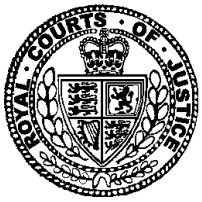

Neutral Citation Number: [2023] EWHC 1781 (Admin)

Case No: CO/3337/2022 CO/3346/2022 CO/3532/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2023

Before :

THE HONOURABLE MR JUSTICE LINDEN

- -

Between :

THE KING **(on the application of ASSOCIATED SOCIETY OF LOCOMOTIVE ENGINEERS AND FIREMEN and 10 OTHERS)**	**Claimant**
THE KING **(on the application of UNISON)**	
THE KING **(on the application of THE NATIONAL ASSOCIATION FOR SCHOOLMASTERS/UNION OF WOMEN TEACHERS)**	
- and - **THE SECRETARY OF STATE FOR BUSINESS AND TRADE**	**Defendant**

- -
- -

Oliver Segal KC and Melanie Tether (instructed by **Thompsons Solicitors LLP**) for the **Associated Society of Locomotive Engineers and Firemen & Others**
Michael Ford KC Stuart Brittenden, and **Serena Crawshay-Williams** (instructed by **UNISON Legal Services**) for **UNISON**
Betsan Criddle KC and Madeline Stanley (instructed by **in house solicitors at the NASUWT**) for the **National Association for Schoolmasters/Union of Women Teachers**
Daniel Stilitz KC, Claire Darwin KC and Oliver Mills (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 3 – 4 May 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 13 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

THE HONOURABLE MR JUSTICE LINDEN

Table of Contents

Mr Justice Linden :

INTRODUCTION

1. From 1976 it was unlawful for an employment business knowingly to introduce or supply workers to an employer to carry out the work of employees who were taking part in official industrial action. Regulations made pursuant to section 5 of the Employment Agencies Act 1973 ("the 1973 Act"), most recently regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (SI 2003/3319 – "the 2003 Regulations"), made this a criminal offence.

2. In 2015, the Government conducted a public consultation on a proposal to revoke regulation 7. The majority of the responses did not favour this change in the law and, in 2016, it was decided not to go ahead. In June 2022, however, the Government decided, in the context of industrial action in the rail sector and other anticipated industrial action, that regulation 7 would be revoked without further public consultation. On 27 June 2022, the draft Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022 (SI 2022/852 – "the 2022 Regulations") were therefore laid before Parliament, regulation 2(a) of which implemented this measure. The 2022 Regulations were made by the then Secretary of State for Business, Energy and Industrial Strategy ("BEIS"), Mr Kwasi Kwarteng, on 20 July 2022 and they came into effect on 21 July 2022.

3. In these three claims, 13 trade unions challenge the then Secretary of State's decision to make the 2022 Regulations. The challenge is on two grounds:

    i) First, they say that he failed to comply with his statutory duty, under section 12(2) of the 1973 Act, to consult before making the 2022 Regulations ("Ground 1").

    ii) Second, it is contended that, by making the 2022 Regulations, the Secretary of State breached his duty, under Article 11 of the European Convention on Human Rights ("ECHR"), to prevent unlawful interference with the rights of trade unions and their members ("Ground 2").

4. The Claims were supported by witness statements made by Mr Richard Arthur, Head of Trade Union Law at Thompsons Solicitors LLP, dated 9 September 2022; by Ms Christina McAnea, General Secretary of UNISON, dated 12 September 2022 and 7 February 2023; by Dr Patrick Roach, General Secretary of the NASUWT, dated 23 September 2022 and 8 February 2023; and by Mr Paul Watkins, a National Negotiating Official of the NASUWT dated 23 September 2022.

5. Both Grounds are contested by the Secretary of State:

    i) In relation to Ground 1, he relies on the consultation which took place in 2015. But he also argues, under section 31(2A) of the Senior Courts Act 1981, that relief should be refused because it is *"highly likely"* that the outcome would not have been substantially different had there been further consultation.

    ii) In relation to Ground 2, the Secretary of State denies that the revocation of regulation 7 amounted to an interference with the rights of trade unions and their

members under Article 11 ECHR and he argues that, in any event, any such interference was proportionate.

6. The Secretary of State relies on a witness statement dated 17 January 2023 which was made by Mr James Stevens. Mr Stevens was deployed to BEIS in November 2020. Since July 2021 he has been the Deputy Director for Employment Rights and Enforcement in Labour Markets, in which capacity he is responsible for the legal framework relating to industrial action, as well as agency worker policy.

7. By Orders dated 7 December 2022, permission was given by Lieven J in relation to each of the three claims. She ordered that they be heard together and gave directions accordingly.

GROUND 1

The legislative framework

8. The overall statutory context is the Employment Agencies Act 1973, the preamble to which describes it as: *"An Act to regulate employment agencies and businesses; and for connected purposes"*. Until 1995 these types of businesses were required to be licensed, and the 1973 Act still contains powers of inspection by officers appointed by the Secretary of State (section 9) and machinery for enforcement by employment tribunals (section 3A) and through the criminal law.

9. Section 6 of the 1973 Act restricts, on pain of criminal sanction, the ability of employment agencies and businesses to charge those who are offering their services through such businesses ("work seekers") unless they fall within any excepted category of case which the Secretary of State may prescribe. And section 5(1) provides that:

> *"The Secretary of State may make regulations to secure the proper conduct of employment agencies and employment businesses and to protect the interests of persons availing themselves of the services of such agencies and businesses and such regulations may in particular make provision-*
>
> *(a) requiring persons carrying on such agencies and businesses to keep records;*
>
> *(b) prescribing the form of such records and the entries to be made in them;*
>
> *(c) prescribing qualifications appropriate for persons carrying on such agencies and businesses;*
>
> *(d) regulating advertising by persons carrying on such agencies and businesses;*
>
> *(e) safeguarding clients' money deposited with or otherwise received by persons carrying on such agencies and businesses;*
>
> *(ea) restricting the services which may be provided by persons carrying on such agencies and businesses;*
>
> *(eb) regulating the way in which and the terms on which services may be provided by persons carrying on such agencies and businesses;*

(ec) restricting or regulating the charging of fees by persons carrying on such agencies and businesses." (emphasis added)

10. Under section 5(2) of the 1973 Act, a person who fails to comply with a regulation made pursuant to section 5 is guilty of an offence and liable to a fine on conviction.

11. Section 12 provides, so far as material:

*"**Regulations and orders**.*

(1) Subject to the next following subsection, the Secretary of State shall have power to make regulations for prescribing anything which under this Act is to be prescribed.

(2) The Secretary of State shall not make any regulations under this Act except after consultation with such bodies as appear to him to be representative of the interests concerned.

....

(5) Regulations under section 5(1) or 6(1) of this Act shall not be made unless a draft has been laid before, and approved by resolution of, each House of Parliament...." (emphasis added)

12. The Conduct of Employment Agencies and Employment Businesses Regulations 2003 were made pursuant to these powers. They replaced and updated earlier statutory instruments to reflect changes in the recruitment sector and they contain detailed provisions regulating the sector. Regulation 7 appeared in Part II of the 2003 Regulations, which contains *"General Obligations"* of employment agencies and businesses such as: not to penalise work seekers for terminating their contracts and taking up employment elsewhere (regulation 6), restrictions on requirements for hirers to pay "transfer fees" in the event that the work seeker enters their employment (regulation 10) and measures to ensure that the work seeker gets paid (e.g. regulation 12). Regulation 7 provided as follows:

*"**7.— Restriction on providing work-seekers in industrial disputes***
(1) Subject to paragraph (2) an employment business shall not introduce or supply a work-seeker to a hirer to perform–

(a) the duties normally performed by a worker who is taking part in a strike or other industrial action ("the first worker"), or

(b) the duties normally performed by any other worker employed by the hirer and who is assigned by the hirer to perform the duties normally performed by the first worker, unless in either case the employment business does not know, and has no reasonable grounds for knowing, that the first worker is taking part in a strike or other industrial action.

(2) Paragraph (1) shall not apply if, in relation to the first worker, the strike or other industrial action in question is an unofficial strike or other unofficial industrial action for the purposes of section 237 of the Trade Union and Labour Relations (Consolidation) Act 1992"

13. An *"employment business"* is defined by section 13(3) of the 1973 Act as follows:

> *"…the business…of supplying persons in the employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity."*

14. The offence under regulation 7 therefore did not apply to *"employment agencies"*, as defined by section 13(2), which find opportunities for direct employment by employers and then introduce work seekers for this purpose. In principle an employer whose employees were taking industrial action could, therefore, directly engage cover through an employment agency. They could also contract out the work to a contractor. But they could not ask an employment business to supply workers to work for them without directly engaging those workers.

15. As will be apparent, regulation 7 also applied to official industrial action only i.e., in broad terms, industrial action which was authorised or endorsed by a trade union in which trade union members were taking part: see section 237(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act").

16. Under regulation 30 of the 2003 Regulations, there is also a right to claim damages for any breach of the 2003 Regulations *"so far as it causes damage"* i.e. there could be civil as well as criminal liability for breach.

The central issues under Ground 1

17. As is well known, in *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168, 189, Hodgson J accepted the following submission by the then Mr Stephen Sedley QC:

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

18. The fourth *Gunning* principle, the requirement of conscientious consideration of the product of the consultation, is of a piece with the requirement that the consultation take place when the proposal is at a formative stage. Obviously, this is so that the results of the consultation inform the decision which is taken. In the present case there was no dispute that, under section 12(2) of the 1973 Act, such consideration was required to be by the Secretary of State personally. Albeit he was not required to read each of the responses, or be aware of the fine detail of what they said, he had to be provided with sufficient information about the views expressed and the evidence provided by the responders, and in coming to his decision he had to consider what they had said. Consideration of the responses by the Secretary of State's officials or *"the Government"* was not sufficient: see *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26].

19. An important issue under Ground 1, given the Secretary of State's reliance on the consultation which took place in 2015, was whether Mr Kwarteng was sufficiently

informed about the responses to that consultation at the time of his decision and gave conscientious consideration to them. The other key issue was whether, in 2022, the Secretary of State could rely on the consultation process which had taken place in 2015 to discharge his obligations under section 12(2) given the lapse of time, what was said to the public about the reasons for deciding not to go ahead with the revocation of regulation 7 in 2016, changes in circumstances in the intervening period and what was said about the reasons for revisiting the proposal in 2022. If the answer to either or both of these questions was in the negative, the question under section 31(2A) Senior Courts Act 1981 arose for consideration.

Analysis of the evidence/findings of fact

The 2015 Consultation

20. The Conservative Party Manifesto for the May 2015 general election contained a commitment:

> *"to repeal nonsensical restrictions banning employers from hiring agency staff to provide essential cover during strikes"*.

21. On 15 July 2015, a public consultation in relation to the proposed revocation of regulation 7 was launched in a document entitled *"Hiring agency staff during strike action: reforming regulation"* ("the Consultation Document/the 2015 Consultation"). This was the same day as the Trade Union Bill, which became the Trade Union Act 2016 ("the 2016 Act"), had its first reading in the House of Commons and the Explanatory Notes to the Bill were published. The Bill proposed, amongst other things, a tightening of the rules relating to balloting for industrial action, particularly where *"important public services"* would be affected.

22. The aim of the 2015 Consultation was said to be *"to seek views on the impact of"* the proposal. It set a closing date for responses of 9 September 2015, and said that a summary of the responses and next steps to be taken would be published within six weeks of this date.

23. Paragraph [18] of the Consultation Document explained that:

> *"The Government is committed to ensuring that strikes only ever happen as the result of a clear, democratic decision and commits to tackling the disproportionate impact of strikes in important public services. The Government thinks that removing Regulation 7 from the Conduct Regulations will give the recruitment sector the opportunity to help employers to limit the impact to the wider economy and society of strike action, by ensuring that businesses can continue to operate to some extent."*

24. The first sentence was a reference to the Trade Union Bill and the proposal in relation to regulation 7 was therefore part of a package of measures. The Consultation Document attached a draft statutory instrument and was accompanied by a 35 page impact assessment, signed on 14 July 2015, which set out the evidence base for the proposal including empirical data drawn from the Labour Force Survey and other sources, the rationale for the proposal and its anticipated costs and benefits based on various assumptions ("the 2015 Impact Assessment"). It was estimated that the annual

net benefit of the proposal would be £11.3 million and the benefit to business would be £2.3 million assuming that between 17% and 27% of working days lost to industrial action would potentially be covered by temporary workers. The Impact Assessment stated that its assumptions would be tested during the consultation and, indeed, the Consultation Document asked four broad questions:

i) Question 1 was in five parts and it asked how consultees thought the removal of regulation 7 would affect employment businesses, employers/hirers, work-seekers, employees taking part in industrial action and the wider economy and society.

ii) In Question 2, consultees were asked whether they thought that it was reasonable for the Impact Assessment to assume that between 17% and 27% of working days lost as a result of industrial action would potentially be covered by temporary agency workers.

iii) Question 3 asked whether it was reasonable for the Impact Assessment to assume that the current options for recruiting temporary labour to cover in the event of industrial action were used infrequently because of the financial and administrative burden of contracting directly with the temporary worker or sourcing the relevant services from a third party.

iv) In Question 4, consultees were asked whether it was reasonable for the Impact Assessment to estimate that a quarter of the pool of temporary agency workers would be available for placement at short notice to provide cover for workers taking part in industrial action.

25. On 18 August 2015, the Regulatory Policy Committee ("RPC"), an independent body sponsored by what was then the Department for Business, Innovation and Skills ("BIS"), whose role is to scrutinise regulatory proposals, published a report on the 2015 Impact Assessment. This said that the Assessment was *"not fit for purpose as it does not provide sufficient evidence of the likely impact of the proposals to support the consultation"*. Amongst other things, the RPC said that the case for the *" central, critical assumption that 22% of the working days lost due to strike action will be covered by temporary workers"* had not been made and it was not a robust basis for assessing the costs and the benefits of the proposal. *"The RPC view is that these estimates are an unsatisfactory basis for the consultation"*.

26. Also in August 2015, the Trade Union Congress ("TUC") complained to the Committee of Experts on the Application of Conventions and Recommendations at the International Labour Organisation ("CEACR") about the proposals in the Trade Union Bill and the proposal to repeal regulation 7. The role of the CEACR is to indicate the extent to which each member State's legislation and practice are in conformity with ratified Conventions, and the extent to which member states have fulfilled their obligations under the International Labour Organisation ("ILO") Constitution to maintain labour standards. The TUC's argument was that the measures were contrary to the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) of which the United Kingdom is a signatory.

27. There were 167 substantive responses to the Consultation Document, from a range of stakeholders, and there was a petition against the repeal of regulation 7 which had been

organised by the TUC and was signed by 25,000 of its members. There were also 11,000 emails from individuals as a result of a campaign by an organisation known as SumofUs.

28. Although the Confederation of British Industry ("CBI") supported the proposal, according to an analysis which I explain below significantly more of the 167 responders who expressed views in relation to Question 1 in the Consultation Document said that the proposal would impact negatively on each of employment businesses, work seekers, employers/hirers, and employees taking part in industrial action than said it would impact positively. 53% of the responses said that it would affect the wider economy and society negatively, as compared with 17% who thought that the impact would be positive. In answer to Question 2, 57% thought that the assumption that 17-27% of days lost to industrial action would potentially be covered by temporary agency workers was unreasonable, as opposed to 17% who thought it was reasonable, and more responses disagreed with the assumptions and estimates which were the subject of Questions 3 and 4 in the Consultation Document than agreed with them.

29. Mr Stevens says that, on 8 October 2015, ministers decided to delay the repeal of regulation 7 until after the Trade Union Bill had gained Royal Assent. No summary of the responses to the consultation and next steps document was published despite the commitment in the Consultation Document to do so.

December 2015-November 2020

30. In December 2015, the CEACR published its response to the concerns which had been raised by the TUC in August 2015. In relation to the proposed revocation of regulation 7, it requested that the Government:

> *"review this proposal with the social partners concerned bearing in mind its general consideration that the use of striker replacements should be limited to industrial action in essential services."*. (emphasis added)

31. On 21 December 2015, officials provided advice to ministers for the purpose of updating them on the proposal to repeal regulation 7 of the 2003 Regulations and to get a steer on next steps. The advice noted that no public announcement had been made on the timing of the Government's response. It also sought a decision on whether ministers wanted to limit the repeal of regulation 7 to important or essential public services and, if so, whether they would like to see a second consultation on that proposal. It said that this had already been suggested by ministers and commented that a further consultation would provide a credible reason for the delay in responding to the first consultation. It also asked whether ministers would consider not repealing regulation 7 as part of the strategy for securing passage of the Trade Union Bill. The advice added that:

> *"it is important to highlight that the revocation of regulation 7 may have limited effect on reducing the impact of strike action on the economy and wider society, particularly if limited to 'essential public services'"*.

32. Mr Stevens does not say what the response was to this advice, nor what if anything was decided.

33. On 5 May 2016, the Trade Union Act 2016 received Royal Assent. The 2016 Act included various amendments to the Trade Union and Labour Relations (Consolidation) Act 1992 which placed further limits on the ability of trade unions to call on their members to take industrial action. Perhaps the most significant of these were in relation to the requirement, under section 226(1)(a) of the 1992 Act, that industrial action must have the support of a ballot if it is to have immunity from suit pursuant to section 219 of that Act. In addition to the existing requirement that the majority of those voting in a ballot for industrial action must have voted in favour:

    i) There would now be a requirement, if the action was to be held to have the support of a ballot, for at least 50% of those entitled to vote to have cast their vote (section 226(2)(iia) of the 1992 Act).

    ii) Where the majority of those who were entitled to vote in the ballot were, at the relevant time, normally engaged in the provision of *"important public services"* in sectors including health, education of the under 17s, fire services and transport, at least 40% of those who were entitled to vote would be required to have voted in favour of the industrial action (section 226(2B)-(2E) of the 1992 Act).

    iii) In the event of a vote in favour, the mandate to take industrial action would be limited to six months, or up to 9 months if the employer agreed (section 234 of the 1992 Act). If a trade union wished to call further action after this point, it was required to seek a further mandate from its members.

34. In the present context it is also relevant to note that, following a vote in favour, the period of notice of an intention to call industrial action which the trade union was required to give the employer would be increased from 7 to 14 days: section 234A(4) of the 1992 Act. As Mr Segal KC pointed out, there would therefore be more time for an employer to plan for the industrial action, including to arrange cover for employees who would be involved.

35. In June 2016, the Government responded to the CEACR's December 2015 request at the Conference Committee of the Application of Standards in Geneva (the "Conference Committee"), which is a standing committee of the ILO. The Government delegate to the Conference Committee stated that the Government was still considering its response on the proposal to repeal the ban on hiring agency workers during strike action and would announce its position in due course. In its Conclusions, the Committee *"noted the Government's indication that secondary legislation was still under discussion and noted with interest the Government`s comments regarding the engagement of the social partners in this ongoing process."*. However, on the evidence it does not appear that there was such engagement, perhaps because, in the event, the proposal was not proceeded with by the Government.

36. By September 2016, Ms Margot James MP was the Parliamentary Under Secretary of State for Small Business, Consumers and Corporate Responsibility and had taken over the portfolio for agency workers. She requested further information on the 2015 Consultation and this was provided to her on 2 September 2016, including a thematic analysis of the responses received which had been undertaken by the Labour Markets Directorate of BEIS. This analysis categorised the 167 responders (e.g. individual, trade union, small business) and said how many there were in each category and the

percentage of the total each number reflected. It then categorised the responses to each of the four questions in the Consultation Document (i.e. negative, not answered, positive, no impact) and quantified the number of responses in each category in the same way. For each question it also drew out themes (e.g. *"employment businesses may face damage to reputation"*) and said how many responders had expressed each view. The analysis did not look at which types of responders were expressing which views, however.

37. The 2 September 2016 advice concluded:

> "*The line we continue to use, as approved by previous Ministers, is that "we are considering responses to the consultation". We recommend moving to a new public line: "We intend to implement the reforms in the Trade Union Act 2015 (sic) and consider the impact of these fully before making any further policy decisions." **Are you content to approve this line**?"* (underlining added)

38. An email from Ms James' office dated 6 September 2016 states that she was content with this line. She asked how much of a problem regulation 7 was for employers, she questioned the need to revoke it given that days lost to strike action were at a record low, and she sought further advice on these points. The thematic analysis of the responses to the 2015 Consultation which had been provided to her was not published.

39. On 16 November 2016, officials provided further advice to Ms James on the policy rationale for repealing regulation 7. The advice also highlighted, under the heading *"Challenges"*, that the responses to the 2015 Consultation had been *"generally opposed to the repeal"* and that in the view of the RPC the case made in the 2015 Impact Assessment was *"insufficiently substantiated"*. The recommendation to the Minister was that the special advisers at BEIS speak to their counterparts in 10 Downing Street ("Number 10") *"to determine what their appetite is for continuing to pursue the full repeal or considering the option of a partial repeal…"*.

40. On 21 November 2016, officials were informed that Ms James wished to drop the proposal for reasons she had set out previously. Her view was apparently that this was a battle which need not be fought and a measure for which there was very little demand, if any, from business organisations. This decision was not formally announced, but the Conservative manifesto for the June 2017 general election did not include any proposal to revoke regulation 7.

41. The relevant provisions of the Trade Union Act 2016 then came into effect on 1 March 2017.

42. It was not until August 2018 that a statement appeared on the part of the Gov.UK website which dealt with the 2015 Consultation. Under the heading *"Detail of outcome"*, this said that *"This consultation was part of a wider trade union reform package. A decision was taken not to progress this particular aspect of the package"*. No reasons were given.

43. The Conservative manifesto for the December 2019 general election did not include any proposal to revoke regulation 7.

44. On 4 November 2020, advice was provided to then Prime Minister Johnson's office on the repeal of regulation 7. The advice explained that previous ministers had considered this reform in 2015-2016 but decided at the time not to proceed. It asked for a steer from ministers on whether they now wished to proceed with the repeal; if so, whether they agreed to run a full public re-consultation and whether they wished to limit the repeal to those services which were subject to the 40% threshold introduced by the 2016 Act i.e. *"important public services"* in the relevant sectors.

45. Mr Stevens says that he does not know what discussions took place following this advice, but no decision was taken to proceed with the repeal of regulation 7.

10-15 June 2022

46. Paragraphs 41-57 of Mr Stevens' witness statement then deal with the chronology between 10 and 15 June 2022 under the heading *"The decision to repeal regulation 7 in June 2022"*.

47. By now, the Secretary of State for BEIS was Mr Kwarteng who had been appointed in January 2021, and the Secretary of State for Transport was Mr Grant Shapps. Mr Stevens says that in the context of the industrial action which was then affecting the rail sector, and media reports that there would be an increase in industrial action in the summer of 2022, BEIS and the Department of Transport were asked by Number 10 to consider measures which could be taken to mitigate the impact.

48. At a meeting on 10 June 2022, Number 10 expressed an interest in pursuing two measures which could be implemented by statutory instrument. These were raising the cap on damages which could be awarded against a trade union if it organised industrial action which was unlawful, and revoking regulation 7 of the 2003 Regulations.

49. What one can see from the email exchanges is that, at 9:22am on Friday 10 June 2022, there was a request by email from Number 10 to BEIS and the Department for Transport for further information on these two options by 5pm that day. In relation to the revocation of regulation 7, the email asked how soon a statutory instrument could be presented, whether there would be a need to re-consult, how quickly the revocation could be delivered and what the key policy considerations were.

50. At 4:58pm that day, a 7 paragraph paper entitled *"Use of Agency Workers During Strikes"* was emailed to Number 10 from BEIS which referred to the background, including the 2015 manifesto commitment and the public consultation in 2015.

51. Mr Stevens says that neither he nor his team were in a position to advise specifically on the potential effectiveness of repealing regulation 7 in mitigating the impact of the rail strikes. However, his exhibit includes a Department for Transport assessment of the likely impact on the industrial action in the rail sector, which is dated 10 June 2022. This concluded that the use of temporary agency workers in that sector was *"unlikely to be a viable option for the foreseeable future"* given the need for any agency workers to have the necessary skills and experience. The immediate beneficial impact would be *"minimal/negligible"*. Although there could be a greater beneficial impact in the longer term, this might be very difficult to achieve and the measure could inflame an already highly volatile industrial relations situation and make resolving the dispute more difficult. *"However, it may also demonstrate Government is considering how to protect*

services for passengers and freight customers and may, in due course, help unions see it is better to work with industry employers."

52. Nevertheless, in an email at 8:52 that night, cc'd to members of the BEIS communications team amongst others, Mr Shapps' Private Secretary wrote:

> *"…I just want to emphasise that, given we are a week away from IA, the Transport Secretary is incredibly keen we get this ready at serious pace. He would like this to be in a position to be announced soon, and laid before recess, which, and not to speak for [redacted] , is goal which I believe is shared by the PM"* (emphasis added)

53. Given the advice that the proposed change in the law was unlikely to have a material beneficial impact in the near future and could well be counterproductive, and absent any explanation in Mr Stevens' witness statement, the reasons for this degree of haste can only be guessed at. Obviously, the aims of announcing the measure and laying the regulations before the summer recess also made further consultation on the proposal highly unlikely.

54. Over the weekend of 11/12 June 2022, Mr Shapps then gave interviews to the national press in which he trailed the revocation of regulation 7 and other measures.

55. On the morning of Monday 13 June 2022 it was indicated that the Prime Minister was minded to move ahead with the proposal. An email at 18:22 that day then stated that Mr Kwarteng was content to proceed with removing regulation 7 and:

> *"has confirmed that he does not want to consult in advance of laying the regulations".*

56. As to what happened in the interim, Mr Stevens says, at [55] of his witness statement, that on 13 June 2022 he provided advice *"to the then Secretary of State for BEIS about repealing regulation 7"*. Mr Stilitz confirmed that this is a reference to the written advice at pages 167-174 of the Main Bundle. The document asked the Secretary of State to advise on whether he wished to proceed with removing regulation 7 and if so *"whether you want to consult in advance of laying the regulations, [redacted] and the impact on timeline"*. Under the heading *"Timing"* the following appeared:

> *"Urgent – we understand this* ***is a high priority for Number 10 and there is a desire to proceed at pace including, if possible, laying required statutory instruments before the recess****."* (emphasis in the original)

57. The 13 June 2023 advice also said, in the section which advised on the legislative process and timeframe, that:

> *"With consultation it would not be possible to lay before recess".*

58. Also at [55], Mr Stevens says:

> *"I specifically asked the Secretary of State if he wanted to remove regulation 7. I explained that repealing regulation 7 was a manifesto commitment from the 2015 Conservative Manifesto and that the Government had consulted on it from July to September 2015. I provided him with a summary of the responses to that*

> consultation. *The Secretary of State's private office advised me later that day that he was content to proceed with removing regulation 7 and indicated that he wanted the repeal to take place at pace."* (emphasis added)

59. The highlighted sentence was evidently directed at the issue between the parties as to whether the Secretary of State sufficiently considered the responses to the 2015 Consultation: the fourth *Gunning* principle. Despite having read his written advice of 13 June 2022, however, I was genuinely uncertain as to whether Mr Stevens was referring to a document and, if so, which one. In this section of his statement he did not cross refer to his exhibit. But Mr Stilitz confirmed that [55] refers to that document. This is what the material part of the 13 June advice said:

> *"7. … BEIS ran a consultation from 15 July to 9 September 2015 to gather views on what the impact would be of repealing this regulation. We received 167 substantive responses from a range of stakeholders. We can provide you with a full analysis of these responses if that would be helpful. In addition to these responses, the TUC also submitted a petition opposing the repeal signed by 25,000 members, 1,500 of whom also made comments. We also received 11,000 individual emails with comments.*
>
> *8. The CBI responded in support of the repeal but the responses from recruitment sector trade associations were more varied. Following the consultation, Ministers at the time decided not to take a decision as they wanted to wait until after the Trade Union Act 2016 had been implemented. A short statement in response to the consultation was issued stating that a decision had been made not to progress this but no detailed reasons were given."* (emphasis added)

60. Apart from stating that there were 167 responses, and that the TUC submitted a petition in opposition etc, the *"summary of the responses to [the] consultation"* provided by Mr Stevens consisted of telling the Secretary of State that: "*The CBI responded in support of the repeal but the responses from recruitment sector trade associations were more varied."*. The summary did not even provide the level of detail which there was in the thematic analysis carried out for Ms James in 2016. It did not say that the responses were *"generally opposed to the repeal"* as she had been told. Nor did it refer to the views of the RPC about the evidential case for the proposal, and nor did it set out the arguments which were put forward for or against the proposal.

61. As Mr Segal also notes, a number of passages in Mr Stevens' 13 June advice are redacted; but, save for the observation that *"With consultation it would not be possible to lay before the recess"*, the unredacted parts do not contain any discussion of whether or not to consult still less indicate some other reason not to consult. It is also noteworthy that Mr Stevens does not claim to have direct knowledge of the then Secretary of State's reaction to his advice, nor of his reasons for deciding not to carry out further consultation. At [58] Mr Stevens says this:

> *"In my advice on 13 June 2022, I asked the Secretary of State if he wanted to consult ahead of legislating to remove regulation 7, should he decide to go ahead with the reform. Later that day his private office confirmed that he did not want to consult in advance of laying the regulations."*

62. Nor does Mr Stevens say anything in his statement about whether the then Secretary of State asked to see the full analysis of the 2015 Consultation which had been offered to him in the advice of 13 June 2022, or whether it was provided to him. The clear inference is that the Secretary of State did not ask to see it – he apparently did not think that it would be *"helpful"* to consider even the analysis of the views of the consultees which was available - and nor was it provided to him.

63. It is also notable that in the only other paragraph of Mr Stevens' witness statement specifically relied on in the Secretary of State's skeleton argument to support his case that the responses to the 2015 Consultation were considered – [60] - Mr Stevens argues that many of the points which the Claimants say they would have wished to raise in 2022 were raised in the 2015 Consultation. He then says:

> *"The Government carefully considered these points but chose to proceed with repealing regulation 7 of the 2003 Regulations"* (emphasis added)

64. He does not say who this refers to or when these points were considered. Where Mr Stevens is referring to a specific person or minister in his witness statement, this is reflected in the text of the statement. It is quite apparent that he is not able to say that the proffered analysis of the responses was considered by the Secretary of State, nor that any other information about the responses to the 2015 Consultation was provided to him at this stage, beyond what was in the 13 June advice.

65. Mr Stevens' approach was therefore to put the Secretary of State's case as best he could, including by referring on a number of occasions to what *"the Government"* thought or did where there is no evidence that this was what the Secretary of State thought or did. However, in taking this approach to what he must have appreciated was a central issue in the Claims, it is not clear that he and those who assisted him in drafting his witness statement had the following aspects of the duty of candour, as described in the judgment of Singh LJ in *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812; [2018] 4 WLR 123 at [106], at the forefront of their minds:

> *"(3) The duty of candour and co-operation is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. As I said in Hoareau at para 20:*
>
> > *"It is the function of the public authority itself to draw the court's attention to relevant matters; …… to identify 'the good, the bad and the ugly'. This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law."*
>
> *(4) The witness statements filed on behalf of public authorities in a case such as this must not either deliberately or unintentionally obscure areas of central relevance; and those drafting them should look carefully at the wording used to ensure that it does not contain any ambiguity or is economical with the truth. There can be no place in this context for "spin"."*

66. The duty of candour is fundamental to the effectiveness of judicial review because the court approaches the case on the basis that, unless the contrary is demonstrated, both

sides have complied with it i.e. they have both sought to "*assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide".* It should not have been necessary, in the present case, for the court to engage in detective work or to read between the lines of Mr Stevens' witness statement and/or draw inferences from his silence on certain points. To borrow the words of Singh LJ, in writing his statement Mr Stevens ought to have been *"engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law"* rather than striving for a particular result in the proceedings. Where, as here, what the Minister saw personally is legally significant, and is in issue, the duty of candour requires a departmental witness statement to set out in clear terms what material was seen by the Minister and what was not. In such a case, statements that a matter has been seen or considered by *"the Government"* risk obfuscating the position rather than achieving the level of clarity required.

67. The distinction between the Secretary of State and *"the Government"* appears to be reflected at [25] of the Secretary of State's skeleton argument:

> *"On 13 June 2022, the SoS decided that Regulation 7 should be repealed and that this should be done as soon as reasonably practicable. In deciding to proceed with the repeal of Regulation 7 the Government carefully considered the responses to the 2015 Consultation [see [55] and [60] of Mr Stevens' statement]"* (emphasis added)

68. This was a considerable improvement, in terms of accuracy, on the plea at [57] of the Summary Grounds of Defence, which was verified by a statement of truth and which formed part of an argument that permission to claim judicial review should be refused in this case on the basis that the Claims were unarguable. [57] said:

> *"There is no dispute that the Secretary of State was obliged to give conscientious consideration to the outcome of the 2015 Consultation. The Secretary of State did so, twice. First, in 2015, and again, in 2022, when the Secretary of State took the responses to the 2015 Consultation fully into account when deciding to make the 2022 Regulations. It follows that the limited statutory duty to consult contained in section 12(2) of the EAA was plainly fulfilled."*

69. Mr Stilitz apologised for the statement that the Secretary of State took the responses to the 2015 Consultation fully into account in 2015. There is no evidence that the then Secretary of State took them into account at all: at best, they were analysed and presented to Ms James (not the Secretary of State) in or around September 2016. That claim was therefore dropped in the equivalent paragraph of the Detailed Grounds of Defence ([63]).

70. However, Mr Stilitz stood by the claim that the responses were taken fully into account by the Secretary of State in 2022, albeit [63] of the Detailed Grounds of Defence and [25] and [38(3)] of his skeleton argument were careful to refer to [55] and [60] of Mr Stevens' witness statement as proving that this was the case. In fact, as I have said, Mr Stevens does not say, in either of these paragraphs or anywhere else in his witness statement, that the Secretary of State considered the responses to the 2015 Consultation or even the thematic analysis of the responses. He appears to have been careful not to say this. The furthest he goes is to say that *"the Government"* considered various matters.

71. I note that Mr Stevens' 13 June 2022 advice also informed the Secretary of State of the advice, given by the Department of Transport team, that the change *"would have a minimal impact on resilience of the rail sector in the short term and may inflame industrial relations (this is likely beyond the rail sector)"* although in the medium term "*it may increase the ability of train companies to deploy some staff more flexibly"*. He added:

> "*We would need to work up a more detailed impact assessment to accompany any consultation and/or introduction of any statutory instrument"*.

72. An email from Mr Stevens later on 13 June 2022, and after the Secretary of State's approval of the proposal had been communicated, states that there was a wish to:

> *"[nail] down the absolute minimum timeline on this/what else would need to be bumped to do this"*.

73. On 14 June 2022, Mr Stevens gave further advice on the timeline. It is apparent from the email that he had added an even shorter one as an option given the Secretary of State's wish *"to proceed at pace and implement the repeal ahead of the Summer Recess"* [56]. Whereas the proposal had been that the statutory instrument would be laid before Parliament before the summer recess but not come into force until the autumn, a timeline which would see it come into effect before the recess was added. However, the original timeline was recommended by Mr Stevens as this was the quickest that the process could be run *"in accordance with standard practice"*. He said that the option of a timetable which would lead to the revocation coming into force before the summer recess would require aspects of the normal legislative scrutiny process to be missed out and was not recommended because:

> *"DFT advice (at official level at least) continues to be that this change will not have a positive short-term impact on the planned rail strikes. Therefore it is not clear, in policy terms, what the benefit of the accelerated timetable is. If it is to act as a deterrent or encourage unions to negotiate more seriously then this may be achieved by laying the regulations before the summer recess (which shows Government intent);"* (emphasis added)

74. Mr Stevens said that the option would also allow very little time to finalise the impact assessment and there was a risk that it was not achievable in any event given the need for Parliamentary scrutiny.

75. Although Mr Stevens does not give specific evidence about the response to his advice, it is apparent that, nevertheless, this was the option which was pursued. Again, the reasons for this degree of haste are not explained.

76. On 15 June 2022, it was confirmed by email that the Prime Minister also wished to proceed with the proposal and agreed with the Secretary of State's *"recommendations around pace"*.

16 June to 21 July 2022

77. On 20 June 2022, a joint statement was issued by the TUC and Mr Neil Carberry, the Chief Executive of the Recruitment and Employment Federation ("REC"), which

represents 3000 employment businesses and agencies in the recruitment sector. This urged the Government to abandon the proposal to repeal regulation 7. The joint statement asserted that the change in the law would not work. Given the tight labour market conditions and shortage of candidates to fill roles, agency staff were unlikely to be willing to cover for employees who were taking industrial action and, in addition, were unlikely to have the skills or training to do so. The measure would also be counterproductive in that it would make the settlement of disputes less likely. Comparisons with events at P&O were made.

78. A press release from BEIS and the Department for Transport then formally announced the decision on 23 June 2022. Mr Kwarteng and Mr Schapps both made statements which emphasised that the measure would reduce the disruption caused by strikes by allowing *"fully skilled"* staff to be provided as cover *"at speed"*.

79. Also on 23 June 2022, Mr Kwarteng wrote to the Chairs of the Joint Committee on Statutory Instruments (Jessica Morden MP) and the Secondary Legislation Scrutiny Committee of the House of Lords (Lord Hodgson) requesting their support in expediting the scrutiny of the measures so as to allow them to come into force before the summer recess. Mr Kwarteng said:

> *"Repealing this regulation does not remove or put additional barriers in the way of an individual's ability to strike but it would allow employers more flexibility in how they limit the impact of strike action on the wider economy and members of the public. In our view it strikes the right balance between the right to strike against the right of employers and ordinary people to not suffer disproportionate disruption to their daily lives."* (emphasis added)

80. On 27 June 2022, the draft regulations were laid before Parliament and a draft Explanatory Memorandum was published. This explained the purposes of the statutory instrument as follows:

> *"2.3 The Government is committed to ensuring strikes only happen as the result of a clear, democratic decision and commits to tackling the disproportionate impact of strikes on important public services. In addition, there are sectors in which industrial action has a wider impact on members of the public that is disproportionate and unfair. Strikes can prevent people from getting to work and prevent businesses from managing their workforces effectively.*
>
> *2.4 The Government also considers it important to protect individuals' right to strike but believes this must not come at the cost of unreasonable disruption to important services for members of the public or unreasonable cost to businesses at a time when both are struggling with the rising cost of living and doing business.*
>
> *2.5 This instrument therefore repeals regulation 7 of the Conduct Regulations, with the aim of limiting the impact to society and the wider economy of strike action by ensuring that businesses can continue to operate to some extent."* (emphasis added)

81. As the Claimants point out, therefore, the revocation of regulation 7 was being explained by reference to the beneficial effect it would have, particularly for the public and business. The measure was also being said to strike the right balance between the

competing interests affected by industrial action. It was therefore being presented as a practical measure rather than a purely ideological one, or a matter of political principle.

82. Although Mr Stevens did not give evidence about this point, at the hearing Mr Stilitz pointed out that the Explanatory Memorandum gave a four paragraph summary of the thematic analysis which had been presented to Ms James in September 2016. This focussed on views about the impact of the measure on each of the four main constituencies – employment businesses, work seekers, hirers and employees taking part in industrial action (Question 1 in the 2015 Consultation Document, save for the question as to the impact on the economy and society) - rather than the responses to the assumptions underpinning the 2015 Impact Assessment (Questions 2-4). It set out the percentages of responders who thought that the effect on each constituency would be negative or positive, and the main reasons for their opinions were summarised. The Memorandum stated, at paragraph 10.7, that:

> *"The Government has carefully considered all these points and remains of the view that removing regulation 7 is the right course of action…"*

83. The Explanatory Memorandum concludes, under the heading *"Contact"*:

> "*Kwasi Kwarteng at the Department for Business, Energy and Industrial Strategy (BEIS) can confirm that this Explanatory Memorandum meets the required standard."*

84. In his oral submissions Mr Stilitz implied that at this stage, and indeed right up to the end of the Parliamentary debates on the draft regulations, the Secretary of State still had an open mind as to whether to repeal regulation 7. He told me, as part of his case that conscientious consideration had been given to the responses to the 2015 Consultation before the decision was taken, that he was instructed that the Secretary of State *"signed off"* on the Explanatory Memorandum and had therefore seen the summary of the responses to the 2015 Consultation. He said that this is reflected in the second of the paragraphs from the Memorandum quoted above.

85. In fact, Mr Stevens says at [95] of his statement that the Secretary of State had approved the Explanatory Memorandum, albeit as part of a section of his statement which deals with the timing and contents of the further impact assessment which the Memorandum committed to publish *"in good time before any parliamentary debates"*. However, Mr Stilitz's argument was the first time in the litigation that significance had been attached to this aspect of the Explanatory Memorandum by the Secretary of State for this purpose, whether in the lengthy and detailed pleadings, Mr Stevens' 30 page witness statement or the Secretary of State's 29 page skeleton argument. On the contrary, the Secretary of State's pleaded case, at [41] of the Summary Grounds of Defence and [48] of the Detailed Grounds, is that the decision was taken on 13 June 2022. Based on [55] of Mr Stevens' witness statement, [25] of the Secretary of State's skeleton argument says, in terms, that:

> "*On 13 June 2022, the SoS decided that Regulation 7 should be repealed".*

86. The suggestion that the Secretary of State had an open mind at any point after 13 June 2022 also flies in the face of the contemporaneous evidence, which shows that a firm decision had been taken by that point at the latest, and there was a clear determination

to implement it as speedily as possible. There is no sign, in the documents after 13 June 2022, of Mr Kwarteng's decision being provisional in any sense other than that the statutory instrument would be subject to the affirmative resolution procedure.

87. The determination to implement the decision of 13 June 2022 is also evidenced by the decision to implement it before the summer recess despite Mr Stevens' advice of 14 June 2022 that this would involve cutting legislative corners for no discernible benefit, despite the advice that it was likely to inflame industrial relations and despite the lack of an impact assessment to support the proposal. The shortened timetable was also applied despite concerns being expressed in writing by, amongst others, the Legal Adviser to the Secondary Legislation Scrutiny Committee and Lord Hodgson, the Chair of that Committee. These concerns included that the 2015 Consultation had taken place 7 years earlier and the responses had generally been opposed to the proposal, the speed of implementation and the lack of an impact assessment, which was said to undermine the ability of Parliament to scrutinise the proposal. There were also questions raised about the position in Wales given the Trade Union (Wales) Act 2017 which, in broad terms, made it unlawful for a devolved Welsh authority to hire a worker supplied by an employment business to provide cover for employees participating in industrial action.

88. The Impact Assessment for the draft 2022 Regulations was published on 11 July 2022, the day on which the House of Commons considered the draft 2022 Regulations. The Assessment took a different approach to that of the 2015 Impact Assessment, which had purported to quantify the beneficial impact of the measure. The Total Net Present Value, Business Net Present Value and Net Cost to Business per year ware all said to be *"£m 0.0"*. In the RPC Opinion box, the entry was "*Not required as De Minimis"*. An asterisk for these figures explained that BEIS had undertaken break-even analysis and was confident that this policy change was likely to be net beneficial, but did not have the evidence robustly to estimate the size of this impact. The break-even analysis was based on estimated familiarisation costs for employers, unions and employment businesses of £332,000 over a ten year period and other estimates of monetised costs and benefits of the proposal. The conclusion was that, leaving out non-monetised impacts such as the benefit to the wider economy, a break-even point for the policy over 10 years was estimated if agency workers were able to reduce annual average working days lost by 2% and agency workers were 50% as productive as the workers they were replacing.

89. I note, in fairness to Mr Kwarteng, that he signed off the 2022 Impact Assessment which also contained a summary of the 2015 Consultation which was very similar to the summary which appeared in the Explanatory Memorandum. [7] of the Impact Assessment stated:

> *"Even though this consultation was conducted a few years ago, it is still considered relevant. It received a significant response from a wide range of stakeholders, who provided views and comments from many different perspectives that remain valid today".*

90. Mr Carberry also wrote to Mr Scully MP, junior Minister in BEIS, on 13 June 2022 and to Lord Hodgson on 11 July 2022. Although I have not seen the former, I understand from Mr Stevens' witness statement that he expressed concerns that employment businesses and their workers would be placed in an invidious position; that there was a lack of suitable qualified and available agency workers; and that damage would be

caused to the reputation of employment businesses if they supplied cover during industrial action. Referring to the 2022 Impact Assessment, the penultimate paragraph of Mr Carberry's letter to Lord Hodgson on 11 July stated:

> *"Yesterday, the government published an Impact Assessment with vastly reduced costs and benefits from the Impact Assessment published in 2015, previously declared "not fit for purpose" by the Regulatory Policy Committee (RPC). Without any consultation with those most affected – the agencies and their workers – it's difficult to give the assumptions in the latest assessment any credence. Relying on a seven-year-old consultation to apply to legislation being laid in 2022 is wholly inappropriate and fails to take account of the wider economic and political context."*

91. Also on 11 July 2022, Mr Kwarteng wrote to Lord Hodgson. In relation to the concern about the lack of an impact assessment he said that one would be published that day and enclosed a copy. He said that the change was *"a permissive change, employers will only hire agency workers when the net benefit is positive"* and he explained that:

> *"In order to estimate the impact of this measure, we would need to make a number of assumptions and do not have the evidence to do this. The IA therefore uses a simple model that looks at impacts from business impacted from industrial action and carried out break even analysis. This shows that if agency workers were able to reduce annual average working days lost from industrial action by 2%, with around half the productivity of regular workers, then the impact of this policy would be neutral (break-even). This does not include non-monetized impacts, most notably the wider (significant) benefits on the rest of the economy if employers facing strike action can maintain some activity. Hence, we are confident that this policy change is likely to be net beneficial, however, we are unable to robustly estimate the size of this impact."* (emphasis added)

92. In relation to the obligation to consult under section 12(2) of the 1973 Act, Mr Kwarteng said: *"In our view the 2015 consultation discharges this obligation and there is no need for an additional exercise."* He went on to say:

> *"As the Explanatory Memorandum sets out, the consultation itself was thorough and elicited a large number of responses (167 in total) and from a wide range of different types of stakeholders. While we accept that circumstances have altered in some ways, we do not think these are particularly relevant to the changes we are proposing to make. As such there is no reason to think any new groups of stakeholders would respond or that they would raise new points."* (emphasis added)

93. In explaining why there had been the delay in implementing the measure he said:

> *"Now that the Trade Union Act has been in place for some time, we have taken the opportunity to consider, once more, whether our industrial relations framework strikes the right balance between the important right of workers to strike and the rights of the public to go about their daily lives unimpeded. In doing this, I have come to the conclusion that removing this regulation is the right thing to do."* (emphasis added)

94. His position in relation to the Trade Union (Wales) Act 2017 was that employment rights and industrial relations were reserved matters and that there was a long standing commitment to reverse the 2017 Act. The matter therefore had not been specifically discussed prior to the announcement of the revocation of regulation 7 but the 2017 Act would be repealed when a suitable primary legislative opportunity arose, as had been indicated in the Explanatory Memorandum.

95. On 14 July 2022, the Secondary Legislation Scrutiny Committee published its report on the draft Regulations. It criticised the fact that no impact assessment had been provided when the draft Regulations were laid before Parliament:

> *"As we have highlighted repeatedly, parliamentary scrutiny starts when legislation is laid before Parliament, and every time an instrument is laid without the supporting IA, this undermines our ability and the ability of Parliament more generally to scrutinise legislation effectively. The fact that in the IA the Department was unable to "robustly estimate the size" of the policy's impact because of a lack of evidence raises questions as to the effectiveness of the change proposed by the draft Regulations."*

96. The Report also expressed concerns about the devolution aspect of the draft Regulations:

> *" in particular the Government's intention to repeal the 2017 Act to ensure that the draft Regulations apply equally across GB. Given that this raises highly sensitive constitutional questions, there should have been an earlier and more comprehensive engagement with the Welsh Government and Senedd on the draft Regulations. We note that the Secretary of State has committed to further engage with the Welsh Government on the repeal of the 2017 Act."*

97. The draft 2022 Regulations were debated by the House of Commons on 11 July and by the House of Lords on 18 July 2022. In the House of Commons, the motion for approval was moved by Ms Jane Hunt MP, Parliamentary Under Secretary of State for BEIS. The Regulations were approved by both Houses. Mr Stilitz took me to passages from the debates. In summary:

i) The debate in the House of Commons lasted just under an hour and a half and the arguments against the draft regulations included assertions that it would not work because agency workers would refuse to provide cover given the number of job vacancies that there were and/or that the proposal would be counterproductive. It was said that the measure was a threat to health and safety, that it was contrary to ILO Convention 87, and that it would have a negative impact on agency workers and the agencies themselves. There were also concerns expressed about the position in Wales, and references to the P&O case. There was reference to the Trade Union Act 2016 but the argument (from a Labour MP) was that it was not preventing industrial action.

ii) The debate in the House of Lords lasted a little over 45 minutes. Lord Collins condemned the lack of consultation and the lateness of the Impact Assessment and pointed out that the responses in 2015 had been opposed to the proposal. The proposal was also said by Lord Hendy to be contrary to international law in the form of ILO Convention 87. There were criticisms of the lack of evidence

to show that it would be beneficial. Mr Carberry's views, as summarised above, were quoted. There were also arguments that the measure would not work and that there were potential issues with safety.

98. The 2022 Regulations were then made by the Secretary of State on 20 July 2022 and came into force on the following day. By regulation 2, the single measure which they introduce is to revoke regulation 7 of the 2003 Regulations.

Caselaw on the duty to consult

99. The *Gunning* requirements for a meaningful consultation, set out at [17] above, were approved by the Court of Appeal, including in *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213, at [108], and endorsed by the Supreme Court in *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56, [2014] 1 WLR 3947 at [25]. Lord Wilson agreed with the description of the four requirements as *"a prescription for fairness"*.

100. *Moseley* concerned a proposal by the local authority to introduce a council tax reduction scheme which would replace council tax benefit. There was a statutory duty under paragraph 3(c) to Schedule 1A to the Local Government Finance Act 1992 to *"consult such other persons as it considers are likely to have an interest in the operation of the scheme"*. The central issue was whether Haringey had provided consultees with sufficient information to enable them to appreciate that there were potential alternatives to the draft scheme which it was proposing.

101. Although the case concerned a statutory duty to consult, at [23] and [24] Lord Wilson, with whom Lord Kerr agreed, discussed the duty to consult as an aspect of the common law duty to act fairly, and the doctrine of legitimate expectation as a potential foundation for a duty to consult. At [23] he said that:

> *"…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"*

102. He went on to say that the requirements of fairness in this context *"must be linked to the purposes of consultation"*. He said that Lord Reed's identification of two of the purposes of procedural fairness in the determination of a person's legal rights at [67] and [68] of his judgment in *R (Osborn) v Parole Board* [2014] AC 1115 equally underlay the requirement that the consultation process be fair in the somewhat different context of the Local Government Finance Act 1992:

> *"First, the requirement "is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested": para 67. Second, it avoids "the sense of injustice which the person who is the subject of the decision will otherwise feel": para 68".*

103. He added:

> *"Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society."*

104. This third purpose, he said, was particularly relevant in a case where the issue was not a binary one and there was a potential range of options, as was the case in *Moseley*.

105. At [25], Lord Wilson also cited with approval the following passage from the judgement of Lord Woolf MR in *ex parte Coughlan* at [112]:

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

106. And at [26] he derived two further general principles from the authorities:

> *"First, the degree of specificity with which, in fairness, the public authority should conduct its consultation exercise may be influenced by the identity of those whom it is consulting…. Second, in the words of Simon Brown LJ in Ex p Baker [1995] 1All ER 73, 91, "the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit"".*

107. Lord Wilson went on to conclude that the consultation exercise which Haringey had carried out was *"unfair and therefore unlawful"*, essentially because insufficient information had been provided to potential consultees and, in particular, they had not been told that there were other potential options than the scheme favoured by Haringey. On the contrary, the information provided gave a misleading impression that all other options were irrelevant.

108. Lord Reed said, at [34], that he was generally in agreement with Lord Wilson, but would prefer to express his analysis of the relevant law in a way which laid less emphasis on the common law duty to act fairly, and more on the statutory context and purpose of the particular duty of consultation with which the Supreme Court was concerned in that case. He pointed out that the case was not concerned with the common law duty to act fairly or a legitimate expectation of consultation. *Statutory* duties to consult vary in their requirements and content according to the terms of the particular statutory provision and the context in which it is enacted. There may be differing requirements as to when the consultation should take place, who should be consulted, about what, and whether in person or in writing. A mechanistic approach should therefore be avoided [36].

109. At [38] Lord Reed said that the duty to consult in the *Moseley* case arose in the context of the local authority's exercise of a general power in relation to finance and therefore:

> *"far removed in context and scope from the situations in which the common law has recognised a duty of procedural fairness. The purpose of public consultation in that context is in my opinion not to ensure procedural fairness in the treatment of persons whose legally protected interests may be adversely affected, as the common law seeks to do. The purpose of this particular statutory duty to consult*

must, in my opinion, be to ensure public participation in the local authority's decision-making process."

110. Lord Reed therefore went on to analyse the issue by reference to the question whether members of the public had been given a meaningful opportunity to participate in the decision-making process. At [39] he reasoned that, because the particular context was one with which members of the public could not be expected to be familiar, there was a greater requirement for the local authority to provide them with information, including as to potential alternative options, so as to enable them to participate effectively. In this connection he cited the passage at [112] of Lord Woolf's judgment in *ex parte Coughlan*, to which Lord Wilson had also referred, with approval.

111. Baroness Hale and Lord Clarke agreed with Lord Wilson and Lord Reed that the appeal should be allowed and a declaration granted in the claimant's favour. At [44] they said:

"There appears to us to be very little between them as to the correct approach. We agree with Lord Reed JSC that the court must have regard to the statutory context and that, as he puts it, in the particular statutory context, the duty of the local authority was to ensure public participation in the decision-making process. It seems to us that in order to do so it must act fairly by taking the specific steps set out by Lord Reed JSC, in para 39. In these circumstances we can we think safely agree with both judgments."

112. Submissions were addressed to me based on the difference of approach as between Lords Wilson and Reed, albeit their approaches led to the same result for essentially the same reasons. I respectfully agree with Lord Reed that, where there is a statutory duty to consult, the task of the court is to determine whether the requirements of the particular statutory provision, interpreted in context, have been met. This will involve consideration of the terms and the purpose of the provision. However, Lord Reed's approach did not call into question the proposition that the statutory requirement to *"consult"* which was under consideration in *Moseley* included a requirement that the basic features of a meaningful consultation, as stated in *Gunning*, were complied with. His essential point was that where there is a statutory duty to consult the application of the *Gunning* principles to the issue in the particular case should be subject to and/or guided by the terms of the statutory duty and the statutory context. The duty to act fairly and the doctrine of legitimate expectation are both distinct common law concepts and are informed by their own particular principles of public law.

113. As for the first *Gunning* principle, the requirement that consultation take place when the proposal is at a formative stage, it is of the essence of consultation that the issue has not been determined before the consultation takes place. As Morris J said in *R (Electrical Collars Manufacturers Association) v Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 2813 (Admin) at [139], having reviewed the authorities:

"139. .. at the relevant time the decision-maker must have an "open mind on the issue of principle involved"... The question is whether the decision-maker had already made up its mind to adopt the proposal or whether it was willing to reconsider its proposal in the light of the consultation process if a case to do so was made out. There must be no actual pre-determination on the part of the decision-maker. Where the decision-maker is consulting on a particular proposal,

> *the consultation must include consultation on whether the proposal should be adopted, and not just on how ..there is a legitimate distinction to be drawn between actual pre-determination on the part of the decision-maker and the decision-maker having a "pre-disposition" towards the proposal. The latter is permissible, and necessarily so in circumstances where the decision-maker is, as entitled to do, to determine the particular proposal upon which he wishes to consult…."*

114. In relation to the second *Gunning* principle, Mr Ford KC repeatedly emphasised the word *"exactly"* in Lord Woolf's dictum at [112] of his judgment in *ex parte Coughlan* (" *exactly why it is under positive consideration"*) as the basis for his arguments about the 2015 and the 2022 Impact Assessments, as if this is a statutory requirement. It is not: in this passage the Court of Appeal in *ex parte Coughlan* was in fact rejecting a submission that the consultation process was flawed because a report which had been considered by the decision making body had not been disclosed to consultees. The principle as stated in *Gunning* is that *"the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response"*. What, precisely, this principle will require in any given case is context specific.

115. I note, however, that in *R (Devon County Council) v Secretary of State for Communities and Local Government* [2011] LGR 64 at [68] Ouseley J added:

> *"What needs to be published about the proposal is very much a matter for the judgment of the person carrying out the consultation to whose decision the courts will accord a very broad discretion . . . But, in my judgment, sufficient information to enable an [intelligent] response requires the consultee to know not just what the proposal is in whatever detail is necessary, but also the factors likely to be of substantial importance to the decision, or the basis on which the decision is likely to be taken."* (emphasis added).

116. As for the fourth *Gunning* principle, the requirement of conscientious consideration of the product of the consultation, in *R (Electrical Collars Manufacturers Association) v Secretary of State for Environment, Food and Rural Affairs* (supra) Morris J said:

> *"151. This requirement does not amount to an obligation to adopt the submission by any particular respondent, nor to adopt the majority view. The decision-maker is entitled to consider the whole range of responses and then to form his own view, independently of the views of any particular consultees. Further there is no obligation to consider each and every specific item of detail… There is an obligation to take account of the majority view, but no obligation to adopt that view…..*
>
> *153….. Where there is a large number of consultation responses, conscientious consideration does not require a fully reasoned decision letter as following a public inquiry. The real question is whether the response to the problems is rational. Nevertheless there should be evidence of consideration of important points made by consultees…"* (emphasis added)

117. As for the standard of review where the issue is as to the fairness of a consultation exercise, in *R (London Criminal Courts Solicitors Association) v Lord Chancellor* [2014] EWHC 3020 (Admin) Burnett J (as he then was) confirmed that that *"The question whether there has been procedural fairness is one for the court to determine"*

[36] but he referred to the statement of Sullivan LJ in *R (Baird) v Environment Agency and Arun District Council* [2011] EWHC 939 (Admin) and accepted that *"The test is whether the process was so unfair as to be unlawful*". Sullivan LJ had also indicated that, although this was not the test, *"in reality a conclusion that a consultation process has been so unfair as to be unlawful is likely to be based on a factual finding that something has gone clearly and radically wrong."*.

118. I was also taken to various authorities for the purpose of the arguments between the parties on what was described as the question whether there is *"a duty to reconsult"*. Two strands in the caselaw were identified, namely cases where the question arises because the proposal which was consulted on is modified after consultation, and cases where it arises because a new factor emerges or circumstances change. However, these strands are not always kept separate in the authorities.

119. As far as the modified proposal cases are concerned, the key authority is *R (Smith) v East Kent Hospital NHS Trust and Another* [2002] EWHC 2640 (Admin) where Silber J said at [49]:

> "*The concept of fairness should determine whether there is a need to re−consult if the decision−maker wishes to accept a fresh proposal but the courts should not be too liberal in the use of its power of judicial review to compel further consultation on any change In determining whether there should be further re−consultation, a proper balance has to be struck between the strong obligation to consult on the part of the health authority and the need for decisions to be taken that affect the running of the Health Service. This means that there should only be re−consultation if there is a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt."* (emphasis added)

120. In such a case it could not be said that there had been consultation on the proposal which had been implemented. This approach was adopted by the Court of Appeal in *R (Elphinstone) v City of Westminster* [2008] EWCA Civ 1069 at [62], a modified proposal case.

121. As far as change of circumstance cases are concerned, I was taken to the judgment of Sullivan LJ on *R (Stirling) v Haringey LBC* [2013] EWCA Civ 116, [2013] PTSR 1285 which became the *Moseley* case in the Supreme Court. At [22]-[24] he considered the fundamental difference test in *Smith* and pointed out that that was a case in which four options were consulted upon and the decision was to take a fifth option, which incorporated elements from the four. Cases where a new factor emerges during the course of consultation were different. At [24] he said:

> *"In the latter type of case, I am not persuaded that the "fundamental change" test is appropriate. …. It is easy to postulate the test - that the new factor must be of such significance that, in all the circumstances, fairness demands that it must (not may) be drawn to the attention of consultees; it is much more difficult to decide what fairness demands in any particular set of circumstances. A holistic approach should be adopted, all relevant factors should be considered, and these may include, in addition to the nature and significance of the new material, such matters as the extent to which the new material is in the public domain, thereby affording consultees the opportunity to comment on its relevance to the proposal the subject*

> *of the consultation, and the practical implications, including cost and delay, of further consultation."* (emphasis added)

122. Albeit the Court of Appeal was not upheld by the Supreme Court, which did not specifically refer to this passage, this reasoning reflects the common law principle that, as part of the duty of fairness, *"if in the course of decision-making a decision-maker becomes aware of a new factor…or some internal material of potential significance to the decision to be made…, fairness may demand that the party or parties concerned should be given an opportunity to deal with it."* per Auld LJ in *R (Edwards) v Environment Agency* [2006] EWCA Civ 877; [2007] Env LR 9. As Sullivan LJ said, however, the question whether fairness places this requirement on a decision maker in any given case is fact sensitive.

123. The Secretary of State's skeleton argument emphasised that these passages from *Stirling* and *Edwards* were concerned with new factors arising whilst the consultation process was ongoing and argued that therefore they were not directly applicable in the present case, where the decision was taken long after the consultation had come to an end. It was not clear why a failure to consult further would be more readily defensible in the latter type of case – one would have thought the opposite, at least in principle – but he relied on *R (Association of British Insurers) v Lord Chancellor* [2017] EHHC 106 (Admin) ("*ABI*") where it was said by Andrew Baker J at [44] to be:

> *"an established public law principle…that having chosen to consult in relation to a public law decision to be taken, if there is a fundamental change of circumstance arising during the course of any delay in the final taking of that decision, there will be a duty to re-consult. That is the Elphinstone case."*

124. However, with respect, this dictum should be approached with caution given that *Elphinstone* concerned the situation where a new proposal emerges from the consultation process, rather than a change in circumstances. *ABI* was also a decision on permission and interim relief, and it does not appear that the passages from *Stirling* to which I have referred were drawn to the attention of the court or that any distinction between new proposals or new factors was drawn or argued for by the parties.

125. It was a feature of *ABI* that there was a delay of in the order of 3 years between the consultation carried out by the then Lord Chancellor and the decision to complete her review of the discount rate applicable to awards of damages for personal injury and announce the result. But the case was not put on the basis that there had been a change of circumstances in the intervening period which meant that there was an obligation to reconsult. It was put on the basis that there had been a breach of legitimate expectation because the Lord Chancellor had not published her response to the original consultation document and had not then given the consultees the opportunity to update their responses made 3 years earlier as had in effect been promised. Andrew Baker J found on the facts that there was no arguable case that there was a promise or legitimate expectation that this was the procedure which would be followed: see [40] and [44]. His remarks about *Elphinstone* were therefore obiter and/or were not made with the benefit of full argument on the point of principle as to the approach where it is said that circumstances have changed since a consultation was carried out. In any event, he was considering what was the legitimate expectation of ABI rather than the requirements of a statutory duty to consult.

126. I was also referred to the decisions of Mr John Howell QC (sitting as a Deputy High Court Judge) in *R (Holborn Studios) v London Borough of Hackney* [2017] EWHC 2823, [2018] PTSR 997 at [57]-[58] and [75]-[81] and of Nicklin J in *Kitchener-Pope v Governing Body of Peacehaven Community School & Others* [2019] EWHC 2666 (Admin). The former, on which the Claimants relied, was a modified proposal case in the planning context. Mr Howells said at [75] that:

> *"When there is a statutory duty of consultation, the question whether reconsultation is required if there is a change to the proposal on which there has been consultation depends on what fairness requires. That will depend inter alia on the purposes for which the requirement of consultation is imposed, the nature and extent of any changes and their potential significance for those who might be consulted"*

127. He did not accept that the test was whether there was a *"fundamental change"* or a *"substantial difference"*, although it appears that his view was based on the specific context, which was a proposed amendment to an application for planning permission [79]. He also rejected the proposition that the role of the court where fairness is in issue is merely to review the reasonableness of the decision-maker's judgment as to what fairness required [80], and he reiterated that the test was whether the process has been so unfair as to be unlawful [85]. The Claimants submitted that this supported their argument that the issue was as to the overall fairness of the approach of the public body rather than there being formal and decisive tests which require to be applied according to the category – modified proposal or change of circumstances – into which a case falls.

128. The Secretary of State placed particular reliance on the following passages from *Kitchener-Pope* which, he submitted, was the only case where the approach in change of circumstances cases had been directly considered and which, it was suggested in the written argument, held that the test was one of irrationality:

> *"20…a duty to re-consult may arise in certain circumstances. However, the changes would have to be of such significance to make it almost irrational for a public authority to press on with its policy without returning to consult those who were originally consulted..*
>
> *22….It is an important point of distinction from the [Holborn] Studios case that in this case the proposal has not changed; it remains the same. The proposal, as it was originally consulted upon, was that the school should be converted to an academy and nothing on that front has changed. The points that are relied upon therefore by the Claimant are external matters. A great deal of caution in my judgment needs to be adopted before the Court accepts that changes in external factors, such as these, give rise to a duty to reconsider. I can imagine changes of such enormous importance and having such significant bearing on a decision that has already been made that it might end up arguably being irrational to press on without reconsidering those new matters. But everything depends upon individual facts. .....There is a clear risk that setting the bar too low in terms of what amounts to material change of circumstances that public authorities will be consigned forever to having to re-consult on any project or policy that is extended over any substantial period"* (emphasis added)

129. *Kitchener-Pope* was also a decision on permission to apply for judicial review albeit the School was represented at the hearing. As I have highlighted, Nicklin J did not in fact apply a test of irrationality. Moreover, as some of the passages which I have highlighted show, it is worth noting the context for these remarks. There had been a lawful statutory consultation process which led to a decision that the School would convert to academy status, and an academy order had been made by the Secretary of State for Education on 9 February 2017. There had then been a delay in implementing the decision until September 2019. The claimant's argument, raised shortly before the decision was due to be implemented, was that in the light of developments in the interim, the question of academy status should be re-opened and there should be a further consultation process in relation to the issue of academisation. With respect, Nicklin J's decision was unsurprising on the facts.

130. Mr Stilitz also placed significant reliance on the decision of the Court of Appeal in *R (Milton Keynes Council & Others) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 1575 as supporting the proposition that a decision as to the scope of any further consultation is merely subject to the supervisory review of the court. He emphasised the Court of Appeal's references to the Secretary of State's decision in that case being a *"macro-political decision"* as part of the reason for rejecting the complaint of failure to consult [36]; and he submitted that there was a close analogy between that case and the present one.

131. However, the issue in the *Milton Keynes* case was whether the common law duty of fairness required that the claimant local planning authorities should have been directly consulted about a change to government planning policy on houses in multiple occupation, rather than consulted through their representative bodies as they had been. There had been a thorough consultation about three policy options in 2009, including directly with the local planning authorities, and the decision had been made in April 2010 to adopt option 2. The policy of the coalition government elected in 2010 was to adopt option 3 and a shorter consultation with a more limited circle of consultees was then conducted before option 3 was adopted in September 2010.

132. In fact, the Court of Appeal in the *Milton Keynes* case said that the issues in relation to the consultation, including as to who should be consulted, were issues of fairness (see e.g. [32] and [35]) but it rejected the local planning authorities' case that the Secretary of State's approach to the question of consultation had been unfair. It was in this context that Pill LJ said:

> *"37. The Secretary of State was well aware of the strongly held views of local authorities, and other bodies, as a result of the 2009 consultation.*
>
> *38. That recent and comprehensive consultation in 2009 is in my judgment the key to the decision in the present situation. The Secretary of State was minded to make the orders challenged notwithstanding the strong, articulated objections to them by local planning authorities, of which he was aware. The decision to make them was a political decision which the Secretary of State was entitled to make. In the circumstances, he was then entitled, first, to make the consultation a limited one and, secondly, to decide that there was no evidence of significant new issues arising, which required fuller consultation."* (emphasis added)

133. Pill LJ's references to the Secretary of State being *"entitled"* to make the decisions which were made were not intended to introduce a test of irrationality but, rather, to indicate that those decisions were not so unfair as to be unlawful.

134. It is true that Pill LJ pointed out that this was a political or *"macro-political"* decision. It is apparent from [26] of his judgment that the principle to which he was alluding, and which I entirely accept, is that: *"The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision."*: per Law LJ in *R v Secretary of State for Education and Employment ex parte Begbie* [2000] 1 WLR 1115, 1131. But I bear in mind the obvious differences in the legal and factual context in which Pill LJ made his remarks. *Milton Keynes* was not concerned with a statutory duty to consult, and the issue was national government planning policy. There were also differences in the extent and quality of the consultation which took place as compared with the present case. In the present case there was also an issue as to the practical impact of the measure as well as political arguments about whether it was desirable.

Summary of the principal arguments of the parties

On behalf of the Claimants

135. First, the test is one of fairness, which is a matter for the court. The court should ask whether the approach of the Secretary of State was so unfair that it was unlawful. The issue is not whether there was *"a duty to reconsult"* as the Secretary of State argued but this, broader, question which should be answered having regard to the statutory purposes of section 12(2) of the 1973 Act. All three of the practical consequences of fair consultation recognised by Lord Wilson in *Moseley* were engaged by section 12(2).

136. Second, even if it would have been sufficient for the Secretary of State to rely on the 2015 Consultation he failed to comply with section 12(2) of the 1973 Act because the responses to that Consultation were not taken into account by him. Although the requirement under section 12(2) was to consult before *making* the 2022 Regulations, the *Gunning* requirements had to be satisfied at the time of the *decision* to make them. That was on 13 June 2022. The then Secretary of State had not considered the responses to the 2015 Consultation at this point, let alone given them *"conscientious consideration"*.

137. Third, in any event the approach of the Secretary of State was unfair and it frustrated the purposes of section 12(2) to the 1973 Act because the 2015 Consultation was flawed, the proposal to revoke regulation 7 had then been dropped, there had been a considerable lapse of time and there had been a number of important developments in the intervening period. Further consultation would have been consistent with the professed reasons for revisiting the proposal and the importance of the rights which would be affected, and other matters, provided further reasons to carry out further consultation.

138. Fourth, the Secretary of State did not consult on the 2022 Impact Assessment, which was put before Parliament as the case for the revocation of regulation 7. This was inconsistent with the second *Gunning* principle which implied that consultation entailed the consultees being in a position to respond to the proposer's reasons for its proposal.

Here, the case for the revocation of regulation 7 had changed since the 2015 Consultation and between the first and the second Impact Assessments.

139. As to the Claimants' third submission, the argument that the 2015 Consultation was flawed was principally based on the criticisms of the evidential basis for the proposal which had been put forward in the 2015 Impact Assessment. In particular, it was argued that as the RPC and the responses to the consultation demonstrated, the proposal was based on a flawed evidential case which was effectively abandoned in the 2022 Impact Assessment. There had also been no publication of the responses to the 2015 Consultation at the time, contrary to the commitment to do so and contrary to Government's Consultation Principles 2018.

140. As far as the lapse of time since the 2015 Consultation is concerned, this was said by the Claimants to be a feature which, in itself, rendered the approach of the Secretary of State unfair and contrary to the aims of section 12 of the 1973 Act. But, in addition to this, whilst making clear that they were not in a position to predict all of the matters which might have been raised by others had there been further consultation, the Claimants relied on the following developments which, they said, were relevant to the impact of the proposal and the question whether revocation of regulation 7 would strike a fair balance between the different interests. They were therefore matters which, amongst others, representative bodies ought to have been given an opportunity to raise or address.

141. First, the effect of the Trade Union Act 2016, which had since come into force including evidence that it had had a material impact on levels of industrial action. This evidence had two main strands:

    i) It was pointed out that at the time of the 2015 Consultation the evidence in the 2015 Impact Assessment was that, on average, 647,000 days each year between 2010 and 2014 were lost to industrial action. The figure for the period between 2015 and 2019 in the 2022 Impact Assessment was 235,000.

    ii) Each of the witnesses who submitted witness statements on behalf of the Claimants for the purposes of these proceedings gave evidence about the number of cases in which the majority of those who voted in the ballot were in favour of industrial action, but the action did not have the support of a ballot for the purposes of the 1992 Act because the minimum turnout of 50% had not been achieved and/or less than 40% of those who were entitled to vote had voted in favour. I need not rehearse this evidence in detail but, for example, Mr Arthur examined the annual returns made by trade unions to the Certification Officer since the 2016 Act came into force and he argues that statistics show that the 50% and 40% thresholds have had a *"hugely significant"* impact on the ability of a union to call industrial action even where the majority of those voting in the ballot – sometimes a sizeable majority - was in favour of industrial action. By way of examples of the statistics which he deploys for this argument, in the case of the GMB it was unable to go ahead in 24% and 20% of such cases in 2018 and 2019. The figure for 2021 was 79%. In the case of PCS the figure was 30% for 2019 and 47% in 2020.

142. Second, in addition to this, measures which had been mooted at the time of the Trade Union Bill as potentially mitigating the effect of the stricter rules on balloting, including

e-balloting to improve turn out, had not been introduced. The current requirement for a postal ballot remains. Moreover, the fact that 14 days' notice of industrial action is now required would also facilitate the use of temporary agency workers.

143. Third, there had also been rapid social and economic changes in the intervening period, which were known to have affected the labour market. In particular: the United Kingdom had left the European Union at the end of 2020 and the principle of free movement no longer applies; there had been the Covid-19 pandemic in 2020/2021 which affected patterns of work; and there had recently been a marked increase in the cost of living as well as a tightening of the labour market.

144. Fourth, the desirability of the increased use of agency work in the public sector – particularly in education and health - and the increasing cost of doing so were live issues. There had also been the recent use by P&O Ferries of agency workers to replace employed staff who were unionised, which had caused public outcry and had been condemned by the Government itself.

145. Fifth, the CEACR had requested the Government to review the proposal to revoke regulation 7 in the light of its international law obligations under Convention 87 of 1948, indicating that any such revocation should be limited to essential public services. In June 2016, the Government had said that it would do so and would engage with the social partners in this connection but had not done so. In any event, there was a potential issue as to whether any revocation of regulation 7 should be limited to *"important public services"* consistently with the approach to balloting thresholds under the 2016 Act.

146. Sixth, the Welsh Government had passed the Trade Union (Wales) Act 2017 and there was therefore an issue as to consistency of approach as between this Act and the revocation of regulation 7.

147. Seventh, in parallel with the proposal to revoke regulation 7 there was also a proposal to raise the cap on damages payable for unlawful industrial action. This also affected the balance in terms of the ability of trade unions to call for industrial action.

148. Other matters which it was said the Claimants would have wished to raise were that there was no manifesto commitment to revoke regulation 7, so there was no specific mandate to do so. They would have wished to emphasise the importance of the matter to trade unions and their members as well as the fact that it affected their rights under Article 11 of the ECHR. It was also said that there were proposals in the 2019 Manifesto which appeared to foreshadow legislation requiring minimum services levels in the public sector which is currently before Parliament. This should have been considered as part of a further consultation process as to how the industrial balance should be struck.

<u>On behalf of the Defendant</u>

149. Section 12(2) of the 1973 Act establishes a *"very limited"* duty to consult. [37] of the Secretary of State's skeleton argument submitted that: *"Provided that the consultation is conducted before any regulations are introduced, and such bodies as the SoS considers representative are consulted, the duty to consult is satisfied"*. In his oral

submissions, Mr Stilitz argued that section 12(2) required very little of the Secretary of the State, and the terms of the section had been complied with in this case.

150. At the same time, second, the section contains an exhaustive account of what is required and, like the provisions under consideration in *R (easyJet Airline Company Ltd) v Civil Aviation Authority* [2009] EWCA Civ 1361, any requirement of fairness will be satisfied by compliance with its terms. This is not a case in which the common law is required to supplement the obligations of the public body under the relevant statutory provision: [40] of the Secretary of State's Skeleton Argument.

151. Third, the purpose of section 12(2) is to ensure that representatives of the interests concerned are able to contribute to the Secretary of State's decision-making process, rather than to ensure procedural fairness in the treatment of persons with legally protected interests. In this connection, the analysis of Lord Reed in *Moseley* was relied on.

152. Fourth, the issue in this case is whether there was a duty to re-consult given an alleged change of circumstances. In such a case, the correct approach is to apply the *Elphinstone* principle to the facts of the case, and ask whether there has been a fundamental change in circumstances since the 2015 Consultation concluded, which necessitates re-consultation: [47] of the Secretary of State's Skeleton Argument.

153. Fifth, somewhat inconsistently with the argument that *the court* should decide the issue of fairness, applying the test in *Elphinstone* in all types of case, the Secretary of State also submitted in writing that:

    i) In applying the *Elphinstone* principle it is essential to identify the nature of the relevant change: it may concern the proposal itself or it may be that the proposal is the same but the changes are to external factors [48].

    ii) *"in external factor cases….the Court will use its power of judicial review to compel further consultation only when the public authority acts irrationally in determining that the new factors do not necessitate re-consultation."* [54] (emphasis added). This, the skeleton said, was what Nicklin J decided in *Kitchener-Pope*. It was also the approach of Pill LJ in the *Milton Keynes* case.

154. Ultimately, however, at the hearing Mr Stilitz rightly did not submit that the test was one of irrationality. As I have noted, that is not what Nicklin J said – he said *"almost irrational"* - and his remarks were in the context of an argument that a decision to proceed with the proposal should be reopened at a late stage, rather than an argument that there should be further consultation before a decision to proceed was taken. Nor was it the approach which the Court of Appeal took in the *Milton Keynes* case: the test applied was clearly one of fairness as I have noted. Moreover, as I pointed out to Mr Stilitz, it is difficult to see how the test could be one of rationality: in this case section 12(2) of the 1973 Act placed an *obligation* on the Secretary of State to consult (albeit with a discretion as to who to consult), rather than conferring a *power* to decide whether to consult. Either he consulted in accordance with the requirements of the section, or he did not.

155. Mr Stilitz's oral submission was that in a case where the question is whether a second round of consultation should have been carried out given a change in external factors,

the court should accord a high degree of deference to the decision-maker and exercise a high degree of caution given that changes in circumstances during or after a consultation process are inevitable and often beyond the control of the public body. An overly interventionist approach by the court runs the risk of never ending consultation, which cannot have been what Parliament intended in enacting the relevant obligation.

156. Sixth, the requirement was to consult before *making* the 2022 Regulations. The Secretary of State was entitled to rely on the 2015 Consultation and he did conscientiously consider the responses to that consultation. In this connection Mr Stilitz relied specifically on [55] and [60] of the witness statement of Mr Stevens, as I have noted.

157. Seventh, the Secretary of State was entitled to decide that further consultation was unlikely to bring up new issues or objections. None of the matters relied on by the Claimants, whether considered collectively or individually, suggested otherwise. Neither the lapse of time since the 2015 Consultation, nor the changes in circumstances since then were material, or sufficiently material to require the Secretary of State to consult again, and it was rational and fair for him to decide not to do so.

i) The logic of the Claimants' case that the effect of the 2016 Act and other changes or proposed changes in the law was that there was a need to re-consult would lead to never ending consultation.

ii) Moreover, the terms of the Trade Union Bill were known when the 2015 Consultation took place. Mr Stilitz took me to various written responses to that consultation which showed that concerns about the impact of the Bill, and particularly the provisions on balloting, were prominent in the objections to the proposal which were put forward by the trade unions. The arguments in relation to the 2016 Act which the Claimants say they would have wished to put forward were therefore put forward during the 2015 Consultation. In a further consultation they would in effect be saying that their pessimistic predictions had proved to be correct.

iii) The other matters raised by the Claimants were not of sufficient materiality to preclude the approach which the Secretary of State took. The Secretary of State's skeleton argument then set out what were said to be the then Secretary of State's views as to whether the Trade Union (Wales) Act 2017, the CEACR report of 2016 and the socio economic and labour market considerations relied on by the Claimants were sufficiently significant or relevant to warrant further consultation. In Mr Stevens' witness statement, however, these were said to be the views or position of *"the Government"* rather than any particular person, and he did not say when these views were formed.

158. Eighth, the Secretary of State was not formally required to consult the Claimants or anyone else about the 2022 Impact Assessment which, in any event, was making much more limited claims for the benefits of the proposal than were made in the 2015 Impact Assessment. The issue was fundamentally one of policy and the introduction of the measure did not require a precise, quantified assessment of its impact to be provided.

159. Ninth, the Secretary of State's decision that further consultation would not bring up new issues is supported by the fact that the complaints which the Claimants now make

are materially the same as the issues which they raised in the 2015 Consultation. Those who oppose the policy continue to do so on the basis that it would: (a) damage the reputation of employment businesses and employers; (b) be ineffective, as there are not enough willing, available, or suitably qualified agency workers to replace striking workers; (c) worsen and prolong industrial disputes; (d) place agency workers in an invidious position; (e) undermine the right to strike; (f) lead to worsening pay and working conditions for workers; and (g) place the United Kingdom in breach of its international obligations.

160. Tenth, there was also an opportunity to put forward these arguments in 2022 and they were put forward by the TUC and the REC, as well as in the Parliamentary debates about the 2022 Regulations.

Discussion and conclusion on Ground 1

The interpretation of section 12(2) of the 1973 Act

161. The parties broadly agreed that the aims of section 12(2) include Lord Wilson's first *"practical consequence"* of the duty to consult. The powers under sections 5 and 6 of the 1973 Act are to make regulations on a range of different aspects of the operation of the recruitment sector which are underpinned by criminal sanction. The obligation in exercising these powers is first to consult such bodies as appear to the Secretary of State to be representative of the relevant interests in the recruitment sector i.e. the interests of employment agencies and businesses, employers/hirers and work-seekers. The reference to bodies which are representative, rather than the public generally, indicates that the aim of the section is to enhance the quality of the Secretary of State's decisions about the regulation of the sector by requiring him to take into account the views and evidence of those who are likely to be well informed. These need not necessarily be bodies which represent others in the sector but the section clearly contemplates that, for example, trade bodies, employers' associations and trade unions might be consulted so that the Secretary of State benefits from their overview(s) of the sector and what they have to say about the impact on the sector of any given regulatory proposal.

162. I also agree with Mr Ford that, given the attenuated level of Parliamentary scrutiny in relation to secondary legislation, even under the affirmative resolution procedure, a further aim of the requirement under section 12(2) is that Parliament can then proceed on the basis that the case for the measure has been tested with interested parties in the sector and that their views and interests have been taken into consideration in fashioning the draft regulations which are laid before it. Moreover, as a practical consequence of the consultation there will be information about the views of the sector on the proposal which Parliamentarians can take into account in scrutinising the proposal and coming to a decision. This is another aspect of the aim of improving decision making and/or the democratic principle.

163. Given the reference in the section to *"interests"* and the overall statutory context, which is concerned with the protection of work-seekers and hirers/employers (see also *R (Simply Learning Tuition Agency Limited) v Secretary of State for BEIS* [2021] ICR 78 at 92D) and the regulation of the sector more generally, another purpose of the section may be to ensure participation in the decision-making and to avoid the sense of injustice which those operating in the sector may feel if decisions are taken, without reference to

them, which impact significantly upon their interests and create potential criminal liabilities. But this is not material to my analysis in the present case.

164. I do not think that the democratic principle which Lord Wilson had in mind applies or, at least, adds much to the statutory aims which I have identified above. The regulatory questions which might be consulted upon under section 12(2) will not necessarily be binary ones – even in this case it might have been concluded that the revocation of regulation 7 should apply to *"important public services"* only - but section 12(2) requires consultation with representative bodies operating within a particular sector of the economy, rather than with members of the public about measures which will affect them in their day to day lives in a particular locality.

165. In the light of these aims, I had no hesitation in rejecting the Secretary of State's proposed interpretation of section 12(2) as, on the one hand, having very limited content and, on the other, being an exhaustive account of what is required, compliance with the literal terms of which necessarily satisfies any duty to act fairly. Parliament cannot have intended that the section is satisfied provided there was consultation at some point before the making of any regulations, regardless of how long before the decision or any other issues as to the quality of the consultation relied on or as to its relevance at the time of the decision.

166. By the same token, nor is the section an exhaustive account, without any need for interpretation, of what is required. Mr Stilitz's reliance on *easyJet* was therefore misplaced. *easyJet* was a case in which regulation 12 of the Civil Aviation Authority (Economic Regulation of Airports) Regulation 1986 set out, in detailed and prescriptive terms, the procedure which required to be followed before the Civil Aviation Authority ("CAA") modified airport charges. Regulation 12 did not refer to *"consultation"* in terms but it did specifically require publication of the proposal with reasons for any departure from the recommendations of the Competition Commission, a 30 day period for written representations by those affected by the proposal, and then consideration of those representations before any decision was made. In that context the Court of Appeal said it would have been inclined to hold that compliance with regulation 12 would be sufficient to meet the requirements of procedural fairness [40] having regard to the context and the nature of the decision [45]. But it did not in fact reach a firm conclusion on this issue [46] because it was not necessary to do so given that the CAA had gone further than regulation 12 required and had consulted voluntarily. It was therefore incumbent on it do so properly and fairly.

167. In the present case section 12(2) of the 1973 Act is not detailed as to what is required; it merely says that there must be consultation with representative bodies before the regulations are made. This, therefore, is a case in which principles derived from the common law do assist with the interpretation of the statutory provision. In my view the *Gunning* principles set out what Parliament required when it referred to *"consultation"* in section 12(2). Indeed, Mr Stilitz did not argue that this requirement entailed less than the four basic features identified in *Gunning* and nor, realistically, could he have done so. Parliament plainly contemplated that consultation pursuant to section 12(2) would be meaningful and fair. But it also contemplated that the aims of the section which I have described would be fulfilled.

168. Given that it was common ground that the question whether the Secretary of State had complied with section 12(2) was for the court to decide, I do not accept Mr Stilitz's

submission that the court is required to afford considerable deference to the Secretary of State's decision as to whether a change in circumstances is such as to require further consultation i.e. to defer to the views of the decision-maker as to what fairness required. That would be so in a case where the test was one of rationality.

169. I accept his argument that the court should proceed with caution in change of circumstances cases although ultimately the question for the court, where compliance with a statutory duty to consult is in issue, is as to what Parliament intended. Unless the contrary is indicated by the terms of the statutory provision, Parliament can be taken not to have required a higher standard of consultation than would be required by the common law. I therefore accept that, in considering whether consultation which is said to satisfy section 12(2) was fair, the court should ask whether the Secretary of State's approach to the consultation was so unfair as to be unlawful, rather than ask what the court itself would have done or apply standards of perfection. But I do not think that it is helpful to attempt to refine the test any further than this in the present case: the issue in a change of circumstances case is whether the change was so significant that failure to consult further would be so unfair as to be unlawful, but this does not add anything. The proposal in 2022 was the same, and the question is whether the then Secretary of State's approach to consultation about that proposal was consistent with the aims and requirements of section 12(2) interpreted as I have indicated it should be.

170. I also accept that the court should have well in mind the need for public bodies to make decisions, and the risk that a fastidious approach will lead to never ending rounds of consultation. That cannot have been what Parliament intended when it enacted section 12(2). But that risk is greater in a case where the circumstances are alleged to have changed in the course of a decision making process which is on-going or where the argument is that a decision which has been taken by a public body, but not yet implemented, should be reopened. That is not this case. Here the question is whether the Secretary of State was required by section 12(2) to carry out further consultation in a case where consultation on the proposal took place nearly seven years earlier and the decision was not to go ahead. The circumstances of the present case are atypical. A decision that there should have been a further period of consultation which examined the position in 2022 would not imply that there should have been the sort of rolling consultation process or delay in arriving at a decision about which concerns are expressed in the authorities.

171. Indeed, I was attracted to the view that the fact that a consultation process had concluded nearly seven years earlier and had positively resulted in a decision not to proceed with the proposal was necessarily fatal to an argument that it satisfied section 12(2). On one view, a fresh decision by a different Secretary of State requires a fresh consultation. However, I accept that this is not necessarily so. Even in these circumstances the responses to a consultation might be current seven years later, and the aims of section 12(2) might be achieved by a conscientious consideration of those responses. But the lapse of time does in principle make this less likely.

Did the Secretary of State take into account the responses to the 2015 Consultation?

172. Against this background, the short answer to the Secretary of State's case on Ground 1 is as follows. Even assuming that it would have been sufficient, to comply with section 12(2) of the 1973 Act, for the then Secretary of State to rely on the 2015 Consultation, he did not in fact do so in the relevant sense.

173. Whether as a matter of the construction of section 12(2) or pursuant to the basic principles of consultation as expressed in *Gunning*, consultation in relation to a proposal must take place before the decision to implement it is taken: see e.g. [18] and [113] above. Views expressed after a decision has been taken will not inform that decision or improve the quality of the decision making, and nor will a consultation in relation to a decision which has already been taken be fair or meaningful. For the reasons which I have given at [48]-[58] and [84]-[87] above, it is clear that the decision in the present case was taken on 13 June 2022 at the latest. Thereafter, it was only provisional in the sense that it might not have been affirmed by Parliament, although no one suggested that there was a realistic possibility that it would not be in the present case given the size of the Government's majority.

174. If, therefore, Mr Kwarteng was to rely on the 2015 Consultation to discharge his obligation under section 12(2), his decision on 13 June 2022 had to be informed by the responses to that consultation. Putting it in terms of the *Gunning* criteria, before the decision on 13 June 2023 he was required conscientiously to consider the responses to that Consultation. There is no evidence that he did so and, for the reasons which I have given at [58]-[70] and [82]-[87] above, I do not accept that he did. He had precious little information about the responses and he was not sufficiently interested in them even to ask to see the analysis which he was offered by Mr Stevens.

175. It is also indicative of Mr Kwarteng's lack of interest in evidence or views about the impact and desirability of the proposal to revoke regulation 7 that the decision was to proceed at exceptional speed, despite the concerns of Mr Stevens about the effect on Parliamentary scrutiny, and without any further consultation at all. This was not an all or nothing decision: there could have been a shortened consultation, and/or one with a more limited group of consultees, as in the *Milton Keynes* case, but there was not. There is no sign that this option was even considered. This was despite the lack of an impact assessment at the time of the decision, and despite the evidence available to Mr Kwarteng being that the measure would have negligible beneficial impact in the short term and, quite possibly, an adverse impact on the Government's ability to settle ongoing industrial disputes.

176. The Secretary of State's judgment on 13 June 2022 about whether regulation 7 should be revoked was not informed by, or tested against, the views and the evidence of bodies which were representative of the interests concerned, not even the views of such bodies which were expressed in 2015. The aims and requirements of section 12(2) therefore were not fulfilled because there was no consultation with such bodies by him or, indeed, any other Secretary of State before he made his decision.

177. Ground 1 therefore succeeds on this basis alone. From an abundance of caution, however, and because it is relevant to the question of relief, I will consider the lawfulness of the Secretary of State's decision, on 13 June 2022, not to consult further.

The decision not to consult to consult further

178. I accept Mr Stilitz's submission that if the Government had proceeded with the proposal to revoke regulation 7 in 2015/2016 it is unlikely that there could have been a successful complaint about the consultation process. It is true that the evidential case in the 2015 Impact Assessment was described as *"not fit for purpose"* by the RPC, and generally held by responders to be unsound, but they were given the opportunity to put forward

their evidence and arguments on this question. Provided these were then conscientiously taken into account by the Secretary of State of the day, a challenge based on breach of section 12(2) of the 1973 Act would very probably not have succeeded.

179. I therefore do not accept the Claimants' argument that flaws in the 2015 Consultation process meant that it could not be relied on in any event. However, in my view there were various other reasons why the Secretary of State failed to comply with section 12(2) of the 1973 Act and would have done so even if he had conscientiously considered the responses to the 2015 Consultation.

180. Mr Kwarteng has not given evidence about why he did not want to consult further although it appears from the contemporaneous documents that a key reason was that this would stand in the way of the objective of the 2022 Regulations being laid and/or coming into effect before the summer recess. Such a reason would be inconsistent with section 12(2), unfair and irrational given that it frustrated the aim of informed decision making and given that, as Mr Stevens advised, there was no compelling reason for the degree of haste with which the Government proceeded, and good reasons not to. But, in any event, Mr Stilitz and Mr Stevens did not seek to explain or justify the decision not to consult on this basis.

181. In his letter of 11 July 2022 to Lord Hodgson, Mr Kwarteng said that he did not think that any change in circumstances in the past six or seven years was "*particularly relevant to the changes we are proposing to make"* and that he thought that there was *"no reason to think any new groups of stakeholders would respond or that they would raise new points."*. According to Mr Stevens, this was the view of *"the Government"*, as I have noted. However, even assuming that this was Mr Kwarteng's view on 13 June 2022, and that it was amongst his reasons for deciding not to consult further, it is not clear how he could, fairly or rationally, reach this conclusion or do so consistently with section 12(2) of the 1973 Act.

182. First, a further consequence of the Secretary of State's failure to consider the responses to the 2015 Consultation or any significant information about them on or before 13 June 2022 was that, when he decided not to consult, he was not in a position to make an informed decision as to whether further consultation would lead to responses from bodies which had not responded in 2015: there is no evidence that he knew which bodies other than the CBI and the TUC had responded in 2015; nor that he knew which bodies which were in existence in 2015 might wish to submit a further response, nor whether any representative bodies had come into existence since then which might wish to express views. Without knowing what evidence had been given in 2015, or what views had been expressed in the responses from the 167 responders, he could not sensibly conclude that no new or relevant points were likely to be raised.

183. Second, even if the Secretary of State had carefully considered the responses to the 2015 Consultation the approach indicated by his 11 July 2022 letter was diametrically opposed to the aims of section 12(2) and the purpose of consultation. The very point of consulting would have been to seek the views of interested and representative parties so as to inform and/or test his own views, and to find out whether there had been any relevant developments, rather than assume that he knew what they would say or that there was nothing they could add which would be of relevance to his decision. The

lapse of time was itself a reason to think that there may be new evidence and/or responders and, in any event, to check the position.

184. Third, the tenor of Mr Stilitz's and Mr Stevens' arguments was that consultation is about arguments and views being expressed for or against a proposal: the voicing of the themes in the thematic analysis carried out for Ms James in or around September 2016. On this basis they argue that the views and arguments of those who opposed the proposal were known or, at least, predictable. Up to a point this is obviously right, but it is an unduly narrow approach. Even assuming that the Secretary of State knew what all of the competing arguments were, and there is no evidence that he did at the time of his decision, the purpose of consultation pursuant to section 12(2) was also to provide an opportunity to present *evidence* and, in particular, evidence about the likely impact and reasonableness of the proposal. That evidence would come from those with direct experience and expertise in the sector. Whilst it could be predicted that the trade unions would oppose the measure, and many of their arguments could be anticipated, the evidence which they might put forward could not necessarily be predicted. The views of trade bodies, work-seekers and hirers/employers were less capable of prediction and, again, the Secretary of State could not know what evidence they would put forward in support of their views. The failure to gather evidence from any of these sources is all the more striking when one considers that the 2022 Impact Assessment, and Mr Kwarteng himself in his letter of 11 July 2022, admitted that he did not have the evidence to estimate the impact of the measure.

185. Fourth, the public had been told, in the *"line"* which was agreed by Ms James on 6 September 2016, that the Government wanted to consider the impact of the 2016 Act *"fully before making any further policy decisions"*. In his letter to Lord Hodgson on 11 July 2022, the Secretary of State also explained that "*Now that the Trade Union Act has been in place for some time"* the opportunity had been taken to consider *"once more"* whether the law struck the right balance between the interests of the unions and the interests of the public. In other words, the issue of revocation of regulation 7 was being revisited in the light of the impact of the 2016 Act, which was being presented as a reason for not implementing the proposal in 2016 and a material change of circumstances since then. This was a perfectly rational approach but, whether looked at from the point of view of informed decision making, fairness or rationality it called for consideration of evidence and views as to the impact of the 2016 Act, and the desirability of repealing regulation 7 given that impact.

186. Fifth, more generally, the Government also explained the reasons for the 2022 Regulations by reference to their likely impact on industrial action, business, services and the public. It was clearly felt that the measure had to be justified by pointing to a likely beneficial impact and this is what the Secretary of State's statements about the decision and the 2022 Impact Assessment attempted to do, albeit based on different evidence and assumptions to those which underpinned the 2015 Impact Assessment. These considerations called for consultation as to whether it was in fact the case that the impact would be beneficial if the proposal was implemented in the circumstances which obtained in 2022 or were likely to obtain thereafter, on the basis suggested in the 2022 Impact Assessment or at all.

187. Sixth, the question whether a fair balance was being struck between the interests of those involved in, or affected by, industrial disputes entailed consideration of the impact of the measure, about which there was room for different views including as to the

interpretation of the statistics and other evidence. But it also called for wider considerations than this. Views might differ as to how a fair balance should be struck, and arguments put forward as to what had or had not been envisaged at the time of the Trade Union Bill, including measures to mitigate the impact of the balloting provisions, albeit I accept that ultimately – having considered these views - the judgement on this issue was for the Secretary of State to make given its essentially political nature.

188. Seventh, the case for the change which was set out in the 2022 Impact Assessment and presented to Parliament had not been tested through consultation. I accept that there was no formal requirement for an impact assessment to be produced and consulted upon, but I also accept the Claimants' submission that section 12(2) and/or the ingredients of a meaningful consultation – including the second *Gunning* principle - contemplated that consultees would be able to respond to the Government's case for the proposal. Whilst the argument for the proposal in 2015 and 2022 was consistently that it would help to mitigate the *"negative externalities"* of industrial action, the evidential case that this was so changed and there ought to have been an opportunity for representative bodies to address it. The consequence of the Secretary of State's approach was that Parliament was presented, in the Explanatory Memorandum, with information about the responses to part of Question 1 of the 2015 Consultation Document but no information about the views of the recruitment sector on the evidential case for the proposal as set out in either the 2015 or the 2022 Impact Assessments.

189. Eighth, there is no evidence from Mr Kwarteng about what he had in mind when he accepted, in his letter to Lord Hodgson, "*that circumstances have altered in some ways"*, nor as to why he did *"not think these are particularly relevant to the changes we are proposing to make".* But clearly there had been changes which were at least potentially relevant to the desirability of the proposal, and it is difficult to see how the contrary view could fairly or rationally be taken if an informed decision was to be made.

    i) It was implicit in the Secretary of State's explanation for the delayed implementation of the proposal - that matter required to be considered in the light of the impact of the 2016 Act– that the evidence on this subject *was* a highly relevant consideration. Moreover, the Claimants' evidence in the present case shows that they would have had evidence to put forward and a genuine argument that the 2016 Act had had a highly material adverse impact on their ability to call industrial action. Others might also have put forward evidence on this subject.

    ii) Mr Stevens points out that the number of days lost to industrial action was going up when the 2022 Regulations came into effect and has markedly increased since then. In October 2022, for example, 417,000 days were lost which is the highest number since November 2011. He argues that therefore the repeal of regulation 7 has not had a material effect on the ability to take industrial action. This appears to be a false point given that, on the evidence, one does not know how many days lost there would otherwise have been. But what matters for present purposes is that it is not an answer to the point that if the Secretary of State was engaged in assessing where the balance should be struck now that the 2016 Act had been in force for five years he should have given interested bodies an opportunity to argue and/or prove that the balance had been significantly tipped for or against them by the 2016 Act.

iii) As far as the trade unions are concerned, nor is it an answer to say that they had had the opportunity to predict the impact of the Trade Union Bill in 2015 and had predicted it, at least in general terms. The Secretary of State purported to look back and consider what the impact had in fact been, and fairness required that he give them the opportunity to put forward evidence to address this question.

iv) Plainly Brexit and the Covid-19 pandemic had an impact on the labour market and ways of working which might well be relevant to the proposal. In a modern economy it was also highly likely that, in any event, in the course of nearly seven years there had been changes in the labour market and/or the recruitment sector which had a bearing on the issue.

v) The fact that the consistency of the proposal with the United Kingdom's obligations under international law had been called into question by the CEACR was surely relevant. Officials had also raised with ministers the question whether the revocation should be limited to important public services after the 2015 Consultation. There would be arguments for and against this approach and interested parties would potentially have a view.

vi) The Government had also said to the Conference Committee of the Application of Standards, when the proposal was "live" in 2015/2016, that it was reviewing the matter in conjunction with the social partners. Again, this was a relevant matter when it came to deciding whether, when the proposal was revived, there should be consultation with the social partners.

190. Other matters raised by the Claimants may have been of less importance taken on their own and/or Mr Kwarteng may have been aware of them. The P&O case was in fact referred to by Mr Stevens' 13 June 2022 advice in the section on *"Communications"* where he predicted criticism in the media along the lines that the Government was being inconsistent in its position on the use of agency workers. The issue in relation to Wales was also clearly on his radar, at least by the time of his 11 July 2022 letter. But the question is as to cumulative effect of all of the potential factors which had arisen since September 2015, only some of which are known and addressed above.

191. All of these reasons led me to conclude that the Secretary of State's approach was contrary to section 12(2) of the 1973 Act, so unfair as to be unlawful and, indeed, irrational. That would have been my conclusion even if he had conscientiously considered the responses to the 2015 Consultation before the decision of 13 June 2022. In my judgment it would still have been unfair and inconsistent with the aims of section 12(2), particularly to ensure informed decision making, to fail at least to seek updated views and evidence given the lapse of time, given the developments which there had been in the intervening period, given the reasons why the proposal had not been implemented in 2016 and given the professed reasons for wishing to implement it in 2022.

Relief: section 31(2A) of the Senior Courts Act 1981

Legal framework

192. Section 31 of the Senior Courts Act 1981 provides, so far as material:

"(2A) The High Court—

(a) must refuse to grant relief on an application for judicial review..

(b) …

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred….."

193. Mr Stilitz was content to rely on the judgment of Hill J in *R (HPSPC Limited & Another v Secretary of State for Education* [2022] EWHC 3159 (Admin). She adopted the following distillation of the principles provided by Ms Kate Grange KC in *R (Cava Bien) v Milton Keynes Council* [2021] EWHC (Admin) at [52]:

"i) The burden of proof is on the defendant.. ;

ii) The "highly likely" standard of proof sets a high hurdle. Although s31(2A) has lowered the threshold for refusal of relief where there has been unlawful conduct by a public authority below the previous strict test set out in authorities such as Simplex GE (Holdings) Ltd v Secretary of State for the Environment (1988) 57 P & CR 306, the threshold remains a high one…: .

iii) The "highly likely" test expresses a standard somewhere between the civil standard (the balance of probabilities) and the criminal standard (beyond reasonable doubt)...

iv) The court is required to undertake an evaluation of the hypothetical or counterfactual world in which the identified unlawful conduct by the public authority is assumed not to have occurred….

v) The court must undertake its own objective assessment of the decision-making process and what the result would have been if the decision-maker had not erred in law..:..

vi) The test is not always easy to apply. The court has the unenviable task of (i) assessing objectively the decision and the process leading to it, (ii) identifying and then stripping out the "conduct complained of" (iii) deciding what on that footing the outcome for the applicant is "highly likely" to have been and/or (iv) deciding whether, for the applicant, the "highly likely" outcome is "substantially different" from the actual outcome'…

vii) It is important that a court faced with an application for judicial review does not shirk the obligation imposed by section 31(2A); the matter is not simply one of discretion but becomes one of duty provided the statutory criteria are satisfied….

viii) The provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed

and the application should instead be rejected. The provision is designed to ensure that the judicial review process remains flexible and realistic..

ix) ....:

x) The Court can, with due caution, take account of evidence as to how the decision-making process would have been approached if the identified errors had not occurred..... Furthermore, a witness statement could be a very important aspect of such evidence…although the court should approach with a degree of scepticism self-interested speculations by an official of the public authority which is found to have acted unlawfully about how things might have worked out if no unlawfulness had occurred…

xi) Importantly, the court must not cast itself in the role of the decision-maker…. While much will depend on the particular facts of the case before the court, 'nevertheless the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law.': R (Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214 at [273].

xii) It follows that where particular facts relevant to the substantive decision are in dispute, the court must not 'take on a fact- finding role, which is inappropriate for judicial review proceedings' where the 'issue raised…is not an issue of jurisdictional fact'. The court must not be enticed 'into forbidden territory which belongs to the decision-maker, reaching decisions on the basis of material before it at the time of the decision under challenge, and not additional evidence after the event when a challenge is brought'. To do otherwise would be to use section 31(2A) in a way which was never intended by Parliament...

xiii) …:

xiv) Finally, the contention that the section 31(2A) duty is restricted to situations in which there have been trivial procedural or technical errors….. was rejected by the Court of Appeal…"

194. I also note that in a consultation case, the counterfactual includes the minister approaching the matter in accordance with the *Gunning* principles and therefore conscientiously and with an open mind: see *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649 [141].

195. At [163] of her judgment in *HPSPC*, Hill J added:

"In assessing whether it is highly likely that the same decision would have been reached regardless of a consultation process being carried out, the factors that

may be relevant will include the extent to which the claimant has had the opportunity to make its views known to the decision-maker by other means, the extent to which such views were taken into account by the decision-maker, and whether quashing the decision would create undue administrative inconvenience or have a significant detrimental impact on third parties…"

The submissions

196. Relying on this passage, Mr Stilitz submitted that:

i) The Claimants had had the opportunity to make their views known through the 2015 Consultation process, and eleven of them took this opportunity.

ii) They put forward essentially the same arguments in the 2015 Consultation as they say they would have put forward had there been further consultation. They have not said that their views have changed since then and nor have they identified any truly new points which are sufficiently material to the decision that there is a realistic likelihood that they would have led to a different result.

iii) The Claimants' views were taken into account by the Secretary of State, who carefully considered the responses to the 2015 Consultation and materially similar views which were raised in the context of the ILO Conference Committee in June 2016, in Lord Hodgson's letters to Mr Kwarteng and when the proposal was debated in Parliament. He was aware of the strongly held negative views about the proposal and proceeded nevertheless.

iv) Self-evidently, quashing the decision would cause undue administrative convenience.

v) I should therefore refuse relief.

197. The Claimants submitted that I should reject the Secretary of State's argument under section 31(2A). Precisely what evidence and arguments would have been put forward had there been proper consultation cannot now be known and it is not possible to conclude, assuming a rational and open minded Secretary of State, that it is highly likely that the same conclusion would have been reached.

Discussion and conclusion

198. I am not persuaded that it is highly likely that a rational and open minded Secretary of State, conscientiously considering responses to a consultation held in 2022 pursuant to section 12(2) of the 1973 Act, would be highly likely to have come to substantially the same decision. This view flows from the findings and the reasoning set out above, which I do not propose to repeat.

199. The starting point is that the burden is on the Secretary of State to recreate the world that never was and to show that, in that world, it is highly likely that the decision would not have been substantially different. This will be more difficult in a case where, as here, there was virtually nil consultation prior to the decision on 13 June 2022 because the Secretary of State did not even consider the information available as to the responses to the 2015 Consultation. This is not a case in which there was substantial compliance

with the obligation to consult but the court has been persuaded that there was a flaw in the process. As I have found, the approach of Mr Kwarteng was to commit to the revocation of regulation 7 at a time when the advice to him was that it would be of negligible short term benefit and probably be counterproductive, without reference to the views of those who operate in the recruitment sector and on the basis that the Government's evidential case that the change would be beneficial - in the form of the 2022 Impact Assessment - would be prepared after the event.

200. Second, although Mr Stevens has said that the Secretary of State was aware of strongly held opinions in opposition to the proposal and has expressed an opinion that it is highly likely that he would still have proceeded if there had been a consultation, Mr Kwarteng has not provided any evidence of his thinking or what he was or was not aware of, other than in the documents which I have summarised above. As to Mr Stilitz's arguments on this point:

i) There is no evidence that Mr Kwarteng, who was not the Secretary of State at the time, had any awareness of what was or was not argued at the ILO Conference Committee in June 2016.

ii) Nor, as I have noted, does Mr Stevens give evidence in support of the assertions in the Secretary of State's skeleton argument as to his consideration of the responses to the 2015 Consultation.

iii) One can see, from the Explanatory Memorandum, that Mr Kwarteng was aware of the summary of aspects of the 2015 responses at the point at which the draft Regulations were laid and therefore aware of opinions which had been expressed in 2015. He was also aware of Lord Hodgson's concerns as expressed in his letter of 6 July 2022 but these were principally about the expedited legislative process and the issues in relation to the Trade Union (Wales) Act 2017.

iv) One can also see, for example from Mr Kwarteng's 11 July 2022 letter to Lord Hodgson, the stance which he and the Government adopted as to why there would be no further consultation. But this evidence has the limitations which I have identified and these statements were made in defence of a decision to press ahead in order to meet the self-imposed and exceptionally tight deadline for the 2022 Regulations coming into effect. In the counterfactual the Secretary of State would not be seeking to defend this approach and he would be obliged to give conscientious consideration to the responses to a meaningful consultation process.

v) There is no specific evidence that Mr Kwarteng considered the views expressed in the debates before either House of Parliament but by this stage the decision had long since been taken. It would have been extraordinary for the Secretary of State not to go ahead after the 2022 Regulations had been approved by Parliament. In any event, those views did not deal with all of the issues identified by the Claimants, whether in detail or at all, and the debates were conducted on the basis of the flawed process which I have described.

vi) More generally, as I have explained, circumstances had changed since 2015 and the Secretary of State cannot, therefore, have been sufficiently aware of the

views which would have been expressed by the trade unions or the sector more generally had they been consulted in 2022.

201. The evidence about what Mr Kwarteng knew about the reaction to the proposal by the time he made the 2022 Regulations therefore has significant limitations.

202. Third, it is not for me to judge the merits of the proposal to revoke regulation 7 but, even on the evidence before the Secretary of State at the time that he made the 2022 Regulations, the case for the measure was on any view less than overwhelming. The advice which he had been given was that it would have negligible short term beneficial effects and might be harmful, and the 2022 Impact Assessment was merely estimating a net benefit in the long term. One does not know what a detailed analysis of the 2022 Impact Assessment by responders to a consultation would have produced. But the overall point is that this is not a case in which the evidence is that the proposal had obvious and undisputed merit based on cogent evidence, and enjoyed strong support from representative bodies in the sector, such that there was a strong likelihood of it being adopted at some point. On the contrary, following the previous consultation, albeit in different circumstances, the proposal had been dropped.

203. Fourth, the evidence which the Claimants have put forward for the purposes of these proceedings shows that there were genuine arguments to be made to the effect that the 2016 Act had had a material impact on the ability of trade unions to call for industrial action and the balance of the law therefore should not be tilted further against them. There is no evidence that Mr Kwarteng was aware of these arguments, which were based on experience since 2015. I accept that, on their own, it appears unlikely that they would have persuaded him but the question is as to their effect in combination with other arguments and evidence from the trade unions and from employers and employment businesses in the sector.

204. Fifth, I agree with the Claimants that one cannot predict with accuracy what all of the responses to a further consultation would have said. In this connection, I do not accept that the court is only concerned with what the Claimants or other trade unions might have argued and nor, as I have said, do I accept that the question relates only to "opinions" or arguments. Moreover, perhaps unusually, the evidence suggests that employers and employment businesses would not necessarily have supported the proposal had there been further consultation and, indeed, might well have opposed it. The hypothetical includes the possibility that evidence would have been forthcoming which demonstrated that the 2022 Impact Assessment was wrong and/or that the overall impact of the proposal would be negative and was therefore opposed by the other interested parties as well as the unions. It assumes that the Secretary of State then gives conscientious consideration to the views and evidence of the responders. On this basis the Secretary of State might have pressed on regardless, but it would be surprising for a court to hold that a person holding that office, acting conscientiously and rationally, would be highly likely to do so.

205. Sixth, as for undue administrative inconvenience and/or detrimental impact on third parties, the evidence before me does not support the suggestion that this would be the result if I were to quash the 2022 Regulations. What would be required, if the Government wished to pursue the proposal to revoke regulation 7, would be a public consultation and further consideration by the Secretary of State/Parliament of whether to implement it. There is no evidence before the court that this would cause widespread

difficulties for employers affected by industrial action in the interim. Rather, the evidence thus far tends to suggest that employers would be unlikely to be able to make extensive use of the ability to source cover for industrial action from employment businesses, particularly in relation to important public services: hence the advice to the Secretary of State in June 2022 that the revocation of regulation 7 would have a negligible beneficial impact in the short term.

Conclusion on Ground 1

206. For all of these reasons I uphold Ground 1 and will quash the 2022 Regulations.

GROUND 2

207. In the light of my conclusion in relation to Ground 1, I have decided not to express a view in relation to Ground 2 for the following reasons.

i) Unless there is a successful appeal, the effect of my decision on Ground 1 is that the 2022 Regulations are quashed. I make no assumption one way or the other as to whether the Government will wish to pursue the proposal to revoke regulation 7. It may not, or it may wish to do so in the same or a more limited form given the argument that it should be restricted to essential public services. But, if it does, it will be obliged by section 12(2) to carry out a consultation. In the light of that consultation it may or may not be decided that the proposal should be implemented. This, in itself, means that any view which I expressed on the compatibility of such a proposal with Article 11 ECHR would be more hypothetical or academic than is typically the case where a party wins on one ground and the court has to consider whether to decide an alternative ground on which the case is put.

ii) But, in addition to this, it would be strongly arguable that any views which I expressed were obiter in any event and/or were overtaken by subsequent events. One of the difficulties which flows from the fact that there was a breach of the duty to consult is that there was little evidence before me as to the likely impact of the proposal. Moreover, the parties did not agree as to the relevance of such evidence to the determination of the issues under Article 11 ECHR, particularly in relation to the issue of proportionality. Mr Stilitz submitted that the test stated by Lords Sumption and Reed JJSC in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 does not apply, and that issues in relation to Article 11 are purely issues of principle. The Claimants disputed this. Their arguments on proportionality also included complaints that the Secretary of State failed to consider matters which they or others would have raised in the course of a consultation. There might be a good deal more evidence as to impact if there were consultation on a future proposal – including, potentially, evidence of the experience of the last year, during which regulation 7 has not been in effect - and, of course, arguments based on the failure to consult itself might not be available to the Claimants. Deciding the Article 11 issue on the basis of the evidence as it currently stands therefore would also potentially lead to further complication and/or my decision might well prove to be redundant.

iii) On the other hand, this is not a case in which, in the event of an appeal, the Court of Appeal would be impeded if I were not to decide the Article 11 point. The

issues under Article 11 include issues of principle and such evidence as there is in relation to the impact of the revocation of regulation 7 is written evidence. The Court of Appeal would therefore be in just as good a position to decide the point as I am and, of course, far better qualified to do so.