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

CLAIM NO

B E T W E E N:

THE PRESS STANDARDS BOARD OF FINANCE

Claimant

-and-

(1) THE SECRETARY OF STATE FOR CULTURE, MEDIA AND SPORT

(2) THE RT. HON. NICK CLEGG MP, LORD PRESIDENT OF THE COUNCIL

(3) THE RT. HON. DANNY ALEXANDER MP

(4) THE RT. HON. CHRIS GRAYLING MP

(5) THE RT. HON. MICHAEL MOORE MP

(6) THE RT. HON. DOMINIC GRIEVE QC MP

(7) THE RT. HON. FRANCIS MAUDE MP

(8) THE RT. HON. LORD WALLACE OF TANKERNESS QC, PC

(9) THE RT. HON. LORD MCNALLY OF BLACKPOOL, PC

Defendants

DETAILED STATEMENT OF FACTS AND GROUNDS

INTRODUCTION

The context and nature of the claim

1. This challenge by way of an application for permission to seek judicial review is made in the context of a wholly unfair and irrational process leading to a recommendation and decision that has the potential profoundly to affect the nature of press regulation in this country.

2. Specifically it concerns the establishment of a body to oversee the regulation of the press. In his report published in November 2012, Lord Justice Leveson recommended the creation of two bodies. The first body would be a press regulator. Leveson LJ made recommendations as to its characteristics. The second body would recognise the regulator as having those characteristics.

3. The Leveson Report (which made a number of wider recommendations) was published in a politically-charged climate that is too well known to require elaboration here. However, it is clear that Lord Justice Leveson was acutely concerned that the climate in which his report came to be published should not in any way lead to any erosion in the freedom of the press. Importantly, too, the recommendations made by Lord Justice Leveson were by no means 'cut and dried' in terms of how they might best be implemented.

4. It was, however, the Government (rather than Lord Justice Leveson) which proposed to create a chartered body to fulfil the recognition role. It published a draft of a proposed Royal Charter ('**the Government Charter**') on 18 March 2013. The Claimant ('**Pressbof**') did not regard the Government's proposal as suitable, principally because of a core concern that it did not guarantee the freedom of the press from executive interference. The Claimant therefore petitioned the Privy Council for its own draft charter for a recognition body ('**the Press Charter**') on 30 April 2013.

5. Between 30 April 2013 and 9 October 2013 the Claimant's charter was under consideration by the Defendants. The Government rightly took the view that it was not possible to put the Government Charter to the Privy Council until a decision had been taken on the Press Charter. In appearance, consideration of the Claimant's charter was initially undertaken by the Department for Culture, Media and Sport ('**DCMS**') and latterly by a committee of the Privy Council ('**the Privy Council Committee**'/'**the Committe**', comprising all but the Second of the Defendants). In fact, while it is submitted that the Defendants have yet to comply with their duty of candour, the documentation available to the Claimant suggests that DCMS (in substance) controlled the process throughout. The Claimant's case is that this consideration was subject to a requirement of fairness, legality and rationality and that (other legal analyses aside) in view of the subject matter under consideration, the requirement of fairness was onerous. The requirements of fairness, legality and rationality were not satisfied. Indeed, the process followed was startlingly unfair, for reasons that are set out more fully below.

6. The context in which the Press Charter was conceived, and the Petition submitted, are set out in some detail in the witness statement of Lord Black of Brentwood ('**Black w/s**') and are not repeated here.

7. While the claim is, in terms of legal analysis, focused on process, it is respectfully submitted that it raises constitutional issues of particular importance. In view of the role of the press in our un-codified UK constitutional arrangements and the importance of a free press to those arrangements, questions relating to press regulation in the UK are obviously highly significant.

8. Any decision which may have consequences in terms of press regulation – in particular, which may herald executive involvement in press regulation – requires the most careful, fair and transparent process for consideration. This is the inevitable consequence not only of the significant role played by the press but also because the core imperative claimed to drive forward the Government's actions in the present context was the need for the charter that was ultimately accepted to be one that was supported by press and public alike.

9. For the purposes of the present challenge it is not necessary for the Claimant to be 'right' about its concerns. There may, indeed, be no 'right' or 'wrong' answer to the underlying issues such as how best to give effect to Lord Justice Leveson's recommendations or the potential for greater executive control over the press. The key point is that the concerns sought to be raised by the Claimant were serious and deserved a fair, lawful and transparent process in terms of the consideration of their charter.

10. Taking as the relevant starting point the importance of a careful, fair and transparent process for consideration of the Press Charter (as the competing charter to that proposed by the Government) four key features appear from examination of the process that took place in fact by reference to its explanation in the proposed Defendants' response to the pre-action protocol letter ('**the response letter**') sent prior to the lodging of these proceedings and to the (limited) contemporaneous documentation that the Claimant currently possesses prior to disclosure from the Defendants.

11. These four key features are as follows.

12. First, although it is in substance now contended by the Defendants in the response letter that there was no need for a careful, fair, or transparent process when considering the Press Charter because – following the recommendations of the Leveson Inquiry[1] and the Government's decision as to how to implement those recommendations – there was nothing more to be said, no such communication was made to Pressbof at any stage of the process. On the contrary, the clear indications given both by DCMS and in public statements by ministers were that a fair and transparent process was required and would be followed. In particular, DCMS indicated that: (a) criteria were to be drawn up by which the Press Charter would be evaluated, and (b) there would be a 'period of openness' followed by a 'period of consideration' of the views of interested parties. That was entirely consistent with the Government's stated wish that the charter that was to be accepted would be one that had the full confidence of press and public alike.

13. Secondly, contrary to the assumption made by the Defendants that there was nothing that could be said (an assumption that is antithetical to any lawful process enabling a party to be head and/or for fair and lawful consultation) there was a lot that could and would have been said. Although the publication of the draft Government Charter followed the report of the Leveson Inquiry, it is notable that Lord Justice Leveson did not recommend the establishment of a recognition body incorporated by Royal Charter at all, far less make recommendations as to what the contents of such a Royal Charter should be. In the light of Pressbof's subsequent submission of its own 'competing' charter, the Government Charter (itself subsequently modified) fell only to be considered by the Privy Council Office ('**PCO**') if the Press Charter was rejected. Moreover, the tone of the response letter suggests that the sole issue of principle was confined to the recognition panel. This was far from being the position. Central to Lord Justice Leveson's recommendations was the principle that there should be no possibility of Government control or regulation over the press. The scope for Government regulation over the press is preserved in the Government charter.

14. Thirdly, although the process that was followed should have been fair and transparent, it was neither. Further, and to say the least, on any view (as developed below) irrationality characterised the entire process.

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[1] Leveson Report, Executive Summary, §51.

15. Finally, the response letter suggests that the recommendation was predetermined and reflects a fettering of discretion on the part of the Defendants. This is addressed separately below.

16. It should, further (and surprisingly), be borne in mind that while, in its initial stages (ie, until the first draft was published on 12 February 2013), the Government Charter was discussed with press industry representatives including Lord Black (the Chairman of the Pressbof), the charter was the subject of continuous amendment from 12 February 2013 until its publication on 18 March, with little further discussion taking place with Pressbof or any press body.

17. For the reasons outlined by Lord Black, it is the view of Pressbof that the Press Charter is more likely than the Government Charter to be effective in achieving Lord Justice Leveson's aim of *"a genuinely independent and effective system of self-regulation"*.[2] That having been said, it is important to be clear that this claim does not concern the relative merits of the Press and the Government Charter (save to the very limited extent that the claim asserts there is a genuine discussion to be had over those merits, ie, that the procedural complaints raised are very far from sterile). Rather, it concerns the profound inadequacy, illogicality and unfairness of the way in which the Press Charter was considered and rejected.

18. For the reasons explained by Lord Black, the idea that there was nothing more to be said after publication of the Government Charter is profoundly flawed. As explained above, it is at odds with both what happened during the consideration of the Press Charter and what the Government said at the time. That Pressbof may have given input to the Leveson Inquiry and that the press had been involved, for a limited period, in post-Leveson Report discussions with the Government as to how to take the recommendations forward is a wholly inadequate basis on which to deny it the right to be heard in relation to its own Petition, which was neither in existence or contemplation at the time of the inquiry or the discussions which immediately followed it .

The decisions challenged

19. Against the above outline background, on 30 April 2013, Pressbof submitted its Petition to the PCO. The Petition, addressed to the Queen, prayed for the grant of a

Royal Charter for a body described as a '**Recognition Panel**' and enclosed a draft of the Press Charter for consideration.

20. The intended function of the Recognition Panel was the same as in the Government Charter, namely, to determine applications for recognition by regulators formed by or on behalf representative bodies of certain newspaper publishers seeking to conduct regulatory activities in relation to their publications – in other words, to provide a mechanism for recognising press industry self-regulators.

21. By letter dated 8 October 2013, the Privy Council Committee recommended to the Privy Council that the Press Charter should be rejected ('**the Recommendation**'). On 10 October 2013, the Clerk of the Privy Council wrote to the Claimant enclosing an Order in Council dated 9 October 2013 approving the Recommendation ('**the Order**').

22. By this claim for judicial review, Pressbof seeks to challenge both the Recommendation and the Order.[3]

FACTUAL BACKGROUND

23. The factual background to this claim is, as explained above, set out in detail in the witness statement of Lord Black. It is not repeated but is relied on to support the legal analysis that follows. The factual detail that is of central relevance is that relating to process of consideration of the Pressbof Petition as set out below.

The 'period of openness' and consideration by the SoS and DCMS

24. As stated at §4 above, the Petition by Pressbof was submitted to the PCO on 30 April 2013. Ceri King, Head of the Secretariat and Senior Clerk informed Pressbof's solicitor, Julian Gizzi of DAC Beachcroft LLP ('**Beachcrofts**'), by an email of the same date, that she *"[would] be taking advice on this and [would] come back to you in due course"*. It is striking that there was no further communication from Ceri King either to Pressbof or to Beachcrofts. Moreover, as explained below, when a further letter was sent by Beachcrofts to the PCO after Beachcrofts had been told by DCMS that the PCO was now in charge of the process, it was immediately passed to, and answered by, DCMS.

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[3] See further §54 below.

25. In the absence of further communication from the PCO, Mr Gizzi proceeded to arrange a meeting with DCMS for 23 May 2013. As was explained to Stephen Amos, the then-Legal Director of DCMS, the purpose of that meeting was *"to hear from you regarding progress with their Petition for the grant of a Royal Charter to establish a Recognition Panel...and to understand the process being followed."*[4]

26. Before that meeting, on 16 May 2013 (as evidenced by her letter to Lord Black dated 30 May 2013) it appears that the First Defendant (the Secretary of State, the Rt Hon Maria Miller MP, referred to herein as '**the SoS**') met Lord Black and explained that there was to be a*' period of openness' concluding on 24th May 'during which interested parties have been given the opportunity to submit their views on the PressBoF Charter. Following the period of openness the Governmment is entering a period of consideration to assess whether the PressBoF draft Royal Charter meets the Privy Council criteria...'.*

27. It should be borne in mind, however, that no criteria whatever had been drawn up in respect of the Press Charter beyond those contained on the Privy Council website. As explained below, these were not, in fact, the relevant criteria that either DCMS or the Privy Council Committee ever sought to apply.

28. Despite this, two days before the meeting between Pressbof and DCMS, a letter was sent by Victoria Kaye, a Legal Adviser at DCMS, to Mr Gizzi, requesting that Pressbof (among other things) provide the information that applicants for a Royal Charter would ordinarily provide in the Memorandum that precedes the submission of a Petition.[5] That information included the criteria contained on the Prvy Council website and read as follows:[6]

"(a) the history of the body concerned;

(b) the body's role;

(c) details of number of members, grades, management organisation and finance;

(d) the academic and other qualifications required for membership of the various grades;

(e) the body's achievements;

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4 **GB3**.

5 **GB3**.

6 See http://privycouncil.independent.gov.uk/royal-charters/applying-for-a-royal-charter/, under 'Preliminary Steps'.

(f) the body's educational role both within its membership and more widely;

(g) an indication of the body's dealings with Government (including details of the Government Department(s) with the main policy interest, or which sponsor(s) the body, together with contact details of officials who deal with the body), and any wider international links;

(h) evidence of the extent to which the body is pre-eminent in its field and in what respects;

(i) why it is considered that the body should be accorded Chartered status, the reasons why a grant would be regarded as in the public interest and, in particular, what is the case for bringing the body under Government control as described above."

29. Mr Gizzi replied the next day (22 May 2013), reminding Ms Kaye that the only formal communication that Pressbof had had since submitting its Petition was the email from Ms King confirming receipt of the Petition and indicating that she would revert *"in due course"*. As to the specific information requested in Ms Kaye's letter, Mr Gizzi explained that according to the Privy Council's own guidance, the information related to the criteria for the consideration of Petitions by professional institutions and, in view of the fact that *"my client's Petition is not to establish a professional institution, but a Recognition Panel"*, most of those criteria were irrelevant. It is clear (and conceded at the meeting on 23 May 2013 – see immediately below) that Mr Gizzi was correct in expressing these concerns.

30. The meeting with DCMS took place, as indicated above, on 23 May 2013. The attendance note of that meeting taken by Beachcrofts may be seen at **GB8**. As can be seen from that attendance note, the points that emerged from the meeting included the following:

(a) The assessment of the Press Charter was to comprise 3 stages: (i) a 'period of openness'; (ii) a 'period of consideration'; and (iii) an assessment by Ministers and the Privy Council.

(b) The 'period of openness', notwithstanding that it involved a public invitation to comment on the draft Press Charter and was intended to be followed by conscientious consideration of the comments received, was said not to be viewed by DCMS as a consultation because (i) the Government's preferred direction had not been set out and (ii) there had been no specific questions, or comments on specific areas, sought from respondents. This reservation – if that is what it was – was not one that had previously been communicated by the SoS or, as far as the Claimant is aware, on the PCO website.

(c) The 'period of openness' was in fact due to end the next day (24 May 2013). No decision had been taken as to whether the responses received would be shared with Pressbof.

(d) The criteria against which the Press Charter would be evaluated during the 'period of consideration' had not yet been decided. DCMS did not intend to consult Pressbof on the criteria, nor to inform it of the criteria until after the Press Charter had been assessed.

(e) The 'period of consideration' and assessment process would be led by the SoS, with officials and legal advisers in DCMS.

(f) The decision to be taken at the end of the assessment would be a recommendation as to whether the Press Charter should be put forward to the 'formal' PCO process. If the recommendation was that the Press Charter should be put forward, it would (as with other draft Royal Charters but not the government's 18 March Charter) be published in the *London Gazette* for eight weeks.

31. Following the meeting, Mr Gizzi wrote to Mr Amos on 30 May 2013 to register Pressbof's disappointment regarding DCMS' intention not to notify Pressbof of the criteria against which the Press Charter would be evaluated, and to express hope that the responses to the Press Charter would be shared with Pressbof.[7] No reply to that letter was received.

32. Mr Gizzi wrote to Mr Amos again, on 4 June 2013, to express Pressbof's concern at the written answer given by Ed Vaizey MP, the Minister for Culture, Communications and Creative Industries, to a Parliamentary question on 3 June 2013.[8] The Minister had stated,

> "As with all charter petitions, consideration will be given to the PressBoF charter against the criteria for charter petitions set out on the Privy Council Office's website."

Clearly, this was inconsistent with what had been said at the meeting on 23 May 2013. Moreover, it showed that those interested parties whose views were sought were presumably providing views by reference to criteria that did not apply.

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7 **GB3**.

8 **GB3**.

33. No reply to his letters of 30 May or 4 June 2013 having been received, Mr Gizzi wrote again to Mr Amos on 11 June 2013, reiterating the concerns and questions expressed at the meeting of 23 May and in his previous letters. This letter was followed by several telephone calls and an email from Mr Gizzi to Mr Amos on 20 June.[9]

34. The email of 20 June 2013, finally, elicited a response. Mr Amos replied by email, on the same date, stating that

> "At this stage I do not have any points of substance to convey to you, but will let you know as soon as I am in a position to do so. Neither my client nor I mean any discourtesy in not responding to the point of substance you have raised in correspondence. As you will appreciate, my client is focussed on dealing with the issues raised by your client's petition properly and expeditiously."

The reference to the Privy Council Committee

35. Immediately prior to the reference to the PCO, there was a meeting on 3 July with Lord Black, Peter Wright (Editor Emeritus of DMG Media) and the SoS. In this meeting (described at Black w/s §86), the SoS said that the Press Charter was 'credible' and was, at that stage, the only charter under consideration. The next day a letter was sent from Mr Amos to Mr Gizzi, dated 4 July 2013, informing him that the SoS had recommended that the Petition be added to the list of business for the next Privy Council meeting on 10 July 2013, and that the Queen would then refer the Petition to a committee of the Privy Council for consideration and report.[10]

36. Mr Gizzi wrote to Mr Amos on 8 July 2013, requesting that Mr Amos:

    (a) clarify the comments made the SoS and her officials, and the further role of DCMS in the consideration of the Press Charter;

    (b) provide Pressbof with the criteria that had been used during the 'period of consideration';

    (c) confirm whether Pressbof would be given sight of the comments received during the 'period of openness'; and

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9 **GB3**.

10 **GB3**.

(d) comment on various Parliamentary statements giving the impression that consideration of the Press Charter was a synthetic exercise.[11]

37. Mr Gizzi also, on the same date, wrote to Ms King of the PCO with a list of procedural questions regarding the committee stage.[12]

38. Mr Amos replied, both to his and to Ms King's letter, by letter dated 9 July 2013. In that reply, Mr Amos

(a) indicated that work was continuing on the Government Charter, with a view to *"formal submission to the Privy Council"*;

(b) the committee that considered the Press Charter would comprise serving Government Ministers who were Privy Counsellors;

(c) the criteria to be used by the committee, the process and the timetable were matters for the committee to determine;

(d) it was *"not...appropriate at this stage"* to publish further details of the responses that had been received during the 'period of openness' but it was, nevertheless, inaccurate to suggest that Pressbof had been denied sight of them; and

(e) the SoS could not comment on remarks made by others. (This was despite the fact that the others in question were members of her own Government commenting on a process being run by her own department.)

39. Mr Gizzi wrote again to Mr Amos on 10 July 2013, reiterating the questions that he had asked in his letter of 8 July and indicating Pressbof's *"concern that the committee avoids the appearance of pre-determination"*.[13] Mr Amos replied, on 12 July, confirming that Pressbof's Petition had been referred to the Queen for consideration and report and confirming that the committee would comprise serving Government Ministers.[14] Mr Amos stated, in relation to Mr Gizzi's other questions,

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11 **GB3**.

12 **GB3**.

13 **GB3**.

14 **GB3**.

"You have asked a number of other questions about the Committee's process. As I have previously said, this is a matter for the Committee. Beyond that, I'm afraid, there is nothing I can usefully add at this stage."

40. Details of the composition of the Privy Council Committee were published on the Privy Council's website, a link to which was sent by Mr Amos to Mr Gizzi on 16 July 2013.[15] As can be seen from that link, the SoS and the Third Defendant were co-chairs of the Privy Council Committee.

41. On 1 August 2013, Ms Elizabeth Hambley, Mr Amos' replacement as Acting Legal Director of the DCMS, wrote to Mr Gizzi to inform him that the Press Charter had gone forward to publication in the *London Gazette*.[16]

42. On 9 September 2013, Lord Black and Mr Wright had a meeting with the SoS and with Colin Perry, a civil servant for DCMS. When they requested an update on the Petition, they were told simply that *"events will unfold as they unfold"*.

43. On 3 October 2013,[17] Mr Gizzi telephoned Ms Hambley to ask further questions about the progress of the Press Charter and the Government Charter. Mr Gizzi's questions, and Ms Hambley's responses to them, are set out in a letter dated 4 October 2013, the contents of which Ms Hambley subsequently confirmed *"captures the essence of what we discussed"*.[18] In view of the grounds of claim, it is helpful to set out the questions and responses in Mr Gizzi's letter *in extenso*:

"JG: 1) Is the PressBoF charter on the agenda for the Privy Council meeting on the 9th October?
EH: I am not in a position to tell you.

JG: 2) If the PressBoF charter is on the agenda, is a decision anticipated on that day?
EH: I am not in a position to tell you.

JG: 3) We are confident that our charter will be accepted, but in the event that it is not, we expect that the Privy Council will give reasons for any rejection. Indeed the Secretary of State has confirmed this at a meeting with our clients on the 9th September 2013.
EH: At the point that your petition is accepted or rejected, reasons for the decision will be promulgated.

JG: 4) If the Privy Council is minded to recommend rejection of the PressBoF charter, will there, as we assume, be an opportunity for our clients to explore whether those reasons can be addressed before a final decision is taken?
EH: I am not in a position to discuss that with you at the moment.

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15 **GB3**.

16 **GB3**.

17 Ie, more than eight weeks since the *London Gazette* publication.

18 **GB3**.

JG: 4A) Will you be able to tell me before the meeting at which the PressBoF charter is considered?
EH: I am not in a position to tell you at the moment.

JG: 4B) Will there be a time at which you will be able to answer these questions?
EH: I am not in a position to discuss that.

JG: 4C) It would be less helpful to us to find out the answer to question 4 after a decision has been taken.
EH: I understand why you asked the question, but cannot discuss it.

JG: 5) What is the process to be followed in relation to the Cross Party charter?
EH: There is nothing I can say on that.

JG: 6) Is the Cross Party charter on the agenda for the 9th October meeting?
EH: There is nothing I can say on that."

The Recommendation, the Order and the subsequent correspondence

44. On 8 October 2013, Ms Hambley wrote again to Mr Gizzi, enclosing the Recommendation.[19] Appended to the Recommendation, at Annex A, was a list of specific considerations to which it was said that the Privy Council Committee had had regard, namely,

> "• Whether the PressBoF Petition assists in securing a vigorous free press?
> • Whether the PressBoF Petition will assist in securing a press self-regulator which delivers the key Leveson principles, as set out by the Prime Minister on 18 March 2013?
> • Whether the Petition will sufficiently activate the legislative incentives that bind the press into the system (exemplary damages and costs)?
> • Whether the PressBoF Charter Petition is likely to hold credibility with the public?
> • Whether the PressBoF Charter Petition is supported by the press industry?
> • Would the petitioners be able to deliver in accordance with the Petition?"

45. As can be seen from that list, the considerations differ significantly from the information listed on the Privy Council's website (which may be seen at §27 above).

46. This letter was followed, on 10 October 2013, by one from Richard Tilbrook, Clerk of the Privy Council, enclosing the Order.[20]

47. Pressbof sent a pre-action protocol letter on 16 October 2013, requesting (among other things) confirmation that the Defendants would take no further steps with regard to the Government Charter before completion of the lawful consideration of the Press Charter. The response letter from the Treasury Solicitor's Department was sent on 23

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19 **GB3** (and see **GB11**).

20 **GB3** (and see **GB12**).

October 2013. The arguments advanced in that letter are discussed further below: see, in particular, §101.

48. The response letter did not address Pressbof's request in respect of the Government Charter. Beachcrofts therefore wrote to the Treasury Solicitor's Department on Friday 25 October 2013 to reiterate its request, seeking an undertaking that no charter for a recognition panel would be put to the Privy Council by the Government until the ultimate conclusion of Pressbof's case – and, specifically, that if the Government Charter was on the agenda for the Privy Council meeting of 30 October, it should be removed. This undertaking was requested by 9am on Monday 28 October.

49. By letter dated 28 October 2013, sent by email to Beachcrofts at 08.35am, the Treasury Solicitor's Department declined, on behalf of the Defendants, to provide the undertaking sought.

LEGAL BACKGROUND

Justiciability

50. As stated in § above, this claim is against (i) the Recommendation and (ii) the Order.

51. The amenability of an Order in Council to judicial review should be uncontroversial, in the light of the decision of the House of Lords in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs.*[21] In *Bancoult*, which concerned the lawfulness of an Order in Council made in respect of a British Overseas Territory, both the majority and the minority speeches of their Lordships agreed that Orders in Council were amenable to judicial review on traditional public-law grounds of illegality, irrationality and procedural unfairness.[22]

52. In the light of the decision in *Bancoult*, the reviewability of an Order in Council was conceded by the Crown in the subsequent case of *R (Barclay) v Secretary of State for Justice & Others.*[23] The decisions against which judicial review was sought in *Barclay*

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21 [2008] UKHL 61, [2009] 1 AC 453; on appeal from [2007] EWCA Civ 598, [2008] QB 365. See also *Pankina v Secretary of State for the Home Department* [2010] EWCA Civ 719, [2011] QB 376, at [17] (*per* Sedley LJ).

22 See at [35] (*per* Lord Hoffmann), [71] (*per* Lord Bingham, who dissented as to the result), [105] (*per* Lord Rodger), [120] (*per* Lord Carswell) and [141] (*per* Lord Mance, who also dissented).

23 [2009] UKSC 9, [2009] 2 WLR 1205; on appeal from [2008] EWCA Civ 1319, [2009] 2 WLR 1205.

were (i) the recommendation by a committee of the Privy Council (in that case, the Committee for the Affairs of Jersey and Guernsey to recommend that Royal Assent be granted to the Reform (Sark) Law 2008) and (ii) the subsequent decision of the Privy Council to advise the Queen to grant Royal Assent to the Reform (Sark) Law 2008. As can be seen from [44]-[45] of *Barclay* (*per* Lord Collins, delivering the sole reasoned judgment of the Supreme Court), it was uncontroversial that both of those decisions were reviewable.[24]

53. In the circumstances, it is clear that both the Recommendation and the Order are amenable to judicial review on all traditional public-law grounds.

54. In the response letter it is simply asserted (but with no supporting argument) that the Order is not amenable to judicial review. The response letter accepts, correctly, that the Recommendation is amenable to judicial review. However, without more, the Claimants are not willing to accept the Defendants' contention that it is sufficient to challenge the Recommendation alone.

The duty to act fairly

55. The common law has long recognised and protected the principle that a decision taken by a public authority must be taken in accordance with certain minimum standards of fairness. As Lord Roskill observed in *Council of Civil Service Unions & Others v Minister for the Civil Service*,[25]

> "[E]xecutive action will be the subject of judicial review on three separate grounds...The third is where it has acted contrary to what are often called "principles of natural justice." ...That phrase perhaps might now be allowed to find a permanent resting-place and be better replaced by speaking of a duty to act fairly."

56. What the duty to act fairly requires of course varies from case to case both as to the nature of the opportunities to be afforded, and as to how much must be done to provide the opportunity required. In the present case, two aspects of the duty are of particular relevance, namely, (i) the right to be heard and (ii) a duty of adequate consultation. The response letter also raises a third aspect of fairness, namely, the duty not to operate policy, the nature or application of which is over-rigid, so as

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24 Albeit that there remained issues as to the jurisdiction of the Court to grant relief.

25 [1985] AC 374, at 414G-H.

automatically determine the outcome thus evidencing a closed mind[26] (see, for example, *R (Lumba) v. Secretary of State for the Home Department* [2011] UKSC 12, *per* Lord Dyson at [21]: *"it is a well established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of decision makers".*)

57. Whether a decision-maker has followed a fair process in a particular case is, of course, a point of law. While the decision-maker's own views as to the fairness of his process are matters to which the Court may have regard, the Court alone is the arbiter of fairness – irrespective of the identity of the decision-maker, the nature of the decision or the policy context in which the decision is taken.[27]

The right to be heard

58. The need to ensure that a person who will be affected by a decision has an effective opportunity to be heard (ie, to make representations to the decision-maker) before that decision is taken is one of the fundamental aspects of the duty to act fairly; indeed, it has been described, along with the rule against bias, as one of the *"twin pillars"* or *"two fundamental rights"* of the rules of natural justice.[28]

59. It is well-established, as a matter of case-law, that the requirements of the right to be heard include the following:

(a) It is not enough for the person affected by a decision to know that the decision will be taken. He must also be given sufficient information about the issues to be considered to enable him to make *"meaningful and focused representations".*[29] The information required will depend on the context. Where the decision-maker has a published policy as to the approach that he will follow in the particular case, or is bound by criteria set out in legislation, a further list of criteria or issues may be superfluous. Conversely, where the decision-maker is exercising a broad discretion and has a choice as to the criteria that he applies, this may increase the need for persons affected to be told the specific criteria and issues, *"as the broad nature of the decision-making function may make it more difficult for the*

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26 Plainly, a closed mind or fettering of discretion is also a denial of the right to be heard and of fair consultation. It also overlaps with the other grounds raised by this application.

27 See *BMI Healthcare Limited & Others v Competition Commission* [2013] CAT 24, at [39(6)].

28 See *Kanda v Government of Malaya* [1962] AC 322, at 337 (*per* Lord Denning) in and *O'Reilly v Mackman* [1983] 2 AC 237, at 279F-G (*per* Lord Diplock).

29 *R v Secretary of State for the Home Department ex p Harry* [1998] 1 WLR 1737, at 1748 (*per* Lightman J).

individual to discern any areas of potential concern, and so make it more difficult to make appropriate representations."[30]

(b) As well as being told enough about the issues and the criteria by reference to which those issues will be decided, it is axiomatic that the person affected must be informed of the case against him.[31] This applies not only in adversarial contexts but when the decision-maker conducts an investigation or assessment that affects a person's interests and has concerns about that person's case.[32] The person must be *"given sufficient information about the reasons relied on...to enable [him] to challenge the accuracy of any facts and the validity of any arguments upon which the...reasons are based".*[33] Fairness also generally requires that the person affected have an opportunity to see the documents and materials on which the decision-maker relies.[34]

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30 Auburn, Moffett & Sharland, *Judicial Review. Principles and Procedure* (OUP, 2013), §6.33.

31 See, eg,

- *In the matter of an application by 'JR17' for Judicial Review (Northern Ireland)* [2010] UKSC 27, [2010] HRLR 27, at [50] (*per* Sir John Dyson SCJ): *"[A] person's right "to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it" is one of the fundamental rights accorded by the common law rules of natural justice".*
- *Kanda*, at 337 (*per* Lord Diplock): *"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."*
- *R v Home Secretary, ex p Doody*, at 560 (*per* Lord Mustill): *"Fairness will very often require that a person who made be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both...Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to meet."*

32 See, eg, *R (Interbrew SA) v Competition Commission* [2001] EWHC Admin 367, at [69] (*per* Moses J (as he then was)): *"The content of the duty [of fairness] will vary from case to case but generally it will require the decision-maker to identify in advance areas which are causing him concern in reaching the decision in question."*

33 *Bushell v Secretary of State for the Environment* [1981] AC 75, at 96C-D (*per* Lord Diplock).

34 As McCombe J put it in *R (Primary Health Investment Properties Ltd) v Secretary of State for Health* [2009] EWHC 519 (Admin) at [120], *"elementary fairness in any decision making process requires that the parties should have seen all the documents in the case that are presented to the decision-maker and/or any adviser that the decision-maker may consult."*

(c) Finally, it is of course necessary that the person affected have an opportunity to make representations, including sufficient time to prepare the representations.[35]

60. All of the above duties apply as much to persons who are supporters of a scheme or proposal on which a decision is being taken as to objectors.[36]

61. Overall, the question is whether – viewing the procedure followed as a whole and in the context of the decision being taken – it can be said that the person affected had *"a fair crack of the whip"*.[37]

The duty of adequate consultation

62. A decision-maker is not under a general duty to consult before taking a decision.[38] That having been said, there are many circumstances in which a duty to consult will arise – for example, as a matter of (express or implied) statutory duty, or to give effect to a legitimate expectation of consultation.

63. Those circumstances include, in particular, where there is a small, identifiable class of persons who are directly affected by the decision under challenge, having enjoyed a benefit under the previous policy that the decision amends.[39]

64. If consultation does take place, whether by reason of a duty to consult or because the decision-maker chooses to conduct a voluntary consultation exercise, that consultation process must be carried out properly.[40] In other words,

> "[C]onsultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the

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35 See, eg, *Doody*, *op cit* in fn. [ref] above and *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (**'GCHQ'**), at 415F-G (*per* Lord Roskill).

36 See *Bushell*, at 96E.

37 See *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 1 WLR 1255, at 1265H-1266A *per* Lord Russell.

38 See, eg, *R (Harlow Community Support Ltd) v Secretary of State for Defence* [2012] EWHC 1921 (Admin).

39 See *R (Dudley Metropolitan Borough Council) v Secretary of State for Communities and Local Government* [2012] EWHC 1729 (Admin), at [61] (*per* Singh J).

40 *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213, CA, at [108].

ultimate decision is taken: *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168."[41]

65. Furthermore, even where the consultation exercise is voluntary, the decision-maker is not generally entitled to pick and chose whom he will consult: there must be fairness in deciding the consultees.[42]

66. The question whether the decision-maker has chosen to embark, in a particular case, on a voluntary consultation exercise (as opposed to, for example, merely discussions with an interest group) is a factual matter, to be determined by the Court in the circumstances of each particular case.[43] It is submitted that the answer to this question must depend on the substance of what the decision-maker has done, not on matters of form (such as how the decision-maker has chosen to label the procedure leading to the decision).[44]

Procedural legitimate expectation, unfairness and abuse of power

67. It is trite law that a legitimate expectation as to the procedure that a decision-maker will follow when he takes a decision may arise out of a representation by the decision-maker; indeed, this is *"a paradigm case of procedural legitimate expectation"*.[45]

68. However, a procedural legitimate expectation may also arise in other cases where a person has an interest in a substantive benefit.[46] In particular, it may arise where the decision-maker's proposed action would, in the absence of any consultation, be so unfair as to amount to an abuse of power.[47]

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41 *Ibid.*

42 *R (Milton Keynes Council & Others) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 1575, at [32] (*per* Pill LJ).

43 See *R (Association of Personal Injury Lawyers & Another) v Secretary of State for Justice* [2013] EWHC 1358 (Admin) (***'APIL'***), at [44] (*per* Elias LJ): *"I agree with Mr Eadie that there is no principled basis for determining when the process amounts to consultation and when it involves discussions falling short of that."*

44 See *ibid* at [34], in which the claimants' case is put by Elias LJ as follows: *"Whether there is consultation is a matter of substance and not simply a matter of form..."*. The Divisional Court did not demur from this proposition in their judgments.

45 *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755, at [29] (*per* Laws LJ).

46 See, for example, *GCHQ* at 412 and *R v Devon County Council, ex p Baker* [1995] 1 All ER 73, CA, at 91-92 (*per* Simon Brown LJ).

47 See *Bhatt Murphy* at [42] and *R (Luton Borough Council & Others) v Secretary of State for Education* [2011] EWHC 217 (Admin), at [85]-[96] (*per* Holman J).

69. Furthermore, as Simon Brown LJ explained in *R v Inland Revenue Commissioners ex p Unilever plc*,[48] if a decision-maker acts in a manner that is egregiously unfair, his decision may be unlawful *"not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power."*

70. As to what circumstances will give rise to such unfairness, Sir Thomas Bingham MR (as he then was) said in *Unilever*:[49]

> "The categories of unfairness are not closed, and precedent should act as a guide not a cage. Each case must be judged on its own facts..."

Irrationality

71. If a decision-maker acts with *"conspicuous unfairness"* then in some cases this may, itself, be sufficient to render his decision irrational: see Simon Brown LJ in *Unilever*, after the passage cited in §69 above:

> "...I regard the [*R v Inland Revenue Commissioners ex parte MFK Underwriting Agents Limited* [1990] 1 WLR 1545] category of legitimate expectation as essentially but a head of *Wednesbury* unreasonableness, not necessarily exhaustive of the grounds upon which a successful substantive unfairness challenge may be based."[50]

72. A decision may also, of course, be irrational because one or more of the stages in the decision-maker's reasoning are vitiated by illogicality. As Sedley J commented in *R v Parliamentary Commissioner for Administration, ex p Balchin*,[51] irrationality arises where the reasoning *"fails to add up"* and has given rise to a decision *"in which, in other words, there is an error of reasoning which robs the decision of logic"*.

73. Finally, the decision to adopt a procedure that is found to be unfair may itself be an irrational decision: see *BMI* at [74].

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48 [1996] STC 681, at 695.

49 [1996] STC 681, at 690.

50 *Ibid*, at [ref]. The *MFK* case to which Simon Brown LJ referred is

51 [1998] 1 PLR 1, QBD, at 13E-F.

Relevant and irrelevant considerations

74. A decision-maker must take into account all those considerations to which it must have regard, and disregard any that are irrelevant to the matter for him to decide.[52]

75. In many situations, the relevant and irrelevant considerations will be identified, expressly or implicitly, by the legislation governing the decision in question. In other cases (such as the present one), the question of relevance/irrelevance largely shades into that of rationality. If a consideration is one that no reasonable decision-maker could consider as part of a rational assessment, it will be irrelevant – or, to put the point differently, a decision taken in reliance on that consideration will be irrational in that the decision-maker relied on a factor that had no bearing upon his decision.[53]

Article 10 ECHR

76. Article 10 of the European Convention on Human Rights ('**ECHR**') enshrines the right to freedom of expression. The case-law of the European Court of Human Rights ('**ECtHR**') has emphasised that this right is *"one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man"*,[54] restrictions on which will be considered *"necessary in a democratic society"* only if they are required by a pressing social need.[55]

77. Furthermore, although the ECHR makes no specific reference to press freedom, the ECtHR has acknowledged on several occasions *"the essential function the press fulfils in a democratic society"*, indicating that in matters involving press freedom, *"the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of "public watchdog" in imparting information of serious public concern."*[56]

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52 See, eg, *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, at 1065 (*per* Lord Diplock).

53 See, eg, *R (Hampshire County Council) v Independent Appeal Panel for Hampshire* [2006] EWHC 2460 (Admin), [2007] ELR 266, at [30]-[33] (*per* Ouseley J).

54 See, eg, *Handyside v United Kingdom* (1979-80) 1 EHRR 737, at [49].

55 See, eg, *Hertel v Switzerland* (1999) 28 EHRR 534, at [47].

56 *Bladet Tromsø & Stensaas v Norway* (2000) 29 EHRR 125, at [59]. See also, for example, *Goodwin v United Kingdom* (1996) 22 EHRR 123, at [39].

78. The ECtHR's case-law establishes that where Article 10 ECHR is engaged, procedural fairness to the party whose right to freedom of expression is (or could be[57]) infringed is required: see in particular *Steel & Morris v United Kingdom*.[58]

GROUNDS OF REVIEW

Breach of the right to be heard

79. Pressbof was directly affected by the Recommendation and the Order in at least three respects:

(a) Firstly, and most obviously, Pressbof was directly affected by virtue of the simple fact that the decisions in question were decisions on Pressbof's own application.

(b) Secondly, the decisions in question were decisions on a charter (the Pressbof Charter) for the creation of a body to recognise press regulators. Pressbof is the body which organises the funding of the current press regulatory body (the PCC) and any other press regulatory body. Under the Press Charter, it would have itself become the recognition body in question. Thus the decisions to recommend that the Press Charter not be granted, and the Order giving effect to that decision, clearly had direct consequences for Pressbof's interests.

(c) Thirdly, the context in which the Press Charter was considered and rejected was of course that the draft Government Charter awaited consideration by the Privy Council – it being the view of the DCMS that only one of the two Charters could be put forward to the Privy Council for consideration at a time.[59] In effect, therefore, the decisions in question, by rejecting the Press Charter, have paved the way for the consideration (and, if recommended, the granting) of the Government Charter. For the reasons summarised by Lord Black, the Government Charter will, if granted, have significant consequences for the entire system of press regulation – including Pressbof.

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57 To be a 'victim' under Article 25(1) ECHR, one does not have to establish that one's substantive right has been or will definitely be infringed but merely that one runs the risk of being affected directly by a measure: see *Marckx v Belgium* (1979) 2 EHRR 330, at [27], and *Norris v Ireland* (1991) 13 EHRR 186, at [28]-[34] See also ss. 7(1) & 7(3) of the Human Rights Act 1998, which refer to someone who *"is (or would be) a victim"*.

58 (2005) 41 EHRR 22, in particular at [98].

59 See **GB8**.

80. Pressbof therefore had a right to be heard. In the light of the matters set out in §23-47 above, that right entailed, in the present case,

(a) having notice that a decision on the Press Charter was going to be taken;

(b) being informed about the criteria with reference to which the decision on the Press Charter would be taken. This was particularly important given that the criteria and the issues to be considered were not set out in legislation but, rather, apparently formulated on a decision-specific and *ad hoc* basis[60] – and given that the only published criteria for evaluating applications to the PCO for Royal Charters were, by DCMS' own admission, irrelevant;[61]

(c) in particular, being informed about the reasons why the DCMS and/or Privy Council Committee had concerns about the Press Charter. Without knowing this information, it was of course impossible for Pressbof to make any meaningful representations to either the DCMS or the Privy Council Committee as to the merits of its Charter, or to suggest any amendments that might allay those bodies' concerns;

(d) being shown the actual materials on which the Privy Council Committee intended to rely, including the comments received during the 'period of openness'. It is apparent from the Recommendation that one of the criteria by reference to which the Committee evaluated the Press Charter was whether it was *"perceived as credible by the public and supported by the press"*.[62] It is also apparent that the Committee took into account the comments received during the 'period of openness' in evaluating whether that criterion was met. It has never been suggested that it would have been impractical for those comments to be provided to Pressbof, or that their provision would give rise to any concerns of confidentiality. That being the case, there is no reason why they could not and should not have been provided;

(e) receiving all of the information above sufficiently in advance of the Recommendation to be able to make representations; and finally

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60 As, indeed, the entire procedure appears to have been.

61 See §30 above.

62 Recommendation, p.2 **GB11**.

(f) having the actual opportunity to make those representations.

81. It is patent, from the chronology in §§24-46 above (set out more fully in Lord Black's witness statement), that every single one of these requirements was violated:

(a) As can be seen from Mr Gizzi's letter to Ms Hambley of 4 October 2013 and her reply of 7 October, the DCMS declined to tell Pressbof whether its Charter would be considered by the Privy Council the very day before the Recommendation was sent to Pressbof.[63]

(b) Despite asking repeatedly for the criteria by reference to which its Charter would be evaluated,[64] the criteria were never provided until after the Recommendation had been made. Indeed, it is striking that while the DCMS told Mr Gizzi that the criteria used during the 'period of consideration' would be given to Pressbof after the SoS had reached a decision on whether to allow the Press Charter to advance to the Privy Council Committee stage, even this was not done.[65]

(c) Until it saw the Recommendation, Pressbof had no idea what concerns the SoS or the Privy Council Committee had about the Press Charter.

(d) Pressbof was never provided with any of the comments that the PCO received during the 'period of openness'. The only (cryptic and utterly uninformative) explanation given for this failing was Mr Amos' statement in his letter of 9 July 2013 that *"it would not be appropriate at this stage to publish further details of the nature of the responses received."*

(e) None of the information required having been provided, the question whether that information was provided in a timely fashion does not arise.

(f) Even if Pressbof had been provided with all of the information that the right to be heard entailed, it appears that there was never any intention to permit it to make representations during the 'period of openness'. Mr Gizzi's attendance note of the meeting of 23 May 2013 records Mr Amos as saying,

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63 See **GB3**.

64 See §§29-31, 33, 36, 39 & 43 above.

65 See **GB8** and **GB3** (letters of 8.07.13 and 9.07.13).

"DCMS does not envisage a period of advocacy or other general representations from Pressbof. SA noted that that was the reason for the letter sent by Victoria Kaye on 21 May."

In other words, Pressbof's right to make representations was to be confined to the ability, at the outset only, to put in material relating to criteria that the DCMS itself considered to be irrelevant (and that were not the criteria by reference to which the SoS evaluated the Press Charter).

82. It is hard to conceive of a more comprehensive or clear example of a breach of the right of a person affected by a decision to be heard in relation to it.

83. That breach is further compounded by the fact that it eroded the procedural guarantees that are required to fulfil the State's obligations under Article 10 ECHR. If the consideration and granting of the Government Charter follow the Recommendation and the Orderthen the press in the UK will, for the first time since 1695, be subject to a regulatory system over which there is – by means of the Recognition Panel and the power to amend its Charter by Parliamentary majority – the material prospect of direct executive control. Such a change clearly has significant implications for the right to freedom of expression and specifically for press freedom of expression, to which the ECtHR accords great importance.

84. In the circumstances, before rejecting an alternative Charter that did not provide for executive control and had the support of the overwhelming majority of the UK press, a scrupulous standard of fairness to the proponent of that Charter was required.

Breach of the duty of adequate consultation

85. It is Pressbof's position that:

(a) In the unique circumstances of the present case, the Government was under a duty to ensure that the decision of the Privy Council Committee on the Press Charter was preceded by an adequate consultation.

(b) In any event, by having the 'period of openness', the Government in fact embarked upon a consultation voluntarily, and thereby came under a duty to consult adequately.

(c) The duty of adequate consultation was breached.

86. In relation to the first of the propositions above, Pressbof relies, in support of the existence of a duty to consult, on the combination of the following factors:

(a) The unique constitutional context is undeniable. The Leveson Report was not, in any sense, a consultation, Moreover, the idea of a charter was at variance with anything that Lord Justice Leveson had recommended. On a matter of such constitutional importance there was a duty to consult. The Government implicitly accepts this in its letter of response because, in effect, it asserts that there was nothing to be said. The corollary of this is that if there were matters of legitimate public concern a consultation would have been appropriate.

(b) Moreover, and in any event, as stated in §63 above, a duty to consult may arise where there is an identifiable class of persons who are directly affected by the decision under challenge, having enjoyed a benefit that the decision amends.

(c) In the present case, the press of the UK (which, in large part, comprises an identifiable class of publishers) has, to date, enjoyed the benefit of being free of any form of executive control. This reflects its constitutional role as a counterpart to an independent judiciary, a prerequisite of a free and democratic society, a specific and important manifestation of free speech, and imparter of information in the public interest.

(d) As explained above, the Recommendation and the Order pave the way for the consideration and granting of the Government Charter which raises significant and serious concerns on the part of the Claimant over the continued freedom of the press. These concerns do not have to be 'proved' to be 'right' in order to trigger a duty of consultation.

(e) Furthermore, curtailment of press freedom would have significant implications for the right to freedom of expression and specifically for press freedom of expression (including the freedom of expression of the publishers which collectively finance and constitute the membership of Pressbof). Article 10 ECHR is therefore engaged.

(f) In the circumstances, a duty to consult before reaching a decision on the Press Charter (and thereby either barring or paving the way for the Government Charter) arose.

87. In relation to the second proposition, Pressbof's position is that – notwithstanding DCMS' insistence that the 'period of openness' did not constitute a consultation, in substance it was exactly that:

(a) In her letter of 21 May 2013, Ms Kaye indicated that the PCO had *"published your client's Petition on its website and asked for comments before 24 May"*.[66] Thus this was not – as in *APIL* – merely a case of discussions, or a meeting with an interest group. It was publication of the document on which a decision would be taken, to the public at large, with an invitation to comment.

(b) As for what the purpose of this publication and invitation was, the SoS herself confirmed in her letter of 30 May 2013 to Lord Black that during the 'period of openness', *"interested parties have been given the opportunity to submit their views on the PressBoF Charter."*[67] This reflects what Mr Amos told Mr Gizzi at their meeting of 23 May 2013:[68]

> "The purpose of the period of openness is to give people the chance to comment on the draft Charter and to inform the DCMS' understanding of the draft Charter."

(c) Furthermore, interested parties having been given the change to comment on the Press Charter, those comments were then not only considered but clearly taken into account both (i) by the SoS/DCMS, in reaching a decision on whether the Pressbof Charter should go forward to the Privy Council Committee[69] and (ii) by the Committee, in reaching its decision as to whether to recommend that the Petition be granted.[70]

88. A process whereby a decision-maker (i) publishes a proposal on which he will be taking a decision (whether or not it his proposal, and whether or not he sets out his views on specific aspects of that proposal); (ii) invites public comments on that proposal; (iii) collates and analyses those comments; and (iv) takes those comments into account in reaching his decision is, it is submitted, plainly a consultation. Describing it instead as a 'period of openness', and seeking to hide behind matters

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66 **GB3**.

67 **GB3**.

68 **GB3**.

69 **GB3**.

70 See **GB11**.

such as the lack of specificity in the invitation to comment, is an unattractive exercise in straw-clutching.

89. That brings Pressbof to the third proposition, namely that the consultation was inadequate. It is clear from the facts that the *ex p Gunning* requirements were breached in at least the following respects:

(a) While the public were consulted, via the 'period of openness' on the PCO website, Pressbof of course was not (see the first ground of challenge above), notwithstanding its status as a party directly affected by the decision and the fact that its members constitute an identifiable class of persons who are directly affected. Such selectivity was unacceptable.

(b) Far from being in a position to *"give intelligent consideration and an intelligent response"*, those who were consulted were not told the criteria by reference to which the Press Charter would be evaluated, and were therefore not in a position to know how to direct their responses. Worse still, members of the public may well have been misinformed as to what the criteria would be by the Minister's written answer of 3 June 2013, set out at §32 above. It is entirely unconvincing for the response letter of 23 October 2013 now to assert that it was or should have been clear that the Government Charter draft of 18 March gave the answer to the question of what criteria applied. In addition to the points made by Lord Black as regards Pressbof's state of knowledge (Black w/s 60-83) it is clear from those organisations which have published their responses, and from the digest of responses prepared by DCMS and disclosed with the response letter, that respondents did not understand that the 18 March Charter had any relevance and addressed themselves to the Privy Council's "professional institution" criteria. On the Government's case, DCMS received a large number of responses which it could see from their faces had wholly missed what it regarded as obvious criteria, and yet it said and did nothing. Further, the proposition that the Government Charter was co-extensive with the relevant criteria, there was no possible 'space' for alternative argument. Thus, the whole process of consideration of the claimant's charter was predetermined and the *"wide discretion"* claimed by the Defendants to be vested in the Privy Council was fettered from inception.

(c) It is unclear how long the 'period of openness' lasted, there having been no announcement on the PCO website or other publicity of which Pressbof is aware, and certainly no announcement to Pressbof itself.[71] However, as the Petition was submitted on 30 April 2013 and the 'period of openness' closed on 24 May, at most, the period can have lasted for about 3 weeks. The Press Charter is a detailed document, which addresses important issues about press regulation. A 3-week period in which to consider it (ie, about a quarter of the standard central Government consultation length) was totally inadequate.

90. For the reasons already summarised in §§83 and 86(e) above, this breach of the duty of adequate consultation – a breach which affected not only Pressbof but also the public as a whole, who were consulted on the basis of incorrect criteria for an inadequate length of time, on an issue of central constitutional importance – was inconsistent with the procedural guarantees that are required to fulfil the State's obligations under Article 10 ECHR.

Breach of procedural legitimate expectation

91. By reason of the facts and matters already adverted to above at §§79 and 86, Pressbof had a procedural legitimate expectation that the consideration of the Press Charter and reaching of a decision on that Charter would be undertaken by means of a fair process.

92. Indeed, in view of the constitutional importance of the issues at stake, it is submitted that the public, too, had such a procedural legitimate expectation.

93. Many of the respects in which the extraordinary process followed was procedurally unfair have already been highlighted in the first and second grounds above. Pressbof would add to that list of flaws the following:

(a) Having accepted that the criteria published on the PCO's website were irrelevant, and indeed having stated explicitly that it would be formulating appropriate criteria before the start of the 'period of consideration', it was unfair for the SoS/DCMS to then proceed to take into account the public responses that were based on the admittedly irrelevant criteria and <u>not</u> give interested members

[71] Pressbof was first informed that it had begun on 21 May 2013: see **GB3**.

of the public (as well of course as Pressbof) the opportunity to comment in the light of the actual, relevant criteria.

(b) It was also unfair for DCMS to, on the one hand, invite representations from Pressbof as to the criteria that should be used but, on the other hand, refuse to tell Pressbof what criteria it was minded to use. As Mr Gizzi observed at the meeting of 23 May 2013, the effect was to invite Pressbof to *"make representations on the DCMS' criteria in a vacuum without any understanding of what those criteria were intended to be."*[72]

(c) It was unfair to decline to give Pressbof any information as to the criteria that would be used by the Privy Council Committee to evaluate the Press Charter, the procedure whereby that Charter would be evaluated or even the date on which a decision would be reached. There was simply no good reason to keep the party that had made the actual application completely in the dark regarding the procedure to be followed.

Unfairness and abuse of power

94. In view of the multiple and serious procedural deficiencies and instances of unfairness referred to above, it is Pressbof's submission that the procedure followed in this case reaches the *Unilever* threshold of *"conspicuous unfairness"* and abuse of power: see at §§67 to 71 above.

95. The Defendants have denied Pressbof the right to be heard on its own application; have undertaken an exercise of consulting the public but sought to disavow the legal obligations to which that exercise gave rise; and have denied the public the right to make appropriately focused representations on the Press Charter.

96. In *Unilever*, Simon Brown LJ referred at 697 to the distinction between

> "conduct which may be characterised as "a bit rich" but nevertheless understandable — and on the other hand a decision so outrageously unfair that it should not be allowed to stand."

97. The conduct of the Defendants in the present case is, in Pressbof's submission, plainly in the second category.

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72 **GB8**.

Irrationality and relevant/irrelevant considerations

98. By reason of the conspicuous unfairness of the procedure followed in this case, the Recommendation and the Order are irrational.

99. Indeed, the entire process was shot through with absurdities that collectively rob the Recommendation and the Order of logic. Specifically:

(a) It was irrational to publish the Petition and invite comments while not informing the public of the criteria by which the Petition would be assessed. The effect was that any comments received would, by definition, either be expressed without reference to any criteria or (worse still) be expressed by reference to incorrect criteria (as indeed must have happened, on the Government's case; a further irrationality was not intervening to correct respondents' misapprehension).

(b) It was irrational for DCMS to then take into account the comments that were received, instead of conducting a fresh consultation exercise on the basis of the correct criteria. Likewise, it was irrational for the Privy Council Committee to take those comments into account. By doing so, the Defendants chose to inform themselves on the basis of comments that were not expressed by reference to the appropriate criteria.

(c) It was irrational for DCMS to refuse to allow Pressbof to see and respond to those comments. No good explanation for this failure has yet been given.

(d) It was irrational for DCMS, knowing about the failure to publish its criteria in time for the 'period of openness' and the failure to give Pressbof a right to be heard, nevertheless to proceed to make a recommendation to the Privy Council Committee without informing the Committee of these procedural flaws.

(e) Finally, it was irrational for the Committee, whose co-chair was of course the very person who presided over this flawed first stage, not to take steps to seek to remedy those flaws by, at the very least, giving Pressbof a chance to be heard.

100. Furthermore or alternatively, by taking into account comments from the public that were either expressed without reference to any criteria or expressed by reference to incorrect criteria, the Defendants were, at both the DCMS and the Committee stages of the process, failing to take into account relevant considerations (by having failed to

elicit properly informed consultation responses) and, conversely, taking into account considerations that were irrelevant.

The Response Letter

101. By the response letter, served on behalf of all of the Defendants, the Defendants argue, essentially, that:[73]

(i) The Leveson Inquiry was sufficient consultation (§7). This is plainly wrong. Not only was the Leveson Inquiry not a proper opportunity to give effect to Pressbof's right to be heard; neither was it in any sense or substance a consultation process. Purely chronologically it cannot have been a consultation on the Press Charter, which did not come into existence until months after the Leveson Inquiry was concluded.

(ii) Discussion post-Leveson Report was *"extensive"* (§7). As explained above, little discussion took place after 12 February 2013. Moreover, discussion over the Government's 'competing' charter would plainly have been no substitute for discussion over Pressbof's charter. The proposition that full discussion over one competing alternative (even if there was such full discussion – there was not) could be a substitute for discussion over the alternative competing charter is, self-evidently, irrational. More than this, it evidences a closed mind and a fettering of discretion in respect of proper and lawful consideration ever being given to the Press Charter.

(iii) The Government Charter was the Government's statement as to the nature of the arrangements necessary for the recognition body (§7). This is analytically irrelevant. The fact that the Government had provided a statement ought not to have precluded consideration of the Press Charter. This observation only makes sense on the footing that the Press Charter was not considered fairly and/or lawfully as it should have been. Further the criteria said to have been applied by the Privy Council Committee in the decision letter of 8 October 2013 are not merely a re-statement of the Ggovernment Charter.

[73] Paragraph references are to the response letter.

(iv) The Privy Council had a wide discretion (§7). No public law decision-maker possesses discretion to act unlawfully, unfairly and/or irrationality. This observation, thus, takes the Defendants' case nowhere.

(v) The process was for the Privy Council to decide (§9). There are two points. First, this statement says nothing about the pre-eminent role exercised by DCMS throughout much if not most of the process (nor that the co-chair of the Privy Council Committee was the SoS, who headed DCMS). Secondly, the fact that a decision-maker may decide the appropriate process does not confer discretion to act unfairly.

(vi) Pressbof knew what was being considered without the need for further information (§10). This is misconceived and directly contradicted by Pressbof's evidence. Very little information or discussion has been provided to or engaged in with Pressbof since 12 February 2013. Given that the overall context was how best to give effect to the Leveson Report's recommendations, there was obviously more than one way of doing this. Denial of further information as to process or criteria (or anything else) because it was thought to be unnecessary demonstrates either that the matter was predetermined or that, to say the least, the Defendants were proceeding on a fundamentally unfair and/or irrational basis.

(vii) Pressbof was free to provide what information it wanted (§11). Pressbof could not provide relevant information if it was unaware prior to the recommendation of the criteria that were being adopted in evaluating how best to give effect to the Leveson Report's recommendations. At best this is a statement that Pressbof could have taken shots in the dark.

(viii) There was no formal consultation exercise (§12). If the point being made here is that the same criteria were adopted as those adopted by the Privy Council, this is plainly wrong. In any event, it is clear from the above chronology that the views of interested parties were being sought during the (ironically-named) 'period of openness' and that this would be followed by the so-called 'period of consideration.'

Unless the views of interested parties were not proposed to be considered, there was nothing to consider beyond the fact that the Press Charter did not coincide with the terms of the Government Charter. But this is circular taking the argument back to: (i) necessary irrationality and (ii) a necessary fettering of discretion.

(ix) All that the Press Charter amounted to was a suggestion for a recognition body which had already been decided (§13) There could, with respect, be no clearer evidence of predetermination and fettering of discretion; not to say complete irrationality in engaging in a process of so-called 'openness' and 'consideration.'

(x) Despite the fact that the public may have responded to inaccurate criteria, the Committee knew what was happening (§14). This could only, sensibly, be true if there were predetermination and a fettering of discretion.

102. If permission to apply for judicial review is granted, Pressbof will await the evidence to be filed before making any necessary submissions as to non-disclosure and any failure of the Defendants to comply with their duty of candour.

CONCLUSION AND CONSEQUENTIAL MATTERS

Conclusion on the claim and the response letter

103. The Claimant submits that nothing raised in the response letter undermines its claim; on the contrary, the response letter raises further concerns as to the fairness, rationality and lawfulness of the Defendants' decisions. In brief:

(a) On the most charitable footing, there has been no lawful, fair or rational consideration of the Claimant's Charter.

(b) The proposition that there was nothing to be said (now the central plank of the Defendants' grounds of resistance) is manifestly absurd.

(c) A decision-maker who asserts that there is nothing to be said has fettered his discretion and predetermined every issue to be decided in purporting to accord a right to be heard.

(d) Moreover, denial that there is anything that can be said is, in fact, a denial of the right to be heard.

(e) The only basis on which it could logically be maintained that there was nothing to be said was if, in truth, there was nothing that the Defendants would permit to be said that would permit deviation from the Government Charter. But, if that was the case, this produces irrationality. Why, for example, would DCMS be attempting to formulate criteria (which it refused to disclose) if the criteria were already present in the Government Charter?

(f) The position sought to be advanced by the Defendants could never have allowed a fair, rational and lawful process. It was conspicuously unfair. The individual details of the several acts and omissions producing unfairness (detailed above) are but a mirror-image of the fact that the Defendants gave no lawful consideration to the Claimant's Charter.

104. In the light of the foregoing, the Court is respectfully invited to grant Pressbof permission and to apply for judicial review and to grant its claim.

Relief sought

105. Pressbof seeks the following by way of remedy:

(a) Declaratory relief to the effect that the Recommendation, of 8 October 2013, is unlawful, by reason of its unfairness and irrationality.

(b) An order quashing the Order, of 9 October 2013, giving effect to the Recommendation.

(c) Such other relief as might be necessary in the light of the judgment of the Court (including, among other things, such declaratory relief as may be required to give effect to the Court's judgment).

(d) Costs

Interim relief

106. As explained in §§47-49 and 54 above, the position at the date of the issue of this claim is as follows:

(a) It is the stated view of the Defendants, in the response letter, that *"[t]here is no basis on which an Order of [the nature in this case] made by The Queen in Council, is susceptible to challenge on an application for judicial review."*

(b) It is the understanding of Pressbof that the Government Charter will formally be approved, without debate or consideration, at a special meeting of the Privy Council to be held on 30 October 2013: see Black w/s §115.

(c) The Defendants have been asked twice not to take any further steps with respect to the Government Charter until (in essence) the complete and lawful resolution of the issues relating to the Press Charter. They have refused to give an undertaking to this effect.

107. For the reasons summarised at §§51-53 above, Pressbof disagrees with the Defendants as to whether an Order in Council is amenable to judicial review. However, if the Court were to find the Defendants' view to be correct but the Government Charter were to be granted (whether at the meeting of 30 October or on another occasion), there would obviously be a risk of the Court finding the Recommendation to be unlawful but Pressbof then being confronted with a non-justiciable Order in Council granting the Government Charter.

108. In other words, if the Defendants are correct as to the justiciability of Orders in Council of this nature, there is a risk that this claim may succeed in substance but turn out to have been futile. Were that to be the case, two decisions of considerable constitutional significance (namely, to reject the Press Charter and grant the Government Charter) would have been taken following an unlawful recommendation but there would be no recourse, whether for the press industry or for the wider public.

109. Accordingly, to protect against the risk of this occurring, Pressbof seeks interim relief in this claim against the Government Charter being considered and/or approved, whether at the meeting of 30 October 2013 or otherwise, pending the conclusion of the claim.

110. The application for interim relief is supported by a witness statement from Mr Gizzi.

111. Finally, in the light of the matters set out above, Pressbof also requests the urgent consideration of this claim.

Richard Gordon QC
Sarah Love
Brick Court Chambers

28 October 2013