

## RECENT CASE

# Strike Cover, Consultation and Quashing: An Analysis of *R. (Associated Society of Locomotive Engineers and Firemen) v Secretary of State*

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### ABSTRACT

In June 2022, the UK Government enacted Regulations purporting to remove the offence of introducing or supplying workers to cover those on strike. In *R. (Associated Society of Locomotive Engineers and Firemen) v Secretary of State* the High Court held that the decision-making process preceding the enactment of the Regulations was unlawful and quashed them. This analysis outlines the case, with a particular focus on the central role played by the existence of a statutory duty to consult in the court's reasoning and the extent to which third party interests were considered in the course of determining the proper remedy.

### 1. INTRODUCTION

Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations (Regulation 7)<sup>1</sup> makes it a criminal offence for employment businesses to introduce or supply workers to cover those on strike. Both the ILO Committee on Freedom of Association (CFA)<sup>2</sup> and the Committee of Experts of the Application of Conventions and

<sup>1</sup>The Conduct of Employment Agencies and Employment Businesses Regulations 2003 (SI 2003/3319).

<sup>2</sup>*Freedom of Association: Compilation of decisions of the Committee on Freedom of Association* (6th edn, International Labour Office, 2018) [917]–[919].

Recommendations (CEACR)<sup>3</sup> regard the use of strike replacements, outside of essential sectors,<sup>4</sup> as a ‘serious violation of freedom of association.’<sup>5</sup> Reversal of the ban would therefore cause the UK to deviate further from international labour law standards.<sup>6</sup>

Although the ban has at times been presented as trading off the interests of businesses and the public in favour of the rights of striking workers, the reality is more complex. Opening up the prospect of covering work during strikes would create a range of practical complications for various sectors. Work may be capable of being performed only by highly skilled workers. The provision of less skilled agency workers, if available at all, may therefore create health and safety risks for service-users and related reputational risks for employment businesses and workers. The creation of pressure to find (possibly unsuitable) cover at short notice, could also make the task of making provision for strike days more practically complex for employers. The removal of Regulation 7, in other words, would not be a straightforwardly ‘pro-business’ move.<sup>7</sup>

Despite all of this, for one year, Regulation 7 was removed from the statute books. In June 2022, in response to political pressures surrounding proposed rail strikes, the UK Government set in place a process for its repeal. On 13 July 2013, in *R. (Associated Society of Locomotive Engineers and Firemen and others) v Secretary of State for Business and Trade (ASLEF)*<sup>8</sup> the High Court of England and Wales found that that process was unlawful in judicial review proceedings. The resulting measure was quashed meaning that the ban in Regulation 7 has effectively been restored.

Section 2 of this analysis outlines the decision-making process which led to Regulation 7’s repeal. Section 3 provides a high-level overview of the High Court’s judgment in *ASLEF*. Sections 4 and 5 then delve deeper into two important doctrinal issues. First, the centrality of the statutory duty to

<sup>3</sup>*Freedom of Association and Collective Bargaining* (International Labour Office 1994) [175].

<sup>4</sup>The term is understood narrowly by these organisations. See for example, *Freedom of Association* (n 2), [918].

<sup>5</sup>*Ibid.*

<sup>6</sup>See generally Ioannis Katsaroumpas, ‘Heading in the Wrong Direction: “Global Britain” and ILO Standards on Industrial Action’ *UK Labour Law Blog*, 7 September 2022 (available at: <https://www.uklabourlawblog.com/2022/09/07/heading-in-the-wrong-direction-global-britain-and-ilo-standards-on-industrial-action/> — by Ioannis Katsaroumpas — UK Labour Law ([uklabourlawblog.com](https://www.uklabourlawblog.com/))).

<sup>7</sup>To paraphrase Neil Carberry, chief executive of the Recruitment and Employment Confederation (see: Ministers press on with ‘cynical’ plan to let agency staff replace striking workers | Industrial action | *The Guardian*).

<sup>8</sup>*R. (on the application of Associated Society of Locomotive Engineers and Firemen) v Secretary of State for Business, Trade and Energy* [2023] EWHC 1781 (Admin).

consult established in s.12 of the Employment Agencies Act 1973 (EAA) to the High Court's reasoning. Secondly, the manner and extent to which the interests of third parties were considered by the court in exercising its remedial discretion. Section 6, finally, concludes.

## 2. THE WRITTEN EVIDENCE IN *ASLEF*: A WINDOW INTO A DEFECTIVE DECISION-MAKING PROCESS

In the latest edition of their seminal text, *Law and Administration*, Carol Harlow and Richard Rawlings describe judicial review as an 'instrument of transparency or "tin-opener"'.<sup>9</sup> It is often said that, due to the limited role played by oral evidence and cross-examination, judicial review is not a fact-finding process.<sup>10</sup> Public authorities are, however, under a duty of candour<sup>11</sup> which requires them to 'draw the court's attention to the relevant matters ... [including] the good the bad and the ugly'.<sup>12</sup> As a result, the judicial review process can open up a window into the inner workings of Government, enabling observers to understand the, otherwise invisible, story behind a decision. The tale that emerges from Linden J's summary of the written evidence in *ASLEF* is this.

It was June 2022. Negotiations between the National Union of Rail, Maritime and Transport Workers (RMT), train companies and the UK Government regarding pay and job security were not going well. In the previous month, in a ballot with a 71% turnout, 89% of RMT members had voted to strike. The planned industrial action, described at the time as the 'biggest rail strike in modern history',<sup>13</sup> was to effectively shut down most of England's rail network for 3 days.

Ministers wanted to react, and to react quickly.<sup>14</sup> Their options were, however, limited. There was little hope of reaching an agreement with the RMT. Indeed, as users of England's rail system well know, the June 2022 strikes

<sup>9</sup>Carol Harlow and Richard Rawlings, *Law and Administration* 4th edn (Cambridge: CUP, 2021), 812.

<sup>10</sup>For example, *Bubb v Wandsworth LBC* [2011] EWCA Civ 1285, especially [24]; David Blundell, 'Of Evidence and Experts: Recent Developments in Fact-finding and Expert Evidence in Judicial Review' (2018) 23(4) *Judicial Review* 243.

<sup>11</sup>*R. v Lancashire CC, ex parte Huddleston* [1962] 2 All E.R. 941 (CA).

<sup>12</sup>*R. (on the application of Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin), [2018] A.C.D. 91, [20].

<sup>13</sup><https://www.bbc.co.uk/news/business-61723515>.

<sup>14</sup>*ASLEF* (n 8), [86].

turned out to be the first of a long and continuing stream. Enacting primary legislation to further curtail the ability of unions to engage in industrial action<sup>15</sup> would take time and was thus a longer-term political option.<sup>16</sup> So Ministerial attention turned to secondary legislation.

Special advisors to the Prime Minister quickly identified as an option the repeal of Regulation 7. The Conservative Party had committed to its revocation in its 2015 Manifesto. A consultation had taken place in the same year, but the proposal was abandoned. Repealing Regulation 7 now would enable the UK Government to present itself as removing ‘1970s-era restrictions [to] give businesses freedom to access fully skilled staff at speed, all while allowing people to get on with their lives’.<sup>17</sup>

The catch, however, was that section 12 of the EAA placed the Secretary of State under a statutory duty to consult ‘with such bodies as appear to him to be representative of the interests concerned’.<sup>18</sup> Holding a fresh consultation exercise would mean delay. The Secretary of State for Business, Energy and Industry (BEI), then Kwasi Kwarteng, was informed in a briefing from civil servants that a consultation had taken place in 2015, had received 167 responses, that the Confederation of British Industry had broadly favoured reform but that responses from other consultees had been ‘varied’.<sup>19</sup> Kwarteng was offered a more detailed briefing but ‘did not ask to see it’.<sup>20</sup> Instead he indicated that he was prepared to go ahead without further consultation.<sup>21</sup> On 27 June draft Regulations were placed before Parliament. On 21 July, they came into effect.

In his judgment in *ASLEF*, Linden J was highly critical of this process, which he described as having been conducted at ‘exceptional speed’<sup>22</sup> by a Minister ‘[in]sufficiently interested ... to see the analysis he was offered’.<sup>23</sup> The result of the process was to leave the Minister ill-informed on many

<sup>15</sup>See the earlier Trade Union Act 2016 and the contributions to (2016) 45(3) *Industrial Law Journal*.

<sup>16</sup>See Strikes Act 2023 (discussed in Ioannis Katsaroumpas, ‘Crossing the Rubicon: The Strikes (Minimum Service Levels) Act 2023 as an Authoritarian Crucible’ (published on *Industrial Law Journal* Early Review 29 August 2023).

<sup>17</sup><https://www.theguardian.com/uk-news/2022/jun/23/ministers-press-on-with-cynical-plan-to-let-agency-staff-replace-striking-workers> (reporting the words used by Kwarteng to announce the measure).

<sup>18</sup>*Ibid.*, s.12(2).

<sup>19</sup>*ASLEF* (n 8), [60].

<sup>20</sup>*Ibid.*, [62].

<sup>21</sup>*Ibid.*, [61].

<sup>22</sup>*Ibid.*, [175].

<sup>23</sup>*Ibid.*, [174].

matters of central importance. Had the Secretary of State looked in greater detail at the events of 2015, for instance, he would have learnt, among other things, that the Impact Assessment underpinning the 2015 proposal had been highly contested by consultees and others<sup>24</sup> and that the UK Government had been strongly urged by the CEACR to review its proposal.<sup>25</sup> Furthermore, seven years had passed since the prior consultation exercise. Events occurring in the interim were clearly pertinent to the issues and meant that the views and evidence of the various stakeholders could not be straightforwardly predicted.<sup>26</sup> This was particularly true of the passage of the Trade Union Act 2016, which, by substantially altering the minimum ballot thresholds to be satisfied before strike action can take place, fundamentally altered the landscape in which reform was taking place.<sup>27</sup>

### 3. THE HIGH COURT'S REASONING AND CONCLUSIONS

*ASLEF* proceeded as a judicial review challenge brought by thirteen trade unions on two grounds. First, breach of the statutory duty of consultation in EAA 1973. Secondly, violation of the Article 11 Convention rights of striking workers. While recognising that the second ground raised important and unresolved legal issues,<sup>28</sup> Linden J considered it unnecessary and unhelpful to offer a concluded view.<sup>29</sup> The main substantive issue in the case, accordingly, concerned the lawfulness of the decision-making process.

Linden J began by setting out the key authorities governing judicial review of consultation. The basic principles are well settled. The oft-cited case of *Gunning* establishes four basic requirements of meaningful consultation: (i) consultation must take place at a formative stage, (ii) sufficient reasons must be given to enable intelligent consideration and response, (iii) consultees must be given adequate time and (iv) responses must be conscientiously considered.<sup>30</sup> Linden J rightly emphasised that these principles apply equally in cases in which public authorities voluntarily engage

<sup>24</sup>Ibid, [25]–[28].

<sup>25</sup>Ibid, [30].

<sup>26</sup>Ibid, [184].

<sup>27</sup>For analysis see Alan Boag, 'Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State' (2016) 45(3) *Industrial Law Journal* 299.

<sup>28</sup>See Katsaroumpas (n 6).

<sup>29</sup>*ASLEF* (n 8), [207].

<sup>30</sup>*R. v Brent LBC, ex parte Gunning* (1985) 84 L.G.R. 168 (QB), 189.

in consultation and where they do so pursuant to a statutory duty.<sup>31</sup> In the latter type of case, however, their application is ‘guided by the terms of the statutory duty and the statutory context’.<sup>32</sup>

Linden J identified three purposes served by the duty to consult imposed by section 12, EAA 1973. First, to ‘enhance the quality’ of decision-making by enabling consideration of ‘the views and evidence of those who are likely to be well informed’.<sup>33</sup> Secondly, to ensure that, in considering a draft Regulation, ‘Parliament can ... proceed on the basis that the case for the measure has been tested with interested parties’.<sup>34</sup> Thirdly, to ‘avoid the sense of injustice which those operating in the sector might feel if decisions are taken without reference to them’.<sup>35</sup> The approach to decision-making taken by the Secretary of State was held to be insufficient to realise these purposes. In the first place, there had been no conscientious consideration of responses to the 2015 consultation. The remarkably thin briefing provided to the Minister was insufficient to ensure he had a full appreciation of the ‘important points’.<sup>36</sup> In the second place, the section 12 duty required the Minister to run a further consultation exercise in any event. Although the aims of section 12 could in principle be achieved through conscientious consideration of an earlier consultation,<sup>37</sup> ‘given the lapse of time ... the developments which there had been in the intervening period ... the reasons why the proposal had not been implemented in 2016 and ... the professed reasons for wishing to implement it in 2022’<sup>38</sup> this was not the case on the facts.

On the issue of remedy, counsel for the Secretary of State argued that s.31(2A) of the Senior Courts Act 1981 required the High Court to refuse relief. Subsection (2A) is the product of controversial reforms to judicial review in 2015<sup>39</sup> and requires the court to refrain from making an order, in the absence of exceptional circumstances,<sup>40</sup> if ‘it appears ... to be highly

<sup>31</sup> *ASLEF* (n 8), [166]–[167]. See also *R. v North and East Devon Health Authority, ex parte Coughlan* [2001] Q.B. 213 (CA).

<sup>32</sup> *ASLEF* (n 8), [112].

<sup>33</sup> *Ibid.*, [161].

<sup>34</sup> *Ibid.*, [162].

<sup>35</sup> *Ibid.*, [163].

<sup>36</sup> *R. (Electrical Collars Manufacturers Association) v Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 2813 (Admin), [116].

<sup>37</sup> *ASLEF* (n 8), [171].

<sup>38</sup> *Ibid.*, [137].

<sup>39</sup> Criminal Justice and Courts Act 2015, s.84. For background and critique see James Maurici QC and Admas Habteslasie, ‘When Does the “No Substantial Difference Test” Make a Difference in Judicial Review Applications?’ (2019) 24(2) *Judicial Review* 127; Conor Crummey, ‘Why Fair Procedures Always Make a Difference’ (2020) 83(6) *M.L.R.* 1221.

<sup>40</sup> Senior Courts Act, 1981, s.31(2B).

likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.<sup>41</sup> The Secretary of State bore the burden of proof<sup>42</sup> and was therefore required, through evidence and argument, to convincingly ‘recreate the world that never was’.<sup>43</sup> While the courts may not ‘shirk the obligation’<sup>44</sup> imposed by s.2A, the ‘highly likely’ threshold is a high one, and the court cannot take on the role of primary fact-finder<sup>45</sup> nor stray into the ‘forbidden territory of assessing the merits’.<sup>46</sup> Unsurprisingly, on the evidence before him, Linden J concluded it was not possible to find that the threshold was met. Too much remained unknown about the views and the evidence consultees in a 2022 process would have submitted, and too many dimensions to the problem had not been thoroughly addressed through the decision-making process.

A final aspect of Linden J’s judgment worth remarking on concerns the duty of candour. The main piece of written evidence supplied by the Department of BEI was a statement from a departmental witness. Linden J described the witness’ approach to producing the statement as being to ‘put the Secretary of State’s case as best he could’.<sup>47</sup> Apparent failures by the Secretary of State to address or seek further evidence on important matters were glossed over by references to ‘what “the Government” thought or did’.<sup>48</sup> Linden J warned that this approach risked breaching the duty of candour. The relevant passage is worth citing in full:

...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... statements that a matter has been seen or considered by ‘the Government’ risk obfuscating the position rather than achieving the level of clarity required.<sup>49</sup>

The duty of candour is a central feature of the judicial review procedure. It is the primary way reviewing courts develop an understanding of what has gone on, meaning compliance is ‘fundamental to [its] effectiveness’.<sup>50</sup> Despite this, *ASLEF* is the latest in a growing line of recent cases in which

<sup>41</sup> Senior Courts Act 1981, s31(2A).

<sup>42</sup> *ASLEF* (n 8), [193]; *R. (HSPSC Ltd) v Secretary of State for Education* [2022] EWHC 3159 (Admin), [162].

<sup>43</sup> *ASLEF* (n 8), [199].

<sup>44</sup> *Gathercole v Suffolk CC* [2020] EWCA Civ 1179, [2021] P.T.S.R. 359, [38].

<sup>45</sup> *HSPSC* (n 42), [162].

<sup>46</sup> *R. (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [273].

<sup>47</sup> *ASLEF* (n 8), [65].

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, [66].

<sup>50</sup> *Ibid.*

central Government has been found to have, or come close to, breach.<sup>51</sup> The duty of candour has been the subject of relatively little scholarly study.<sup>52</sup> These cases highlight the importance of careful and ongoing thought about the role it plays within judicial review.

#### 4. JUDICIAL REVIEW OF CONSULTATION

The existence of the statutory duty to consult in section 12 was crucial to the High Court's finding that the decision-making process preceding the repeal of Regulation 7 was unlawful. Its effect was to place the Secretary of State under the burden of demonstrating that he had undertaken a conscientious consultation, either by considering the 2015 responses or embarking on a new process. It is worth, however, posing what the legal position would have been had section 12 not existed. This is not a purely academic question. There is no shortage of duties of consultation in the statute books<sup>53</sup> but they exist as a patchwork. Statutory duties to consult are common in some areas of administrative decision-making.<sup>54</sup> They are, however, scant in others.<sup>55</sup> At the same time, the type of ill-informed, hurried decision-making revealed by *ASLEF* could occur in any area.

A useful starting point is to recognise that the High Court's finding that the Secretary of State had not conscientiously considered the 2015 consultation responses was a crucial finding in *ASLEF*. The Secretary of State's failure to rerun consultation in 2022 meant that reliance on the 2015 consultation was his only potential route for demonstrating compliance with

<sup>51</sup>See especially *R. (on the application of Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812, [2018] 4 W.L.R. 123; *JM v Secretary of State for the Home Department* [2021] EWHC 2514 (Admin), [2022] P.T.S.R. 260; *R. (on the application of HM) v Secretary of State for the Home Department* [2022] EWHC 2928 (Admin); *R. (on the application of Police Superintendents' Association) v Police Remuneration Review Body* [2023] EWHC 1838 (Admin).

<sup>52</sup>Although the duty is beginning to generate valuable input. See especially Elizabeth O'Loughlin, 'Government's duty of candour: on the move?' [2023] PL 567.

<sup>53</sup>See generally Janet McLean, 'Participation and the Duty to Consult' in James Goudkamp, Mark Lunney and Leighton McDonald (eds), *Taking Law Seriously: Essays in Honour of Peter Cane* (London: Bloomsbury, 2022).

<sup>54</sup>An obvious example is planning and environmental law. See for example, Jenny Steele, 'Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach' (2001) 21(3) OJLS 415.

<sup>55</sup>An obvious example is immigration. See for example, *R. (BAPIO) v Secretary of State for the Home Department* [2007] EWCA 1139 (concerning the absence of a legal duty to consult prior to altering the Immigration Rules).

section 12. Things would have been very different, however, if section 12 was not on the statute books.

In the first place, it is far from clear that the Secretary of State would have been under a legal duty to give conscientious consideration to the 2015 responses in the first place.<sup>56</sup> The usual case in which the *Gunning* criteria have been applied involves a public authority reaching a decision shortly after running a consultation process.<sup>57</sup> There have also been cases in which the conscientious consideration requirement has been applied across more protracted decision-making processes. *Rights: Community: Action*,<sup>58</sup> for instance, concerned a challenge to Statutory Instruments enacted in July 2020. The process leading to the SIs had many stages including a public consultation in October 2018. In reviewing the SIs, the High Court proceeded on the assumption that the Secretary of State was bound to conscientiously consider the, by that time, nearly two-year old consultation exercise.

The facts of *ASLEF*, however, are strikingly different from these cases. In particular, *Rights: Community: Action* considered an *ongoing*, albeit lengthy, decision-making process. Whereas in *ASLEF* the 2015 consultation had taken place as part of a substantially separate and long complete decision-making process. It seems unlikely a court would have regarded *Gunning* as applicable to these facts. To so hold would treat the obligation to conscientiously consider consultation responses as an ongoing one, applicable wherever a public authority considers an issue which has been the subject of consultation in the past. This would be a considerable extension of how it had traditionally been understood.

In the second place, the applicants would also have incurred much greater difficulty establishing a duty to hold fresh consultation in 2022. In *Plantagenet Alliance* Hallett LJ summarised the case law as follows:

There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation.

<sup>56</sup> An applicant may try to establish that the consultation responses were ‘obviously material’ to the decision. However, this is a high bar, requiring the applicant to show that the responses were ‘so “obviously material” that it [would be] irrational not to [take] it into account’ (*R. (on the application of Friends of the Earth) v Heathrow Airport Ltd* [2020] UKSC 52, [2021] 2 All E.R. 967 at [118]–[119]).

<sup>57</sup> See for example, *Electrical Collars* (n 36).

<sup>58</sup> *R. (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 1954, [2022] P.T.S.R. 907.

Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness.<sup>59</sup>

The facts of *ASLEF* do not obviously fit within any of these categories. There was nothing amounting to a promise to consult. It is unlikely that the 2015 consultation would have been sufficient to constitute an ‘established practice of consultation’, given the judicial emphasis on the need for a practice which is ‘more than an occasional voluntary act’<sup>60</sup> and ‘so consistent as to imply clearly, unambiguously and without relevant qualification that it will be followed’.<sup>61</sup> The case law also demonstrates that ‘conspicuous unfairness’ is a high bar.<sup>62</sup> Laws LJ in *Bhatt Murphy* referred to the need to point to a ‘pressing and focused’ impact giving ‘substantial grounds to expect that the substance of the relevant policy will continue to endure’.<sup>63</sup> The threshold, for instance, was not made out in *BAPIO* when the Government amended the Immigration Rules to limit permit-free training to graduates of UK medical schools without consulting non-UK graduates who had come to the UK to seek training.<sup>64</sup> Nor was it established in *Brooke Energy* when the Government limited the renewable heat incentive scheme without consulting businesses which had invested money in reliance on the scheme.<sup>65</sup>

In the absence of section 12, therefore, it seems likely that the decision-making process described in section 2 above, despite its evident defects, would have been lawful. This is a clear reminder to those involved in the drafting of legislation of the importance of making provision for the procedural, as well as the substantive, aspects of policy making. The existence of a statutory duty to consult makes a significant difference in judicial review. Where a duty exists, the onus lies on the public authority to demonstrate a *Gunning-compliant* process. Where a duty does not exist, the onus is on the applicant to bring the case within the, extremely narrowly defined, categories outlined in *Plantagenet Alliance*.

<sup>59</sup>*R. (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662, [2015] 3 All E.R. 261, [2].

<sup>60</sup>*BAPIO* (n 55), [47].

<sup>61</sup>*R. (MP) v Secretary of State for Health* [2020] EWCA Civ 1634, [2021] 4 All E.R. 326, [53].

<sup>62</sup>See for example, *R. (Hollow) v Surrey CC* [2019] EWHC 618 (Admin), [78] where the High Court refers to the need for ‘conspicuous unfairness, amounting to an abuse of power’.

<sup>63</sup>*R. (on the application of Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 at [49].

<sup>64</sup>*BAPIO* (n 55).

<sup>65</sup>*R. (Brooke Energy Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 2012 (Admin).

For administrative law scholars, the analysis also highlights the need for careful reflection on whether the principles governing judicial review of consultation themselves provide an adequate safeguard against the kind of defective decision-making process which led to the repeal of Regulation 7. The courts have generally shown themselves to be comfortable reviewing the fairness of a consultation exercise which *has* taken place.<sup>66</sup> They have been much more hesitant, however, to ‘supply to omission of the legislature’<sup>67</sup> by finding a duty to consult in the common law where none exists on the statute books. The reasons for that hesitance<sup>68</sup> would benefit from deeper scrutiny than they have so far received.

## 5. REMEDIAL DISCRETION AND THIRD PARTIES

As explained above,<sup>69</sup> *ASLEF* contains a useful discussion of one legislative reform to the courts’ remedial discretion in judicial review enacted in recent years: section 31(2A) of the Senior Courts Act (SCA). A second is curiously absent. In 2022, s.1 the Judicial Review and Courts Act (JRCA) further amended the SCA to stipulate that courts in judicial review have the power both to suspend and to limit the retrospective effect of quashing orders.<sup>70</sup> There has been debate about whether the reform introduces novel powers,<sup>71</sup> or confirms the existence of powers already held.<sup>72</sup> Whatever the position before, the ability to suspend and limit the effect of quashing orders was viewed by the Independent Review of Administrative Law<sup>73</sup> and the Ministry of Justice<sup>74</sup> as a useful tool in the courts’ remedial armoury.

<sup>66</sup> See for example, *R. (Moseley) v Haringey LBC* [2014] UKSC 56, [2014] 1 W.L.R. 3947.

<sup>67</sup> To quote the famous language of Byles J in *Cooper v Wandsworth Board of Works* 143 E.R. 414.

<sup>68</sup> The most comprehensive discussion of which can be found in Sedley LJ’s judgment in *BAPIO* (n 54), especially [43]–[45].

<sup>69</sup> See section 3.

<sup>70</sup> For discussion and critique see Joanna Bell, ‘Remedies in judicial review: confronting an intellectual blindspot’ (2022) PL 200.

<sup>71</sup> See for example, Tom Hickman QC, ‘Quashing Orders and the Judicial Review and Courts Act’ *UK Constitutional Law Blog* (26 July 2021) (available at <http://ukconstitutionallaw.org/>).

<sup>72</sup> See for example, Lewis Graham, ‘Suspended and prospective quashing orders: the current picture’ *UK Constitutional Law Blog* (7 June 2021) (available at <http://ukconstitutionallaw.org/>). See also *HM Treasury v Ahmed* [2010] UKSC 5.

<sup>73</sup> *Independent Review of Administrative Law* (March 2021), 70–75.

<sup>74</sup> Ministry of Justice, *Judicial Review Reform Consultation: The Government Response* (July 2021).

It is somewhat surprising that section 1 JRCA was not considered in *ASLEF*. By quashing (without modification) the 2022 Regulations the High Court rendered them void ab initio. That is, the effect of the quashing order was to strike the measure entirely from the statute book, treating it as if it had never existed. In consequence, for the one-year period in which the 2022 measure was *purportedly* in effect, Regulation 7 had not, as a matter of law, been repealed. For this period, it therefore continued to be a criminal offence for employment businesses to introduce or supply workers to cover strikes.

This is a potentially problematic outcome. It is entirely plausible that, during this period, employment businesses *did* introduce or supply workers to cover strikes in (reasonable) the belief that it was lawful to do so. Were those businesses to be prosecuted, it is difficult to see how they could defend their case in light of the (unmodified) quashing order issued in *ASLEF*. Such a case would be factually distinct from well-known cases, such as *Boddington*,<sup>75</sup> in which defendants in criminal proceedings have successfully ‘collaterally challenged’ measures purportedly creating the offence they are alleged to have committed. It is difficult to see how an employment business facing prosecution could achieve a similar result, given that the offence of introducing or supplying strike-cover workers was created by Regulation 7 which is uncontestedly lawful.

These complexities could have been avoided had the High Court used the power in section 1 JRCA to specify that the quashing order would have effect only from the date of the judgment. The effect of such an order would have been that the offence of supplying workers *was* removed from the statute books for the period between July 2022 and July 2023. From July 2023 onwards, however, the offence would be prospectively restored.

Section 1(8)(d) of the JRCA explicitly provides that in deciding whether to exercise the discretion to limit the retrospective effect of a quashing order, ‘the court must have regard to ... the interests or expectations of person who have relied on the impugned act’. Despite this provision, *ASLEF* contains no discussion of the possibility of the impact of quashing on employment businesses. One possible reason may be that the court and the parties were operating under the assumption that employers had not, in practice, made use of the widened option to engage workers to cover strikes. In discussing the applicability of section 31(2A) Linden J remarked that the evidence before him tended to suggest ‘that employers would be unlikely to be able

<sup>75</sup> *Boddington v British Transport Police* [1999] 2 A.C. 143 (HL).

to make extensive use of the ability to source cover.... particularly in relation to important public services?<sup>76</sup> The effect of the 2022 measure, however, was to repeal Regulation 7 on a generalised basis, not just in relation to essential public services. It is plausible that Linden J simply assumed that the prosecutorial authorities would be unlikely to initiate proceedings. It is unclear, however, whether there is a robust evidence base for this assumption. Another possible reason is that the parties simply did not ask the High Court to exercise its discretion under s.1.

One broader lesson to be taken from *ASLEF*, accordingly, is that remedial measures in judicial review may have practical consequences for third parties, and that those interests may not align with those of the parties to the case. In considering how to exercise its remedial discretion, the High Court should not limit itself to considering the options put before it by counsel. A degree of judicial initiative may be required if thorough regard is to be had to all of the factors relevant to the question of whether and how a quashing order should be modified.

## 6. CONCLUSION

The case of *ASLEF* provides a window into the Governmental decision-making process preceding a labour law reform of considerable importance. The view is not a pleasant one. It is of a hurried procedure undertaken by Ministers prioritising being seen to be doing something over thoroughly understanding the nature of the problem the reform was directed at addressing.

*ASLEF* is a judicial review success story in the sense that the existence of the section 12 duty to consult enabled the High Court to make a quashing order removing the product of this defective process. However, as this analysis has highlighted, the principles governing judicial review as they stand would have operated very differently in the absence of such a duty. The case, furthermore, is an illustration of the importance of courts, in the exercise of their remedial discretion, not limiting themselves to the options and arguments offered by the parties, especially where third party interests are potentially in issue.

<sup>76</sup>*ASLEF* (n 8), [205].

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