

# GLS Administrative Law Webinar

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## CASE REFERENCE

**R. (on the application of Luton BC) v Secretary of State for Education**  
**R. (on the application of Sandwell MBC) v Secretary of State for Education**  
**R. (on the application of Kent CC) v Secretary of State for Education**  
**R. (on the application of Newham LBC) v Secretary of State for Education**  
**R. (on the application of Waltham Forest LBC) v Secretary of State for Education**

**Queen's Bench Division (Administrative Court)**  
**11 February 2011**

Westlaw Case Analysis ..... 8 pages

Official Transcript ..... 31 pages

Status:  Positive or Neutral Judicial Treatment

**R. (on the application of Luton BC) v Secretary of State for Education**

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**R. (on the application of Waltham Forest LBC) v Secretary of State for Education**

Queen's Bench Division (Administrative Court)

11 February 2011

## Case Analysis

### Where Reported

[2011] EWHC 217 (Admin); [2011] Eq. L.R. 481; [2011] B.L.G.R. 553; [2011] E.L.R. 222; [\[2011\] A.C.D. 43](#); [Official Transcript](#)

### Case Digest

**Subject:** Administrative law **Other related subjects:** Local government; Education

**Keywords:** Construction projects; Consultation; Disability equality duty; Fettering of discretion; Irrationality; Legitimate expectation; Ministerial acts; Race equality duty; Schools; Termination

**Summary:** The secretary of state's decision to stop certain school building projects which had received outline business case approval under the Building Schools for the Future programme was unlawful as he had failed to consult the local authorities affected and he had failed to discharge his statutory duties under equality legislation.

**Abstract:** The claimant local authorities applied for judicial review of a decision of the defendant secretary of state to stop certain school building projects which had been earmarked under the Building Schools for the Future (BSF) programme. That programme aimed over a 15-year period from 2005 to rebuild or refurbish every secondary school in England. After the change of government in May 2010 the secretary of state decided on July 5, 2010 to end it. The claimants contended that his decision was unlawful, at least in so far as it affected them, and that he should be required to reconsider the affected projects in their areas. The projects affected were principally those which had received "outline business case" approval after January 1, 2010, but which had not received "final business case" approval (from which a promise of funding flowed) by July 5, 2010. The claimants argued that (1) the secretary of state's selection of January 1, 2010 as the cut-off date for projects was arbitrary and irrational and bore no relation to any date in the BSF programme or process; (2) by adopting the rules-based approach that he did, the secretary of state had unlawfully fettered his discretion; (3) the decision-making process had breached their substantive legitimate expectations; (4) the decision-making process had breached their legitimate procedural expectation that they would be consulted; (5) the secretary of state had failed to discharge statutory duties under the equality legislation.

Application granted in part. (1) The decision was not open to legal

challenge on a discrete ground of irrationality, [R. \(on the application of Cordant Group Plc\) v Secretary of State for Business, Innovation and Skills](#) [2010] EWHC 3442 (Admin), (2011) 108(4) L.S.G. 19 applied. It was a decision with a patently political and heavy macro-economic content. If the secretary of state had acted irrationally or unlawfully when making that type of decision, that should be apparent without unduly detailed or sophisticated enquiry, [Jones v Jones](#) [2011] EWCA Civ 41, [2012] Fam. 1 followed. The secretary of state and his officials did not misunderstand what they were doing. He drew a clear demarcation between situations where the local authorities already had contractual obligations and where they did not. The cut-off date of January 1, 2010 bore no relation to the BSF programme, but it clearly fitted and reflected government-wide policy, and helped to achieve it by making large savings. The secretary of state's reasons for his decision might or might not withstand political scrutiny, but there was no inherent irrationality about them (see paras 8, 47-48 of judgment). (2) Even if the secretary of state was making a one-off decision, he did so in circumstances in which the essential duty not to fetter discretion so as to preclude individual consideration of individual cases was in play. There were many projects from many different local authorities, all at more or less advanced stages of the pipeline. Each project was an individual case. The secretary of state decided certain rules, but his officials then applied those rules to each project so as to decide into which category it fell. It was the application of a policy decision or "rules" which determined, without more, the outcome in all the claimants' categories of projects. The rules were applied in a hard-edged way, with no individual discretion (paras 60-61). (3) The outline business case approvals did not create a substantive legitimate expectation that any given project would definitely proceed. Further, the law recognised that public bodies, and especially central government, enjoyed a wide discretion to change policies from time to time to reflect their conception of the public interest. That was especially so in the case of a different political party taking power after a general election. All participating local authorities must have known that there would be a general election, and none of them with anything less than full business case approval could have had any legitimate expectation that any project would still go ahead after it, [R. \(on the application of Bibi\) v Newham LBC \(No.1\)](#) [2001] EWCA Civ 607, [2002] 1 W.L.R. 237 followed (paras 78-82). (4) The BSF process had involved continuous and intense dialogue between the education department and the local authorities, who right up to the date of the decision were acting and spending in reliance on their outline business case approvals. The way in which the secretary of state abruptly stopped those projects, without any prior consultation with the claimants, was so unfair as to amount to an abuse of power. There was no overriding public interest that precluded any consultation or justified the lack of consultation. The very substantial sums of money involved reinforced the need to consult. Therefore, insofar as it affected the claimants the decision was unlawful, [R. v Secretary of State for Education and Science Ex p. Southwark LBC](#) [1994] C.O.D. 298 applied and [R. \(on the application of Niazi\) v Secretary of State for the Home Department](#) [2008] EWCA Civ 755, Times, July 21, 2008 followed (paras 83-97). (5) Neither the papers prepared for ministers in the period May to July 2010 nor the decision itself contained any reference to disability, race or gender need or impact. It seemed that no regard was had to the relevant duties at all, let alone rigorous regard, [R. \(on the application of Brown\) v Secretary of State for Work and Pensions](#) [2008] EWHC 3158 (Admin), [2009] P.T.S.R. 1506 followed. This too made the decision-making process unlawful

(paras 101-116).

**Judge:** Holman, J.

**Counsel:** For Luton Borough Council and Nottingham City Council: Richard Drabble QC, Daniel Kolinsky. For Waltham Forest London Borough Council: Jemima Stratford QC, Oliver Jones. For Newham London Borough Council: Peter Oldham QC, Tom Cross. For Kent County Council: Harry Matovu QC, Tony Singla. For Sandwell Metropolitan Borough Council: Nigel Giffin QC, Rachel Kamm. For the secretary of state: James Goudie QC, Clive Sheldon, Robin Hopkins.

**Solicitor:** For Luton Borough Council: Addleshaw Goddard. For Nottingham City Council: Ward Hadaway. For Waltham Forest London Borough Council: In-house solicitor. For Newham London Borough Council: Dickinson Dees LLP. For Kent County Council: In-house solicitor. For Sandwell Metropolitan Borough Council: Bevan Brittan LLP. For the secretary of state: Treasury Solicitor.

## Related Cases

**R. (on the application of Luton BC) v Secretary of State for Education (Post Judgment Discussion)**

[\[2011\] EWHC 556 \(Admin\)](#); [Official Transcript](#); QBD (Admin)

## Significant Cases Cited

**Jones v Jones**

[\[2011\] EWCA Civ 41](#); [\[2012\] Fam. 1](#); [\[2011\] 3 W.L.R. 582](#); [\[2011\] 1 F.L.R. 1723](#); [\[2011\] 1 F.C.R. 242](#); [\[2011\] Fam. Law 455](#); [\(2011\) 161 N.L.J. 210](#); [Times, March 28, 2011](#); [Official Transcript](#); CA (Civ Div)

**R. (on the application of Cordant Group Plc) v Secretary of State for Business, Innovation and Skills**

[\[2010\] EWHC 3442 \(Admin\)](#); [\(2011\) 108\(4\) L.S.G. 19](#); [Official Transcript](#); QBD (Admin)

**R. (on the application of Brown) v Secretary of State for Work and Pensions**

[\[2008\] EWHC 3158 \(Admin\)](#); [\[2009\] P.T.S.R. 1506](#); [Official Transcript](#); DC

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

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

**R. (on the application of Bibi) v Newham LBC (No.1)**

[\[2001\] EWCA Civ 607](#); [\[2002\] 1 W.L.R. 237](#); [\(2001\) 33 H.L.R. 84](#); [\(2001\) 98\(23\) L.S.G. 38](#); [\[2001\] N.P.C. 83](#); [Times, May 10, 2001](#); [Official Transcript](#); CA (Civ Div)

**R. v Secretary of State for Education and Science Ex p. Southwark LBC**

[\[1994\] C.O.D. 298](#); QBD

## All Cases Cited

**Jones v Jones**

[\[2011\] EWCA Civ 41](#); [\[2012\] Fam. 1](#); [\[2011\] 3 W.L.R. 582](#); [\[2011\] 1 F.L.R. 1723](#); [\[2011\] 1 F.C.R. 242](#); [\[2011\] Fam. Law 455](#); [\(2011\) 161 N.L.J. 210](#); [Times, March 28, 2011](#); [Official Transcript](#); CA (Civ Div)

**R. (on the application of Cordant Group Plc) v Secretary of State for Business, Innovation and Skills**

[\[2010\] EWHC 3442 \(Admin\)](#); [\(2011\) 108\(4\) L.S.G. 19](#); [Official Transcript](#); QBD (Admin)

**Paponette v Attorney General of Trinidad and Tobago**

[\[2010\] UKPC 32](#); [\[2011\] 3 W.L.R. 219](#); [Times, December 15, 2010](#); [Official Transcript](#); PC (Trin)

**R. (on the application of Brown) v Secretary of State for Work and Pensions**

[\[2008\] EWHC 3158 \(Admin\)](#); [\[2009\] P.T.S.R. 1506](#); [Official Transcript](#); DC

**R. (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs**

[\[2008\] UKHL 61](#); [\[2009\] 1 A.C. 453](#); [\[2008\] 3 W.L.R. 955](#); [\[2008\] 4 All E.R. 1055](#); [\(2008\) 105\(42\) L.S.G. 20](#); [\(2008\) 158 N.L.J. 1530](#); [\(2008\) 152\(41\) S.J.L.B. 29](#); [Times, October 23, 2008](#); [Official Transcript](#); HL

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

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

**R. (on the application of Elias) v Secretary of State for Defence**

[\[2006\] EWCA Civ 1293](#); [\[2006\] 1 W.L.R. 3213](#); [\[2006\] I.R.L.R. 934](#); [Times, October 17, 2006](#); [Independent, October 18, 2006](#); [Official Transcript](#); CA (Civ Div)

**R. (on the application of Bibi) v Newham LBC (No.1)**

[\[2001\] EWCA Civ 607](#); [\[2002\] 1 W.L.R. 237](#); [\(2001\) 33 H.L.R. 84](#); [\(2001\) 98\(23\) L.S.G. 38](#); [\[2001\] N.P.C. 83](#); [Times, May 10, 2001](#); [Official Transcript](#); CA (Civ Div)

**R. v Secretary of State for Education and Employment Ex p. Begbie**

[\[2000\] 1 W.L.R. 1115](#); [\[2000\] Ed. C.R. 140](#); [\[2000\] E.L.R. 445](#); [\(1999\) 96\(35\) L.S.G. 39](#); [Times, September 14, 1999](#); [Official Transcript](#); CA (Civ Div)

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

[\[1998\] A.C. 407](#); [\[1997\] 3 W.L.R. 23](#); [\[1997\] 3 All E.R. 97](#); [\[1997\] 2 F.L.R. 471](#); [\(1997\) 9 Admin. L.R. 413](#); [\[1997\] Fam. Law 789](#); [\(1997\) 94\(34\) L.S.G. 27](#); [\(1997\) 147 N.L.J. 955](#); [Times, June 13, 1997](#); [Independent, June 18, 1997](#); HL

**R. v Secretary of State for Education and Science Ex p. Southwark LBC**

[\[1994\] C.O.D. 298](#); QBD

**Hughes v Department of Health and Social Security**

[\[1985\] A.C. 776](#); [\[1985\] 2 W.L.R. 866](#); [\[1985\] I.C.R. 419](#); [\[1985\] I.R.L.R. 263](#); [\(1985\) 82 L.S.G. 2009](#); [\(1985\) 129 S.J. 315](#); HL

**British Oxygen Co Ltd v Minister of Technology**

[\[1971\] A.C. 610](#); [\[1969\] 2 W.L.R. 892](#); [\[1970\] 3 W.L.R. 488](#); [\[1970\] 3](#)

[All E.R. 165](#); HL

## Key Cases Citing

### Applied

Loreto Grammar School's Application, Re

[\[2012\] NICA 1; Official Transcript](#); CA (NI)

### Considered

R. (on the application of Child Action Poverty Group) v Secretary of State for Work & Pensions

[Unreported](#); QBD (Admin)

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

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

## All Cases Citing

### Considered

R. (on the application of Child Action Poverty Group) v Secretary of State for Work & Pensions

[Unreported](#); QBD (Admin)

### Considered

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

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

### Mentioned by

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

[Unreported](#); QBD (Admin)

### Applied

Loreto Grammar School's Application, Re

[\[2012\] NICA 1; Official Transcript](#); CA (NI)

### Mentioned by

R. (on the application of Cheshire East BC) v Secretary of State for the Environment

[\[2011\] EWHC 1975 \(Admin\); \[2011\] N.P.C. 92; Official Transcript](#); QBD (Admin)

### Mentioned by

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

[\[2011\] UKSC 12; \[2012\] 1 A.C. 245; \[2011\] 2 W.L.R. 671; \[2011\] 4 All E.R. 1; \[2011\] U.K.H.R.R. 437; \(2011\) 108\(14\) L.S.G. 20; \(2011\) 155\(12\) S.J.L.B. 30; Times, March 24, 2011; Official Transcript](#); SC

## Legislation Cited

[Disability Discrimination Act 1995 \(c.50\) s.49A](#)

[Education Act 2002 \(c.32\)](#)

[Education Act 2002 \(c.32\) s.14](#)

[Education Act 2002 \(c.32\) s.15](#)

[Race Relations Act 1976 \(c.74\)](#)

[Race Relations Act 1976 \(c.74\) s.71](#)

[Sex Discrimination Act 1975 \(c.65\) s.76A](#)

## Journal Articles

### **A legitimate expectation of a successful challenge?**

Consultation; Implied promises; Legitimate expectation; Promises; Public authorities.

[J.R. 2012, 17\(2\), 161-176](#)

### **The bad boy in school**

Construction sites; Local authorities; Secondary schools.

[Building 2011, 8, 50-51](#)

### **Statutory powers: judicial review - "Building Schools for the Future" scheme - irrationality - fettering of discretion**

Breach of statutory duty; Construction projects; Fettering of discretion; Government grants; Irrationality; Legitimate expectation; Schools.

[Ed. L.M. 2011, Mar, 1-4](#)

### **Cancellation of projects under the "Building Schools for the Future" programme**

Breach of statutory duty; Construction projects; Legitimate expectation; Schools.

[Ed. Law 2011, 12\(1\), 8-9](#)

### **Schools building programme: exercise of statutory powers by Secretary of State**

Breach of statutory duty; Construction projects; Irrationality; Public sector equality duty; Schools.

[Ed. Law 2011, 12\(3\), 191-193](#)

### **Public and administrative law (December/January)**

Breach of statutory duty; Closure; Community care; Construction projects; Consultation; Disability equality duty; Economic conditions; Funding; Irrationality; Judicial review; Legitimate expectation; Local authorities' powers and duties; Magistrates' courts; Private Finance Initiative; Public expenditure; Public sector equality duty; Schools; Waste minimisation.

[I.H.L. 2011/12, 196\(Dec/Jan\), 53-56](#)

### **Changing times: the importance of proper consultation**

Consultation; Legitimate expectation; Notification; Planning authorities' powers and duties; Planning procedures; Statements of community involvement.

[J.P.L. 2011, 11, 1447-1454](#)

### **R. (Luton) v Secretary of State for Education: a case note**

Breach of statutory duty; Construction projects; Fettering of discretion; Government grants; Irrationality; Legitimate expectation; Public sector equality duty; Schools.

[J.R. 2011, 16\(2\), 156-162](#)

### **Judicial review in an age of austerity**

Economic conditions; Judicial review; Local authorities' powers and duties; Public expenditure.

[J.R. 2011, 16\(3\), 202-215](#)

### **Judicial review of cuts to publicly funded services**

Consultation; Fairness; Funding; Irrationality; Legal Services Commission; Public sector equality duty; Public services; Tenders.

[Legal Action 2011, Jul, 29-33](#)

### **Recent developments in public law: Part 2 (June)**

Children; Compliance; Construction projects; Costs; Education; Finality; Gypsies; Irrationality; Legitimate expectation; Public sector equality duty; Schools; Statutory duties; Taxis; Travellers.

[Legal Action 2011, Jun, 27-30](#)

### **Education secretary forced to reconsider spending cuts**

Construction projects; Judicial review; Legitimate expectation; Project finance; Public private partnerships; Schools.

[N.L.J. 2011, 161\(7453\), 220](#)

### **Fortune favours the brave**

Breach of statutory duty; Buildings; Consultation; Equality; Government grants; Irrationality; Legitimate expectation; Ministers' powers and duties; Secondary schools.

[N.L.J. 2011, 161\(7456\), 351-352](#)

### **Update: local government (March)**

Buildings; EU law; Government grants; Local authorities' powers and duties; Public procurement procedures; Schools.

[S.J. 2011, 155\(8\), 23-24](#)

### **Schools funding programme cuts after general election: application for judicial review by affected councils**

Construction projects; Project finance; Secondary schools.

[S.L. Rev. 2011, 63\(Sum\), 3-4](#)

## **Books**

### **Encyclopedia of Local Government Law**

Chapter: Equality Act 2010

Documents: [3-999.4546.4 Public sector equality duty](#)

### **IDS Employment Law Handbooks**

Chapter: Chapter 38 - General Public Sector Equality Duty

Documents: ['Due regard'](#)





Neutral Citation Number: [2011] EWHC 217 (Admin)  
Case No: CO/10349/2010,CO/10424/2010,CO/10428/2010,CO/10437/2010,CO/1070/2010  
**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 11/02/2011

**Before:**

**MR JUSTICE HOLMAN**

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**Between:**

**THE QUEEN on the application of (1) LUTON  
BOROUGH COUNCIL & NOTTINGHAM CITY  
COUNCIL (2) WALTHAM FOREST LONDON  
BOROUGH COUNCIL (3) NEWHAM LONDON  
BOROUGH COUNCIL (4) KENT COUNTY  
COUNCIL (5) SANDWELL METROPOLITAN  
BOROUGH COUNCIL**

**Claimants**

**- and -**

**THE SECRETARY OF STATE FOR  
EDUCATION**

**Defendant**

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**Mr RICHARD DRABBLE QC and Mr DANIEL KOLINSKY (instructed by Addleshaw  
Goddard) for Luton Borough Council and (instructed by Ward Hadaway) for Nottingham  
City Council**

**Miss JEMIMA STRATFORD QC and Mr OLIVER JONES (instructed by London  
Borough of Waltham Forest Legal Services)**  
**Mr PETER OLDHAM QC and Mr TOM CROSS (instructed by Dickinson Dees LLP) for  
London Borough of Newham**  
**Mr HARRY MATOVU QC and Mr TONY SINGLA (instructed by Kent County Council  
Legal and Democratic Services)**  
**Mr NIGEL GIFFIN QC and Ms RACHEL KAMM (instructed by Bevan Brittan LLP) for  
Sandwell Metropolitan Borough Council**

**Mr JAMES GOUDIE QC, Mr CLIVE SHELDON and Mr ROBIN HOPKINS (instructed  
by The Treasury Solicitor) for the Secretary of State for Education**

Hearing dates: 25th - 28th January 2011  
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**Judgment**

**Mr Justice Holman:**

1. I am very grateful to all the leading and junior counsel and all the solicitors in these combined cases for their thorough preparation and their sustained arguments, to which I pay tribute. The hearing was attended throughout by a considerable number of representatives from all parties, and I would like to thank them all for their close attention and good humour during a case in which, I appreciate, the stakes may be said to be very high.

### **The essential issue**

2. In 2003 the Department for Education (DfE or “the department” – I ignore the different titles of the department over the period in question) within the then (Labour) government launched a national programme called Building Schools for the Future (BSF). The programme aimed over a fifteen year period from 2005 – 2020 to rebuild or refurbish every secondary school in England, of which there are about 3,500. The estimated overall capital cost increased, and exceeded £50 billion by 2009. By July 2010, 181 schools had benefited from BSF funding of which 98 were new builds. A further 735 were, at more or less advanced stages, in the pipeline for refurbishment/rebuild.
3. On 12 May 2010, after a general election the previous week, a new, coalition, government was formed. On 5 July 2010 the newly appointed Secretary of State for Education in that government, Mr Michael Gove MP, made a statement in the House of Commons in which he announced that certain projects which were in the pipeline would go ahead; others would be stopped; and, in effect, that the BSF programme, which he criticised in trenchant terms as “a dysfunctional process”, would come to an end.
4. I will, for convenience, call the six claimants Luton, Nottingham, Waltham Forest, Newham, Kent and Sandwell. They all had projects in that pipeline which were stopped or cancelled. They all complain that the decision of 5 July 2010 and/or the decision making process leading up to it was, for a range of reasons, unlawful, at any rate insofar as it affects them, and that the decision should be quashed, insofar as it affects them, and that the Secretary of State should be required to reconsider their projects. Newham also seek an order for reimbursement to them of expenditure which they say they have wasted as a result of the decision.
5. The cost of the projects (including academies) which were saved and are going ahead following the Secretary of State’s decision is of the order of £9 billion. The cancelled or stopped projects affect about 79 local authorities and 735 schools. The total cost of the capital grants “saved” on all the stopped projects is about £7.5 billion. I put the word “saved” in inverted commas because the Secretary of State’s decision and statement does not preclude that some of the projects may proceed in the future, but they will not proceed now and as part of the run off of the BSF programme. The claims relate to 58 schools, and if all the projects about which the claimants complain were to be reinstated and carried out, the cost to the department would be of the order of nearly £1 billion. (If Nottingham’s 8 “indicative approved” schools, as explained later, are added, the total number of schools would increase to 66 and the cost by a further £60 million.)

6. All the claimants say, through their leading counsel, that they accept the political decision that cuts and savings had to be made. But they say that other (unidentified) projects should have been stopped rather than theirs; or, in any event, that the line should have been drawn so as to save rather than stop their projects.
7. Although there are six claimant local authorities, each with their own facts, there is considerable overlap in the way the claims are put. Indeed, leading counsel for the claimants largely divided up the grounds or heads of claim so that only one counsel developed any given common argument. I was grateful for that economy. Nevertheless the case generated about 7,500 pages of documents, complemented by two “core bundles” totalling about 840 pages and a further 460 pages of “court documents”. The skeleton arguments, supplemented by various additional notes and written submissions, amounted by the end to about 300 pages. The claimants invoke several of the established and well-known grounds of judicial review challenge, but the case does not involve any new principle of law. The claimants also allege breach of statutory duties under the equality legislation, but the actual statutory provisions in point are short and straightforward ones. No issue has arisen as to the construction of new or complex statutory provisions. Yet the case has generated also a bundle of no less than 70 authorities and other legal material (not all of it referred to).
8. However the case remains one of judicial review. It is not a detailed public inquiry into the demise of the BSF programme, nor does it require fact-finding on disputed facts after hearing oral evidence. All judicial review requires scrutiny. Cases involving torture, persecution or other grave threats to human rights require anxious scrutiny; but this is not such a case and, as the claimants are themselves public authorities, no human rights issues arise. So although a measure of scrutiny is required, the essential character of the present case is one of review of the minister’s decision and decision making process. Whilst speaking on behalf of all of the claimants, Mr Nigel Giffin QC stressed the importance in this case of focussing upon the wood rather than the trees. My own view is that if, on any one or more of the grounds alleged, the Secretary of State, when personally making patently political, large scale macro economic decisions, has acted irrationally or unlawfully, that ought to be apparent without unduly detailed or sophisticated enquiry. I asked Mr James Goudie QC, who appeared on behalf of the Secretary of State and whose experience in this field is very great, whether such an impressionistic approach is heretical. He assured me it is orthodox. I thus propose to consider this case in a relatively impressionistic way, focussing on the wood rather than the trees, and without over-immersion in, or reference to, the mass of detail in both the facts and the arguments which have been advanced. These considerations are now fortified by the observations in the Court of Appeal on 28 January 2011 (the last day of the oral hearing in the present case) in Jones v Jones [2011] EWCA Civ 41 at paragraphs 73 and 74, which I incorporate by reference. Although the subject matter of that case could not have been further removed from this one, the observations are entirely general. “The primary function of a first instance judgment is to ... identify the crucial legal points and to advance reasons for deciding them in a particular way.”

### **The BSF programme and how it operated: a very simplified summary**

9. The DfE delivered the BSF programme through an agency, wholly owned by the department, called Partnership for Schools (PfS). In his statement to the House of Commons on 5 July 2010 the Secretary of State described the scheme as being

“characterised by ... needless bureaucracy” with a large number of “meta-stages” and “sub-stages”. He said that “it can take almost three years to negotiate the bureaucratic process of BSF before a single builder is engaged or brick laid. Some councils that entered the process six years ago have only just started building new schools.” The “bureaucratic process” was not, however, devised by the councils; and it is largely upon the stage at which any given claimant council was mired in the department’s own “bureaucratic process” that their claims depend.

10. When BSF was launched, local authorities could apply to participate in it. Not all have done so. The programme was to be implemented over the following 15 years in a series of “waves”. Participating local authorities were to divide their own overall projects into “sample” and “non-sample” schools. As a generalisation, the “sample” and most pressing or needy projects were to be allocated to the earlier waves. A Funding Allocation Model (FAM) was developed, allocating an authority’s estimated overall funding requirement between the different waves. The overall funding earmarked for a particular local authority was known as their “funding envelope”. At this point a local authority needed to develop, first, a Strategic Business Case (SBC); and after approval of that, their Outline Business Case (OBC). The OBC is a document, written to a prescribed PfS template, which sets out in some detail the scope, costs, affordability, risks, procurement route and timetable of the project or projects concerned, and corresponds to RIBA stage B. The OBC was then considered by PfS (and others, including HM Treasury) who decided whether or not to grant “OBC approval”. In the context of a local authority’s first wave of projects, OBC approval was the trigger for establishing a Local Education Partnership (LEP). A LEP is a joint venture partnership for delivery of the projects, formed between the respective local authority, PfS and a Private Sector Partner (PSP). The PSP was the contractor, identified after a tendering process in accordance with EU requirements, who would actually deliver the projects and build or refurbish the schools. Very importantly, the LEP, once established, was not limited to the first wave or sample schools, but was expected to endure for the 10 – 15 years required to fulfil the whole BSF programme for the respective local authority. Provisions of the Strategic Partnering Agreement (SPA) between the local authority and the LEP grant exclusivity to the LEP for the remainder of that building/refurbishment programme.
11. In the case of later wave or non-sample schools, an OBC was still required; but it was not a trigger for establishing a LEP as the LEP already existed and had contractual exclusivity.
12. Once OBC approval had been given, the local authority and the LEP did further work on the detailed scope, costs and plans for the projects in question, to RIBA stage E, and prepared a document, again written to a prescribed PfS template, called a Final Business Case (FBC). If this was approved, PfS (in conjunction with HM Treasury) gave “FBC approval” and issued a “promissory note” to fund the respective project.

### **The situations of the claimants in outline**

13. All the claimant local authorities had passed OBC approval for their earliest wave schools and had established their respective LEPs, which still exist. All had passed FBC approval for some schools or academies which have been, or still will be, built/refurbished. The case of the five claimants except Sandwell essentially rests upon the state of their respective OBC approval for further projects on the date of the

Secretary of State's decision (5 July 2010), and I will, for convenience, call them collectively "the five claimants" (Sandwell being the sixth).

14. As I will later explain, in relation to repeat waves the Secretary of State saved all projects which had already received FBC approval by 5 July 2010 and these have gone, or will go, ahead. In relation to repeat waves, he has also saved all projects which had received even OBC approval *before* 1 January 2010, and they, too, have gone, or will go, ahead. But he has cancelled or stopped those projects in relation to which OBC approval was given *after* 1 January 2010 but which had not reached the stage of FBC approval by 5 July 2010. Each of the five claimants had indeed received OBC, but not FBC, approval in relation to various projects between 1 January 2010 and 5 July 2010, and it is in relation to these projects that they now claim. It is at once apparent, therefore, that much turns on the effect and consequences of OBC approval in repeat wave cases (a LEP already being in existence) upon which the five claimants rely.
15. Sandwell's claim relates to their wave 5 projects. These did not have even OBC approval as such before 1 January 2010 or even 5 July 2010. But Sandwell had had both OBC and FBC approval for their wave 3 projects long before. They say that the allocation of projects between waves 3 and 5 was, at least in their case, particularly random, and that the effect of various statements made to them in the course of allocation of projects and funding between waves 3 and 5 is such that they should have been treated no less favourably in relation to their wave 5 projects than if OBC approval had indeed already been formally given before 1 January 2010.
16. On behalf of the Secretary of State, Mr Goudie emphasises the funding which each of the claimants have already received, or still will receive, under BSF: Luton, £150 million; Nottingham, £179 million; Waltham Forest, £68 million; Newham, £186 million; Kent, £213 million; and Sandwell, £189 million – a total of nearly £1 billion. Mr Goudie, Mr Clive Sheldon and Mr Robin Hopkins write in their skeleton argument "These proceedings are about whether they must get even more"; and that "The claimants nevertheless see fit to contend that the Secretary of State has acted unlawfully in not providing them with yet further investment from the BSF programme." The inference is that the claimants have already done very well out of the programme and are being greedy. The actual further sums which the five claimant local authorities hope to receive in relation to their stopped OBC approved projects are approximately (and in round figures): Luton, £48 million; Nottingham, £36 million (not including their indicative approved projects); Waltham Forest, £258 million; Newham, £230 million; and Kent, £255 million. These sums total nearly £830 million. Additionally, if Sandwell, whose factual situation is different (as I have briefly explained), are able to obtain funding for their wave 5 schools, as they hope, the sum is about £128 million. In total, therefore, the claimants aspire to achieve further funding approaching £960 million, or more if Nottingham's indicative approved schools are added. (I have based all the above figures on figures in the document headed "Agreed facts", dated 28 January 2011, and prepared by all junior counsel, to whom I am indebted. The figures in some of the skeleton arguments and other documents are not always quite the same; but nothing at all turns on the precise figures.)
17. These sums, both those received (or to be received) and also those in issue, are of course very large sums. But BSF was a very large and ambitious project, and the size

of the sums involved may tend to cut both ways. They certainly underline the macro economic and political nature of the decision, an area into which the court should be slow to tread. But they may also tend to fortify the claimants' complaints, in particular, as to the lack of consultation.

### **The new government and the statements of the Chief Secretary to the Treasury**

18. The new government was formed on 12 May 2010. On 17 May 2010 the new Chancellor of the Exchequer and the new Chief Secretary to the Treasury, Mr David Laws MP, made public statements (now at SoS 1: 369 – 377) as to the state of public finances and the need to make “cuts” (their word) and savings. In his statement, the Chief Secretary said that he had that day asked departments “... to review ... new spending commitments agreed by the previous government since the start of this year.” Also on 17 May 2010, and consistent with his statement, the Chief Secretary sent to all cabinet ministers a memorandum headed “Spending Control”, now at CB 1: 373. This said that the immediate priority was to deliver £6 billion in savings in 2010 – 11 and that “In addition ... [he] would like all Secretaries of State to re-examine spending approvals given between the start of the year [viz 1.1.2010] and the election. It is the responsibility of every Secretary of State to assure themselves that all approvals made since 1<sup>st</sup> January [2010] are affordable and consistent with the new government's priorities. Those that are not should be immediately stopped. Those that required Treasury approval will need to be re-submitted to the Treasury by 28th May. In the meantime, all approvals [meaning, I understand, Treasury approvals] given since 1<sup>st</sup> January should be considered as suspended, pending re-approval ...”
19. On 17 June 2010 the Chief Secretary to the Treasury, by now Mr Danny Alexander MP, made a statement to the House Commons “...on review to public spending commitments made since 1 January 2010”, now at CB 2: 573. It referred to such projects being “approved” because they are a high priority or because the money has largely been spent; or “cancelled” (and he gave a non-exhaustive list of some of them); or “suspended” until outcome of a Spending Review. Within that statement the Chief Secretary said that “The Secretary of State for Education ... is looking at the whole [BSF] programme and will shortly set out the outcome of this work. This programme has been very heavily committed and we are in agreement that tough decisions need to be taken.”

### **The decision and announcements of the Secretary of State**

20. On 5 July 2010 the Secretary of State made a statement on education funding to the House of Commons (Hansard, HC columns 47 – 50; CB 2: 582 – 584).
21. After describing the BSF programme and process in highly critical terms, he announced that he had established a review team (which seems now to be known as the James review) to “look at every area of departmental capital spending to ensure that we can drive down costs, get buildings more quickly ...” Other than the saved projects, “... any future capital commitments will have to wait until the conclusion of our review.”
22. As to where the line would be drawn, he said “... I will take into account contractual commitments already entered into ... Where financial close has been reached in a local education partnership, the projects agreed under that LEP will go ahead. ...

Where financial close has not been reached, future projects procured under BSF will not go ahead ...”

23. The Secretary of State went on to say that there were 14 areas where, although financial close had not been reached, he would be looking at some sample projects to see whether any should be allowed to proceed. He announced that a number of academies would also be allowed to go ahead.
24. In the ensuing debate many members of Parliament unsurprisingly asked about specific schools or categories of school in their respective constituencies. In all or most of his answers the Secretary of State linked the outcome to whether or not there had been “financial close”.
25. In an answer to Mr Clive Efford, MP for Eltham, at Hansard HC column 65, now at CB 2: 592, the Secretary of State said “... inevitably, because of the complicated way in which [BSF] was arranged, there is confusion. However, I can say that I believe that the phase 1 projects in his constituency ... are unaffected ... but I am afraid that in four other areas the later wave of projects has been stopped because they have not yet reached financial close.”
26. On the same day, 5 July 2010, the Secretary of State sent a letter, now at CB 2: 603, to all local authorities participating in BSF. It said in part:

“I have therefore concluded that where financial close has been reached on a particular LEP, then the agreed set of projects under that LEP should go ahead. This reflects the financial negotiations and contracts that have been signed. This means that even where financial close has not been reached on particular school projects within that LEP, they should nonetheless go ahead where formally agreed as part of the creation of the LEP.

Where financial close has not been reached, I am clear that projects should stop as part of the ending of the BSF programme. In particular, I do not wish to allow the creation of new area-wide exclusivity agreements over many years with a single contractor.”

27. He then referred to making some exceptions for “sample” (viz within first wave) projects in the 14 areas, and to individual consideration of academy projects.
28. The letter concluded that “I must stress that the cancellation of BSF does not represent the end of capital investment in schools”, and referred to the review (viz the James review) which he had announced that day.
29. In none of the sources from which I have quoted did the Secretary of State himself define or describe exactly what he meant by “financial close”. Mr Richard Drabble QC, speaking on behalf of the claimants generally, has suggested, in polite but thinly veiled terms, that the Secretary of State, who had himself described the system as so complicated and referred to confusion, did not really understand it, or understand what he was deciding. Mr Drabble says that any given local authority only enters



into one LEP, with exclusivity for the remainder of the BSF programme. His clients, Luton and Nottingham, and all the other claimants had already entered into LEPs and so they already did have “financial close on a particular LEP” and accordingly their agreed projects under that LEP should go ahead. Further, in all their cases area-wide exclusivity agreements had already been created.

30. However on 12 July 2010 the DfE issued a document headed “Impact of ... announcement of Monday 5 July 2010”, now at CB 2: 605 – 611. A list was attached to this showing on a school by school basis which were “open” (i.e. already completed), “unaffected”, “for discussion”, or “stopped.” All the schools about which the claimants now claim were (after a correction to the list in relation to Sandwell) “stopped”. This document did expressly define what the department meant by “Financial close”, namely:

“This is the point where contracts are signed between the promoting authority and the private sector partner for the creation of the LEP together with two or more of the first schools to be delivered (known as ‘sample schools’). There are further ‘closes’ at school level during the life of the LEP. Approval is given after evaluation of a final business case and at this point local authorities receive a confirmation of BSF funding.”

31. In a box under a heading “Operational LEP – one wave of investment” the document referred to the exclusivity of a LEP procurement; to the first procurement for a “wave”; and to two “sample” schools, used to test the bidders for the LEP in competition. That box referred also to “... a financial close on each individual school”.
32. In a box under the heading “Operational LEP – more than one wave of investment” the document referred to a further “repeat” wave of funding which “does not require a procurement process as the LEP is already in place ... However, repeat waves do need formal approval from central government to secure additional funding.”
33. The document then described “unaffected” schools as those “which are within initial LEP ... procurements which have reached ‘Financial Close’; or which for BSF are within a repeat wave of investment which was approved prior to 1 January 2010.”
34. It described “stopped” schools as those “which are within initial LEP procurements which had not yet reached ‘Financial Close’ (other than the ‘sample’ schools in projects which had passed the ‘Close of Dialogue’ point) ... ; or which were to have been in a repeat wave of investment, but which had not received approval prior to 1 January 2010.”
35. The document described “For discussion” schools as those which were to have been “sample” schools (i.e. within first wave projects) and were at an advanced stage in the procurement process, but which had not yet reached ‘Financial Close’; and various categories of academies.
36. With respect to the Secretary of State, I do feel that he could have made more clear in his statement and letter of 5 July 2010 that he was using the term “financial close” in

two very different senses and contexts: (i) the signing of the contract which created the LEP, and provided for the first wave sample schools; and (ii) financial close on individual schools (other than the sample schools) during the whole lifetime of the LEP. But this does clearly emerge from the “Impact” document of 12 July 2010; and although his language could, with respect, have been more clear, I do not at all accept that either he or his officials were actually confused about what they were deciding. At all events, the “Impact” document, if nothing earlier, made quite clear that in relation to repeat wave schools (which this case concerns) all would be stopped “which had not received approval [viz OBC approval] prior to 1 January 2010”, unless even after 1 January 2010 they had reached FBC approval as well.

37. In his statement to the House of Commons and his letter of 5 July 2010, the Secretary of State expressly gave as his reasons for cancelling BSF that it was, as he said, too complex, bureaucratic, inefficient and wasteful of money. In relation to repeat wave schools he could, arguably, have stopped all those in relation to which there was no FBC approval by the date of the decision, 5 July 2010, irrespective of when the OBC approval had been given. Instead he chose a cut off date of 1 January 2010. He did not expressly say why, but it is obvious that it was selected with reference to the government wide review date of 1 January 2010 set by the Chief Secretary to the Treasury. Mr David Bell is the Permanent Secretary at the department. At paragraphs 66 and 67 of his statement, now at CB 1: 333 – 334, Mr Bell says:

“66. The Secretary of State formed the view that the option of funding projects in a second or further wave where OBC had been granted after 1<sup>st</sup> January 2010 was inconsistent with the government-wide approach to the funding of projects approved between the start of the calendar year and the date of the General Election. Having discussed this issue with the Chief Secretary to the Treasury, the Secretary of State considered that there was no justification for departing from the approach taken by his ministerial colleagues.

67. When assessed against the tests set down in the Chief Secretary to the Treasury’s instruction to members of Cabinet of 17<sup>th</sup> May 2010, the Secretary of State formed the view that these projects were not affordable, delivered questionable value for money, and did not remain genuine priorities for the Government. Furthermore, the Secretary of State was satisfied that ceasing further wave projects where OBC approval had been granted since 1<sup>st</sup> January 2010 was unlikely to result in greater expenditure to the public purse than if funding was continued. In other words, the Secretary of State was of the view that the cost to local authorities of meeting potential liabilities to private sector partners was considerably less than the cost of continuing to fund all of the projects that had obtained OBC approval.”

38. The claimants argue that the selection by the Secretary of State of 1 January 2010 as the cut off date for projects, in relation to which OBC but not FBC approval had been given, was arbitrary and irrational and bore no relationship to any date in the BSF

programme or process. Clearly, however, it was not arbitrary in its relationship to Treasury or government policy as a whole, as Mr Bell clearly explains.

39. At paragraphs 35 - 40 of his statement, now at CB 1: 31 – 33, Mr Bell describes a series of six options, 0 – 5, which were prepared and considered by the Secretary of State in the period May – 5 July 2010. The evolution of these options also appear from a series of policy memoranda or advices prepared by officials for the Secretary of State and others in the period 18 May – 30 June 2010, now at CB 1: 376 – 556. I will refer again to these documents when considering the submissions made in relation to consultation and to the equality legislation. For the present, although they were much analysed by several of the counsel for the claimants, I do not think it necessary to make any detailed reference to them. They culminated in agreement being reached between the Secretary of State and the Chief Secretary to the Treasury as to the content of the decision, as confirmed at the outset of Mr Alexander’s letter to Mr Gove dated 8 July 2010, now at CB 1: 557 – 560. The Chief Secretary wrote:

“While I recognise that the ongoing cost of projects in contract imply a level of funding commitments, I could not agree to a specific number at this stage ahead of your Department’s Spending Review Settlement. We therefore agreed an approach to manage down the costs to a bare minimum in the three areas that I set out later in this letter ... The DfE will need to manage costs of any BSF and Academy commitments and risk within its final capital settlement .... To achieve the scale of capital savings necessary, the DfE will need to cancel projects that are now being frozen ...”

40. At paragraph 7, now page 559, the Chief Secretary spelled out that “All BSF and Academy projects pre Financial Close are frozen. With the exception of BSF projects between Close of Dialogue and Financial Close that meet the criteria below [viz in the 14 areas to which the Secretary of State later referred], and specific Academies, no new contracts will be signed between now and completion of the Spending Review. We agreed to give certainty to those projects that are beyond Financial Close ...”
41. Whilst that letter employs the words “frozen” as well as “cancel”, the financial imperative from the Treasury is clear, and the Secretary of State’s decision and announcement substantially gave effect to it.

#### **The effect on the claimants and the grounds of challenge**

42. All the five claimants had received OBC approval for projects between 1 January and 5 July 2010 which, consistent with his announcement, the Secretary of State stopped or cancelled.
43. As indicated, Sandwell had not received OBC approval, but claim that in relation to their projects which were moved from wave 3 to wave 5 they should be treated no less favourably.
44. The following broad heads of challenge have been advanced:

- i) A challenge to the rationality of the decision as a whole;
  - ii) A submission that by adopting the “rules based” approach that he did, the Secretary of State unlawfully fettered his discretion under the Education Act 2002;
  - iii) A challenge that, even if otherwise rational, the decision breached substantive legitimate expectations of each of the claimants;
  - iv) A challenge that, additionally or alternatively, the decision making process breached a legitimate procedural expectation of consultation, as the claimants were not consulted before the decision was taken;
  - v) A submission that in reaching and applying the decision, the Secretary of State failed to discharge statutory duties under the equality legislation.
45. There is substantial overlap between many of these heads of challenge, and all of them really boil down to saying that, insofar as the decision affected the claimants in their particular positions, the Secretary of State did not consider their cases and projects in a sufficiently case specific way. If he had applied less rigid “rules” and had consulted with them and had considered them more case specifically, he would have appreciated the strength of their legitimate expectations, could have been alerted to particular equality considerations and levels of need, and might have saved at least some of their respective projects.
46. It is, however, necessary to begin somewhere and I propose to consider, first, the arguments as to irrationality.

### **Rationality**

47. I am absolutely clear that the decision is not open to legal challenge on a discrete ground of irrationality, however that argument is developed or put. I agree with, and adopt, some words of Kenneth Parker J in R on the application of Cordant Group PLC v Secretary of State for Business, Innovation and Skills [2010] EWHC 3442 (Admin) at para. 23:

“... the Secretary of State is exercising a broad discretionary power in a social, economic and ... political context. He has to balance a number of complex, and perhaps conflicting, social and economic variables in order to determine what he believes is the fair, effective and efficient solution to the central issue in question ... It is trite law that this court must be cautious in interfering with such an exercise of discretionary power, unless there are solid legal reasons for doing so, *and must not allow itself to become an umpire of a social and economic controversy that has been settled by due political process.* ”  
(my emphasis)

48. That case concerned proposed amendments to minimum wage regulations. The present case concerns a very major decision with a patently political and heavy macro economic content, made at the highest level in the immediate aftermath of a general

election and change of government, and patently intended to help achieve economic demands from the Treasury. I have already explained that I am satisfied that the Secretary of State and his officials were not confused, and did not misunderstand what they were doing. I will address later the rigidity of the lines which they drew, and the effect on any legitimate expectations of these individual claimants. But there is no inherent irrationality about these lines or “rules”. The Secretary of State intended to draw, and did draw, a clear demarcation between situations where there were obligations under contract and those where there were not. He deliberately and rationally was prepared to make exceptions for sample schools in first waves being “the first to be taken forward in the area”, as he said in his statement to the House of Commons. He made exceptions for political reasons for academies, which, he said, the government “believe in supporting”. Whilst a cut off date of 1 January 2010 bears no specific relationship with any milestones in the BSF scheme, it clearly fitted and reflected government wide policy as I have explained, and helped to achieve that policy by making very large savings. By drawing the line so as to stop rather than save the claimants’ projects, the Secretary of State “saved” about £1 billion or more. The Secretary of State and the government are politically answerable for the decisions they have taken. Their reasons may or may not withstand political scrutiny and challenge; but, being satisfied that there is no inherent irrationality about them, I decline further to examine their rationality. To do so would, in my view, be a grave and exorbitant usurpation by the court of the minister’s political role.

### **Fettering discretion**

49. It is submitted, and Mr Goudie on behalf of the Secretary of State did not demur, that the ultimate source of the power that the Secretary of State was exercising in deciding to what extent to give or withhold further funding was the power under section 14 of the Education Act 2002, which confers the most general of discretions:

“14 (1) The Secretary of State .... may give, or make arrangements for the giving of, financial assistance to any person for or in connection with any of the purposes mentioned in subsection (2).”

Those purposes are very wide and general ones, and include “the provision of education or educational services”. By section 15, “financial assistance” includes “grants”.

50. Mr Nigel Giffin QC, who appeared on behalf of Sandwell but developed the fettering argument on behalf of all claimants, submitted that the Secretary of State was thus exercising the most broad and open of statutory discretions and should not have fettered that discretion by adopting or applying such a rigid “rules based” approach as he did. This is a different point from considering the rationality of the “rules” that he decided to adopt. Mr Giffin does not argue that there could not have been some “rules”, but does submit that they should have been less hard edged and should have accommodated more case specific consideration of marginal cases or, linking to another point, those where there was a legitimate expectation of, at the very least, consultation.
51. Mr Giffin refers to a letter dated 3 September 2010 from a senior official in the DfE (Mr Stuart Miller) to a councillor (Mr Darren Cooper) on Sandwell Council, now at

CB 2: 836 – 838. The letter said that “The decision making process was not straight forward as there were significant BSF contracts and operations under way. The Secretary of State was clear that some parts of the programme should not be stopped. He therefore sought to establish a set of rules-based criteria which would determine which BSF projects continue and which are to stop. He was also clear that he wanted national criteria, to be applied consistently in all parts of the country ... Therefore it would not have been possible for the decisions on Sandwell’s schools to be reconsidered without revising the entire rules-based approach that the Secretary of State had been using ...”

52. In paragraph 61 of his statement, now at CB 1: 332, Mr Bell explains the approach as follows:

“61. In setting the framework for his decision-making, the Secretary of State was clear that the approach had to be based on general principles, and not based on the specific arrangements of every affected BSF project. The Secretary of State did not wish to pick ‘winners’, being petitioned on a school-by-school basis and required to arbitrate between the merits of the claims of different local authorities or different projects (whether by reference to state of development or to the needs of the particular area). He considered that such an approach would be both unacceptably time-consuming and potentially subjective and thus unfair.”

53. Consistency is an important aim, and I accept that if the Secretary of State were to have considered all the 735 schools in the BSF pipeline on a school by school basis the disadvantages described by Mr Bell in his paragraph 61 would have occurred. There was a need for “general principles”. The question is how rigid those general principles had to be.
54. In answer, Mr Goudie first submitted that the jurisprudence about fettering discretion relates to the creation and operation of a “policy”. Here, he submits, there was no formulation or operation of a policy at all; merely a one-off decision.
55. Mr Goudie and Mr Giffin both cite and rely upon certain classic passages in authorities on fettering discretion. In British Oxygen Co. Ltd. v Minister of Technology [1971] AC 610 at 625 C – E, Lord Reid said:

“The general rule is that anyone who has to exercise a statutory discretion must not “shut his ears to the application.” I do not think there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say ...”

56. Mr Goudie emphasises the reference there to a policy evolved in the context of “a multitude of similar applications”, and says that the passage has no application to a one-off decision. Mr Giffin emphasises that there is no “great difference between a policy and a rule” and that “what the authority must not do is to refuse to listen at all.”
57. British Oxygen was the foundation of the passage relied upon in the later judgment of Sedley J in R v Hampshire CC ex parte W [1994] ELR 460 at 475E – 476D. He said:
- “An authority with ... broad discretions ... would be acting arbitrarily if it decided one case after another with no discernible rationale or consistency between applicants. It is to enable a public authority to guard against such arbitrariness that the law recognises the wisdom and acceptability of having a policy for the exercise of administrative discretions ... But public law is also jealous to guard the discretion which a permissive power carries with it, and discretion is negated if any inflexible rule is adopted for the exercise of the power. That is why British Oxygen lays down principles which permit, and indeed encourage, the adoption of a policy but forbid the decision-maker to allow the policy to ossify ...
- What is required by the law is that, without falling into arbitrariness, decision makers must remember that a policy is a means of securing a consistent approach to individual cases, each of which is likely to differ from others. Each case must be considered, therefore, in the light of the policy but not so that the policy automatically determines the outcome.”
58. I stress that the context of that case was far removed from the present one, and Sedley J is there referring to the application of policy to “the exercise of administrative discretions”, which is far removed from a macro political decision by a Secretary of State. Further, Mr Goudie again emphasises that the passage is concerned with a policy to guide repeat exercises of discretion. Mr Giffin submits, however, that in the present case no less than in that case a rule or “policy” was adopted as “a means of securing a consistent approach to individual cases”, and that in this case, no less than in that one, the policy must not “automatically determine the outcome.”
59. Mr Goudie relied also on the passage in the speech of Lord Browne-Wilkinson in R v Home Secretary ex p Venables [1998] AC 407 at 496 G – 497 B which deals with fettering “the future exercise of discretion” and refers to “a discretionary power exercisable from time to time over a period.” Both Mr Goudie and Mr Giffin agree that the passage at page 497 A – C is a correct statement of principle, but Mr Goudie submits it is of no application to the present case. To borrow from Lord Browne-Wilkinson, the Secretary of State was not exercising a power “now for then” (nunc pro tunc). He was exercising it “now for now”.
60. It seems to me that, even if the Secretary of State was making a “one-off” decision, he did so in circumstances in which the essential duty not to fetter discretion so as to preclude individual consideration of individual cases was in play. There were a large number of projects from many different local authorities, all at more or less advanced stages of the pipeline. Each project was an individual case. The Secretary of State

decided certain “rules”, but his officials then applied those rules to each project so as to decide whether that particular project was “unaffected”, “for discussion” or “stopped”. It may be that that process occurred in a single, short period of time, and indeed it had already been done before he took the policy decision. But it was still the application of a policy decision or “rules” which determined, without more, the outcome in all the claimants’ categories of projects. The rules themselves of course recognised a category for individual consideration, the “for discussion” cases. But that category did not include repeat wave cases where the OBC was approved after 1 January 2010.

61. That the rules were indeed applied, and continued to be applied, in a hard edged way, with no residual individual discretion, is well illustrated by a letter from Mr Tim Byles CBE, Chief Executive of PfS, who wrote to Mr Kim Bromley-Derry, acting chief executive of Newham, on 16 August 2010, now at N1: 210. Mr Bromley-Derry and the Mayor of Newham had written at length in late July asking the Secretary of State to review his decision in relation to Newham. Mr Byles replied that:

“According to [the] criteria determined by the Secretary of State, Newham’s wave 5 projects will not go ahead through BSF ... PfS is not able to review the application of the Secretary of State’s decision on specific cases and all future capital investment and allocations to Newham will be determined by the outcome of the capital review [viz the still awaited James review].”

**Substantive legitimate expectation**

62. In considering this aspect of the case it is important to keep in mind some observations of Laws LJ in R v Secretary of State for Education and Employment ex p. Begbie [2000] 1 WLR 1115 at 1131, cited with approval at paragraph 23 of the reserved judgment of the Court of Appeal in R (Bibi) v Newham London Borough Council [2002] 1 WLR 237 at 244:

“The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court’s supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy.”

63. The relevant principles of law are essentially agreed in the present case. As the Court of Appeal said in Bibi at paragraph 25, there is no wide-ranging formulation which will provide a test in all cases, and it is certainly not for me to attempt one. There must be a commitment which can be characterised as a “promise” (although the word “promise” will rarely, if ever, have been used) such that to renege on the promise would be so unfair as to amount to an abuse of power (Bibi at paragraph 34). Words such as “a considered assurance” and “undertaking” have also been used as alternatives to “promise” in some authorities: see De Smith’s Judicial Review, 6<sup>th</sup> edition (2007) at para. 12 – 016, page 615. In deciding whether there has been such a



commitment, however, one must not look “purely from the point of view of the disappointed promisee who comes to the court with a perfectly natural grievance”, and it is important to remember that sometimes many promises may have been made “all of which cannot be fulfilled” (Bibi at paragraphs 35 and 36). There must in any event be “a promise which is ‘clear, unambiguous and devoid of relevant qualification’” (see Lord Hoffmann in R (Bancoult) v Foreign Secretary (no 2) [2009] 1 AC 453 at 488 para 60, citing with approval a phrase first used by Bingham LJ; see also Lord Rodger at paragraph 115 and Lord Carswell at paragraph 134). If there is a legitimate expectation, then “fairness requires that, if the authority decides not to give effect to that expectation, the authority articulate its reasons so that their propriety may be tested by the court ...” (Bibi at paragraph 59, cited by the majority of the Board of the Privy Council in the judgment of Sir John Dyson, SCJ in Paponette v The AG of Trinidad and Tobago [2010] UKPC 32 at para 42.)

64. To these principles there is added another, stressed by Mr Drabble in the present case. In Bibi at paragraph 39 the Court of Appeal said:

“But, on any view, if an authority, without even considering the fact that it is in breach of a promise which has given rise to a legitimate expectation that it will be honoured, makes a decision to adopt a course of action at variance with the promise then the authority is abusing its powers.”

65. That proposition underpinned the later passage at paragraph 49 of Bibi which was cited with approval by Sir John Dyson in Paponette at paragraphs 45 and 46. He said:

“Where an authority is considering whether to act inconsistently with a representation or promise which it has made and which has given rise to a legitimate expectation, good administration as well as elementary fairness demands that it takes into account the fact that the proposed act will amount to a breach of the promise. Put in public law terms, the promise and the fact that the proposed act will amount to a breach of it are relevant factors which must be taken into account.”

66. All this, however, starts with the first question: “... to what has the public authority, whether by practice or a promise, committed itself?”, which is “a question of analysing the evidence” (Bibi at paragraphs 19 and 20), and to this I now turn.
67. All the five claimants base their claims under this ground on the content and effect of their OBC approval letters, considered in the context of the scheme as a whole. Mr Drabble says that there has been no previous case in the history of the operation of the scheme in which OBC approval for a repeat wave did not later fructify into FBC approval and the project has gone (or still will go) ahead. He and the claimants say, therefore, that OBC approval is the critical point at which PfS commits itself to fund the particular project, and that the stage between OBC and FBC approval is merely in the nature of an audit of the detailed costings. Mr Drabble and the five claimants accept that there is no contract at the stage of OBC approval, but say that, as a matter of hypothesis, the doctrine of legitimate expectation only applies where there is no

contract. If there is a contract, then the case has moved beyond the stage and scope of legitimate expectation to one of contract. Meantime, the local authorities and the LEPs are entitled to act, and do act and spend considerable sums of money in reliance upon the legitimate expectation that OBC approval will lead, almost inexorably, to FBC approval.

68. The OBC letters clearly followed a relatively standard “pro forma” or “template”, and most of the language and structure of the letters is common to all five cases, although obviously the figures and numbers of schools vary and the “conditions precedent” vary. I will, therefore, illustrate the case by reference to the letter dated 22 January 2010 (thus 3 weeks after the cut off point later imposed) to Luton, now at CB 2: 669. It begins:

**“BSF Wave 6a OBC Approval**

I am pleased to inform you that consideration of the Outline Business Case (OBC) for the Luton Wave 6a OBC BSF project has been completed and that the OBC has been approved. OBC approval demonstrates that the project is robust and is prepared for procurement, and I would like to congratulate you and your team for reaching this significant milestone.

PfS will work with the LA and the LEP during the stage 1 and stage 2 processes up to FBC. During that period the LA and LEP will need to show evidence of value for money in terms of the costings of the facilities and also continuous improvement in terms of costings as set out in the SPA and KPI requirements. As part of this process the LA should engage with PfS to compare the LEP costings with those of the PfS Benchmarking System.

**Conditions Precedent**

Approval has been granted with the following Conditions Precedent:

That the statutory consultation process is satisfactorily completed by the end of May 2010.

**Funding**

The total funding approved is £43,688,759 plus £4,579,100 ICT funding. A list of schools, the opening dates you have committed to and the status of the approved funding is set out on the table below.”

69. The letter then listed the two schools, Cardinal Newman and Stopsley High, in relation to which “Funding Approved in this letter” was given, with their planned completion dates (September 2012) and the approved funding: in round figures £24.5 million and £19 million respectively, plus associated ICT costs and funding.

70. The letter continued:

“Whilst we are of course sympathetic to matters arising out of your control that lead to cost increases, you should assume this level of funding to be fixed and that no further central funding will be available for these schools.

Please note that a location factor of 1.07 has been used to calculate the funding and the Public Sector tender price indices used to calculate inflation are included in your Funding Allocation Model. Funding for your non-sample projects remains indicative and will be subject to adjustment at Stage 0 for changes in the location factor and inflation forecasts.

### **Moving Forward**

You will continue to be supported by PfS, and your main point of contact is the Project Director Mark Friday.

Please note that if the project is changed in any significant way from the agreed OBC, you should inform your PfS Project Director. You may be required to obtain the Department’s written consent to the proposed changes, to ensure the project continues to be supported. PfS will assist and advise you if this is necessary.

Finally, I wish you every success with your project and look forward to receiving the first of your Final Business Cases, which will be expected in August 2010.

Yours sincerely,”

71. The letters in the cases of the other five claimants were sub-divided into two categories of “Approval Funding”, namely: “Funding Approved in this letter”, and “Indicative funding – not yet approved”, with projects listed under the one or the other heading respectively.
72. The OBC approval letter to Nottingham dated 15 February 2010, now at CB 2: 694 is in that form. Three schools, Trinity, Top Valley, and Top Valley Learning Centre were to receive “Funding Approved in this letter” totalling £33 million, plus ICT costs/funding. A further eight schools were to receive “Indicative Funding – not yet approved”, totalling (indicatively) a further, rounded, £89.5 million plus ICT costs. On behalf of Nottingham, for whom he acts, Mr Drabble has focussed on the three “Funding Approved in this letter” projects in that letter. He recognises an analytical and factual difference between those and the “Indicative Funding - not yet approved” projects. Other local authorities and their counsel have argued, however, that there is no relevant distinction. In the case of Newham, one of their schools, Eleanor Smith, was the subject of “Indicative funding” on 2 February 2010 (see CB 2: 754 – 756) but was moved up to “Funding Approved in this letter” by a further letter dated 28 April 2010, now at CB 2: 761. Another, John F Kennedy School, was moved up on 21 June 2010 (see CB 2:762). On behalf of Newham, Mr Peter Oldham QC emphasised

(and the same point applies to other OBC approval letters combining both “Funding approved in this letter” and “Indicative funding – not yet approved”) that the section under the overall heading “Funding” refers to “The total funding approved is ....” and then gives the combined total of all approved funding, including indicative funding. In Newham’s case that total is, rounded, £234 million.

73. Mr Drabble says that the length to which the legitimate expectation goes is acutely illustrated in the case of Luton who, by 5 July 2010, were within about 7 weeks of actually starting construction of their two schools, even although the “formality”, as he would suggest, of the FBC approval had not by then been given. Luton say that since the date of the OBC approval they had expended, or incurred liabilities of, about £4.25 million in reliance upon it.
74. Waltham Forest make a discrete, fact specific point (fully developed in the Notes of Miss Jemima Stratford QC and Mr Oliver Jones dated 26 and 28 January 2011) that three of their schools, Willowfield, William Morris and Holy Family were originally in wave 1 (but non sample schools) and received OBC approval as long ago as August 2005. Although the schools were later redesignated to wave 5, they submit that that should not alter their status as OBC approved before 1 January 2010. They thus submit that on any view those three schools should not have been stopped on the application of the Secretary of State’s own criteria. I refer to this point as a discrete matter in paragraph 118 below.
75. Kent accept that the OBC approval letters upon which they rely post date 1 January 2010. They say, however, that it was what Mr Harry Matovu QC calls “mere happenstance” that certain of their schools were moved from wave 3, for which funding has continued, to wave 4 for which it was stopped. Kent has the largest number of schools of any local authority in England, and because there are so many of them some schools were transferred from wave 3 to wave 4 so as to allow continuity of education while re-builds took place. At paragraph 32 of her second statement, now at CB 1: 197, their officer managing delivery of BSF, Mrs Rebecca Spore, says that “waves 3 and 4 were mixed up as we were able to deliver the BSF projects quickly. This was recognised and encouraged by the previous government.” Kent say, further, that for reasons described by Mrs Spore at paragraphs 18 – 24 of her statement, now CB 1: 193 – 194, it was only as a result of “capacity issues within PfS and a backlog of business cases which needed approval” that their OBC approval was not given before the 1<sup>st</sup> January cut off point. In reliance upon the OBC approval which was given on 31 March 2010, they went on to incur liabilities of the order of £7.5 million to the LEP. Mr Matovu relies on some exchanges of emails as late as 15 and 22 June 2010, now at K 3: 72 and 74, between Mrs Spore and Mr Andrew Alsbury of PfS as indicating that the schools within the OBC approval were still proceeding as planned. Kent accept that the OBC letter expressly excluded Portal House School (see the “Note” in the letter at CB 2:771 which says “... no funding has been provided in respect of Portal House. A supplementary OBC will need to be submitted to secure funding for this scheme.”) Kent make no claim in relation to Portal House, and Mr Matovu submits that that illustrates where the line of legitimate expectation is properly drawn: below “indicative funding” but above an expressly excluded school such as Portal House.
76. Sandwell cannot rely upon any actual OBC approval letter, whether before or after 1 January 2010. They say, however, that OBC and FBC approval for their wave 3

schools was granted on the express understanding that other projects would be undertaken in wave 5 (to which their present claim relates) which would follow straight on from the wave 3 schools. The FAM for their wave 5 schools was received as long ago as April 2006. In September 2006 they were permitted to transfer funding between waves, and a letter of 5 September 2006, now at CB 2: 783, refers to bringing forward £17 million from their wave 4 – 6 project to their wave 3 project. On 30 July 2007, a BSF Manager, Dana Woodmansey, referred to the movement of funds between the waves and continued “... the development of the wave 5 schools will follow straight on from the wave 3 schools. Therefore, the delay to the Perryfields School will be minimised by ensuring that this is one of the schools included in the first phase of wave 5.”

77. Mr Giffin submits that these and other documents evidence “linkages” between the first and repeat waves of Sandwell’s projects which were, he says, “unique” or highly unusual, and which mean that they, too, had no less strong a legitimate expectation that their later wave schools would proceed than if they had had formal OBC approval.
78. In answer to all these arguments Mr Goudie really makes two broad points. First, that even in those cases where there was an OBC letter, the language of the letter, in the context of the BSF scheme as a whole, does not amount to a clear and unambiguous promise/commitment/undertaking or assurance which is capable of creating a legitimate expectation. As all the claimants knew, the critical stage by which PfS or the Secretary of State bound themselves was FBC approval. It is at the FBC approval stage that a promissory note is given by PfS or the department, from which Mr Goudie accepts there is no going back. This, he says, is made very clear by a document “FBC: Approval Process Document Status” issued in July 2009 and now in the Luton and Nottingham bundle 1: 176 – 180. This refers at paragraph 2 to “... the differences between the agreed positions at FBC and the intended positions described in the OBC approval stage.” Under a heading “Step 4. Promissory Note” the document states “The release of the promissory note signifies that the [department] is committed to funding the project and will issue a credit approval letter if all the [conditions precedent] have been satisfied.” Mr Goudie accepts that a legitimate expectation does not itself require a contract, either already in being (in which case the stage of legitimate expectation would have been passed) or in prospect. But he submits that *if there is* a later contract (or the giving of a promissory note) in prospect, then if matters do not reach that stage there is not a breach of legitimate expectation but merely what he calls a “near-miss contract”. He says that reaching an advanced stage (the OBC approval) in a multi stage process is not the same as reaching the finishing line (the FBC approval) and that there is no room for a clear and unambiguous promise earlier than that FBC point.
79. These considerations are, in the context of BSF, closely linked with Mr Goudie’s second point. BSF was a very long term programme, lasting ultimately for 15 years or so. Passages in early published BSF documents, now summarised in paragraph 21 of the skeleton argument of Mr Goudie, Mr Sheldon and Mr Hopkins, repeatedly make references such as “subject to future spending decisions”; “we are aware that over fifteen years circumstances change, including government priorities”; “subject to future spending rounds and Ministerial decisions on priorities”. The law recognises that public bodies, and especially central government, must enjoy a wide discretion to

change policies from time to time to reflect their conception of the public interest. “The liberty to make such changes is something that is inherent in our form of constitutional government” (per Lord Diplock in Hughes v Department of Health and Social Security [1985] AC 776 at 788 A – C.) This must be especially so in the case of a different political party taking power after a general election and in the immediate aftermath of that election.

80. Under our electoral law there was, as all the claimants and all other participating local authorities must have known, bound to be a general election not later than June 2010. So, submits Mr Goudie, no authority with anything less than FBC approval and a promissory note can have had any legitimate expectation that any project would still go ahead after that general election. It is, in my view, neither necessary nor appropriate for this purpose to look at the content of speeches or other statements made by political parties in the period prior to the general election, the more so as it resulted, as history turned out, in a coalition government which has had to adapt to the policies of two different political parties. Mr Goudie’s short point is that governments may change at general elections, and even if there is an expectation that a given government will carry through its policies and assurances, there can be no legitimate expectation that a later and politically different one will do so, absent the kind of binding commitment that a promissory note contains. As Mr Goudie, Mr Sheldon and Mr Hopkins put it at paragraph 20 of their skeleton argument: “It was plainly implicit that the delivery of a project of such a scale, duration and ambition [as BSF] would always be conditional upon the availability of the requisite finance and the policy decisions of the government of the time. *Had it been otherwise the present government’s predecessor would have been guilty of unlawfully fettering a successor government.*” (my emphasis)
81. I accept and agree with these submissions. I perfectly understand what high hopes were raised with the claimants and many other local authorities, and with local communities of pupils, parents and staff by the BSF process and the milestones that were reached. But I agree with Mr Goudie that neither the OBC approvals (whether actual or indicative), nor any other material which I have seen, go so far as to create a substantive legitimate expectation that any given project would definitely proceed.
82. It follows that I do not consider that there was any failure by the Secretary of State to consider the fact that he was making a decision in breach of a promise or legitimate expectation as described in Bibi at paragraph 39 (see paragraph 64 above), because there was no such promise or expectation.

### **Procedural legitimate expectation and the duty to consult**

83. As well as, but distinct from, substantive legitimate expectations, the law recognises a discrete form of procedural legitimate expectation which may raise a duty on the decision maker to consult before taking the step or decision. It is easy to visualise many situations in which a person or body cannot legitimately expect any particular outcome, but may nevertheless have a strong entitlement to be consulted before the outcome is decided upon. As I have already said, the Secretary of State adopted a policy or “rule” in relation to repeat wave projects which he and his officials applied without any case specific consultation and on the basis of which (as illustrated by Mr Byles’ letter to Newham referred to in paragraph 61 above) he or his officials have so far refused to engage in any subsequent reconsideration.

84. In considering this aspect of the case I have very firmly in mind some observations of Laws J in R v Secretary of State for Education ex parte London Borough of Southwark [1995] ELR 308 in which he said (at page 13 of the version supplied to me in authorities, Tab 16):

“It is important to have in mind that while this area of the law is pre-eminently concerned with fairness ... we are obliged, sitting here, to pay due respect to another principle: the principle of legal certainty. It would be intolerable if our jurisprudence did not make it reasonably clear to the public administrators ... when the law obliges them to consult persons or bodies affected by their decisions, and when it does not.”

That proposition must apply with especial force in relation to democratically elected ministers of the highest rank as it does to administrators.

85. In my view the jurisprudence does indeed make itself reasonably clear and it is not necessary to look beyond the decision of the Court of Appeal in The Queen on the application of Bhatt Murphy and others v The Independent Assessor (also, Niazi) [2008] EWCA Civ 755. The judgments were reserved and, as I understand them, the Master of the Rolls agreed fully with the judgment of Laws LJ. Sedley LJ put a “gloss” on the judgment of Laws LJ; but that gloss did not relate to what Laws LJ had said about consultation with which, as I understand it, Sedley LJ also agreed.
86. I remind myself that in that case the court was considering an expectation of consultation by a public authority “before it changes an existing substantive *policy*” (see the second sentence of paragraph 29, and the reference in the second question posed in paragraph 40 to “before effecting a change of policy”).
87. At paragraph 41 Laws LJ said that “both ... types of legitimate expectation are concerned with exceptional situations ... Thus ... nor will the law often require [a public authority] 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.” The underlying reason is that “Public authorities typically, and central government *par excellence* ... must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel ... This entitlement .... is repugnant also to an enforced obligation, in the name of procedural legitimate expectation, to take into account and respond to the views of particular persons whom the decision-maker has not chosen to consult.”
88. However Laws LJ continued at paragraph 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 be so unfair as to amount to an abuse of power, by reason of the way it has earlier conducted itself ... What is fair or unfair is of course notoriously sensitive to factual nuance ... ‘the categories of unfairness are not closed, and precedent should act as a guide not a cage.’”

89. At paragraph 49 Laws LJ apprehended that the secondary case of legitimate expectation will not often be established, but concluded:

“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.”

90. Mr Goudie submitted that a duty to consult only arises if (i) statute so provides, which it does not do here; or (ii) there has been an express promise or assurance of consultation, which, I accept, there had not been here; or (iii) there has been an established practice of consultation; or (iv) “in a residual category of case because of the nature of the circumstances” (the words of Mr Goudie). He submitted that there had been no “established practice of consultation” because the Secretary of State was taking a one-off decision; and submitted that whatever the ambit of his “residual category”, this case does not fall within it.
91. I cannot accept all these submissions. If the decision is characterised as an overarching policy decision to scrap the BSF programme, then I agree that there had been no “practice” of consultation on that policy. The programme had been established in 2003, and driven forward ever since without any, or any further, consultation with the claimants, (or with anybody else so far as I am aware). The “policy” had been to take BSF to its intended conclusion of rebuilding or refurbishing all schools. But it is not suggested by the claimants, nor do I for one moment suggest, that the minister was required to consult them before taking the overarching decision to change that policy and, in principle, to scrap the programme.
92. But it is necessary to look at the circumstances of this case more fact specifically, using precedent as a guide and not a cage.
93. The fact is that in the implementation of the previous policy (to drive BSF forward) the department and/or PfS had been in continuous and intense dialogue with each of the claimants over many years. There was continuing dialogue between the central government officials and the local government officials, often on relatively informal first name terms. That process continued almost to the very last moment – see, for example, the emails between Mrs Spore and Mr Alsbury in mid-late June referred to in paragraph 75 above. The delivery agency was called, presumably deliberately, “Partnership” for Schools. The delivery vehicle was the Local Education “Partnership”, in which PfS was itself a shareholder or “partner”. I have rejected the argument that the claimants can have had a legitimate expectation that all or any of their stopped projects would necessarily continue; but that does not diminish that the five claimants all had their recent OBC approval letters and were continuing not only to act and spend in reliance upon them, but actively to engage in continuing dialogue with the department or PfS about them. It is, in my view, relevant also that the sums involved were very large: a hundred or more millions of pounds for most of these



claimants. While the scale of the proposed expenditure may have added to the imperative to make substantial savings, it did also, in my view, fortify the duty to consult.

94. In my view the impact of the department's past conduct on the five claimants was indeed "pressing and focussed" and change could not lawfully be made abruptly without some prior consultation. Mr Bell says in paragraph 61 of his statement, quoted at paragraph 52 above, that consultation would have been unacceptably time-consuming, and Mr Goudie has submitted that any consultation would have to have allowed at least three months for responses and to have extended also (as a minimum) to the contractor partners in the LEPs. I do not accept this. There were altogether seven local authorities in the position of the five claimants, who had received OBC approval between 1 January 2010 and July: namely, the five claimants plus Durham and Bradford (who have not chosen to pursue claims). This discrete group of authorities was in fact identified to the Secretary of State in paragraph 6(a) of an impact document presented to him on 10 June 2010, now at CB 1: 387, although it overlooked that Luton and Nottingham should have been included in the group (a point which merely reinforces the benefits of consultation); and in a second impact document, also dated 10 June 2010, from Mr Byles to the Secretary of State, now at CB 1: 403, at paragraph 5 (that, too, overlooked Luton and Nottingham); and in a yet further options document dated 18 June 2010, now at CB 1: 501 at page 502. These references all point out to the Secretary of State that these categories of project will have already invested substantial sums, construction might be starting soon, and the authorities could be left with contractual liabilities of circa £1 – 3.5 million. The Secretary of State decided in any event to give more individual consideration to certain schools in 14 other areas, and to academies. I can see no pressing reason why he could not have given to the seven local authorities who already held post January OBC approval a short opportunity (perhaps only of three weeks or so) to press their case for any one or more of their projects to be saved. Luton's two schools which were almost on the point of starting to build might have been particularly strong examples. Waltham Forest would have had an opportunity to explain and press their case (now the subject of Miss Stratford's and Mr Goudie's detailed Notes) that 3 of their schools fell within OBC approval which had already been given long before (see paragraph 74 above). Further, one of their schools was also on the point of starting to build. There may well be other special cases.
95. In relation to Kent, Mr Goudie places some reliance on a "Case Study" which officials prepared on Kent's situation (there was another on the London Borough of Camden), now at CB 1: 513. It formed part of an options paper prepared for the Secretary of State dated 18 June 2010, now at CB 1 Tab 30. Mr Goudie says that that shows that the Secretary of State was able to give, and did give, informed case specific consideration to Kent. But what he gave consideration to was his officials' presentation in the case study. If there was a duty to consult Kent, it is no answer to say that he consulted someone else (his officials) about Kent. Kent were, in short, entitled to make their own input and representations as well.
96. In my view, the way in which the Secretary of State abruptly stopped the projects in relation to which OBC approval had already been given, without any prior consultation with the five claimants, must be characterised as being so unfair as to amount to an abuse of power. However pressing the economic problems, there was

no “overriding public interest” which precluded any consultation or justifies the lack of any consultation; and insofar as it affects the five claimants the decision making process was unlawful.

97. The position of Sandwell is in my view more difficult and more marginal. The Secretary of State should have identified the relatively small number of authorities (seven) to whom OBC approval had been given since 1 January 2010 and should have consulted them. Sandwell would not have been picked up in that “sieve”. However Sandwell have since come forward and have identified facts which I have briefly described in paragraphs 76 and 77 above and which, even if not apparent to the minister at the time, do support that they, too, had a particular claim to be consulted. By the absence of any consultation they were deprived of an opportunity to remind the Secretary of State of what they claim are unique or highly unusual facts and to press that case. I am satisfied that in relation to them, too, the process was unlawful.

### **The equality duties challenge**

98. Section 76A of the Sex Discrimination Act 1975, in the form in force between October 2007 and 17 August 2010 (i.e. in the period relevant to the challenged decision), provided that:

“76A(1) A public authority shall in carrying out its functions have due regard to the need –

- a) to eliminate unlawful discrimination and harassment, and
- b) to promote equality of opportunity between men and women.”

99. Section 71 of the Race Relations Act 1976, in the form in force in the relevant period, provided that:

“71(1) Every body or other person specified in schedule 1A [which includes the Secretary of State] ... shall, in carrying out its functions, have due regard to the need –

- a) to eliminate unlawful racial discrimination; and
- b) to promote equality of opportunity and good relations between persons of different racial groups.”

100. Section 49A of the Disability Discrimination Act 1995, in the form in force in the relevant period, provided that:

“49A(1) Every public authority shall in carrying out its functions have due regard to-

- a) the need to eliminate discrimination that is unlawful under this Act;
- b) ...
- c) the need to promote equality of opportunity between disabled persons and other persons;

- d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons;
- e) the need to promote positive attitudes towards disabled persons; and
- f) ...”

101. In each Act these duties to “have due regard” are described in the section heading as general, or general statutory, duties. In R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at paragraph 274, Arden LJ said, in relation to the Race Relations Act 1976:

“274. It is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation. It is not possible to take the view that the Secretary of State’s non-compliance with that provision was not a very important matter. In the context of the wider objectives of anti-discrimination legislation, section 71 has a significant role to play.”

102. Those observations must, of course, apply with equal force to the materially identical, and no less important, provisions of the disability and sex discrimination legislation.

103. The disability legislation was considered by a Divisional Court constituted by two Lords Justices in R (Brown) v Secretary of State for Work and Pensions and another [2008] EWHC 3158 (Admin), [2009] PTSR 1506. Giving the reserved judgment of the court, Aikens LJ pointed out at paragraph 36 that the duty on public authorities under the relevant sections of all three enactments is not to achieve the specified objectives but, rather, “to bring these important objectives relating to discrimination into consideration when carrying out [their] public functions.” (see also, to the same effect, paragraph 81).

104. At paragraphs 88 and 89 Aikens LJ stressed that the relevant duties, to have due regard, do not require formal disability (or, accordingly, race or sex) equality impact assessments to be carried out. At paragraphs 90 – 96 Aikens LJ developed six principles which, I was told, are now known as the Brown principles. I can only summarise and paraphrase them here:

- i) The decision maker who has to take decisions that do or might affect disabled people (or persons of different race or sex) must be made aware of his duty to have “due regard” to the identified goals.
- ii) The due regard must be fulfilled *before and at the time* that a particular decision is being considered. Attempts to justify a decision as being

consistent with the exercise of the duty when it was not, in fact, considered before the decision, are not enough to discharge the duty.

- iii) The duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions. It is not a question of “ticking boxes”. However the fact that the duty has not been specifically mentioned (although it is good practice to do so) is not determinative of whether it has been performed.
  - iv) The duty is non delegable.
  - v) The duty is a continuing one.
  - vi) It is good practice to keep an adequate record showing that the equality duties had been actually considered and pondered. That disciplines decision makers to undertake their equality duties conscientiously.
105. Mr Goudie does not, of course, dispute any of these principles. He submits that the Secretary of State personally (the duty being non delegable) was well aware of his duties under the relevant statutory provisions and did have the required due regard. But, submits Mr Goudie, he was entitled to conclude that discharge of the duties did not require him to engage in case by case consideration of individual projects before stopping them. He was not, as Brown makes clear, required to carry out any formal impact assessment before making his decision; and Mr Goudie argues that an equality impact assessment (EIA) carried out after the decision shows little differential impact upon single sex, racial or disabled groupings.
106. On 9 June 2010 Mrs Theresa May MP, in her capacity as Minister for Women and Equalities, sent to the Chancellor of the Exchequer and copied to all Cabinet Ministers a letter, now at SoS 3: 2068. Specifically in the context of making savings, she wrote “... I am writing to remind colleagues of the importance of considering the impact of reductions in public expenditure on different groups when identifying how departmental savings can be achieved ... This letter is to remind colleagues of the legal requirement to additionally consider how women, disabled people and ethnic minorities are affected ... It is ... important that departments individually consider the potential impact of savings on different equality groups before taking decisions ...” Somewhat prophetically, Mrs May continued “If there are no processes in place to show that equality issues have been taken into account in relation to particular decisions, there is a real risk of successful legal challenges ... This does not stop us taking the tough decisions necessary but we will need to show that we have considered the equality impacts ...”
107. I unhesitatingly assume that the Secretary of State personally will have read that important letter and will have been aware of his duties of due regard under the relevant legislation. I am confident, too, that senior civil servants such as Mr Bell, and others advising the Secretary of State are also well aware of them. I am accordingly confident that the first of the Brown principles is satisfied in this case.
108. Mr Bell asserts at paragraphs 97 – 102 of his statement, now at CB 1: 344 -346, that the Secretary of State was also aware that his decisions could have a differential impact on the different groups. Mr Bell says that the Secretary of State was well

aware that a number of BSF projects related to special schools (whose pupils would ordinarily fall within the definition of “disabled”) and that newly-built schools would generally be likely to produce facilities which were more accessible to disabled pupils. He was also aware that a number of the projects were situated in areas with significant populations of minority ethnic pupils.

109. In a paragraph which, with respect to Mr Bell, I find highly unconvincing, Mr Bell continues “The Secretary of State was also aware, however, that earlier waves of BSF investment were likely to have delivered funding for schools with greater proportions of pupils with disabilities and those from certain minority ethnic communities; the investment in those cases would be allowed to continue.” When Mr Bell says “those cases”, he does not mean equality specific cases. He simply means, as a generalisation, earlier waves. So generalised an approach (if, in truth, it formed part of the minister’s positive decision making at all) does not begin to discharge the equality duties “in substance [and] with rigour” as the third Brown principle requires.
110. There was certainly no “good practice” in this case, as the third and sixth principles recommend, of either expressly announcing the Secretary of State’s regard to the statutory needs and duties, or of making adequate records to record and demonstrate that regard.
111. His statement to the House of Commons on 5 July 2010 itself does begin with the words “The coalition government are determined to make opportunity more equal ...” but that (although very laudable) is entirely generalised and not at all disability, race or gender specific. There is absolutely no mention whatsoever in the statement of any disability, race or gender equality issues or needs having been considered by the Secretary of State at all.
112. Further, it is in this context that I have scrutinised as best I can the series of “option” papers which were prepared for the ministers in the period May – July, now at CB 1 tabs 26 – 32. I may have overlooked something, but I cannot find (nor has Mr Goudie been able to highlight) a single reference to disability, race or gender need/impact anywhere in them. The focus is entirely on different stages in the procurement process and what savings might be made. The letter from Mr Alexander to Mr Gove of 8 July 2010, at CB 1: 557 and quoted at paragraph 39 above, records their agreement, but makes no mention whatsoever of equality impact despite the very clear advice from Mrs May to the Chancellor of the Exchequer only a month before of the need both to consider it and to record that it has been considered.
113. Whilst the absence of such references or records is not determinative (as the third and sixth Brown principles make clear), I regret to say that in this case I regard the absence as glaring and very telling. I am simply not satisfied that any regard was had to the relevant duties at all, let alone rigorous regard.
114. The tie-in is, of course, with the lack of consultation. Different claimants have emphasised to me schools of particular disability (special needs), race or gender (single sex schools) relevance in their respective areas. The point is that if only the Secretary of State had consulted with them they would have been able (if they wished) to highlight those special equality considerations to him.

115. The Secretary of State has sought to rely on an Equality Impact Assessment which was carried out in July 2010 after the decision had been made and announced. Several counsel have made submissions as to the correct analysis of that EIA and what it shows. Mr Bell says, and Mr Goudie submits, that the overall differential equality impact was very small. Other counsel submit that if, they say, more correctly, the EIA had compared the impact on the stopped schools compared with the impact on the saved schools (rather than with all schools nationally) the impact is more marked. These statistical issues are, however, outside my remit. What the second Brown principle makes clear is that “attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision, are not enough.” As Sedley LJ said in one case, this is no more than “a rearguard action”, and is too late. In any event the later EIA, now at CB 2: 645 – 649 itself says, in its conclusion, now at page 649, that “... a stop now means that these prioritised groups will be inadvertently disadvantaged disproportionately ...” As Miss Stratford submitted, a major purpose of due regard before a decision is made, not after, is to avoid the “inadvertent”.
116. I am thus satisfied that the Secretary of State’s decision making process was also unlawful because of his failure to discharge the relevant statutory equality duties.

### **Other matters**

#### **(i) Sandwell; permission**

117. Sandwell issued their claim on 12 October 2010, a week or so more than 3 months after the announcement on 5 July 2010. They have not yet been granted permission to apply for judicial review, and Mr Goudie submits that they were in any event out of time and it should be refused. They were, he says, merely climbing too late upon a bandwagon. Sandwell say, first, that there was initially a confusion as to whether their projects were stopped or not; and second, that they delayed for a period in the hope of persuading the Secretary of State to change his mind. I do not propose to delve into these matters. I am satisfied that the delay was relatively short. It has not delayed the date of this hearing as a whole, and the fact of delay has not, of itself, been an impediment to good administration. As I consider that Sandwell’s case is a good one, I grant permission.

#### **(ii) Waltham Forest**

118. As I mentioned in paragraph 74, Waltham Forest claim that by application of the Secretary of State’s own rules, three of their schools, Willowfields, William Morris and Holy Family, should in any event have been saved and that is now the subject of detailed Notes from counsel on both sides. If Waltham Forest are right, that might, arguably, suggest a mandatory order that the Secretary of State must restore funding for those three schools. I would not be prepared to go that far in a situation in which, in my view, the Secretary of State must now reconsider on a much more case by case basis whether all or any one or more of the totality of the schools the subject of these proceedings can and should, after all, be saved. Waltham Forest may, if they wish, press the points made in their Notes upon the Secretary of State as part of that reconsideration.

**(iii) OBC indicative approved schools**

119. If I considered, which I do not, that there was a case of breach of substantive legitimate expectation based on the OBC Approval letters, it would be necessary to consider whether that extended also to the indicative approved schools, or whether, as Luton and Nottingham have formulated their cases, the line should be drawn above them. But the breach of procedural legitimate expectation extends to the indicative approved schools as well as the funding approved schools and, accordingly, the Secretary of State must (if any claimant, including Luton or Nottingham so wish) consider also any representations made in relation to their indicative approved schools.

**(iv) Newham; costs**

120. As I have mentioned, Newham (alone amongst the claimants, although they have all incurred liabilities or losses) have advanced a claim for their lost costs and liabilities. Mr Oldham on their behalf agreed that if I were to order the Secretary of State to reconsider his decision insofar as it affects them, the costs claim becomes, at best, premature. As I do propose to order reconsideration, I give no further consideration to that aspect of Newham's claim.

**Outcome**

121. In the result, I do not further examine or question the broad rationality of the Secretary of State's decision. I am not persuaded that he decided and acted in breach of any substantive legitimate expectation of any of these claimants.
122. However I do consider and hold that, unlawfully and without justification, he failed to consult with any of these claimants as to the effect on their individual projects of his possible decision options. Partly as a result, but also as a discrete matter, he unlawfully failed to give due regard to the equality impacts of his proposed decision. He must now, after giving each of them a reasonable opportunity to make representations, reconsider his decision insofar as it affects the claimants and each of the projects in relation to which they have claimed, with an open mind, paying due regard to any representations they may make, and rigorously discharging his equality duties.
123. I will hear submissions from counsel as to the appropriate form of any order (if any is necessary) to give effect to these conclusions, if one cannot be agreed.

**Final observations**

124. I wish, finally, to make two matters very clear so there is no future misunderstanding.
125. First, other local authorities than these claimants will no doubt read this judgment and may consider that they are in the same or a sufficiently similar factual position to claim the same relief. I have stretched a benevolent discretion to Sandwell, who were shortly out of time, for the reasons I have given. The decision is now, however, over seven months ago, and in my view any other authorities would now be far too late to apply for judicial review. I do not mean to trivialise so important an issue, but it may be said that fortune has favoured the brave.

126. Finally, the extent of my decision is that the Secretary of State must, I stress must, reconsider the position of each of the claimants with an open mind and paying due regard to whatever representations they may respectively make. But provided he discharges that duty and his equality duties, the final decision on any given school or project still rests with him. He may save all, some, a few, or none. No one should gain false hope from this decision.