

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QB DIV. ADMINISTRATIVE COURT
THE HON MR JUSTICE FOSKETT
CO4722/2009 and CO4823/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/12/2009

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE WALL
and
LORD JUSTICE MOORE-BICK

Between :

**THE ELECTORAL COMMISSION,
THE BOUNDARY COMMITTEE FOR ENGLAND**

Appellant

- and -

**(1) FOREST HEATH DISTRICT COUNCIL &
ST. EDMUNDSBURY BOROUGH COUNCIL
- (2) SUFFOLK COASTAL DISTRICT COUNCIL**

Respondents

-and-

**THE SECRETARY OF STATE FOR
COMMUNITIES AND LOCAL GOVERNMENT**

**Interested
Party**

Richard Gordon QC and Andrew Henshaw (instructed by **Treasury Solicitors**) for the
Appellant

James Findlay QC and Sophie Weller (instructed by **Sharpe Pritchard Solicitors**) for the
Respondents

Tim Buley (Instructed by **Treasury Solicitors**) for the **Interested Party**

Hearing dates : 6th and 7th October 2009

Judgment

This is the judgment of the Court

Introduction

1. The Boundary Committee for England of the Electoral Commission, who appeal from a decision of Foskett J in the Administrative Court on 10th July 2009, considered and made draft proposals for unitary local government in Suffolk at the same time as they undertook equivalent procedures for Norfolk and Devon. Their draft proposals for Norfolk and Devon were challenged in judicial review proceedings, and these claims were each heard and determined by Cranston J, who gave judgments on 28th November 2008 [2008] EWHC 2329 (Admin) (Norfolk) and on 8th January 2009 [2009] EWHC 4 (Admin) (Devon). There were appeals against these decisions determined by this court on 25th March 2009 – *R (Breckland D.C.) v The Boundary Committee* [2009] EWCA Civ 239. These judgments have a substantial bearing on the issues in the present appeal, although the main issue in the present appeal did not arise in the Norfolk or Devon cases. Foskett J's judgment in the present case is at [2009] EWHC 1682 (Admin) and it may be referred to for greater detail than this judgment need contain.
2. The process which the Boundary Committee undertook derives from Part 1 of the Local Government and Public Involvement in Health Act 2007. A summary of the provisions in sections 2 to 7 of this 2007 Act is given in paragraphs 5 to 9 of this court's *Breckland* judgment. Those paragraphs are cited verbatim in paragraph 20 of Foskett J's judgment and we will not repeat them again here. Detail apart, the essential statutory structure is as follows. The Secretary of State may invite proposals for a change to single tier local government. Upon receiving such a proposal, he may request the Boundary Committee to advise. One of the options then available to the Boundary Committee is to make an alternative proposal. Before doing so, the Boundary Committee have to publish the draft proposal for public consultation. The Secretary of State's options on receiving an alternative proposal from the Boundary Committee are to implement the original proposal with or without modification; to implement an alternative proposal made by the Boundary Committee with or without modification; or to decide to take no action.
3. The Secretary of State's requests to the Boundary Committee for advice for each of Norfolk, Devon and Suffolk were made on 6th February 2008. The Boundary Committee's draft proposals were each published in July 2008. The Secretary of State's requests had stated that she was not minded to implement the respective initiating proposals on affordability grounds. The original proposal for Suffolk had been made by Ipswich Borough Council and comprised a unitary authority for Ipswich. The Boundary Committee had been advised, and their draft proposals stated, that the terms of the legislation precluded them from making more than one alternative proposal. In the *Breckland* appeal, it was accepted that if, as Cranston J had held in the *East Devon* case, this advice was wrong, the Boundary Committee had

proceeded under a mistake of law. Counsel for the Boundary Committee further indicated in that appeal that, if the Boundary Committee had not been constrained by the advice which they had received, they would probably have made more than one alternative proposal, as the text of the draft proposals in effect implied. In the event, this court upheld Cranston J's decision on this point – see paragraphs 79 and 80 of the *Breckland* judgment. The court did not, however, quash the Norfolk or Devon draft proposals, as it was invited to do by the Claimants in those appeals, holding that the Boundary Committee's incomplete process was not inevitably broken beyond repair such that further process and consultation was not incapable of resulting in the making of a lawful proposal or proposals to the Secretary of State.

4. Other decisions of this court in the *Breckland* judgment, of relevance to the present appeal, were (a) that the Boundary Committee did not have to make a separate blanket comparative judgment between a draft alternative proposal for unitary local government and the two tier status quo, although there were some comparisons embedded in the Secretary of State's criteria (see paragraphs 90 to 93 of the judgment); and (b) that the 2007 Act did require the Boundary Committee to consider the original initiating proposals, although such consideration was not likely to be extensive since the Secretary of State had already given a strong indication that she was unlikely to decide to adopt the original proposals (see paragraph 100 of the *Breckland* judgment).

5. The main grounds of challenge in the Norfolk and Devon cases went to the adequacy of the statutory public consultation process which the Boundary Committee undertook under section 6 of the 2007 Act. The main ground of challenge in the present case concerns the earlier period during which the Boundary Committee obtained information and formulated its Suffolk draft proposals. In a sense, there were for Suffolk two such formulation periods. The first was between the Secretary of State's request for advice in February 2008 and the publication of the first draft alternative proposal for Suffolk on 7th July 2008. Shortly after that, the Norfolk and Devon claimants (but not then the Suffolk claimants) advanced their challenges and began and conducted their judicial review proceedings. As we understand it, the Suffolk draft proposal remained somewhat in suspense during the autumn of 2008 and until Cranston J's *East Devon* judgment on 8th January 2009. In the light of that judgment, the Boundary Committee then stated in February 2009 that they would undertake - unless Cranston J's judgment was reversed on appeal which, so far as is relevant, it was not - an adapted process such that they would publish for consultation such further draft alternative proposals as they might, subject to consultation, make to the Secretary of State. The Secretary of State meanwhile extended the time for such advice to 15th July 2009. The Boundary Committee accordingly published further draft alternative proposals for Suffolk on 19th March 2009. Thus, for Suffolk, a second or extended formulation stage ran to that date.

Facts

6. Ipswich Borough Council submitted its original proposal to the Secretary of State on 25th January 2007. After consultation by the Secretary of State with stakeholders and

the submission of further financial information by Ipswich, the Secretary of State concluded on 5th December 2007 that the Ipswich proposal was not likely to meet her criteria on financial grounds. The five criteria in substance became Annex A to the Secretary of State's request to the Boundary Committee for advice dated 6th February 2008.

7. The five criteria, which are elaborated in subsequent paragraphs of the Annex, are summarised in paragraph 13 and 25 and 26 of Foskett J's judgment and referred to at somewhat greater length in paragraph 12 of this court's *Breckland* judgment. The criteria, with which any proposal had to conform, included, in addition to affordability, that the proposal was supported by a broad cross-section of partners and stakeholders; and that it would provide strong, effective and accountable strategic leadership. The terms of the requirement for strategic leadership were enlarged in a passage cited in paragraph 26 of Foskett J's judgment.
8. The terms of the Secretary of State's request to the Boundary Committee for advice asked whether there could be an alternative proposal for a single tier of local government, and if so on what basis, for Ipswich and the whole or part of the surrounding Suffolk county area which was likely to have the capacity, if it were implemented, to meet the five criteria. She also asked for equivalent consideration of the same geographical areas with the addition of the whole or part of the district of Great Yarmouth, which is currently within Norfolk.
9. Annex B to the request for advice comprised statutory guidance by the Secretary of State to the Boundary Committee to which, by section 6(2) of the 2007 Act, the Boundary Committee was required to have regard. Paragraphs 5 to 12 of this Guidance are quoted in paragraph 27 of Foskett J's judgment. Paragraphs 6 to 9 of the Guidance are of central importance to this appeal and are as follows:
 - “6 The first stage in the procedures for making an alternative proposal set out in section 6(4) and (5) of the 2007 Act is for the Boundary Committee to formulate a draft alternative proposal. In deciding what steps it needs to take to do this, the Committee should have regard to, among other issues, the matters on which the Secretary of State has requested it to advise, and the dates she has specified by which the advice is to be received. In any event those steps should include the Committee having a dialogue with potentially affected local authorities about possible unitary solutions for the area concerned, and requesting local authorities as necessary to provide it, by such date as it may specify, with such information as it may reasonably require in order to formulate the alternative proposal.
 - 7 Any dialogue with, or request for information from, a local authority should not involve the authority having

to incur significant expenditure. The process of dialogue and information seeking should be proportionate to the Committee's needs for formulating such alternative proposal as it considers appropriate, having regard to the Secretary of State's request for advice. Accordingly, this process should not involve some general invitation to all potentially affected local authorities to provide their own worked up proposals with full business cases containing detailed evidence against the 5 criteria. It will be for the Committee to obtain such information as it may reasonably require to compile the necessary rationale for any draft alternative proposals that it formulates.

- 8 The Committee's formulation of any draft alternative proposal should not be a process limited to assessing and choosing proposals, or ideas, put forward by local authorities or other interested parties. Accordingly, whilst it is recognised that the local authorities concerned and others may have views on, ideas about, and seek to promote, particular unitary solutions, a draft alternative proposal made by the Committee may be, if the Committee believes this to be right, entirely different from anything that local authorities or other stakeholders have suggested or sought to promote.
- 9 The procedure that the Committee is required to follow by section 6(4) and (5) of the 2007 Act provides the opportunity for persons who may be interested in a draft alternative proposal to make representations to the Committee which it must take into account. This should ensure that all interested parties will have the opportunity to contribute to the Committee's formulation of any alternative proposal made by it to the Secretary of State. Such representations may assist the Committee to make judgements about and fully assess the merits of an alternative proposal, and hence to decide whether to make it to the Secretary of State. The volume of representations for or against a proposal should not of itself be considered to provide a definitive view of that proposal's merits."
10. Thus, although a blinkered reading of the 2007 Act alone might conceivably suggest that the Boundary Committee might be expected to formulate alternative proposals on their own without at that stage asking for the views of others, including existing local authorities, that would obviously not be a sensible way to proceed and would not have regard to the Secretary of State's Guidance. It is certainly so, and is important to our consideration of this appeal, that the 2007 Act requires publication of and public consultation about draft proposals once they are made, but does not explicitly require consultation before such proposals are published. Section 6(1) merely gives the

Boundary Committee power to request a local authority to provide relevant information – an essentially one way process. The Boundary Committee however obviously need to formulate any draft proposal and, despite their expert experience, it would scarcely be sensible to proceed to do so without making contact with appropriate organisations in the area under consideration, including existing local authorities, to find out what their views might be.

11. The Guidance refers to the necessary formulation stage. It required the Boundary Committee, in addition to requesting local authorities to provide information, to have a “dialogue” with potentially affected local authorities about possible unitary solutions (paragraph 6). Any dialogue should be proportionate and should not generate significant expenditure by inviting all potentially affected local authorities to provide expensive worked up proposals (paragraph 7). The Committee’s formulation of any draft alternative proposal was not limited to assessing and choosing proposals promoted and put to them by others. The Committee might devise and make an entirely different proposal of their own (paragraph 8). The statutory consultation process under s. 6(4) and (5) of the 2007 Act was to provide the opportunity for interested persons to make representations and contribute to the Committee’s fully informed formulation, judgment and assessment of any alternative proposal which the Committee may decide to make to the Secretary of State (paragraph 9). Thus, although “dialogue” is by definition not an entirely one-way process, its purpose was to enable the Committee to formulate one or more draft proposals; the formulation stage is not a consultation stage; and it is the statutory public consultation stage which is expected to enable local authorities and other interested persons to make representations and to contribute to the Committee’s eventual judgment.
12. Faithful to the Guidance and common sense, in February 2008, the Boundary Committee embarked upon a formulation stage and dialogue with Suffolk local authorities. The judge referred to details of this in paragraph 30 of his judgment, including a meeting with all Suffolk local authorities on 28th February 2008. The present claimants emphasise the Boundary Committee’s stated intention to be open-minded, accessible and consultative and to work co-operatively and openly with local authorities.
13. By 14th March 2008, Suffolk local authorities had identified four general concepts for consideration by the Boundary Committee. These were (i) a single unitary authority for Suffolk; (ii) an expanded Ipswich unitary authority and a second unitary authority for the rest of Suffolk; (iii) two unitary authorities for East and West Suffolk respectively; and (iv) unitary authorities for East Suffolk and West Suffolk and an expanded Ipswich unitary authority.
14. We were told that the notion of dividing local government in Suffolk between East and West Suffolk harks back to Suffolk local government as it was before 1974. There appears to be significant enduring support for that general concept or variants of it. So far as it goes, the areas of the two first claimants in the present proceedings (Forest Heath and St Edmundsbury) would be in the West of a divided county and the second claimants (Suffolk Coastal) would be in the East. Bury St Edmunds is a

substantial centre of population in the West; Ipswich (and Felixstowe) in the East. But a three way division with Ipswich as one of three unitary authorities would necessarily remove Ipswich from the Eastern authority.

15. On 18th March 2008, the Boundary Committee gave a presentation about the review process (paragraph 34 of the judge's judgment). By 11th April 2008, which was the date for the end of stage 1 of the formulation process, six of the Suffolk district or borough councils were actively supporting versions of unitary authorities for East and West Suffolk, with or without an Ipswich unitary authority. Each of the present claimant authorities had submitted such proposals individually or jointly. Each of these contained detailed arguments in support of the relevant proposal, including in particular detailed reasons why the criterion of strategic leadership would be met for an East/West split (see paragraph 35 of the judge's judgment). On 15th and 16th April 2008, the Boundary Committee discussed the concepts and identified areas which required further clarification. On 22nd April, the Boundary Committee sent a detailed questionnaire to proponents of the concepts (paragraph 36 of the judgment). This document and the responses to it by the claimants, to be sent by 9th May 2008, are significant. Although the questionnaire did not in terms spell out any provisional thinking which the Boundary Committee might then have had, it did in our view indicate to the claimants areas of potential concern relating to the proponents' concepts and gave them an opportunity to supplement the material they had provided on those areas. This, together with the process undertaken by the Boundary Committee with Suffolk local authorities in March, April and early May 2008 undoubtedly, in our view, constituted "dialogue" with the local authorities such as was envisaged by the paragraphs of the Secretary of State's Guidance to which we have referred. The judge, in our view, somewhat underplayed the significance of the questionnaire by saying in paragraph 37 of his judgment that "only two questions" were asked about strategic leadership, the perceived weakness of which became a central reason why the Boundary Committee did not pursue a draft alternative proposal for an East/West split. There were numerous other questions (covering two full closely typed pages) on other topics including all five of the Secretary of State's criteria. However that may be, on 9th May 2008, the claimant authorities and others responded to the Boundary Committee's questionnaire with detailed further material including answers to the questions relating to strategic leadership.
16. The Boundary Committee's initial view on 15th May 2008 preferred two possible proposals, neither of which comprised an East/West split. The preferred proposals were (a) an enlarged Ipswich unitary authority and a further unitary authority for the remainder of Suffolk without Lowestoft; and (b) a unitary authority for the county without Lowestoft. Being then advised, as we have said, that they could only make, and therefore consult upon, one alternative proposal, the Boundary Committee considered at a meeting on 21st May 2008 a paper which recommended that (a) above should be their draft proposal and that (b) above should be a second pattern regarded as having merit. The eventual Draft Proposal for Suffolk, published on 7th July 2008, was for an Ipswich and Felixstowe unitary authority and a Suffolk unitary authority comprising the rest of Suffolk, but excluding the Lowestoft area. Paragraph 6.25 of the Draft Proposals expressed the view that the proposed Suffolk authority would be likely to provide strong, effective and accountable strategic leadership to the majority of the county area. This was contrasted with "a number of locally-generated concepts

seeking to restore the pre-1974 distinction between East and West Suffolk” which might be perceived as imposing an artificial boundary (paragraph 6.24). The proposal at (b) above featured in the Draft Proposals as a pattern or concept having merit. The other possible proposals which local authorities and others had promoted featured as short descriptive headings with brief details of which organisations had promoted them and what they comprised. These included five versions which comprised or included an East/West split.

17. The meeting of 21st May 2008 is recorded as having discussed an East/West split (with or without Ipswich as part of East Suffolk) and identified potential problems – for the details see paragraph 41 of the judge’s judgment. The judge correctly noted (paragraph 42) that there was no explicit documentary reference to strategic leadership (although some of the recorded material might appear to touch on that rather imprecise concept). The judge said that there was no recorded indication that an East/West split would not meet the Secretary of State’s criteria.
18. The Boundary Committee did not communicate its thinking to the claimants or other organisations between 9th May 2008 and the publication of its Draft Proposals on 7th July 2008. The Committee took the view that it should not meet individual organisations during the statutory consultation period, but should meet Chief Executives and political group leaders as a group. At a presentation to the principal Suffolk authorities on 17th July 2008, the Boundary Committee said that it would consider other patterns than the two contained in the Report provided these were backed by new evidence.
19. In August 2008, during the statutory consultation period which was initially intended to run until 26th September 2008, three councils, Forest Heath, St Edmundsbury and Waveney, joined forces to promote a concept which would keep the expanded Ipswich unitary authority and divide the remainder of Suffolk between East and West unitary authorities. The three councils had differences, irrelevant to the present proceedings, as to precise boundaries, but had a common position on what they regarded as flaws in the process to date. The leaders of these councils wrote to the Boundary Committee on 5th September 2008 in terms which are quoted in paragraph 54 of the judge’s judgment, and see paragraph 55 for an excerpt from the Boundary Committee’s response. The Councils’ letter said that they would make an initial submission promoting a three way East/West/Ipswich split before the 26th September deadline. The Boundary Committee’s response said that the Boundary Committee had considered an East/West/Ipswich pattern and would take all representations into account; but was looking for further information on the questions outlined in its 7th July Report. The Boundary Committee then set about arranging meetings mainly to consider its Draft Proposal and its alternative “pattern of merit”. The three leaders asked the Committee to provide financial (affordability) information for an East/West/Ipswich split such as had been provided for the Draft Proposal and the pattern of merit. On 17th September 2008, the Boundary Committee wrote saying that it would take into account all representations it received; but in effect saying that such financial information would not be useful unless it were persuaded to alter its draft proposal to a quite different pattern.

20. On 26th September 2008, the three councils submitted a long and detailed joint proposal promoting an East/West/Ipswich split (paragraph 61 of the judgment) 11 of whose 63 pages were devoted to strategic leadership. On the same day, Suffolk Coastal submitted a 20 page response supporting an East/West/Ipswich split, addressing strategic leadership; and a response submitting that the Draft Proposal and the pattern of merit did not meet the Secretary of State's five criteria. Paragraphs 63 to 68 of the judge's judgment refer to Boundary Committee meetings in November 2008; the briefly recorded respects in which an East/West or East/West/Ipswich split had been, or were, regarded as not viable and unlikely to meet the five criteria; and the extent to which detailed consideration had been given to the joint response of the three councils.
21. On 17th December 2008, the three councils asked to meet the Boundary Committee to discuss their proposal for three unitary authorities. They made clear that they did not consider that they had been fairly treated. On the same day, they wrote to the Secretary of State saying that the Boundary Committee's process was flawed (paragraph 70 of the judgment). The essential complaint, which in substance carries through into these proceedings, was that there had been no explanation of why some form of East/West/Ipswich split had not featured in the Boundary Committee's July 2008 Draft Proposals and that there had been no meeting or public consultation on it. There was correspondence to similar effect in January 2009, leading to a pre-action protocol letter of 14th January 2009 in which Suffolk Coastal joined with the three councils. The councils had by then commissioned opinion research to determine the level of public support for various patterns including their East/West/Ipswich split.
22. Cranston J's judgment in the *East Devon* case was delivered on 8th January 2009. The Boundary Committee decided on 20th January 2009 to follow an adapted process by which the Committee would reassess concepts for unitary local government which had been submitted to it, but which had not become the single draft alternative proposal in the July 2008 report; and that it would publish as draft alternative proposals concepts which it judged would be likely to meet the five criteria – see paragraph 33 of the *Breckland* judgment and paragraphs 74 and 75 of the judge's judgment in the present case, which quotes at some length from the Boundary Committee's letter to the local authorities of 12th February 2009. The three leaders wrote on 16th February 2009 drawing attention to findings of their opinion research (paragraph 77 of the judgment).
23. The Boundary Committee met on 18th February 2009. The report to the Committee (see paragraph 78 of the judgment for extended excerpts) described support for and the Committee's then historic consideration of a three way split. The Committee had considered in May 2008 that a three unitary pattern would not on the evidence received satisfy all five of the Secretary of State's criteria; and had been concerned at its meeting on 11th November 2008 about how strategic leadership and value for money services could be offered across three unitary authorities. There had been support for a three unitary pattern from four councils (the three claimants and Waveney). There was no detailed financial information to assess affordability. The Committee would need to use its experience and judgment for this criterion. The Committee decided that a three unitary pattern would not meet the five criteria

because an East Suffolk authority, with or without Felixstowe, would be unlikely to provide strategic leadership “in that it would fail to give a coherent approach to an increasingly complex landscape of local players and partnerships”. The Further Draft Proposals were published on 19th March 2009, and it is that publication which these proceedings seek to challenge. These proposals were for (1) a Suffolk unitary authority comprising the existing county and (2) an Ipswich and Felixstowe unitary authority and a Rural Suffolk unitary authority comprising the rest of the county.

The judge’s judgment

24. The judge summarised the basis of the claimants’ challenge in paragraph 85 of his judgment as follows:

“The matter is put in a number of ways, but the essential proposition can be summarised quite shortly. Mr Findlay submits that the East/West/Ipswich concept has been unfairly excluded from being published as a possible candidate for recommendation by the Boundary Committee to the Secretary of State because (a) for the whole of the time until 12 February 2009 (see paragraph 75 above) the Committee had been working on the erroneous basis that only one proposal could be published; (b) throughout that time it did not engage in a fit and proper dialogue about the East/West/Ipswich concept and any reservations it had about it; and (c) when it regarded itself as free from the “one proposal” constraint, it failed properly and fairly to evaluate the concept and engage in any dialogue about it. It is argued that at no stage has the Committee afforded the proponents of the concept the opportunity to address even the gist of the apparent reservations it had about its ability to meet the Secretary of State’s criteria.”

As the judge indicated in paragraph 87, a central feature of the challenge is that the claimants were trying to work within the statutory process, but had never been told why the general concept they support was not apparently worthy of consideration.

25. The judge considered first whether Cranston J’s decision that it was open to the Boundary Committee to publish more than one draft proposal had or may have had an impact on what happened in this case. The judge found it difficult to see how it could not have affected the decision-making process. If the Committee believed that they could only choose one option, they were bound to choose what they regarded as the best option. Reference to paragraph 59 of Mr Gall’s witness statement of 5th December 2008 (before Cranston J’s judgment), which the judge quoted in paragraph 89 of his judgment, appeared to indicate that there was perceived to be no requirement to consider whether any of the other concepts met the Secretary of State’s criteria. It seemed clear that the approach did change after Cranston J’s judgment. The letter of 12th February 2009 suggested that all proposals which met the five criteria would be

published for consultation. A letter of 19th February was not quite so explicit, but none the less gave essentially the same message.

26. We say in parenthesis that none of us reads the Committee's letters of 12th and 19th February 2009 (paragraphs 75 and 81 of the judge's judgment) as necessarily holding out that all proposals which met the five criteria would be published for consultation, although there may have been a more general indication to that effect when the adapted process was announced after Cranston J's *East Devon* judgment. That was however in the context of July 2008 Draft Proposals for all three counties which had advanced a single draft proposal for each county and, for each county, a second proposal seen as having merit. The second proposal for Suffolk was not a three unitary split of the county. Neither the 2007 Act nor, in our view, the Secretary of State's request for advice, require the Boundary Committee to publish for public consultation every draft proposal which may meet the five criteria. The statutory requirement in s. 6(4) of the 2007 Act is to the effect that the Boundary Committee cannot make an alternative proposal to the Secretary of State which they have not duly published for public consultation. However that may be, there is no claim for consideration by this court based on legitimate expectation. Further, whatever may be said about their processes, the Boundary Committee did in fact decide in February 2009 before publishing their Further Draft Proposals for Suffolk that a three unitary authorities split was unlikely to meet the Secretary of State's criteria. Nor are we entirely clear of the impact or eventual relevance of the judge's conclusion that the Committee's erroneous belief that they could only publish one alternative proposal must have affected their decision-making process. As a matter of historical fact, no doubt it did. But it does not follow that the Committee's decisions on 18th February 2009, which resulted in the publication of the Further Draft Proposals in March 2009, were unfair or otherwise amenable to judicial review, because, at an earlier stage and until 8th January 2009, they were proceeding under a mistaken view that they could only publish one alternative proposal.
27. The judge expressed a main part of the claimants' case, as advanced by Mr James Findlay QC on their behalf, as that the Boundary Committee proceeded to assess the East/West/Ipswich concept without any dialogue with the claimants about matters upon which, as it now appears, reservations were entertained. The Committee, eventually at least, set itself the task of identifying all the proposals which could meet the criteria and was obliged to enter into a dialogue with affected local authorities to discuss with them the Committee's reasons, if they were minded not to publish a proposal for consultation. Mr Richard Gordon QC, for the Boundary Committee, had submitted that this represented a misunderstanding of the statutory scheme and the Guidance.
28. The judge rejected Mr Gordon's submission in paragraph 95 of his judgment as follows:
- "I am unable to accept this. Plainly, the Guidance is not to be construed like a statute, but any normal understanding of the two expressions 'dialogue' and 'information-gathering' does involve a sense of two different processes. There may, of

course, be an overlap, particularly in the sense that information may be conveyed within the context of a dialogue. But a dialogue connotes a bilateral exchange of thoughts or ideas and not merely the provision of factual information. That proposition is derived from the ordinary understanding of language. But it is reinforced by the context in which the two expressions operate here. It cannot surely have been intended by the Secretary of State's Guidance that a local authority could only provide what might be termed "hard" factual information to the Committee at the pre-consultation stage. It may well be that the intention was not to invite "worked up examples with full business cases containing detailed evidence against the 5 criteria", but where an apparently thought-through proposal is advanced by a local authority, whether in relatively summary form or at a more advanced stage of presentation, it defies common sense for there not to be a discussion or dialogue about it if the objective is to decide, in a situation where there may be doubt, whether a particular criterion of the Secretary of State is likely to be met. The nature of the dialogue may, of course, vary depending on the nature of the proposal being advanced and the status of the party advancing it. But any self-denying ordinance on the part of the Committee so far as true discussion and true communication of views and ideas is concerned must, I would have said, be wrong. Equally, there must be true engagement with the issues: it would not, in my view, be achieved by the Committee simply receiving the representations, not engaging them and not discussing any doubts that may arise and simply saying that an open mind is being kept."

29. The judge then referred to submissions about the resource implications of the Boundary Committee having to engage in pre-consultation dialogue of the kind which the judge described. It was important not to be carried away by fears and matters of that nature. "This case", he said "concerns how the Boundary Committee should respond, at the pre-consultation stage, to apparently well-articulated and well-supported proposals by reputable local authorities", representing between them approximately 50% of the population of Suffolk. That did not give the authorities the right to dictate the outcome of the statutory process. But they did have the right to have their proposals fully and properly considered and evaluated at the pre-consultation stage. This included inviting assistance through dialogue on areas where doubts existed about whether the proposal met any or all of the Secretary of State's criteria.

30. The judge's conclusion was that the Boundary Committee should have discussed with the claimants any reservations which it had about whether the concepts advanced met the Secretary of State's criteria before publishing the Draft Proposals in July 2008 and the Further Draft Proposals in March 2009. In the result the judge made an order quashing the Boundary Committee's Further Draft Proposals. He gave them permission to appeal to this court.

31. There are, we think, two short but important questions raised by this appeal. These are, first, whether, in the statutory context taken as a whole, the Secretary of State's Guidance and its use of the word "dialogue" obliged the Boundary Committee to debate with their proponents perceived difficulties with schemes which were proposed during the pre-consultation stage, when the Boundary Committee were formulating their own draft alternative proposals; and second, if not, whether it was unfair for the Boundary Committee to proceed as they did. The Grounds of Appeal are variously expressed versions of the proposition that the judge decided these issues wrongly.
32. A third insubstantial issue arises by a Respondent's Notice dated 14th August 2009. The original claim for judicial review had a third ground of challenge which the judge did not address, that is that the Boundary Committee's approach to the status quo was in error and inconsistent with this court's *Breckland* judgment – see paragraphs 90 to 93 of that judgment. The issue is insubstantial because, unlike in each of the Norfolk and Devon cases, as Mr Findlay acknowledged, no party now before this court advocates retention of the status quo for Suffolk. Mr Findlay rightly did not press this as a persuasive reason for upholding the judge's decision.

“Dialogue”

33. Leaving to one side for the moment the second issue relating to the general concept and requirement of fairness, in our judgment the judge's conclusion cannot properly be derived in this statutory context from the use of the word "dialogue" in the Secretary of State's Guidance. We have set out the relevant paragraphs from the Guidance in paragraph 9 above and summarised our view of its import in paragraphs 10 and 11. We agree with Mr Gordon that the judge accorded the word "dialogue" a weight and significance which in its full context it cannot bear. The context was that the Secretary of State had received pursuant to the statute a proposal for unitary local government, which she was not minded to implement. She had asked the Boundary Committee for advice whether there could be one or more alternative proposals for Suffolk which were likely to meet the five criteria and which the Committee might make to the Secretary of State under the statutory powers arising in those circumstances. Any such proposal needed to be formulated, for which purpose the Boundary Committee should naturally seek the views of interested local authorities. Seeking their views itself constitutes a dialogue – two parties talking to each other – and that word does not extend in its context to the Boundary Committee having to offer to the proponents of possible proposals for further comment or submission the Committee's thinking which would lead them to publishing one or more draft proposals for public consultation. The formulation and publishing of draft alternative proposals is the prelude to, not the product of, statutory consultation. The weight given by the judge to the word "dialogue" is in the nature of grafting onto the statutory consultation a pre-consultation consultation obligation. We agree with Mr Gordon that the Guidance did not require the Boundary Committee to discuss with local authorities any reservations it might have as to whether proposals which they might or might not make were likely to meet the criteria. Its task was rather to hold such discussion and seek such information as it reasonably required in order to formulate "such alternative proposals as it considers appropriate" (paragraph 7 of the

Guidance). The Boundary Committee were not obliged to limit themselves to proposals put forward by local authorities.

34. As this court said in paragraph 40 of its *Breckland* judgments, the critical parts of section 6(4) of the 2007 Act are the requirement to publish a draft of an alternative proposal and the requirement to enable persons who may be interested to be informed of the draft proposal so that they may make representations about it. It was necessary to publish, not just what is proposed by way of structural change, but also a summary of the reasons why that change is proposed and in particular why the proposed change was considered to meet the Secretary of State's criteria. That was said of the statutory public consultation process and with reference to the alternative proposal or proposals which the Boundary Committee were thinking of making to the Secretary of State. The statutory structure does not extend back to the formulation stage and does not require the Boundary Committee to consult at that stage about proposals which they are not thinking of taking forward. Our reading of the Guidance does not import that requirement either.
35. Mr Gordon accepts that the Boundary Committee should give consideration to any of the various concepts which local authorities or others may put forward. But it does not follow, he submits, that the Committee are obliged to treat any such concept as if they were all draft proposals requiring consultation. Nor does it follow that the Committee are required as part of any "dialogue" to give reasons for not adopting any such concepts as draft alternative proposals. Paragraph 8 of the Guidance states that the Committee's formulation of any draft alternative proposal should not be limited to assessing and choosing proposals put forward by others. A draft proposal may be entirely different from anything suggested to them. Their function is to form a judgment as to what they regard as the most promising alternative proposal or proposals and to consult in the way prescribed by section 6 of the 2007 Act on that or those draft proposals.
36. There are, we think, underlying strands of general fairness in the judge's discussion in paragraph 95 of his judgment, which we discuss later in this judgment. We agree, of course, that "dialogue" and "information gathering" are not synonymous. But paragraph 6 of the Guidance refers to no more than "a dialogue ... about possible unitary solutions"; and, as Mr Gordon points out, paragraph 7 describes "the process of dialogue and information seeking" as being directed towards "the Committee's needs for formulating such alternative proposal as it considers appropriate". The Boundary Committee were not, we think, obliged, as the judge may have thought, to consider and decide whether every proposal advanced met each or all of the five criteria. They were not, as we have indicated, obliged to publish for public consultation every proposal which might meet the five criteria. They were certainly not obliged to publish for public consultation any proposal which they decided was not likely to meet one or more of the five criteria, which was their view about the East/West/Ipswich split in February and March 2009. If, as we think, to put it shortly, "dialogue" does not extend to consultation during the pre-publication formulation stage, there is no doubt but that the Boundary Committee had a dialogue with the Suffolk local authorities. The Committee explained the process they were engaged on. They invited and received suggested schemes for unitary local government. They

asked a long series of questions about the proposed schemes (see the request of 22nd April 2008) to which the claimants and Waveney responded and so forth.

Duty of Fairness

37. The claimants' main grounds of claim relied on a duty on the Boundary Committee of fairness. There was no dispute but that the Boundary Committee had to act fairly and Mr Findlay says that the question of fairness has to be assessed over the whole process. Of the two main grounds of claim, the first contended that the Boundary Committee acted unfairly in stages leading up to the Draft Alternative Proposals in July 2008 and then leading to the Further Draft Alternative Proposals in March 2009. The second ground contended that the published Draft Alternative Proposals were in a material respect incomplete, so that the statutory public consultation process was unfair. Each of these contentions is a manifestation at different stages of the whole process of essentially the same complaint. As will appear, although many pages of written submission by all three parties addressed details of the historical process as it unfolded, the central point underpinning both these grounds of claim, as put by Mr Findlay in his oral submissions, is capable of being shortly expressed.
38. Those acting pursuant to statutory procedures are obliged to act fairly, unless perhaps exceptionally Parliament has specifically or by necessary implication enacted otherwise. Those who make decisions pursuant to statutory procedures must act in good faith and listen to both sides – see for both these propositions Sedley LJ in *R v Secretary of State for Home Department ex parte BAPIO Action Limited* [2007] EWCA Civ 1139 at paragraph 35 and the authorities there cited. The Boundary Committee were not of course making decisions, other than those incidental to their advisory function. The decisions about changes in local government structure in Suffolk were for the Secretary of State at a later stage. Nevertheless the Boundary Committee were obliged to act fairly in their performance of the advisory function required by the statute and derivatively by the Secretary of State.
39. What is fair depends on the statutory structure and all the particular attendant circumstances. It is essentially an intuitive judgment – see Lord Mustill in *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 at 560D. Standards of fairness are not immutable and principles of fairness are not to be applied by rote identically in every situation. Fairness depends on all aspects of the context of the decision, essential features of which are the statutory provisions and the shape of the legal and administrative system under and within which the Boundary Committee is operating. Fairness will very often require a person who may be affected by a decision to have an opportunity to make representations, before the decision with a view to producing a favourable result, or after the decision with a view to procuring its modification. Fairness will very often require that a person is informed of the gist of the case he has to answer. *Ex parte Doody* was concerned with processes leading to a decision by the Secretary of State about the period which a prisoner serving a mandatory life sentence should serve before the first review of the date on which he might be released on licence. The statutory regime in the present case does not require the Boundary Committee to make any determinative decision.

They have to decide whether to give advice, whether to publish one or more draft alternative proposals, and, if so, which draft alternative proposal or proposals to publish.

40. In *Interbrew v The Competition Commission* [2001] EWHC Admin 367, a report of the Competition Commission that the takeover of a brewing company could be expected to operate against the public interest was challenged on grounds that the procedure adopted by the Commission was unfair. Moses J said at paragraph 69 that there could be no doubt but that the Commission owed a duty of fairness; and that the content of the duty would vary from case to case, but would generally require the decision-maker to identify in advance areas which were causing him concern in reaching the decision in question. Any person who might be adversely affected by a decision should be placed in a position where he may effectively make his views known, at least as regards the matters taken into account by the Commission as the basis for the decision. Again, the Boundary Committee was not making a decision at least of the kind under consideration in the *Interbrew* case.
41. Mr Findlay referred us to *Abbey Mine Ltd v the Coal Authority* [2008] EWCA Civ 353, a case where the authority had decided under statutory power to offer an underground coal mining licence and demise of coal to one bidder rather than another. The unsuccessful bidder challenged the decision on grounds of unfairness because the authority had not disclosed the successful application to the unsuccessful bidder. Laws LJ concluded at paragraph 34 that the applicant was entitled to be told the decision-makers concern against his own case, but not the details of his rival's case. He had said at paragraph 32 that the decision-making body was concerned to arrive at a result in the public interest in conformity with the statutory obligations. If every applicant saw every other's bid and was entitled to comment and challenge and criticise, the resulting prolongation and complexity of the decision-making process could scarcely be exaggerated. There are loose analogies here with the present case. Since the Boundary Committee are not a decision-maker but an advisor, the concept of a case which a local authority had to meet is not so apt. A submission based on prolongation and complexity did not impress Foskett J, but prolongation and complexity there would nevertheless be, if the Boundary Committee were obliged at the formulation stage to explain to every proponent of a scheme which they were not minded to publish as a draft alternative proposal why they were minded so to proceed.
42. Laws LJ quoted in the *Abbey Mine* case paragraphs 28 and 29 of the judgment of Lord Woolf CJ in *Asha Foundation v the Millennium Commission* [2003] EWCA Civ 88, a case in which the primary issue was the extent of The Millennium Commission's obligation to give reasons for its decision to refuse an application for a capital grant. Both main parties in the present appeal referred us to these paragraphs in which Lord Woolf said this:

“28. One of the issues that the Commission had to decide in this case was the question of eligibility. If the Commission had concluded that the application fell down because it did not meet the eligibility criteria then in my judgment it would be necessary for the Commission to point out in their decision why

the application did not comply with the eligibility criteria. However, when considering the question of whether or not to grant an application which is eligible, differing situations can exist. There may be situations where the Commission conclude: “We reject the application, although it is eligible, on a particular ground.” If that is the basis for the decision, then the Commission must say what the particular ground is. Certainly this is the case if they choose to make a promise, as was made in this case.

29. But there are other kinds of decisions of the Commission where a realistic assessment of what is appropriate dictates a different conclusion. When the Commission is engaged in assessing the qualities of the different applications which were before them in competition with each other, the difficulties which would be involved in giving detailed reasons become clear. First, the preference for a particular application may not be the same in the case of each commissioner. Secondly, in order to evaluate any reasons that are given for preferring one application to another, the full nature and detail of both applications has to be known. If the Commission were to be required to do what Mr Gordon submits was their obligation here, the Commission would have had to set out in detail each commissioner’s views in relation to each of the applications and to provide the background material to Asha so that they could assess whether those conclusions were appropriate. This would be an undue burden upon any commission. It would make their task almost impossible. It certainly would be in my judgment impracticable as a matter of good administration.”

43. Mr Findlay relies on paragraph 28, Mr Gordon on paragraph 29. The basis of Mr Gordon’s submission is obvious. Equally Mr Findlay submits that one or other of Lord Woolf’s situations essentially applies to this case. Either the Boundary Committee did not publish the East/West/Ipswich split as a draft alternative proposal because they considered that it did not meet the Secretary of State’s criteria (as now appears to be the case); or they decided that it did meet the criteria but decided not to publish it upon grounds the gist of which they should have explained.
44. Mr Findlay further submits that in appropriate circumstances parties should be given the opportunity of dealing with an issue before a decision is taken. He refers to *R (Edwards) v Environment Agency* [2006] EWCA Civ 877 at paragraphs 93, 94 and 103 and the cases there cited, in particular *R v Secretary of State for Health ex parte United States Tobacco International* [1992] 1 QB 353 at 369H-372H and 376F-G. *Edwards* concerned an application to quash a conditional permit granted by the Environment Agency for the continued operation of a cement plant including, as a new proposal, the burning of waste tyres as a partial substitute for conventional fuel. One question addressed in the judgment of Auld LJ was whether fairness in decision-making subject to public consultation requires the internal workings of the decision-maker also to be disclosed as part of the consultation. The answer given by the House

of Lords in *Bushell v Secretary of State for the Environment* [1981] AC 75 was generally not, and Auld LJ quoted in paragraph 91 from the speech of Lord Diplock in *Bushell* at pages 95 and 102. In paragraph 93, Auld LJ quoted again from Lord Diplock in *Bushell* at page 96 to the effect that fairness “also requires that objectors should be given sufficient information about the reasons relied on by the department as justifying the draft scheme to enable them to challenge the accuracy of any facts and the validity of any arguments on which the departmental reasons are based”.

45. Both main parties to this appeal rely on parts of the judgment of Maurice Kay J in *R (Medway Council and others) v Secretary of State for Transport* [2002] EWHC 2516 Admin. In July 2002 the Department of Transport published a consultation document about the future development of Air Transport in the South East of the United Kingdom. The consultation was to be followed by a White Paper in 2003 concerned with planning for extra airport capacity over the next 30 years. The consultation document described various possibilities for expansion at Heathrow, Stansted and Luton and also included a possible new airport at Cliffe in North Kent. A new runway at Gatwick was not included. The reasons for this exclusion included that an agreement in 1979 with West Sussex County Council, which the government did not intend to overturn, would prevent a new runway at Gatwick being opened before about 2024. Various claimants with interests in Kent and Essex sought to challenge the exclusion of Gatwick from the consultation. The challenge was on various grounds, some of which succeeded and some of which failed. Two grounds, relevant for present purposes were (a) that the Secretary of State had a closed mind about Gatwick and (b) that the intended consultation procedure was unfair. Of the first of these Maurice Kay J said at paragraph 26:

“In my judgment, subject to other issues such as those raised by the other grounds of challenge in this case, the Secretary of State was entitled to proceed in that way. Other things being equal, it was permissible for him to narrow the range of options within which he would consult and eventually decide. Consultation is not negotiation. It is a process within which a decision-maker, at a formative stage in the decision-making process, invites representations on one or more possible courses of action. In the words of Lord Woolf MR in *ex parte Coughlan* [2001] QB 213 at para 112, the decision-maker’s obligation

“is to let those who have potential interest in the subject-matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.”

I conclude that, absent any other vitiating feature, the Secretary of State did not act unlawfully simply by defining the parameters so as to exclude Gatwick or by holding to that position. That was not an unlawful fettering of his discretion or closing of his mind.”

46. Of the second of these two grounds of challenge, Maurice Kay J said that it is axiomatic that consultation, whether it is a matter of obligation or undertaken voluntarily, requires fairness. He then said at paragraphs 29 to 32:

“What, then, is the unfairness which is alleged in the present case? It is submitted that, one way or another, Gatwick will have to be considered in the future and that is obvious. For example, in the event of a future planning application in relation to Cliffe, Medway/Kent, as objectors, would seek to promote Gatwick as an alternative but, at that stage, the metaphorical dice would be loaded against them. They would be arguing against Government policy enshrined in the White Paper.

It would be “very difficult if not impossible” to persuade an Inspector, or even more so, the Government itself, to go against such weighty policy. On the other hand, if they were enabled to make their representations in the course of the present consultation process that would provide the only opportunity for them to be considered on a level playing field. Similar arguments are advanced on behalf of Mead/Fossett in relation to Stansted and, more obliquely, on behalf of Essex. In a nutshell, therefore, the alleged unfairness is in being prevented from making representations about Gatwick at a time and stage when the consideration of such representations is not constrained by adopted Government policy.

It cannot be doubted that the Claimants are disadvantaged by the exclusion of Gatwick options from consideration in the consultation process. The question is whether that process is tainted with unfairness as a result of that exclusion.

... It is common ground that the issue of Gatwick will probably re-emerge, if only as a proffered alternative solution. The question really becomes this: knowing that the Claimants will probably and legitimately wish to advocate Gatwick as an alternative solution at a later stage in the decision-making process, is it procedurally unfair of the Secretary of State to operate the consultation process in such a way that the Claimants lose their only real opportunity to present their case on Gatwick without there being in place a Government policy which, realistically, will present them with an insurmountable hurdle? In my judgment, when one considers the decision-making process as a whole, the answer is that to operate the consultation process in that way is indeed procedurally unfair. Accordingly, this ground of challenge succeeds.”

47. The facts of the *Medway Council* case are not closely analogous to those in the present appeal. Mr Gordon does, however, derive some support from the first of these passages (paragraph 26) for the submission that it was part of the statutory function of

the Boundary Committee to narrow the range of options which they would publish for public consultation. Mr Findlay derives some support from the second of the passages for the proposition, inherent in the present claimants' second ground of challenge, that, if the East/West/Ipswich split was not to be published as a draft alternative proposal, they should at least be told the gist of why. It was a credible, well and fully presented, well supported concept promoted by reputable representative authorities which ought not to be discarded without explanation. The claimants would then be able to make targeted representations in the course of the consultation to the effect that the East/West/Ipswich split was preferable to either of the draft alternative proposals and that the Boundary Committee's reasons for discarding it were not persuasive or correct.

48. The claimants' case that they have not been fairly treated is thus that at no stage throughout the whole process would the three claimant councils or others who supported the East/West/Ipswich split have been told the basis or gist of why their proposals were not favourably considered nor published as draft alternative proposals. They now know only because of orders for disclosure in the proceedings. If the challenge fails, they would not have had any real or informed opportunity to address the Boundary Committee's concerns and reasons for rejecting all of the East/West/Ipswich variants. This was unfair, both at the pre-consultation and the consultation stages. Although the Boundary Committee has said that its mind remains open, the claimants' right to make representations would be worthless if they had to guess. The claimants say that, in the pre-consultation stage the Boundary Committee had a duty to undertake a dialogue which would include telling the claimants the gist of the Boundary Committee's concerns. This boiled down in Mr Findlay's oral submission, now that the Boundary Committee's main reasons are known, to no more than telling the claimants that the Boundary Committee considered that the East/West/Ipswich split was unlikely to have the capacity to meet the criterion of strategic leadership in East Suffolk. Mr Findlay emphasises the status of the claimants and the level of support for an East/West/Ipswich split; the role of the Boundary Committee as an impartial and independent body giving advice which aimed to be "open minded, accessible and consultative" and open to receiving submissions on all concepts; the requirement in the Secretary of State's Guidance to enter into a dialogue; and the contrast with the Secretary of State's earlier approach to the initial Ipswich proposal. He says that the Boundary Committee would not have been hindered or prejudiced by disclosing the gist of their concerns. He emphasises the Boundary Committee's refusals to meet with individual authorities or to discuss proposals other than those which had featured as the draft alternative proposal or the pattern of merit in the July 2008 Report. The Boundary Committee did not, he says, respond to the significant documentary submissions made by the claimants after July 2008. Specific requests for meetings or reasons were rejected.

49. The second ground of challenge which the judge did not decide, but which the claimants seek to rely on if the first ground fails, is that the consultation was unfair because some indication should have been given in the March 2009 Further Draft Alternative Proposals of why the East/West/Ipswich split had not been included as a draft alternative proposal. Mr Findlay relies on the well known paragraph 108 in Lord Woolf CJ's judgment in *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 referred to by this court in paragraph 35 of its *Breckland*

judgment. This includes that consultation must be undertaken at a time when proposals are at a formative stage; and must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response. Fairness in this context includes operating a consultation in such a way as to allow a person interested a real opportunity to present its case without there being in place a recommendation of the Boundary Committee that will present a very difficult hurdle to overcome.

50. Mr Gordon submitted that ground 2 of the challenge was a make-weight. Mr Tim Buley, for the Secretary of State, submitted that this challenge did not raise any issue which is different in character from those raised under the claimants' ground 1 and that the points relied on are mainly a repetition of points already made.

Discussion

51. Mr Gordon is, in our view, correct to emphasise the structure of the statutory scheme. Following the Secretary of State's request for advice, there was a formulation stage during which the Boundary Committee were to gather information and enter into a dialogue with interested local authorities. The purpose of the dialogue and the Boundary Committee's considerations generally was to enable them to formulate one or more draft alternative proposals which, subject to consultation, they were minded to make to the Secretary of State. Such proposals had to be reasonably likely to meet the Secretary of State's five criteria. If they were not likely to meet the criteria, they were not candidates for becoming draft alternative proposals. We have already discussed the import and extent of the "dialogue" to which we consider the judge gave undue weight. As to fairness, the process was one of formulation, not consultation. If, as we consider, there was adequate "dialogue", there was no obligation derived from fairness to explain to local authorities in advance of the publication of the draft alternative proposals the internal thinking which led to those draft alternative proposals being made. The local authorities knew the nature of the task upon which the Boundary Committee was engaged. They knew the criteria which the Boundary Committee were obliged to apply. By February 2009 they had had, and had taken, ample opportunity to make and support their cases for an East/West/Ipswich split. In particular, they knew that there was a criterion relating to strategic leadership, and they had been asked questions relating to it. They had responded to those questions and later made further submissions on that and other topics. In short, they had made their case, and we do not consider that the concepts of fairness or "dialogue" required the Boundary Committee to say how they were likely to judge that case with others in advance of the publication of the draft alternative proposals. The Boundary Committee were not at that stage deciding anything and they were not, in our view, obliged to publish for consultation as draft alternative proposals schemes which in their view were not likely to meet one or more of the Secretary of State's criteria.
52. As to the second ground of appeal relating to the consultation stage, the statutory structure following the publication of draft alternative proposals is also important. This includes (a) that the Boundary Committee must take into account any representations made to them within the period of the consultation, and (b) that later,

if and when the Boundary Committee come to make one or more alternative proposals to the Secretary of State, there is a period during which representations may be made to the Secretary of State. A local authority whose favoured concept has not been adopted by the Boundary Committee as a draft alternative proposal may want, and are entitled, to make representations to the effect that their concept is preferable to either or any of those proposed as draft alternatives by the Boundary Committee.

53. In our judgment, the purpose of the consultation stage in this statutory structure is not to give those whose concepts have not been published for consultation an opportunity to improve them, but to obtain views about the proposals that the Boundary Committee are considering putting forward. Those who have proposed different concepts are able to make representations to the effect that their concept or concepts have greater merit than any of those published for consultation by the Boundary Committee. The Boundary Committee must address such representations with an open mind, and may indeed be persuaded that a different concept is preferable. They would then, no doubt, have to arrange with the Secretary of State to publish that concept as a draft alternative proposal for consultation. At the consultation stage, the Boundary Committee's obligation is to let interested parties know in clear terms what the proposal or proposals are and exactly why they are under positive consideration, telling them enough to enable them to make an intelligent response – see *Coughlan* at paragraph 112. We do not consider that they are obliged to explain in the consultation document why concepts which they have decided not to publish do not appear there as draft alternative proposals. As we have said, the Boundary Committee are not obliged to publish for consultation every concept which they consider meets the Secretary of State's criteria; and the statutory structure, taken as a whole, requires the Boundary Committee to explain what they are proposing, but not to explain in detail what they are not proposing, and why not. To an extent, this may mean that those who have vigorously, but unsuccessfully, promoted a concept in detail at the formulation stage may have little new to say at the consultation stage. But that does not, in our view, render the consultation process, much less the whole procedure, unfair as a matter of substance or procedure.
54. As Maurice Kay J said in the *Medway* case, consultation is not negotiation. He further said of the consultation process under consideration in that case that, other things being equal, it was permissible for the Secretary of State to narrow the range of options within which he would consult and eventually decide. The present statutory structure and the Secretary of State's request for advice positively requires the Boundary Committee to make choices which in a sense narrow the range of options. But the narrowing is not necessarily exclusive because (a) the Boundary Committee may be persuaded by responses to the consultation not to carry forward as alternative proposals any of those which they have published; and (b) the Secretary of State may decide not to implement any proposal which the Boundary Committee has made.
55. As to Maurice Kay J's decision in the *Medway* case that the intended consultation procedure was unfair, we do not consider that the present case is comparable. The decision in the *Medway* case was that the process was procedurally unfair because, taking the decision-making process as a whole, the Secretary of State had gone about it in a way which prevented Medway from promoting an expansion of Gatwick in

preference to a new airport at Cliffe before the option was effectively precluded by a policy decision in the White Paper. In the *Medway* case, no formulation stage preceded the consultation. The Secretary of State was consulting in general terms, and had formulated certain options on the basis of a prior policy decision to exclude Gatwick. That was held to be procedurally unfair, because it effectively prevented those who opposed other options from arguing, before the planning stage when it would have been too late, that an expansion of Gatwick would be preferable. In the present case, there is a statutory procedure with several stages, including a formulation stage and a consultation stage. The formulation stage includes “dialogue”, in the course of which local authorities can put forward proposals for consideration by the Boundary Committee. We have decided that the present claimants had a fair opportunity to contribute at this stage. The consultation stage is designed to enable interested persons to make representations on the proposals formulated by the Boundary Committee. Although that inevitably narrows its scope, that is inherent in the statutory scheme. It does not prevent the claimants or others from continuing to promote their concepts as being preferable to those upon which the Boundary Committee is consulting. The claimants are not, in our view, unfairly hindered or prevented from doing so for want of what Mr Findlay acknowledges is a single sentence of explanation by the Boundary Committee why the East/West/Ipswich split was not considered to be a candidate even for becoming an alternative proposal.

Conclusion

56. For these reasons, we will allow the appeal and set aside the judge’s order.