

GLS Legitimate Expectation Webinar

CASE REFERENCE

R. (on the application of W) v Secretary of State for Education

Queen's Bench Division (Administrative Court)

09 December 2011

Westlaw Case Analysis 6 pages

Official Transcript 18 pages

R. (on the application of W) v Secretary of State for Education

Queen's Bench Division (Administrative Court)

09 December 2011

Case Analysis

Where Reported

[2011] EWHC 3256 (Admin); [2012] E.L.R. 172; [\[2012\] A.C.D. 24; Official Transcript](#)

Case Digest

Subject: Education **Other related subjects:** Administrative law; Human rights

Keywords: Child sexual abuse; Independent Safeguarding Authority; Legitimate expectation; Teachers

Summary: Although a former teacher had a substantive legitimate expectation that no further action would be taken against him in the absence of further misconduct, a later decision by the Secretary of State for Education to bar him from working with children pursued a legitimate aim and was proportionate.

Abstract: The claimant (W) applied for judicial review of the defendant secretary of state's decision to bar him from working with children. W had worked as a teacher. After two pupils made allegations against W of assault and indecency, W received cautions for common assault. W was later charged with indecently assaulting another child but the case was stayed. W was informed by letter that the secretary of state would not take action against him under the [Education Act 2002 s.142](#), under which she could bar or restrict his employment, but that his details would remain on record and might be taken into account in the event of further misconduct. Subsequently, as part of an historical cases review intended to identify persons who might pose a risk to children, an expert panel referred W's case to the secretary of state to consider making a barring order against him. W made representations to the panel and was assessed. The secretary of state barred W, who by then lived in Hong Kong, pursuant to s.142. W's appeal against that decision to the Care Standards Tribunal was stayed. It was common ground that there was no evidence or allegation of any misconduct by W since he received the letter from the secretary of state. W submitted that (1) the decision to bar him was taken in breach of a substantive legitimate expectation that no further action would be taken in the absence of further misconduct and that he had relied on that expectation, adversely impacting on his health; (2) the decision breached his rights under the European Convention on Human Rights 1950 art.6 and art.8.

Application refused. (1) The letter created a legitimate expectation that W would not have further action taken against him unless further misconduct came to the secretary of state's attention. The letter contained a representation to that effect which was clear, unambiguous and devoid of relevant qualification. That was how it would be understood by the person to whom it was addressed, [Paponette v Attorney General of Trinidad and Tobago \[2010\] UKPC 32, \[2012\] 1 A.C. 1](#) considered (see para.51 of judgment). It was common ground that the test for determining whether the secretary of state had acted lawfully when acting inconsistently with a substantive legitimate expectation was whether there was a legitimate aim in the public interest and whether the secretary of

state's conduct was proportionate, [R. \(on the application of Nadarajah\) v Secretary of State for the Home Department \[2005\] EWCA Civ 1363, Times, December 14, 2005](#) and [Paponette](#) considered. The public interest in protecting children from the risk of sexual abuse was a legitimate aim that was manifest and pressing. The availability of an appeal on the merits of the barring order was relevant to the question of whether the secretary of state's decision was proportionate. Further, the secretary of state did not simply resile from the legitimate expectation without more; he sought to devise fair procedures that would be followed before a barring order was imposed, which included the right to make representations, involvement of an expert panel, advice from a child protection charity and giving W the opportunity to have a face-to-face assessment. Any criticism of the views of those advising the secretary of state should be done in appeal proceedings before the tribunal. In any event, the Administrative Court should not entertain such a challenge on discretionary grounds as there was an adequate alternative remedy, [R. \(on the application of M\) v Bromley LBC \[2002\] EWCA Civ 1113, \[2002\] 2 F.L.R. 802](#) followed. The claim for judicial review was dismissed on that basis alone. However, it was also to be noted that the public interest lay in favour of allowing the tribunal to consider the case on its merits, [R \(on the application of M\) considered](#). W's mental stress did not outweigh the overriding public interest, [R. \(on the application of Zegiri\) v Secretary of State for the Home Department \[2001\] EWCA Civ 342, \[2002\] Imm. A.R. 42](#) and [R. \(on the application of Bibi\) v Newham LBC \(No.1\) \[2001\] EWCA Civ 607, \[2002\] 1 W.L.R. 237](#) considered. Therefore the decision was proportionate (paras 52-53, 55-58, 64-65, 67). (3) It was necessary to consider whether W was entitled to rely on the [Human Rights Act 1998](#), given that he was living outside the United Kingdom at the time of the secretary of state's decision. The secretary of state exercised legal authority or jurisdiction over W by making a barring order, even though W was outside the UK, and could not then deny that W was entitled to rights under the 1998 Act. However, art.6 of the Convention took W's case nowhere as W's complaint was not about procedural unfairness. Further, although it was common ground that the decision constituted an interference with W's right to respect for private life contrary to art.8(1), it was proportionate and justified and, accordingly, W's argument based on art.8 was rejected (paras 72-73, 76).

Judge: Singh, J.

Counsel: For the claimant: Heather Williams QC. For the defendant: Martin Chamberlain.

Solicitor: For the claimant: Matthew Gold & Co. For the defendant: Treasury Solicitor.

Significant Cases Cited

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); 2010-12-13

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

[\[2005\] EWCA Civ 1363; Times, December 14, 2005; Official Transcript](#); CA (Civ Div); 2005-11-22

R. (on the application of M) v Bromley LBC

[\[2002\] EWCA Civ 1113; \[2002\] 2 F.L.R. 802; \[2002\] 3 F.C.R. 193;](#)

[\[2002\] A.C.D. 101; \[2003\] Fam. Law 20; Times, July 20, 2002; Official Transcript](#); CA (Civ Div); 2002-07-16

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); 2001-04-26

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

[\[2001\] EWCA Civ 342; \[2002\] Imm. A.R. 42; Times, March 16, 2001; Independent, March 23, 2001; Official Transcript](#); CA (Civ Div); 2001-03-12

All Cases Cited

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); 2010-12-13

R. (on the application of Smith) v Oxfordshire Assistant Deputy Coroner

[\[2010\] UKSC 29; \[2011\] 1 A.C. 1; \[2010\] 3 W.L.R. 223; \[2010\] 3 All E.R. 1067; \[2010\] H.R.L.R. 28; \[2010\] U.K.H.R.R. 1020; 29 B.H.R.C. 497; \[2010\] Inquest L.R. 119; \(2010\) 107\(28\) L.S.G. 17; \(2010\) 160 N.L.J. 973; \(2010\) 154\(26\) S.J.L.B. 28; Times, July 8, 2010; Official Transcript](#); SC; 2010-06-30

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

[\[2005\] EWCA Civ 1363; Times, December 14, 2005; Official Transcript](#); CA (Civ Div); 2005-11-22

R. (on the application of M) v Bromley LBC

[\[2002\] EWCA Civ 1113; \[2002\] 2 F.L.R. 802; \[2002\] 3 F.C.R. 193; \[2002\] A.C.D. 101; \[2003\] Fam. Law 20; Times, July 20, 2002; Official Transcript](#); CA (Civ Div); 2002-07-16

Bankovic v Belgium (Admissibility) (52207/99)

[11 B.H.R.C. 435; \(2007\) 44 E.H.R.R. SE5](#); ECHR; 2001-12-12

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); 2001-04-26

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

[\[2001\] EWCA Civ 342; \[2002\] Imm. A.R. 42; Times, March 16, 2001; Independent, March 23, 2001; Official Transcript](#); CA (Civ Div); 2001-03-12

Lubbe v Cape Plc

[\[2000\] 1 W.L.R. 1545; \[2000\] 4 All E.R. 268; \[2000\] 2 Lloyd's Rep. 383; \[2003\] 1 C.L.C. 655; \[2001\] I.L.Pr. 12; \(2000\) 144 S.J.L.B. 250; Times, July 27, 2000; Independent, July 26, 2000; Official Transcript](#); HL; 2000-07-20

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); 1999-08-20

R. v North and East Devon HA Ex p. Coughlan

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

R. v Inland Revenue Commissioners Ex p. Unilever Plc

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

R. v Inland Revenue Commissioners Ex p. MFK Underwriting Agents Ltd

[\[1990\] 1 W.L.R. 1545](#); [\[1990\] 1 All E.R. 91](#); [\[1990\] S.T.C. 873](#); [62 T.C. 607](#); [\[1990\] C.O.D. 143](#); [\(1989\) 139 N.L.J. 1343](#); [Times, July 17, 1989](#); [Independent, August 4, 1989](#); [Independent, August 7, 1989](#); [Financial Times, July 19, 1989](#); [Guardian, July 20, 1989](#); QBD; 1989-07-07

R. v Inland Revenue Commissioners Ex p. Preston

[\[1985\] A.C. 835](#); [\[1985\] 2 W.L.R. 836](#); [\[1985\] 2 All E.R. 327](#); [\[1985\] S.T.C. 282](#); [59 T.C. 1](#); HL; 1985-04-25

All Cases Citing

Mentioned by

R. (on the application of McGetrick) v Parole Board

[\[2012\] EWHC 882 \(Admin\)](#); [\[2012\] 1 W.L.R. 2488](#); [\[2012\] A.C.D. 83](#); [Official Transcript](#); QBD (Admin); 2012-04-04

Significant Legislation Cited

[Education Act 2002 \(c.32\) s.142](#)

European Convention on Human Rights 1950 art.6

European Convention on Human Rights 1950 art.8

European Convention on Human Rights 1950 art.8(1)

[Human Rights Act 1998 \(c.42\)](#)

Legislation Cited

[Criminal Justice and Court Services Act 2000 \(c.43\) s.35](#)

[Criminal Justice and Court Services Act 2000 \(c.43\) s.35\(2\)](#)

[Education Act 2002 \(c.32\) s.142](#)

European Convention on Human Rights

European Convention on Human Rights 1950 art.6

European Convention on Human Rights 1950 art.8

European Convention on Human Rights 1950 art.8(1)

European Convention on Human Rights art.1

European Convention on Human Rights s.142(8)

[Human Rights Act 1998 \(c.42\)](#)

[Human Rights Act 1998 \(c.42\) s.36](#)

[Protection of Children Act 1999 \(c.14\) s.9](#)

[Safeguarding Vulnerable Groups Act 2006 \(c.47\)](#)

[Safeguarding Vulnerable Groups Act 2006 \(c.47\) Sch.1](#)

[Safeguarding Vulnerable Groups Act 2006 \(c.47\) s.142](#)

[Safeguarding Vulnerable Groups Act 2006 \(c.47\) s.144](#)

[Safeguarding Vulnerable Groups Act 2006 \(c.47\) s.35\(1\)](#)

[Sexual Offences Act 1956 \(c.69\) s.15](#)

[Tribunals, Courts and Enforcement Act 2007 \(c.15\)](#)

Journal Articles

Employment in schools: barring of staff

Assault; Barred persons; Children; Indecency; Legitimate expectation; Proportionality; Teachers.

[Ed. L.M. 2012, Feb. 6-8](#)

Legal challenge to a decision barring a teacher from working with children

Barred persons; Children; Indecency; Legitimate expectation; Proportionality; Teachers.

[Ed. Law 2012, 13\(1\), 11-12](#)

Teacher: accusations of assault and indecency

Assault; Barred persons; Indecency; Legitimate expectation; Proportionality; Right to respect for private and family life; Teachers.

[Ed. Law 2012, 13\(2\), 116-118](#)

Recent developments in public law

Administrative decisions; Banks; Belize; Bias; Discrimination claims; Fettering of discretion; Funding; Hospitals; Judicial review; Law centres; Legitimate expectation; Libraries; Local authorities' powers and duties.

[Legal Action 2012, Feb. 41-44](#)

Books

Bullen, Leake and Jacob's - Precedents of Pleadings from Sweet and Maxwell

Chapter: Part J - Education

Documents: [39-04 - Public Law.](#)

De Smith's Judicial Review 7th Ed.

Chapter: Chapter 12 - Legitimate Expectations

Documents: [Section 5. - The Standard of Judicial Review](#)



Case No: CO/110/2010

Neutral Citation Number: [2011] EWHC 3256 (Admin)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9th December 2011

Before :

THE HONOURABLE MR. JUSTICE SINGH

Between :

**THE QUEEN ON THE APPLICATION OF
PATRICK WOOD**

Claimant

- and -

SECRETARY OF STATE FOR EDUCATION

Defendant

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

Heather Williams QC (instructed by **Matthew Gold & Co**) for the **Claimant**
Martin Chamberlain (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing dates: 16th & 17th November 2011

Judgment

As Approved by the Court

Crown copyright©

The Honourable Mr. Justice Singh :

Introduction

1. In this claim for judicial review the claimant challenges the decision of the Secretary of State dated 6 October 2009, taken under section 142 of the Education Act 2002, to bar him from working with children. As the claimant has spent his entire professional life as a teacher, this has obvious and serious consequences for him, including an impact on his reputation as well as on his employment prospects.
2. In essence the claimant's complaint is that his case was investigated by the department for which the Secretary of State is responsible¹ between 2003 and 2005 but at that stage it was decided that no action would be taken to bar him. In particular he was sent a letter dated 15 April 2005 which, he submits, made it clear that no further action would be taken against him in the absence of further misconduct coming to the department's attention. It is common ground between the parties that there is no evidence or allegation of any misconduct since that time. In those circumstances, the claimant submits, the decision to bar him in October 2009 is unlawful on a number of grounds. His main ground is that the decision was an abuse of power because it was taken in breach of a substantive legitimate expectation. He also contends that it breached his rights under the Human Rights Act 1998 (HRA), in particular the right to a fair hearing in article 6 and the right to respect for private life in article 8.
3. It should be noted that the claimant has exercised his right of appeal against the Secretary of State's decision. By a consent order dated 14 May 2010 that appeal is currently stayed before the Care Standards Chamber of the First-tier Tribunal. Although the Secretary of State has reserved his position in relation to whether that appeal was lodged in time, there is no dispute that in principle the Tribunal does have jurisdiction to hear appeals in cases of this kind. This is something to which I shall have to return later in this judgment.

Procedural matters

4. Permission to bring this claim was granted after an oral hearing on 13 January 2011 by David Elvin QC (sitting as a deputy High Court judge). Permission was granted to pursue all of the grounds then proposed in the Amended Grounds attached to the claim form except for ground (f). That ground alleged that the Secretary of State had acted irrationally by leaving a particular piece of evidence out of account. More recently the claimant has made it clear that he no longer wishes to pursue grounds (a) and (c). Those grounds asserted, respectively, that the Secretary of State was prevented, as a matter of law, from taking the decision under challenge on grounds of finality and that he had acted in a way which was procedurally unfair at common law. However, the claimant now seeks permission to re-amend his grounds in so far as that may be necessary.

¹ The name of the relevant department has changed from time to time during the period to which this case relates: it was the Department for Education and Skills until 28 June 2007, then the Department for Children, Schools and Families (at the date of the decision under challenge) and since 13 May 2010 has been the Department for Education. However, in law the decision-maker is the "Secretary of State" and, for convenience, I will refer either to that office or to "the department."

5. In the exercise of my discretion I grant the claimant permission to re-amend his grounds as proposed, including a short addition that was filed, at my request, after the hearing, which puts in writing one of the points that was advanced orally before me. In my view, the interests of justice would be served by permitting the claimant to advance all the grounds that he now wishes to, having had the opportunity to consider the evidence filed on behalf of the defendant. There has been no prejudice to the defendant, who was able to respond to all the arguments which the claimant wishes to pursue.
6. Counsel for the defendant did not object to all of the proposed changes in the Re-amended Grounds but submitted that the claimant should not be permitted to make arguments challenging the decision to make the barring order against him, and should be confined to challenging the earlier decision to reconsider his case with a view to making such an order.
7. However, the decision under challenge in the original claim form was the decision to make a barring order dated 6 October 2009. At least one of the original grounds of challenge, that based on article 8, relates to that decision in any event. Most importantly, the real thrust of the submissions for the Secretary of State was that the distinction between the decision to reconsider the claimant's case and the resulting decision to make a barring order is of crucial significance because the latter decision can be the subject of an appeal to the First-tier Tribunal. In my view, that argument is an important one which should be considered in the context of the merits of the present claim rather than at a procedural stage.

Factual background

8. The claimant, who is now aged 67, qualified as a teacher in 1965 and spent most of his working life as a teacher in various schools both in this country and abroad.
9. Between 1968 and 1991 he was a teacher at Towers School in Ashford, Kent. After a spell in China, he returned to this country in 1994 and began teaching at Sittingbourne Community College.
10. Early in 2000 accusations of assault and indecency were made against the claimant by two 12 year old boys at Sittingbourne College, who were referred to at the hearing of this case as T and A. The minutes of a strategy discussion meeting held on 17 February 2000 to consider the allegations record that T alleged that he had been put over the claimant's knee by him and smacked on the bottom with a hand, ruler or stick. This was alleged to have happened several times. A stated that he had witnessed it and that it had also happened to him. T also alleged that the claimant had cuddled him by pulling him into "his private parts." Additionally it was stated by T that the claimant had offered him money of £10. He admitted taking £5 on one occasion but said that he did not know why he was being offered the money.
11. On 8 May 2000 the claimant was administered cautions for two offences of common assault at Sittingbourne police station in connection with the above allegations. He accepted those cautions at the time although he has more recently denied that he was guilty of anything and regrets having accepted the cautions. The claimant was not cautioned in respect of any offence of indecent assault. Nor was any disciplinary action taken against him by his school, Sittingbourne College.

12. In November 2002 allegations of indecent assault were made against the claimant by his step-son, who was referred to at the hearing as K. These were allegations of incidents alleged to have taken place at Towers School between January 1973 and December 1975, when the claimant was a teacher there and K was a pupil. K alleged that the claimant used to take him into the school office and indecently assault him there by making him sit on his lap and that he could feel that the claimant had an erection. The claimant subsequently married K's mother and K alleged that the claimant had continued to abuse him at home by kissing him and touching him around his genital area while he was lying in bed. There was also an allegation of kissing made by K's brother, referred to at the hearing as S, dating from around the same period in the 1970s.
13. As a result of those allegations, the claimant was charged on 24 July 2003 with indecent assault on a boy under the age of 14, under section 15 of the Sexual Offences Act 1956. He was committed for trial at Maidstone Crown Court. The trial took place on 10 and 11 June 2004. The evidence in relation to S was ruled inadmissible on the ground that it did not meet the test for similar fact evidence. At the conclusion of the prosecution's case the trial was stayed by the judge on the ground that a fair trial was not possible because of the passage of time since the alleged events. In particular it was observed that potentially important witnesses had died in the meantime and potentially relevant documents had been in files which had by then been destroyed.
14. In the meantime, on 17 September 2003 the Kent Schools Personnel Service wrote to the Teacher Misconduct Section of the department, which investigated the allegations which had by then surfaced.
15. A memorandum within the department, which is wrongly dated 12 April 2004 but which was in fact written on 12 April 2005, records the following views:

“Turning to Mr Wood's caution in 2000 for common assault, which related to his employment at Sittingbourne College, the details are still not exactly clear, despite the police having sent us their notes. From these notes....we can establish that two 13 year old boys alleged that Mr Wood both physically and indecently assaulted them by pulling them close to him so that his genitals were touching them whilst he smacked their bottoms (all were fully clothed). However, the police are unable to say why the CPS decided to pursue assault by beating rather than indecent assault charges.

There are no witnesses to these allegations or evidence relating to the other allegations that he offered one of the boys money..., although the head teacher did write to the police casting doubt on the credibility on one of the boys concerned and his allegations against another teacher...; the head also did not want to take disciplinary action against Mr Wood...we really don't have any information relating to Mr Wood's response to the allegations, other than a note saying that Mr Wood denies any offences...

Although undoubtedly serious, we have no evidence relating to the historical allegations and although Mr Wood accepted a caution for common assault this would appear to be in relation to him smacking the boys' bottoms rather than the alleged sexual element of the accusations. This differs from Kent's child protection coordinator description of Mr Wood as a "schedule 1 offender"...

I have discussed and agreed with [redacted] that on the basis of the available evidence, this case falls short of a bar, as all of the sexual allegations are unsubstantiated and we only have one caution for common assault to proceed with. Therefore, defence action will not be taken and a no action, retain papers letter issued."

16. On 15 April 2005 the department's Children's Safeguarding Operations Unit (List 99)² wrote to the claimant as follows:

"After careful consideration of all of the information put before her in this matter, the Secretary of State has decided that she will not, on this occasion, take any further action under section 142 of the Education Act 2002, which empowers her to bar or restrict a person's employment as a teacher or worker with children and young persons on grounds of misconduct.

Although the Secretary of State has decided that she will not take any further action, your details will remain on record and may be taken into account in the event of any further misconduct coming to the department's attention."

It is that letter which, the claimant submits, generated a substantive legitimate expectation which has been breached in the present case.

17. During the course of late 2005 and early 2006 significant public concern emerged that the existing system for safeguarding children in the educational context was not sufficiently robust. Part of the background to that public concern arose from the murder of two young girls in Soham in 2002, for which Ian Huntley was convicted in 2003, and which led to an inquiry by Sir Michael Bichard. Sir Michael's report in June 2004 made a number of recommendations which eventually led to the enactment by Parliament of the Safeguarding Vulnerable Persons Act 2006. Under that Act there was created an Independent Safeguarding Authority for children. However, it was felt by the department that, in the meantime, further changes needed to be made on a non-statutory basis.
18. A second cause of rising public concern in 2005 and 2006 centred on the engagement by a school in Norfolk of a teacher, whose name was on the Sex Offenders Register as a result of a caution arising from his giving his credit card details to a website

² List 99 is the name that was given to the list of persons barred from working with children in an educational context under various legislation since the 1920s.

containing child pornography, but who had not been placed by the department on List 99 and who had remained eligible for appointment as a teacher at a school.

19. As a result of this public concern the Secretary of State, who was then Ruth Kelly, made an announcement on 11 January 2006 that there would be an urgent review of cases where individuals on the Sex Offenders Register were not also on List 99. On 19 January 2006 the Secretary of State announced that:
 - a) all individuals who were convicted or cautioned for any sexual offence against a child should be included on List 99, whether or not they were on the Sex Offenders Register; and
 - b) the list of convictions and cautions against adults which resulted in automatic inclusion on List 99 should be expanded.

The Secretary of State also announced the establishment of an independent panel of experts chaired by Sir Roger Singleton, who was the former Chief Executive of Barnardo's, the well known children's charity.

20. This process was known as the Historical Cases Review. Initially cases dating from 1997 or earlier were reviewed because it was in that year that the Sex Offenders Register was created. By June 2006 the Department had come to the view that there were in addition cases *after* 1997 in which a decision had been taken not to bar an individual but where that person might pose a current risk to children. Accordingly the Secretary of State, who was by then Alan Johnson, extended the review to include such cases. After an initial assessment, done by way of an electronic "score card", certain cases were selected for substantive review to be subject to additional police and other inquiries. A relatively small number of cases for such further review were identified on the ground of being "high risk" because they met one or more of the following criteria:
 - (1) if there was a relevant conviction or caution which dated after the original decision not to bar;
 - (2) where there was additional or relevant information on the department's files which had been supplied after the decision not to bar;
 - (3) where there was concern as to the result of further checks which had been carried out;
 - (4) where there was no new evidence but where the decision not to bar was considered to be *prima facie* a doubtful decision given the evidence available (this was the category into which the claimant was regarded as falling).
21. Cases identified as high risk according to these criteria were to be considered by a member of the independent panel of experts. Then Sir Roger Singleton was to review that panel member's recommendation and give his own recommendation as to what action should be taken.

22. On 16 December 2008 the claimant's case was referred to the Secretary of State for approval to reconsider it with a view to barring him. The Secretary of State agreed to this on 19 December 2008. On 16 January 2009, in a letter mistakenly dated 6 January, the department wrote to the claimant informing him that his case was being reconsidered as part of the Historical Cases Review and inviting him to make representations. This was the first indication received by the claimant that his case would be investigated despite the letter of 15 April 2005. Although he was shocked that his case could be reconsidered in this way, the claimant took the opportunity to make representations within the two month period which was specified.

23. Those representations were sent to Sir Roger Singleton on 18 March 2009. On 1 April 2009 Sir Roger Singleton said in a minute that:

"I continue to be concerned that allegations on separate occasions have been made against Mr Wood. His representations do not assuage that concern....I think we need the insight which a specialist risk assessment would bring and I recommend that."

24. Because the claimant was by now overseas again he agreed to be subject to a paper based assessment, but not a face to face assessment, by the Lucy Faithfull Foundation (LFF).

25. On 5 June 2009 the Department received an assessment by Mr Tom Squire of the LFF. He is a probation officer who prepares reports on persons who have committed sexual offences and specialises in the treatment of sex offenders. Mr Squire was of the view that:

"On balance...the allegations against Mr Wood are unlikely to be totally fictitious in their origins."

26. Mr Squire's report was sent to Sir Roger Singleton, who provided his recommendation in a minute dated 14 June 2009. He said:

"My instincts lead me to believe that Mr Wood probably did abuse boys in 1973/1975 and again in 2000. Whilst I do not wholly agree with all the points made by the LFF assessor to support his view that: 'The allegations made against Mr Wood are unlikely to be totally fictitious.' I do agree with his conclusion that if the allegations are broadly true there is clear evidence that Mr Wood presents a risk of harm to children, especially pubescent boys...on a fine balance therefore, and principally on the admitted behaviour which led to the caution, I support a bar."

27. In a submission to the Secretary of State, dated 21 September 2009, the background to the case was set out in some detail as were summaries of the specialist assessment by Mr Squire and the recommendation by Sir Roger Singleton. The recommendation to the Secretary of State was that the claimant should be excluded from carrying out work with children.

28. On 6 October 2009 a direction to that effect was made by the Secretary of State. At the hearing I was informed that the decision was taken personally by the then Secretary of State, Ed Balls. The direction was sent to the claimant with a letter setting out the reasons for making it. That letter pointed out to the claimant that he had the right to appeal to an independent tribunal under section 9 of the Protection of Children Act 1999.

Legislative framework

29. The decision under challenge in this case was taken by the Secretary of State under section 142 of the Education Act 2002 (the 2002 Act), which was applicable at the material time. As sub-section (2) makes clear, section 142 applies to a variety of activities which include the provision of education at a school. Sub-section (3) provides that the section also applies to work of a kind that brings a person regularly into contact with children and is carried out at the request of, or with the consent of, a relevant employer.
30. Sub-section (1) is the main operative provision of section 142: it confers power on the Secretary of State, in relation to England, to direct that a person may not carry out work to which the section applies. This is in effect a general barring order and is what was imposed on the claimant on 6 October 2009. The sub-section also gives the Secretary of State the power to impose a more limited bar or a bar subject to specified conditions. However, those powers were not used in the present case.
31. Section 144 of the 2002 Act gives a right of appeal to a person in respect of whom a direction has been made under section 142. This appeal lies to the tribunal established under section 9 of the Protection of Children Act 1999. As a result of reforms of the tribunal system made under the Tribunals, Courts and Enforcement Act 2007, the appeal now lies to the Care Standards Chamber of the First-tier Tribunal.
32. Section 142(8) of the 2002 Act provides that, where a person is subject to a direction under that section, a relevant employer shall not use the person to carry out work in contravention of that direction. Sub-section (9) makes it clear that “relevant employer” includes a local education authority or the proprietor of a school.
33. The 2002 Act does not in itself create any criminal sanctions for breach of the provisions to which I have referred. However, a criminal offence can in certain circumstances be committed under sections 35 and 36 of the Criminal Justice and Court Services Act 2000 (the 2000 Act). Section 35(1) applies to an individual who is disqualified from working with children and makes it an offence knowingly to apply for, offer to do, accept or do any work in a regulated position. By virtue of section 36 a regulated position includes a position whose normal duties include work in an educational institution. As for potential employers, section 35(2) of the 2000 Act makes it an offence for a person knowingly to offer work in a regulated position to, or procure work in a regulated position for, an individual who is disqualified from working with children, or to fail to remove such an individual from such work.
34. List 99 was replaced by the Children’s Barred List on 12 October 2009, just six days after the decision under challenge in the present case. The Children’s Barred List is operated by the Independent Safeguarding Authority under the Safeguarding Vulnerable Groups Act 2006. However, List 99 continues to exist under transitional

provisions in respect of individuals who were on the list before 12 October 2009 and have an outstanding appeal against their inclusion: the claimant is such a person as he has an appeal pending before the Tribunal.

The claimant's grounds

35. The main ground advanced by the claimant in his challenge to the Secretary of State's decision is that it was so unfair as to amount to an abuse of power and was, accordingly, unlawful. He contends that this is because it breached the doctrine of substantive legitimate expectation.
36. The claimant also contends that the Secretary of State has breached his rights under the HRA, in particular the right to a fair hearing in the determination of his civil rights and obligations in article 6, and the right to respect for private life in article 8: both are Convention rights within the meaning of the HRA and are set out in Sch. 1 to that Act.

Relevant authorities on substantive legitimate expectation

37. Although at one time it was controversial whether the doctrine of substantive legitimate expectation existed at all in English public law, a turning point occurred in July 1999, when the Court of Appeal gave judgment in R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213. Lord Woolf MR gave the judgment of the Court, which also included Mummery LJ and Sedley LJ.
38. The Court dealt with the concept of substantive legitimate expectation, and in particular the court's role in reviewing decisions said to be in breach of that concept, at paragraphs 55 to 82 of the judgment. At paragraph 57 the Court said:

“Where the Court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the Court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the Court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.”
(Emphasis in original)

39. At paragraph 61 the Court observed that the question whether to frustrate a legitimate expectation can amount to an abuse of power had been considered by the House of Lords in R v Inland Revenue Commissioners, ex parte Preston [1985] AC 835 and by the Court of Appeal in R v Inland Revenue Commissioners, ex parte Unilever plc [1996] STC 681. As the Court went on to observe in the same paragraph, it cannot be suggested that special principles of public law apply to the revenue or to taxpayers. Nevertheless what appears to have happened is that different and apparently contradictory lines of authority had emerged in other fields of public law raising similar challenges. In Coughlan the Court synthesised the relevant principles, drawing upon the major cases in various fields of public law, in particular those in the tax context, including R v Inland Revenue Commissioners, ex parte MFK Underwriting

Agents Ltd. [1990] 1 WLR 1545, a decision of the Divisional Court comprising Bingham LJ and Judge J. In that case, at page 1569, Bingham LJ said, in words that have often been quoted since, that, for a statement to give rise to a legitimate expectation, it must be “clear, unambiguous and devoid of relevant qualification.”

40. In Coughlan the Court of Appeal made it clear both that the doctrine of substantive legitimate expectation does exist in English public law and that the arbiter of whether there is an overriding public interest which justifies a failure to honour that expectation is the court itself. The court is not confined to review of the executive’s decision on the ground of irrationality only. See the valuable discussion of Coughlan in Paul Craig, Administrative Law (6th ed., 2008) pages 656-663.
41. Another valuable discussion of the developing concept of legitimate expectation in English public law can be found in the judgment of Laws LJ, in what were acknowledged to be *obiter dicta*, in Nadarajah v Secretary of State for the Home Department [2005] EWCA Civ 1363, at paragraphs 46-70. Two important points of principle emerge from that judgment. First, at paragraph 69, Laws LJ made it clear that there is no distinction in principle as to the approach to be taken by the court between procedural and substantive expectations. The second is that the standard of review which the court should adopt when the executive seeks to resile from its previous promise is that of proportionality: see paragraph 68. In that paragraph Laws LJ said:

“...where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. In my judgment this is a legal standard which, although not found in terms in the European Convention of Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. That being so there is every reason to articulate the limits of this requirement – to describe what may count as good reason to depart from it – as we have come to articulate the limits of other constitutional principles overtly found in the European Convention. Accordingly a public body’s promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body’s legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to

comply is objectively justified as a proportionate measure in the circumstances.”

See also the discussion of Nadarajah by Professor Craig in the book to which I have already referred, at pages 663-666.

42. As the argument in the present case developed before me, it became clear that what initially appeared to divide the parties on one point was not ultimately in issue. The claimant accepted that the Secretary of State was entitled in principle to adopt the change of policy which was reflected in the Historical Cases Review. What he sought to challenge was the application (or, as he would submit, misapplication) of that policy to the facts of the present case. For his part, the Secretary of State contended that any challenge to the change in policy as such would have been unsustainable because it lay within the “macro-political field.” This drew upon authorities such as R v Secretary of State for Education, ex parte Begbie [2000] 1 WLR 1115, at page 1131, where Laws LJ drew a contrast between cases which fall within the “macro-political field” and others, such as the case before the Court, which concerned a relatively small, identifiable, number of persons. In those circumstances Laws LJ said: “If there has been an abuse of power, I would grant appropriate relief unless an overriding public interest is shown...” On the facts of the present case, the Secretary of State was content to accept that the claimant’s challenge could properly be brought against the decision in his particular case, since that did not lie in the “macro-political field.”
43. The question of the relevance of reliance and detriment was considered in R (on the application of Bibi) v Newham Borough Council [2002] 1 WLR 237 by the Court of Appeal, which comprised Schiemann LJ, Sedley LJ and Blackburne J. In the judgment of the Court which was given by Schiemann LJ, at paragraphs 26 to 27 the argument that a substantive legitimate expectation can only arise where the situation is analogous to a private law wrong, and therefore there has been detrimental reliance, was rejected. At paragraph 28 the Court said that reliance, though potentially relevant in most cases, is not essential. At paragraph 31 the Court said:

“In our judgment the significance of reliance and of consequent detriment is factual, not legal. In Begbie’s case both aspects were in the event critical: there had been no true reliance on the misrepresentation of policy and therefore no detriment suffered specifically in consequence of it. In a strong case, no doubt, there will be both reliance and detriment; but it does not follow that reliance (that is credence) without measurable detriment cannot render it unfair to thwart a legitimate expectation.”
44. At paragraph 32 the Court quoted with approval from R (on the application of Zeqiri) v Secretary of State for the Home Department [2001] EWCA Civ 342, in particular paragraph 68 in the judgment of Lord Phillips of Worth Matravers MR. In that passage Lord Phillips made it clear that detriment in this context may include mental stress caused, for example, by a prolonged period of uncertainty which arises from a public authority’s decision to resile from an earlier representation. In Bibi itself the Court returned to this theme at paragraphs 49-55, where it made it clear that there need not be “concrete detriment”: what the Court described as “moral detriment” may suffice. This could include, for example, prolonged disappointment. The claimant submits that, on the evidence before the Court in the present case, he has suffered

moral detriment both in that sense and in the sense of adverse impact on his health. He submits that, while detrimental reliance is not essential as a matter of law for him to succeed, it is relevant when the court carries out the proportionality exercise which is called for and that it should carry considerable weight.

45. The most recent case to which it is necessary to refer in relation to the concept of substantive legitimate expectation is the decision of the Judicial Committee of the Privy Council in Paponette v Attorney General of Trinidad and Tobago [2011] 3 WLR 219. The judgment of the majority of the Board was given by Lord Dyson JSC. At paragraph 28 Lord Dyson quoted with approval from the opinion of Lord Hoffmann in R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2009] AC 453, at paragraph 60, where Lord Hoffmann had said that is not essential that the applicant should have relied upon a promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with that promise would be an abuse of power.
46. At paragraph 30 Lord Dyson said that the question whether a representation is “clear, unambiguous and devoid of relevant qualification” depends on how, on a fair reading of the promise, it would have been reasonably understood by those to whom it was made.
47. At paragraph 34 of his judgment Lord Dyson quoted with approval paragraph 57 of the judgment of the Court of Appeal in the Coughlan case to which I have already made reference.
48. At paragraph 37 Lord Dyson made it clear that, while the initial burden lies on an applicant to prove the legitimacy of his expectation, in particular that it was clear, unambiguous and devoid of relevant qualification, and that in order to support the legitimacy of that expectation he may be able to show that he relied on the promise to his detriment, once those elements have been proved by the applicant the onus shifts to the public authority concerned to justify the frustration of the legitimate expectation. Lord Dyson said:

“It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the Court to weigh the requirements of fairness against that interest.”
49. As I have already mentioned, a valuable discussion of the concept of substantive legitimate expectation is to be found in the textbook on administrative law by Professor Craig. At pages 649-650, Professor Craig suggests that the type of cases that can arise in a variety of circumstances can be categorised in the following manner. The first class will consist of a general norm or policy choice, which an individual has relied on, and has been replaced by a different policy choice. The second class is where a general norm or policy choice has been departed from in the circumstances of a particular case. The third class is where there has been an individual representation relied on by a person, which the administration seeks to resile from in the light of a shift in general policy. The fourth class is where there has been an individual representation which has been relied upon and the administrative body then changes its mind and makes an individual decision which is inconsistent with the original representation.

50. As Professor Craig observes, cases falling into the fourth category are normally treated as the strongest, both because an unequivocal representation made to an individual carries a particular moral force, and because holding the public body to that representation is less likely to have serious consequences for the administration as a whole. As the claimant submits, the present case falls within the fourth category. However, as the claimant also accepts, that does not necessarily mean that a public authority may never lawfully resile from its earlier representation.

Substantive legitimate expectation

51. I accept the claimant's submission that the letter of 15 April 2005 created a legitimate expectation that he would not have further action taken against him unless further misconduct came to the department's attention. In my view, the letter did contain a representation to that effect which was clear, unambiguous and devoid of relevant qualification. That is how it would reasonably have been understood by the person to whom it was addressed: see *Paponette* (above). Although this point was not formally conceded by the Secretary of State, in substance the submission that was made on his behalf was that he was entitled to change his mind because there was an overriding reason in the public interest to do so.
52. The main dispute in the present case is about whether the Secretary of State is right in that submission. It was common ground before me that the burden lies upon him on this issue: see *Paponette* (above). It was also common ground that the test for determining whether the Secretary of State has acted lawfully when acting in a way which is inconsistent with a substantive legitimate expectation is whether (a) there was a legitimate aim in the public interest; and (b) his conduct satisfied the principle of proportionality: see *Nadarajah* and *Paponette* (above).
53. As to (a) there was, and could be, no real dispute. There clearly was a legitimate aim. The public interest in protecting children, in particular in protecting them from the risk of sexual abuse, is manifest and pressing.
54. As to (b), the principle of proportionality, the claimant invited the Court to subject the reasoning of those advising the Secretary of State in the process leading up to his decision to impose the bar, in particular Sir Roger Singleton, to close, rigorous and sustained criticism. This is because the claimant submitted that, since it is for the Secretary of State to satisfy the Court that his conduct accorded with the principle of proportionality, he would fail in that task if the claimant could show that the reasoning process was defective in material respects. Furthermore, and in particular, the claimant submitted that the reasoning process failed to comply with the Secretary of State's own policy as to the way in which the Historical Cases Review should be conducted.
55. In my view, it would not be appropriate for this Court to accept that invitation by the claimant. This is because I accept the central submission made on behalf of the Secretary of State, that there is an important distinction to be drawn between the decision to reconsider the claimant's case and the resulting decision to make a barring order against him.
56. This is not only because there is an appeal available against the latter decision, although it is generally true that the Administrative Court will in its discretion refuse

to hear cases where there is an adequate alternative remedy available (an argument to which I will return later). There is a deeper reason here. It is that the availability of an appeal on the merits of the barring order is relevant to the question whether the Secretary of State's decision to resile from the claimant's legitimate expectation satisfies the principle of proportionality. It is also relevant that the appeal will be heard by an independent judicial body. Another very important reason why the availability of an appeal is relevant is that, in the present context, there are not only the interests of the parties involved but also an important public interest in the protection of children, in particular protection from sexual abuse by people who are in positions of trust such as teachers. It is to be noted that the Secretary of State did not reconsider all old cases where there was no new evidence which had emerged, only those where it was thought a person might pose a *current* risk.

57. Another important consideration in the assessment of proportionality is that the Secretary of State did not simply resile from the legitimate expectation that had been created in this case without more. The department was well aware of the sensitivity of reviewing cases which had been thought to be closed and sought to devise fair procedures which would be followed before a barring order was imposed. This included not only the right to make representations, a right which the claimant exercised, but also the involvement of an expert panel, chaired by an eminent and respected person from outside the department, Sir Roger Singleton, and the advice of the LFF with its expertise and experience in the field. It should also be noted that the procedures which the Secretary of State devised included the opportunity to have a face to face assessment, rather than just a paper based one, although this particular claimant chose not to avail himself of that opportunity as he now lives in Hong Kong.
58. The claimant is perfectly entitled to criticise the views of those experts and others who advised the Secretary of State but this should be done in the appeal proceedings before the Tribunal. In my judgment those criticisms really go to the weight, if any, which should be attached to the evidence and do not render it unfair or an abuse of power for the Secretary of State to resile from the letter of 15 April 2005. Such questions of weight are best suited for determination by the Tribunal, which will be able to form its own view of the merits of whether the claimant should be the subject of a direction under section 142 of the 2002 Act.
59. Counsel for the Secretary of State submitted that another reason for rejecting the challenge to the decision to bar the claimant is that an appeal can be brought against such a decision. He relied in particular on the decision of the Court of Appeal in R (on the application of M) v London Borough of Bromley [2002] 2 FLR 802.
60. In that case the appellant had been employed by a local authority as a care worker in a respite centre for children with learning difficulties. During an investigation into that centre, allegations surfaced that the appellant had sexually abused some of the children. The report of the investigation stated that the allegations had been made out. The local authority referred the appellant to the Department of Health and in consequence his name was placed on the list of persons considered unsuitable to work with children. The appellant was dismissed from his new job with a different local authority. The appellant was entitled to appeal to what was then the Care Standards Tribunal but instead sought judicial review to quash the report in respect of him on the basis of alleged procedural flaws in the investigation.

61. At first instance Scott Baker J accepted that there had been arguable deficiencies in the investigation process but nevertheless refused relief by way of judicial review on the basis that the statutory tribunal was better equipped to carry out detailed examination of the case than the Administrative Court. The claimant's appeal was dismissed by the Court of Appeal. At paragraph 26 Buxton LJ said:

“The object of the judicial review application is to stop any further inquiry as to M's suitability in its tracks but judicial review can only consider procedure, not the merits of the case. The implications of a man who should not be working with the disadvantaged being cleared to work with them are, of course, too serious to need elaboration.”

62. The Court of Appeal was of the view that the judge was entirely right to take that consideration into account. He did so not simply on the basis that the interests of the disadvantaged people must be predominant, but because, with the availability of the tribunal process, the whole question of M's suitability could be looked at in the round and not just in the straitjacket of a judicial review application. The judge considered, as did Buxton LJ, that that in itself was an overriding consideration in that case. Buxton LJ then noted that counsel for the appellant had sought to meet that objection in two ways. First she said that the local authority's process was so flawed that the appellant should never have found himself before the tribunal at all. A similar argument was advanced on behalf of the claimant before me. Buxton LJ rejected that argument even if it was borne out by the facts on the ground that it would be:

“hopelessly formulistic, in view of the general considerations of public interest involved in these questions, to say that that objection, in itself and without further consideration, should prevent any investigation by the Secretary of State or tribunal.”

Counsel for the appellant in M also submitted that the question was not just one of procedure in the judicial review sense, so that on substantive rather than procedural grounds the matter should not go to the tribunal. Buxton LJ also rejected that argument on the ground that it trenched on questions of technical judgement on which the tribunal had expert knowledge which the court does not: see paragraphs 27 and 28 of the judgment. In an important passage in paragraph 31 Buxton LJ observed that:

“The tribunal might find that the process is flawed but still consider that M is unfit. The opportunity to make that decision should in my view not be lightly held from them.”

63. Another important passage is to be found in the judgment by Judge LJ at paragraphs 42-45, where he emphasised that judicial review is a discretionary remedy which should only be ordered before a claimant has exhausted an adequate alternative remedy “with the greatest circumspection.” This was notwithstanding the fact that Judge LJ appears to have taken the view that there were on the facts of M “demonstrable flaws in the process.” One reason for this was that to quash the local authority's decision at that stage of proceedings might be unfair to children and vulnerable adults who would be subject to supervision by a person who was in fact unsuitable for such work. However, Judge LJ made it clear that this did not mean that judicial review could never be appropriate. Without wishing to set out a

comprehensive list in what is necessarily a discretionary matter, Judge LJ suggested that judicial review might be ordered if, for example, a local authority's inquiry had been motivated by spite or malice or conducted in bad faith. Another example he mentioned was where there was "not a scintilla of evidence" to sustain the case against an individual.

64. In my view, the judgments in the case of M are instructive. They lend support to the Secretary of State's submissions in the present case at two levels. First, they support his submission that in general the Administrative Court should not entertain a challenge of the present kind on discretionary grounds as there is an adequate alternative remedy since there can be an appeal to the Tribunal. In the exercise of the Court's discretion I would dismiss this claim for judicial review on that basis alone.
65. But matters do not rest there. This is because, secondly, the judgments in M also tend to support the Secretary of State's submission that, in its assessment of proportionality, this Court should be slow to stop a case being considered on its merits by the Tribunal. Otherwise there is a real risk that the case may be one where, although the reasoning process which led to the decision to bar an individual may be criticised in some way, the Tribunal would have upheld the barring order on its merits. If that were to be the case, the public interest would be undermined. I accept the Secretary of State's submission that, although the decision of the Court of Appeal in M is not directly on point in that it did not expressly deal with the concept of substantive legitimate expectation, it does tend to support the conclusion which I would in any event have reached, that the public interest lies in favour of allowing the Tribunal to consider the case on its merits. Since the assessment of proportionality requires the court to reach a view on where the balance of public interest lies, that, in my view, is a powerful factor to take into account.
66. This does not mean that every decision to reconsider a case will always be proportionate. Everything depends on the facts of each case. There may be cases in which, to use Judge LJ's phrase, there is "not a scintilla of evidence" for reviewing a closed case at all and the individual concerned should not have to go through the trouble and anxiety of going through an appeal. But the present case is not such a case. I would not wish anything I say to prejudice the outcome of the appeal which is currently pending before the Tribunal, so what I do say necessarily has to be at the level of principle rather than commenting on the merits of this particular case. Approaching the issue at the level of principle, it is at least possible that, even if the criticisms which the claimant makes of (for example) the views and reasoning of Sir Roger Singleton are well-founded, the Tribunal may give more weight to other parts of the evidence than he did, for example the evidence of K and S as to what occurred in the 1970s.
67. I am very conscious of the impact on the claimant of the Secretary of State's decision to reconsider his case and to make the barring order, in particular the mental stress which is evidenced before the Court. However, I am not persuaded that that is sufficient to outweigh the overriding public interest which justified the decision. The Secretary of State's decision satisfied the principle of proportionality.

Applicability of the HRA

68. There was brief but interesting argument before me as to whether the claimant was entitled to rely on the HRA at all in the present case. The question arose only because at the time of the decision under challenge the claimant was living in Hong Kong and therefore outside the territory of the United Kingdom (UK). In a number of recent cases the House of Lords and the Supreme Court have held that the geographical reach of the HRA is co-extensive with that of the Convention on which it is based, the European Convention on Human Rights (ECHR), which, by virtue of article 1, requires a High Contracting party to secure the Convention rights to everyone within its “jurisdiction”: see e.g. R (on the application of Al-Skeini) v Secretary of State for Defence [2008] AC 153 and R (on the application of Smith) v Oxfordshire Assistant Deputy Coroner [2011] 1 AC 1. It has been held by the European Court of Human Rights that, although the concept of jurisdiction in article 1 is primarily territorial, it is not exclusively such. There are well-recognised exceptions in which a state will be held to have exercised jurisdiction over a person outside its own territory: see Bankovic v Belgium (2001) 11 BHRC 435.
69. The reason why argument on this question was brief in the present case is that counsel for the Secretary of State did not wish to make a positive case objecting to the claim on this basis at least in the context of the present proceedings, although he did not wish to concede the point either. Accordingly, I will keep my observations on this equally brief since I have not heard full argument on the point and it may be more important in another case than it has been in the present one.
70. It seems to me that in the present case the Secretary of State did exercise jurisdiction over the claimant by making the barring order which he did in October 2009 even though the claimant was then outside the UK. An analogy can be drawn with the situation where a court in this country makes a decision in respect of a person overseas. I note that this scenario was referred to in Smith by Lord Collins of Mapesbury JSC. At paragraph 301 Lord Collins said that: “it makes complete sense for the Convention to apply to parties to litigation in contracting states irrespective of where they are. It could not be seriously suggested, for example, that a Japanese defendant in English proceedings who is served out of the jurisdiction is not entitled to article 6 rights.” After referring to the decision of the House of Lords in Lubbe v Cape plc [2000] 1 WLR 1545, Lord Collins observed that: “There was no suggestion, nor could there have been, that the claimants could not rely on article 6 because they were South Africans without any connection with the United Kingdom.”
71. If one searches for the principle which lies beneath the instinctive feeling that that must be right, it can be found in the realisation that “jurisdiction” is a legal concept, not a physical one. As a matter of etymology, the word “jurisdiction” originally meant “speaking the law.” Without attempting an exhaustive definition, it can now be understood to mean the exercise of legal authority. In international law the concept of jurisdiction is conventionally understood to refer to any one or more of the three classic functions of the state: legislative, executive and judicial (see e.g. the late Sir Ian Brownlie’s Principles of Public International Law (7th ed., 2008), ch. 15).
72. A court which purports to exercise jurisdiction over a person who is outside the territory asserts legal authority over that person in relation to the case before it. It cannot then deny that the person is entitled to a fair hearing under article 6 when it

decides that case. Similarly, in the present case, the Secretary of State asserted legal authority (or jurisdiction) to make a barring order against the claimant and the order has effect, pursuant to the terms of section 142 of the 2002 Act, in England. The Secretary of State could not then deny that the claimant was in principle entitled to rights under the HRA even though he was living outside the territory of the UK.

Article 6

73. In my judgement, article 6 takes the claimant's submissions nowhere in the present case. Article 6 is concerned with procedural fairness. The claimant's real complaint is not one about a lack of procedural fairness but about a substantive decision which is adverse to his interests. That no doubt is why he has abandoned his ground (c), which was based on alleged procedural unfairness at common law.
74. Although not formally abandoned, the claimant's submission based on article 6 was not pursued with any vigour at the hearing in the present case. In any event, in my judgment it has no merit and I reject it. As I have mentioned earlier, the Secretary of State was at pains to devise a fair procedure to deal with cases such as the present one, precisely because it was appreciated that reconsideration of such cases was a sensitive matter. There was no procedural unfairness and no breach of article 6 in the present case.

Article 8

75. It was common ground before me that the decision under challenge did constitute an interference with the claimant's right to respect for private life in article 8(1). This is no doubt because of the obvious impact that a barring order has on a professional person's ability to work in certain fields and the impact on their reputation. In the present case, there is also evidence of the particular impact on the claimant's health that the decision has had.
76. However, the Secretary of State submitted that the interference was justified under article 8(2) and, therefore, lawful. This was essentially for the same reasons as those which, in the Secretary of State's submission, justified the decision as being a proportionate means of achieving a legitimate aim in the public interest in the context of the argument based on legitimate expectation. I accept those submissions by the Secretary of State. In fairness to counsel for the claimant, she realistically acknowledged, without making any concessions, that, if her argument based on legitimate expectation failed, it was unlikely to succeed under article 8. I am satisfied, for the reasons I have already given in the context of that earlier argument, that the Secretary of State's decision was a proportionate one. Accordingly I also reject the claimant's argument based on article 8.

Conclusion

77. For the reasons which I have given this claim for judicial review is dismissed.