Neutral Citation Number: [2025] EWCA Civ 251

Case No: CA-2024-000220

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Mr Justice Linden
[2024] EWHC 38 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2025

Before :

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

- -

Between :

MEDICAL JUSTICE	**Claimant/ Respondent**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant/ Appellant**

- -
- -

Alan Payne KC and **Julie Anderson** (instructed by **the Treasury Solicitor**) for the **Appellant**
Angus McCullough KC, **Shu Shin Luh** and **Laura Profumo** (instructed by **Wilson Solicitors LLP**) for the **Respondent**

Hearing dates: 6 & 7 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Underhill :

INTRODUCTION

1. This is an appeal from a decision of Linden J concerning the relationship between two guidance documents issued by the Home Secretary, who is the Appellant before us, relating to the treatment of vulnerable adults in immigration detention. The documents are:

   - *The Statutory Guidance.* Section 59 of the Immigration Act 2016 required the Secretary of State to issue guidance, subject to the negative resolution procedure, specifying the matters to be taken into account when deciding whether a person would be "particularly vulnerable to harm" (otherwise referred to as "at risk") if they were to be detained for immigration purposes, and whether such a person should be detained or remain in detention. Such guidance, entitled *Immigration Act 2016: Guidance on adults at risk in immigration detention*, was laid before Parliament in August 2016 and came into effect on 12 September 2016. The version with which we are concerned ("the Statutory Guidance") is dated May 2021.

   - *The Interim Guidance.* On 12 September 2022 the Secretary of State issued guidance entitled *Interim Guidance: Requesting a second opinion for an external medical report/Medico-Legal Report* ("the Interim Guidance") establishing a "second opinion process" by which caseworkers should identify cases in which a detainee claims to be at risk on the basis of an external medico-legal report (or "MLR") but where the Home Office should seek its own opinion. The policy of employing that process is referred to in these proceedings as "the Second Opinion Policy", but I will sometimes simply call it "the Policy".

   A third, non-statutory, guidance document issued by the Secretary of State is relevant, though less centrally. This supplements the Statutory Guidance and is also entitled, somewhat confusingly, *Adults at risk in immigration detention.* It is referred to by the Secretary of State as "the AAR policy" or "the AAR policy guidance", but I will use Linden J's shorthand of "the Caseworker Guidance".

2. The Claimant, which is the Respondent before us, is a charity which, through a network of doctors, facilitates the provision of medical assessments, advice and assistance to people who are detained in immigration removal centres. It also conducts research into issues which affect vulnerable people and victims of torture who are in immigration detention, and it seeks to influence policy on these issues through dialogue with relevant state bodies including the Home Office.

3. On 12 December 2022 the Claimant issued judicial review proceedings in the High Court claiming that the Interim Guidance is unlawful in two respects:

   (1) *Inconsistency with the Statutory Guidance.* In short, the Claimant's case is that the Second Opinion Policy contradicts the Statutory Guidance, which was approved by Parliament, and undermines the purpose of section 59 of the 2016 Act. It introduces an unacceptable delay into the assessment of vulnerability which will result in people who ought to be released from immigration detention being released significantly later than required by that Guidance.

(2) *Lack of consultation.* The Claimant contends that the Secretary of State was under a common law duty to consult it about the introduction of the Second Opinion Policy but did not do so.

4. By a judgment handed down on 12 January 2024 Linden J upheld the Claimant's claim in both respects. He issued declarations accordingly and quashed the Second Opinion Policy. This is the Secretary of State's appeal, brought with the permission of Arnold LJ granted on 3 May. She has been represented before us by Mr Alan Payne KC, leading Ms Julie Anderson. The Claimant has been represented by Mr Angus McCullough KC, leading Ms Shu Shin Luh and Ms Laura Profumo. Mr Payne and Mr McCullough did not appear below.

5. Following Linden J's judgment the Secretary of State commenced consultation on changes to the Statutory Guidance which would introduce a process by which in appropriate cases caseworkers would seek second medical opinions. Following that consultation a revised version of the Statutory Guidance was laid before Parliament and came into effect in May 2024. On 1 July the Claimant applied for permission to appeal to be rescinded on the basis that that development rendered the appeal academic. By order dated 9 July Arnold LJ declined to dismiss the appeal on that basis but said that the application could be renewed at the hearing. At the start of the hearing we indicated that we would hear argument on both issues and would address the issue of whether the appeal was academic in the context of our judgment. I do not believe that it is, for the reasons given at para. 37 below.

6. In this judgment I propose to deal with the issue of whether the Second Opinion Policy was inconsistent with the Statutory Guidance, which is the subject of the Secretary of State's ground 1. The consultation issue, which is the subject of ground 2, will be dealt with by Dingemans LJ, whose judgment I have read and with which I respectfully agree.

THE STATUTORY GUIDANCE

7. As I have said, the Statutory Guidance is issued under section 59 of the 2016 Act. That section reads, so far as material:

> "(1) The Secretary of State must issue guidance specifying matters to be taken into account by a person to whom the guidance is addressed in determining —
>
> (a) whether a person ("P") would be particularly vulnerable to harm if P were to be detained or to remain in detention, and
>
> (b) if P is identified as being particularly vulnerable to harm in those circumstances, whether P should be detained or remain in detention.
>
> (2) …
>
> (3) A person to whom guidance under this section is addressed must take the guidance into account.

> (4) Before issuing guidance under this section the Secretary of State must lay a draft of the guidance before Parliament.
>
> (5)-(7) …"

8. The background to the enactment of section 59 is helpfully summarised by Linden J at paras. 15-16 of his judgment, themselves based on the account given by Ouseley J in *R (Medical Justice) v Secretary of State for the Home Department* [2017] EWHC 2461 (Admin):

> "15. … [I]n February 2015 the Home Office under the then Home Secretary, Ms Theresa May MP, commissioned Mr Stephen Shaw CBE to review the appropriateness of its policies and practices in relation to the welfare of people in immigration detention. This followed criticisms in court judgments and inspectorate reports, particularly in relation to the detention of people with mental illness. In his report, which was published in January 2016, Mr Shaw developed the concept of 'particular vulnerability' to harm in detention i.e. susceptibility to physical or emotional harm, damage or injury. He recommended that the existing categories of people who would be presumed unsuitable for detention should be expanded, and that some of the qualifications to that unsuitability should be removed. There should also be recognition of the dynamic nature of vulnerability in detention so that people who fell outside the specific categories might nevertheless be identified as sufficiently vulnerable for their continued detention to be injurious to their welfare.
>
> 16. As Ouseley J recorded at [23] of his judgment, a ministerial statement on 16 January 2016 accepted Mr Shaw's recommendation to adopt a wider definition of people "at risk" and said that the Government would:
>
> > 'introduce a new "adult at risk" concept into decision-making on immigration detention with a clear presumption that people who are at risk should not be detained, building on the existing legal framework. This will strengthen the approach to those whose care and support needs make it particularly likely that they would suffer disproportionate detriment from being detained, and will therefore be considered generally unsuitable for immigration detention unless there is compelling evidence that other factors which relate to immigration abuse and the integrity of the immigration system, such as matters of criminality, compliance history and the imminence of removal, are of such significance as to outweigh the vulnerability factors.'"

9. The Statutory Guidance is in seven sections, as follows:

   (1) "Purpose and background" (paras. 1-5)

   (2) "Principles" (para. 6)

(3) "Who is an adult at risk?" (paras. 7-8)

(4) "Assessment of whether an individual identified as being at risk should be detained" (paras. 9-10)

(5) "Indicators of risk" (paras. 11-12)

(6) "Assessment of immigration factors" (paras. 13-17)

(7) "Medico Legal Reports" (para. 18)

(The sections are not numbered in the Guidance but I have added numbers for ease of reference.) The main substantive provisions of the Guidance are to be found in sections (3)-(6). They have of course to be read in the light of the statement of its purpose in section (1) and the summary of the applicable principles which are set out in a series of bullets in section (2) (though in truth much of what appears there is repeated in the substantive sections).

10. The purpose of the Statutory Guidance is stated in para. 1 as follows:

> "The intention is that the guidance will, in conjunction with other reforms …, lead to a reduction in the number of vulnerable people detained and a reduction in the duration of detention before removal. It aims to introduce a more holistic approach to the consideration of individual circumstances, ensuring that genuine cases of vulnerability are consistently identified, in order to ensure that vulnerable people are not detained inappropriately. The guidance aims to strike the right balance between protecting the vulnerable and ensuring the maintenance of legitimate immigration control."

That is of course in accordance with the legislative history noted at para. 8 above. The broad scheme of the substantive parts of the Guidance can be summarised as follows.

11. The starting-point is that there should be a "clear presumption … that detention will not be appropriate if a person is considered to be 'at risk'"; but that presumption may be outweighed by "immigration control considerations", including where detention is necessary in order to effect removal (see paras. 3 and 8). Para. 4 refers to the situation where the Home Office is considering whether to detain an adult in order to facilitate their removal. It says that it will first assess whether they are "at risk" and, if it finds that they are, proceed to assess "whether the immigration considerations outweigh the risk factors". There are thus in principle two assessments. The first is the subject of section (3), read with section (5); and the second is the subject of sections (4) and (6). Since in practice the second assessment (if required) will be carried out at the same time as the first I will, save where it is necessary to distinguish, refer to them together as "the required assessment".

12. Section (3) begins with para. 7, which reads:

> "For the purposes of this guidance, an individual will be regarded as being an adult at risk if:

> - they declare that they are suffering from a condition or have experienced a traumatic event (such as trafficking, torture or sexual violence), that would be likely to render them particularly vulnerable to harm if they are placed in detention or remain in detention
>
> - those considering or reviewing detention are aware of medical or other professional evidence, or observational evidence, which indicates that an individual is suffering from a condition, or has experienced a traumatic event (such as trafficking, torture or sexual violence), that would be likely to render them particularly vulnerable to harm if they are placed in detention or remain in detention – whether or not the individual has highlighted this themselves."

It will be seen that the criterion of being "at risk" is being rendered "particularly vulnerable to harm" if placed or kept in detention (which I will call "particular vulnerability" for short) as a result either of "a condition" or of having suffered a traumatic event. The difference between the two bullets is that the first covers the case where the individual declares that they satisfy that criterion and the second covers the case where that is indicated by third-party evidence of one of the specified kinds (i.e. "medical", "other professional" or "observational"). Whether that criterion is satisfied is to be determined by the Home Office, "on the basis of the available evidence" (para. 8).

13. Section (5) identifies, at para. 11, a list of "conditions or experiences which will indicate that a person may be particularly vulnerable to harm in detention" – for example, suffering from a mental health condition or having been a victim of torture: as I have said, it appears to operate as an adjunct to section (3). I need not set out the list here. I should, however, note that para. 12 includes a statement that "the nature and severity of a condition, as well as the available evidence of a condition or traumatic event, can change over time".

14. Section (4) reads:

> "9. Once an individual has been identified as being at risk, consideration should be given to the level of evidence available in support of, and the weight that should be afforded to the evidence in order to assess the appropriateness of initial detention or continued detention of the person for the period identified as necessary to effect their removal:
>
> - a self-declaration of being an adult at risk – should be afforded limited weight, even if the issues raised cannot be readily confirmed. Individuals in these circumstances will be regarded as being at evidence level 1
>
> - professional evidence (e.g. from a social worker, medical practitioner or NGO), or official documentary evidence, which indicates that the individual is an adult at risk – should be afforded greater weight. Individuals in these circumstances will be regarded as being at evidence level 2

> - professional evidence (e.g. from a social worker, medical practitioner or NGO) stating that the individual is at risk and that a period of detention would be likely to cause harm – for example, increase the severity of the symptoms or condition that have led to the individual being regarded as an adult at risk – should be afforded significant weight. Individuals in these circumstances will be regarded as being at evidence level 3.
>
> 10. Determinations from courts or tribunals about the credibility of a person's account or claims, or about professional evidence, or credibility concerns arising from other sources, may be taken into account in deciding the weight that should be afforded to evidence and could result in a reconsideration of the evidence level into which the individual falls."

The effect of para. 9 is thus to specify three "levels" of evidence, with each level requiring a greater degree of "weight" – that is, for the purpose of deciding whether it outweighs (or, strictly, is outweighed by) "the immigration considerations".[1] Again, it will be noted that the reference is to "the level of evidence *available*". Likewise, the seventh bullet under section (2) reads:

> "Assessment of risk is based *on the evidence available*, ranging from a self declaration of risk to authoritative professional opinion."

15. Section (6) addresses the other side of the balance – that is, the "immigration considerations" that may weigh in favour of the detention of a vulnerable adult. I need only note that paras. 13 and 15 repeat the point made in sections (1) and (3) that (as it is put in para. 13) "the presumption will be that, once an individual is regarded as being at risk ..., they should not be detained". I do not need to consider section (7).

16. It is important to note that it was common ground that the Statutory Guidance does not require the assessments identified above only at the point of initial detention. On the contrary, it is Home Office policy, as set out in a document called *Detention: General Instructions*, that detention must be reviewed at specified intervals, and also in between such reviews in the event of a significant change in the detainee's circumstances. If evidence – and, more particularly, medical evidence – indicating that an individual who is already in detention is vulnerable an assessment will be required of whether they are in fact at risk and, if so, whether their continuing detention is justified; and that is indeed implicitly recognised in para. 12. The issue on this appeal arises only in the case of persons already in detention.

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[1] There was some discussion before us about what it is that the Guidance requires to be "weighed" in this exercise. The structure of section (4) might suggest that it is only the quality of the evidence and not also the degree of the harm or the likelihood of it eventuating. But other parts of the Guidance appear to show that, as one would expect, those factors also fall to be taken into account in the assessment: see in particular, the statement in one of the bullets under section (2) that "consideration will need to be given to the weight of evidence in support of the contention that the individual is at risk, and the level of risk that is supported by the evidence". Mr Payne accepted that that was the correct approach.

17. The essential point to note from that summary of the provisions of the Statutory Guidance is that the assessments required by sections (3) and (4) involve a categorisation of the weight of the "available evidence". We are concerned in this appeal with cases where the evidence takes the form of professional evidence from a medical practitioner and where the evidence is accordingly at level 2 or 3.

THE CASEWORKER GUIDANCE

18. It will be seen that the Statutory Guidance is expressed in very general terms. The purpose of the Caseworker Guidance is to assist caseworkers by giving more detailed assistance on how to conduct the necessary assessments. For our purposes it is necessary only to note two points.

19. First, it gives guidance as to the circumstances in which the detention of adults at risk will be appropriate if the evidence in their cases is at level 2 or level 3. The criteria justifying detention in level 3 cases are summarised by Linden J at para. 37 (ii) of his judgment as follows:

> "In relation to Level 3 cases, the person should be considered for detention 'only' if removal has been set for a date in the immediate future, there are no barriers to removal, escorts and any other appropriate arrangements are (or will be) in place to ensure the safe management of their return and they have not complied with voluntary or ensured return; or if they present a significant public protection concern, or they have been subject to a 4 year plus custodial sentence, or there is a serious relevant national security issue or they present a current public protection concern. 'It is very unlikely that compliance issues, on their own, would warrant detention of individuals falling into this category.' (page 24 of 29 in version 9 of the Caseworker Guidance)."

The criteria applicable to level 2 cases are markedly less stringent. Again, I adopt Linden J's summary (para. 37 (i)):

> "In relation to level 2 cases, a person should be considered for detention only if the date of removal is fixed, or can be fixed quickly, is within a reasonable timescale and the individual has failed to comply with reasonable voluntary return opportunities; or if the individual is being detained at the border pending removal having been refused entry to the UK; or if they present a level of public protection concerns that would justify detention: for example, they are a 'foreign criminal' as defined in the Immigration Act 2014; or if there is a relevant national security or other public protection concern; or if the evidence shows that they are highly likely not to be removable unless detained."

20. Second, it gives guidance for the assessment of the quality of external medical reports. It specifies a "baseline requirement" that the report is from a qualified healthcare professional registered with the relevant healthcare regulator and listing their registration number and qualifications and experience in the relevant field: if that is not satisfied, the report should be rejected. If the baseline requirement is satisfied the

caseworker is required to apply a series of "further standards". These are summarised by Linden J at para. 39 of his judgment as follows:

> "(i) An explanation of the healthcare professional's understanding of what they are being asked to do, and consideration of whether they have been led to reach specific conclusions by the adviser or firm who commissioned the report.
>
> (ii) A list of the medical records and other documents which the healthcare professional has considered so that the caseworker can see whether the assessment is well informed.
>
> (iii) The circumstances in which any medical examination took place and whether, for example, it was face to face or by video-link. The Caseworker Guidance provides that, other than in exceptional circumstances, 'the report must be based on a face to face consultation'.
>
> (iv) Whether there was any language barrier between the healthcare professional and the detained person and, if so, whether an interpreter was used.
>
> (v) Whether the report is specific to the circumstances of the individual, as opposed to being based on generic statements about the impact of detention, whether based on research or otherwise.
>
> (vi) Whether the healthcare professional has referred any concerns about the health of the detainee to the onsite healthcare team, has taken into account treatment received or available in the detention centre and has engaged with the question whether the person could be adequately cared for in detention."

Failure to meet any of those standards may, but need not, lead the caseworker to assign the report a lower evidence level than would otherwise apply.

THE INTERIM GUIDANCE

21. As already noted, the purpose of the Interim Guidance is to establish a process by which caseworkers should, in specified circumstances, seek a second opinion, in cases where a detainee claims to be at risk on the basis of an external medico-legal report. I need not attempt a summary of all its provisions. For our purposes the relevant features are as follows.

22. The substantive part of the Interim Guidance starts by specifying that, subject to certain exceptions, the Policy applies to all external medical reports requiring consideration under "the Adults at Risk in Detention (AAR) policy" (i.e. the Statutory Guidance read with the Caseworker Guidance) received while a person is detained under immigration powers: it does not therefore apply to the initial decision whether to detain. The exceptions are: where there has already been a decision to release the person from detention; where removal is due within ten working days; or where the report falls to be rejected in any event because it does not satisfy the baseline requirement in the

Caseworker Guidance. There is, however, an additional distinct limitation inasmuch as the maximum number of reports referred for a second opinion is ten per week: we were told that this reflected the capacity of the panel of doctors contracted by the Home Office to provide such reports.

23. The procedure where the Policy applies is summarised by Linden J at paras. 47-50 of his judgment, which the parties accepted was accurate. I need not reproduce his summary. What matters for present purposes is how long the process would take. As to that, the essentials are that an appointment must be arranged with the contracted doctor within seven working days, and that the second opinion report is required to be completed within five working days of that appointment: if those deadlines are missed the assessment will have to proceed on the basis of the evidence originally supplied. On that basis the assessment would be postponed by a maximum of twelve working days – that is, some two-and-a-half calendar weeks. However, there are provisions covering the case where the appointment with the contracted doctor is delayed or cancelled, in which case, depending on the circumstances, the maximum period between receipt of the original report and the assessment of risk could be 18 working days – that is, depending how the weekends fall, between 22 and 24 calendar days.

LINDEN J's JUDGMENT

24. At para. 19 of his judgment Linden J identified the core issue as relating to the interpretation of the Statutory Guidance and, more specifically, as being

> "whether, as Ms Luh contended, [it] required the Defendant to make a decision about the detention or continued detention of a person 'on the available evidence' or whether, as Ms Anderson submitted, it permitted a decision on a person's risk level to be postponed pending further inquiries, including the seeking of a second opinion".

His reasons for determining that issue in the Claimant's favour can be summarised as follows.

25. At para. 70 of his judgment he takes as his starting-point the (uncontested) principle that it is for the state to justify the detention of an individual, referring to the decision of the Supreme Court in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245; and he observes that, other things being equal, greater justification will be required where the circumstances of the individual mean that they are vulnerable while in detention. The presumption in the Statutory Guidance that adults at risk will not be detained, or, if detained, will not be kept in detention if evidence of vulnerability is produced in the light of which detention is no longer justified, reflects this principle.

26. I should set out paras. 71-73 in full:

> "71. As I read the Statutory Guidance, and as I consider the reasonable caseworker would read it, the Guidance recognises these points and therefore requires decisions about whether the presumption against detention has been rebutted to be made *'on the basis of the available evidence'* (see e.g. [8] of the Guidance). Unless detention is justified on the available evidence, the presumption of liberty will prevail and the

> person will not be detained or will be released. This is one of the main principles underpinning the Guidance: see [3] and the passages referred to [26] above[2]. If a person is an adult at risk, the caseworker is therefore required to consider *'the level of evidence available in support and the weight that should be accorded to the evidence in order to assess the likely risk of harm to the individual if detained…'* and to determine the person's risk level under [9] of the Guidance. This requirement continues during the person's detention as [5] and [12] of the Statutory Guidance and the requirements for regular reviews, under the *'Detention: General Instructions'*, reflect, and Ms Anderson did not dispute.
>
> 72. It would not be consistent with this approach for there to be material delays in acting on the available evidence. The available evidence approach means that, under the Statutory Guidance, a person cannot be held in detention when the evidence available to the Defendant shows that this is not justified. It would therefore be contrary to the Guidance to postpone consideration of the evidence or a decision about detention for more than a de minimis period of time after receipt of material new evidence. An external medical report which is submitted on behalf of a detainee must therefore be considered when it is received, the level of risk assessed and a decision taken as to whether the continued detention of that person is justified. If detention is not justified, the person must be released.
>
> 73. Given the presumption against detention, this also seems to me to be a *reasonable* interpretation of the Statutory Guidance. It does not mean that an external medical report has to be accepted or given full weight by a caseworker: there were and are bases on which it might be rejected or given limited weight on the available evidence. Nor does it mean that no further inquiries at all may be made, or other information taken into account: as Ms Anderson submitted and Ms Luh accepted, if it was known that the detainee had an appointment the next day to see a Home Office doctor it might be permissible to await the doctor's views depending on the circumstances. But there is a difference between waiting for a short period of time for the outcome of an existing medical appointment and postponing a decision on the available evidence in order to organise an assessment to see whether further evidence might become available to contradict or undermine the available evidence."

27. Linden J's conclusion in those paragraphs is thus that the effect of the Statutory Guidance, construed in the light of its evident purpose, was that the required assessment must be carried out forthwith at the time that the issue first arises on the basis of the evidence then available. (I use "forthwith" as a shorthand for his reference to "[within] a de minimis period of time after receipt".) He goes on at para. 74 to say that, on that basis, the Second Opinion Policy is necessarily inconsistent with it since in those cases where it requires a second opinion to be sought it involves a more than minimal delay

[2] These are the fifth bullet under para. 6 and paras. 13 and 15: see para. 15 above.

in the making of the assessment and the continued detention of people who, on the available evidence, would not satisfy the criteria for such detention. At para. 75 he addresses certain counter-arguments advanced on behalf of the Secretary of State, and at paras. 76-77 he considers two additional grounds of challenge advanced by the Claimant which he declines to adopt.

28. At para. 78 Linden J identifies the basis on which he held the claim to succeed as follows:

> "Perhaps the simplest way of expressing the point is that the Statutory Guidance was required by section 59 of the Immigration Act 2016 to be approved by Parliament, albeit by negative resolution procedure, and was approved by Parliament. It therefore was not open to the Defendant to contradict or undermine it without the approval of Parliament."

29. That reasoning did not involve Linden J expressing any view about whether the Second Opinion Policy was a good or bad thing, and it was common ground before him, as before us, that that was not the issue. As he put it at para. 13, agreeing with certain observations by Heather Williams J when granting permission:

> "I respectfully agree that the issues for determination do not call for the Court to adjudicate the merits or demerits of the Statutory Guidance or the Second Opinion Policy. Both parties agreed on this point and they presented the case accordingly. Grounds 1 and 2 [being the relevant grounds of challenge] require consideration of the text of the Statutory Guidance and the Second Opinion Policy with a view to deciding whether they are consistent with each other and with the purpose of section 59 of the 2016 Act."

THE APPEAL

30. The Secretary of State's sole ground as regards this aspect of the appeal reads:

> "The High Court misdirected itself in law in its interpretation of the statutory guidance to find that the second opinion policy was contrary to its terms and so unlawful, in particular, by excluding from the interpretation of evidence 'available' to the decision-maker the second opinion evidence available through the dedicated system set up and resourced specifically to provide it to decision-makers within specific time limits (i.e. applying *Tameside* principles of availability of evidence to decision-makers)."

In my view that ground of appeal is well-founded. My reasons are as follows.

31. The starting-point is the language of the Statutory Guidance. I can see nothing in it that states, or even suggests, that the necessary assessment must be carried out forthwith on receipt of a medico-legal report indicating that the detainee is vulnerable. Indeed it says nothing explicit about the time within which it should be carried out. Mr McCullough, like Linden J, placed great weight on the phrase "on the basis of the available evidence" which appears at several points in the Guidance. But the word "available" does not necessarily mean that the evidence in question should be on the caseworker's desk at

the moment that the question of vulnerability is first raised. Absent any contrary indication in the context, it would equally, if not more, naturally connote evidence which the caseworker has or is in a position to obtain (or, perhaps, readily obtain); in which case it would be entirely consistent with the policy of the Statutory Guidance for a caseworker to be permitted to postpone making the assessment for a reasonable period in order to obtain further evidence that might give them a fuller picture. The real question is thus whether contextual considerations lead to the conclusion that the required assessment must indeed be carried out forthwith. By the end of his oral submissions I understood Mr McCullough to acknowledge that that was so.

32. I turn therefore to the context. Mr McCullough submitted that the decisive contextual feature was the declared policy of the Statutory Guidance that there should be a presumption against the detention of vulnerable persons: he referred not only to the terms of the Guidance itself but to the legislative history leading to its introduction. He pointed out that where the original medico-legal report constituted level 3 evidence, and where the stringent criteria for detention in level 3 cases were not met, any delay in carrying out the necessary assessment would mean that someone would be being kept in detention who there was evidence was likely to be particularly vulnerable to harm as a result. He submitted that that was wholly inconsistent with the policy of the Guidance.

33. In this connection there was some discussion at the hearing about Linden J's acceptance in para. 73 of his judgment, reflecting a concession by Ms Luh, that the Statutory Guidance did permit a short postponement of the assessment in order to obtain further evidence, as long as the period was "no more than *de minimis*". In response to a question from the Court about whether the true implication of that acceptance was that the assessment should be carried out within a reasonable period, Mr McCullough submitted that there was for the purpose of the present case no real difference: in the light of the policy behind the Guidance, only a *de minimis* postponement would be reasonable. The example accepted by Linden J was of a postponement by a single day. Mr McCullough was understandably unwilling to be drawn into defining what longer period might be reasonable: he submitted that all that mattered was that, as Linden J had held, the kinds of timescale envisaged by the Second Opinion Policy were more than *de minimis*.

34. I do not agree that the features relied on by Mr McCullough point to an interpretation of the Guidance under which the required assessment has to be carried out forthwith. The importance of not detaining people who are particularly vulnerable is not the only relevant contextual consideration. The need for informed decision-making is also important.[3] Para. 1 of the Guidance, quoted at para. 10 above, says in terms that the purpose of the approach which it enshrines is to ensure that "genuine" cases of vulnerability are identified. Though I have no reason to doubt that most claims by detainees that they are particularly vulnerable are genuine, it is inevitable that there will be some which are not and where medical opinions have been obtained on the basis of histories or symptoms that are false or exaggerated. There is an important public interest in avoiding, so far as possible, the release of detainees in such cases: the purpose of their detention will typically have been to facilitate their removal or deportation, and once released there is a real risk of them absconding. Accordingly there is a public

[3] This is no doubt the point being made by the reference in the pleaded ground to *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, though I am not sure the reference is particularly apt.

interest in caseworkers having a reasonable opportunity to check the reliability of the evidence of detainees who claim to be particularly vulnerable, rather than having to proceed solely on the basis of the evidence provided by the detainee themselves. That need not only be by seeking a second medical opinion. There might also be cases where checks into the detainee's immigration history would reveal tribunal findings or other objective evidence that contradicted the histories on which their own reports were based.

35. I accept of course that the public interest in the Secretary of State having the opportunity to obtain evidence of her own has to be balanced against the risk that prolongation of the detention will cause harm, or further harm, to the detainee. But I see nothing in the terms of the Statutory Guidance to suggest that that balance has to be struck in favour of requiring the assessment to proceed forthwith, which would in practice mean that only in the most unusual case (such as that referred to in para. 73 of Linden J's judgment) would caseworkers have a chance to carry out any meaningful check. In my view the obvious approach, which I would hold was implicit in the Guidance in the absence of any clear contrary indication, is that caseworkers should be entitled to a reasonable period in which to seek independent evidence as to whether the detainee is indeed particularly vulnerable. No doubt, in view of the overall policy of the statute and the Guidance, anything other than a short period would not be reasonable but it must be sufficient for some meaningful enquiry. I do not believe that the public interest in the Secretary of State having that opportunity is outweighed by the risk that a person who would otherwise be entitled to immediate release may (though they will not necessarily) suffer significant harm, or further harm, from the continuation of their detention for a short further period. It is important to appreciate that neither the statute nor the Guidance is intended to achieve a situation in which particularly vulnerable individuals are never detained or, therefore, are never at risk of suffering harm from detention. The issue in this appeal only affects individuals who are already in detention and who may well have been so for some time. And even detainees in whose cases particular vulnerability is established by level 3 evidence may be properly detained, and thus risk suffering harm, or further harm, if the stringent criteria in the Caseworker Guidance are satisfied. We are not dealing in absolutes.

36. The foregoing discussion does not offer any guidance on the limits of the reasonable period which I believe that the Statutory Guidance envisages, beyond my observation that it should be "short". In particular, I express no view on whether the timescales provided for in the Interim Guidance exceed that period. That reflects the fact that the issue before Linden J was, and was only, whether on its true construction the Guidance allowed *any* interval (beyond a *de minimis* period) between the receipt of a detainee's medico-legal report and the carrying out of the required assessment. I would hold that it did, but it is not appropriate to decide anything further. I would, however, observe that the Interim Guidance recognises the need for the further medical evidence for which it provides to be obtained within what are on the face of it short timescales, and that it expressly provides that if those timescales are not met the assessment must proceed on the basis of the evidence so far available.

IS THE APPEAL ACADEMIC?

37. As noted at paras. 5-6 above, we declined to determine in advance of hearing substantive submissions the question whether the appeal was academic and if so whether we should nevertheless, exceptionally, determine it. Mr Payne put forward,

and Mr McCullough sought to rebut, various reasons why it was right for us to decide the appeal notwithstanding that the Second Opinion Policy has now been superseded by the terms of the new Statutory Guidance issued in May 2024. But I believe that the issue can be disposed of shortly. Mr Payne contended that claims for damages for unlawful detention might still be made in respect of the period prior to May 2024 relying on Linden J's order quashing the Policy. Mr McCullough did not dispute that that was a theoretical possibility, but he pointed out that the Secretary of State had not been able to point to any such claims having been advanced and he submitted that it was highly probable that if any were going to be brought they would have emerged by now. That may be so, but the possibility cannot be ruled out; and on that basis alone I believe that the Secretary of State is entitled to a decision, irrespective of the other arguments advanced by Mr Payne.

DISPOSAL

38. For the reasons given above I would allow the Secretary of State's appeal on ground 1. However, for the reasons given in Dingemans LJ's judgment, with which Newey LJ also agrees, ground 2 is dismissed.

Newey LJ:

39. I agree with both judgments.

Dingemans LJ:

40. I agree with the judgment of Underhill LJ, and gratefully adopt his summary of the facts and issues. His conclusion on the first ground of appeal means that it is necessary to determine the second ground of appeal. This raises issues relating to Linden J's finding that the respondent claimant Medical Justice has a legitimate expectation of consultation in relation to the Interim Guidance.

41. Part of the case for Medical Justice on the consultation issue before Linden J was that there had been an established practice of consultation so as to give rise to a legitimate expectation of consultation before the guidance was issued. In that respect Medical Justice relied on a witness statement from Idel Hanley, Policy, Research and Parliamentary Manager at Medical Justice since May 2021. There was evidence that Medical Justice had been invited to respond to consultations on a range of Home Office policies concerning immigration detention, arrangements of healthcare and safeguarding detained persons. This included consultations on Detention Services Orders ("DSO") and other guidance. The practice had continued over a period of 15 years.

42. The case for the Secretary of State before Linden J was that there had never been such an established practice. The Secretary of State relied on a witness statement from Peter Ledwitch-Madsen, a civil servant working in detention policy for the Home Office, to the effect that there had been consultation on an ad hoc basis, according to a host of variable factors including subject matter and time available. There had been some constructive engagement with Medical Justice and others who had the relevant interest, expertise or experience to contribute, which the Home Office recognised as important. There was, however, no workable process that could be devised for prior consultation in the context of the relevant operational policies and guidance.

The ground of appeal and respective cases

43. The second ground of appeal by the Secretary of State was to the effect that Linden J misdirected himself in law "when finding that the Claimant had a legitimate expectation of consultation such as to render the Second Opinion Policy unlawful for absence of consultation". Particular complaints were made that Linden J: erred in the approach taken to the evidence in finding that the materials before the Court provided a sound basis for imposition of legal obligations in this area (where the Court is slow to create legal obligations); misapplied the 'high threshold' to create legal obligations on the basis of a 'pattern of seeking the views of the Claimant'; and failed to give due consideration to the countervailing considerations that weighed against giving legal effect to any expectation of prior consultation on the second opinion policy.

44. Mr Payne KC and Ms Anderson on behalf of the Secretary of State accepted that Linden J had identified the correct legal test, but submitted that it had not been properly applied by Linden J on the findings made. The evidence of Idel Hanley showed that she could not have been present at the time of earlier practice of consultation relied on by Medical Justice, there was a failure to exhibit relevant documents, and the evidence did not justify the finding made by Linden J. This was particularly so in circumstances where the evidence of Peter Ledwitch-Madsen was to the effect that the Home Office did not accept that there was an established practice of consultation on all operational policies of this nature prior to their initial implementation.

45. Mr McCullough KC and Shu Shin Luh and Laura Profumo submitted that Linden J had undertaken a comprehensive and thorough exposition of the evidence and applied the correct legal tests. The evidence of Ms Hanley had been examined, and this was an evaluative judgment by Linden J which should not be set aside by the Court of Appeal. The evidence of Mr Ledwitch-Madsen had been an assertion, and it did not engage with the details of consultations provided by Ms Hanley. Linden J had properly assessed the limitations in the evidence and come to a reasonable conclusion.

46. By the end of the submissions it was apparent that the issue raised by the second ground of appeal was: whether Linden J's finding of fact that there was an established practice of consultation so as to give rise to a legitimate expectation of consultation was wrong.

Relevant legal principles

47. The court will allow an appeal against a finding of fact where the decision of the judge below was wrong, see CPR 52.21(3)(i). An appellate court will only decide that a finding of fact made by the judge below is wrong in limited circumstances, such as where the judge made a finding of fact which has no basis in the evidence, or is based on a misunderstanding of the evidence, or a failure to consider relevant evidence, see *Henderson v Foxworth Investments Limited* [2014] UKSC 41; [2014] 1 WLR 2600 at paragraphs 57 and 67. This approach of the appellate court is taken for the principled reasons set out in *Fage v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] ETMR 26 at paragraph 114.

48. This approach applies even if the assessment of the judge below is based on written evidence in judicial review proceedings, see *Smech Properties Ltd v Runnymede Borough Council* [2016] EWCA Civ 42 at paragraphs 29 and 30, *R(Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWCA Civ 1010;

[2021] 1 WLR 472 at paragraphs 166 and 167, *R(Z and another) v Hackney Borough Council and another* [2020] UKSC 40; [2020] 1 WLR 4327 at paragraph 74 and *R(MP) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1634; [2021] 4 All ER 326 at paragraph 55.

49. So far as consultation is concerned, in *R v North and East Division Health Authority, ex parte Coughlan* [2001] QB 213 the court held that if there was a consultation by a public body, it had to be carried out properly. This meant that: "to be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168 ."

50. So far as is material to this appeal, a duty to consult may arise where there has been an established practice of consultation so as to give rise to a legitimate expectation of consultation, such that a failure to carry out the consultation would lead to unfairness amounting to an abuse of power. This appears from *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at page 401, *R(Bapio) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 (*Bapio*) and *R(MP) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1634; [2021] PTSR 1122 at paragraph 50.

51. Sedley LJ said in *Bapio* at paragraph 39 that "while a practice does not have to be unbroken, it has to be sufficiently consistent to be regarded as more than an occasional act". Other authorities have referred to a practice being "so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment", see *R(Davies) v Revenue and Customs Commissioners* [2011] UKSC 47; [2011] 1 WLR 2625. The description of the process, including the use of the word "consultation", will not be determinative, see *R(Eveleigh) v Work and Pensions Secretary* [2023] EWCA Civ 810; [2023] 1 WLR 3599 at paragraph 81. There is a difference between targeted engagement and consultation, see *R(FDA and others) v Minister for the Cabinet Office* [2018] EWHC 2746 (Admin) at paragraph 90.

Some comments on the evidence in the proceedings below

52. When originally refusing permission to apply for judicial review on the papers in March 2023, Lang J commented on the witness statements served on behalf of Medical Justice as follows "the witness statements filed in support of the challenge provide comment and opinion from the claimant's perspective. They cannot be admitted as independent expert evidence as they do not comply with the requirements …".

53. A renewed oral application for permission to apply for judicial review was heard and granted by Heather Williams J on 25 July 2023. In giving judgment Heather Williams J recorded that there had been some misunderstanding as a result of the comments made by Lang J, saying "Lang J did not rule that the claimant's witness evidence only contains comment and opinion. What she ruled was that part of the witness statements contained comment and opinion and this aspect could not be admitted as independent expert evidence … I have observed this morning that whilst the claimant's witness statements cover perfectly proper subjects, including … the alleged established practice

of consultation, the statements do also contain a significant amount of comment setting out the witness's views on particular policies and practices … I trust the parties will bear this well in mind in their preparation for the substantive hearing" (emphasis added).

Material parts of the judgment below

54. The issue of a duty to consult based on a legitimate expectation was the subject of submissions at the hearing of the application for judicial review before Linden J. Linden J reserved judgment. As the issue relates to Linden J's findings of fact, it is necessary to set out parts of the judgment in some detail.

55. Linden J dealt with Medical Justice's case on consultation from paragraphs 89 to 165 of the judgment. Linden J recorded in paragraph 89 that the duty to consult was alleged by Medical Justice to have arisen in one of three ways. The first basis was because of an alleged established practice of consultation. It is not necessary to consider the other two ways in which the duty was said to arise because Linden J rejected those bases, and there has been no cross appeal on those points.

56. In paragraphs 90-93 Linden J summarised the legal principles which were not in dispute before him. Linden J recorded a passage from *R (Plantagenet Alliance Ltd) v Secretary of State for Justice & Others* [2014] EWHC 1662 (Admin) at paragraph 98(10) to the effect that a legitimate expectation to consult might be created by an express representation that there would be a consultation or "a practice of the requisite clarity, unequivocality and unconditionality …". Linden J noted that the bar was a high one for a claimant where it was alleged that the duty was based on an established practice of consultation.

57. Linden J referred to the evidence from Ms Hanley on behalf of Medical Justice, and then summarised that evidence from paragraphs 106 to 130. Linden J then summarised the submissions on behalf of Medical Justice. It was contended that the duty to consult was not in relation to all changes in policy relating to immigration detention but there was an established practice to consult "on material developments in policy in relation to adults at risk and the operation of the statutory framework in relation to them".

58. Linden J then turned to the Secretary of State's case at paragraph 134, summarising the contents of the pre-action protocol response letter dated 28 November 2022. Linden J recorded that the Secretary of State had denied a duty to consult, but on the basis that the policy did not materially alter the policy position on consideration of evidence contained in external medical reports. There had been an apology for the failure to inform partners, including Medical Justice, of the introduction of the guidance when it was implemented. Linden J recorded, at paragraph 136 of the judgment, that the pre-action protocol response did not address or deny the clear and specific contention that there was a duty to consult at common law.

59. Linden J considered the detailed grounds of defence, recorded the denial that there was an established practice of consultation and noted it said "very little" about the facts in relation to this ground, recording that the approach was not to contradict Ms Hanley's evidence, but to argue that it did not establish the case or that relief should be refused because the views had now been taken into account.

60. Linden J referred to the evidence of Mr Ledwitch-Madsen recording that the statement "does not explain whether he knew about what consultation there may have been in the past" and that it seemed that he was not a member of the National Asylum Stakeholder Forum (NASF) Detention Sub-Group (DSG). Linden J found that Mr Ledwitch-Madsen seemed to have misunderstood the comments made by Lang J and Heather Williams J on the grant of permission.

61. Linden J specifically set out Mr Ledwitch-Madsen's statement "I confirm on behalf of the Home Office that it is not accepted that there is an established practice of consultation on all operational policies of this nature prior to their initial implementation" recording that this did not appear to amount to a categorical denial, noting that Mr Ledwitch-Madsen had given no specific evidence or examples of the consultations which were said to have taken place on an ad hoc basis.

62. Linden J referred to Mr Ledwitch-Madsen's statement being in vague terms about discussions with external stakeholders, and noted the absence of evidence about the discussions with the two psychiatrists.

63. Linden J summarised the arguments made on behalf of the Secretary of State, recording the "surprising" submission that the Secretary of State had prepared its evidence on the understanding that Medical Justice's evidence was not admissible for certain purposes. It was submitted that the evidence of Ms Hanley, and other witnesses relied on by Medical Justice, should be excluded because analysing the evidence relied on by Medical Justice would be costly and disproportionate to the issue to which it was relevant. Linden J recorded the submissions that there was no statutory obligation to consult and no express assurance of consultation.

64. Linden J set out his conclusions on this issue from paragraphs 156 to 165 of the judgment. Linden J rejected the submission that the evidence from Ms Hanley and other witnesses should be excluded, recording that there was no basis to exclude the evidence, and that the Secretary of State had had months to obtain evidence and proof witnesses and that inaction was no basis to exclude relevant evidence.

65. Linden J accepted that in the event of a dispute on the evidence in judicial review proceedings it would normally be appropriate to accept the evidence of the defendant, unless there was good reason not to do so. Linden J, however, found that the statement of Mr Ledwitch-Madsen did not go further than saying he did not accept that there was an established practice.

66. Linden J stated, at paragraph 159 of the judgment, that the more difficult question was whether Ms Hanley's evidence did establish a practice of consultation which was "so consistent as to imply clearly, unambiguously and without relevant qualification that it will be followed in the future". Linden J held that "with some hesitation, I have concluded that it does". Linden J recorded that the underlying documentation had not been adduced, and he had asked counsel for Medical Justice a number of questions which sought to clarify aspects of Ms Hanley's evidence. Having done so Linden J indicated that, on reflection, he would not take those answers into account insofar as they added materially to the evidence already before the court. Linden J asked whether an application to adduce further evidence was to be made, but no application was made.

67. Linden J held that Medical Justice had a legitimate expectation of consultation about the policy and there had been "no real attempt to explain or justify the failure to consult having been put forward by the defendant in the context of the claim". Linden J held that he would not have accepted the alternative bases of the claim for consultation advanced by Medical Justice. In those circumstances the guidance was quashed because there had been a failure to consult.

Whether Linden J's finding of fact that there was an established practice of consultation so as to give rise to a legitimate expectation of consultation was wrong

68. Medical Justice had to show an unambiguous, widespread, well-established and well-recognised practice of consulting them in respect of policies concerning adults at risk in detention for immigration purposes, creating a legitimate expectation on the part of Medical Justice that it would be consulted in respect of any policies concerning the detention for immigration purposes of adults at risk, such that it would amount to an abuse of power to frustrate that expectation. It is common ground that Linden J directed himself correctly in law, emphasising the high bar which faced Medical Justice in respect of this part of the claim.

69. What should have been a reasonably straight-forward process of evaluating the evidence to determine whether that high bar was overcome, was made much more difficult by the approach of both parties. As far as Medical Justice was concerned this was because Ms Hanley had only been with Medical Justice from May 2021 and so was giving evidence on the basis of information provided to her, but Ms Hanley did not exhibit documents to her witness statement to provide the detail about past practice relating to consultations. It was also apparent that parts of Ms Hanley's witness statement did not contain relevant evidence but took the form of contentious argument and submissions, for example, paragraph 94 where Ms Hanley said "The detention safeguard is not functioning properly to provide such professional evidence, then what choice do detained people have?". As far as the Secretary of State was concerned, the witness statement from Mr Ledwitch-Madsen failed to engage with the details of the case about a practice of consultation. This may have been because those representing the Secretary of State in the proceedings below misunderstood what has been said by Lang J, but as Heather Williams J pointed out, Lang J had not said that the evidence from Medical Justice was inadmissible, and Heather Williams J had specifically identified that Medical Justice's witness statements covered proper subjects including the alleged established practice of consultation.

70. It was in this immensely unsatisfactory state of affairs that Linden J approached the task of finding whether there was an established practice of consultation, giving rise to a legitimate expectation of consultation. Linden J directed himself as to the correct legal test for finding a legitimate expectation of consultation. Linden J made his finding of fact "with some hesitation", showing a proper understanding of the weaknesses of the evidence.

71. I do not consider that the criticisms about Ms Hanley's lack of personal knowledge of the past practice of consultation are sufficient to undermine Linden J's finding. Ms Hanley made it clear that her evidence was based on a review of Medical Justice's records, and Mr Ledwitch-Madsen did not take issue with the facts set out. It was unsatisfactory that those records were not exhibited, but Linden J had that failure well in mind. The Secretary of State could have given evidence or exhibited documents

relevant to Ms Hanley's evidence to show, if it were the case, that this was a targeted engagement and not a consultation.

72. I have considered whether the amendments to the DSOs made on 3 February 2020 and 5 October 2022 without prior engagement with Medical Justice, meant that there was no legitimate expectation of consultation. Ms Hanley's evidence about the first amendment was that they were "minor amendments clarifying the distribution of responsibilities between different Home Office teams and providing further guidance on access to facilities …". The evidence about the second amendment was that it was "to clarify the extent that the DSO applies to people who refuse food and/or fluids for reasons other than a protest". There was no evidence on behalf of the Secretary of State to show that these were anything other than minor amendments which did not undermine the past practice of consultation. In these circumstances I do not consider that this point is sufficient to overturn Linden J's finding of fact.

73. I have also considered whether the fact that proceedings relating to a previous challenge by Medical Justice in early 2019 were compromised on the basis that the Secretary of State would hold a wider consultation, undermined the evidence relating to the existence of a legitimate expectation of consultation. This was because it might be inferred that if there was an established practice of consultation, there would be no need to include the requirement to have a consultation as part of the settlement. In the event there is insufficient evidence to draw that inference. This is because even where there is such practice, it is sensible to make an obligation to carry out a consultation explicit in a compromise agreement. It is also because Ms Hanley's evidence was that that this was to be "a wider consultation" rather than the other consultations with Medical Justice to which reference had been made.

74. Finally I have had regard to the fact that Linden J asked Ms Luh, counsel on behalf of Medical Justice, a number of questions to clarify Ms Hanley's evidence. Linden J stated that, so far as additional evidence was elicited, he ignored it in the absence of an application to adduce further evidence, and there is nothing to suggest that Linden J did take into account any inadmissible evidence.

75. In all the circumstances I can determine no error of approach by Linden J to the finding of fact made by Linden J. I do not consider that this court is permitted to overturn Linden J's finding of fact, just because I or others might have made a different finding, compare *Royal Bank of Scotland v Carlyle* [2015] UKSC 13; [2015] SLT 206 at paragraphs 20-22. All of that said, I would emphasise again the high bar necessary to show that a past practice of consultation has been so unambiguous, widespread, well-established and well-recognised that it creates a legitimate expectation of consultation, such that it would amount to an abuse of power to frustrate that expectation.

76. For the reasons set out above I would dismiss the Secretary of State's appeal on this ground.