



Neutral Citation Number [2022] EWHC 105 (Admin)

Case No: CO/1142/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 January 2022

Before :

MR JUSTICE GRIFFITHS

Between :

**MIRIAM BINDER, JEAN EVELEIGH,
VICTORIA HON AND DOUGLAS PAULLEY**

Claimants

- and -

**SECRETARY OF STATE FOR WORK AND
PENSIONS**

Defendant

Stephen Broach and Katherine Barnes (instructed by Bindmans LLP) for the Claimants
Sarah Hannett QC and Emily Wilsdon (instructed by Government Legal Department) for
the Defendant

Hearing date: 3 November 2021

Judgment

Mr Justice Griffiths :

1. This is an application for judicial review brought with permission.
2. The claimants are four disabled adults and their standing to bring the claim is not disputed. They claim that the defendant failed to consult lawfully, via its UK Disability Survey (“the Survey”), before publishing a National Disability Strategy document on 21 July 2021 (“the Strategy”) and that, consequently, the Strategy itself is unlawful. I have been very sorry to learn today that the first claimant, Miriam Binder, died shortly after the hearing before me, and I send my condolences to those she leaves behind.
3. The relief claimed is a declaration that the Strategy is unlawful. A claim to quash the Strategy is not pursued. The claimants expect, however, that if such a declaration is made, the defendant will carry out further appropriate consultation with a view to revising the Strategy, if appropriate.

The issues

4. The essential points made by the claimants have remained broadly consistent but the way in which the issues have been formulated has been subject to development.
5. The Statement of Facts and Grounds, as amended on 24 April and 11 August 2021, now raises three Grounds, as follows:
 - i) Ground 1 The common law consultation fairness requirements are applicable in this instance because: (a) in carrying out the Survey and/or engaging with stakeholders, the defendant voluntarily embarked on a consultation exercise; (b) in any event, the common law required consultation because to do otherwise would result in “conspicuous unfairness”; and (c) it was irrational not to consult in circumstances where the stated purpose of the Strategy was to facilitate greater participation by disabled people in society and decision-making.
 - ii) Ground 2 The common law required the defendant to consult with Disabled People’s Organisations (“DPOs”) on the Strategy because the failure to do so would result in “conspicuous unfairness”. Therefore, in failing to consult with DPOs (which the defendant accepts was not done), the defendant was in breach of the duty to consult.
 - iii) Ground 3 In carrying out the function of consulting (as the claimants contend) or information-gathering (as the defendant contends) through the Survey, the public sector equality duty imposed by section 149 of the Equality Act 2010 (“the PSED”) required the defendant to have due regard to the equalities implications of its design and implementation. There is no evidence that the defendant did so at the relevant time, such that there has been a breach of the PSED, resulting in choices about the way the Survey was carried out which risked disadvantaging disabled people. An Equality Impact Assessment carried out subsequently does not remedy the error because it fails to consider “various highly material issues”. This Ground is relied on only in relation to the Survey consultation, and not in relation to the subsequent Strategy.

6. Before the hearing, the parties agreed the following formulation of issues for determination:
 - i) By undertaking the Survey, did the defendant voluntarily embark on a consultation with the public to which the *Gunning* principles apply? This is a reference to the common law principles of fair consultation discussed in *R v Brent London Borough Council ex parte Gunning* (1985) 84 LGR 168, encapsulated by the Court of Appeal in *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213, and approved by the Supreme Court in *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56, [2014] 1 WLR 3947.
 - ii) If not, did the defendant nevertheless have a duty to consult with (a) disabled people and/or (b) DPOs?
 - iii) If not, was the defendant's decision not to consult disabled people and/or DPOs irrational?
 - iv) In conducting the Survey, did the defendant breach the PSED?
7. At the hearing, the claimants reformulated both the Statement of Facts and Grounds analysis and the agreed issues, and addressed me under the following headings:
 - i) Did the defendant engage in a consultation as a matter of substance as part of her development of the Strategy?
 - ii) If not, was the defendant under a duty to do so, in relation to disabled people and/or DPOs?
 - iii) If not, was it irrational not to consult disabled people and/or DPOs?
 - iv) In conducting the Survey, did the defendant breach the PSED?
8. It is essential for the issues in any case to be formulated logically and clearly, but it is often not easy to do that. A logical and clear formulation of issues demonstrates a sound analysis. It enables all parties to engage with each other head on, rather than circling around each other without solid engagement. It also helps the judge who, unlike the parties, comes to the issues from a standing start. If the questions to be answered are identified (questions being more helpful than broad topics), and if those questions are presented in a logical order (so that related issues are worked through progressively), even the most complicated case will fall into place. There is a difference between complexity and difficulty: the shortest questions may be as hard as any to answer. Nothing much can be done about that. But a tangle of threads can always be untangled to advantage.
9. The issues in this case fall naturally into two: a claim alleging an unlawful failure to consult, and a claim that the PSED was breached. The first is the one which the various analyses above articulate less clearly. This is Grounds 1 and 2 of the re-amended Statement of Facts and Grounds, issues (i) to (iii) in the agreed issues, and issues (i) to (iii) in the claimants oral argument. Having heard the argument, I will approach the issues raised under the following headings:

- i) Was the defendant under a duty to consult? The Statement of Facts and Grounds at Ground 1 (b) and (c) relies on “conspicuous unfairness” and/or irrationality in this respect. Ground 2 pursues the “conspicuous unfairness” point raised in Ground 1(b).
- ii) If not, did the defendant voluntarily embark upon a consultation and, if she did, what if any consultation duties were thereby created?
- iii) If and insofar as any consultation duties existed (as examined under (i) and (ii) above), did the Survey discharge those duties?
- iv) In conducting the Survey, did the defendant breach the PSED?

Facts

10. Before winning the General Election on 12 December 2019, the Conservative party said in its manifesto:

“We will publish a National Strategy for Disabled People before the end of 2020. This will look at ways to improve the benefits system, opportunities and access for disabled people in terms of housing, education, transport and jobs. It will include our existing commitments to increase SEND funding and support pupils, students and adults to get careers advice, internships, and transition into work.”

11. Delays caused by the Coronavirus pandemic meant that the Strategy was not published until 28 July 2021.
12. Work on the Strategy was co-ordinated by the Disability Unit which is a cross-departmental disability team within the Cabinet Office.
13. On 28 January 2020, the Director of the Disability Unit wrote to the Disability Charities Consortium in advance of an initial discussion with them on 3 February 2020. The letter identified “the key policy themes” for the Strategy as “Supporting independent living, Positive attitudes and stigma, Access to justice and enforcing rights, Inclusive products and services, [and] Accessible built environment.” It said:

“We envisage taking forward parallel strands of work to realise the [Strategy], covering:

- collection and analysis of evidence and data
- engagement with disabled people and stakeholders
- engagement with Government Departments leading on key issues
- policy iteration and development
- communication

On engagement with DCC specifically, we envisage meetings at roughly monthly intervals with DCC in 2020 on different aspects of the [Strategy] NSfDP, mainly with officials but with engagement by Ministers directly at key points.”

Meetings between the Disability Unit and the Disability Charities Consortium then took place on 12 occasions, between 3 February 2020 and 25 May 2021.

14. A variety of other groups were also selected to participate in a number of other engagement sessions, working groups, roundtables, and joint roadshows in various parts of the UK, on various dates in 2020 and 2021, which are listed in the evidence filed by the defendant (pp 188-190 of exhibit MB1). These included (for example) 12 meetings of Regional Stakeholder Network Chairs between 4 March 2020 and 30 June 2021. The Regional Stakeholder Network was set up by the Disability Unit “to help build a picture of the lived experience of disabled people in England”, one of its purposes being “helping to develop the [Strategy]” (press release of 2 April 2020).
15. A number of written submissions were also received from a variety of individuals and organisations in 2020 and 2021 in response to the announcement of the forthcoming Strategy. These too are listed, although only by date and source, in the evidence (pp 61-62 of exhibit MB1).
16. On 2 April 2020, the Disability Unit issued a Press Release headlined “A National Strategy for Disabled People to remove barriers and increase participation” which said “The Cabinet Office’s Disability Unit is working across government and with disabled people to develop a National Strategy for Disabled People.” It continued (with emphasis added):

“The Cabinet Office’s Disability Unit is working with government colleagues, disabled people, disabled people’s organisations, charities and businesses to achieve practical changes that will remove barriers and increase participation.

A key focus is the development of a National Strategy for Disabled People. This will put fairness at the heart of government work, to level up opportunity so everyone can fully participate in the life of this country.

The strategy will build on evidence and data, and critically on insights from the lived experience of disabled people. It will include existing commitments, such as to increase special educational needs and disability funding and support pupils, students and adults to get careers advice, internships and transition into work, whilst identifying further opportunities to improve things.

Our objectives for the National Strategy for Disabled People are to:

- develop a positive and clear vision on disability which is owned right across government

- make practical changes to policies which strengthen disabled people's ability to participate fully in society
- ensure lived experience underpins policies by identifying what matters most to disabled people
- strengthen the ways in which we listen to disabled people and disabled people's organisations, using these insights to drive real change
- improve the quality of evidence and data and use it to support policies and how we deliver them

As the coronavirus pandemic is the current priority for the government, we are reviewing our plans for the development of the strategy. We want to ensure we have enough time to get this right and undertake a full and appropriate programme of stakeholder engagement. People's views and insights will be crucial as we work with colleagues across government, disabled people and other stakeholders on possible solutions."

17. Work also continued within government, including "challenge sessions" between the Disability Unit and relevant government departments in August and September 2020, and meetings of "cross cutting groups" between August and October 2020.
18. Meetings of a Disabled People's Organisations Forum took place on 4 occasions between July and November 2020.
19. On 2 December 2020, the Disability Unit published a blog post on the GOV.UK domain about the Strategy, which it said:
 - "... will be built on:
 - improved data and evidence
 - engagement with disabled people
 - insight from lived experiences"
20. Under the heading "Where is the Strategy at?", the blog post said (with emphasis added):
 - "Our early discussions with disability stakeholders highlighted a number of major themes that sit across departmental responsibilities:
 - housing and the wider built environment
 - transport
 - the justice system

- the ability to live independently
- accessible products and services (including assistive technology)
- perceptions of disabled people

This is not a complete list. We are continuing to listen to stakeholders to find the right areas to build a strategy that makes a real difference to the lives of disabled people.”

21. Under the heading “How will the government deliver the strategy?”, the blog post said:

“We’re also stepping up further engagement with our stakeholders. We’ll use technology, including social media, to ensure that we collect thoughts directly from people who are not represented by existing groups. Our stakeholder groups have been working with us to provide insight on key issues for disabled people. We have regular meetings to ensure that disabled people’s voices are heard, from a range of geographical regions, and varying experiences of disability.

Our stakeholder groups include:

- the Disabled People’s Organisation forum
- the Disability Charities Consortium
- the Regional Stakeholder Network
- Disability Access Ambassadors

We value insights from our stakeholders, who provide lived experience and expert views to guide our National Strategy. This is a part of our programme of engagement which will continue even after the Strategy is published.”

22. Under the heading “What’s next?”, the blog post said:

“We’ll spend the next few months gathering thoughts, testing approaches and ensuring that we loop in views from the widest possible range of stakeholders and citizens.”

23. The defendant accepts that none of the engagement elicited views on detailed policy proposals, because no such proposals had been finalised or agreed within government. The evidence on behalf of the defendant says that, during most of the period of the information gathering phase which this engagement exercise represented, “there was no draft Strategy (bringing those proposals together in a single framework), nor were the proposals sufficiently concrete to make it possible to discuss them externally”. It concedes that “Details of the emerging policy proposals from Government departments were not shared” during the information gathering phase.

24. The Disability Unit developed the content and design of the Survey between September 2020 and January 2021 “with support and input from external specialists and stakeholders and from across Government” (witness statement of Marcus Bell, para 9.5).
25. The Survey was published on 15 January 2021 and was open for an initial period of four weeks for responses (to 13 February 2021) which was later extended (initially to 28 February, when responses would inform the Strategy, and ultimately to 23 April 2021, when responses would inform the implementation of the Strategy). The launch was accompanied by a press release entitled “National Strategy for Disabled People Survey” which began: “Today the Disability Unit has launched a public survey to gather views and experiences for the National Strategy for Disabled People”. The press release said (with emphasis added):

“The Disability Unit in the Cabinet Office is working with government colleagues, disabled people, disabled people’s organisations, charities and businesses to develop and deliver a National Strategy for Disabled People. We intend to publish the Strategy in Spring 2021.

Despite the unprecedented challenge we face as a nation, this Government is committed to delivering an ambitious National Strategy for Disabled People with expert advice and the lived experience of disabled people at its heart.

The Strategy will make practical changes to policies which strengthen disabled people’s ability to participate fully in society and will place fairness at the heart of government work on disability, to level up opportunity so everyone can reach their potential and participate in life in this country.

We want to place the lived experiences of disabled people at the centre of our approach, as well as views from people across the country including those caring for and related to disabled people, as well as the general public.

Today, we are launching a public survey to gather views. This Survey continues the engagement that was carried out across government throughout 2020, and continues to be this year. It includes engagement nationally and across the regions with a diverse network of stakeholders, including leading charities, disabled people’s organisations and individuals from all parts of society that are affected by disability.

The survey is hosted on Citizen Space. If you share your views by 28 February, your views will inform the development of the National Strategy for Disabled People, but thereafter we will continue to listen. The Survey will remain open until 23 April,

and your views will be used to inform the delivery of the plans we set out.

The Survey is fully accessible to ensure as many people as possible have their voices heard. It is available in Easy Read, BSL and written responses can be sent to:

DUCitizenspace@cabinetoffice.gov.uk.”

26. The Disability Unit also published a blog post on the GOV.UK website on 15 January to accompany the launch of the Survey, which was entitled: “Tell us your thoughts for our National Strategy for Disabled People”. It said (with emphasis added):

“The National Strategy for Disabled People is an ambitious piece of work that will support disabled people in all aspects and phases of their life. The Disability Unit is working with many groups of people to develop the National Strategy, including disabled people, disabled people’s organisations, charities, businesses and across government. By putting your lived experience first, we want to understand and dismantle the barriers holding disabled people back from realising their full potential. The Strategy is due to be published in Spring 2021.

COVID-19 has been an unprecedented challenge for the nation. Despite this, work has continued to ensure that we can deliver an ambitious Strategy that improves opportunities and outcomes for disabled people. As the country builds back, we're determined that no one is left behind.

We want to deliver practical action through policies which will make a real difference to disabled people’s day-to-day lives. This will continue to place fairness at the heart of government work. It will mean that disabled people can participate fully in society.

We want to create a National Strategy for Disabled People which drives positive change, with your voice at the heart of the process. Therefore, we want to have the lived experience of disabled people at the centre of our strategy. We would also like to hear the views of carers, relatives of disabled people and those of the general public.

How can you join in?

We are initially launching an online survey to gather these views, and we would like you to contribute. The survey will cover different topics that are important to disabled people and understanding the barriers in their way. This is a part of our ongoing consultation and marks the start of our insight gathering.

We would like as many people as possible to contribute to this survey. The more people we hear from, the better our National Strategy will reflect the needs of disabled people in our society.

We have already collaborated with various interested groups, including organisations representing disabled people. Our insight gathering survey will have the ability to go straight to people we want to reach, so we can hear from you first hand. We will continue this work as we launch the National Strategy, as listening to your views is important to us throughout the process.

A structured conversation

Our aim is to lead a structured conversation to hear about people's daily lives. This will inform our National Strategy with the lived experience of the people most affected. This includes disabled people, their carers, family and friends.

We want to help dismantle and challenge unhelpful perceptions, and enact positive change, and for that reason we will also have a conversation with the general public about their interaction with disability issues and disabled people.

As we progress with our insight gathering, we hope to collect a range of viewpoints and opinions from a variety of different people. One way we can do this is through our survey. Another way we will listen to people's viewpoints is through focus groups or workshops. These conversations will continue once the National Strategy is published.

The survey will be available in easy read or plain English, British Sign Language, Braille and Welsh. It will be tested using voiceover software and other assistive technology.

What's next?

Asking people for their views does not stop here. This is just the first opportunity to get your views heard. We will be seeking people's views into the future, even once the National Strategy has been published. This is part of a much bigger programme of engagement which will not end when the National Strategy is launched as we know that to achieve lasting change, our commitment must be ongoing and collaborative."

27. The Survey itself was placed on the Disability Unit website, in a section entitled the "Consultation Hub", which listed the Survey as one of its "Open Consultations". The Consultation Hub explained itself at the top of the page as follows:

"Consultation Hub

Welcome to Citizen Space. This site will help you find and participate in consultations that interest you.”

28. A section at the start of the Survey, entitled “Overview”, said (with emphasis added):

“The Disability Unit at the Cabinet Office is developing a National Strategy for Disabled People. Publication is planned for Spring 2021.

To help the government with understanding the barriers that disabled people face and what it may need to focus upon to improve the lives of disabled people, we need to hear about your views and know more about your experiences.

This survey will ask about your life experiences either as a disabled person, a carer or parent or as someone who has an interest in disability issues.

Many people have had big changes in their lives as a result of the COVID-19 pandemic and there will be an opportunity at the end of the survey to state if your life has changed notably due to COVID-19, and in what ways. However, please answer other questions thinking about yourself, your own experiences and your current situation.

The survey will be open until 23 April 2021. Responses received before 28 February 2021 will inform the development of the National Strategy, while those received after this date used to inform its delivery.”

29. The Survey itself was mostly in multiple choice format, with some limited scope for free form responses in specific comment boxes. There was a total of 113 questions but different selections of questions were presented depending on whether the Survey was being completed by disabled people, carers, or the general public.
30. Four of the 113 questions were not in multiple choice format and, instead, asked for open-ended free-text replies. These were:
- i) Question 109: “Briefly detail how your experiences now are different to prior to the COVID 19 pandemic and government response, relating to all the topic(s) you previously selected” (250 word limit).
 - ii) Question 111: “Thinking about your life, what are the top 3 changes that would make your life better / or improve your life?” (100 word limit).
 - iii) Question 112: “If you feel we have missed any issues or barriers, can you please set these out here?” (100 word limit).
 - iv) Question 113: “Building on your experience or insights, can you suggest any solutions to issues raised or how to remove barriers?” (100 words limit).

31. The claimants maintain, and the defendant concedes, that the Survey did not outline the proposed content of the Strategy and it did not allow comment on any specific policy proposals: Statement of Facts and Grounds para 14, defendant skeleton argument para 20.
32. The evidence filed on behalf of the defendant says:

“...none of the Survey, the Roundtables or any of the [Disability Unit’s] other engagement activities were intended to elicit views on detailed policy proposals. Policy proposals from Government departments were not shared. Given the broad scope of the themes discussed across a great range of Government business this would in any event have been practically impossible. Rather, the purpose of the IGP was to gather information so that the DU, and the Government more generally, could assess whether the commitments to be included in the Strategy would likely meet the concerns and priorities of disabled people, and therefore whether to pursue them or amend them.”
33. The evidence explains that the Survey was originally intended to be accompanied by targeted shorter surveys focusing on specific policy areas and targeted at specific interest groups. However, “these targeted surveys did not take place due to the delay in launching the Survey and consequential impact on timescales.”
34. A pre-action letter challenging the lawfulness of the consultation was sent by solicitors for the claimants on 8 February 2021. A reply was sent on behalf of the defendant on 22 February 2021.
35. On 3 March 2021, a draft equality impact assessment pursuant to the public sector equality duty in section 149(1) of the Equality Act 2010 was produced in relation to the Strategy, but not in relation to the Survey.
36. On 25 March 2021, the Disability Unit submitted to the defendant’s junior minister (the Minister of State for Disabled People, Work and Health) what was described as a “Policy Stocktake” in relation to the forthcoming Strategy. The opening paragraph, and subsequent paragraphs, made it clear that the Survey and other components of the insight gathering phase which I have already summarised were being used to cross-check work in relation to the forthcoming Strategy. For example, the first paragraph said:

“This submission provides an assessment of the extent to which the policies in the National Strategy for Disabled People will address a) issues highlighted in the evidence base and b) priority areas for action raised by stakeholders. It draws on data from the insight gathering phase, which ran from January - March 2021, specifically 14,500 responses to the UK Disability Survey and 5 insight gathering roundtables.”
37. It went on to say: “the UK Disability Survey and the insight gathering roundtables have enriched our understanding of the daily realities and priorities for disabled people in many areas.” (para 3(i)). It then identified the key “gaps” in the Strategy, “set against

issues highlighted by disabled people and other stakeholders and in the evidence base” (para 3(iii)). It said “we will draw on the further insights and evidence for the next draft Strategy draft [sic], which we will aim to have ready by w/c 29 March.” (para 3(iv)). Before highlighting specific points “from the rich and diverse evidence base we now have” (para 6), it said (in paras 4-5):

“The UK Disability Survey and the 11 insight gathering roundtables have proved an extremely valuable source of additional and mainly confirmatory information on the issues that disabled people, carers and families face in everyday life. We have completed an initial assessment of these. Alongside this, we have completed further structured analyses of our core evidence, ethnographic research, stakeholder submissions, and the outputs from other local, national and targeted engagement we have undertaken. All these sources have been compared and provide a consistent picture of disabled people’s lives, needs and experiences.

With your agreement, we plan to publish a full analysis of responses to the Survey by around June...”

38. The present proceedings for judicial review were issued on 29 March 2021.
39. The Survey finally closed on 23 April 2021, and the Disability Unit carried out another internal policy stocktake in May 2021, followed by draft Strategy read-through sessions with Regional Stakeholder Network chairs and Disability Charities Consortium leaders and further internal work. It is not suggested that this phase constituted *Gunning* compliant consultation, if that was required.
40. On 28 July 2021 the Strategy was published. In their Foreword, the defendant and her junior minister said:

“We have carried out the biggest listening exercise with disabled people in recent history, with 14,000 people responding to our UK Disability Survey. As a result, this strategy is far more wide-ranging than approaches of the past. Informed by what we have heard, the strategy sets out... actions...”

41. The next section, entitled “About this Strategy”, included the following statements about the relationship between the Survey and the Strategy:

“A huge range of organisations and individuals have shaped the development of this strategy.

The UK Disability Survey launched in January 2021 and ran until April. Thousands of people responded to inform this strategy...

We are grateful to everyone who has taken the time to share their thoughts on what we should include in this strategy, whether through completing the UK Disability Survey, attending

meetings or events, or engaging through social media and correspondence. Their expertise and insights have been integral to the development of the strategy.”

42. The Strategy itself is summarised (in an Executive Summary) as being in three parts, namely:

“Part 1 sets out immediate commitments we will make to improve every part of a disabled person’s day...

Part 2 sets out ambitious changes to how the government works with and for disabled people into the future. We commit to putting disabled people at the heart of government policy-making and service delivery – laying the foundations for longer term, transformative change.

Part 3 summarises clearly the actions each government department will take as part of this strategy to improve disabled people’s everyday lives. This section makes clear which department is responsible for which commitment. Each department commits to play their part, with ministerial champions setting out how they will personally drive progress.”

(i) Was the defendant under a duty to consult?

43. As I have already mentioned, the Statement of Facts and Grounds at Ground 1 (b) and (c) relies on “conspicuous unfairness” and/or irrationality as the basis of a duty to consult. Ground 2 pursues the “conspicuous unfairness” point raised in Ground 1(b).
44. The common law does not impose any general duty on decision makers to consult before they take decisions: *R (AD) v Hackney London Borough Council* [2019] EWHC 943 (Admin) per Supperstone J at para 87. In particular, there is no common law duty to consult persons who may be affected by a measure before it is adopted: *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56 per Lord Reed at para 35. Nor should a duty to consult be constructed on the basis of a general assessment of what might be called fairness: *R (MP) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1634 per Newey LJ at para 36. It might be a good idea to consult. It might be sensible to consult. But what is a good idea, or sensible, are such vague and likely contested questions that they must be for policy makers to judge and decide rather than the courts. For this reason, in many cases, the duty to consult, if any, is imposed by statute. Per Lord Wilson in *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56 at para 23: “A public authority’s duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly.”
45. A summary of the circumstances in which a legal duty to consult does arise is in the judgment of the Divisional Court in *R (Plantagenet Alliance) Ltd v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at para 98:

“The following general principles can be derived from the authorities:

1. There is no general duty to consult at Common Law. The government of the country would grind to a halt if every decision-maker were required in every case to consult everyone who might be affected by his decision. (*Harrow Community Support Limited*) v. *The Secretary of State for Defence* [2012] EWHC 1921 (Admin) at paragraph [29], per Haddon-Cave J).
2. There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult (*R (Cheshire East Borough Council) v. Secretary of State for Environment, Food and Rural Affairs* [2011] EWHC 1975 (Admin) at paragraphs [68-82], especially at [72]).
3. The Common Law will be slow to require a public body to engage in consultation where there has been no assurance, either of consultation (procedural expectation), or as to the continuance of a policy to consult (substantive expectation) (*R Bhatt Murphy*) v *Independent Assessor* [2008] EWCA Civ 755, at paragraphs [41] and [48], per Laws LJ).
4. A duty to consult, i.e. in relation to measures which may adversely affect an identified interest group or sector of society, is not open-ended. The duty must have defined limits which hold good for all such measures (*R (BAPIO Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 at paragraphs [43]-[44], per Sedley LJ).
5. The Common Law will not require consultation as a condition of the exercise of a statutory function where a duty to consult would require a specificity which the courts cannot furnish without assuming the role of a legislator (*R (BAPIO Ltd)* (supra) at paragraph [47], per Sedley LJ).
6. The courts should not add a burden of consultation which the democratically elected body decided not to impose (*R (London Borough of Hillingdon) v. The Lord Chancellor* [2008] EWHC 2683 (QB)).
7. The Common Law will, however, supply the omissions of the legislature by importing Common Law principles of fairness, good faith and consultation where it is necessary to do, e.g. in sparse Victoria statutes (*Board of Education v Rice* [1911] AC 179, at page 182, per Lord Loreburn LC) (see further above).

8. Where a public authority charged with a duty of making a decision promises to follow a certain procedure before reaching that decision, good administration requires that it should be bound by its undertaking as to procedure provided that this does not conflict with the authority's statutory duty (*Attorney-General for Hong Kong v Ng Yuen Shiu* [1983] AC 629, especially at page 638 G).

9. The doctrine of legitimate expectation does not embrace expectations arising (merely) from the scale or context of particular decisions, since otherwise the duty of consultation would be entirely open-ended and no public authority could tell with any confidence in which circumstances a duty of consultation was to be cast upon them (*In Re Westminster City Council* [1986] AC 668, HL, at 692, per Lord Bridge).

10. A legitimate expectation may be created by an express representation that there will be consultation (*R (Nadarajah) v Secretary of State for the Home Department* [2003] EWCA 1768 Civ), or a practice of the requisite clarity, unequivocalness and unconditionality (*R (Davies) v HMRC* [2011] 1 WLR 2625 at paragraphs [49] and [58], per Lord Wilson).

11. Even where a requisite legitimate expectation is created, it must further be shown that there would be unfairness amounting to an abuse of power for the public authority not to be held to its promise (*R (Coughlan) v. North and East Devon Health Authority* [2001] 1 QB 213 at paragraph [89] per Lord Woolf MR)."

46. In the present case, there was no statutory obligation to consult. It is not suggested that there was a promise to consult or a legitimate expectation based on any representation or assurances that there would be consultation of the kind now sought. It is not suggested that this is a case in which there is an established practice of consultation.
47. Therefore, reliance has to be and is placed on the fourth example in para 98 sub-para 2. of *Plantagenet Alliance*: namely, where, in exceptional cases, a failure to consult would lead to "conspicuous unfairness". Such cases are exceptional for the reasons explained in the passage from *Plantagenet Alliance* which I have set out; see especially subparagraphs 3, 6, 9 and 11 of para 98 in the quotation above. It is accepted that this is not a case in which the claimants can rely on past conduct to create "conspicuous unfairness" as in *R (Brooke Energy Limited) v. Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 2012 (Admin) at para 66.
48. Given the preliminary and general nature of the Strategy, I am not persuaded that consultation was legally required in order to avoid conspicuous unfairness or irrationality (even if, which the defendant does not accept, irrationality can be separated from the conspicuous unfairness exception). The Strategy did not immediately make any changes to law or detailed policy. It essentially provided a policy framework within which more specific future policies would be developed and implemented. The lack of specifics is, in fact, one of the criticisms made of it in the claimants' evidence (para 6

of the second witness statement of Jean Eveleigh). I recognise that the Strategy was of great interest and importance to the claimants, but the same might be said of many government policy documents and there is, nevertheless, no general common law duty of consultation. It was not as a matter of fact conspicuously unfair to publish this particular Strategy without full consultation. In my judgment, neither the content of the Strategy, nor its potential impact, made it one of those exceptional cases in which full consultation would be required.

49. For the same reasons, the level of consultation represented by the Survey and other elements of the defendant's information gathering phase was sufficient to meet the defendant's obligation "to take reasonable steps to acquaint himself with the relevant information" (*Secretary of State for Education v Tameside MBC* [1977] AC 1014, 1065, per Lord Diplock; see also *Plantagenet Alliance* at para 100).
50. Reliance was placed by the claimants on article 4(3) of the United Nations Convention on the Rights of Persons with Disabilities ("CRPD"), which provides:

"In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations."
51. However, the CRPD has not been incorporated into domestic law, unlike, for example, the incorporation of the European Convention on Human Rights into domestic law by the Human Rights Act 1998.
52. Although Lord Hughes in *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 said (at para 137) "international treaty obligations may now guide the development of the common law", that is far from saying that they are directly enforceable or applicable, which they clearly are not. That is confirmed by *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 at paras 77-78. The common law rejection of a general duty to consult is too well-established for it to be overturned by interpretation in the light of article 4(3) of the CRPD. It has also been refined and examined in many relatively recent cases and none of them support a duty as broad as that suggested by article 4(3) if it is coupled (as in the claimants argument it is coupled) with application of the *Gunning* and *Moseley* principles to the consultation there referred to. I therefore reject this argument.
53. Reliance was also placed on *R (Article 39) v Secretary of State for Education* [2020] EWCA Civ 1577 but that was a case in which the finding that it was "conspicuously unfair" not to consult fully seems (from para 85) to have been linked to what I am going to consider shortly and separately as issue (ii) and was, in any case, reached on very different facts. It was also a case in which there was a statutory duty to consult (para 83), and an established practice of consulting (para 84), neither of which are features of the case before me, and the further finding of conspicuous unfairness was made in that context.
54. The conclusions I have reached apply both to a duty to consult disabled people and DPOs.

(ii) If not, did the defendant voluntarily embark upon a consultation and, if she did, what if any consultation duties were thereby created?

55. Per Lord Woolf MR giving the judgment of the court in *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 at para 108:

“...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.”

Lord Woolf then summarised what was required for it to be carried out properly, citing *R v Brent London Borough Council, ex parte Gunning* (1985) 84 LGR 168.

56. The defendant does not accept that a consultation was embarked upon in this case which carried with it the *Gunning* requirements. Marcus Bell, who was Director of the Disability Unit at the relevant time, says in his evidence on the defendant’s behalf:

“The Survey was not a consultation. The Survey was never intended to be a formal consultation exercise on any particular proposal, notably the Strategy. The Survey, together with the DU’s other activities, were listening and insight gathering exercises undertaken as a means to understand more about the lived experience of disabled people.”

57. In Mr Bell’s evidence, and in submissions on behalf of the defendant made to me, the description of the Survey as part of the “insight gathering phase” was relied upon in order to distinguish it from a consultation exercise properly so-called.

58. Per Simler J in *R (FDA, PCSU and PROSPECT) v Minister for the Cabinet Office* [2018] EWHC 2746 (Admin) at para 99:

“...the question whether a public body has embarked on consultation for these purposes is a matter of substance and not form. If, without using the term, a decision-maker embarks on an exercise that is in substance consultation then this principle applies.”

59. In the case before her, the term “consultation” had been used “from time to time” (para 103) but, adopting the test of substance not form, Simler J found that “what took place was at best an exchange of information on some issues” (para 102). Therefore, she rejected the submission that, in the case before her, “the process on which the parties were embarked was in substance one of consultation in the *Gunning/Coughlan* sense” (para 101).

60. In the present case, I am satisfied that the Survey was a consultation in the *Gunning/Coughlan* sense. I approach this as an assessment of substance rather than form, and I make the assessment based on what was said and done at the time, which I have summarised at paragraphs 10 to 41 above. I consider the passages I emphasised in those paragraphs particularly relevant to this point.

61. At the start, the documents are consistent with an information gathering exercise in which there is no commitment to linking that exercise to specific content in the Strategy or about what impact, if any, the information will have on the Strategy. However, by the time of the Disability Unit's press release of 2 April 2020, that link began clearly to be made, for example when it was said in the press release that "The strategy will build on evidence and data, and critically on insights from the lived experience of disabled people", coupled with the assurance later in the same press release that "We want to ensure we have enough time to get this right and undertake a full and appropriate programme of stakeholder engagement. People's views and insights will be crucial..." (para 16 above).
62. The Disability Unit blog post on 2 December 2020 said "We are continuing to listen to stakeholders to find the right areas to build a strategy that makes a real difference to the lives of disabled people" (para 20).
63. When the Survey was launched, the link between it and the Strategy was made perfectly explicit. The word "consultation" was used ("The survey... is a part of our ongoing consultation"), and the substance of the press release which accompanied the launch, and of the Disability Unit's blogpost, fully justified that word. This is particularly apparent from the passages in both press release and blogpost which I have highlighted with emphasis in paras 25 and 26 above.
64. The Survey was also placed on the Consultation Hub, where it was described as an Open Consultation, with the promise that "Responses received before 28 February 2021 will inform the development of the... Strategy" (see para 28 above).
65. When the Strategy was finally published on 28 July 2021, the way in which it claimed to be responsive to the Survey further demonstrated that the Survey was intended in substance to be, and was not merely described as, a consultation. The defendant's Foreword referred to the Survey as "the biggest listening exercise with disabled people in recent history", and claimed that "As a result, this strategy is far more wide-ranging than approaches of the past" (para 40 above). The Survey was said to have "shaped the development of this Strategy", the responses to the Survey were said to have "inform[ed]" the Strategy, those who completed the Survey were described as sharing their thoughts "on what we should include" in the Strategy and "Their experience and expertise have been integral to the development of the [Strategy]" (para 41 above).
66. Consequently, I am satisfied that the defendant voluntarily embarked on a consultation to which the *Gunning / Moseley* principles should be applied, and the Survey was at the heart of that consultation. Although I have described the Strategy as preliminary and general, it was not lacking in any substance. It made "immediate commitments", set out "ambitious changes to how the government works with and for disabled people into the future" and summarised "actions each government department will take as part of this strategy to improve disabled people's everyday lives" (para 42 above). A perusal of the Strategy justifies these claims. It was capable of attracting, if the defendant chose to assume it, a consultation obligation.
67. That being the case, what precisely were the consultation duties involved?
68. Per Lord Wilson in *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56 at para 23: "...irrespective of how the duty to consult has been generated, that same

common law duty of procedural fairness will inform the manner in which the consultation should be conducted.” Per Baker LJ in *R (Article 39) v Secretary of State for Education* [2020] EWCA Civ 1577 at para 78: “...the case law is clear that, whether or not a consultation is a legal requirement, if it is embarked on it must be carried out properly and fairly”.

69. What this duty entails was succinctly set out in *R v Brent London Borough Council ex parte Gunning* (1985) LGR 168 at 189 as follows:

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

70. The *Gunning* principles have been endorsed by the Supreme Court in *Moseley* (per Lord Wilson at para 25). The claimants rely particularly on the second requirement, “that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response”.

71. In stating that it is “hard to see” how any of these four requirements “could be rejected or indeed improved”, Lord Wilson in *Moseley* at para 25 quoted also the judgment in *Coughlan* of Lord Woolf MR at para 112 which says that the obligation of the consulting authority “is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response.”

72. Per Hickinbottom LJ in *R (Help Refugees Ltd) v Secretary of State for the Home Department* [2018] EWCA Civ 2098 at para 90: “A consultation may be unlawful if it fails to achieve the purpose for which the consultation is carried out.”

(iii) If and insofar as any consultation duties existed (as examined under (i) and (ii) above), did the Survey discharge those duties?

73. The Statement of Facts and Grounds, as amended on 24 April and 11 August 2021, puts the case on this issue (in para 3(a)(ii)) as follows:

“The defendant breached the second *Gunning* criterion because (a) the information provided to respondents as part of the consultation documentation was insufficient; and/or, (b) the consultation document was designed in such a way that it precluded proper and effective response. Further or alternatively, the questions posed by the consultation document were irrational because they did not correspond to the purpose of the consultation.”

74. I did not understand the defendant substantially to dispute that, if the second *Gunning* criterion applied, it was not met. The defendant denies that the consultation duties applied at all, on which I have decided against her.
75. The defendant accepts that no attempt was made at any stage, including in the Survey, to advise the claimants, the DPOs, or any outside body with an interest in the outcome, what she was proposing to include in the Strategy. This made it impossible meaningfully to respond in the Survey to those proposals before they were finalised and published in the Strategy. The Survey was presented (as I have shown) as being a way in which the Strategy could be shaped, would be shaped and (eventually) was shaped, but the information provided made that impossible. It therefore failed to achieve its stated purpose. It did not let respondents to the Survey “know in clear terms what the proposal is and exactly why it is under positive consideration” as required by *Coughlan* and *Moseley*. The Survey was presented as a consultation, and the Strategy was said to have been a response to that consultation, but neither the Survey nor any other form of consultation enabled the “intelligent consideration and response” required by the second *Gunning* principle of lawful and fair consultation.
76. Other criticisms are made by the claimants of the Survey and, indeed, of the Strategy. In addition to the lack of information, I agree with the claimants that the multiple-choice format, and the word limit on free-form responses (although I am told that this was not enforced), did not allow for a proper response even to the issues canvassed in the Survey. The design of the Survey forced the defendant’s own analysis on respondents, without providing enough leeway for the required “intelligent response” from the respondents themselves.
77. For these reasons, I have concluded that the defendant took on a duty to consult which she did not properly discharge and, as a result, the consultation she carried out, principally by means of the Survey, was not lawful.
78. I should acknowledge that the Survey’s failure to comply with the second *Gunning* requirement, or to allow for proper consultation, was put forward by the defendant as another basis for saying that there can have been no duty to consult in the first place, and that no such duty was undertaken by the defendant in conducting the Survey. It was said, in effect, that the Survey was so obviously not allowing comment upon proposals eventually to be included in the Strategy itself that it cannot have been understood as a consultation. But this was a circular argument. Failure to comply with a duty to consult does not in itself prove that no such duty was imposed. I am satisfied on the evidence I have set out that the defendant was purporting to consult in a way which required compliance with the principles I have identified, notwithstanding the deficiencies in doing so. The failure to consult lawfully was therefore a breach of duty.

(iv) In conducting the Survey, did the defendant breach the PSED?

79. Issue (iv), an alleged breach of the Public Sector Equality Duty, is a free-standing additional (or alternative) attack by the claimants on the lawfulness of the Survey.
80. Section 149 of the Equality Act 2010 imposes the PSED in the following terms:

149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, (...) and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(...)

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(...)

(7) The relevant protected characteristics are—

(...)

disability;

(...)"

81. I was referred to the summary of principles in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 per McCombe LJ at para 26. The claimants argue that, in breach of those principles:

- i) There is no evidence that the defendant was “clear precisely what the equality implications” of the Survey were, as required by *R (Harley and Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 01 (Admin) per Elias LJ at para 78.
- ii) The defendant did not pay “due regard” to the particular needs of disabled people completing the Survey, as required by section 149(1) and (3) of the Equality Act.

82. The claimants’ criticisms of the equality impact of the Survey are:

- i) The Survey was online only and (it is said) disabled people were more likely to be unable to access the internet than non-disabled people. This is a proposition which may or may not be true, but there was no evidence to support it.
 - ii) The Easy Read materials, on the other hand, could not be submitted online, and therefore required access to a printer at a time when most public services were shut due to the pandemic. Again, however, there was no objective or quantitative evidence to support the proposition that disabled people had less access to printers (whether their own or not) compared with non-disabled people during the pandemic or otherwise. The claimants' skeleton argument relied on the minutes of a meeting of the Disability Unit and the Disability Charities Consortium on 23 March 2021, which said "the DCC would want to be a critical friend and help with the issues raised. In particular, there were issues for people with learning disabilities with no way to complete an Easy Read version online"; to which the Minister responded by asking the DCC "to feed back specifics on improving accessibility... so it can be got right." That is not a point about access to a printer. The Easy Read materials were not, in the event, submitted online and this appears to have been consistent with the point raised by the DCC rather than inconsistent with it. The evidence shows that the Easy Read version could be downloaded online but there were technical difficulties in making it editable online which could not be solved in the time available.
 - iii) No version of the Survey was produced for the DPOs, since the various versions of the Survey were directed at disabled people, carers and the general public. The Survey was, however, a well-publicised exercise open to anyone who cared to complete it online and this would include both members and official representatives or spokespeople for DPOs. In any case, it is not clear how this complaint can be presented as a breach of the PSED.
 - iv) The six-week time limit for responses to the Survey is said, at least potentially, to have prejudiced people with learning disabilities or others who have difficulty in processing information. However, a period of six weeks for completion of a survey of this nature appears to be sufficient even for those with difficulty in processing information for whatever reason. There was no evidence of anyone who wished to complete the Survey finding themselves unable to do so because of the deadline and because of their disability.
83. The evidence of Marcus Bell, Director of the Disability Unit, says that due regard was given to the equality implications of the exercise of which the Survey was the centrepiece "both prior to and during the Insight Gathering Phase". He says that while "Digital engagement was considered an important mechanism for the DU in order to increase the DU's reach and connect with more individuals and smaller organisations", the Disability Unit also recognised that using technology "could be a barrier for some" and "throughout 2020 and early 2021... worked to identify inclusive and accessible ways of engaging with stakeholders". Accessibility was promoted through a range of measures set out in para 9.10 of Mr Bell's witness statement. I have no reason not to accept this evidence, which is supported by the contemporaneous materials in my papers. The extract from the DCC meeting minute to which I was referred (see para 82.ii) above) is an example of active interest in "specifics on improving accessibility... so it can be got right."

84. It was in the nature of the Survey that it was designed to address the needs of disabled people. The evidence shows that it was designed so that disabled people could and would respond to it on at least equal terms with the general public. The fact of the Survey, the content of the Survey, and the way in which it was publicised and administered paid due regard, in my judgment, to the need to eliminate discrimination, advance equality, remove or minimise disadvantages suffered by disabled people and meet their needs. It was made available to all, online. It could also be submitted by email or by post. There was an Easy Read version, a British Sign Language version (including voiceover and subtitles) and a braille version. A long consultation period was allowed for it to be completed. The PSED requires “due regard”, not perfection, and is to be discharged without the benefit of hindsight. For what it is worth, however, the defendant also conducted a retrospective PSED impact assessment, which found the Survey to be satisfactory. I have no doubt that if, contrary to my judgment, there was a breach of the PSED in any respect, it made no difference to what was done or how it was done, and section 31(2A) of the Senior Courts Act 1981 would apply.
85. I therefore reject this part of the claimants’ challenge.

Conclusion

86. For these reasons, I find against the claimants on issues (i) and (iv), but I find in their favour on issues (ii) and (iii). I will invite Counsel to agree a form of Order accordingly.