Neutral Citation Number: [2025] EWCA Civ 571

Case No: CA-2024-001242

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE KING'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT
LORD JUSTICE GREEN AND MR JUSTICE KERR
[2024] EWHC 1181 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/05/2025

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE DINGEMANS
and
LORD JUSTICE EDIS

- -

Between :

THE KING (on the application of THE NATIONAL COUNCIL FOR CIVIL LIBERTIES)	**Claimant/ Respondent**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant/ Appellant**
-and-	
PUBLIC LAW PROJECT	**First Intervener**
-and-	
THE SPEAKER OF THE HOUSE OF COMMONS AND THE CLERK OF THE PARLIAMENTS	**Second Interveners**

- -
- -

Sir James Eadie KC and **Tom Leary** (instructed by **the Treasury Solicitor**) for the **Appellant**
Jude Bunting KC, **Hollie Higgins** and **Rosalind Comyn** (instructed by **Liberty**) for the **Respondent**
Tom de la Mare KC and **Bijan Hoshi** (instructed by **Herbert Smith Freehills LLP**) for the **First Intervener**

Sarah Hannett KC and **Eleanor Mitchell** (instructed by **the Office of Speaker's Counsel**) for the **Second Interveners** (written submissions only)

Hearing dates: 4 and 5 December 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 2 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Underhill :

INTRODUCTION

1. The proceedings giving rise to this appeal challenge the lawfulness of regulations amending the provisions of the Public Order Act 1986 ("the 1986 Act") which empower the police to impose conditions upon public processions and assemblies. In bare outline, the background to the challenge can be summarised as follows:

   (1) The powers in question are contained in sections 12 and 14 of the 1986 Act. The circumstances in which they can be exercised include where the responsible police officer reasonably believes that a procession or assembly may result in "serious disruption to the life of the community".

   (2) The phrase "serious disruption to the life of the community" is not defined in the original version of the Act, but new sections 12 (12) and 14 (11), introduced by the Police, Crime, Sentencing and Courts Act 2022 ("the 2022 Act"), gave a power to the Secretary of State (in practice, the Home Secretary) to make regulations about its meaning, including by "defining any aspect of [it]". A power of that kind – that is, to amend by secondary legislation a provision of primary legislation – is commonly referred to as a "Henry VIII power".

   (3) In purported exercise of that power the Secretary of State made the Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulations 2023 ("the Regulations"), which came into force on 15 June 2023. The effect of the Regulations, so far as relevant for our purposes, was to amend sections 12 and 14 so as to provide that the powers conferred by them could be exercised in specified circumstances where the disruption in question was "more than minor".

   (4) Prior to the making of the Regulations the Government had sought to introduce provisions to substantially the same effect by amending a bill then before Parliament which became the Public Order Act 2023 ("the Public Order Bill"). The proposed amendments were, however, rejected by the House of Lords, and the Government did not seek to have them restored when the bill returned to the House of Commons.

2. On 23 June 2023 the Claimant, the National Council for Civil Liberties ("Liberty"), issued proceedings seeking judicial review of the Secretary of State's decision to make the Regulations. Public Law Project ("PLP") was subsequently given permission to intervene in support of Liberty's challenge.

3. The claim was heard before a Divisional Court comprising Green LJ and Kerr J on 28 and 29 February 2024. Liberty advanced four grounds of challenge, of which we are now only concerned with two –

   (A) that the provisions of the new subsections (2A)-(2B) fell outside the power conferred by sections 12 (12) and 14 (11) of the 1986 Act (as amended) – "the *ultra vires* ground"; and

   (B) that prior to making the Regulations the Government had conducted a one-sided and unfair consultation process – "the consultation ground".

The other two grounds arose out of the background noted at para. 1 (4) above.

4. By a judgment handed down on 21 May 2024 the Divisional Court upheld both the *ultra vires* ground and the consultation ground, though it dismissed the other two grounds. It made an order quashing the Regulations.

5. This is the Secretary of State's appeal against that decision, with leave granted by the Divisional Court itself. The appeal was originally expedited and a date was fixed for July last year. That hearing was adjourned following the change of government in June, so that the Secretary of State could have an opportunity to decide whether she wished to pursue the appeal. Her eventual decision was to do so.

6. The Secretary of State was represented before us by Sir James Eadie KC, leading Mr Tom Leary, and Liberty by Mr Jude Bunting KC, leading Ms Hollie Higgins and Ms Rosalind Comyn. Sir James and Mr Leary appeared below, as did Mr Bunting and both his juniors. PLP was again given permission to intervene and was represented by Mr Tom de la Mare KC and Mr Bijan Hoshi, both of whom also appeared below. The Speaker of the House of Commons and the Clerk of the Parliaments ("the Parliamentary Authorities") were given permission to intervene by way of written submissions, which were settled by Ms Sarah Hannett KC and Ms Eleanor Mitchell. Ms Hannett and Ms Mitchell in fact attended the hearing and were able to assist the Court with some queries.

7. There are two grounds of appeal corresponding to the two grounds on which Liberty succeeded in the Divisional Court. I take them in turn.

(A) THE *ULTRA VIRES* GROUND

THE LEGISLATIVE PROVISIONS

The 1986 Act

8. Section 12 of the 1986 Act is headed "Imposing conditions on public processions". As originally enacted, subsection (1) provided:

> "If the senior police officer[1], having regard to the time or place at which and the circumstances in which any public procession is being held or is intended to be held and to its route or proposed route, reasonably believes that—
>
> (a) it may result in serious public disorder, serious damage to property or *serious disruption to the life of the community* [my italics], or
>
> (b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do,

[1] "The senior police officer" is defined in subsection (2), but the definition is immaterial for our purposes.

> he may give directions imposing on the persons organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions."

It will be seen that alternative (a) itself contains three alternative feared consequences of the procession which justify police intervention. In this appeal we are concerned with the third such consequence, "serious disruption to the life of the community" – for short, "the serious disruption condition".

9. Section 14 is headed "Imposing conditions on public assemblies". Subsection (1) as originally enacted was in identical terms to section 12 (1) save that it referred to public assemblies rather than public processions.

10. It is a criminal offence (subject to defences) for any person organising or taking part in a public procession or assembly to knowingly or recklessly fail to comply with a condition imposed under these powers: see sections 12 (4)-(5A) and 14 (4)-(5A).

The Changes Introduced by the 2022 Act

11. Section 73 of the 2022 Act amended section 12 of the 1986 Act in various respects, including but not limited to the inclusion of the Henry VIII power with which we are directly concerned. I should refer to three changes.

12. First, it introduced into subsection (1) two further matters – (aa) and (ab) – on the basis of which the senior police officer is entitled to impose conditions. Both are concerned with noise generated by processions, the former potentially resulting in "serious disruption to the activities of an organisation which are carried on in the vicinity of the procession" and the latter potentially having "a relevant impact on persons in the vicinity of the procession". This change is not central to the issue before us but it needs to be mentioned.

13. Second, it introduced new subsections (2A)-(2E). Subsection (2A) reads as follows:

> "For the purposes of subsection (1) (a), the cases in which a public procession in England and Wales may result in serious disruption to the life of the community include, in particular, where —
>
> (a) it may result in a significant delay to the delivery of a time-sensitive product to consumers of that product, or
>
> (b) it may result in a prolonged disruption of access to any essential goods or any essential service, including, in particular, access to —
>
> (i) the supply of money, food, water, energy or fuel,
>
> (ii) a system of communication,
>
> (iii) a place of worship,

(iv) a transport facility,

(v) an educational institution, or

(vi) a service relating to health."

Subsection (2B) defined "time-sensitive product". Subsections (2C)-(2E) glossed various aspects of the new heads (aa) and (ab) under subsection (1): subsection (2C) in particular is addressed to "serious disruption" cases under head (aa).

14. Third, new subsections (12)-(15) introduced the Henry VIII power referred to above. Subsections (12) and (13) read as follows:

> "(12) The Secretary of State may by regulations amend any of subsections (2A) to (2C) for the purposes of making provision about the meaning for the purposes of this section of —
>
> (a) serious disruption to the activities of an organisation which are carried on in the vicinity of a public procession, or
>
> (b) serious disruption to the life of the community.
>
> (13) Regulations under subsection (12) may, in particular, amend any of those subsections for the purposes of —
>
> (a) defining any aspect of an expression mentioned in subsection (12) (a) or (b) for the purposes of this section;
>
> (b) giving examples of cases in which a public procession is or is not to be treated as resulting in —
>
> (i) serious disruption to the activities of an organisation which are carried on in the vicinity of the procession, or
>
> (ii) serious disruption to the life of the community."

Subsections (14)-(15) provide, so far as relevant, that regulations under subsection (12) are to be made by statutory instrument and subject to the affirmative resolution procedure.

15. Section 74 made materially identical amendments to section 14, though the Henry VIII power and associated provisions are in new subsections (11)-(14), rather than (12)-(15) as in section 12.

16. On 8 June 2021 there was a debate in the Public Bills Committee of the House of Commons on the bill which became the 2022 Act. In relation to the clauses introducing the Henry VIII power the responsible Minister, the Rt Hon Victoria Atkins MP, stated as follows (Hansard, PCSC Deb (Bill 005) 8 June 2021, col. 398):

> "I now turn to the parts of the clauses that set out that the Home Secretary will have the power, through secondary legislation, to define the meaning of 'serious disruption to the life of the community' and 'serious disruption to the activities of an organisation which are carried on in the vicinity of the procession', or assembly or single-person protest. Again, to clear up any misunderstandings, this is not about the Home Secretary of the day banning protests. Opposition Members have understandably called for clearer definitions wherever possible, which is what this delegated power is intended to achieve. *Any definition created through this power will need to fall within what can reasonably be understood as 'serious disruption'. The threshold will be clarified, not changed: such definitions will be used to clarify the threshold beyond which the police can impose conditions on protests, should they believe them necessary to avoid serious disruption*. This is about putting the framework in place to help the police on the ground."

The sentences which I have italicised were referred to by the Divisional Court as "the Ministerial statement" and relied on as part of its reasoning: see para. 32 below.

The Changes made by the Regulations

17. Following approval in draft by resolution of both Houses of Parliament, the Regulations were made on 14 June 2023 and came into force on the following day.

18. Regulation 2 amends section 12 of the 1986 Act by substituting new subsections (2A) and (2B). The new subsection (2A) read:

> "For the purposes of subsection (1) (a) –
>
> (a) the cases in which a public procession in England and Wales may result in serious disruption to the life of the community include, in particular, where it may, by way of physical obstruction, result in –
>
> (i) the prevention of, or a hindrance *that is more than minor* to, the carrying out of day-to-day activities (including in particular the making of a journey),
>
> (ii) the prevention of, or a delay *that is more than minor* to, the delivery of a time-sensitive product to consumers of that product, or
>
> (iii) the prevention of, or a disruption *that is more than minor* to, access to any essential goods or any essential service,
>
> (b) in considering whether a public procession in England and Wales may result in serious disruption to the life of the community, the senior police officer –
>
> (i) must take into account all relevant disruption, and

(ii) may take into account any relevant cumulative disruption, and

(c) 'community', in relation to a public procession in England and Wales, means any group of persons that may be affected by the procession, whether or not all or any of those persons live or work in the vicinity of the procession."

(The italicisation is mine.) The new subsection (2B) contained definitions of a number of the phrases in subsection (2A), but I need not set it out here.

19. Regulation 3 substitutes subsections (2A) and (2B) of section 14 of the Act in materially the same terms as regulation 2.

20. It will be seen that the new subsections (2A) and (2B) under sections 12 and 14 perform the same function as their predecessors – that is, in giving examples of particular kinds of "serious disruption to the life of the community" – and contain many of the same elements, but there are also substantive differences. The difference with which we are primarily concerned is the introduction of the phrase "more than minor" qualifying the particular examples of disruption under heads (i)-(iii) in subsection (2A) (a). To anticipate, it is Liberty's case, and the Divisional Court found, that an amendment having that effect falls outside the power conferred on the Secretary of State by sections 12 (12) and 14 (11) because a power to make provision about the meaning of "serious" disruption cannot naturally be construed as a power to define it so as to cover disruption that is more than minor.

THE PUBLIC ORDER ACT 2023

21. The Public Order Act 2023 ("the 2023 Act") – which, as mentioned above, the Government sought unsuccessfully to amend so as to introduce provisions equivalent to those subsequently introduced by regulations 2 and 3 of the Regulations – received Royal Assent on 2 May 2023. Part 1 of the Act creates various new public order offences, in particular as regards "locking on" and "tunnelling"; and Part 2 creates a form of order known as a "serious disruption prevention order" which can be made by a court following a conviction for a "protest-related offence" or by the magistrates' court on application. The Act is relevant for our purposes because section 34, which falls under Part 3, contains a definition of "serious disruption" which, like the amended section (2A) of the 1986 Act, uses the phrase "more than minor". Section 34 (1) reads:

> "For the purposes of this Act, the cases in which individuals or an organisation may suffer serious disruption include, in particular, where the individuals or the organisation —
>
> (a) are by way of physical obstruction prevented, or *hindered to more than a minor degree*, from carrying out —
>
> (i) their day-to-day activities (including in particular the making of a journey),
>
> (ii) construction or maintenance works, or

(iii) activities related to such works,

(b) are prevented from making or receiving, or suffer a *delay that is more than minor* to the making or receiving of, a delivery of a time-sensitive product, or

(c) are prevented from accessing, or suffer a *disruption that is more than minor* to the accessing of, any essential goods or any essential service."

(Again, the italics are mine.) To anticipate, the Secretary of State relies on the fact that the particular instances of "serious disruption" given at (a)-(c) treat it as encompassing cases where the impact is "more than minor" and accordingly give it exactly the broad meaning which Liberty contends it cannot naturally have.

LIBERTY'S CASE ON GROUND 1

22. In the Divisional Court Liberty contended that the new subsections 12 (2A) and 14 (2A) were *ultra vires* the powers conferred by sections 12 (12) and 14 (11) in two respects:

(1) Its primary argument was that the threshold for police intervention set by the phrase "more than minor" in the kinds of case identified at (a) (i)-(iii) was lower than that set by the word "serious" in sections 12 (1) and 14 (1); and that the power conferred by section 12 (12) to "[make] provision about the meaning" of the relevant parts of those subsections did not extend to lowering the threshold in that way.

(2) It also contended that the changes also affected the meaning of the phrase "disruption to the life of the community" in ways which went beyond the scope of the enabling power.

The Court rejected the challenge under (2), and it was not pursued by Liberty before us. However, PLP sought to raise one aspect of it by a Respondent's Notice, and I address that point separately at paras. 58-62 below.

THE DECISION OF THE DIVISIONAL COURT

23. After making some preliminary observations (at paras. 45-46 of its judgment) the Divisional Court addressed the first of those challenges under the following heads – (1) "what Parliament intended by the word 'serious' in the context of 'serious disruption' in [the 1986 Act]" (paras. 48-72); (2) the breadth of the enabling power (paras. 73-83); (3) whether the relevant respects the Regulations were within the scope of the enabling power paras. 86-99; and (4) "Conclusion on 'serious' and 'more than minor'". I take those heads in turn.

(1) The meaning of "serious" in the 1986 Act

24. The Court began, at paras. 48-49, by stating its conclusion and summarising the basis for it, as follows:

> "48. … For reasons set out below we conclude that 'serious' was intended to indicate a relatively high threshold consistent with the ordinary and natural meaning of that word.
>
> 49. We rely upon: (i) the ordinary natural meaning of 'serious'; (ii) the application of the *de minimis* principle of construction; (iii) the context to the legislation; (iv) extrinsic material relevant to interpretation including the White Paper which preceded the bill; and (v) guidance from other cases and legislative sources including on the word 'serious' where Parliament has used an adjective to qualify and limits the meaning of a noun."

It then proceeded to amplify points (i)-(v).

25. As regards (i), at para. 50 it said:

> *"*'Serious' in ordinary parlance connotes something towards the top end of the scale. Dictionary synonyms of the adjective are consistent with this and include: severe, grave, big, and major. …"

As will appear, it is not clear that that statement is challenged by the Secretary of State. Whether it is or not, I respectfully agree with it.

26. Point (ii) is addressed at paras. 52-55. Its effect is simply that since Parliament is presumed not to trouble itself with *de minimis* matters, "serious" must have been intended "to set a threshold for police intervention above the *de minimis* level". The Court records at para. 55 that "the Secretary of State does not argue that the converse of 'serious' is 'trivial' or some other word indicating a *de minimis* threshold". That remained the position before us.

27. As regards point (iii), the Court notes at para. 55 that the context to sections 12 and 14 of the 1986 Act is that "they countenance intervention by the state (*via* the police) to constrain conduct otherwise amounting to the fundamental common law rights of freedom of expression and assembly" and refers at para. 56 to paras. 37-38 of the judgment of Lord Burnett CJ in *R v Roberts (Richard)* [2018] EWCA Crim 2739, in which the importance of those rights, both at common law and under the European Convention on Human Rights ("the Convention"), is emphasised. At para. 57 it says:

> "An important part of the context was therefore that Parliament balanced carefully these 'long established' rights against competing interests and sought to set the threshold for state intervention at a high level. Use of the adjective 'serious' in common parlance, performs this task."

That proposition is not, as such, challenged by the Secretary of State, and I agree with it.

28. Paras. 57-59, which address point (iv), refer to the White Paper which led to the 1986 Act, *Review of Public Order Law* (Cmnd. 9510), which the Secretary of State accepted was an admissible aid to construction. At para. 58 the Court described paras. 1.7-1.8 of the White Paper as recognising "that the rights of peaceful protest and assembly were

amongst the most fundamental of freedoms enjoyed by society" and as stating that the Government was concerned to regulate such freedoms "to the minimum extent necessary" to preserve order and protect the rights of others. At para. 59 it quoted para. 4.22 of the Paper, referring to the Government's acceptance of the Select Committee's recommendation that, while some degree of disruption caused by a procession of average size had to be accepted, the police should have the power to intervene in order (among other things) "to reduce the severe disruption sometimes suffered by pedestrians, business and commerce" and that accordingly they should have power "to impose conditions on a procession in order to prevent serious disruption to the normal life of the community". That showed, it said, that the Government (being the promoter of the bill) regarded the term "serious" as representing the criterion distinguishing acceptable from non-acceptable disruption; and it noted, that it was clearly used in the same sense as "severe". I see nothing wrong in those observations, though I do not believe that they add much to what could already be established from the contextual considerations already identified.

29. Point (v) is addressed at paras. 60-71, where the Court reviews a number of authorities to which it had been referred by the parties considering the meaning of "serious", and also "substantial", in other statutory contexts. None of them, however, was concerned with the 1986 Act, or any closely analogous legislation, and we were not taken to any of them in the oral submissions; and I am bound to say that I regard them as affording little real assistance. The most that can be said is that in them, consistently with its normal meaning, "serious" connoted a level of gravity towards the higher end of the relevant scale.

30. The Court's conclusion on head (1) appears at para. 72 and reads:

> "… [T]he expression 'serious' is intended to set the threshold for police intervention at a relatively high level. This reflects its ordinary and natural meaning, its purpose and context, and is a conclusion consistent with admissible extrinsic material. It reflects the important balance to be struck between the right of free speech, assembly and protest, on the one hand, and the orderly conduct of society, on the other."

I respectfully agree with that conclusion, and indeed the Secretary of State did not challenge it as such.

(2) The breadth of the enabling power

31. The Court began by identifying the parties' respective submissions. The Secretary of State's submissions were substantially the same as Sir James advanced before us, and I will not summarise them here. I should, however, record that Liberty and PLP relied on the decision of the Supreme Court in *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39, [2016] AC 1531, ("*PLP*") about the proper approach to the construction of a provision conferring a Henry VIII power.

32. Having set out the parties' submissions, the Court expressed its own conclusions as follows:

> "83. … [T]he difference between the parties at this stage of the analysis is not that great. They agree that the power is not unlimited and that it

> cannot be used to promulgate regulations which have no linguistic connection to the phrase 'serious disruption'. The Secretary of State was, in our view, correct to take this position.
>
> 84. Applying conventional principles of construction the power must be read in the context of [the 1986 Act] in which it resides, which, as we have set out above, was to set the threshold for police intervention at a relatively high level. This is our starting position and the scope of the power should be consistent with this statutory purpose and context which is that it was intended to clarify but not alter.
>
> 85. This conclusion is in line with the Ministerial statement in Parliament (paragraph [22] above [my para. 16]) during which the Minister emphasised that the power was to be exercised by reference to what '… can reasonably be understood as serious disruption' and that the threshold for police intervention would be 'clarified not changed'. This supports the submissions of Liberty and PLP that the power is about clarification not alteration. Insofar as there is any doubt as to this then the appropriate rule of construction applied to Henry VIII powers supports the conclusion that the power can only be used to clarify or exemplify but not alter or change. This is especially appropriate in a context where the word 'serious' has been carefully chosen by Parliament to reflect the balance to be struck between competing fundamental common law rights and where altering the balance of those rights, in a manner adverse to protestors, exposes those persons to an increased risk of criminal sanction. That was not the purpose of the enabling power."

(3) Does the expression "more than minor" fall within the scope of "serious"?

33. Under the sub-heading "What the dispute boiled down to" the Court observed at para. 86 that the real dispute was "about how far the concept of seriousness can stretch". At para. 87 it defined the dispute as being

> "whether the expression 'more than minor' is within the linguistic penumbra of 'serious' and whether, more particularly, it encapsulates the statutory phrases:
>
> (i) 'a hindrance that is more than minor to, the carrying out of day-to-day activities';
>
> (ii) 'the prevention of, or a delay that is more than minor to, the delivery of a time-sensitive product to consumers of that product'; and,
>
> (iii) 'the prevention of, or a disruption that is more than minor to, access to any essential goods or any essential service'."

It proceeded to address a number of particular arguments which arose under that head. Some of the arguments are central, but others did not feature significantly in the submissions before us, and I need not deal with them at length.

34. Para. 91 is headed "Ordinary and natural meaning/purpose/context". The main part of it reads:

> "The word 'serious' refers to a point relatively high up on the scale. In our judgment, as a matter of common parlance and in view of the case law and other legislative comparables, 'more than minor' is different from and materially lower down the scale than 'serious'. It would not on a natural and ordinary meaning be treated as falling within the scope of 'serious', however generously construed. We also see force in the argument of Liberty and PLP that Parliament, when it adopted the enabling power, would not have contemplated that it could be used to change the meaning of 'serious' so as to lower the protection accorded to the fundamental common law rights of public procession and assembly and materially to increase the exposure of protestors to criminal proceedings. This was something to be addressed by primary legislation, if it was to happen at all."

I agree with that passage, save perhaps that I would place less weight on the "case law and other legislative comparables": cf. para. 29 above. The natural meaning of "serious" seems to me to justify the Court's conclusion on its own.

35. Para. 92 addresses the principles governing the interpretation of Henry VIII powers. The Court had referred to the relevant case-law earlier in its judgment, but it may be convenient if I set out here the key passage from the judgment of Lord Neuberger (with whom the other members of the Court agreed) in *PLP*:

> "25. … When a court is considering the validity of a statutory instrument made under a Henry VIII power, its role in upholding Parliamentary supremacy is particularly striking, as the statutory instrument will be purporting to vary primary legislation passed into law by Parliament.
>
> 26. The interpretation of the statutory provision conferring a power to make secondary legislation is, of course, to be effected in accordance with normal principles of statutory construction. However, in the case of an 'amendment that is permitted under a Henry VIII power', to quote … from [*Craies on Legislation* (10th ed (2015))] para 1.3.11:
>
> > 'as with all delegated powers the only rule for construction is to test each proposed exercise by reference to whether or not it is within the class of action that Parliament must have contemplated when delegating. Although Henry VIII powers are often cast in very wide terms, the more general the words by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature's contemplation.'
>
> 27. In two cases, *R v Secretary of State for Social Security, Ex p Britnell* [1991] 1 WLR 198, 204 and *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 383, the House of Lords has cited with approval the

following observation of Lord Donaldson MR in *McKiernon v Secretary of State for Social Security*, The Times, November 1989; Court of Appeal (Civil Division) Transcript No 1017 of 1989, which is to much the same effect:

> 'Whether subject to the negative or affirmative resolution procedure, [subordinate legislation] is subject to much briefer, if any, examination by Parliament and cannot be amended. The duty of the courts being to give effect to the will of Parliament, it is, in my judgment, legitimate to take account of the fact that a delegation to the Executive of power to modify primary legislation must be an exceptional course and that, if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach.'

28. Immediately after quoting this passage in *Spath Holme*, Lord Bingham went on to say '[r]ecognition of Parliament's primary law-making role in my view requires such an approach'. He went on to add that, where there is 'little room for doubt about the scope of the power' in the statute concerned, it is not for the courts to cut down that scope by some artificial reading of the power."

The Divisional Court said that it "saw force" in Mr Bunting's submission that in the present case it had a choice between a broader or a narrower definition of "serious" and that in those circumstances it should follow Lord Donaldson's guidance, endorsed in *PLP*, and adopt a restrictive approach. It observed, however, that:

> "Our ultimate conclusion does not depend upon applying a strict construction. Our primary conclusion is that 'more than minor' does not fall within the ordinary and natural meaning of 'serious'. Our conclusion on Henry VIII powers is merely confirmatory of our conclusion on the natural and ordinary meaning of 'serious'."

36. At para. 93 the Court considered and rejected an argument by the Secretary of State that the definition of "serious" as "more than minor" would conduce to legal certainty. I need not set out its reasons, but for reasons which will appear I should note that it referred (albeit in passing) to views expressed in a report on the Regulations dated 11 May 2023 by the House of Lords Secondary Legislation Scrutiny Committee ("the Scrutiny Committee").

37. As already noted, the Secretary of State relied in part on the fact that section 34 of the 2023 Act includes impacts which are "more than minor" as instances of "serious disruption": see para. 21 above. She relied on the principle that where more than one statute are *in pari materia* they should be "taken and construed together as one system and as explanatory of each other" – *R v Loxdale* (1758) 1 Burr 445, *per* Lord Mansfield at p. 477. At para. 94 the Court rejects that argument. Again, I need not set out its reasoning but I should note that it relied in part on the report of the Scrutiny Committee referred to above.

38. At para. 95 the Court held that the Ministerial statement was "consistent with" its conclusion. It said:

> "It is confirmatory of a construction of the power as limited to amendments which do not lower the threshold for police intervention. The use of the ministerial expression 'reasonably be understood' should be read in this context and as a fair, everyday, proxy for the ordinary and natural meaning of the words. In our judgement something which is 'serious' cannot reasonably encompass anything that is merely 'more than minor'."

It said that there was no objection to its admissibility for that purpose.

39. At paras. 96-99 the Court considered and rejected a submission by the Secretary of State that it should apply a lesser degree of scrutiny in recognition of the fact that the Regulations had been approved by the affirmative resolution procedure.

(4) "Conclusion on 'serious' and 'more than minor'"

40. The Court's conclusion, at para. 100, reads as follows:

> "For all of the above reasons Ground I succeeds. The conventional approach to interpretation is to start with the ordinary and natural meaning of the words and, having formed a conclusion upon that question, consider other guides to interpretation to see whether they are consistent with the conclusion arrived at. This is the approach we have adopted. As a matter of ordinary and natural language 'more than minor' it is not within the scope of the word 'serious'. That conclusion is consistent with, and confirmed by: the purpose and context to [the 1986 Act]; principles of construction applicable to Henry VIII powers; considerations of legal certainty; the *in pari materia* principle of interpretation; and, extrinsic considerations such as the Ministerial statement in Parliament. Our conclusion is not affected by the fact that the Regulations were subject to scrutiny in the course of the affirmative resolution procedure. It follows that the Regulations are *ultra vires* the enabling power contained within sections 12 (13)[2] and 14 (11) [of the 1986 Act]."

41. It is important to appreciate the structure of that paragraph. The Court's primary reason is, straightforwardly, that as a matter of the natural use of language "more than minor" does not fall within the scope of the word "serious". It refers to the various considerations in the second part of the paragraph only on the basis either that they do not displace that conclusion or that they are confirmatory of it.

THE APPEAL

42. The relevant ground of appeal is ground 1, which reads:

> "The Court erred in law in concluding that the Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulations 2023 …

[2] This must be a slip for "12 (12)".

were *ultra vires* the enabling provisions in sections 12 (12) and 14 (11) of the Public Order Act 1986 …:

a. Contrary to the Court's findings, the power given to the Secretary of State to make regulations 'about the meaning … of … serious disruption to the life of the community' includes the power to adopt any linguistically tenable definition of 'serious disruption', including by reference to disruptions that are 'more than merely minor'. The power is not limited to merely clarifying the meaning of 'serious disruption' in the Act.

b. Further, there was no proper basis for the other matters relied on by the Court below to support the very significant narrowing of the permissible spectrum of meanings of the concept of 'serious disruption' which its analysis entailed."

43. I can summarise Sir James's core submissions in support of that ground as follows:

(1) It was important to focus on the scope of the enabling power conferred by section 12 (12)[3]. That allows the Secretary of State to make regulations "about the meaning" of what he described as the object concept (for our purposes the serious disruption condition). That is a very broadly expressed power, which covers not only, as the Divisional Court had put it, "clarifying" the meaning of the object concept but defining it. That was put beyond doubt by the provision in subsection (13) that the Secretary of State was empowered to make amendments "defining any aspect of an expression mentioned in subsection (12) (a) or (b)". The word "serious" was apt for definition because there are degrees of seriousness: the definition given in the Regulations answers the inevitable question "*how* serious?".

(2) Sir James accepted that any definition provided for in such regulations had to be one which the object concept was capable of meaning and thus that the scope of the power was "bounded by linguistic possibility". But as long as any definition fell within the range of "linguistically tenable" meanings the power to provide for it had been properly delegated by Parliament to the Secretary of State. The role of the Court was limited to deciding whether any definition provided for in regulations made by the Secretary of State fell outside that range. There was no ambiguity about that being the effect of the subsection, and accordingly the fact that it conferred a Henry VIII power was immaterial.

(3) Provided that any such definition fell within the range of linguistically tenable meanings – or, as it is put in para. (b) of ground 1, "the permissible spectrum of meanings" – it was irrelevant whether it corresponded to what Parliament might have intended by the undefined language used in the original Act. It was wrong in principle for the Divisional Court to have taken that meaning (as it held it to be) as its starting-point. That was all the more so because in the 2022 Act Parliament had taken a fresh look at protest law and introduced other changes

[3] In the interests of brevity I will refer only to the relevant subsections of section 12; but the submissions of course relate equally to section 14.

besides the introduction of the Henry VIII power: that rendered it particularly inappropriate to go back to what its understanding might have been in 1986.

(4) Applying that approach, the phrase "serious disruption to the life of the community" was capable of embracing any disruption that was more than minor, and accordingly the impugned definitions in the new subsection (2A) were within the scope of the power granted by section 12 (12). He emphasised that "more than minor" did not mean the same as "more than *de minimis*".

(5) Sir James continued to rely on section 34 of the 2023 Act, but he made it clear that he was not relying on the *in pari materia* rule as such. Rather, he submitted, the fact that Parliament in the 2023 Act treated impacts that were more than minor as potential instances of "serious disruption" was the clearest possible indication that that was a possible interpretation of that phrase.

44. It will be observed that those submissions do not go so far as to contend that the natural reading of the phrase "serious disruption" in the 1986 Act extends to any disruption that is "more than minor". Sir James goes no further than saying that such a reading is within the range of linguistic possibilities; and that, that being so, the choice whether to employ it in that sense has been left by Parliament to the unfettered choice of the Secretary of State.

45. Even if I were to accept in full Sir James's submissions summarised at (1)-(3), in my view the ultimate question is that addressed at (4) – namely, as the Divisional Court put it, how far the concept of seriousness can stretch; more particularly, is the phrase "serious disruption" as a matter of language capable of extending so as to cover any disruption that is more than minor? I do not believe that it is. No doubt "minor" is not the same as "*de minimis*", but it is inherently a word connoting a low threshold, and the term "serious" inherently connotes a high threshold: in my view the upper and lower limits of the two concepts cannot meet. To put the same point another way, I agree with the Divisional Court that "'serious' cannot reasonably encompass anything that is merely 'more than minor'".

46. However, I should say that even if I accepted that the Secretary of State's proposed construction of "serious" was linguistically tenable, I would not accept the submission at (2) that that was determinative – that is, that Parliament must be taken to have intended to give the Secretary of State power to provide for any definition that satisfied that criterion. Like any other statutory provision, sections 12 (12) and 14 (11) need to be construed having regard to the relevant context. It follows from what I have already said that in the 1986 Act as originally enacted the word "serious" connoted a higher degree of disruption than "more than minor". There are three contextual considerations, though they may to some extent overlap, which in my view point to a conclusion that Parliament did not intend to give the Secretary of State a power to provide for a definition which lowered that threshold.

47. First, it is inherently unlikely that Parliament would have intended to grant by secondary legislation the power to amend the primary statute in a way which changed a criterion which was fundamental to the balance which it struck between the rights of individuals to protest and the rights of the community (see paras. 25-26 of Lord Neuberger's judgment in *PLP*, quoted at para. 35 above). I do not accept Sir James's submission at (3) that the meaning of the statute prior to amendment is irrelevant. On

the contrary, I agree with the Divisional Court that it is a necessary starting-point: in order to decide on the scope of a power to amend it will always be necessary to understand what it is that is being sought to be amended.

48. Second, that consideration is reinforced by the nature of the rights with which the statute is concerned. Parliament is unlikely to have granted a right to interfere by secondary legislation with the balance which it had chosen to strike as regards fundamental rights. It is also relevant that breach of a condition imposed under sections 12 or 14 is a criminal offence.

49. Third, I agree with the Divisional Court that it is relevant that we are here dealing with a Henry VIII power. Contrary to Sir James's submission there is (at least) an ambiguity: the Court is having to choose between a narrower and a broader interpretation (assuming for present purposes that both are available) of the phrase "about the meaning"; and in accordance with the principles stated in *PLP* it should accept the narrower. Sir James submitted that the Divisional Court erred in referring in para. 92 of its judgment to the choice being between a broader or a narrower definition of "serious": what we were concerned with was the interpretation not of section 12 (1) but of section 12 (12). That is formally correct but it does not meet the substance of the point.

50. I have not so far addressed element (5) in Sir James's submissions. I cannot see how the fact that Parliament in 2023 adopted a definition of "serious disruption" that did cover certain "more than minor" impacts can as a matter of logic cast any light on the scope of the powers that it intended to confer when it enacted sections 12 (12) and 14 (11) of the 2022 Act. Indeed Sir James did not suggest that it could. Rather, his point was that a court should be very slow to say that a definition having that effect fell outside the available meanings of the term when Parliament itself had subsequently adopted precisely such a definition. I do not accept that. Parliament is entitled in its own Acts to define a term in any way it likes, including in ways which are (to borrow the well-known words of Holt CJ[4]) "pretty odd"; and there may be good reasons why it suits it in a particular case to adopt a definition which goes beyond the natural meaning. But, as Mr Bunting pointed out, that is very different from it conferring a power on someone else to define a term which it has itself chosen in a way that goes beyond any natural meaning.

51. Mr Bunting also submitted that the context of the 2023 Act was in any event very different from that of the 1986 Act. The purpose of the relevant provisions of the 1986 Act is to grant powers to the police to place restrictions on the important right to protest by way of processions or assemblies, whereas the purpose of Part 1 of the 2023 Act was to criminalise certain specific kinds of behaviour which it regarded as not falling within those rights. The fact that in the latter context Parliament adopted – explicitly "for the purposes of this Act", as he reminded us – an artificially extended definition of "serious disruption" casts no light on whether that is a natural use of language in the very different context of the 1986 Act. I see force in that point too, though it is not essential to my conclusion.

52. I should mention that in the context of the latter submission in the course of his oral submissions Mr Bunting said that he accepted that a meaning of "serious" which

---

4 *City of London v Wood* 12 Mod. 669, 88 Eng. Rep. 1592, at p. 1602 (1702).

embraced any disruption that was "more than minor" was, as he put it, "within, but only just within" the range of available meanings. Sir James suggested that that was an important concession, but I did not understand Mr Bunting to be saying more than that it was an available meaning in the very different context of the 2023 Act.

Parliamentary Materials

53. I have not in the foregoing reasoning referred to the Ministerial statement quoted at para. 16 above. In their written submissions on behalf of the Parliamentary Authorities Ms Hannett and Ms Mitchell[5] pointed out that, in accordance with the principles identified in *Pepper v Hart* [1993] AC 593, reference to the Ministerial statement as an aid to the construction of sections 12 (12) and 14 (11) was only permissible if they could properly be regarded as ambiguous. Ms Hannett acknowledged that the use of Parliamentary materials by way of "confirmation", i.e. in the absence of any ambiguity, appeared to have been approved in at least two cases – *R v Warwickshire County Council* [1992] AC 583 (see *per* Lord Roskill at p. 590), and *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 (*per* Lord Nicholls at para. 65); but she pointed out that such use was not authorised in *Pepper v Hart* itself and suggested that there remained some doubt as to the permissibility of that approach[6]. She submitted that best practice was for a court to reach a clear conclusion as to whether the threshold requirement of ambiguity is satisfied before making reference to Parliamentary materials; and she was critical of the Divisional Court for not expressly taking that approach. In my view it is reasonably clear that in so far as the Court relied on the Ministerial statement it was indeed only by way of confirmation (see para. 41 above); and I would rely on it in the same way. However, if, contrary to my view, there were an ambiguity about whether the relevant provisions empowered the Secretary of State to define "serious" in a way that covered "more than minor", I believe that the Ministerial statement would be admissible to help resolve that ambiguity.

54. Ms Hannett also took issue with the Divisional Court's reference to the Report of the Scrutiny Committee: see paras. 36-37 above. (There is also a reference to the Report in the context of the consultation ground: see para. 111 below.) She submitted that the effect of article 9 of the Bill of Rights is that "it is not permissible for parties to rely on or ask the court to approve the findings of Select Committee reports, save where these are uncontroversial" because the proceedings of committees, and their reports, represent "proceedings in Parliament" and "any invitation to either endorse or reject the contents of such a report would involve 'questioning' those proceedings". She referred to the decision of Stanley Burnton J in *Office of Government Commerce v Information Commissioner* [2008] EWHC 737 (Admin), [2010] QB 98 (approved by this Court in *Reilly v Secretary of State for Work and Pensions* [2016] EWCA Civ 413, [2017] QB 657: see at para. 109). She also submitted that it was hard to see how even "confirmatory" reference to such reports could be admissible given that they do not

---

5 In the interests of economy and without disrespect to Ms Mitchell, I will henceforth refer to the submissions as being Ms Hannett's.

6 She made clear that the Parliamentary Authorities were not challenging the permissibility of such "confirmatory" use before us but that they reserved the right to do so in the event of an appeal to the Supreme Court.

represent statements by a responsible Minister of the kind which it was held in *Pepper v Hart* could, under certain conditions, be admissible.

55. Since the two references made by the Divisional Court were on no possible view central to its reasoning, and since Liberty has made it clear that it does not seek to rely on them (and nor do I), and in circumstances where we have heard no oral submissions (still less adversarial argument), I prefer not to express a view on the circumstances in which reference to Select Committee reports is permissible or whether the Court's references in this case were legitimate. But it is clear that parties and Courts should think carefully about what use they make of Parliamentary materials of this kind.

56. Finally, Ms Hannett made submissions about the importance of notifying the Parliamentary Authorities of hearings in which issues about Parliamentary privilege may arise. I will quote paras. 35-37 of her submissions in full:

> "35. It is of some concern to the Parliamentary Authorities that they did not become aware of the extensive use of Parliamentary materials in these proceedings until the publication of the Divisional Court judgment on 21 May 2024. This was despite the Divisional Court itself having indicated – albeit in the context of an issue not arising in this appeal – that '[i]n past cases where Article 9 has been live Parliament has on occasion appeared before the Court to make submissions' and '[w]e would have welcomed such assistance': [129].
>
> 36. Without criticism of any party or of the Divisional Court, the Parliamentary Authorities would respectfully recall the mechanisms by which either House of Parliament may be notified where issues of Parliamentary privilege arise.
>
> 36.1 First, any party may write to Speaker's Counsel, in the House of Commons, or to Counsel to the Chairman of Committees, in the House of Lords, identifying the issue which has arisen, to enable the relevant Parliamentary Authority to take a view on whether an intervention is likely to assist the Court.
>
> 36.2 Second, the Court may of its own motion inform Speaker's Counsel or Counsel to the Chairman of Committees where an issue of privilege arises and invite the relevant Parliamentary Authority to intervene (or apply to intervene) if appropriate – as occurred in *R (Project for the Registration of Children as British Citizens)* [2021] 1 WLR 3049 (see [1]).
>
> 37. Given the course of events in these proceedings, the Parliamentary Authorities would respectfully invite the Court in its judgment to encourage the use of either or both of these mechanisms in appropriate cases."

I am happy to accept the invitation in para. 37. Litigants and Courts should make use of the indicated mechanisms whenever occasion to do so arises.

Conclusion on Liberty's Appeal

57. For those reasons I would dismiss ground 1 of the Secretary of State's appeal.

PLP's RESPONDENT'S NOTICE

58. As noted above, PLP seeks by its Respondent's Notice to challenge the Divisional Court's rejection of (part of) Liberty's second challenge to the vires of the Regulations: see para. 22 above. The relevant part of section 6 of the Notice reads:

> "… [I]n purporting to define the word 'community' in sections 12 and 14 Public Order Act 1986 …, the Regulations are ultra vires because they go beyond the enabling power by defining 'the community' by reference to a wider class of affected persons than contemplated by the enabling power."

59. Mr de la Mare's submissions in support of that ground can be summarised as follows. He referred to the definition of "the community" (with a definite article) in the Oxford English Dictionary as "the civic body to which all belong; the public society" and submitted that that connoted a minimum degree of scale and something more than "a mere or adventitious group of persons". He noted various statutory and other contexts, including the Emergency Powers (Defence) Act 1939 and article 4 of the Convention, in which the term is used in that sense. That was, he submitted, the sense in which it was used in the 1986 Act as originally enacted. He pointed out that the definition of "community" (without a definite article) in the new subsection (2A) (c) was plainly incompatible with that meaning in as much as it defined it as "*any group of persons that may be affected by the procession*, whether or not all or any of those persons live or work in the vicinity of the procession". That did not work as a matter of language, since a direct transposition of the definition into the statutory language would read "serious disruption of *the any* group of persons that may be affected etc". More substantially, the omission of the definite article and the reference to "any group of persons" fundamentally changed the meaning. It meant that disruption suffered by a few people with nothing else in common beyond being adversely affected by the procession or assembly would constitute disruption "to the life of the community". Parliament cannot have intended the power granted by under sections 12 (12) and 14 (11) to be used to effect so fundamental a change.

60. Essentially the same submission was made to the Divisional Court. It addressed it at para. 107 of its judgment as follows:

> "… [T]he definition of 'community' does not, in our judgment, unlawfully replace the concept of 'the community' in [the 1986 Act] with a different and narrower concept of a 'community' in the Regulations. Again, the purpose of the provision is to clarify, in the context of a procession or assembly, that it may have no disruptive impact on persons far from the scene and having no involvement in it. The generalised sense of the word in other contexts (e.g. in emergency powers legislation empowering regulations 'for maintaining supplies and services essential to the life of the community') is not apt in the present context. The definition of 'community' in the Regulations makes explicit the point that the disruption need not be to the public

> generally; it may be to a limited class of persons affected by a procession or assembly. We do not consider that when read in context the omission of the definite article from the definition makes any difference."

61. Sir James did not address this issue in his oral submissions but relied on the Secretary of State's skeleton argument. Paras. 40-41 read as follows:

> "40. … On the Secretary of State's case as to the scope of the enabling power, this aspect of regulation 2(2) is *intra vires*. The concept of 'the community' does not have an established or natural meaning. Depending on context, 'the community' may denote a community that is national, regional, local, international, or a particularly affected group. The [Convention] and Emergency Powers legislation are not a useful or relevant guide to the range of possible meanings that the Secretary of State may ascribe to the words 'the community' or the word 'community' in the context of the 1986 Act. The meaning chosen was one the Secretary of State was entitled to use.
>
> 41. Furthermore, even if the Secretary of State's power were limited to clarifying (rather than changing) the meaning of 'the community' in the Act, the Divisional Court was right to find … that the purpose of this aspect of regulation 2(2) was to 'clarify, in the context of a procession or assembly, that it may have no disruptive impact on persons far from the scene and having no involvement in it'. It is both obvious and necessary to construe 'the community' so as to enable restrictions to be placed on processions or assemblies that cause serious disruption to a particular local area or a class of affected persons, even if the procession or assembly does not have wider repercussions for the public generally (or the community at a national level)."

62. I am persuaded by those submissions. I agree with Mr de la Mare that the drafting of the definition in subsection (2A) (c) is clumsy, but I believe that on a fair reading its effect is as the Divisional Court and the Secretary of State characterise it. I do not agree that a definition of "the community" which is limited in that way falls outside the range of natural meanings of the term. I do not accept that the definition in subsection (2A) (c) will mean that an anticipated adverse impact on a few otherwise unconnected persons will meet the threshold for police intervention. Quite apart from the importance of the requirement that the disruption be "serious", it remains the case, as the Divisional Court explains and the Secretary of State accepts, that it must be to a class of persons affected as such.

CONCLUSION ON THE *ULTRA VIRES* GROUND

63. For those reasons I would uphold the decision of the Divisional Court that the Regulations were *ultra vires* for the reasons that it gave, but not on the further basis advanced by PLP.

(B) THE CONSULTATION GROUND

THE ISSUE

64. As a starting-point, I gratefully adopt the statement of the relevant background law at paras. 152-153 of the Divisional Court's judgment:

> "152. The law governing the obligation to undertake public consultation is now reasonably well settled. A public body or decision maker owes no general duty in all cases to consult interested persons before deciding upon a measure. But the decision maker may become subject to such a duty in certain circumstances. A duty to consult may be enacted by a statutory provision. If the duty is statutory, the scope of the obligation is determined primarily by the terms of the statute. The process ordained in the statute must be followed and must, in addition, be undertaken in a fair manner.
>
> 153. A duty to consult may arise at common law in the second, third and fourth cases identified in the judgment of the court in *R (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin), at paragraph [98(2)] where: (i) there has been a promise to consult; (ii) there has been an established practice of consultation; and (iii), where exceptionally a failure to consult would lead to conspicuous unfairness. … It is unnecessary to examine the boundaries of those categories. Liberty does not submit that the present case is within any of them."

65. It is important not to lose sight of the point made at the beginning of para. 152 that, for better or for worse, the common law recognises no general duty on a public authority decision-maker – or, more particularly, on the Government when contemplating making primary or secondary legislation – to consult those who may be affected. The *locus classicus* is the discussion at paras. 41-47 of the judgment of Sedley LJ in *R (BAPIO Action Ltd) v Secretary of State for the Home Depar*tment [2007] EWCA Civ 1139, where he explains why the separation of powers and the entitlement of executive government to formulate and reformulate policy are inconsistent with the existence of any such general obligation based on common law fairness. He acknowledges of course that there may be particular circumstances in which an obligation to consult may arise at common law. The kinds of case in which that may arise are conveniently summarised in *Plantagenet Alliance*, as cited in the passage quoted above.

66. That background is uncontroversial, but Liberty does not rely on a statutory duty to consult, nor does it assert that any of the circumstances summarised in *Plantagenet Alliance*, are present in this case. Rather, its case was based on what Ms Higgins, who argued this ground (with, if I may say so, conspicuous ability), called "the *Coughlan* principle" – or, perhaps more accurately, a development of it. The reference is to the well-known decision of this Court in *R (Coughlan) v North & East Devon Health Authority* [1999] EWCA Civ 1871, [2001] QB 213. At para. 108 of the judgment of the Court, Lord Woolf MR said:

> "It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it

> must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken (*R v Brent LBC ex parte Gunning* [1986] 84 LGR 168)."

The essential proposition on which Ms Higgins relied is in the first sentence – that is, that if a voluntary consultation is undertaken there is an obligation to carry it out "properly". But the remainder of the paragraph, which identifies what "proper" consultation requires by reference to the so-called "*Gunning* principles", is potentially relevant to the extent that it casts some light on the kind of consultation which triggers the obligation in the first place.

67. The reason why Liberty contends that the *Coughlan* principle is engaged is that over the course of December 2022 the Home Office was involved in a series of meetings and communications to discuss what became the Regulations[7] with representatives of various bodies responsible for policing. It says that that constituted voluntary consultation of the kind to which the *Coughlan* principle applies and that that consultation was unfair – and so not "properly" conducted – because no-one representing the interests of protesters was involved and it was accordingly wholly one-sided. Ms Higgins did not submit that the persons who should have been treated as representing those interests necessarily included Liberty itself; but Liberty would have been an obvious candidate and I will refer sometimes to it below as a convenient label for the omitted consultee(s).

68. Ms Higgins accepted that the unfairness alleged by Liberty did not involve breach of the *Gunning* principles as summarised in *Coughlan*, since those principles are not directed to the question of who should be consulted. But she pointed out that it is well-established that *Gunning* was not intended to be an exhaustive statement of what fairness requires, and that the underlying principle of fairness extended to the choice of persons to be consulted. She relied in particular on para. 32 of the judgment of Pill LJ (with which Arden and McFarlane LJJ agreed) in *R (Milton Keynes Council) v Secretary of State for Communities & Local Government* [2011] EWCA Civ 1575, where he said:

> "I do not accept the submission that a decision-maker can routinely pick and choose whom he will consult. A fair consultation requires fairness in deciding whom to consult as well as fairness in deciding the subject matter of the consultation and its timing."

At para. 36 of his judgment (sitting in the Divisional Court) in *R* (*Association of Personal Injury Lawyers) v Secretary of State for Justice* [2013] EWHC 1358 (Admin) ("*APIL*"), Elias LJ described the *Milton Keynes* case as supporting the proposition "that

---

7 I put it that way because at that time it was envisaged that the provisions in question would be introduced by way of amendment into the Public Order Bill: see para. 71 below.

there may be circumstances where a selective consultation exercise will render a decision taken pursuant to it unlawful".

69. The Secretary of State's response to that case is that the various meetings and communications in December 2022 did not amount to "consultation" in the sense of an exercise which attracted the requirements of fairness or, more particularly, of fairness in deciding whom to consult – for short, "formal consultation". They were no more than the kind of "engagement" (or "targeted engagement") which ministers proposing legislation routinely conduct with other public authorities involved in the operation of the system to which the legislation related.

70. Accordingly the essential issue for the Divisional Court, and for us, is whether the process that was gone through in December 2022 was indeed such as to give rise to an obligation on the Secretary of State to consult also with Liberty. The argument was sometimes characterised as being whether that process constituted "formal consultation" or "engagement". That is a convenient shorthand, but we are not ultimately concerned with labels but with a fact-sensitive question of whether what the Secretary of State did in seeking the views of policing bodies was such as to render it unfair not also to seek the views of a body or bodies representing the interests of protesters.

THE FACTS

71. The process on which Liberty relies was conducted with reference not to the Regulations themselves but to the equivalent clauses which the Government sought unsuccessfully to introduce by way of amendment to the Public Order Bill: the amendments (designated amendments 48 and 49) were tabled in January 2023 during the report stage in the House of Lords and were rejected on 7 February 2023[8]. The evidence about the process comes partly from contemporary documentation which was produced to the Court and partly from the witness statement of Mark Williams, a Deputy Director in the Public Safety Group Directorate within the Home Office and at the relevant time Head of the Police Powers Unit ("the PPU").

72. Mr Williams explained that the origin of the proposed amendments was criticism by MPs during the Second Reading Debate on the Bill in May 2022, and by witnesses during the Committee Stages in June, of the absence of any definition in the 1986 Act of the phrase "serious disruption". The National Police Chiefs' Council ("the NPCC") made the same point in a letter to the Home Secretary dated 9 June setting out its views in relation to aspects of the Bill.

73. During the autumn of 2022 there were high-profile episodes of disruption by Just Stop Oil protesters at the Dartford Crossing (in October) and on the M25 (in November).

74. On 1 December 2022 the Prime Minister convened a "roundtable" meeting at 10 Downing Street. It was attended by the Home Secretary, the Minister of State for Crime and Policing, with their civil servants; by representatives of the Crown Prosecution Service; and by the Commissioner of Metropolitan Police ("the MPC"), the Mayor of London and senior representatives of the NPCC, of the College of Policing and of some

[8] Strictly, it was only amendment 48 which was rejected. Following that rejection amendment 49 was not moved.

other police forces (to whom I will refer as "the policing bodies"). The "read out" email of the following day recorded the Home Secretary as having said in her introductory remarks that it was necessary to do more "to prevent protesters bringing chaos and misery to the public". The Prime Minister "asked the police to tell him what they needed". The NPCC, supported by the MPC, raised four "key asks". The first was a "statutory definition of serious disruption, including ref to cumulative impact". The others were possible changes "to ensure key intelligence powers can be used to tackle this problem"; the setting up of a cross government working group to look at two particular specific operational issues; and more funding. Other attenders made further suggestions including better training and guidance for police managing major protests. A number of particular action points were identified. The Prime Minister made it clear that he wanted progress on the issue of the definition of "serious disruption" as soon as possible.

75. On 6 December 2022 the PPU sent policy instructions to the Home Office Legal Advisers as the basis for drafting amendments to the Public Order Bill. These were copied to the policing bodies who had attended the roundtable for their comments, and a meeting of the PPU to discuss the policy instructions took place on 7 December. Item 1 on the agenda was "definition of serious disruption (Public Order Act 1986 and Public Order Bill)". In his witness statement Mr Williams says of this meeting:

> "It should be stressed ... that engaging with policing stakeholders in this manner is routine for policy officials when dealing with any specific policy area that may affect operational policing."

76. On 14 December 2022 the NPCC and the MPC wrote a four-page joint letter to the Home Office. Although the letter gives a certain amount of background about the nature of the problems faced by policing commanders dealing with sophisticated and well-organised protest groups, in substance its purpose is to confirm the four "asks" made at the roundtable.

77. On 15 December 2022 the PPU circulated to the policing bodies a number of draft amendments to the Bill addressed at amending sections 12 and 14 of the 1986 Act. The covering email said that:

> "We are working with OPC [the Office of Parliamentary Counsel] to further clarify these clauses, but in parallel, we would like to gain your input from a police perspective. As such, I have written below some explanations and thoughts on parts the drafted clauses, as well as flagging key areas where we [sic] your thoughts would be helpful."

Eight particular questions followed, raising points about the drafting where the practical experience of the police might be of value. Mr Williams says:

> "As with the meeting on 7 December, this type of engagement is not indicative of a consultation and is routine among officials when handling policy matters that will have a material impact on policing."

78. On 21 December 2022 the NPCC and the MPC sent a joint response commenting on each of the PPU's eight questions in turn. The responses raise some drafting points and

some which are more substantive; but they are all from the perspective of whether the proposed changes would be workable as a matter of practical policing.

79. There was no further communication between the Home Office and the stakeholders in the period up to the introduction of the amendments in the House of Lords in January 2023, or, following their defeat there, in the run-up to the making of the Regulations. However, there are three contemporary references to the process to which Ms Higgins drew our attention.

80. First, in the aftermath of the rejection of the relevant amendments to the Public Order Bill by the House of Lords the Home Office prepared an "Economic Note" addressing the question whether to proceed with making the amendments to the 1986 Act by secondary legislation. The Note itself is dated 17 March 2023, though it did not receive its final sign-offs until the end of April. It is reviewed in some detail by the Divisional Court at paras. 28-33 of its judgment, including the fact that it appears to exist in two versions. Both versions address the question of whether consultation would be required. In that context both say that identified policing stakeholders had been "consulted", but that "full consultation"/"public consultation" was not required (though the reasons given vary between the two versions).

81. Second, in accordance with the usual procedures the Home Office produced a draft Explanatory Memorandum relating to the Regulations for the purpose of the affirmative resolution procedure. Section 10 is headed "Consultation outcome". Paras. 10.1-10.2 read:

> "10.1 The National Police Chiefs Council, the Metropolitan Police Service, the Police and Crime Commissioners of the police forces whose areas include the M25, and National Highways were consulted on how to improve the response to highly disruptive protests at a roundtable chaired by the Prime Minister.
>
> 10.2 Both the National Police Chiefs Council and the Metropolitan Police Service welcomed a commitment to bring further clarity to the meaning of 'serious disruption to the life of the community'. Drafts of the proposed amendments to the Public Order Bill … were shared with and commented on by both organisations. As set out in this Explanatory Memorandum, those amendments provided the basis for the changes made by the instrument."

In the final version of the Memorandum, a new para. 10.1 was introduced, which reads:

> "A full consultation was not necessary as the provisions in this instrument serve to clarify existing police powers and do not create new powers or criminal offences. Instead, targeted engagement with operational leads was held."

The previous paras. 10.2 and 10.3 were re-numbered but not otherwise redrafted.[9] Although there was no evidence as to the reasons for the difference between the two versions, it is a reasonable inference that the Home Office had become aware of the possibility that the reference to the communications with the Police Bodies as "consultation" rather than "targeted engagement" might raise questions of the kind raised in these proceedings.

82. Third, the Report of the Scrutiny Committee records the evidence of the Home Office as being that it believed that "consulting those who would help ensure the statutory instrument would be operationally useful was most important".[10]

83. It is convenient to say at this stage that Ms Higgins did not suggest that those various references to "consultation" were determinative of whether the processes on which she relied constituted consultation for the purpose of attracting the operation of the *Coughlan* principle; but she submitted that they were nonetheless relevant.

THE AUTHORITIES

84. I have already identified the essential principles on which Liberty relies, with the authorities on which they are based. But I need to say a little more about the *Milton Keynes* case and *APIL*, and I should identify two other authorities which are relevant to the analysis. I emphasise that we are in this case concerned only with one aspect of the law relating to the duty to consult, and it is unnecessary, and indeed unhelpful, to range more widely. (It is for that reason that, although it was cited to us, I do not refer to the most recent Supreme Court authority in the field – *R (Moseley) v London Borough of Haringey* [2014] UKSC 56, [2014] 1 WLR 3947 – which was concerned with a very different issue.)

The *Milton Keynes* case

85. The challenge in the *Milton Keynes* case was to a decision by the Secretary of State for Communities and Local Government to make two statutory instruments relating to the rights of local authorities with regard to the change of use of a property from a dwelling house to a house in multiple occupation. The basis of the challenge was that although prior to making the instruments in question the Secretary of State had (voluntarily) consulted with a limited group of "key partners", including the Local Government Association, it had not consulted individual councils. The challenge was brought by Milton Keynes and two other councils.

86. The councils' case was based on the *Coughlan* principle, which was said to be based on an underlying principle of fairness and thus to require also "a fair approach as to what parties should, in the circumstances, be consulted" (see paras. 17-18 of Pill LJ's judgment). The Secretary of State argued, by reference to dicta in earlier authorities,

---

9 We asked for assistance in the course of the hearing about the relationship between the draft and final versions of the Explanatory Memorandum. Ms Hannett and Ms Mitchell helpfully provided a note following the hearing. For our purposes nothing turns on the detail, but since the processes may not be generally well understood I reproduce it as an Annexe to this judgment (subject to some minor presentational editing).

10 Ms Hannett did not suggest that the reference to the Scrutiny Committee's report simply as a record of the evidence given to it was objectionable.

that it was for the decision-maker to decide who to consult (see para. 25); but he went on to submit that it was unnecessary to consult the individual authorities in the circumstances of the instant case, and in particular the fact that they had very recently been consulted in relation to a predecessor proposal and had had the opportunity to express their views on that occasion (see para. 30).

87. The statement in para. 32 of Pill LJ's judgment on which Liberty relies is at the start of the section in which he states his conclusion and represents a rejection of the Secretary of State's primary case. It is not, however, developed in any way because he went on to dismiss the councils' appeal on the basis of the fallback case. At para. 38 he said:

> "That recent and comprehensive consultation in 2009 is in my judgment the key to the decision in the present situation. The Secretary of State was minded to make the orders challenged notwithstanding the strong, articulated objections to them by local planning authorities, of which he was aware. The decision to make them was a political decision which the Secretary of State was entitled to make. In the circumstances, he was then entitled, first, to make the consultation a limited one and, secondly, to decide that there was no evidence of significant new issues arising, which required fuller consultation."

88. Sir James submitted that since the outcome of the appeal did not depend on the statement in para. 32 of Pill LJ's judgment they did not constitute part of the *ratio*. In my view that is correct. However, I see nothing wrong in principle with what Pill LJ says. If *Coughlan* is right to say that a voluntary consultation must be carried out fairly, it is hard to see why that obligation should not extend to a fair selection of consultees. No doubt in deciding whether the exclusion of a particular potential consultee is in fact unfair it will be important to bear in mind that the decision-maker is likely to have a broad discretion as to who should be consulted, but it does not follow that the discretion is unlimited.

APIL

89. In *APIL* two associations of personal injury solicitors challenged the lawfulness of a decision by the Secretary of State for Justice to reduce the fixed recoverable costs payable under the pre-action protocol on the basis that before doing so he had discussed the proposal with representatives of insurers but not with them. As already noted, Elias LJ, who delivered the main judgment, accepted at para. 36 that the *Milton Keynes* case established that there might be "circumstances where a selective consultation exercise will render a decision taken pursuant to it unlawful". He said that he did not understand the Secretary of State to have disputed that proposition. Rather, he continued:

> "His submission is that there never was a consultation exercise. There was no statutory obligation to consult and the Government was not choosing to consult over whether the decision to reduce fees should be taken, it was simply engaging with an interested party in a way which it considered to be beneficial to its decision making."

90. Elias LJ accepted that submission. At para. 43-45[11] of his judgment he said:

> "43. … Contact with interest groups (or 'stakeholders', I think it is, given the modern spin) is the very warp and woof of democratic government; it is central to decision making. It means that Government is better informed of the implications of the different options, and will more likely to be made aware of potential pitfalls, political or otherwise, which the decision may create. But it cannot be the case that every time a minister deals with one group, he or she must hold a similar meeting with a group holding the opposite view. It must be for Government to decide what information it requires, and from what source and at what time, in order to facilitate its decision making. If the Government decides to enter into a formal consultation process, that exercise must satisfy the *Gunning* requirements if it is to be fair and meaningful. But, in my view, a court cannot justifiably infer that a minister has entered into a consultation exercise merely because a decision is taken after a meeting with a particular interest group, even where representations from that group have, in fact, proved decisive. The purpose of the meeting may have been to clarify a particular matter, or to gauge the strength of the group's opposition to a proposed decision, or simply so that the Government will be able to trumpet that group's support for the decision when it was announced. None of this could remotely be said to amount to consultation with all the baggage inherent in that process.
>
> 44. I agree with [counsel for the Secretary of State] that there is no principled basis for determining when the process amounts to consultation and when it involves discussions falling short of that. If a government is persuaded to a view as a result of information volunteered to it, [counsel for the claimants] accepts that that would not be consultation. But is it different if the Government solicits the same information? And if the Government seeks an exchange of views with one body, must it necessarily do so with respect to other potentially interested parties whenever it finds those views persuasive? And how do we determine whether it has found those views decisive? In my judgment, there is no safe mooring for the principle on which [counsel] relies. It is not the function of the courts to map out the way in which Government approaches its task of decision making. If the Government chooses to go down the road of formal consultation, then the courts have the obligation to make sure it is fairly carried out, but in my judgment they should go no further than that.
>
> 45. The process of government would, in my view, grind to a halt if the nature of a government's obligations were as outlined by [counsel for the claimants]. Government must be able to take advice, obtain information, secure undertakings, and garnish support from various interest groups without being required to treat their polar opposites in precisely the same way. This is not unfair: it is simply practical governance. If Government is perceived to be deaf to some interest

[11] There is a mismatch between the paragraph numbers in the online (that is, BAILII) and printed versions of the judgment: I have used the former.

> groups but not others, or unresponsive to interests to which it is ideologically unsympathetic, that is a matter for the ballot box; it is not a matter for the courts."

91. I respectfully agree with what Elias LJ says in those paragraphs. It will be noted that he draws a distinction between, on the one hand, a "formal consultation process" ("with all the baggage inherent in that process") and, on the other, meetings and exchanges of views with interested parties "falling short of that". It is only if the decision-maker has (voluntarily) undertaken the former, that any question of unfair selection of consultees may arise. If they have not, the fact that the engagement is one-sided goes nowhere.

92. Cranston J delivered a concurring judgment. Paras. 64-66 are to similar effect to the passage which I have quoted from Elias LJ's judgment. Although his experience at the interface of law and government entitles his views to particular respect, I will not lengthen this judgment by quoting them here, but I note his observation at para. 66 that "[f]or constitutional and pragmatic reasons, there must be boundaries to the judicialisation of decision-making on watershed policy matters".

Eveleigh

93. Ms Higgins placed considerable weight on the decision of this Court in *R (Eveleigh) v Secretary of State for Work and Pensions* [2023] EWCA Civ 810, [2023] 1 WLR 3599. I can take the account of the issue from the headnote in the Weekly Law Reports, which reads:

> "In order to obtain information to inform its new National Disability Strategy ('the Strategy'), the Government launched the UK Disability Survey ('the Survey') which invited responses from disabled persons and their carers. Following the publication of the Strategy, the claimants brought a claim for judicial review, contending that the Secretary of State had failed lawfully to consult, via the Survey, before publishing the Strategy, with the result that the Strategy itself was unlawful. The judge allowed the claim and quashed the Strategy, holding that the Survey had been a consultation at common law and as such had been required to satisfy the four '*Gunning* criteria', but had failed to satisfy the second *Gunning* criterion, which was that the proposer of the proposal being consulted on had to have given sufficient reasons for the proposal to permit of intelligent consideration and response. The Secretary of State appealed on the ground that the judge had been wrong to hold that the survey amounted to a consultation to which the *Gunning* criteria applied."

94. This Court allowed the appeal. The main judgment was given by Elisabeth Laing LJ. Her essential point was that, although the Survey had been referred to as consultative in nature, it was not the kind of consultation that attracted the *Gunning* criteria because it was not carried out for the purpose of a specific governmental decision. Paras. 81-85 read (so far as relevant):

> "81. As [counsel for the claimants] accepted, there is no magic in the word 'consultation'. It is a word which in ordinary usage has a range of meanings. The mere use of that word cannot entail legal consequences,

> especially if that word is used by people who are not lawyers. For that reason, the repeated use by the Disability Unit of the word 'consultation' and the fact that the Survey was put on the Consultation Hub are legally irrelevant. As Simler J recognised in para 99 of *R (FDA) v Minister for the Cabinet Office* [2018] EWHC 2746 (Admin) whether, when a public authority engages with the public, that engagement attracts legal obligations is a question of substance, not form.
>
> 82. As Bean LJ pointed out during oral submissions, the Judge did not expressly explain what test he applied in deciding that the Survey was a consultation which attracted legal obligations. In my judgment, the *Gunning* criteria are based on self-evident assumptions about the characteristics of the exercise to which they are able, and are intended, to apply. If the exercise in question does not have those characteristics, the *Gunning* criteria cannot apply to it. It is therefore necessary to spell out those assumptions, as, contrary to [counsel's] submissions, they do tell us a great deal about the characteristics of the exercise to which they are intended to apply.
>
> 83. All the cases in which the *Gunning* criteria have been held to apply are cases in which a public authority contemplated making a specific decision which would or might adversely affect a particular person or group of people. …
>
> 84. Unsurprisingly, it might be thought, the *Gunning* criteria therefore assume that a public authority is proposing to make a specific decision which is likely to have a direct (and usually adverse) impact on a person or on a defined group of people. The Strategy is not comparable with those proposed decisions. It is a different thing altogether: a series of general policy commitments which are at such a high level of abstraction that it is not easy to see their direct negative (or positive) impact on a particular person or group of people. So the Strategy is not obviously the type of intended decision to which the *Gunning* criteria can, or are intended to, apply.
>
> 85. The *Gunning* criteria also make two assumptions about the stage of the decision-making process at which they apply. The first is that there is a proposal to make a decision, which, while not inchoate, is at a sufficiently 'formative' stage that the views of those consulted might influence it. But the second assumption, which sheds light on what is meant by 'formative stage' in this context, is that the proposal has crystallised sufficiently that the public authority also knows what the proposed decision may be, and is able to explain why it might make that proposed decision, in enough detail to enable consultees to respond intelligently to that proposed course of action. … ."

Paras. 86-90 go on to amplify the point but I need not set them out here because the passage quoted is enough to identify Elisabeth Laing LJ's reasoning.

95. Bean LJ delivered a short concurring judgment. I need only quote para. 95, which reads:

> "I agree with the judgment of Elisabeth Laing LJ. In particular I agree with her that the *Gunning* criteria only apply where a public authority is proposing to make a specific decision which is likely to have a direct (usually adverse) impact on a person or on a defined group of people. The proposal must be at a sufficiently formative stage that the views of those consulted might influence it, but also must have crystallised sufficiently that the public authority knows what the proposed decision might be, and can explain it in enough detail to enable consultees to respond intelligently to the proposed course of action."

96. Macur LJ agreed with both judgments.

97. Ms Higgins submitted that *Eveleigh* was authority for the proposition that it followed from the *Gunning* principles that a process of engagement with stakeholders would constitute a "consultation" in the formal sense and have to be conducted fairly (not only as regards the *Gunning* principles themselves but also as regards who was consulted) if it satisfied the following three criteria:

(a) that there was a sufficiently crystallised proposal;

(b) that it was likely that the proposal would impact a particular group (usually adversely); and

(c) that the proposal was at a formative stage.

To anticipate, it is clear that she made essentially the same submission to the Divisional Court: see para. 107 below.

98. I do not believe that any such proposition can be extracted from *Eveleigh*. Elisabeth Laing LJ does indeed say in terms that where any of the characteristics implicitly assumed in *Gunning* were absent a putative consultation process would not be subject to the *Gunning* requirements: see the third sentence of para. 82. But that is not the same as saying that where they were all present the process would necessarily constitute a formal consultation attracting those requirements or, more generally, a requirement of fairness extending also to the selection of consultees. In other words, even if the "criteria" identified by Ms Higgins are necessary, they are not necessarily sufficient. Ms Higgins took us carefully through para. 82 of Elisabeth Laing LJ's judgment. She pointed out that her aim appeared to be to rectify the omission of the trial judge in that case to explain what test he had applied in deciding that the Survey was "a consultation which attracted legal obligations", and she submitted that the "self-evident assumptions" identified in the second sentence were clearly intended to constitute such a test: she drew attention to the words "are intended … to apply". I cannot, however, see that anything she says there or elsewhere in her judgment has the effect that the assumptions are not only necessary but sufficient. In any event, such a conclusion would not have been necessary to the issue before the Court and would not be binding.

99. If Ms Higgins' submission were right, the result would be make a huge inroad into the hitherto well-understood position that at common law the duty to consult is confined to

the limited and specific classes of case identified in *Plantagenet Alliance*. It would mean that, in a case where there was otherwise no statutory or common law obligation to consult, a decision-maker would nevertheless come under such an obligation if they chose to engage with any third party in circumstances satisfying her three criteria. It will in practice be very common for public authorities contemplating a legislative measure which will affect a particular group or groups to wish to have some such engagement; and if they do it is most likely to occur at a time when the proposal is "sufficiently crystallised" and at a formative stage: that is just when it is most likely to be useful. Yet if they do so they will, on Liberty's case, become automatically obliged to apply the *Gunning* principles and, it appears, to consult a fairly chosen group representing persons potentially affected. That seems to me wholly inconsistent with the law as it has developed in this field.

100. I am reinforced in that conclusion by the fact that in *APIL* counsel for the claimants submitted, as recorded by Elias LJ at para. 34 of his judgment, that the Government's engagement with the insurers amounted to consultation because it

> "… had indicated what it was proposing to do, it invited comments, it received them and it made its decision. It took these comments into account in making that decision."

That is in practice the same argument as advanced by Ms Higgins before us; and it was roundly rejected by the Court.

101. I should note for completeness that there was a distinct ground of appeal in *Eveleigh* raising the question whether the observations of Lord Woolf MR at para. 108 of his judgment in *Coughlan* constituted binding authority and, if not, whether the *Gunning* obligations applied in their full rigour in the case of a voluntary consultation. The Court declined to grant permission to appeal on that issue although Elisabeth Laing and Bean LJJ made some tentative observations about it which tended in rather different directions. Sir James did not pick up that gauntlet before us.

Article 39

102. In *R (Article 39) v Secretary of State for Education* [2020] EWCA Civ 1577, [2021] PTSR 696, the Secretary of State had made regulations during the COVID-19 pandemic which affected the social care system as it related to children. Before doing so, she had consulted providers of care services, including local authorities, service providers and Ofsted, but not the Children's Commissioner or any organisations representing children in care. This Court held that that that omission was unlawful. Although there is a superficial similarity with the issues in the present case, the decision was not at the centre of Liberty's case, or the reasoning of the Divisional Court, because the basis of Baker LJ's decision (with which I and Henderson LJ agreed) was very specific to the circumstances of the case: he relied on a combination of a statutory duty and two of the recognised cases in which the common law imposes an obligation to consult (see paras. 83-85 of his judgment). Although he does refer to the *Coughlan* principle at para. 78, there is no reference to the *Milton Keynes* case, which indeed was not cited to the Court.

103. Although *Article 39* was thus not at the forefront of Ms Higgins' submissions, it was relied on in one respect by Sir James. One of the bases on which the Court held that the Secretary of State had acted unlawfully was that he was under a statutory duty in

making regulations under the Care Standards Act 2000 to consult "any persons he considers appropriate" and that in the circumstances it had been "irrational" of him not to exercise that power in respect of the Children's Commissioner and the other organisations: see para. 83 of Baker LJ's judgment. Sir James relied on the fact that the test of irrationality there applied differed from the test of unfairness formulated by Pill LJ in the *Milton Keynes* case.

THE DECISION OF THE DIVISIONAL COURT

104. The structure of the decision of the Divisional Court on the consultation issue was as follows. At para. 131 it identified the nature of Liberty's challenge. At paras. 132-139 it set out the facts relating to the process undertaken in December 2022. At paras. 140-151 it summarised the parties' submissions. Its dispositive reasoning is at paras. 152-183. At the end of that reasoning it concludes, at para. 184:

> "Ground IV succeeds. A voluntary consultation process was undertaken. It was however one-sided and not fairly carried out. For this reason it was procedurally unfair and unlawful."

For our purposes I need only focus on the reasoning in paras. 152-183. This is under four headings, which I take in turn.

(i) "The basic principles"

105. This heading comprises paras. 152-162. I have already quoted paras. 152-153. Para. 154 sets out the passage from *Coughlan* on which Liberty bases its case. Paras. 155-156 acknowledge that "[n]ot every process of communication and discussion by a public body with chosen interlocutors engages an obligation to carry out a full consultation exercise meeting the requirements of the *Gunning* criteria", and the Court quotes the passage from the judgment of Elias LJ in *APIL* which I have quoted at para. 90 above. Paras. 157-158 quote from the judgments of Elisabeth Laing LJ and Bean LJ in *Eveleigh*. Paras. 159-160 address the purpose of consultation. Referring in particular to the judgment of Baker LJ in *Article 39*, the Court observes, at para. 160:

> "… [T]he purpose of consulting goes beyond merely informing the reasoning in support of the eventual decision. Consultation should ensure that the decision is both of high quality and justly reached. Fairness in carrying out a consultation is part of procedural fairness in decision making more generally."

(ii) "Did the Secretary of State carry out a consultation exercise?"

106. This heading comprises paras. 163-169. I start with the Court's conclusion, at para. 169:

> "In those circumstances, we accept the submission of Liberty that the conditions for application of the *Gunning* criteria stated by Elisabeth Laing LJ, echoed by Bean LJ, in the *Eveleigh* case, are satisfied in this case. This was a case where the Secretary of State chose to consult."

107. The Court was thus accepting the submission considered at paras. 98-101 above, namely that *Eveleigh* established that any engagement with third parties in

circumstances satisfying the three criteria identified at para. 98 constituted a formal consultation. The preceding paragraphs are concerned with showing that those criteria are satisfied. At paras. 163-164 the Court addresses the first two criteria, pointing out that the Government was seeking the views of the policing bodies on a concrete legislative proposal, intended to be implemented shortly, which would have an important impact both on would-be protesters and on those affected by protests: it observes at para. 163 that this "had all of the hallmarks of a consultation". At paras. 165-168 it seeks to demonstrate that the proposal was at a formative stage, pointing out that the responses which the Government invited and received had the potential to affect the drafting of the proposed legislation and very likely did so. In this connection it referred to the letter from the NPCC and the MPC dated 21 December 2022 as "a classic consultation response, with suggestions and comments on the proposal".

108. Since for the reasons already given I do not accept that analysis of *Eveleigh*, it follows that I regard this part of the Court's reasoning as flawed. I return to this below.

(iii) "Fairness: Can a selective consultation be fair in general?"

109. This heading comprises paras. 170-181. Under it the Court considers the principles governing who should be included in the process in a case where the Government has voluntarily undertaken a formal consultation. Sir James's submission had been that such a case the Secretary of State could consult whomever he chose, subject only to the decision being rational. He relied on Baker LJ's application of a test of rationality in *Article 39* – see para. 103 above – and pointed out that that had apparently been based on an observation of Stanley Burnton J in *R (Liverpool CC) v Secretary of State for Health* [2003] EWHC 1975 (Admin), to which Baker LJ had referred with approval at para. 35 of his judgment[12]. Both decisions had been followed by Rooney J in *Re JR130's Application* [2023] NIKB 109.

110. In response to that submission the Divisional Court pointed out that in *Article 39* this Court had not been referred to either the *Milton Keynes* decision or its endorsement by Elias LJ in *APIL* and that what Baker LJ said could not be regarded as "clear authority supporting a general principle that a decision maker can always, subject only to rationality, choose whom to consult in a voluntary consultation case" (para. 178). It stated at para. 181:

> "[W]e take the law to be as stated by Elias LJ in the *Milton Keynes* case[13]: there may be circumstances where a voluntary but selective consultation exercise will render a decision taken pursuant to it unlawful. Such cases might be relatively rare. The Court will tread with care in characterising as a consultation a process of Government engagement with those from whom it seeks advice."

---

12 The Court points out at para. 173 that by a slip Baker LJ gave the citation for a different case involving Liverpool City Council.

13 This is a slip: the reference is evidently to *APIL*.

(iv) "Did fairness require consultation of bodies representing the interests of protestors?"

111. This heading comprises paras. 182-183. The substance of the Court's answer to the question posed is in para. 183. However, by way of preliminary, at para. 182 it says that it is "instructive" that the Scrutiny Committee had expressed the view that a consultation process which included only law enforcement agencies was inadequate and quotes a long passage from the Committee's report explaining why.

112. Turning to the Court's substantive reasoning, para. 183 begins:

> "Applying a broad standard of fairness we conclude that fairness required a balanced, not a one sided, approach, and the procedure adopted was not fair. There are eight reasons for this."

It then goes on to give the eight reasons as sub-paras. (i)-(viii). The passage is very long, and I need only identify the headings, namely: (i) "the proposals assumed an increased exposure to criminal sanction"; (ii) "fundamental common law rights were engaged"; (iii) "readily identifiable class of adversely affected bodies and persons"; (iv) "stage of development"; (v) "scope of issues/ability to improve the quality of legislation"; (vi) "conducting a broader consultation would not have been onerous or disproportionate"; (vii) "existence of Parliamentary scrutiny not an answer"; and (viii) "implications for other cases".

Observations

113. I should make two points at this stage about the Divisional Court's reasoning as summarised above.

114. First, the Court was, with respect, right to consider separately (1) whether the December 2022 process amounted to "a consultation exercise" and (2) whether, if so, fairness required that a body or bodies representing the interests of protesters be included in that exercise. That approach properly reflects the fact that there is no general duty to consult and that Liberty's case depended on the Secretary of State having chosen to carry out a consultation of the necessary character.

115. Second, Ms Hannett on behalf of the Parliamentary Authorities made the same objection to the Court's reference in para. 182 to the report of the Scrutiny Committee (and also to several references in para. 183 which I have not reproduced), as she had in relation to the references in connection with the *ultra vires* ground: see paras. 54-55 above. Again, I need not reach a final decision on its admissibility because the Court's references to the Report are clearly of a confirmatory nature and not integral to its reasoning, and Ms Higgins did not seek to rely on it at all. I am bound to say, however, that irrespective of the question of Parliamentary privilege, I doubt whether the views of Scrutiny Committee about the desirability of consultation are likely to assist on the narrower question of what the law required.

THE APPEAL

116. The Secretary of State's ground of appeal as regards the consultation ground is threefold. It reads as follows:

> "… [T]he Court erred in concluding that the Secretary of State had embarked on a voluntary consultation exercise, and that the Regulations resulted from an unfairly one-sided consultation process:
>
> a. Contrary to the Court's findings, no voluntary consultation exercise was undertaken by the Secretary of State.
>
> b. Even if a voluntary consultation exercise had been embarked upon, the Court erred in concluding that the standard of review (when assessing the Secretary of State's decision as to who to consult) was fairness, rather than rationality.
>
> c. Finally, and in any event, [if], contrary to the Court's findings, fairness did not require the Secretary of State to consult bodies representing the interests of protestors or to conduct the broad exercise that the Divisional Court appears to have contemplated."

Heads (a)-(c) address in turn stages (ii)-(iv) in the Divisional Court's analysis. I take them in turn.

(a)/(ii) Did the Secretary of State carry out a consultation exercise?

117. As noted at para. 70 above, the question posed by the Divisional Court is a shorthand. More precisely, the question is whether what the Secretary of State did in seeking the views of policing bodies in December 2022 was such as to render it unfair for her not to seek also the views of a body or bodies representing the interests of protesters. I do not believe that it was. My reasons are as follows.

118. I start with the point made at paras. 107-108 above. In so far as the Court proceeded on the basis that the question was answered by deciding whether the Secretary of State's engagement with the policing bodies satisfied "the conditions for application of the *Gunning* criteria stated … in the *Eveleigh* case", I respectfully believe that it was wrong to do so. Specifically, I do not believe that *Eveleigh* is authority for the proposition that, in any case where the Government chooses to seek the views of an interested party at the formative stage of a "sufficiently crystallised" proposal affecting the rights of a particular group, that must be treated as the undertaking of formal consultation such as to render selective consultation potentially unfair. In my view, whether the process constituted a formal consultation in that sense, and with those consequences, has to be judged by a wider assessment of its purpose and character.

119. Approaching the question in that way, I do not believe that the Government's engagement with the policing bodies in December 2022 had the character of a formal consultation – or, to put it another way, it was not of a character that required it to comply with the common law principles as regards procedural fairness. It was not a process set up by the Government with a view to hearing arguments from a range of affected parties for and against the legislative and other changes which it was contemplating making in the light of the Parliamentary debates in the summer and the Just Stop Oil protests in the summer. Rather, its purpose was to obtain the input of the policing bodies as the authorities with executive responsibility in the relevant field. Although of course the police are not a department of government, they are nevertheless arms of the state, for which the Home Secretary has constitutional responsibility: in that

sense, the process was essentially intra-governmental. Engagement of this kind is not only sensible but necessary; but it is of a wholly different character from formal consultation.

120. The factors mainly relied on by the Divisional Court in its judgment, summarised at para. 107 above, are, with respect, wide of the mark, because they are dependent on its acceptance of Liberty's submission as to the effect of *Eveleigh*. The Court's statements that the December 2022 process had "all the hallmarks of a consultation" or that the letters of the NPCC and the MPC were "classic consultation responses" do not by themselves advance the argument, without a clear understanding of what the necessary characteristics of a consultation (in the relevant sense) are.

121. It is fair to say that at one or two points in paras. 163-168 the Court does mentions features which go beyond the three criteria relied on in that submission. In particular, it referred to the breadth of the matters referred to in the consultation responses, which it characterises as "everything spanning human rights implications, practical issues relating to enforcement through to drafting of the statutory language", and it describes the NPCC and MPC letter of 21 December 2022 as giving a "detailed, sophisticated and informed response". Ms Higgins likewise emphasised that the questions raised with the policing bodies and their responses were not limited to "operational" matters. I am not sure that those points give a fair reflection of the overall character of the engagement, which does indeed seem to me mainly to focus on the workability of the proposed changes (to which the statutory drafting is essential). But in so far as the responses at some points extended into wider questions that is not in any way inconsistent with the purpose and nature of the exercise being as I have characterised them above.

122. Against that background, the fact that in the contexts noted at paras. 80-82 above the Secretary of State referred to the December 2022 process as a "consultation" has no substantial weight. I refer to the observations of Elisabeth Laing LJ in para. 81 of her judgment in *Eveleigh*.

123. Since it is essential to Liberty's case that the December 2022 process was a formal consultation my conclusion on this head of the Secretary of State's case is sufficient to require us to allow the appeal on the consultation ground. It is accordingly unnecessary to consider the remaining two grounds, and I will confine myself to a few observations.

(b)/(iii) Fairness or rationality?

124. I am doubtful how real this issue is, and indeed in the course of his oral submissions Sir James seemed inclined to share that doubt. As a matter of ordinary public law principles, I do not see why a decision-maker who is obliged to conduct a consultation, or who has voluntarily undertaken to do so, should not be under a duty to act both fairly and rationally when choosing whom to consult. And in many or most cases a choice which is unfair is likely also to be irrational. I cannot attach much significance to the fact that in *Article 39* Baker LJ described the Secretary of State's omission to consult the Children's Commissioner as irrational rather than unfair. That may well have seemed the appropriate term in the circumstances of the case and in the context of a discretion conferred by statute; and I suspect (though I cannot recall) that it reflected the way that the challenge was framed. In either case, it needs to be borne in mind that,

save where a statute contains a specific prescription, the decision-maker is likely to have a broad discretion as to whom to consult.

(c)/(iv) If there was a formal consultation should Liberty have been a consultee?

125. If the Secretary of State had indeed chosen to embark on a formal consultation, the conclusion of the Divisional Court that Liberty, or some other organisation or organisations representing the interests of protesters, should have been among the consultees. I was a little concerned that some of the eight arguments deployed by the Divisional Court in support of that conclusion, indicated in outline at para. 112 above, appeared to be directed to the different question of whether the Secretary of State should have chosen to carry out a formal consultation; but that is not a question which I need to explore.

OVERALL CONCLUSION

126. This appeal should be dismissed on the basis that the Divisional Court was right to hold the amendments made to sections 12 and 14 of the 1986 Act by the Regulations were outside the amendment power conferred by the 2022 Act. I would not, however, uphold the Divisional Court's decision that the Regulations were unlawful for the further reason that the Secretary of State had carried out an unfairly selective consultation.

Lord Justice Dingemans:

127. I agree.

Lord Justice Edis:

128. I also agree.

ANNEXE TO JUDGMENT OF UNDERHILL LJ

PARLIAMENTARY AUTHORITIES' NOTE ON EXPLANATORY MEMORANDA

1. This short note responds to the Court's request for a summary of the Parliamentary processes governing the production and publication of the Explanatory Memoranda ("EMs") which accompany delegated legislation.

2. Since the establishment of what is now known as the Secondary Legislation Scrutiny Committee (in December 2003) ("the SLSC"), EMs have been provided and published for every instrument subject to the affirmative or negative resolution procedure.[1]

[1] See Erskine May, para 31.2

3. EMs are prepared by the executive, and seek (i) to help any reader (whether an MP or a member of the public) to understand the content of the instrument (particularly given that delegated legislation can often be complex or technical); and (ii) to assist Parliament in scrutinising the instrument by providing information on (for example) relevant policy background.[2]

4. EMs are initially laid before Parliament alongside the relevant instrument.[3] In the House of Commons this is done by providing copies to the Journal Office.[4] In parallel, the instrument is registered with the Statutory Instrument Register and published on the "legislation.gov" website.[5]

5. In the case of instruments subject to the affirmative resolution procedure, both the EM and the instrument are initially in draft form;[6] these are the documents considered and debated by the SLSC. If the instrument is ultimately approved by resolution of Parliament, the Government is then able to make the final Statutory Instrument; when it does so, the instrument is assigned an SI number and a final version of both the instrument and the accompanying EM are published on "legislation.gov".[7]

6. The EM initially laid alongside an instrument (whether in draft or final form) can be revised after publication, either to correct errors or more generally. For minor errors (e.g. typographical errors), the original EM is simply replaced. Where substantive amendments are made, a "revised" EM must be produced and published alongside the original.[8]

7. In this case, it appears that substantive amendments were made to the original draft EM following comments from the SLSC. As a result, both draft EMs were published (and remain available) online; the final EM, also available online, is identical to the revised draft but includes the SI number.

---

2 Cabinet Office, *Guide to Preparing Explanatory Memoranda to Statutory Instruments* (2 January 2024), section 2 (available on the gov.uk website).

3 Ibid, section 3.

4 For more information on the process, see National Archives, *Statutory Instrument Practice* (5th edn, November 2017) (available on the legislation.gov.uk website).

5 Again, for more information see National Archives, *Statutory Instrument Practice*.

6 Where the negative resolution procedure is used, the instrument laid and the accompanying EM are technically final.

7 Again, for more information see National Archives, *Statutory Instrument Practice*.

8 Cabinet Office, *Guide to Preparing Explanatory Memoranda to Statutory Instruments* (2 January 2024), section 3.