From 1 April 2013, however, local authorities were required to operate a new scheme, entitled a Council Tax Reduction Scheme (“CTRS”), which they were required to have made for themselves. Before making a CTRS, local authorities were required to consult interested persons on a draft of it. Between August and November 2012 the London Borough of Haringey (“Haringey”) purported to consult interested persons on its draft CTRS, following which it made the scheme in substantial accordance with its draft.
3. In these proceedings two single mothers, who were resident in Haringey and who until 1 April 2013 had been in receipt of what I will describe as full CTB (by which I mean at a level which had relieved them entirely of their obligation to pay council tax), applied for judicial review of the lawfulness of the consultation which Haringey had purported to conduct in relation to its draft CTRS. The women asked the court to quash the decision which on 17 January 2013 Haringey had made in the light of the consultation; and my reference in paragraph 8 below to the “default scheme” will explain why the quashing of the decision would have been very much in their interests. On 7 February 2013 Underhill J dismissed their application: [2013] EWHC 252 (Admin); [2013] ACD 62. The judge had allowed them to be anonymised as “M” and “S”. The latter appealed to the Court of Appeal, which ruled that she was not entitled to anonymity and should be referred to by name, Ms Stirling. On 12 February 2013, with astonishing alacrity referable no doubt to the deadline of 1 April 2013, the court heard the appeal. On 22 February 2013, by a judgment of Sullivan LJ with which Sir Terence Etherton, the Chancellor of the High Court, agreed, and by a judgment of Pitchford LJ in which he disagreed with one aspect of the reasoning of Sullivan LJ but concurred in the proposed result, the court dismissed her appeal: [2013] EWCA Civ 116; [2013] PTSR 1285. Ms Stirling appealed to this court

against the dismissal of her appeal but unfortunately she became ill and unable to give instructions, with the result that, by consent, the court substituted Ms Moseley as the appellant; and since then, sadly, Ms Stirling has died. Like the other two women, Ms Moseley is a single mother, resident in Haringey, who until 1 April 2013 had been in receipt of full CTB.

### *The Surrounding Facts*

4. For the period prior to 1 April 2013 a means-tested scheme set by central government identified those entitled to CTB. Local authorities were obliged to apply it to residents in their area. Although reference is conveniently made to payment of CTB, it was not, in the usual sense of that word, paid to those entitled to it. Instead it provided them with a credit, in whole or in part, against what they would otherwise owe to their local authority in respect of council tax. Central government reimbursed local authorities, pound for pound, for what they forewent as a result of being obliged to grant the benefit.
5. In the final year in which it was payable, namely the year to 1 April 2013, about 36,000 households in Haringey, namely about one third of all of its households, were entitled to CTB. Of those, 25,560 were entitled to full CTB.
6. In its Spending Review back in 2010 central government announced that, as part of its programme for reduction of the national deficit, it would from April 2013 transfer to each local authority the responsibility for making, as well as for operating, a scheme for providing relief from council tax; and that in 2013-2014 the reimbursement by central government to each local authority in respect of whatever it provided by way of relief from council tax would be fixed at about 90% of the amount which the government would have paid to it in that regard in 2012-2013.
7. Section 33(1)(e) of the Welfare Reform Act 2012 duly abolished CTB with effect from 1 April 2013. Section 13(A)(2) of the Local Government Finance Act 1992 (“the 1992 Act”), as substituted by section 10(1) of the Local Government Finance Act 2012 (“the 2012 Act”), duly obliged each local authority to make a CTRS for those whom it considered to be in financial need.
8. Schedule 1A to the 1992 Act [“the schedule”], which was added by Paragraph 1 of Schedule 4(1) to the 2012 Act and given effect by section 13A(3) of that Act, made provisions about a CTRS. Paragraph 2 of the schedule, together with regulations made under subparagraph 8 of it, specified requirements for

a scheme, including that pensioners who would have been entitled to CTB should be granted relief at the same level. Paragraph 3 of the schedule, entitled “Preparation of a scheme”, provided:

- “(1) Before making a scheme, the authority must (in the following order)-
- (a) consult any major precepting authority which has power to issue a precept to it,
  - (b) publish a draft scheme in such manner as it thinks fit, and
  - (c) consult such other persons as it considers are likely to have an interest in the operation of the scheme.
- (2) ...
- (3) Having made a scheme, the authority must publish it in such manner as the authority thinks fit.
- (4) The Secretary of State may make regulations about the procedure for preparing a scheme.”

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

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

eligible for relief. In his introduction to the report Councillor Goldberg, Haringey's Cabinet Member for Finance, wrote:

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

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

10. On 10 July 2012 Haringey's Cabinet approved the recommendation in Mr Ellicott's report. Haringey thereupon proceeded to prepare its draft scheme. Pursuant to paragraph 3(1)(a) of the schedule, it consulted the Greater London Authority, which has power to issue a precept to local authorities in London for a contribution to the cost of funding the Metropolitan Police and fire and transport services. Then, on 29 August 2012, Haringey published its draft scheme pursuant to paragraph 3(1)(b) and purported to embark on the consultation required of it by paragraph 3(1)(c).
11. In that the terms by which it conducted its consultation are at the centre of this appeal, Haringey's consultation exercise deserves separate consideration in the next section of this judgment.
12. Haringey's consultation exercise was expressed to continue until 19 November 2012. Meanwhile, however, on 16 October 2012 a government minister announced the introduction of a “Transitional Grant Scheme”

("TGS"). The scheme, set out in a circular published two days later, was that central government would make a grant, not likely to be extended beyond 2013-2014, to each local authority which introduced a CTRS for that year in accordance with three criteria. Of these the most important was that those currently in receipt of full CTB should pay no more than 8.5% of their council tax liability. An annex to the circular revealed that the grant referable to Haringey would be £706,021. Haringey concluded, however, that the grant would not cover the difference between a recovery from those currently in receipt of full CTB of 8.5% of their liability, on the one hand, and of 18-22% of their liability, on the other; and that the scheme would therefore leave Haringey with an unacceptable net shortfall in its receipts of council tax. So it resolved not to amend its draft CTRS so as to comply with the TGS criteria and not to bring the TGS to the attention of those likely to be interested in the operation of its CTRS by means of any enlarged consultation exercise.

13. Haringey's full Council met on 17 January 2013. Before it was a report substantially drafted by Mr Ellicott. Annexed to the report was an elaborate analysis of the responses to Haringey's consultation exercise, including numerous quotations from them, often in vivid language. It was suggested in the report:
  - (a) that the effect of the default CTRS would be to leave Haringey with a shortfall of £3.846m;
  - (b) that adoption of a CTRS which complied with the TGS criteria would leave Haringey with a net shortfall of £1.489m;
  - (c) that in the light, among other things, of responses to the consultation exercise, it would be appropriate for the disabled to join pensioners as the two groups exempt from reduction in support below current CTB levels; and
  - (d) that, in the light of (c) above and of clarification by central government of the precise amount to be paid by it in respect of council tax reduction in 2013-2014, Haringey's CTRS should provide for a reduction of relief below current CTB levels of 19.8% across the board other than for those two groups; and that, subject to difficulties of collection, such a reduction would render Haringey not out of pocket as a result of the move from CTB to a CTRS.
14. The full Council adopted the suggestion in the report. Thus it was that, prior to 31 January 2013, Haringey made a CTRS which provided for a reduction of relief in 2013-14, below the 2012-2013 CTB level, of 19.8% other than for pensioners and the disabled. Its CTRS came into operation on 1 April 2013 (and has not been revised for 2014-2015).

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

### *The Consultation*

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

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

**This means that the introduction of a local Council Tax Reduction Scheme in Haringey will directly affect the**

**assistance provided to anyone below pensionable age that currently involves council tax benefit.**

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

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

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

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

“Early estimates suggest that the cut will leave Haringey with an actual shortfall in funding of around 20%. *This means* Haringey claimants will lose on average approximately £1 in

every £5 of support they currently receive in [CTB]. ” [Italics supplied]

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

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

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

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

In the consultation document there was no reference to options for meeting the shortfall other than by a reduction in relief from council tax, namely to the options of raising council tax or of reducing the funding of Haringey’s services or of applying its deployable reserves of capital (which amounted to £76.8m in March 2012); and it follows that there was no explanation of why Haringey was not proposing to adopt any of those three options.

20. In the document Haringey thereupon set out its proposals. It stated its belief that the fairest way in which to apply the government cut was to reduce all relief to working age claimants by about 20% from CTB levels. It added:

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

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

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

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

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

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

A reader who answered “Yes” to the fifth question was then offered a box in which to identify the groups whom he or she considered should be protected. The second, third and fourth questions related to other, less significant, departures from CTB rules proposed in Haringey's draft CTRS. Following the five main questions there was a second box, above which Haringey wrote:

“Please use the space below to make any other comments about our draft Council Tax Reduction Scheme.”

22. In response to its consultation exercise Haringey received 1251 completed questionnaires and 36 letters and emails. Of those who completed the questionnaire, 43% agreed or strongly agreed with the first question and 44% disagreed or strongly disagreed with it. Suggestions were made in at least ten of the responses that Haringey should meet the shortfall by cutting services

and in at least 11 of them that it should meet it by increasing council tax. One of the 36 letters and emails was an email sent to Haringey by The Reverend Paul Nicolson, a prominent anti-poverty campaigner, on 29 October 2012. He wrote:

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

On 6 November 2012 Haringey responded:

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

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

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

On 10 December 2012, following the end of the consultation, The Rev. Nicolson wrote a letter of protest to the Leader of Haringey Council, which ended as follows:

“I am shocked that no alternative to hitting the fragile incomes of the poorest residents of Haringey ... was included in the recent consultation.”

23. A public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation; such was the source, for example, of its duty to consult the residents of a care home for the elderly before deciding whether to close it in *R v Devon County Council, ex parte Baker* [1995] 1 All ER 73. But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted.
  
24. Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In *R (Osborn) v Parole Board* [2013] UKSC 61, [2013] 3 WLR 1020, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement "is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested" (para 67). Second, it avoids "the sense of injustice which the person who is the subject of the decision will otherwise feel" (para 68). Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not "Yes or no, should we close this particular care home, this particular school etc?" It was "Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our Borough, should we make one in the terms which we here propose?"
  
25. In *R v Brent London Borough Council, ex p Gunning*, (1985) 84 LGR 168 Hodgson J quashed Brent's decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. He said at p 189:

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

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

“It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.”

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

26. Two further general points emerge from the authorities. First, the degree of specificity with which, in fairness, the public authority should conduct its consultation exercise may be influenced by the identity of those whom it is consulting. Thus, for example, local authorities who were consulted about the government’s proposed designation of Stevenage as a “new town” (*Fletcher v Minister of Town and Country Planning* [1947] 2 All ER 496 at p 501) would be likely to be able to respond satisfactorily to a presentation of less specificity than would members of the public, particularly perhaps the economically disadvantaged. Second, in the words of Simon Brown LJ in the *Baker* case, at p 91, “the demands of fairness are likely to be somewhat higher

when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit”.

27. Sometimes, particularly when statute does not limit the subject of the requisite consultation to the preferred option, fairness will require that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options. For example, in *R (Medway Council and others) v Secretary of State for Transport* [2002] EWHC 2516 (Admin), [2003] JPL 583, the court held that, in consulting about an increase in airport capacity in South East England, the government had acted unlawfully in consulting upon possible development only at Heathrow, Stansted and the Thames estuary and not also at Gatwick; and see also *R (Montpeliers and Trevors Association) v Westminster City Council* [2005] EWHC 16 (Admin), [2006] LGR 304, at para 29.
  
28. But, even when the subject of the requisite consultation is limited to the preferred option, fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options. In *Nichol v Gateshead Metropolitan Borough Council* (1988) 87 LGR 435 Gateshead, confronted by a falling birth rate and therefore an inability to sustain a viable sixth form in all its secondary schools, decided to set up sixth form colleges instead. Local parents failed to establish that Gateshead’s prior consultation had been unlawful. The Court of Appeal held that Gateshead had made clear what the other options were: see pp 455, 456 and 462. In the *Royal Brompton* case, cited above, the defendant, an advisory body, was minded to advise that only two London hospitals should provide paediatric cardiac surgical services, namely Guys and Great Ormond Street. In the Court of Appeal the Royal Brompton Hospital failed to establish that the defendant’s exercise in consultation upon its prospective advice was unlawful. In its judgment delivered by Arden LJ, the court, at para 10, cited the *Gateshead* case as authority for the proposition that “a decision-maker may properly decide to present his preferred options in the consultation document, provided it is clear what the other options are”. It held, at para 95, that the defendant had made clear to those consulted that they were at liberty to press the case for the Royal Brompton.

#### *Application of the law to the facts*

29. Paragraph 3(1)(c) of the schedule imposed on Haringey the requirement to consult. The requirement was to consult “such other persons as it considers are likely to have an interest in the operation of the scheme”. So the subject of the consultation was Haringey’s preferred scheme and not any other discarded scheme. It is, however, at this point in the analysis that the division

of opinion arose in the Court of Appeal. Sullivan LJ, with whom Sir Terence Etherton agreed, concluded, at para 18, that:

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

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

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

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

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

“We could decide to provide support at the same level as Council Tax Benefit, but this would mean

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

...

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

Part of Birmingham's first question was:

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

Birmingham's presentation was fair.

31. Underhill J and Pitchford LJ nevertheless proceeded to conclude, as did Sullivan LJ and Sir Terence Etherton on the assumption that they were wrong to discern an absence of need to refer to other options, that Haringey's consultation exercise had been lawful because the other options would have been reasonably obvious to those consulted. It is clear that no conclusion to that effect can be drawn from the fact that, from the 36,000 households to which a hard copy of the consultation document was delivered, there were at least ten responses that services should be cut and at least 11 responses that council tax should be increased. On the contrary the apparently infinitesimal number of such responses arguably runs the other way. Assuming, however, that Underhill J and the Court of Appeal were entitled to conclude that the other options would have been reasonably obvious to those consulted, two matters arise. The first is to question whether it would also have been reasonably obvious to them why Haringey was minded to reject the other options. I speak as one who, even after a survey of the evidence filed by Haringey in these proceedings, remains unclear why it was minded to reject the other options. Perhaps the driver of its approach was political. At all events I cannot imagine that an affirmative answer can be given to that question. The second matter is the need to link the assumed knowledge of those consulted with the terms of Haringey's presentation to them in the consultation document and the covering letter. With respect to them,

Underhill J and the Court of Appeal gave insufficient attention to the terms both of the document and of the letter, which, as I have demonstrated in paras 17 to 21 above, represented, as being an accomplished fact, that the shortfall in government funding would be met by a reduction in council tax support and that the only question was how, within that parameter, the burden should be distributed. This limited approach to the relevant question was entirely consistent with Mr Ellicott's report in July 2012 (see para 9 above) and, Haringey's response dated 6 November 2012 to The Rev. Nicolson (see para 22 above). Haringey's message to those consulted was therefore that other options were irrelevant and in such circumstances I cannot agree that their assumed knowledge of them saves Haringey's consultation exercise from a verdict that it was unfair and therefore unlawful.

32. A separate ground of Ms Moseley's appeal relates to the TGS. The contention, rejected by Underhill J and the Court of Appeal, is that, following the announcement of the TGS on 16 October 2012, Haringey, even though not minded to propose a scheme in accordance with it, acted unlawfully in failing to enlarge its consultation exercise so as to refer to it. But adoption of a scheme in accordance with the TGS would have left Haringey with a net shortfall in its receipts of council tax and have therefore required its absorption in other ways. Granted that reference should in any event have been made to other ways in Haringey's consultation exercise, the TGS did not add any substantially different dimension to the relevant possibilities. In the light also of the practical consideration that the announcement of the TGS was made on a date when Haringey's consultation exercise was less than five weeks short of completion, I also consider that it was not unlawful for Haringey to fail to refer to the TGS. In its argument on this ground, however, Haringey makes an illuminating concession, namely that, had it known of the TGS when it commenced its consultation exercise, it would have referred to it. The need for brief reference to other discarded options which would have required absorption of the shortfall in ways other than by reduction of council tax support is indeed the basis of my earlier conclusion.
33. In addition to the declaration to which in my view she is entitled, Ms Moseley aspires, albeit with little apparent enthusiasm, to persuade the court to order Haringey to undertake a fresh consultation exercise, in accordance with the terms of its judgments, in relation to its CTRS for the forthcoming year 2015-2016. Paragraph 5(5) of the schedule requires it to comply with paragraph 3, including therefore to undertake the consultation exercise mandated by paragraph 3(1)(c), only if it is minded to revise its CTRS. It is unclear whether it is so minded but, if so, no doubt it will undertake its exercise in accordance with the terms of this court's judgments. The proposed mandatory order would therefore have practical effect only in the event that Haringey was not minded to revise its CTRS. My conclusion is that it would not be

proportionate to order Haringey to undertake a fresh consultation exercise in relation to a CTRS which will have been in operation for two years and which it is not minded to revise.

## **LORD REED**

34. I am generally in agreement with Lord Wilson, but would prefer to express my analysis of the relevant law in a way which lays less emphasis upon the common law duty to act fairly, and more upon the statutory context and purpose of the particular duty of consultation with which we are concerned.
35. The common law imposes a general duty of procedural fairness upon public authorities exercising a wide range of functions which affect the interests of individuals, but the content of that duty varies almost infinitely depending upon the circumstances. There is however no general common law duty to consult persons who may be affected by a measure before it is adopted. The reasons for the absence of such a duty were explained by Sedley LJ in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139; [2008] ACD 20, paras 43-47. A duty of consultation will however exist in circumstances where there is a legitimate expectation of such consultation, usually arising from an interest which is held to be sufficient to found such an expectation, or from some promise or practice of consultation. The general approach of the common law is illustrated by the cases of *R v Devon County Council, Ex p Baker* [1995] 1 All ER 73 and *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, cited by Lord Wilson, with which the *BAPIO* case might be contrasted.
36. This case is not concerned with a situation of that kind. It is concerned with a statutory duty of consultation. Such duties vary greatly depending on the particular provision in question, the particular context, and the purpose for which the consultation is to be carried out. The duty may, for example, arise before or after a proposal has been decided upon; it may be obligatory or may be at the discretion of the public authority; it may be restricted to particular consultees or may involve the general public; the identity of the consultees may be prescribed or may be left to the discretion of the public authority; the consultation may take the form of seeking views in writing, or holding public meetings; and so on and so forth. The content of a duty to consult can therefore vary greatly from one statutory context to another: “the nature and the object of consultation must be related to the circumstances which call for it” (*Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 1111, 1124). A mechanistic approach to the requirements of consultation should therefore be avoided.

37. Depending on the circumstances, issues of fairness may be relevant to the explication of a duty to consult. But the present case is not in my opinion concerned with circumstances in which a duty of fairness is owed, and the problem with the consultation is not that it was “unfair” as that term is normally used in administrative law. In the present context, the local authority is discharging an important function in relation to local government finance, which affects its residents generally. The statutory obligation is, “before making a scheme”, to consult any major precepting authority, to publish a draft scheme, and, critically, to “consult such other persons as it considers are likely to have an interest in the operation of the scheme”. All residents of the local authority’s area could reasonably be regarded as “likely to have an interest in the operation of the scheme”, and it is on that basis that Haringey proceeded.
38. Such wide-ranging consultation, in respect of the exercise of a local authority’s exercise of a general power in relation to finance, is far removed in context and scope from the situations in which the common law has recognised a duty of procedural fairness. The purpose of public consultation in that context is in my opinion not to ensure procedural fairness in the treatment of persons whose legally protected interests may be adversely affected, as the common law seeks to do. The purpose of this particular statutory duty to consult must, in my opinion, be to ensure public participation in the local authority’s decision-making process.
39. In order for the consultation to achieve that objective, it must fulfil certain minimum requirements. Meaningful public participation in this particular decision-making process, in a context with which the general public cannot be expected to be familiar, requires that the consultees should be provided not only with information about the draft scheme, but also with an outline of the realistic alternatives, and an indication of the main reasons for the authority’s adoption of the draft scheme. That follows, in this context, from the general obligation to let consultees know “what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response”: *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, para 112, per Lord Woolf MR.
40. That is not to say that a duty to consult invariably requires the provision of information about options which have been rejected. The matter may be made clear, one way or the other, by the terms of the relevant statutory provisions, as it was in *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472; [2012] 126 BMLR 134. To the extent that the issue is left open by the relevant statutory provisions, the question will generally be whether, in the particular context,

the provision of such information is necessary in order for the consultees to express meaningful views on the proposal. The case of *Vale of Glamorgan Council v Lord Chancellor and Secretary of State for Justice* [2011] EWHC 1532 (Admin) is an example of a case where such information was not considered necessary, having regard to the nature and purpose of that particular consultation exercise, which concerned the proposed closure of a specific court. In the present case, on the other hand, it is difficult to see how ordinary members of the public could express an intelligent view on the proposed scheme, so as to participate in a meaningful way in the decision-making process, unless they had an idea of how the loss of income by the local authority might otherwise be replaced or absorbed.

41. Nor does a requirement to provide information about other options mean that there must be a detailed discussion of the alternatives or of the reasons for their rejection. The consultation required in the present context is in respect of the draft scheme, not the rejected alternatives; and it is important, not least in the context of a public consultation exercise, that the consultation documents should be clear and understandable, and therefore should not be unduly complex or lengthy. Nevertheless, enough must be said about realistic alternatives, and the reasons for the local authority's preferred choice, to enable the consultees to make an intelligent response in respect of the scheme on which their views are sought.
42. As Lord Wilson has explained, those requirements were not met in this case. The consultation document presented the proposed reduction in council tax support as if it were the inevitable consequence of the Government's funding cuts, and thereby disguised the choice made by Haringey itself. It misleadingly implied that there were no possible alternatives to that choice. In reality, therefore, there was no consultation on the fundamental basis of the scheme.
43. I therefore concur in the order proposed by Lord Wilson.

#### **LADY HALE AND LORD CLARKE**

44. We agree that the appeal should be disposed of as indicated by Lord Wilson and Lord Reed. There appears to us to be very little between them as to the correct approach. We agree with Lord Reed that the court must have regard to the statutory context and that, as he puts it, in the particular statutory context, the duty of the local authority was to ensure public participation in the decision-making process. It seems to us that in order to do so it must act

fairly by taking the specific steps set out by Lord Reed in his para 39. In these circumstances we can we think safely agree with both judgments.