

GLS Legitimate Expectation Webinar

CASE REFERENCE

R. (on the application of Bhatt Murphy (A Firm)) v Independent Assessor

Court of Appeal (Civil Division)

09 July 2008

Westlaw Case Analysis 13 pages

Official Transcript 25 pages

Status:  Positive or Neutral Judicial Treatment

R. (on the application of Niazi) v Secretary of State for the Home Department

R. (on the application of Bhatt Murphy (A Firm)) v Independent Assessor

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Case Analysis

Where Reported

[2008] EWCA Civ 755; (2008) 152(29) S.J.L.B. 29; Times, July 21, 2008; [Official Transcript](#)

Case Digest

Subject: Administrative law **Other related subjects:** Legal advice and funding

Keywords: Compensation; Consultation; Legal advice and funding; Legitimate expectation; Miscarriage of justice; Public policy

Summary: Decisions to withdraw a discretionary scheme to compensate victims of miscarriages of justice and to reduce the level of costs payable to solicitors acting in such cases did not breach the doctrine of legitimate expectations.

Abstract: The appellants appealed against a decision ([\[2007\] EWHC 1495 \(Admin\), Times, July 9, 2007](#)) that the withdrawal by the secretary of state of a discretionary scheme to compensate victims of miscarriage of justice was not unlawful, nor was the reduction in the level of legal costs payable in respect of applications for compensation. The appellants were applicants (N) who claimed to have suffered miscarriages of justice and solicitors (S) who specialised in applications for compensation by victims of miscarriages of justice. N had instructed solicitors but had not submitted applications for compensation to the secretary of state under the discretionary scheme before it was withdrawn. N were not eligible for statutory compensation and their prospective claims would have been under the discretionary scheme. They unsuccessfully sought judicial review of the decision to withdraw the discretionary scheme with immediate effect save as regards applications already received. S unsuccessfully sought judicial review of the decision of the Independent Assessor, taken at the same time, that from that date legal costs incurred in respect of compensation applications would be assessed by reference to the level of fees paid for legal help pursuant to the [Community Legal Service \(Funding\) Order 2000](#) rather than on the more generous private client basis which had previously applied. N submitted that there should have been consultation before withdrawal of the discretionary scheme, that that was required by the Cabinet Code of Practice on Consultation, and that the secretary of state should have given advance notice of the proposed change so that N would have been on notice that their claims for compensation under the discretionary scheme would have to be submitted before a certain date. S submitted that the Independent Assessor should have consulted them before changing the policy relating to recoverable costs, and should have made transitional arrangements under which private client rates would continue to apply to cases where the solicitor had been retained but no application for compensation had been submitted.

Appeals dismissed. (1) The Code of Practice applied to all public consultations by government departments and agencies but that meant that it was to apply whenever it was decided as a matter of policy to have a public consultation, not that public consultation was a required prelude to every policy change. There had been no promise that there would be consultation before the discretionary scheme was changed, [*Council of Civil Service Unions v Minister for the Civil Service* \[1985\] A.C. 374](#), [*R. v Devon CC Ex p. Baker* \[1995\] 1 All E.R. 73](#) and [*R. v North and East Devon HA Ex p. Coughlan* \[2001\] Q.B. 213](#) applied. (2) Where there had been no assurance of consultation, there could be no objection to the authority in question deciding to effect a change in its approach, since that involved no abuse of power, *Coughlan* applied. For there to be such a procedural legitimate expectation, the impact of the authority's past conduct on potentially affected persons had to be pressing and focused. The case had to be exceptional and there had to be an individual or group who in reason had substantial grounds to expect that the substance of the relevant policy would continue to enure for their particular benefit for a reasonable period. There was nothing of that kind in the instant case, [*R. v Rochdale MBC Ex p. Schemet* \[1993\] 1 F.C.R. 306](#), [*R. \(on the application of BAPIO Action Ltd\) v Secretary of State for the Home Department* \[2007\] EWCA Civ 1139](#), [*\[2008\] A.C.D. 7*](#) and [*R. v Inland Revenue Commissioners Ex p. Unilever Plc* \[1996\] S.T.C. 681](#) distinguished. (3) The transitional arrangements in respect of costs might have been different. However, the effect of the costs change was not that solicitors thereafter remained subject to unavoidable obligations to continue representing clients whose cases they had undertaken in the expectation of obtaining full private client costs, since the solicitors would have been entitled to terminate their retainers, had they chosen that course, in light of the costs change. N and S were in effect arguing for a more generous scheme but the reach of the policy change was wholly in the hands of the secretary of state and none of the special features of the law of legitimate expectation which might justify his being constrained was present. In particular there was no evidence of any assurance, promise or practice that the policy would be set differently in any respect. An expectation that the scheme would continue in effect until rational grounds for its cessation arose was categorically inadequate to generate a legitimate expectation which the courts would enforce.

Judge: Sir Anthony Clarke, M.R.; Laws, L.J.; Sedley, L.J.

Counsel: For the first appellant: Rabinder Singh QC, Phillippa Kaufmann. For the second, third and fourth appellants: Rabinder Singh QC, Stephen Cragg. For the respondents: Jonathan Swift.

Solicitor: For the first appellant: Bindman & Partners. For the second and third appellants: Hodge Jones and Allen. For the fourth appellant: Fisher Meredith. For the respondents: Treasury Solicitor.

Appellate History & Status

Divisional Court

R. (on the application of Niazi) v Secretary of State for the Home Department

[\[2007\] EWHC 1495 \(Admin\)](#); [\[2007\] A.C.D. 75](#); [Times, July 9, 2007](#); [Official Transcript](#)

Affirmed

Court of Appeal (Civil Division)

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[\[2008\] EWCA Civ 755](#); [\(2008\) 152\(29\) S.J.L.B. 29](#); [Times, July 21, 2008](#); [Official Transcript](#)

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[\[1985\] A.C. 374](#); [\[1984\] 3 W.L.R. 1174](#); [\[1984\] 3 All E.R. 935](#); [\[1985\] I.C.R. 14](#); [\[1985\] I.R.L.R. 28](#); [\(1985\) 82 L.S.G. 437](#); [\(1984\) 128 S.J. 837](#); HL; 1984-11-22

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Sumukan Ltd v Commonwealth Secretariat

[\[2007\] EWCA Civ 243](#); [\[2007\] 3 All E.R. 342](#); [\[2007\] 2 All E.R. \(Comm\) 23](#); [\[2007\] Bus. L.R. 1075](#); [\[2007\] 2 Lloyd's Rep. 87](#); [\[2007\] 1 C.L.C. 282](#); [\(2007\) 157 N.L.J. 482](#); [\(2007\) 151 S.J.L.B. 430](#); [Times, April 13, 2007](#); [Official Transcript](#); CA (Civ Div); 2007-03-21

R. (on the application of O'Brien) v Independent Assessor

[\[2007\] UKHL 10](#); [\[2007\] 2 A.C. 312](#); [\[2007\] 2 W.L.R. 544](#); [\[2007\] 2 All E.R. 833](#); [26 B.H.R.C. 516](#); [\(2007\) 151 S.J.L.B. 394](#); [Official Transcript](#); HL; 2007-03-14

R. v Taghibeglou (Hamidreza)

[\[2005\] EWCA Crim 3453](#); [Official Transcript](#); CA (Crim Div);

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[\[2001\] Q.B. 213](#); [\[2000\] 2 W.L.R. 622](#); [\[2000\] 3 All E.R. 850](#); [\(2000\) 2 L.G.L.R. 1](#); [\[1999\] B.L.G.R. 703](#); [\(1999\) 2 C.C.L. Rep. 285](#); [\[1999\] Lloyd's Rep. Med. 306](#); [\(2000\) 51 B.M.L.R. 1](#); [\[1999\] C.O.D. 340](#); [\(1999\) 96\(31\) L.S.G. 39](#); [\(1999\) 143 S.J.L.B. 213](#); [Times, July 20, 1999](#); [Independent, July 20, 1999](#); CA (Civ Div); 1999-07-16

R. v Secretary of State for the Home Department Ex p. Hargreaves

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R. v Inland Revenue Commissioners Ex p. Unilever Plc

[\[1996\] S.T.C. 681](#); [68 T.C. 205](#); [\[1996\] C.O.D. 421](#); [Official Transcript](#); CA (Civ Div); 1996-02-13

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[\[1995\] 2 All E.R. 714](#); [\[1995\] 1 C.M.L.R. 533](#); [\(1995\) 7 Admin. L.R. 637](#); [\[1995\] C.O.D. 114](#); QBD; 1994-11-03

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[\[1990\] 1 Q.B. 146](#); [\[1989\] 2 W.L.R. 863](#); [\[1989\] 1 All E.R. 509](#); [\(1988\) 4 B.C.C. 714](#); [\[1989\] B.C.L.C. 255](#); [\(1988\) 138 N.L.J. Rep. 244](#); [\(1989\) 133 S.J. 660](#); CA (Civ Div); 1988-07-28

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Kruse v Johnson

[\[1898\] 2 Q.B. 91](#); QBD; 1898-05-14

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R. (on the application of Lewisham LBC) v Assessment and Qualifications Alliance (AQA)

[\[2013\] EWHC 211 \(Admin\)](#); [Official Transcript](#); QBD (Admin); 2013-02-13

R. (on the application of Harrow Community Support Ltd) v Secretary of State for the Defence

[Unreported](#); QBD (Admin); 2012-07-10

R. (on the application of Godfrey) v Southwark LBC

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[\[2011\] EWCA Civ 430](#); [\[2012\] P.T.S.R. 604](#); [\[2011\] B.L.G.R. 616](#); [\[2011\] 2 E.G.L.R. 49](#); [\[2011\] 24 E.G. 110](#); [\[2011\] 16 E.G. 79 \(C.S.\)](#); [\(2011\) 108\(17\) L.S.G. 14](#); [\(2011\) 155\(15\) S.J.L.B. 38](#); [Times, April](#)

[21, 2011: Official Transcript](#); CA (Civ Div); 2011-04-13

R. (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales

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[\[2013\] EWHC 1858 \(Admin\)](#); QBD (Admin); 2013-06-28

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[\[2008\] EWHC 2602 \(Admin\); Times, January 19, 2009; Official Transcript](#); QBD (Admin); 2008-10-03

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UK FPO v Secretary of State for Environment, Food and Rural Affairs

[\[2013\] EWHC 1959 \(Admin\)](#); QBD (Admin); 2013-07-10

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R. (on the application of Tony Simpson) v Chief Constable of Greater Manchester

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[\[2013\] P.A.D. 38](#); Planning Inspector; 2013-04-12

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[\[2013\] EWHC 211 \(Admin\); Official Transcript](#); QBD (Admin); 2013-02-13

Considered

AJ v Calderdale BC

[\[2012\] EWHC 3552 \(Admin\); Official Transcript](#); QBD (Admin); 2012-10-22

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R. (on the application of Harrow Community Support Ltd) v Secretary of State for the Defence

[Unreported](#); QBD (Admin); 2012-07-10

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R. (on the application of Dudley MBC) v Secretary of State for Communities and Local Government

[\[2012\] EWHC 1729 \(Admin\)](#); [Official Transcript](#); QBD (Admin); 2012-06-25

Followed

R (on the application of Essex County Council) v Secretary of State for Education

[Unreported](#); QBD (Admin); 2012-05-17

Considered

R. (on the application of B) v Nursing and Midwifery Council

[\[2012\] EWHC 1264 \(Admin\)](#); QBD (Admin); 2012-05-15

Applied

R. (on the application of Godfrey) v Southwark LBC

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Applied

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Mentioned by

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[\[2011\] EWHC 1097 \(Admin\); Official Transcript](#); QBD (Admin); 2011-02-25

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Neutral Citation Number: [2008] EWCA Civ 755

Case Nos: C1/2007/1963, C1/2007/1935, C1/2007/1937, C1/2007/1956

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM the Queen's Bench Division (Administrative Court and Divisional Court)
May LJ and Gray J

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2008

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE LAWS
and
LORD JUSTICE SEDLEY

Between :

The Queen
On the application of
(1) Bhatt Murphy (a firm) and Ors
- and -
The Independent Assessor

Appellant

Respondent

- and -

The Queen
On the application of
(2) Noorrullah Niazi
(3) Hamidreza Tachibeglou
(4) Huseyin Cakir
- and -
The Secretary of State

Appellants

Respondent

**(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)**

Mr Rabinder Singh QC and Ms Phillippa Kaufmann (instructed by Bindman & Partners for the 1st appellant)
Mr Rabinder Singh QC and Mr Stephen Cragg (instructed by Hodge Jones and Allen) for the 2nd and 3rd
Appellants and (instructed by Fisher Meredith) for the 4th Appellant)

Mr Jonathan Swift (instructed by The Treasury Solicitor) for the Respondents

Date of Hearing: 14 & 15 April 2008

Judgment

As Approved by the Court

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LORD JUSTICE LAWS:

1. **INTRODUCTION** There are two sets of appellants before the court. I will call them respectively “the applicants” and “the solicitors”. They seek to challenge two decisions announced by the Secretary of State in a written ministerial statement on 19 April 2006. Other decisions were also announced in the statement, but we are not concerned with those. The statement’s context was the existence until that date of two concurrent schemes to compensate victims of miscarriages of justice. There was a statutory scheme provided for by s.133 of the Criminal Justice Act 1988 (“the 1988 Act”). There was also a discretionary scheme operated under the Crown’s common law powers. I will describe the schemes below. The first decision now sought to be impugned was to withdraw or abolish the discretionary scheme with immediate effect save as regards applications already received. The second was a decision not of the Secretary of State’s own, but of an officer called the Independent Assessor (at present Lord Brennan QC). It was to the effect that as from 19 April 2006 legal costs incurred in relation to applications (both under the statutory scheme which continued, and as regards extant applications under the discretionary scheme) should be assessed by reference to the level of fees paid for Legal Help pursuant to the Community Legal Service (Funding) Order 2000. There were certain transitional arrangements which I will describe. The previous basis of assessment had been more generous. It allowed for sums by way of legal costs (which were included in the overall figure for compensation arrived at in any given case) which were reasonable and proportionate.
2. The applicants are three persons who claim to have suffered miscarriages of justice. They had instructed solicitors before 19 April 2006, but no applications on their behalf had been submitted to the Secretary of State prior to that date. None of them is eligible for compensation under the statutory scheme. Their prospective claims would be under the discretionary scheme. The solicitors are six firms possessing specialist professional skill in this field, having over time represented many persons seeking compensation for actual or alleged miscarriages of justice. I give below a more detailed account of the facts relating both to the applicants and the solicitors. With permission granted by Calvert-Smith J they both sought judicial review: the applicants of the decision to withdraw the discretionary scheme, the solicitors of the decision to substitute Legal Help costs. The applications were dismissed by the Divisional Court (May LJ and Gray J) on 26 June 2007. The solicitors appeal to this court with permission granted by the court below; the applicants with permission granted by myself on 16 October 2007.
3. The case requires the court to revisit the law relating to legitimate expectations. It is a field much trodden in recent years, but its principles are still developing.

COMPENSATION FOR MISCARRIAGES OF JUSTICE: THE SCHEMES AND THEIR BACKGROUND

4. Since as long ago as 1905 the Home Secretary has from time to time made *ex gratia*

payments to the victims of miscarriages of justice. Since 1957 the level of such payments has been fixed on the advice of an Independent Assessor. In a written answer in the House of Commons on 29 July 1976 the then Home Secretary, Mr Roy Jenkins, described the payments as being “offered in recognition of the hardship caused by a wrongful conviction or charge and notwithstanding that the circumstances may give no grounds for a claim for civil damages”. On 20 May 1976 the United Kingdom had ratified the International Covenant on Civil and Political Rights (“the ICCPR”). On 20 August 1976 Article 14(6) of the ICCPR came into force. It provides:

“When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.”

5. From 1976 until 1985 the United Kingdom purported to fulfil its obligation under Article 14(6) by means of the existing arrangements for *ex gratia* payments. At length, however, measures required for compliance with Article 14(6) were placed on a statutory footing in the shape of s.133 of the 1988 Act. Mr Douglas Hurd, then Home Secretary, announced that that would be done in a statement to the House of Commons on 29 November 1985. S.133 provides so far as material:

“(1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.

(2) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Secretary of State.

(3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State.

(4) If the Secretary of State determines that there is a right to such compensation, the amount of the compensation shall be assessed by an assessor appointed by the Secretary of State.

(5) In this section “reversed” shall be construed as referring to a conviction having been quashed—

(a) on an appeal out of time; or

(b) on a reference—

(i) under section 17 of the Criminal Appeal Act 1968...”

6. In the same statement on 29 November 1985 the Secretary of State described the discretionary scheme, which was to continue in tandem with the statutory scheme. This description has been taken as defining the scope of the discretionary scheme from that date on. The Secretary of State said this:

“I remain prepared to pay compensation to people who do not fall within the terms of the preceding paragraph [sc. the statutory scheme] but who have spent a period in custody following a wrongful conviction or charge, where I am satisfied that it has resulted from serious default on the part of a member of a police force or of some other public authority.

There may be exceptional circumstances that justify compensation in cases outside these categories. In particular, facts may emerge at trial, or on appeal within time, that completely exonerate the accused person. I am prepared, in principle, to pay compensation to people who have spent a period in custody or have been imprisoned in cases such as this. I will not, however, be prepared to pay compensation simply because at the trial or an appeal the prosecution was unable to sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought.”

7. It will be apparent that a significant difference between the statutory and discretionary schemes is that the former did not cover the case where the claimant’s conviction was quashed on an appeal brought within time.
8. The Independent Assessor fixed the level of compensation under both schemes, including sums in respect of claimants’ legal costs. Under the statutory scheme this was (and is) on the footing that the phrase “the amount of the compensation” in s.133(4) of the 1988 Act is apt to include costs. Until 19 April 2006 the figures arrived at for costs were based on the private fee rates of the solicitors instructed. We were told that across the board this was some three to five times the Legal Help rate substituted by the Independent Assessor’s decision announced on that date.
9. Both schemes have received the attention of the higher courts. The House of Lords has considered the statutory scheme in *Re McFarland* [2004] UKHL 17, [2004] 1 WLR 1289, *Mullen* [2004] UKHL 18, [2005] 1 AC 1, and *O’Brien* [2007] UKHL 10. In the last case Lord Bingham of Cornhill made these general remarks at paragraph 11:

“... [N]or does the right to compensation in any way depend on the existence or proof of any delictual wrong recognised by the law. Wrongful conviction and punishment may and often are the result of delinquency on the part of public officials or others, but this is not necessarily so. The Secretary of State makes payment

out of public funds to victims of miscarriages of justice not because he or his officials are or are treated as being wrongdoers, but because such victims are recognised as having suffered what may (as here) be a great injury at the hands of the state and it is accepted as just that the state, representing the public at large, should make fair recompense.”

The discretionary scheme has been considered by their Lordships’ House in the *McFarland* case, and by this court in *Raissi* [2007] EWCA Civ 243.

THE SECRETARY OF STATE’S STATEMENT OF 19 APRIL 2006

10. This is what the Secretary of State said about the discretionary scheme:

“The existence of the second, discretionary scheme is confusing and anomalous. The scheme predates the introduction of international standards and agreements in this area and addresses cases beyond the UK’s international obligations. The scheme currently costs over £2m a year to operate but benefits only between five and ten applicants. I do not believe that the discretionary scheme can continue to be justified.

Applications for compensation already received by the Office for Criminal Justice Reform will continue to be considered both under section 133 and the discretionary scheme. However, with immediate effect I will entertain new applications for compensation only under the statutory scheme.”

This is what he said about legal costs:

“The Assessor has also decided that legal costs in relation to applications for compensation will, with immediate effect, be paid by reference to the fees for publicly funded civil cases as provided for in the Legal Help contained in the Community Legal Service (Funding) Order 2000. This change will apply to all existing cases (both under the statutory and discretionary scheme) which are currently awaiting a decision from the Assessor on the amount of compensation, as well as to all existing cases (both under the statutory and discretionary scheme) where the question of eligibility for compensation is being considered by the Office for Criminal Justice Reform, and to all new cases for compensation under the statutory scheme received by the Office for Criminal Justice Reform. However, in the case of applications already received by the Office for Criminal Justice Reform or already under consideration by the Assessor, the change will apply only in relation to legal costs incurred after today and compensation in respect of legal costs before today will be paid on the same basis as before.”

The Office for Criminal Justice Reform (“OCJR”) is a cross-departmental organisation within government which reports to Ministers in the Ministry of Justice, the Home Office and the Attorney General’s Office. On behalf of the Secretary of State it decides eligibility for compensation under both schemes. If an application is found eligible it is passed to the Independent Assessor to fix the amount, including legal costs.

THE APPLICANTS AND THE SOLICITORS

The Applicants

11. I turn next to the facts concerning the appellants. First, the applicants. Mr Taghibeglou was convicted of indecent assault and sentenced to three and a half years imprisonment. Mr Cakir was convicted of blackmail and sentenced to four years three months. Mr Niazi was charged with rape and indecent assault and remanded in custody. In the first two cases the convictions were quashed by the Court of Appeal Criminal Division on appeals brought within time. In Mr Niazi’s case the charges were dropped.
12. Allowing Mr Taghibeglou’s appeal in December 2005 ([2005] EWCA Crim 3453) the court stated:

“[I]t seems to us that critical aspects of the case against the appellant were so implausible as truly to defy belief”

and the case against Mr Taghibeglou “offended common sense”.
13. In Mr Cakir’s case a critical piece of evidence was a tape recording of a conversation in which according to Mr Duzen, a Turkish interpreter, Mr Cakir threatened the life of a Mr Esmene. Mr Cakir insisted on an innocent interpretation. Mr Duzen said he had listened to the tape 75 times and was sure of the threat of death. But the Crown had failed to disclose Mr Duzen’s suspension from practice on grounds of dishonesty. On 10 May 2005 Mr Cakir’s appeal was allowed on the ground that Mr Duzen’s evidence was undermined.
14. In Mr Niazi’s case medical evidence, which was not disclosed to the defence when it should have been, showed that his alleged victim was *virgo intacta*.
15. All three applicants spent time in custody before their appeals were allowed or (in Mr Niazi’s case) the prosecution was dropped. As I have said, none of them was eligible for compensation under the statutory scheme. All three had instructed solicitors before 19 April 2006 and been advised that they had potential claims under the discretionary scheme. But no applications on their behalf had been submitted to the Secretary of State before that date.

The Solicitors

16. The solicitors are six firms which specialise, as I have indicated, in the preparation and presentation of applications for compensation for miscarriages of justice. It is plain from the material before us that this kind of work (under either scheme) may involve complex and difficult issues, relating not only to criminal law and practice and the gathering of evidence, but also to the assessment and evaluation of loss (including the configuration of applications so as to fit with analogous principles relating to claims for damages for civil wrongs: see *O'Brien* [2004] EWCA Civ 1035 paragraph 45), and where appropriate the attribution to the relevant public authorities of blame or fault in the conduct or handling of the criminal case. A miscarriage of justice may have persisted over many years, with consequent refinements and complications in all these areas. The solicitors' experience is that before 19 April 2006 the Independent Assessor almost invariably allowed costs at their standard fee rates for private work. Where there was a reduction it was with one exception on the basis that too much time had been spent, not that the hourly rate was excessive.
17. We have in the papers an example of the terms on which as between themselves and their clients the solicitors undertook this class of work before 19 April 2006. It takes the form of a letter to the client. The terms set out are not of course uniform among all six firms (or, probably, as between any individual firm and its clients) but we were effectively invited to treat this letter as typical and nothing turns on any differences. Under the heading "Fees" the charges which are to be based on the hourly expense rates of different members of the firm are explained. So is the VAT position. It is stated there will be no claim for costs on account. Then this:

"The Home Office will pay your legal costs in addition to your award for compensation so long as they consider that those costs are reasonable."

The letter goes on to deal with other matters. Then under the heading "Termination", among other things this is stated: "We may decide to stop acting for you if we have a good reason... We must give you reasonable notice that we will stop acting for you."

18. Thus there is no doubt, and this is spoken to in a series of witness statements, that as at 19 April 2006 all the solicitors were engaged on retainers from clients (seeking compensation under the statutory or discretionary scheme) on terms that their fees would be charged out at the firm's standard fee rates for private work in the expectation that the costs would be met by the Independent Assessor. Equally the solicitors were entitled to terminate the retainer on reasonable notice. It is not I think in contest that the solicitors would have been entitled so to terminate (had they chosen that course) in light of the costs change announced on 19 April 2006.

TRANSITIONAL AND CONSEQUENTIAL ARRANGEMENTS AFTER 19 APRIL 2006

19. After the announcement on 19 April 2006 certain transitional arrangements relating to costs were arrived at and communicated to interested parties including the solicitors.

Here is the description given by Mr Paul Jackson, Head of the (to my mind oddly named) Miscarriages of Justice Team within the Better Trials Unit of the OCJR, in his witness statement of 20 December 2006:

“32. To avoid unfairness, it was decided that the pre-19 April 2006 approach to the costs of making an application for compensation would continue to apply for legal work undertaken prior to 19 April 2006 where an application has already been made. I should also make it clear that, in relation to applications for compensation received before 19 April 2006 a further concession will be made by the Assessor. In any such case it will be open to the applicant to make representations that his costs incurred after 19 April 2006 should be reimbursed at a rate higher than the Legal Help rate because work was undertaken on the assumption that a different rate would apply, and that work would not have been undertaken had it been realised that the Legal Help rate would apply. The Assessor will consider any such representations, and may adjust the amount payable in respect of the legal costs of the application for compensation accordingly. Finally, on this point, it should also be noted that the costs incurred when it is necessary to instruct an expert for the purposes of making an application for compensation are treated differently. The Assessor will agree reimbursement of reasonable costs for this purpose where he considers the use of an expert to be justifiable and necessary.”

20. Counsel’s fees after 19 April 2006 were only to be paid if the Assessor had agreed that counsel might be instructed. It is to be noted that the Legal Help rate was only applied to the costs involved in making the application for compensation; costs incurred in reversing the claimant’s conviction (which if otherwise unrecovered might also be included in the amount of compensation) were unaffected: see the OCJR revised guidance for April 2006, paragraph 14. I should also notice a concession made before the Divisional Court by Mr Swift for the respondents. It was described as follows by May LJ:

“52. ... Mr Swift, upon taking specific instructions, accepted that the Assessor will be prepared to receive and consider representations that a particular case might merit the payment of solicitors’ costs above the Legal Help rate.”

This seems to me to contemplate a somewhat wider discretion to pay costs on the old basis than is described by Mr Jackson in paragraph 32 of his witness statement which I have set out.

REASONS FOR REDUCING COSTS

21. The Independent Assessor’s reasons for reducing the level of recoverable costs were in part given in the Secretary of State’s announcement on 19 April 2006, in part in a letter from Mr Jackson of 12 July 2006, and on one point in a Parliamentary written answer of 10 July 2006 from Mr Gerry Sutcliffe MP. They included a concern as to the sharp

recent rise in compensation payouts for miscarriages of justice, where 10% of the current average payout represented costs; a significant increase in cases where substantial material had been (expensively) provided which was of little assistance; Legal Help was a common and well known standard and was appropriate since a compensation application was not truly a form of litigation; no costs were provided for in the criminal injuries scheme; but (this was the Parliamentary answer) a desire to make savings did not motivate the change.

22. I have described these considerations summarily. Mr Rabinder Singh QC for the appellants refers to them only to make three points, two of which are not in principle contentious. They arise in the context of his overall argument as to legitimate expectations which I will summarise in due course; however it is useful to identify the three points now. He says first that certain criticisms of the Assessor's reasons which he is able to advance demonstrate that had the solicitors been consulted about the proposed change, there is much they might have said: consultation would by no means have been futile. Secondly it is contended that none of the matters advanced could, by appeal to the public interest, override the solicitors' legitimate expectations. However Mr Swift for the respondents does not assert that consultation would have been futile, or that if the solicitors (or the applicants) enjoyed any legitimate expectations there was an over-arching public interest which must have defeated them. His case is that in any event the facts disclose no legitimate expectations of a kind which the public law court will enforce.
23. Mr Singh's third point concerns the Minister's statement that a desire to make savings did not motivate the change. He submits that on that footing concerns as to increasing costs must have been irrelevant. I have to say I am not entirely clear where this point goes, since I understood Mr Singh to disavow any free-standing argument that the decision on costs was so unreasonable as to fall foul of the *Wednesbury* principle ([1948] 1 KB 223). In any event the Minister's written answer was more nuanced than Mr Singh's submission (or my summary) suggests. He stated that the changes

“were not driven by the desire to make savings, rather to ensure that compensation following a miscarriage of justice is more proportionate to the level of injustice, to achieve a better balance with the treatment of the victims of crime, and to make the system simpler and fairer...”

So the concern was not to make net savings, but to ensure that available money was spent in the right place (as the Crown saw it). That is by no means to say that matters of cost were irrelevant to the decision; quite the contrary.

THE CABINET OFFICE CODE OF PRACTICE AND THE HOME OFFICE WEBSITE

24. Before turning to the substantive arguments in the case I should briefly describe these materials, which have played some part in the appellants' submissions on legitimate expectations. The Home Office website contains this:

“About us

Consultations – have your say

Before changing policy, the Home Office publishes consultation papers.

These set out Government proposals on a particular issue and ask for responses from people and organisations with specialist knowledge in that area. We also value responses from the general public.

The responses received help to ensure that any proposed changes to the law will have a real, practical impact.

All Home Office open consultation papers are available in the current consultations section of this website. We welcome your views.”

25. The Cabinet Code of Practice on Consultation which is before us is a revised version issued in January 2004 and coming into force in April 2004. It is a substantial document. It was crisply summarised by May LJ as follows:

“23. The Prime Minister’s Foreword introduced [the Code] with a statement that effective consultation is a key part of the policy making process. The first of six criteria adverts to wide consultation throughout the process allowing a minimum of twelve weeks for written consultation at least once during the development of the policy. The Introduction states that the Code and the criteria apply to all public consultations by government departments and agencies... The Code states that it does not have legal force but should generally be regarded as binding on United Kingdom departments and their agencies unless Ministers conclude that exceptional circumstances require a departure from it. Ministers retain their existing discretion not to conduct a formal written consultation exercise under the terms of the Code, for example where the issue is very specialised and where there is a very limited number of so-called stakeholders who have been directly involved in the policy development process.”

I would add two citations from the Code, the first also from the Prime Minister’s Foreword:

“[The original Code] has been effective in raising both the quality and quantity of consultation carried out by government. We consult more extensively now than ever before.”

Then the first sentence of the Introduction:

“The code and the criteria within it apply to all UK public consultations by government departments and agencies,

including consultations on EU directives.”

LEGITIMATE EXPECTATIONS – THE PRINCIPLES

Introduction

26. The appellants’ arguments are all based on the doctrine, or doctrines, of legitimate expectations. I hope it will make for clarity if I describe the relevant law (and where it is contentious or uncertain, my view of it) before I address Mr Singh’s distinct submissions.
27. Legitimate expectation is now a well-known public law headline. But its reach in practice is still being explored. In one of the leading cases, *Ex p Coughlan* [2001] QB 213, Lord Woolf MR as he then was, giving the judgment of the court, described it as “still a developing field of law” (paragraph 59). The cases show that put broadly (there are refinements) it encompasses two kinds. There is procedural legitimate expectation, and there is substantive legitimate expectation. But in certain types of case these terms are more elusive than they appear. These appeals therefore call for some account of the material principles, however well trodden the ground. I acknowledge that much of the ground is at the foothills. But the path falters a little further up.
28. Legitimate expectation of either kind may (not must) arise in circumstances where a public decision-maker changes, or proposes to change, an existing policy or practice. The doctrine will apply in circumstances where the change or proposed change of policy or practice is held to be unfair or an abuse of power: see for example *Ex p Coughlan* paragraphs 67 ff, *Ex p Begbie* [2000] 1 WLR 1115, 1129F – H. The court is generally the first, not the last, judge of what is unfair or abusive; its role is not confined to a back-stop review of the primary decision-maker’s stance or perception: see in particular *Ex p Guinness Plc* [1990] 1 QB 146. Unfairness and abuse of power march together: see (in addition to *Coughlan* and *Begbie*) *Preston* [1985] AC 835, *Ex p Unilever* [1996] STC 681, 695 and *Rashid* [2005] INRL 550 paragraph 34. But these are ills expressed in very general terms; and it is notorious (and obvious) that the ascertainment of what is or is not fair depends on the circumstances of the case. The excoriation of these vices no doubt shows that the law’s heart is in the right place, but it provides little guidance for the resolution of specific instances.

Procedural Legitimate Expectation

29. There is a paradigm case of procedural legitimate expectation, and this at least is in my opinion clear enough, whatever the problems lurking not far away. The paradigm case arises where a public authority has provided an unequivocal assurance, whether by means of an express promise or an established practice, that it will give notice or embark upon consultation before it changes an existing substantive policy: see *CCSU* [1985] AC 374 at 408G – H (Lord Diplock’s category (b)(ii)), *Ex p Baker* [1995] 1 AER 73 at 89 (Simon Brown LJ’s category 4, acknowledged by him to equate with Lord Diplock’s category (b)(ii): see p. 90), *Ex p Coughlan* at paragraph 57, p.242A – C: Lord Woolf’s category (b)). I need not for present purposes set out these taxonomies.

30. In the paradigm case the court will not allow the decision-maker to effect the proposed change without notice or consultation, unless the want of notice or consultation is justified by the force of an overriding legal duty owed by the decision-maker, or other countervailing public interest such as the imperative of national security (as in *CCSU*). There may be questions such as whether the claimant for relief must himself have known of the promise or practice, or relied on it. It is unnecessary for the purpose of these appeals to travel into those issues; I venture only to say that there are in my view significant difficulties in the way of imposing such qualifications. My reason is that in such a procedural case the unfairness or abuse of power which the court will check is not merely to do with how harshly the decision bears upon any individual. It arises because good administration (“by which public bodies ought to deal straightforwardly and consistently with the public”: paragraph 68 of my judgment in *Ex p Nadarajah* [2005] EWCA Civ 1363) generally requires that where a public authority has given a plain assurance, it should be held to it. This is an objective standard of public decision-making on which the courts insist. I note with respect the observations of Peter Gibson LJ on the importance of reliance in *Ex p Begbie* at 1124B – D; but that was a case (or a putative case) of substantive legitimate expectation, where different considerations may arise.
31. Aside from these possible refinements, the paradigm case of procedural legitimate expectations is as I have said clear enough. But as I shall show, there is another class of procedural expectation which wants careful attention, and is relied on in these appeals. It is convenient first to turn to substantive legitimate expectation.

Substantive Legitimate Expectation

32. A substantive legitimate expectation arises where the court allows a claim to enforce the continued enjoyment of the content – the substance – of an existing practice or policy, in the face of the decision-maker’s ambition to change or abolish it. Thus it is to be distinguished from a merely procedural right. It is expressed by Simon Brown LJ as he then was in *Ex p Baker* as category 1:

“1. Sometimes the phrase [sc. legitimate expectation] is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him... [Various] authorities show that the claimant’s right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it. The doctrine employed in this sense is akin to an estoppel.”

And it formed category (c) in the judgment of the court delivered by Lord Woolf in *Ex p Coughlan* at paragraph 57 (242C):

“(c) Where the court considers that a lawful promise or practice has induced a legitimate

expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."

33. Here I have set out the reasoning in the cases because it is in this area of substantive legitimate expectation that the subject's first uncertainty arises. It concerns the references in *Ex p Baker* to "a clear and unambiguous representation" and in *Ex p Coughlan* to "a lawful promise or practice". These citations do not explain the content of the putative representation, promise or practice. It must, however, surely go to the enjoyment of the substance of the policy in question. Presumably there will either be an authoritative representation of what the relevant policy is and will continue to be, or else simply the fact of a policy's being settled and established in practice. A promise or practice: but not the kind of promise or practice found in the paradigm case of procedural legitimate expectation. In the procedural case we find a promise or practice of *notice* or *consultation* in the event of a contemplated change. In the substantive case we have a promise or practice of present and future *substantive policy*. This difference is at the core of the distinction between procedural and substantive legitimate expectation.
34. It seems to me, however, that on the face of it the existence of a promise or practice of present and future substantive policy serves as a somewhat fragile boundary by which to set limits to substantive legitimate expectations. Once set in place, *every* policy of a public authority, not subject to a stated terminal date or terminating event, may no doubt be expected to continue in effect until rational grounds for its cessation arise. A promise of its continuance, if it points to no particular date or future event to mark the end of the policy, represents little more than this ordinary expectation. And nothing is added by referring to a practice of the policy in operation over time.
35. In this context, then, the notion of a promise or practice of present and future substantive policy risks proving too much. The doctrine of substantive legitimate expectation plainly cannot apply to every case where a public authority operates a policy over an appreciable period. That would expand the doctrine far beyond its proper limits. The establishment of any policy, new or substitute, by a public body is in principle subject to *Wednesbury* review. But a claim that a substitute policy has been established in breach of a substantive legitimate expectation engages a much more rigorous standard. It will be adjudged, as I have foreshadowed, by the court's own view of what fairness requires. This is a principal outcome of this court's decision in *Ex p Coughlan* (see in particular paragraphs 74, 78, 81 and 82). It demonstrates the importance of finding the reach of substantive legitimate expectation.
36. The concept of substantive legitimate expectation therefore poses a question: what

are the conditions under which a prior representation, promise or practice by a public decision-maker will give rise to an enforceable expectation of a substantive benefit? Before addressing this issue I should return to procedural expectations, where as we shall see a like problem arises.

A Question of Classification

37. But there is first a prior question – one of classification. To explain it, I must return to the texts: Lord Diplock in *CCSU* and Simon Brown LJ in *Ex p Baker*. First, Lord Diplock's category (b)(i) (*CCSU* at 408F – G):

“To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:

(a) ...

(b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment...”

Next, Simon Brown LJ's category 2 (*Ex p Baker* at 88 – 89):

“2. Perhaps more conventionally the concept of legitimate expectation is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or, some would argue, attain). Here, therefore, it is the interest itself rather than the benefit that is the substance of the expectation. In other words the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness - the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision...”

38. Each of these passages refers to the same category of legitimate expectation, as Simon Brown LJ recognised in *Ex p Baker* at 90. But neither passage offers an objective criterion by which to decide whether the class of legitimate expectation in question should be applied to the case in hand (beyond the fact that the claimant has enjoyed the relevant benefit in the past). Neither formulation involves any prior representation, promise or practice. Simon Brown LJ recognised the want of any objective test. He said (*Ex p Baker* at 90):

“Thus the only touchstone of a category 2 interest emerging

from Lord Diplock's speech is that the claimant has in the past been permitted to enjoy some benefit or advantage. Whether or not he can then legitimately expect procedural fairness, and if so to what extent, will depend upon the court's view of what fairness demands in all the circumstances of the case. That, frankly, is as much help as one can get from the authorities."

39. I shall have to return to "the court's view of what fairness demands in all the circumstances of the case" in the context of this category of legitimate expectation. But I should first state my view that it is best classified as a form of procedural legitimate expectation: it is the further class of procedural expectation to which I referred, but with no elaboration, at paragraph 32. I shall call it the secondary case of procedural legitimate expectation. It is to be noted that Lord Diplock's reference to the communication of "some rational ground for withdrawing" [the benefit or advantage in question] gives the appearance of a procedural right: the *right* actually enjoyed is the right to make representations in response to such a communication. This is identical to the right afforded in the paradigm case of procedural legitimate expectation, where there has been a promise or practice by which just such an opportunity has been provided.

Two Issues

40. There remain two issues to be confronted. They bear a close similarity. The first relates to substantive legitimate expectation. It is the question I posed at paragraph 36: what are the conditions under which a prior representation, promise or practice by a public decision-maker will give rise to an enforceable expectation of a substantive benefit? The second relates to the secondary case of procedural legitimate expectation: what are the conditions under which a public decision-maker will be required, before effecting a change of policy, to afford potentially affected persons an opportunity to comment on the proposed change and the reasons for it where there has been no previous promise or practice of notice or consultation? Answers to these questions might give sharper edges to the doctrine of legitimate expectation.

Generally

41. There is first an overall point to be made. It is that both these types of legitimate expectation are concerned with exceptional situations (see Lord Templeman in *Preston* at 864; compare *ABCIFER* [2003] QB 1397 *per* Dyson LJ at paragraph 72). It is because their vindication is a long way distant from the archetype of public decision-making. Thus a public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Nor will the law often require such a body to involve a section of the public in its decision-making process by notice or consultation if there has been no promise or practice to that effect. There is an underlying reason for this. Public authorities typically, and central government *par excellence*, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally

entitled to keep their own counsel. All this is involved in what Sedley LJ described (*BAPIO* [2007] EWCA Civ 1139 paragraph 43) as the entitlement of central government to formulate and re-formulate policy. This entitlement – in truth, a duty – is ordinarily repugnant to any requirement to bow to another’s will, albeit in the name of a substantive legitimate expectation. It is repugnant also to an enforced obligation, in the name of a procedural legitimate expectation, to take into account and respond to the views of particular persons whom the decision-maker has not chosen to consult.

42. But the court will (subject to the overriding public interest) insist on such a requirement, and enforce such an obligation, where the decision-maker’s proposed action would otherwise be so unfair as to amount to an abuse of power, by reason of the way in which it has earlier conducted itself. In the paradigm case of procedural expectations it will generally be unfair and abusive for the decision-maker to break its express promise or established practice of notice or consultation. In such a case the decision-maker’s right and duty to formulate and re-formulate policy for itself and by its chosen procedures is not affronted, for it must itself have concluded that that interest is consistent with its proffered promise or practice. In other situations – the two kinds of legitimate expectation we are now considering – something no less concrete must be found. The cases demonstrate as much. What is fair or unfair is of course notoriously sensitive to factual nuance. In applying the discipline of authority, therefore, it is as well to bear in mind the observation of Sir Thomas Bingham MR as he then was in *Ex p Unilever* at 690f, that “[t]he categories of unfairness are not closed, and precedent should act as a guide not a cage”.

Authority

(1) Substantive Expectation

43. Authority shows that where a substantive expectation is to run the promise or practice which is its genesis is not merely a reflection of the ordinary fact (as I have put it) that a policy with no terminal date or terminating event will continue in effect until rational grounds for its cessation arise. Rather it must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy’s continuance is assured. Lord Templeman in *Preston* referred (866 – 867) to “conduct [in that case, of the Commissioners of Inland Revenue] equivalent to a breach of contract or breach of representations”.
44. I will give two concrete instances from the cases. In *Ex p Khan* [1985] 1 AER 40 the Home Office promulgated specific criteria for the admission of children into this country for the purposes of adoption here. The appellant sought entry for his prospective adoptive child. He relied in terms on the published criteria which he fulfilled. But he found his application blocked by a further, unannounced criterion which he did not satisfy. This court allowed his appeal.
45. *Ex p Coughlan* is a particularly strong case. Miss Coughlan was a very severely disabled lady. She and seven comparably disabled patients had been given a clear promise by the health authority that a particular facility,

Mardon House, would be their home for life. But the health authority decided to close Mardon House which had ceased to be financially viable. The court said this at paragraph 86:

“[The health authority’s promise of a home for life] was an express promise or representation made on a number of occasions in precise terms. It was made to a small group of severely disabled individuals who had been housed and cared for over a substantial period in the Health Authority’s predecessor’s premises at Newcourt. It specifically related to identified premises which it was represented would be their home for as long as they chose. It was in unqualified terms. It was repeated and confirmed to reassure the residents. It was made by the Health Authority’s predecessor for its own purposes, namely to encourage Miss Coughlan and her fellow residents to move out of Newcourt and into Mardon House, a specially built substitute home in which they would continue to receive nursing care. The promise was relied on by Miss Coughlan. Strong reasons are required to justify resiling from a promise given in those circumstances. This is not a case where the Health Authority would, in keeping the promise, be acting inconsistently with its statutory or other public law duties. A decision not to honour it would be equivalent to a breach of contract in private law.”

46. These cases illustrate the pressing and focussed nature of the kind of assurance required if a substantive legitimate expectation is to be upheld and enforced. I should add this. Though in theory there may be no limit to the number of beneficiaries of a promise for the purpose of such an expectation, in reality it is likely to be small, if the court is to make the expectation good. There are two reasons for this, and they march together. First, it is difficult to imagine a case in which government will be held legally bound by a representation or undertaking made generally or to a diverse class. As Lord Woolf MR said in *Ex p Coughlan* (paragraph 71):

“May it be... that, when a promise is made to a category of individuals who have the same interest it is more likely to be considered to have binding effect than a promise which is made generally or to a diverse class, when the interests of those to whom the promise is made may differ or, indeed, may be in conflict?”

The second reason is that the broader the class claiming the expectation’s benefit, the more likely it is that a supervening public interest will be held to justify the change of position complained of. In *Ex p Begbie* I said this (1130G – 1131B):

“In some cases a change of tack by a public authority, though unfair from the applicant’s stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no position to adjudicate

save at most on a bare *Wednesbury* basis, without themselves donning the garb of policy-maker, which they cannot wear... In other cases the act or omission complained of may take place on a much smaller stage, with far fewer players... The case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes."

Though I will not go into the details, *Ex p Begbie* repays attention because the facts of the case (an apparent undertaking given to a parent as to the continuance of an assisted place at an independent school) potentially furnish another good example of this class of legitimate expectation – potentially, because the claim failed for reasons not relevant to this present discussion (principally because to enforce the expectation would have required the Secretary of State to act contrary to statute).

(2) The Secondary Case of Procedural Expectation

47. I posed the question earlier: what are the conditions under which a public decision-maker will be required, before effecting a change of policy, to afford potentially affected persons an opportunity to comment on the proposed change and the reasons for it where there has been no previous promise or practice of notice or consultation? Under this head I will first cite one of the cases given by Simon Brown LJ in *Ex p Baker* as "clear examples" of this kind of legitimate expectation. In *Ex p Schemet* [1993] 1 FCR 306 the claimants were the parents of two children who went to a school outside the local authority's district. The local authority had paid for the elder child's travel costs, but then changed their policy. They stopped paying for the elder child's travel, and never paid for the younger's. There had been no promise or practice of notice or consultation. Roch J as he then was nevertheless held (324C – D) that the claimants enjoyed a legitimate expectation that the benefit would continue in relation to the elder child until there had been communicated to them some rational ground for withdrawing it on which they had been given an opportunity to comment. It might be thought that the decision was a generous one. However, again, the affected persons were few in number. And Roch J's reason for upholding the expectation was expressed thus (324D – E):

"There could well be cases where the withdrawal of a travel pass would mean that the child would have to change schools, and it would seem right and sensible that the local education authority should pay some regard to the effect that a change of schools would have on that particular child before finally deciding whether to withdraw that advantage."

48. The next case is *Ex p Unilever*. The facts were very stark. The case concerned the Inland Revenue's treatment of a taxpayer's claims for loss relief against corporation tax. A time limit for making such claims was stipulated in the legislation, but (as was common ground) the Revenue enjoyed a discretion to entertain late claims. On thirty

occasions over a period of more than 20 years the taxpayer submitted late claims and the Revenue accepted them. But then for the accounting years 1986, 1987 and 1988, with no prior notice, warning or consultation, they refused the taxpayer's claims on the ground that they were not made within the statutory time limit. Sir Thomas Bingham MR as he then was said (691g):

“On the history here, I consider that to reject Unilever's claims in reliance on the time-limit, without clear and general advance notice, is so unfair as to amount to an abuse of power.”

It is plain both from Sir Thomas Bingham's judgment and that of Simon Brown LJ (Hutchison LJ added no reasoning of his own) that the court regarded the Revenue's conduct as outrageous (see for example Simon Brown LJ at 697c: “so outrageously unfair that it should not be allowed to stand”).

49. I apprehend that the secondary case of legitimate expectation will not often be established. Where there has been no assurance either of consultation (the paradigm case of procedural expectation) or as to the continuance of the policy (substantive expectation), there will generally be nothing in the case save a decision by the authority in question to effect a change in its approach to one or more of its functions. And generally, there can be no objection to that, for it involves no abuse of power. Here is Lord Woolf again in *Ex p Coughlan* (paragraph 66):

“In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process.”

Accordingly for this secondary case of procedural expectation to run, the impact of the authority's past conduct on potentially affected persons must, again, be pressing and focussed. One would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit: not necessarily for ever, but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult.

Postscript

50. A very broad summary of the place of legitimate expectations in public law might be expressed as follows. The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. If it has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation). If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation). If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so,

then ordinarily it must consult before effecting any change (the secondary case of procedural expectation). To do otherwise, in any of these instances, would be to act so unfairly as to perpetrate an abuse of power.

51. To all this there are no doubt refinements and qualifications, and there may be other cases. And major questions can arise as to the circumstances in which the public interest will, in the court's view, allow the change of policy despite its unfair effects. This was the subject of some observations of mine in *Ex p Nadarajah*. It is not a topic for debate in the present case, because the question here is whether any potentially enforceable legitimate expectation has arisen at all. I would only draw from *Nadarajah* the idea that the underlying principle of good administration which requires public bodies to deal straightforwardly and consistently with the public, and by that token commends the doctrine of legitimate expectation, should be treated as a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. Any departure from it must therefore be justified by reference among other things to the requirement of proportionality (see *Ex p Nadarajah*, paragraph 68).

52. Now I may turn to the law's application in these appeals.

THESE APPEALS

The Paradigm Case of Procedural Expectation: Was There a Promise?

53. The applicants rely on the Cabinet Code of Practice on Consultation and the Home Office website, whose relevant terms I have set out, as demonstrating a promise to consult before changing policy by the announcement of 19 April 2006. In particular they draw attention to this sentence from the website: "Before changing policy, the Home Office publishes consultation papers". Before the Divisional Court, however, they relied only on the Code of Practice.

54. As regards the Code of Practice I agree entirely with the Divisional Court. May LJ said:

"23... The Introduction states that the Code and the criteria apply to all public consultations by government departments and agencies. Mr Swift submits, correctly in my view, that this means that the Code is to apply whenever it is decided as a matter of policy to have a public consultation; not that public consultation is a required prelude to every policy change. The Code states that it does not have legal force but should generally be regarded as binding on United Kingdom departments and their agencies unless Ministers conclude that exceptional circumstances require a departure from it. Ministers retain their existing discretion not to conduct a formal written consultation exercise under the terms of the Code, for example where the issue is very specialised and where there is a very limited number of so-called stakeholders who have been directly

involved in the policy development process.

24. For the reasons given by Mr Swift, I do not consider that it is possible to read this document as any form of governmental promise or undertaking that policy changes will never be made without consultation. It would be very surprising if it could be so read, not least because a decision in a particular case whether to consult is itself a policy decision. Rather the Code prescribes how generally public consultation should be conducted if there is to be public consultation.”

55. The sentence from the Home Office website, in my judgment, gives the applicants no greater comfort. As Mr Swift submits (skeleton argument paragraph 57), in context the sentence is no more than an explanation of the nature and function of the consultation papers made available in that section of the website. It is by no means apt to commit the Home Office to a universal practice of consultation. Indeed, the applicants do not contend for such a universal practice; yet read in isolation, as the applicants would read it, that is presumably what it confides.

The Remaining Arguments

56. The rest of the case accordingly proceeds on the footing that there was no promise or practice of notice or consultation. The solicitors and the applicants each put their remaining (and more substantial) arguments in two ways. The solicitors submit as follows. (1) The Independent Assessor should have consulted them before changing the policy relating to recoverable costs. This is a plea to the secondary case of procedural legitimate expectation. (2) The Independent Assessor should have made different transitional arrangements. He should have undertaken to continue payment after 19 April 2006 at private client rates in all “pipeline” cases, that is, cases where the solicitor had been retained before that date but no application for compensation had by then actually been submitted. This is a plea for substantive legitimate expectation.
57. The applicants submit as follows. (1) The Secretary of State should have consulted before withdrawing the discretionary scheme. (It is not quite clear *who* should have been consulted: it is not suggested that the Secretary of State should have made enquiries as to the identity of alleged victims of miscarriages of justice who had not yet submitted applications. No doubt a public notice, or notice to the solicitors known to act in the field, is what is meant.) This, again, is a plea to the secondary case of procedural legitimate expectation. (2) The Secretary of State should have given advance notice of the proposed change so that the applicants would be on warning that their claims for compensation under the discretionary scheme would have to be submitted before a certain date. This, again, is a plea for substantive legitimate expectation.

Pleas to the Secondary Case of Procedural Expectation

58. Founding on *Ex p Schemet* Mr Singh submitted that a beneficiary of a public authority’s

policy enjoys a legitimate expectation that the policy will continue in being until rational grounds for its withdrawal have been communicated to him and he has been given an opportunity to comment. I can understand how so ambitious an argument might be got out of *Ex p Schemet*, in which, with respect to Roch J, the boundaries of this kind of legitimate expectation are not uncovered. But in my judgment *Ex p Schemet* does not vouchsafe anything like so wide a proposition as that contended for by Mr Singh, and if it did, that would in my judgment amount to a grave error. The secondary class of procedural expectation denotes an exceptional case. It runs, as I have said, where the impact of the authority's past conduct on potentially affected persons is pressing and focussed, and in reason such person or persons have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit. There is nothing of the kind here.

59. Mr Singh's argument, seeking on behalf of both sets of appellants to invoke the secondary case of procedural legitimate expectation, proves far too much. Confronting a similar argument addressed by Mr Singh in *BPIO*, Sedley LJ said this:

"44. But what are its implications? The appellants have not been able to propose any limit to the generality of the duty. Their case must hold good for all such measures, of which the state at national and local level introduces certainly hundreds, possibly thousands, every year. If made good, such a duty would bring a host of litigable issues in its train: is the measure one which is actually going to injure particular interests sufficiently for fairness to require consultation? If so, who is entitled to be consulted? Are there interests which ought *not* to be consulted? How is the exercise to be publicised and conducted? Are the questions fairly framed? Have the responses been conscientiously taken into account? The consequent industry of legal challenges would generate in its turn defensive forms of public administration. All of this, I accept, will have to be lived with if the obligation exists; but it is at least a reason for being cautious."

The court in that case declined to uphold a duty of such breadth, and I would decline to uphold it here. To do otherwise would be to judicialise what belongs to the political sphere. There is nothing in the facts of this case to bring it within the narrow and specific compass, best exemplified by *Ex p Unilever*, which is the proper territory of this class of legitimate expectation.

Pleas for Substantive Legitimate Expectation

60. On this part of the case the argument in particular focussed on the solicitors' claim for larger transitional provisions, such that in all cases where the solicitor had been retained before 19 April 2006 he would in the event of a successful outcome have been paid at private client rates whether or not his client's claim was submitted to the Secretary of State before that date. This might have given me pause if the effect of the costs change on 19 April 2006 had been that solicitors thereafter remained, under the new regime, subject to unavoidable obligations to continue representing clients whose cases they had

undertaken in the faith of obtaining full private client costs. But that is not the case. As I have said (paragraph 19) the solicitors would have been entitled to terminate their retainers, had they chosen that course, in light of the costs change announced on 19 April 2006.

61. No doubt the transitional arrangements might have been set at a different point. However, not least given the qualifications described by Mr Jackson in paragraph 32 of his witness statement and the concession explained by Mr Swift to the Divisional Court (see paragraphs 19 and 20 above), it is in my judgment impossible to characterise the arrangements actually made as unfair, far less as an abuse of power.
62. The applicants' claim of substantive legitimate expectation is in effect a plea to be treated as if their applications had been submitted before 19 April 2006. It is not clear how far before that date it is said the safety net should have extended. It might, I suppose, have covered potential applicants whose convictions had been quashed but who had not yet instructed solicitors to seek compensation. At all events, just as with the solicitors' case, what is in reality being contended for is the promulgation of a more generous policy. But the reach of the policy change was wholly in the hands of the Secretary of State. None of the special features of the law of legitimate expectation which might justify his being constrained is present here.
63. In particular, and critically, there is no evidence on behalf of either the solicitors or the applicants of any assurance, promise or practice that the policy would be set differently in any respect. Before 19 April 2006, there was nothing more than the scheme's existence: at most a factual expectation that it would continue in effect until rational grounds for its cessation arose. As I have sought to explain, such an everyday state of affairs is categorically inadequate to generate a legitimate expectation which the courts will enforce.
64. I would dismiss these appeals.

LORD JUSTICE SEDLEY:

65. What has troubled me most in these appeals is whether the solicitors had a legitimate expectation that remuneration for compensation claims for which they had already accepted instructions as at 19 April 2006 would continue to be at the private client rates upon which they had entered into their retainers. If there had been an unmitigated cut-off at that date, they would in my view have had a good case; but in my judgment the transitional provisions noted by Lord Justice Laws at §19 and §20, coupled with their ability to terminate a now unremunerative retainer, satisfied their substantive expectations to the extent to which these are recognised by modern public law.
66. I will take the liberty of explaining why I put it this way. While the outcome of this case does not depend on the taxonomy of legitimate expectation advanced by Lord Justice Laws, it may matter to the development of law in this field that there is more than one approach to it.

67. A high proportion of modern government is conducted by the exercise of powers and discretions bounded only, until recent years, by the broad principles of public law familiar from cases such as *Kruse v Johnson* [1898] 2QB 91. But, because one of the most fundamental of these principles is that such powers must not be exercised partially or arbitrarily, as well as for practical reasons, good government has increasingly involved the adoption of policies for the exercise of these functions. Policies have the virtue of combining consistency in unexceptional cases with flexibility in marginal or out-of-the ordinary cases, but the vice of being unenforceable in law despite the reliance that people are compelled to place on them. Public law has grown to meet the needs of justice on the one hand and of good government on the other by holding public administration to as much of its public undertakings – its policies – as is necessary and fair.
68. A duty to consult before modifying policy may arise from an explicit promise to do so. It may also arise from practice which generates a similarly legitimate expectation that, other things being equal, there will continue to be no change without prior consultation. But there is no equivalent expectation that policy itself, and with it any substantive benefits it confers, will not change. It follows that the most that the beneficiary of a current policy can legitimately expect in substantive terms is, first, that the policy will be fairly applied or disapplied in his particular case, and secondly that if the policy is altered to his disadvantage, the alteration must not be effected in a way which unfairly frustrates any reliance he has legitimately placed on it.
69. The most striking illustration of this, *Coughlan*, was, as Lord Justice Laws says, a particularly strong case, involving as it did an unequivocal promise without limit of time and no good reason for breaking it. But even in such a case, as the citation set out in §45 recognises, sufficiently powerful supervening factors could entitle the authority to go back on its word, since neither breach of contract nor estoppel has a formal place in public law. The problem with strong cases is that other cases which engage exactly the same principles of law tend to seem weak by comparison. Yet precisely the same principle was engaged in *R v MAFF, ex parte Hamble Fisheries* [1995] 2 All ER 714. There a change of policy had frustrated the shipowners' continuing accumulation of licences to enable them, pursuant to the existing policy, to undertake beam-trawling for pressure stocks; but because the new policy made reasonable transitional provisions to mitigate the impact of the change in pipeline cases, it was held that such legitimate expectation as existed of benefits under the policy had been met. The time has come, I respectfully think, to say that the description of this decision in *Ex parte Hargreaves* [1997] 1 WLR 906 as heretical is shown by a solid body of authority both before and since to have been mistaken. As can be seen from the cases cited by Lord Justice Laws, the concept of a policy – which is of course a form of public promise – giving rise to a substantive expectation which the courts will not allow to be unjustly frustrated, far from being heretical, is today entirely orthodox.
70. It is, moreover, a class of case which is not confined to requiring consultation before change but may result, as it did in *Coughlan*, in inhibiting the change itself. More typically, however, it will not be the making of a policy change but the terms on which it is done which are capable of frustrating a legitimate substantive expectation. That is why, as happened in *Hamble Fisheries* and has happened here, government has for many years routinely made transitional provision to cushion those who would otherwise be unfairly affected by a change of policy. Such provision may take the simple form of

giving prior warning that the change is coming. Where that is not possible, it commonly takes the form of transitional provisions for the temporary continuation of certain of the benefits of the policy. The transitional provisions made here must seem parsimonious and largely arbitrary to the firms affected by them, and few would dispute that government could have acted more handsomely; but they do as much as I consider could be legitimately expected to cushion the financial impact of a perfectly permissible policy change.

71. With this respectful gloss upon Lord Justice Laws' judgment, I agree that these appeals fail.

THE MASTER OF THE ROLLS:

72. I agree that the appeal should be dismissed for the reasons given by Laws and Sedley LJ. As to the gloss which Sedley LJ had introduced into the topic of legitimate expectation, I would prefer to express no view at present since the difference between his approach and that of Laws LJ does not affect the result of this appeal.