Neutral Citation Number: [2024] EWHC 638 (Admin)

Case No: AC-2022-MAN-000317

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT AT MANCHESTER

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ

Date handed down: 21 March 2024

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

THE KING on the application of CU
(by his mother and litigation friend, DV) **Claimant**

- and -

SECRETARY OF STATE FOR EDUCATION **Defendant**

- -
- -

Stephen Broach & Katherine Barnes
(instructed by **Rook Irwin Sweeney LLP, London EC4A**) for the **Claimant**

Tom Cross (instructed by **Government Legal Department, London SW1**) for the **Defendant**

Hearing dates: 26 & 27 February 2024
Draft judgment circulated: 14 March 2024

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APPROVED JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10am on 21 March 2024 by circulation to the parties or their representatives by email and by release to The National Archives.

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

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Introduction and summary of decision

1. This case involves a challenge by way of judicial review to just one of 22 "consultation questions" asked in the SEND Review, a consultation Green Paper published by the government on 29 March 2022.

2. The claimant is a 12 year old boy with special educational needs and disabilities ("SEND"). He is referred to as "CU" to protect his right to privacy as a child and acts by his mother, DV (also anonymised only to protect CU's anonymity).

3. He contends that the approach taken in question 7 of the Green Paper ("Q7"), concerning the remedies available to the First-tier Tribunal ("FTT") in claims of disability discrimination against disabled children by schools, was unlawful, because it failed to inform readers that the FTT currently has no jurisdiction to award a remedy of compensation in such cases. This failure is said to contravene what is known as the second Gunning principle, which I shall explain below, as well as being irrational.

4. That argument is disputed by the defendant, the Secretary of State for Education, who contends that the Gunning principles do not apply to Q7, so that there was no need to provide this information, and that the case based on irrationality fails for the same or similar reasons.

5. This case has been listed and heard as a "rolled-up hearing", where the court must decide whether the claimant should have permission to bring the claim and, if so, whether the claim should succeed on the substantive grounds argued.

6. As regards permission, the defendant contends that permission should be refused on the specific grounds that:

    a) the claim was brought outside the required time limit for bringing judicial review claim under CPR Part 54.5 and there is no proper basis for extending the time limit under CPR Part 3.1(2) ("the delay point"); and

b) it is highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred: s.31(3D) of the Senior Courts Act 1981 ("the no substantial difference point").

7. Essentially the same or similar arguments are advanced by the defendant in relation to the question as to whether or not relief should be granted even if the claimant succeeds on his case, pursuant to s.31(6) SCA 1981 as regards alleged undue delay in making the application – "the s.31(6) delay point" – and to s.31(2A) SCA 1981 as regards the no substantial difference point – "the s.31(2A) no difference point".

8. The case was issued in 17 August 2022 and, having been listed and anonymity orders made by Mr Justice Fordham in his order dated 4 November 2022, was then stayed by consent to await the judgment of the Court of Appeal in the case of Eveleigh v. Secretary of State for Work and Pensions, which was handed down on 11 July 2023 and reported under neutral citation number [2023] EWCA Civ 810 ("Eveleigh"). After that judgment the case was restored and the claimant made an application to amend to include, as an alternative to breach of the second Gunning principle, an allegation of irrationality, which I granted on terms.

9. The case has been extremely well argued by all counsel. Although there is little if any room for serious dispute about the Gunning principles, which have, of course, recently been considered in a context similar to the present case by the Court of Appeal in Eveleigh, or about the principles applicable to irrationality challenges, there is: (a) no clear - and some conflicting - authority about the date from which the time limit begins to run in judicial review challenges to consultation exercises undertaken by public bodies; and (b) no clear authority about the application of the no substantial difference point in such cases.

10. Whilst it is logical to deal with the permission issues first, since I have found the substantive question easier to decide and, since I am satisfied that I must find in favour of the defendant on that point, that is determinative of the whole case, I shall deal with that issue first and then go on to deal with the out of time and no substantial difference points.

11. I have received and read witness statements from DV and from witness statements filed in support of CU from parents and other relatives of children with SEND, namely Ms Jones, Ms Hughes and Ms Hilote, together with a witness statement from CU's solicitor Ms Barrett.

12. I have also received and read two witness statements from Ms Elizabeth Franey, Deputy Director of the SEND and Alternative Provision ("AP") System Outcomes and Experiences Division, Department for Education, with responsibility for the Education Health and Care plan (EHCP) system, mediation, and redress.

13. In summary, I find that the claim is sufficiently arguable for permission to be granted and also that permission should not be refused on the grounds of delay or no substantial difference, but that the substantive claim fails on the merits on both substantive grounds. My reasons follow.

The facts, summarised

14. It is necessary only to summarise the facts, beginning with the Green Paper.

15. The Green Paper was headed: "SEND Review: Right support, right place, right time Government consultation on the SEND and alternative provision system in England". In large

part it contained the policy proposals that had arisen from a review, commissioned in 2019, as to the way in which children and young people with SEND are supported. It also asked respondents for their views on certain issues relevant to the SEND review by asking a number of questions and inviting responses.

16. Q7 asked: "Do you consider the current remedies available to the SEND Tribunal for disabled children who have been discriminated against by schools effective in putting children and young people's education back on track?".

17. Immediately above Q7 was paragraph 34, which stated: "The Equality Act 2010 makes clear that schools must operate inclusively and ensure that children and young people who are disabled can access and participate in education and other activities schools provide. However, where this is not the case and practices may have been discriminatory, families and young people are able to bring a claim to the First-tier SEND Tribunal, which has the power to award a range of remedies to redress the wrong with the aim of putting a child or young person's education back on track. These remedies can include training of school staff and ordering a change to school policies. The government proposes to explore how well this arrangement is working in practice".

18. It is apparent that neither Q7 nor paragraph 34 made reference to the fact that the FTT has no jurisdiction to order the payment of compensation in disability discrimination cases brought against schools or that this exclusion – which is provided for by paragraph 5(3)(b) of Schedule 17 to the Equality Act 2010 – is unique to this particular sub-set of disability discrimination cases.

19. This exclusion is also something which has been a source of much concern to many parents of children with SEND and the larger body of those providing assistance and support to such children and to their parents and wider families. That includes DV, who explains in her witness statement how this exclusion has directly impacted CU and her in the particular context of the difficulties which they have experienced in relation to provision for CU as a child with SEND by his former primary school and which she is concerned he may also experience in his current secondary school. It is unnecessary to rehearse what she says. It is sufficient to say that I have read it and do not doubt the strength and genuineness of her views.

20. In 2019 two children with SEND brought judicial review claims against the defendant, the Secretary of State for Education, and others, asserting that the absence of a compensation remedy in such cases breached their rights under the European Convention on Human Rights ("ECHR"). The claim was defended by the defendants and, after various delays, it went to a substantive hearing before Saini J. on 14 June 2022, after which he produced his judgment dismissing their claim: AA v Secretary of State for Education [2022] EWHC 1613 (Admin). I have been provided with extracts from certain witness statements made in support of the claimants' case in AA.

21. The SEND Review does not include any direct consideration of this issue and nor does it include any express proposal to make any change to the FTT's power to award a compensation remedy in such cases. The SEND Review is a lengthy document but its essential content and structure can briefly be summarised as follows.

22. In the Ministerial foreword it is explained that the paper sets out the proposals for a system, building on the reforms made in 2014, which would offer children and young people with SEND "the opportunity to thrive, with access to the right support, in the right place, and at the right time". The principal proposal was to establish "a single national SEND and alternative provision system that sets clear standards for the provision that children and young people should expect to receive, and the processes that should be in place to access it, no matter what their need or where they live". The ministers said that they were "committed to continuing to listen to children, young people, parents, carers, and those who advocate for and work with them, as well as system leaders, to achieve this ambition". They concluded: "We encourage you to reflect on the proposals set out in this green paper and respond to our consultation".

23. The Executive summary identified three key challenges facing the SEND system, of which the second was navigating the SEND system. In paragraph 10 it gave details of an increasing appeal rate to the FTT with a high percentage of successful appeals, notwithstanding the "heavy emotional - and sometimes financial - costs associated with tribunals".

24. The key proposals were explained at paragraph 25, with the sixth and final one being to "streamline the redress process, making it easier to resolve disputes earlier, including through mandatory mediation, whilst retaining the tribunal for the most challenging cases". In paragraph 29 it said that they would "publish a national SEND and alternative provision delivery plan setting out government's response to this public consultation and how change will be implemented in detail and by whom to deliver better outcomes for children and young people".

25. Chapter 2 addressed in more detail the six proposals identified at paragraph 25. After each section explaining each proposal there was what was described as a consultation question. Under the sixth proposal there appeared in paragraphs 29 to 32 the proposals for dealing with complaints under the new national system, including a proposal for mandatory mediation before any appeal to the FTT. This was the subject of question 6.

26. Paragraph 33 then summarised the role of the FTT and its existing and extended powers and also explained that its decisions would be made in line with the new standards. Paragraph 34 and Q7 – set out above – then followed.

27. The consultation period ran to 1 July 2022, but was extended to 22 July 2022 to allow those who required accessible documents sufficient time to respond.

28. Ms Franey states that no policy proposal relating to the subject matter of Q7 had been developed at the time of the publication of the Green Paper or, indeed, has been subsequently. There was no proposal either to maintain the current system or to make a change to it, only to gather information on the current arrangement to better inform policy thinking on it for the future. There was a decision to include the question in neutral and open terms so as to elicit the widest possible response from stakeholders. She disagrees with the claimant's case that Q7 contained a proposal to "do nothing for the time being". She said that it was not uncommon for government to seek to gather information on a topic to inform policy thinking in what she described as "the often multi-staged or iterative process of policy-making". She says that Q7 did not need to be included in the Green Paper, but it was decided to include it because it was "linked to the theme

of strengthening accountability in the SEND system". She observed that Q7 was not unique in not dealing with a specific proposal.

29. In oral submissions I suggested that any proposal only to gather further information could be said to include within it an implicit proposal not to make any change to the existing position in the meantime. Mr Broach did not disagree with this, but submitted that the question was context-specific to each case and, in this case, in circumstances where AA was being heard at the same time as the Green Paper was out for consultation, it was plainly in reality a proposal to do nothing. One might, if one was being uncharitable, describe it as a proposal to kick the can down the road.

30. In her second witness statement Ms Franey explained that Q7 was not asking whether respondents considered the remedies currently available were effective, but whether they considered the remedies available to the FTT effective "in putting children and young people's education back on track". She said that this was deliberate, because the government was specifically interested in exploring the effectiveness of those remedies rather than the question of the absence of a compensation remedy about which, she said, government already had a good idea about the arguments in favour of removing the compensation exclusion from reading the evidence and submissions in the AA case and from other sources going back as long ago as 2001.

31. She gave, as an example of one possible change, that of converting the FTT's existing power to "make such order as it thinks fit" into a positive duty to make such orders in specified circumstances. Although Mr Broach poured scorn on this as a suggestion, I do not think that it can be discounted as a proposal which no government, acting rationally, could even consider.

32. Mr Broach was on firmer ground, in my view, when he submitted that there was no logical reason to think that an award of compensation could not also be effective in certain circumstances in putting children and young people's education back on track. That, however, seems to me to raise a different point. Government is plainly entitled, if it wishes and in the absence of some positive duty to do otherwise, to decide for itself which proposals it wishes to explore and which it does not, even if others might consider that the proposals to be explored should extend further than they do or be more positive or immediate in their terms and timescale. Even if, to take a possibility which has doubtless occurred to DV and others with similar views, it is possible that government had no particular desire to explore a proposal to allow the FTT to award compensation in relation to disability discrimination claims against schools, because it has no particular enthusiasm for such a change, that does not mean that there is any legal basis for a judicial review claim, under Gunning or irrationality principles, against the decision not to include this as a positive proposal in the Green Paper.

33. Ms Franey also explained that there was available, on the Gov.uk website and elsewhere, various information which explained what remedies were available in the FTT for disability discrimination. However, I agree with the claimant that in reality this information would not have been readily available for anyone wishing to respond to Q7 especially since, as Mr Broach submitted, there was no link to any such information source or suggestion in Q7 or the preceding information that the available remedies were limited in any way. On this basis the defendant's argument that, if the second Gunning requirement arose, it was complied with in

this way, seems to me to be hopeless on the facts and was not pressed very hard in submissions for understandable reasons.

34. DV accepts that she became aware of the Green Paper and that she sent in a reply to Q7 on 19 July 2022, within the extended period for responses, in which she made clear her strong view that the FTT should be given power to award compensation, stating her reasons. This is a point very much relied upon by the defendant in relation to the "no substantial difference" issue. She also instructed solicitors on 22 June 2022, who wrote a pre-action letter dated 1 July 2022 on behalf of CU, articulating the claim in substantially the same terms as later advanced.

35. The letter included this statement, relevant to the no substantial difference issue: "Conspicuous unfairness clearly arises; whilst [CU's] mother is informed about this limitation, many other parents will not be, which will clearly affect the outcome of the consultation". The action required of the defendant was to publish an amended version of the supporting information which explained that the FTT could not award compensation and to extend the consultation period to allow for responses. A response was sought by 15 July 2022, failing which proceedings would be issued without further notice.

36. The defendant did not respond until 22 July 2022, raising substantially the arguments raised in these proceedings, including the no substantial difference and the out of time arguments.

37. The claimant changed solicitors, for reasons explained in Mr Barrett's witness statement as being not a change of actual solicitor but merely a change of firm to one which was able to take the case on legal aid. By letter dated 8 August 2022 she wrote to the defendant in substantially the same terms as the previous letter, seeking a response by 12 August 2022.

38. In the meantime, an application for legal aid was submitted on 27 July 2022, duly chased and received on 4 August 2022, after which the claim was issued on 18 August 2022.

39. Although in submissions Mr Cross criticised the claimant's solicitors for not making an application before then, especially if it appeared that it was always known that any claim was intended to be funded by legal aid, it seems to me that there was no delay of any real consequence following the initial letter of claim, so that the real question is whether or not the claim ought to have been issued on the basis that time started to run for making the claim on the date the consultation was opened.

40. In her second witness statement Ms Franey updated the position, referring to the results of the consultation exercise. She commented that Q7 received a total of 1780 responses, of which a substantial number raised the current exclusion of the compensation remedy. Mr Broach observed that the response number was lower than the number of responses to other questions. However, I do not for myself consider that point as being of any obvious relevance to the issues I have to decide. The comparison does not in my view show, contrary to Mr Broach's submission, that respondents as a group were obviously hampered by the lack of information about the current exclusion of the compensation remedy.

41. She also explained that the improvement plan anticipated in paragraph 29 of the Green Paper was published in March 2023 and that it included at paragraph 23 and in line with what might

have been expected, the statement: "We will also further consider our policy on how disability discrimination claims against schools are dealt with".

42. It is useful for me to conclude this section by stating in the light of this evidence my clear view as to what was conveyed to any reasonably careful reader of paragraphs 33-34 and Q7 in their setting and context. In my view they would see that the only specific proposal was at the very end of paragraph 34 where it said that "the government proposes to explore how well this arrangement is working in practice". "This arrangement" can only be understood as a reference to the current arrangement, where disability discrimination claims can be made to the FTT which has power to award a range of remedies to redress the wrong with the aim of putting the child's education back on track. Put short, it was clearly a proposal to carry out further exploration which might, or might not, lead to further specific proposals at some future stage.

43. Q7 must be read in that context. It referred to the current remedies available to the FTT and asked the specific question whether those current remedies are effective in putting children's education back on track. Of course a respondent might well say that they did not consider them effective, and give reasons, and also go on to suggest other remedies which would be effective, such as the addition of a compensation remedy. However, they were not being specifically asked to consider and identify any such additional remedies, whether a compensation remedy or otherwise.

Consultations and the Gunning principles – the law

44. I can take the relevant principles, which are not in dispute, primarily from the leading judgment, given by Laing LJ, in Eveleigh.

45. In paragraph 7 Laing LJ identified that a public body will be obliged to consult in three cases: (a) if there is a statutory duty to do so; (b) if there is a legitimate expectation that it will do so (whether because of a promise, or a sufficiently consistent past practice); and (c) if it would be conspicuously unfair not to consult.

46. The claimant rightly does not suggest that there was an obligation to consult in this case under any of the three cases identified above. Instead, its case is that a public body, having decided voluntarily to consult, is obliged to follow the Gunning guidelines in doing so. The correctness of that conclusion was a point raised by way of respondent's notice in Eveleigh but, in the light of their conclusion on the issue on appeal, the Court of Appeal declined to answer it. Mr Cross confirmed that it is not argued by the defendant in this case.

47. The four essential Gunning requirements, as suggested by counsel for the appellant in the Gunning case and endorsed and approved since then, including in the Supreme Court in R (Moseley) v LB Haringey [2014] 1 WLR 3947, per Lord Wilson (at paragraphs 25-26) are as follows:

    First, that consultation must be at a time when proposals are still at a formative stage.

    Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response.

    Third, that adequate time must be given for consideration and response.

Fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.

48. The essential section of Laing LJ's judgment for present purposes begins at paragraph 81 and may be summarised as follows.

    a) The question as to whether, when a public authority engages with the public, that engagement attracts legal obligations is a question of substance, not form.

    b) In order for the Gunning requirements to apply:

        (i) A public authority must be 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. That is to be distinguished from a general policy commitment 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.

        (ii) There is a proposal to make a decision, which, while not inchoate, is at sufficiently formative stage that the views of those consulted might influence it, and has crystallised sufficiently that the public authority 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. That is to be distinguished from an inchoate plan which would take shape as and when information was gathered, and in response to that information

    Further, the fact that a self-described consultation document states that the responses would influence the contents of the eventual proposals does not overcome the essential requirement that there must, at this initial consultation stage, be a proposal to which the Gunning requirements could apply. It is not sufficient that respondents were given the opportunity to influence the future proposals with information and their views.

49. As to irrationality, in their written submissions Mr Broach and Ms Barnes rely upon and refer me to the decision of the Divisional Court (Leggatt LJ and Carr J) in R (Law Society) v Lord Chancellor [2018] EWHC 2094 (Admin) at [98], where they said that:

    "The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of "irrationality" or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is "so unreasonable that no reasonable authority could ever have come to it": see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, 233–234. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e g *Boddington v British Transport Police* [1999] 2 AC 143, 175, per Lord Steyn. The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it—for example, that significant reliance was placed on an irrelevant

consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error…"

50. Although in their written submissions they also relied upon the Tameside duty of inquiry, under which the public authority is required to ask itself the right question and take reasonable steps to acquaint itself with the relevant information to enable it to answer it correctly (Lord Diplock in Secretary of State for Education and Science v Tameside MBC [1977] AC 1014 at page 1065B), in her oral submissions on this aspect of the case Ms Barnes confirmed that this point was not separately relied upon on the basis that it added nothing to the existing case on irrationality.

Discussion and reasons for decision on the substantive issue

(a) Gunning

51. In my judgment it is readily apparent, once one applies the principles stated in Eveleigh to the facts of this case, that the Gunning requirements simply cannot apply to Q7 and the information provided with it.

52. Although it was part of a document which described itself as a consultation, one has to look at the substance of Q7 and the information provided with it, in the context of the document as a whole, to see whether there was in fact a proposal to which the Gunning consultation requirements applied.

53. Here, as I have said, there was no explicit proposal other than one to explore how well the current arrangement regarding the remedies currently available to the First Tier Tribunal in relation to disability discrimination claims against schools were working in practice.

54. That was not even a general policy commitment at a high level of abstraction, let alone a proposal to make a specific decision. Nor was it even an inchoate plan, which would take shape as and when information was gathered and in response to that information, let alone a policy which had crystallised sufficiently that the proposal could be explained in enough detail to enable consultees to respond intelligently to it. The fact that the responses might affect the scope of the future investigation and, hence, at some future stage a concrete proposal, does not convert it into a proposal to which the Gunning requirements applied.

55. It is no doubt appreciating these formidable difficulties which led Mr Broach to submit that Q7 could properly be read as including with it a proposal to do nothing in the meantime in relation to removing the compensation remedy exclusion, which itself was a proposal to which the Gunning requirements would apply. Whilst impressively ingenious, in my judgment this argument fails on a plain reading of Q7 and the information provided.

56. Mr Broach accepted in argument that a similar case could be made in almost every case where a public authority was inviting responses to inform a future investigation and/or future proposals, in that it necessarily carried with it an implicit proposal to do nothing more concrete to change the existing position in the meantime. He realistically accepted that it could not sensibly be argued that this meant that there was always an obligation to put this forward as a positive proposal (i.e. to do nothing in the meantime) in relation to which the Gunning consultation obligations would then apply.

57. His submission was that on the particular facts of this case, where: (a) there was this existing exclusion, unique in relation to disability discrimination cases as a whole; and (b) government was already aware (in particular from the ongoing challenge in AA) that it was a controversial issue, with immediate and continuing impacts on the lives of children with SEND and their families; then implicitly proposing to do nothing to address this mischief in the meantime did amount to a proposal to do nothing for the time being to which the Gunning obligations did apply.

58. Again, ingenious though the submissions was, I am unable to accept it. I have no doubt that those affected by the compensation remedy exclusion feel, entirely genuinely, that it is a massive injustice, and saw the absence of any reference to it as an obvious elephant in the room in relation to Q7 and the information provided in relation to that question. However, that does not mean that government was also required to see it in the same way when it came to making the decision whether or not to include it as a proposal for change in the Green Paper. It cannot be said, nor indeed is it argued, that it was public law irrational for government not to do so. To find that there was a positive obligation on government to consult on whether or not there should be an immediate proposal to change the existing law would require the court to intrude on the constitutional principle that changes to the existing law and policy, including decisions about whether or not to investigate whether there should be any such changes and if so what, are firmly a matter for government, in the absence of some particular legal or other obligation to the contrary.

59. It follows that I must reject this ground of challenge.

(b) Irrationality

60. In her oral submissions Ms Barnes argued, as ingeniously as did Mr Broach in relation to the Gunning ground, that since the purpose of the question was to enable government to assist it in better understanding whether or not the existing remedies were effective in getting the education of children with SEND back on track, it was irrational to exclude reference to the lack of a compensation remedy which could not be said to be unrelated to the achievement of that purpose.

61. If Q7 had in fact amounted to a proposal not to change the existing remedies available to the First Tier Tribunal in disability discrimination claims against school and which had the aim of putting the education of a child with SEND back on track, then I am prepared to accept that would have been force in the claimant's submission that it was irrational to make no reference to the existing exclusion of a compensation remedy, in circumstances where government well knew that it was an obvious and significant lacuna in the remedies available to the First Tier Tribunal, and where it could not sensibly be said that it had no part at all to play in putting children's education back on track. In particular, the submissions that: (a) the power to award compensation against schools might well encourage schools to agree a sensible remedy, to avoid the risk of such an award, rather than unsuccessfully contesting cases in the First Tier Tribunal; and (b) the availability of compensation awards to be used to fund, for example, additional educational provision to remedy past deficiencies, were both well made.

62. However, since that was not the proposal, in my judgment the same fundamental problem applies to the irrationality ground as applies to the Gunning ground. In reality, it seems to me, the real focus of the irrationality ground has to be that the defendant ought to have extended the question to ask whether responders considered that the addition of a compensation remedy would also be effective in putting children's education back on track. However, that is not the way in which the irrationality case is argued and, more fundamentally, it founders on the same difficulty as the Gunning ground, namely that: (a) it is for the authority in question to decide what proposals it wishes to put forward and when; and (b) individual members of the public cannot, through judicial review, force government to put forward a positive proposal rather than to ask for information to inform the content of any future proposals.

63. It follows that I must reject this ground of challenge as well.

When does the time limit begin to run in consultation cases?

64. This issue was hotly contested. Given my decision on the substantive issue it is not necessary to address it in the context of s.31(6) but, since it is also raised as a basis for refusing permission (which decision may itself have consequences independent of the failure of the substantive claim) I must engage with and decide the argument under CPR Parts 54.5 and 3.1(2), even though it will not affect the final result.

65. The first decision in time to which I was referred is that of Sedley J in R v Secretary of State for Transport ex p London Borough of Richmond (No 3) [1995] Env LR 409. In his judgment he said that "the want of an identifiable decision is not fatal to an application for review", so that "if it is arguable that the new consultation is proceeding on a false basis which is justiciable in law, there will be every reason to lean in favour of deciding the issue sooner rather than later". He did not say that the claim must be brought at the earlier stage, simply that it may be.

66. In Burkett v Hammersmith and Fulham LBC [2002] UKHL 23 the House of Lords decided, in the case of a resolution to grant outline planning permission which was subject to a s.106 agreement and also, potentially, to call-in by the minister, that: (a) such resolution could, in principle, be the subject of a judicial review challenge; but (b) this did not prevent an application for judicial review to challenge the subsequent grant of planning permission, even though it raised substantially the same grounds.

67. The decision of the Court of Appeal in Nash v Barnett LBC [2013] EWCA Civ 1004 concerned decisions to proceed with outsourcing procurement processes without first complying with statutory consultation requirements and subsequent decisions to enter into contracts with the successful tenderers. Those subsequent decisions were the subject of the judicial review challenges. Distinguishing Burkett on the facts, Davis LJ held that, since the duty to consult arose in relation to the earlier decisions, the time to bring the claims started from the date of those decisions. That, of course, is not the same as saying that the time started from the earlier date when the defendant ought to have consulted before making those decisions. It must be borne in mind that in a case where the essence of the complaint is that there should have been but was not a consultation, it may well be difficult to identify with any sufficient precision the latest date when the consultation should have taken place. Nonetheless, the decision is not

binding authority that, in a case where the complaint is a deficient consultation rather than no consultation at all, the start point is the date when the deficient consultation is launched.

68. I was then referred to the earlier decision of the Court of Appeal in Royal Brompton v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472. This was a case about a statutory consultation document issued in March 2011 for the whole of England, where the target of the claim was the expressed preferred option for London for two centres for paediatric cardiac surgical services which excluded the Royal Brompton hospital. The consultation ran for 4 months. At first instance the claimant succeeded only on one ground, legitimate expectation, which resulted in the consultation being quashed. The defendant appealed that decision and the claimant argued that the decision should be upheld on additional grounds. In a section beginning at paragraph 87 Arden LJ, giving the judgment of the court (Richards LJ and Sir Stephen Sedley), made various observations of some relevance to the current issue.

69. In particular, she emphasised that many of the arguments advanced to the court were subject to the threshold objection that this was a consultation process, not a final decision, where the defendant owed a duty to reconsider its preferred option in the light of the responses received, so that if it failed to do so in a proper manner the decision could be the subject of a challenge on that basis. It followed, she said, that complex litigation at the consultation stage might be wasteful and itself cause harmful or avoidable delay, so that (paragraph 93) "the courts should [in general only] grant … public law remedies … if there is some irretrievable flaw in the consultation process". Nonetheless (paragraph 89 "there will be cases where it is appropriate to grant some form of relief in relation to a consultation process, not least because applications for judicial review must be made promptly".

70. It is apparent from this discussion, and from her later summary at paragraph 140, that the decision as to whether a claim could and should be brought during the course of a consultation or after a decision has been made following the end of the consultation will very much depend upon the particular facts.

71. Penultimately, I was referred to the decision of McGowan J in Draper v Lincolnshire County Council [2015] EWHC 2964 (Admin), made following a two day rolled-up hearing. It involved a challenge in a case where a one month consultation process, beginning on 1 October 2014, for a re-design of the council library service, led to a decision on 3 December 2014 to accept an expression of interest from a private service provider and, in turn, a procurement process leading to the decision to award the contract to that provider on 3 February 2015. The claim was only issued on 1 May 2015, right at the end of the 3 month period beginning on the date of the decision to award the contract. The defendant took the point that the claim was brought out of time in relation to the first ground and, more generally, that it was not brought promptly in relation to all grounds and that the defendant would be prejudiced if relief was granted.

72. McGowan J rejected the ground 1 challenge to the fairness of the consultation on the substantive merits. She added, at paragraph 26, that "the challenge on this ground was not brought in a timely manner and not even within three months of the publication of the document under challenge". She stated that "if the Claimant was aggrieved at the nature of the consultation document it was not open to him to "wait and see" if he liked the result of the process, nonetheless, and that the ground "was not brought within time". She concluded in this

paragraph that: "If it had been arguable then it would have been necessary to consider an exercise of discretion but that does not arise. Permission to bring a claim for judicial review is refused on this ground".

73. In my judgment it is clear that what McGowan J decided, following a detailed review in a 2 day rolled up hearing, was that this ground was not arguable on the merits and also that permission was refused on grounds of delay. Although it was argued by Mr Broach that this, being only a decision on permission and, hence, not normally one attracting significant weight, it seems to me that it deserves the weight properly to be attached to a decision made after a full review of the facts at a rolled-up hearing. What she concluded was that, if the challenged decision was the award of the contract on 1 February 2015, then even that claim was not brought promptly albeit just within the 3 month outside limit. However, she also decided that the claim ought to have been brought even before that decision, although she does not (so far as I can see) identify whether that was the start of the consultation, the end of the consultation or the date of the decision to accept the expression of interest from the provider. Nor did she expressly refer to the earlier authorities on the point to which I have been referred.

74. Finally, then, there is the judgment of Elisabeth Laing J in Tilley v Vale of Glamorgan Council [2015] EWHC 3194 (Admin). That was another library consultation case, where the decision challenged was made on 9 March 2015, following a detailed process involving reviews, consultations, reports and decisions beginning in autumn 2013, with the relevant consultation taking place some time between August 2014 and March 2015, following which the decision challenged was made at the meeting. In between the decision and the issue of the claim the library the subject of the claim was the subject of an expression of interest to be run as a community library, and business cases were received in respect of the others, so that the decision at the meeting to close libraries in respect of which no such expression of interest was received or business cases received did not have any effect.

75. One argument specifically advanced was that the challenge to the consultation was out of time. Before addressing this submission the judge decided that the grounds of challenge to the consultation still live as a result of the above course of events failed on the merits. She said: "This decision means that I do not need to consider whether the consultation challenge is out of time", but added: "For completeness, and since I have read and heard argument about it, I briefly consider this question" (paragraph 69).

76. She then held, at paragraph 70 of her judgment, that: "the consultation was in this case not of itself, a decision, and did not, of itself, have any legal consequences". She referred to it as being "even less legally significant that the outline planning permission in Burkett" and distinguished Nash on the facts. She referred to Brompton and the possibility for self-correction and, in conclusion, rejected the submission that the claimant was obliged to bring proceedings promptly after the end of the consultation. She also suggested that the decision in Draper was a special decision on its own facts, suggesting that the facts of that case were closer to Nash than to the current case.

77. Although I was invited to take the view that these two most recent decisions were conflicting, and that it is necessary for me to prefer one over the other, in my view the above analysis demonstrates that neither judge considered that they were doing anything more than reaching a

decision on the particular facts of the case, rather than stating and following some clearly articulated principle which was in conflict with the other. Again, therefore, it appears that the decisions were, and were seen as being, very much dependent on their particular facts.

78. After oral submissions closed I turned to Fordham's Judicial Review Handbook (7th edition) to see if that could point me to any cases of further assistance. At paragraph 26.2.9, headed "when grounds first arose: the running of time", the author refers to two decisions of potential relevance in the consultation context, which also illustrate the fact sensitive nature of this exercise.

79. The first in time is Esai Ltd v National Institute for Health and Clinical Excellence [2008] EWCA Civ 438 where, at paragraph 70, Richards LJ addressed the defendant's argument that relief should be refused under s.31(6) on grounds of delay, in a case where the claimant had waited some 18 months, until after a final determination at the end of an appraisal process, to bring a judicial review to challenge the defendant's refusal to provide a fully executable version of a particular document during that process. He refused to accept this argument, saying that "it is more likely that such a challenge would have been considered premature and inappropriate. At the time when NICE refused to release the fully executable version, it was uncertain what the outcome of the appraisal process would be. The final appraisal determination might have proved to be acceptable to Eisai, in which case the issue concerning release of the fully executable version would have been academic". He also relied on the alternative, available to Eisai and taken up, of a right of appeal against the determination, but he clearly did not consider that as a matter of law he had to decide the application on the basis that the time necessarily started to run from the date of the refusal.

80. The second in time is Hoareau v Secretary of State for Foreign and Commonwealth Affairs [2019] EWHC (Admin), where the Divisional Court had to consider a similar argument that the claim had been brought too late and relief should be refused because challenges to the consultation process (in relation to the resettlement of the Chagos islanders) were not brought until 15 months later, after the government had made its decision in relation to that option. At paragraph 286 the court (Singh LJ and Carr J) said that they "[did] not accept that a challenge to the inadequacies relied upon could only have been pursued after it became clear how central the 2015 Consultation responses are said to have been to the decisions under challenge. Nor is the fact that the assumptions were not final an answer; they were the basis of the consultation which is now criticised. There has been undue delay and the granting of relief would be likely substantially to prejudice the Government's position. The Resettlement Decision has been taken. The consultation exercise would potentially have to be re-run". There one can see the court taking a different view on the particular facts of the case.

81. It is important in my view when considering these authorities to note that the four Gunning principles are not all directed to the same point in the process. If a consultation is embarked on too late, so that the proposals have already been too far developed to enable any meaningful consultation on their substance, then it is difficult to see how such a failure could sensibly be remedied during the course of the consultation, so that the only available option would be to quash any decision taken at the end of the process (unless it was possible to say that, had a challenged been made earlier, the public authority would have been willing to withdraw the

developed proposals and start again from scratch). If, however, the complaint – as here – is that insufficient reasons were given to permit intelligent consideration and response, then that could be remedied at any time before the close of the consultation by providing such reasons and extending the period for responses or, even in appropriate cases, by a fresh or supplemental consultation process before the proposal was finalised or decision made. The same is true of a complaint that inadequate time was given for consideration and response. The fourth requirement, that the product of the consultation must be conscientiously taken into account, logically only arises after the consultation process has ended and may be remedied at any time before the proposal is finalised or decision made.

82. These differences may explain why the cases, and the observations made in them, are not always necessarily consistent. It also explains why it is said in a number of the cases that an applicant is entitled to bring a judicial review challenge against the first stage in the process, but is not necessarily obliged to do so and, instead, may await the promulgation of the finalised proposal following the consultation and then bring a judicial review challenge against that, relying on the flawed consultation. This also explains why it is said that a challenge brought at too early a stage may be premature; that probably explains the observations in Royal Brompton where the challenge was based on the fourth Gunning requirement.

83. In my judgment, in the case of the second Gunning requirement it follows from the authorities that: (a) an applicant would be entitled to judicially review the consultation as soon as it is issued, but may face the objection that the challenge is categorised as premature, if the circumstances are such that there would be sufficient time, and it would otherwise be practicable, to address the contravention within the lifetime of the consultation, as extended where appropriate; (b) an applicant may also choose to judicially review the consultation once it has ended, especially where – as here – the applicant has requested the public authority to address the contravention within the lifetime of the consultation but had been met with a refusal, although here the circumstances might be such as to suggest either that the claim was still premature or, at the opposite extreme, that it was not brought promptly; and finally (c) an applicant may also choose to judicially review the decision to promulgate the finalised proposal, based on a flawed consultation, although again the circumstances might be such as to suggest that the claim was not brought promptly.

84. If I had to say that as a matter of law there could only be one relevant starting point, then I would – albeit with some hesitation – hold that it ought to be the start of the consultation period since that is, on proper analysis, the date of the decision which is said to be public law unlawful. However, I would also accept that where the applicant has, during the course of the consultation, asked the public authority to remedy the flaw within a reasonable time of becoming aware of it and has been met with a refusal, then that refusal decision ought itself to be capable of being the subject of a separate challenge. I would not hold that the applicant should be entitled to await the final decision itself, unless the circumstances are such that there was a proper basis for saying that the final decision included a decision not to remedy the flaw in the prior consultation process.

85. In my judgment, the above would provide a proper answer to the prejudice which late challenges to consultations may cause to affected individuals or to good public administration

where, for example, the judicial review challenges the decision to promulgate a definite proposal which itself is taken many months or years after the close of the consultation, so that there would be no need to rely on the discretion which the court has under s.31(6) to refuse permission to bring the judicial review or to refuse relief in such a case. I do however see the force of the alternative option, which is to allow the claimant to challenge the consultation process at the same time as challenging the decision, but if the claimant had had plentiful opportunity to bring a challenge within the consultation period or promptly thereafter, especially in circumstances where the public authority had made plain that it would not accede to any request to address the contravention, and if it was obvious that some considerable time would pass between the close of the consultation and the eventual promulgation of the proposal, then the court could and no doubt would exercise its discretion under s.31(6) in appropriate cases, even if the judicial review was brought promptly and within 3 months of the promulgation, where delay would prejudice affected individuals or good administration.

86. The decision as between these two options seems to me better to await a case where it actually made a difference to the outcome, which is not this case.

Decision on the out of time point

87. Here, there was a request to remedy the alleged flaw within the consultation period, which was refused on the last day of the consultation period. In accordance with the above principles I would hold that: (a) the challenge, being brought promptly and in any event within 3 months of the end of the consultation period, was not out of time; but in any event and even if the time started to run from the start of the consultation period (b) the circumstances are such that an extension of time should be granted, because it was not only sensible but proper in the circumstances to request the defendant to remedy the flaw, given the ample time between that date and the likely promulgation of the relevant proposal.

What is the meaning of "the outcome would not have been substantially different for the applicant" in consultation cases?

88. The defendant's argument is that: (a) it is clear from the words used in the statute that the court is expressly required to consider the outcome to the applicant, rather than to any wider class of persons; (b) since CU was able to and did, through his mother, answer Q7 by making representations about the absence of a compensation remedy, of which she was already aware, it is clear that the outcome for him would not have been substantially different, so that permission and/or relief should be refused.

89. This raises the question as to whether or not the court can and should only consider the direct and immediate outcome for the claimant or should consider matters more widely.

90. It appears, somewhat surprisingly, that there is no decision since the introduction of these provisions in 2015 which has addressed the particular argument advanced by the defendant here.

91. There is a very helpful summary of the central points concerning the proper approach to this test in the decision of Ms Kate Grange QC in R (Cava Bien Limited) v Milton Keynes Council [2021] EWHC 3003 (Admin) at paragraph 52. As is made clear in that summary, the "highly likely" standard sets a high hurdle, where the court has to evaluate what would have happened if

the alleged unlawful conduct had not occurred without trespassing on the decision-making function of the public authority. However, as can be seen, none of the authorities which she cites address this particular point.

92. Mr Cross relies upon the decision of the Court of Appeal (in relation to the existing common law discretion to refuse relief) in the case of R (Wainwright) v Richmond upon Thames LBC [2001] EWCA Civ 2062 at paragraphs 46 where Clarke LJ, with whose judgment Henry LJ and Wall J agreed, held that where a claimant has herself been fully consulted it will only be in rare cases that she can seek relief by relying on the lack of consultation of others. He observed that "the mere number of objectors is not itself generally material, rather it is whether they have additional points to make". He also observed at paragraph 49 that on the facts of that case: "The respondent has not been able to identify any particular point that any resident might have made which might have made a difference to the proposals or the ultimate decision. Although in some cases that may not be significant because it may be difficult to find out what other interested people or groups might have thought, I do not think that that can fairly be said to be the case here".

93. The common law requirement of materiality and presence of prejudice in relation to judicial review is discussed in Fordham's Judicial Review Handbook at paragraph 4.2 and the cases cited therein. Perhaps the most helpful consideration for present purposes is the decision of Moses J in R v North & East Devon Health Authority, ex p Pow (1998) 1 CCLR 280, referred to at paragraph 4.2.10, where, in the context of a successful challenge based on a failure of consultation where it was argued that relief should be refused as a matter of discretion on the basis that there had been "ample opportunity for those who oppose the decision to make their views known. This they have done. Those views have been taken into account. It is said that nothing further has been said or could be said which could cause a fresh decision to be taken".

94. Moses J accepted that: "There are cases, of which [counsel for the defendant] has helpfully provided me with examples, where proposals have been well known in advance and where it can be said that, despite the absence of a formal consultation process, all possible suggestions have already been advanced or that the decision is so obvious that there is no reason to think further opportunity of a consultation would make any difference".

95. However, he continued: "But the mere fact that the grounds of opposition are already known or that it is well understood that the opposition is widespread and deeply felt does not mean that there is no room for a process of consultation whereby not just opposition but also the offer of alternative solutions is advanced. [The defendant's witness] thinks that consultation provides no fruitful solution. That is undoubtedly correct, if that consultation merely consists of rejection of an existing proposal. But proper consultation should be far more positive and, as contemplated by the Regulation, may provide alternative solutions".

Decision on the no substantial difference point

96. I have already referred to the evidence that Q7 received a total of 1780 responses, of which a substantial number raised the current exclusion of the compensation remedy, and already concluded that there is no basis for a submission that respondents generally were hampered by the lack of information about the current exclusion of the compensation remedy.

97. The claimant has, however, produced evidence from one witness who has stated that although she did respond to Q7, because she was unaware of the disability discrimination compensation remedy exclusion she was unable to and did not comment upon that point.

98. I would not be willing in a case such as this to decide against the claimant at the permission stage because this is not, in my view, simply a question of identifying what other additional arguments other respondents might have wished to make, as to which I see the force of Mr Cross' submission that, given the existing knowledge of the groups in favour of removing the exclusion it is difficult to see what further arguments might have emerged. It is also, in my view, a question of identifying what other additional experiences or reasons other respondents might have wished to put forward to explain why in their individual case the absence of a compensation remedy had already made, or might make in the future, a particular difference in relation to them or their child with SEND. The defendant wanted to know about the experiences of people actually using the system, and not just from those who already had clear views. Given that the defendant was obliged to consider all responses conscientiously and with an open mind, had this been a consultation which attracted Gunning principles it would have been difficult for me to conclude that it is highly likely that nothing said by anyone about their own experiences would have made a difference.

99. In my judgment, on the authorities it is at least arguably sufficient that, on the assumptions the court is required to make when applying the no substantial difference question at the permission stage: (a) the outcome for the claimant includes an outcome where all those who might wish to respond to Q7 with knowledge of the compensation remedy exclusion can do so, so that all such responses can conscientiously be taken into account; (b) it cannot be said to be highly likely that this would have made no substantial difference to the result of the consultation or thus, in turn, no difference to the claimant insofar as he has a legitimate interest in the consultation being run properly and also – as DV says – in relation to any future disability discrimination claims he might bring as regards his secondary school education.

100. It follows that I do not refuse permission on this ground either. It is not necessary for me to go further in this case.