

GLS Administrative Law Webinar

CASE REFERENCE

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

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

**Divisional Court
26 June 2007**

Westlaw Case Analysis 6 pages

Official Transcript 25 pages

Status:  Positive or Neutral Judicial Treatment

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

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

Divisional Court

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Case Analysis

Where Reported

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

Case Digest

Subject: Administrative law **Other related subjects:** Criminal procedure

Keywords: Administrative decisions; Compensation; Consultation; Discretionary payments; Ex gratia payments; Irrationality; Legitimate expectation; Miscarriage of justice; Notice; Public policy; Solicitor and client costs

Summary: The secretary of state had not acted unfairly or in breach of legitimate expectation in deciding to abolish a discretionary ex gratia scheme, under which compensation was paid to those who had suffered miscarriages of justice, without notice or prior consultation. There was nothing amounting to a representation or promise either that the scheme would continue indefinitely or that the secretary of state would consult or give notice before withdrawing it.

Abstract: The claimants (N) applied for judicial review of a decision of the respondent secretary of state to withdraw, without prior notice or consultation, a discretionary ex gratia scheme under which compensation was paid to those who had suffered miscarriages of justice, and to reduce costs of the solicitors acting for claimants under a statutory scheme. N comprised claimants who had suffered miscarriages of justice and solicitors who specialised in acting for such claimants. Each of the claimants was in a position to make a claim under the discretionary scheme, which had, since the inception of the [Criminal Justice Act 1988](#), operated in parallel with, and in addition to, the statutory compensation scheme under [s.133](#) of the Act. Under the discretionary scheme payment was made from public funds in recognition of the hardship caused by a wrongful conviction or charge notwithstanding that the circumstances might not give grounds for a claim for civil damages. The assessor would take into account the expenses incurred by the claimant in establishing his innocence or pursuing the claim for compensation. Under the statutory scheme [s.133\(4\)](#) embraced a power to award as compensation costs of both establishing innocence and of making the claim for compensation itself. Costs were usually paid by reference to solicitors' private client rates. Without prior notice or consultation, the secretary of state announced the withdrawal of the discretionary scheme, and announced that legal costs under the statutory scheme would be paid by reference to the level of fees paid for Legal Help pursuant to the [Community Legal Service \(Funding\) Order 2000](#), which was around one-third of the solicitors' private client rates. N submitted that (1) the secretary of state had acted unfairly or in breach of his legitimate expectation in abolishing the discretionary scheme without giving notice or an opportunity to

interested parties to make representations; (2) the decision to award the solicitors their costs at the Legal Help rate was irrational.

Application refused. (1) The ex gratia scheme was entirely discretionary and it was open to the secretary of state to withdraw it. His reasons for doing so were not irrational. There was nothing amounting to a representation or promise either that the scheme would continue indefinitely or that the secretary of state would consult or give notice before withdrawing it. There was no established practice of consultation with anyone, let alone with unidentified future potential claimants under the discretionary scheme. There was an established practice of paying compensation in cases that were judged to qualify under the scheme, but that was a substantive, not a procedural, practice. In the circumstances, N could not claim that they had a legitimate expectation that the scheme would not be withdrawn without notice or consultation, [Council of Civil Service Unions v Minister for the Civil Service \[1985\] A.C. 374](#) distinguished, [R. v Rochdale MBC Ex p. Schemet \[1993\] 1 F.C.R. 306](#), [R. v Devon CC Ex p. Baker \[1995\] 1 All E.R. 73](#), [R. v North and East Devon HA Ex p. Coughlan \[2001\] Q.B. 213](#) and [R. v Inland Revenue Commissioners Ex p. Unilever Plc \[1996\] S.T.C. 681](#) considered. The solicitor claimants, although well placed to make representations if they had been given the opportunity, had no stronger legitimate expectation than any of their actual or potential clients. The decision not to consult or give notice was not so unfair as to amount to an abuse of power. (2) Section 133 of the Act conferred no right to recover legal costs. Moreover the assessor had a broad discretion as to the amount payable. The mere fact that the assessor had in the past exercised such a discretion on a particular basis did not of itself give rise to any expectation that it would continue indefinitely. He was entitled to reconsider the policy. The assessor was well aware that the Legal Help rate was regarded as low, but he considered it to be an appropriate standard. The secretary of state's concession, namely that the assessor would be prepared to consider representations that a particular case might merit the payment of solicitors costs above the Legal help rate, did not mean that the assessor was obliged to consider paying costs at a higher rate.

Judge: May, L.J.; Gray, J.

Counsel: For the first and second claimants: Stephen Cragg. For the third claimant: Henrietta Hill. For the fourth claimants: Rabinder Singh QC, Heather Williams QC, Phillippa Kaufman. For the defendants: Jonathan Swift.

Solicitor: For the first and second claimants: Hodge Jones & Allen. For the third claimant: Fisher Meredith. For the fourth claimants: Bindman & Partners. For the defendants: Treasury Solicitor.

Appellate History & Status

Divisional Court

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

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

Affirmed

Court of Appeal (Civil Division)

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](#)

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

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)

R. v Devon CC Ex p. Baker

[\[1995\] 1 All E.R. 73](#); [91 L.G.R. 479](#); [\(1994\) 6 Admin. L.R. 113](#); [\[1993\] C.O.D. 253](#); [Times, January 21, 1993](#); [Independent, February 22, 1993](#); CA (Civ Div)

R. v Rochdale MBC Ex p. Schemet

[\[1993\] 1 F.C.R. 306](#); [91 L.G.R. 425](#); [\[1993\] C.O.D. 113](#); [Times, September 9, 1992](#); [Independent, November 9, 1992](#); [Guardian, October 7, 1992](#); QBD

Council of Civil Service Unions v Minister for the Civil Service

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

All Cases Cited

Sumukan Ltd v Commonwealth Secretariat

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

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

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

R. (on the application of Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs

[\[2006\] EWCA Civ 1279](#); [\[2008\] Q.B. 289](#); [\[2007\] 2 W.L.R. 1219](#); [\[2006\] H.R.L.R. 42](#); [\[2007\] U.K.H.R.R. 58](#); [\(2006\) 103\(41\) L.S.G. 33](#); [Times, October 18, 2006](#); [Official Transcript](#); CA (Civ Div)

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

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[\[2004\] UKHL 18](#); [\[2005\] 1 A.C. 1](#); [\[2004\] 2 W.L.R. 1140](#); [\[2004\] 3 All](#)

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McFarland's Application for Judicial Review, Re

[\[2004\] UKHL 17; \[2004\] 1 W.L.R. 1289; \[2004\] N.I. 380; \(2004\) 148 S.J.L.B. 541; Times, April 30, 2004; Official Transcript; HL \(NI\)](#)

R. (on the application of Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence

[\[2003\] EWCA Civ 473; \[2003\] Q.B. 1397; \[2003\] 3 W.L.R. 80; \[2003\] A.C.D. 51; \(2003\) 100\(23\) L.S.G. 38; Times, April 19, 2003; Independent, April 10, 2003; Official Transcript; CA \(Civ Div\)](#)

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

[\[2002\] UKHL 3; \[2002\] Imm. A.R. 296; \[2002\] I.N.L.R. 291; \[2002\] A.C.D. 60; Times, February 15, 2002; Official Transcript; HL](#)

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 \(Civ Div\)](#)

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 \(Civ Div\)](#)

R. v Criminal Injuries Compensation Board Ex p. P

[\[1995\] 1 W.L.R. 845; \[1995\] 1 All E.R. 870; \[1994\] 2 F.L.R. 861; \[1995\] 2 F.C.R. 553; \[1994\] C.O.D. 507; \[1994\] Fam. Law 670; \(1994\) 144 N.L.J. 674; Times, May 19, 1994; Independent, May 12, 1994; CA \(Civ Div\)](#)

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

[\[1994\] 1 A.C. 531; \[1993\] 3 W.L.R. 154; \[1993\] 3 All E.R. 92; \(1995\) 7 Admin. L.R. 1; \(1993\) 143 N.L.J. 991; Times, June 29, 1993; Independent, June 25, 1993; HL](#)

R. v Devon CC Ex p. Baker

[\[1995\] 1 All E.R. 73; 91 L.G.R. 479; \(1994\) 6 Admin. L.R. 113; \[1993\] C.O.D. 253; Times, January 21, 1993; Independent, February 22, 1993; CA \(Civ Div\)](#)

R. v Rochdale MBC Ex p. Schemet

[\[1993\] 1 F.C.R. 306; 91 L.G.R. 425; \[1993\] C.O.D. 113; Times, September 9, 1992; Independent, November 9, 1992; Guardian, October 7, 1992; QBD](#)

R. v Panel on Take-overs and Mergers Ex p. Guinness Plc

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

Council of Civil Service Unions v Minister for the Civil Service

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

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[\[1971\] A.C. 610](#); [\[1969\] 2 W.L.R. 892](#); [\[1970\] 3 W.L.R. 488](#); [\[1970\] 3 All E.R. 165](#); HL

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[\[1967\] 2 Q.B. 864](#); [\[1967\] 3 W.L.R. 348](#); [\[1967\] 2 All E.R. 770](#); [\(1967\) 111 S.J. 331](#); QBD

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[\[1924\] A.C. 318](#); PC (NZ)

R. v Port of London Authority Ex p. Kynoch Ltd

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[Criminal Justice Act 1988 \(c.33\)](#)

[Criminal Justice Act 1988 \(c.33\) s.133](#)

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Legislation Cited

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[Community Legal Service \(Funding\) Order 2000 \(SI 2000/627\)](#)

[Criminal Appeal Act 1968 \(c.19\) s.17](#)

Criminal Injuries Compensation Scheme

[Criminal Justice Act 1988 \(c.33\)](#)

[Criminal Justice Act 1988 \(c.33\) s.133](#)

[Criminal Justice Act 1988 \(c.33\) s.133\(4\)](#)

[Criminal Justice Act 1988 \(c.33\) s.133\(5\)](#)

[Criminal Justice Act 1988 \(c.33\) s.133\(5\)\(a\)](#)

European Convention on Human Rights Art.6

[Industrial Development Act 1966 \(c.34\)](#)

International Covenant on Civil and Political Rights

Journal Articles

Planning law update

Consultation; Environmental impact assessments; Planning; Planning control; Pollution control.

[J.P.L. 2007, Dec Supp \(Planning: Still Sexy at Sixty?\), 105-115](#)

Recent developments in public law (November)

Abuse of power; Asylum seekers; Bias; Care homes; Compensation; Consultation; Deportation; Discretion; Fairness; Legitimate expectation; Miscarriage of justice; Parole Board; Public authorities; Reasons; Right to independent and impartial tribunal.

[Legal Action 2007, Nov, 28-33](#)

Power games

Abuse of power; Administrative decisions; Compensation; Consultation; Discretionary payments; Legitimate expectation; Miscarriage of justice; Public policy.

[N.L.J. 2007, 157\(7292\), 1417](#)

Divisional Court's decision may deny access to justice, warn human rights lawyers

Access to justice; Fees; Miscarriage of justice; Solicitors.

[S.J. 2007, 151\(25\), 819](#)

Books

De Smith's Judicial Review 6th Ed.

Chapter: Chapter 12 - Legitimate Expectations

Documents: [Section 1. - Introduction](#)

De Smith's Judicial Review 6th Ed.

Chapter: Chapter 12 - Legitimate Expectations

Documents: [Section 3. - Legitimacy](#)



Neutral Citation Number: [2007] EWCA Civ 1495 (Admin)

Case No: CO/5845/2006; CO/5884/2006;
CO/5942/2006; CO/5932/2006

IN THE HIGH COURT OF JUSTICE
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 June 2007

Before:

THE RT. HON. LORD JUSTICE MAY
THE HON. MR JUSTICE GRAY

Between:

The Queen (on the application of)

Claimants

- 1. Noorullah Niazi**
- 2. Hamidreza Taghibeglou**
- 3. Husyein Cakir**
- 4. Bhatt Murphy *and***
Bindman & Partners *and*
Birds, Solicitors *and*
Fisher Meredith *and*
Hickman & Rose *and*
Hodge, Jones & Allen *and*
Stephensons

- and -

Secretary of State for the Home Department
The Independent Assessor

Defendants

(Transcript of the Handed Down Judgment of
WordWave International Ltd
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Stephen Cragg (1 & 2); Henrietta Hill (3);
Rabinder Singh QC, Heather Williams QC, Phillippa Kaufman (4)
(instructed by **Hodge, Jones & Allen (1&2); Fisher Meredith (3); Bindman & Partners (4)**) for
the **Claimants**
Jonathan Swift (instructed by Treasury Solicitor) for the Defendants

Hearing dates: 10-11 May 2007

Judgment
As Approved by the Court

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Lord Justice May:

Introduction

1. On 19 April 2006, the Secretary of State announced the withdrawal for the future of an ex gratia scheme under which compensation was paid to some people who had suffered miscarriage of justice. This discretionary scheme, or earlier versions of it, had operated for a very long time, the first recorded ex gratia payment having been made in the 19th century. The scheme had since the inception of the Criminal Justice Act 1988 operated in parallel with, and in addition to, a statutory scheme under section 133 of the 1988 Act. The announcement of the withdrawal of the discretionary scheme was made without notice or prior consultation. In addition to the withdrawal of the discretionary scheme, it was summarily announced that for the future the Independent Assessor under the schemes, currently Lord Brennan QC, would henceforth award solicitors acting for claimants under the schemes costs at a much lower rate than had been awarded up to then.
2. In these judicial review proceedings, for which Calvert-Smith J gave permission, three individual disappointed claimants and seven firms of solicitors, who between them specialise in acting for claimants under the schemes, challenge the legality of (a) the decision to withdraw the discretionary scheme without notice or prior consultation, and (b) the decision to reduce solicitors' costs. The challenges are mainly on grounds of procedural fairness, abuse of power or irrationality. A case of orthodox breach of legitimate expectation was but weakly maintained, if at all. As to the withdrawal of the discretionary scheme, it was accepted in argument that, since the scheme was discretionary and ex gratia, it was open to the Secretary of State to decide to withdraw it; but not, it is said, without notice or consultation. As to the costs decision, it is said that the announced rates of costs are so inadequately low as to be unfair and irrational, and that consultation would have enabled those best placed to do so, that is the solicitor claimants, to make representations of substance in favour of a better structured and fairer approach.
3. Mr Rabinder Singh QC with Ms Heather Williams QC and Ms Phillippa Kaufmann appeared for the solicitor claimants. Mr Stephen Cragg appeared for two of the individual claimants, Noorullah Niazi and Hamidreza Taghibeglou. Ms Henrietta Hill appeared for the third individual claimant, Huseyin Cakir. Mr Jonathan Swift appeared for the Secretary of State and the Independent Assessor.
4. Each of the individual claimants was in a position to make a claim under the discretionary scheme. They were preparing to do so, and indeed one or more of them did so after the scheme had been withdrawn. But they were too late. Given any period of notice, they would have been able to make their claims before the scheme was withdrawn.
5. I had an initial theoretical concern about the standing of the solicitor claimants to bring their proceedings. They certainly had a professional interest in the continuance of the discretionary scheme and economically they were and are the recipients of any costs

allowed for their work. But they have no entitlement to be instructed in claims such as these. The beneficiaries of the discretionary scheme were, or would be, their clients and any costs allowed are part of the clients' compensation. However, a debate about standing would have been pointless, since the submissions ably advanced by Mr Singh were going to be made on behalf of one or other of the claimants anyway, and the solicitor claimants were probably better placed than anyone to marshal the facts and appropriate threads of argument.

The statutory and discretionary schemes

6. As I have said, a discretionary scheme to pay compensation for some blatant miscarriages of justice had operated for a very long time. From 1957, ex gratia payments were fixed on the advice of an Independent Assessor. On 20th May 1976, the United Kingdom ratified the International Covenant on Civil and Political Rights 1966. On 29th July 1976, Mr Roy Jenkins, as Home Secretary, gave a written ministerial statement in Parliament with a note for claimants outlining procedural changes to the scheme. This included a statement making it clear that the general principles governing the assessment of ex gratia payments were analogous to those governing the assessment of damages for civil wrongs. A decision to make an ex gratia payment from public funds did not imply an admission of legal liability. The payment was to be offered in recognition of the hardship caused by a wrongful conviction or charge notwithstanding that the circumstances might give no grounds for a claim for civil damages. The Assessor would take into account the expenses, legal or otherwise, incurred by the claimant in establishing his innocence or pursuing the claim for compensation.
7. On 29th November 1985, Mr Douglas Hurd, as Home Secretary, made a written parliamentary statement which has since been taken to define the basis on which ex gratia payments were made. It was as follows:

“There is no statutory provision for the payment of compensation from public funds to persons charged with offences who are acquitted at trial or whose convictions are quashed on appeal, or to those granted free pardons by the exercise of the royal prerogative of mercy. Persons who have grounds for an action for unlawful arrest or malicious prosecution have a remedy in the civil courts against the person or authority responsible. For many years, however, it has been the practice for the Home Secretary, in exceptional circumstances, to authorise on application ex gratia payments from public funds to persons who have been detained in custody as a result of a wrongful conviction.

In accordance with past practice, I have normally paid compensation on application to persons who have spent a period in custody and who receive a free pardon, or whose conviction is quashed by the Court of Appeal or the House of Lords following the reference of a case by me under section 17 of the Criminal Appeal Act 1968, or whose conviction is quashed by the Court of Appeal or the House of Lords following an appeal after the time normally allowed for such an appeal has lapsed. In future I

shall be prepared to pay compensation to all such persons where this is required by our international obligations. The international covenant on civil and political rights [article 14.6] provides that:

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

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

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

8. Section 133 of the Criminal Justice Act 1988 implemented in this jurisdiction the United Kingdom’s relevant international obligations. It is headed “Compensation for miscarriages of justice”. It provides as amended as follows:

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

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

- 3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State.
- 4) If the Secretary of State determines that there is a right to such compensation, the amount of the compensation shall be assessed by an assessor appointed by the Secretary of State.”

Subsection (5) provides that “reversed” shall be construed as referring to a conviction having been quashed “on an appeal out of time”. Subsection (4) embraces a power to award as compensation costs both of establishing innocence and of making the claim for compensation itself.

9. The nature of the statutory scheme was considered by the House of Lords in *O’Brien and others v Independent Assessor* [2007] UKHL 10 where Lord Bingham of Cornhill said at paragraph 11 that the Secretary of State makes payments out of public funds to victims of miscarriages of justice not because he or his officials are or are treated as being wrongdoers, but because such victims are recognised as having suffered what may be a great injury at the hands of the State and it is accepted as just that the State, representing the public at large, should make fair recompense. It is for the Assessor to judge what recompense is fair. Section 133 gives the Assessor a very broadly-defined remit. It makes no provision for the sort of scrutiny to which a court would subject a contested claim involving hundreds of thousands of pounds. Assessments are made relatively infrequently and are not published. Section 133 was not intended to encourage undue legalism.
10. On 17th June 1997, Mr Jack Straw, as Home Secretary, confirmed in Parliament that he would continue to be bound by the provisions for the ex gratia payment of compensation as set out in Mr Hurd’s statement of 29th November 1985.
11. On various dates before and including January 2006, the Office for Criminal Justice Reform published a Note for Successful Applicants for Compensation for Miscarriages of Justice covering both the statutory and the discretionary scheme.
12. The withdrawal of the discretionary scheme was announced by Mr Charles Clarke, as Home Secretary, in a written ministerial statement on 19th April 2006 which included the following:

“I have decided reform is needed to the arrangements under which state compensation is paid for miscarriages of justice.

The purpose of the reforms which include some important changes being made by the Assessor, with my full support, is to modernise and simplify the system, and to bring about a better balance with the treatment of victims of crime. In summary, with immediate effect:

I will not consider any new applications under the discretionary

scheme for compensation;

I will introduce time limits for all applications;

the Assessor will assess compensation in respect of applicants' legal costs by reference to the level of fees paid for Legal Help pursuant to the Community Legal Service (Funding) Order 2000;

...

A single scheme

Currently I pay compensation under two schemes: a statutory scheme under section 133 of the Criminal Justice Act 1988 and a discretionary scheme which operates on the basis of the statement made by the then Home Secretary to the House of Commons on 29th November 1985.

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

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

Other immediate changes

Claims for compensation have increased in complexity in recent years and may drag on for several years. This reflects the absence of time limits on the process, as would be expected if the case had come to court, lack of clarity about the maximum amounts payable, and the absence of limits on legal fees, which are reimbursed at private work rates. Currently, applicants are invited simply to submit their claims for compensation and to detail their financial loss. Compensation payments for miscarriages of justice have increased sharply over the last few years and are now running at an average of well over £250,000, with more than ten per cent of that amount also paid in legal fees. In contrast, no legal costs are payable under the scheme for victims of crime, and the average amount received by each victim is less than one fiftieth of what is paid to those eligible under the miscarriages of justice scheme.

...

The Assessor has also decided that legal costs in relation to

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

13. A subsequent Office for Criminal Justice Reform Note explained that LSC Legal Help rates would apply to legal costs incurred in handling an application for compensation. Other legal costs would be paid in full, at the discretion of the Assessor if he considers them to be reasonable and proportionate. I understand this to apply to the costs of a claimant establishing his innocence.
14. The nature of the discretionary scheme was very recently described by Auld LJ in *R (Raissi) v Secretary of State for the Home Department* [2007] EWCA Civ 243 at paragraph 21 as follows:

“Before examining each of those issues, I shall consider the way in which the courts should interpret and apply the *ex gratia* scheme, set out as it is in the form of a statement of ministerial policy. The first consideration is that it is just that, a statement by the Home Secretary of the day, to which his successors have adhered, of what he intends to do. It is not a statute. The second is that it is an *ex gratia* scheme directed to circumstances that the Home Secretary, on a case by case basis, might consider exceptional and, which, on that account and in his discretion, merit payment of compensation from public funds. Given those considerations, whilst decisions of a Home Secretary under the scheme are susceptible to judicial review, both as to matters of general interpretation and individual application, intervention by the courts in either respect should, it seems to me, be highly guarded.”

Auld LJ said at paragraph 28 of possible changes to the scheme:

“He [the Home Secretary] is entitled to introduce such change, providing it is not irrational or otherwise unlawful and gives such public or private notice as is necessary or appropriate, especially in the case of an *ex gratia* and discretionary policy

such as this. As I have said, the application of the ex gratia scheme is not by its subject matter and the circumstances in which the claimant first may have recourse to it, a natural area for attack on the grounds of long-term legitimate expectation or inconsistency.”

15. The nature of the discretionary scheme had earlier been described by Lord Scott of Foscote in *In re McFarland* [2004] 1 WLR 1289 at paragraphs 40 and 41 as follows:

“In making ex gratia payments the Home Secretary is disbursing public money. But he is not doing so pursuant to any statutory duty or statutory power. There is no statute to be construed. He is exercising a Crown prerogative. He is accountable for what he does with public money to Parliament and, in particular, to the House of Commons. The making of ex gratia payments is lawful if, but not unless, there is parliamentary authority for the disbursements: see *Auckland Harbour Board v The King* [1924] AC 318, 326-327, per Viscount Haldane. Your Lordships have, not surprisingly, not been addressed on this aspect of the ex gratia scheme but presumably ex gratia payments in wrongful conviction cases are authorised by some provision in the annual Appropriation Act.

So, on the footing that the requisite parliamentary authority exists, the ex gratia payments are lawfully made under the prerogative power of the Crown. It is now well established that the Crown prerogative origin of the power to make ex gratia payments does not exclude the scheme under which the payments are made from judicial review: see *R v Criminal Injuries Compensation Board, Ex p Lain* [1967] 2 QB 864 and *R v Criminal Injuries Compensation Board Ex p P* [1995] 1 WLR 845. But the scope of the courts’ powers of intervention are, in my opinion, limited by the nature of the prerogative power in question. The Secretary of State for the time being is not bound by the statement of policy made by his predecessor. He is not bound to make an ex gratia payment to a person whose case falls within the current statement of policy and he is not bound to refuse a payment to a person whose case falls outside it. Provided the Secretary of State avoids irrationality in his decisions about who is and who is not to receive ex gratia payments, and provided the procedure he adopts for the decision-making process is not unfair, I find it difficult to visualise circumstances in which his decision could be held on judicial review to be an unlawful one.”

Although this passage refers to the operation of the discretionary scheme rather than to a decision to withdraw it, it generally supports Mr Swift’s reference to the fragile nature of any expectation that the scheme would continue – see also *R v Secretary of State for the Home Department ex parte Mullen* [2005] 1 AC 1 at paragraph 12.

The individual claimants

16. Mr Niazi was charged with rape and indecent assault of a foster child in his custody and spent ten days in custody in July 2004. The charges against him were dropped at the end of October 2004 and it is understood that medical evidence obtained as early as 21st July 2004 (but never disclosed to the defence) showed that his alleged victim was a virgin. On this basis, it is said that Mr Niazi would have a case that he was completely exonerated and within the discretionary scheme.
17. Mr Taghibeglou was convicted in March 2005 of indecent assault and sentenced to three-and-a-half years' imprisonment. He appealed in time and his appeal was allowed. In allowing the appeal, the Court of Appeal stated that it seemed to them that critical aspects of the case against him were so implausible as truly to defy belief. The investigation of the case against him was profoundly unsatisfactory and in breach of a Code of Practice. The case against him was simply untenable and offended common sense. It is said that he had spent a period in custody following a wrongful conviction resulting from serious default on the part of a member of a police force.
18. Each of these claimants was advised by solicitors that they had potential claims under the discretionary scheme and steps in preparation for making these claims were taken. But no claim had been made by 19th April 2006.
19. Mr Cakir was convicted of blackmail at Inner London Crown Court on 9th July 2004. On 17th December 2004 he was sentenced to four years and three months' imprisonment. An important part of the evidence against him was that of a Turkish interpreter who gave translation evidence of what was said in Turkish on a taped recording. It was suggested to the interpreter that he had mistranslated crucial words. He rejected this, relying on his professional qualifications, experience and integrity. It transpired that the prosecution had failed to disclose that the interpreter had been suspended from practice for issues of dishonesty. The Court of Appeal quashed Mr Cakir's conviction for this reason on an appeal submitted in time. He had spent eighteen months in custody. He is and remains of good character. His and his wife's health suffered badly. Each of them lost their jobs and an order for possession was made against their property. Because his appeal was in time, his claim would not come within section 133 of the 1988 Act by reason of section 133(5)(a). It is to be supposed that appeals brought in time represent for these purposes the normal operation of a properly regulated criminal justice system, no more requiring compensation than an acquittal at first instance.
20. Mr Cakir was advised that he had no viable basis for bringing a civil claim but that he would be able to make a claim for compensation under the discretionary scheme. He had not done so before 19th April 2006, but a claim on his behalf was nevertheless submitted on 12th May 2006. He was told that he would only be eligible for compensation if his case came within section 133 of the 1988 Act, which it is now accepted it does not.
21. The evidence and skeleton arguments in these proceedings contain details of a number

of cases, some of them notorious, in which compensation under the discretionary scheme has been paid and which are said to illustrate the need for a scheme going beyond the statutory scheme. There undoubtedly are cases, of which those of the three individual claimants may be examples, where there has been what may be termed a miscarriage of justice, which do not come within the statutory scheme, which do not give rise to a viable civil claim, but which did or would be judged to qualify for compensation under the discretionary scheme. Since it is not (or no longer) contended in these proceedings that the Secretary of State could not legitimately decide to discontinue the scheme, it is not necessary to consider the merits of its possible continuation.

Issues

22. It is submitted on behalf of the claimants that their claims and the defendants' grounds of opposition raise the following issues:
- i) Did the Secretary of State act unfairly or in breach of the claimants' legitimate expectation in abolishing the discretionary scheme without giving notice or an opportunity to interested parties to make representations?
 - ii) Was the Secretary of State in breach of a duty to provide adequate and intelligible reasons for abolishing the long-standing discretionary scheme?
 - iii) In the alternative to (ii), was the decision flawed because the Secretary of State took into account an irrelevant consideration in seeking to achieve a better balance with the compensation afforded to victims of crime?

In my view, the claimants' case on issues (ii) and (iii) taken alone are weak, and I shall in due course address them quite briefly. The main burden of oral submission rightly concentrated on issue (i).

Consultation

23. The claimants rely on a revised Code of Practice on Consultation issued in January 2004 and coming into force in April 2004. The Prime Minister's Foreword introduced this with a statement that effective consultation is a key part of the policy making process. The first of six criteria adverts to wide consultation throughout the process allowing a minimum of twelve weeks for written consultation at least once during the development of the policy. The Introduction states that the Code and the criteria apply to all public consultations by government departments and agencies. Mr Swift submits, correctly in my view, that this means that the Code is to apply whenever it is decided as a matter of policy to have a public consultation; not that public consultation is a required prelude to every policy change. The Code states that it does not have legal force but should generally be regarded as binding on United Kingdom departments and their agencies unless Ministers conclude that exceptional circumstances require a departure from it. Ministers retain their existing discretion not to conduct a formal

written consultation exercise under the terms of the Code, for example where the issue is very specialised and where there is a very limited number of so-called stakeholders who have been directly involved in the policy development process.

24. For the reasons given by Mr Swift, I do not consider that it is possible to read this document as any form of governmental promise or undertaking that policy changes will never be made without consultation. It would be very surprising if it could be so read, not least because a decision in a particular case whether to consult is itself a policy decision. Rather the Code prescribes how generally public consultation should be conducted if there is to be public consultation.
25. Mr Singh promoted the following as relevant fundamental legal principles. All public power must be exercised lawfully, fairly and rationally. The requirement of fairness will be presumed and implied into a decision-making process, although what is required will depend on the context. This is as true of common law or prerogative powers as of statutory powers. It is for the court to decide what is procedurally fair. The test is not merely one of rationality. Procedural fairness should not be confused with substantive legitimate expectation, and procedural fairness may still be required even though there is no substantive legitimate expectation of a particular result. The present claimants' main case depends on procedural fairness. The requirement for fairness may arise from practice, but procedural fairness does not require a promise that past practice will continue indefinitely or for any particular period.
26. These submissions implicitly recognise, as I think, that it is not possible to spell out from the ministerial statements or past practice relating to the discretionary scheme any representation or promise that it will continue indefinitely or for a defined period. There is no such representation or promise that the scheme will not be withdrawn without notice or public consultation. This applies as much to the long continued existence of the scheme as to the fact that the Practice Statement about it was reissued in January 2006. Although this gave no indication that the scheme was soon likely to end, it did not make any representation as to its indefinite continued existence. There was no element of promise or representation to the public at large. Mr Swift submits that the limit of any legitimate expectation would not extend further than an expectation that those who had submitted claims whilst the scheme was in operation would have their claims duly considered. There was nothing in the nature of a representation or promise that this would extend indefinitely to unidentified future claimants.
27. In *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, Lord Mustill considered at pages 560 and 561 fairness in the context of the exercise by the Secretary of State of his then statutory powers in determining the date on which a prisoner serving a mandatory sentence of life imprisonment might be released on licence. He said that, with statutory administrative powers, it is presumed that they will be exercised in a manner which is fair in all the circumstances. What fairness demands is dependant on the context of the decision. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it with a view to procuring its modification. Fairness will very often require that the person is informed of the gist of the case which he has to answer. Those affected must do more than persuade the court that some other

procedure than that adopted would be better or more fair. They must show that the procedure adopted is actually unfair. It is to the decision-maker, not the court, that parliament has entrusted not only the making of the decision but also the choice as to how the decision is made.

28. The discretionary scheme was not of course statutory. But Mr Singh submits that if the Secretary of State chooses to exercise a common law or prerogative power in respect of a function which is justiciable, he must do so in accordance with the same principles of administrative law including the duty to act fairly and to meet such legitimate expectations as have been engendered. The decision of the House of Lords in *Council for Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 supports the first part of this submission (see for convenience the headnote at page 375 D-E). As to the second part of the submission, this case contains the well-known passage in the opinion of Lord Diplock at page 408 E as follows:

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

(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or

(b) by depriving him of some benefit or advantage which either
(i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.”

The case concerned a ministerial decision, made without consultation purportedly under article 4 of the Civil Service Order in Council 1982, to vary immediately the terms and conditions of service of staff employed at GCHQ to the effect that they would no longer be permitted to belong to national trade unions, despite a well-established practice of consultation with trade unions about important changes in terms and conditions of service. The application for judicial review of this decision failed on the grounds of national security. But it was held that, apart from considerations of national security, the applicants would have had a legitimate expectation that unions and employees would be consulted before the minister made her decision. The decision-making process would thus have been unfair and amenable to judicial review. The employees did not have the legal right to prior consultation, but they had a legitimate expectation arising from the invariable rule, ever since GCHQ began in 1947, that there had been prior consultation when conditions of service were significantly altered – see Lord Fraser of Tullybelton at page 401 E. Lord Fraser said at page 401 B that legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. The test in that case was whether the practice of prior consultation was so well established by 1983 that it would be unfair and inconsistent with good

administration for the government to depart from the practice.

29. There are, I think, significant differences between the *GCHQ* case and the present. In the present case, there was no established practice of consultation with anyone, let alone with unidentified future potential claimants under the discretionary scheme. There was an established practice of paying compensation in cases which were judged to qualify under the scheme, but that was a substantive, not a procedural, practice and the claimants point to no promise that it would continue. Needless to say, established practice of this kind cannot convert an entirely discretionary scheme into an obligatory one, and the making of past payment says little or nothing about the need to consult future unidentified potential claimants before withdrawing the scheme. As Lord Roskill said in the *GCHQ* case at page 415 A, it is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent to which the duty to act fairly will vary greatly from case to case as decided cases consistently show.
30. In *R v Rochdale Metropolitan Borough Council ex parte Schemet* [1993] 1 FCR 306, the claimants were the parents of a child who went to a school outside the local authority's district. The local authority had paid for the child's travel costs until they changed their policy. There was no specific promise or practice of consultation, but Roche J held that the claimants had a legitimate expectation that the benefit would continue until there had been communicated to them some rational ground for withdrawing it on which they had been given an opportunity to comment – this with reference to Lord Diplock's category (b)(i) in the passage from the *GCHQ* case which I have quoted. The claimants had enjoyed the privilege or advantage of the payment of travel costs for some two years before it was withdrawn. Again, in the present case the individual claimants had enjoyed nothing relevant before the scheme was withdrawn.
31. In *R v Devon County Council ex parte Baker; R v Durham County Council ex parte Curtis* [1995] 1 All ER 73, elderly permanent residents of local authority care homes challenged in judicial review proceedings decisions by the local authorities to close the homes on the ground that they had not been adequately consulted. It was held by this court that the authority owed such residents a duty to act fairly in making the decisions to close the homes, the duty including a duty to consult over the proposed closure. In the first case, there had on the facts been ample opportunity to make representations and objections. In the second case there had not. Simon Brown LJ identified four broad distinct categories or senses in which the phrase "legitimate expectation" is now used. The first is where the phrase is used to denote a substantive right which will only be found established where there is a clear and unambiguous representation upon which it is reasonable for the claimant to rely. Simon Brown LJ described the second category, important for present purposes, as follows:

"Perhaps more conventionally the concept of legitimate expectation is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or, some would argue, attain). Here, therefore, it is the interest itself rather than the benefit which is the substance of the expectation. In other words the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is

one that the law holds protected by the requirements of procedural fairness; the law recognises that the interests cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision.”

He referred to various authorities, including the *Rochdale* case, as clear examples of this head of legitimate expectation. I need not refer to his third and fourth categories.

32. With reference to his second category, Simon Brown LJ referred to the passage from Lord Diplock’s opinion in the *GCHQ* case and equated it with Lord Diplock’s class (b)(i). He then said:

“Thus the only touchstone of a category 2 interest emerging from Lord Diplock’s speech is that the claimant has in the past been permitted to enjoy some benefit or advantage. Whether or not he can then legitimately expect procedural fairness, and if so to what extent, will depend upon the court’s view of what fairness demands in all the circumstances of the case. That, frankly, is as much help as one can get from the authorities. Lord Diplock’s analysis supersedes, as I believe, all earlier attempted expositions of this doctrine such as that found in *McInnes v Onslow Fane* [1978] 3 All ER 211, [1978] 1 WLR 1520.

In short, the concept of legitimate expectation when used, as in the *Durham* case, in the category 2 sense seems to me no more than a recognition and embodiment of the unsurprising principle that the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit. That is not to say that a bare applicant will himself be without any entitlement to fair play. On the contrary, the developing jurisprudence suggests that he too must be fairly dealt with, not least in the field of licensing.”

I note that Simon Brown LJ was cautious about extending this category of legitimate expectation to those who hope to attain a benefit which they have yet to achieve. I also accept Mr Swift’s submission that the individual claimants in the present proceedings were not even bare applicants for a future benefit. They were unidentified future potential applicants.

33. *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 was another case about the proposed closure of a long-term care home, a purpose-built National Health Service facility for the long-term disabled which the NHS had assured the applicant and others would be their home for life. It was a case of substantive legitimate expectation. At paragraphs 55 ff, Lord Woolf CJ, giving the judgment of the court, considered the court’s role in relation to various forms of legitimate expectation. In paragraph 57, he considered possible outcomes. First was where the public authority

is only required to bear in mind its previous policy or other representation. Here the court's role is confined to reviewing the rationality of the decision. The second was where the court considers that a promise or practice induced a legitimate expectation of, for example, being consulted before a particular decision is taken. Here the court's task is the conventional one of determining whether the decision is procedurally fair (paragraph 58). The court will require the opportunity for consultation to be given unless there is an overriding reason to resile from it. The third is where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantial. Here 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.

34. *Coughlan* itself was a case in the third category. Mr Singh contends that the present case is in the second category. He does not, I think, contend that it is in the first category, and rightly so. There was, of course, a long-standing previous policy to pay ex gratia compensation under the discretionary scheme in cases to which it applied. But the previous policy alone in the circumstances of this case cannot sustain a legitimate expectation that the scheme will be maintained indefinitely either in its then existing form or at all; and on the procedural front there was no representation or promise that the scheme would not be withdrawn without notice nor that there would be consultation. In short, in my view, the mere existence of the discretionary scheme alone, for however long, does not sustain a legitimate expectation. This is, I think, where Mr Singh's reliance on the second procedural category falls down. Certainly the court might consider whether the decision to withdraw the discretionary scheme without consultation was procedurally fair if a promise or practice had induced a legitimate expectation that there would be consultation. But there was no such promise or practice as to consultation in this case, as there was for instance in the *GCHQ* case. Another feature in *Coughlan* was, as Lord Woolf said at paragraph 59 of an enforceable expectation of a substantive benefit, that most such cases were likely in the nature of things to be cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract. There might of course be a procedural representation by a public body made to a large number of people or to the public generally – as if some public body announced that a change would not take effect before a particular date. But where there is no such representation, it is an added difficulty that potential claimants are not in the context to be regarded as a small number of identified people. They are not even bare applicants.
35. *R v Inland Revenue Commissioners ex parte Unilever* [1996] STC 681 was a unique and exceptional case in which this court upheld a decision that the revenue could not in fairness, having regard to past conduct, insist that claims for loss relief against profits of the current year were time-barred, as technically they were. There was no clear, unambiguous and unqualified representation by the Revenue, but a combination of facts, enumerated by Sir Thomas Bingham MR at pages 690-691, cumulatively persuaded him that on the unique facts of the case the Revenue's argument should be resisted. On the history, to reject Unilever's claims in reliance on the time limit, without clear and general advance notice, was so unfair as to amount to an abuse of power. One of the facts was an accepted tax accounting practice between Unilever and the Revenue over twenty years. The circumstances were literally exceptional (page 692e). Simon Brown LJ said at page 695a that unfairness amounting to an abuse of power is unlawful, not principally because it breaches a legitimate expectation that

some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power. The expression “conspicuous unfairness” was adopted by Lord Hoffmann in *Secretary of State for the Home Department v Zequiri* [2002] Imm AR 296 at paragraph 44. *Unilever* thus shows that the need for a representation or promise is not hard edged or always necessary, but that, without a clear representation or promise, you need strong, perhaps exceptionally strong, facts before a decision not to consult about or give notice of a decision by a public authority will be so unfair as to amount to an abuse of power. The position was summarised by Dyson LJ in *R (ABCIFER) v Defence Secretary* [2003] QB 1397 at paragraph 72 thus:

“Thus it is clear that it will only be in an exceptional case that a claim that a legitimate expectation has been defeated will succeed in the absence of a clear and unequivocal representation. That is because it will only be in a rare case where, absent such a representation, it can be said that a decision-maker will have acted with conspicuous unfairness such as to amount to an abuse of power. In the *Unilever* case, the taxpayer had, in effect, been lulled into a false sense of security, and had regulated its tax affairs in reliance on the revenue’s course of conduct, and thereby acted to its detriment. In those circumstances, and in the light of the revenue’s acceptance of its duty to act fairly and in accordance with the highest public standards, it is not surprising that the court felt able to treat this as a wholly exceptional case.”

36. I do not regard the facts of the present case as within, or even close to, that strong category. After all, an obligation to act fairly has to derive from something. In the present case, as I think, the only substantial fact available was the fact that Home Secretaries had for many years made discretionary ex gratia payments to some few people whose cases fell within the criteria for the scheme.
37. Mr Singh relies on *R v Take-over Panel ex parte Guinness Plc* [1990] 1 QB 146 for the proposition that procedural fairness is a matter for the court whose consideration is not limited to a test of rationality. Guinness applied for judicial review of a decision of the Take-over Panel to refuse them an adjournment of a proposed hearing until after Department of Trade Inspectors had concluded their investigations when full evidence would be available. The procedure in question therefore was that of a tribunal. As Lloyd LJ said at page 184B, the principles of fair procedure apply as well to administrative as judicial tribunals. In this context, he said that in the last resort the court is the arbiter of what is fair. Mr Swift emphasised that what was in issue in the *Guinness* case was the exercise of a judicial discretion, which is not the present case. He submitted that the test of whether an administrative decision such as that in the present case was fair is one of rationality in the terms used by Lord Diplock in the *GCHQ* case at page 410 or by Simon Brown LJ in *Unilever*. In my view, Mr Swift makes a helpful distinction between an administrative decision and the exercise of a judicial discretion. For the latter, the requirement of fairness derives from the very function being performed. For administrative decisions, *Coughlan* shows that the court is the judge of whether a procedure is fair, if the requirement for it derives from a lawful promise or practice – see also the judgment of Laws LJ in *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at paragraph 68.

In such a case, the requirement to follow the procedure is established. If that requirement is not thus established, *Unilever* shows that you need strong, perhaps exceptionally strong, facts before a decision not to consult about or give notice of a decision will be so unfair as to amount to an abuse of power.

38. It will have become evident that I do not consider that the claimants establish that the decision of 19th April 2006 to withdraw the discretionary scheme was procedurally unfair, an abuse of power, a breach of their legitimate expectation or otherwise amenable to judicial review.

Duty to give reasons and irrelevant consideration

39. The claimants also argue that the Secretary of State failed to give adequate and intelligible reasons for withdrawing the discretionary scheme, being obliged to do so; and that he took account of an irrelevant consideration. I have indicated that I regard these as weak. Certainly if a decision is made to frustrate a legitimate expectation which a public authority has by its conduct induced, there must be adequate reasons for doing so. But there was no legitimate expectation of this kind in this case. Clearly also in any event the decision must be rational, and no doubt, if the rationality of an administrative decision is credibly challenged, reasons in support of its rationality will be needed.
40. It is not suggested that the discretionary scheme was withdrawn to save money. A parliamentary answer of 10th July 2006 said that it was not. Indeed the amounts of money referred to in the evidence are small in terms of public finance generally. In addition to what was said in the ministerial statement of 19th April 2006, paragraphs 11 to 18 of the statement of Paul Jackson explain ministerial advice and thinking. First, there was concern following a decision in *R (Grecian and Abraham) v Secretary of State for Home Department* CO/5706/02, CO/5684/02 that the scope of the discretionary scheme had gone well beyond the policy intention. It was then said that the discretionary scheme was in some respects anomalous. Paragraphs 14 to 16 of Mr Jackson's statement are in these terms:

“The criteria for eligibility under the discretionary scheme set up distinctions (between persons eligible, and persons who were not) that in terms of personal hardship were not regarded as appropriate, and in many cases were not understood – particularly by those who did not meet the criteria for eligibility under the discretionary scheme. Most obviously, the discretionary scheme rested on the premise that it was appropriate to treat some persons acquitted after trial, or following an appeal made in time, differently from others. There were, however, in the region of 200,000 cases per year in which the defendant was acquitted or the case was not proceeded with. In the other instances the applications had rested on the “mere” fact that either the person concerned had been acquitted, or that charges originally made had not been pursued. Thus the situation in practice was that in a small number of instances compensation had been paid under the discretionary scheme, but

in the vast majority of cases no compensation was paid following an acquittal.

These points had been highlighted in the course of correspondence with persons who had made applications for compensation that had been refused. Sometimes, people who had been found not guilty at trial (or who had been the subject of charges, subsequently not pursued) understandably regarded themselves as completely exonerated and perceived their situation to be barely distinguishable from those who had been awarded compensation. For example, someone held on remand for a considerable length of time, perhaps pending trial for sexual assault, and subsequently found not guilty because the prosecution could not sustain the burden of proof at trial would almost certainly not receive compensation. However, someone else [who] had been held for just a few hours who subsequently had charges dropped, perhaps because of mistaken identity, could be completely exonerated and might therefore receive substantial compensation.

Insofar as eligibility under the discretionary scheme rested on demonstrating that either the police force, or some other public authority had been responsible for some act of serious default, it was also the case that in such situations a person who made an application under the discretionary scheme might in any event have a claim for compensation that could be pursued through the civil courts in the ordinary course of events. This fact called into question whether this aspect of the discretionary scheme was appropriate. It was recognised that it may well have been the case that persons who received compensation under the discretionary scheme regarded this route as more convenient and less onerous than the route of formal civil litigation. However, the real issue for consideration was not the possible preferences of potential applicants, rather whether it remained appropriate for a discretionary scheme to continue to exist by way of alternative or supplement to civil remedies regularly available in the civil courts.”

41. With these considerations in mind, a range of options was considered, including the possibility of restricting the discretionary scheme to those who were completely exonerated. This would however in practice be difficult to apply. On consideration, the Secretary of State decided that the discretionary scheme could not be acceptably reformed. It was decided to abolish it for the future with appropriate (and rational) transitional arrangements for those who had already applied under it.
42. The claimants try to pick holes in these reasons, but in my view unsuccessfully. Given that what is relevant for the purposes of policy decisions such as this is a matter for the decision-maker not the court – see *R (Al Rawi) v Foreign Secretary* [2006] EWCA Civ 1279 at paragraph 131 – I do not consider that this explanation comes anywhere near being irrational. The statutory scheme complies with international obligations and took over part of the original discretionary scheme. There are intelligible problems with

supplementing that scheme but not compensating everyone who is acquitted of a charge the prosecution of which may have caused them damage.

43. The irrelevant consideration is said to be that an inappropriate comparison was made between the discretionary scheme and payments to victims of crime. It does not seem to me to be irrational to be concerned if victims of crime were perceived to receive small compensation in comparison with some who suffer miscarriages of justice. Mr Jackson also makes the point that victims of crime were referred to in the context of modifying the Assessor's continuing approach to the statutory scheme, not as a reason for withdrawing the discretionary scheme.
44. In the main, the reasons challenge goes to the substantive decision to withdraw the discretionary scheme, which the claimants now accept was within the proper administrative competence of the Secretary of State, rather than to the procedure by which it was withdrawn, which is their main case. I accept of course in this context that, if there had been consultation, the solicitor claimants would have been able to advance reasons why the scheme or a modified version of it should continue.

Conclusion on the first challenge

45. Drawing the threads together, this was an entirely discretionary scheme which it was open to the Secretary of State to decide to withdraw. His reasons for doing so were not irrational. Neither the existence of the scheme nor the length of time it had operated in some form predicated its continued indefinite existence. There was nothing amounting to a representation or promise either that the scheme would continue or that the Secretary of State would consult or give notice before withdrawing it. The individual claimants were not even bare applicants. The solicitor claimants, although they were well placed to make representations if they had been given the opportunity, had no stronger legitimate expectation than any of their actual or potential clients. The decision not to consult or give notice was not so unfair as to amount to an abuse of power. It was not conspicuously unfair. The Cabinet Office Code of Practice did not require consultation. As to the failure to give notice as distinct from the failure to consult (which would have the same effect as giving notice), individual potential claimants whose appeals had already been allowed were of course disappointed, but I do not see that drawing a line without notice on one date is conspicuously unfair when drawing the same line at a somewhat later date with advance notice would not be. To do either will disappoint future potential claimants. It is not, I think, conspicuously unfair to exclude also a relatively small number of potential claimants whose potential claims were rather more mature than others, when those potential claimants have no legally recognisable legitimate expectation.

The Independent Assessor's decision about costs

46. This relates to the payment of legal costs to claimants for work done by their solicitors in pursuing their claims for compensation under the statutory scheme. The Assessor's power to include such costs in an assessment is in section 133(4) of the 1988 Act, which is in very general terms. The subsection simply provides that, if the Secretary of

State determines that there is a right to compensation, the amount of compensation is to be assessed by an assessor. Legal costs of establishing innocence have as a matter of practice been included. These are unaffected by the announcement of 19th April 2006.

47. Before 19th April 2006, applicants sought legal costs for pursuing their claims for compensation at their solicitors' standard fee rates for private work, and these were almost invariably allowed in full. The Assessor allowed what he considered reasonable and proportionate – see paragraph 12 of Mr Jackson's letter of 12th July 2006. The announcement of 19th April 2006 said that for the future solicitors' fees would be paid at the CLS Legal Help rate, which is of the order of one-third of solicitors' private client rates depending on their experience and location. Work undertaken before 19th April 2006 would be allowed on the basis then prevailing. After 19th April 2006, disbursements, including experts' and counsels' fees, would be assessed as before if the Assessor considered them to be reasonable and proportionate, but counsels' fees would only be allowed if the Assessor agreed in advance that counsel might be instructed.
48. The solicitor claimants challenge this decision on the basis that it was irrational, that it unlawfully fettered the Assessor's discretion and that it frustrated the solicitors' legitimate expectation or was in breach of the Assessor's duty to act fairly towards them. The challenge is a general one which does not have the advantage of particular facts in a particular case.
49. I do not consider that the solicitors can make any legitimate expectation case on their own account (except conceivably in relation to individual cases current on 19th April 2006) nor any better legitimate expectation case than their clients or potential clients. The clients or potential clients have no better legitimate expectation case here than they have in relation to the decision to withdraw the discretionary scheme. In addition, there is no express statutory obligation on the Assessor to allow any costs, and his general statutory discretion is broadly defined as described by Lord Bingham in *O'Brien*. The case based on irrationality or fettering of discretion needs more detailed consideration.
50. The solicitors' case and evidence, largely uncontested as to fact, is that Legal Help rates, at a current level of little more than £50 per hour, are only payable for routine, low level work, including initial basic advisory work formerly covered by the Green Form Scheme. They do not, and are not intended to, reflect the complexity of and the experience required for work undertaken in the sustained preparation of claims such as those in question. The nature of the work undertaken by solicitors in preparing and presenting claims for compensation is indicated in their evidence. The claims are often complicated and require detailed specialist legal skill and knowledge. Such claims can be, and some of them have been, in the nature of detailed personal injury claims with an overlay of psychiatric damage, injury to feelings and damage to reputation. Evidence may need to be painstakingly gathered, and the claims are required to be constructed by analogy with claims for damages in civil cases. Legal Help rates will scarcely cover the cost of work by a paralegal, to whom it would be irresponsible to entrust much of the work. If Legal Help rates only are to be paid, claimants will not get solicitors to act for them. One of the solicitor claimants used to do work under the Criminal Injuries Compensation Scheme, but abandoned it as uneconomic.

51. Mr Singh accepts that the solicitors and their clients have no legal right to be paid at any particular rate, but submits that the rates that are paid should at least be reasonable and proportionate, as they previously purported to be. In short, it is irrational to pay costs at unreasonably low rates whatever the nature and complexity of the work. The claim may also raise questions under Article 6 of the European Convention on Human Rights which, says Mr Singh, may extend to providing effective access to a compensatory administrative process. There should, he submits, have been consultation on this subject at least when these powerful irrationality points would have been made with good prospect of having the decision at least modified.
52. This last point bore fruit during the hearing, because in the course of it Mr Swift, upon taking specific instructions, accepted that the Assessor will be prepared to receive and consider representations that a particular case might merit the payment of solicitors' costs above the Legal Help rate.
53. This concession was made, I think, in the light of the well-known passage in the opinion of Lord Reid in *British Oxygen Co v Board of Trade* [1971] AC 610. The case concerned what was held to be a discretionary power to make grants under the Industrial Development Act 1966. It was argued that the minister was not entitled to make a rule for himself as to how he would in future exercise his discretion. Lord Reid quoted at page 625 from the judgment of Bankes LJ in *Rex v Port of London Authority ex parte Kynoch Limited* [1919] 1 KB 176 at 184 and then said:
- “But the circumstances in which discretions are exercised vary enormously and that passage cannot be applied literally in every case. The general rule is that anyone who has to exercise a statutory discretion must not ‘shut his ears to an application’ (to adapt from Bankes LJ on page 183). 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 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 – of course I do not mean to say that there need be an oral hearing.”
54. The concession has to be seen in the light of the Secretary of State's case and the evidence of Mr Jackson. The Assessor had expressed concern at the amounts being awarded for legal costs of making applications for compensation, and the high awards of costs in specific cases. He was also concerned that there had been a significant increase in the number of cases in which he had been provided with substantial amounts of material that were of little assistance. The Assessor's decision was to pay legal costs as part of compensation on a consistent standard which would reduce the amount of costs awarded. The steps to be taken and the material required for an application for compensation under the statutory scheme are well established and known and are generally not unduly complicated. The process is not adversarial and cannot therefore

be compared with civil litigation. The Assessor was well aware that the Legal Help rate was regarded as low, but he considered it to be an appropriate standard. There was no reason why the starting point for costs awarded should be the rate agreed between a claimant and the lawyer he chose to instruct. The Criminal Injuries Compensation Scheme does not provide for payment of legal fees of victims of crime at all. This was not the determining consideration, but the Assessor did conclude that a commonly used legal aid rate was reasonable.

55. Mr Swift further pointed out that both before and after 19th April 2006, if a claim was rejected, the claimant received no costs at all. By contrast, whenever costs are paid, there will be an award, so that no-one should be put off making a claim because the costs awarded as part of a successful claim may be low. There is no intrinsic reason why successful claimants should not, if necessary, pay part of their solicitor's bill out of their award. There was, said Mr Swift, a spectrum of possibility. The present policy would be unassailable, if nothing had gone before it. So the case had to be that it was unfair not to continue or closely replicate what had gone before. There was a change of policy whose legitimate purpose was to reduce costs. It was accepted that there would be cases in which the applicants' full costs or full reasonable costs would not be reimbursed. It was rational and lawful to have a policy which would or might mean that the claimant had to make a contribution toward the costs of preparing the claim for compensation. Further and importantly, it was rational and entirely sensible to have a flat rate and thereby avoid the expense of an assessment process in each case.
56. In the light of this evidence and these submissions, I understand the concession with reference to the *British Oxygen case* not to go very far. The Assessor's policy, as explained, is no longer to allow reasonable and proportionate solicitors' costs in full, but to allow flat rate costs at a rate which is recognised to be low and which may not reimburse the successful claimant in full. I understand the concession to be, not that the Assessor will consider paying costs at a rate higher than Legal Help rates on a case by case basis, if he is persuaded that Legal Help rates are for the particular case less than the rate which it is reasonable for the solicitor to charge; but that the Assessor will listen to a substantial argument urging him to change his policy and will listen to anyone who has something new to say. But telling the Assessor that Legal Help rates are very low is not something new, because he knows that already and his policy has already taken account of it.
57. I record that I composed the preceding paragraphs about the Secretary of State's concession before I received and read the Treasury Solicitor's letter of 30th May 2007 and Bindman and Partners reply of 13th June 2007 which were sent to the court after the hearing. The preceding paragraphs reproduce my note of the concession, confirmed by Mr Swift during the hearing, and contain my understanding of it. I have not made alterations to these paragraphs following the receipt of the subsequent correspondence.
58. I was initially attracted by the claimant solicitors' argument that, since the previous policy had been to allow private client rates as being reasonable and proportionate and since nothing changed on and after 19th April 2006 to make this inappropriate, a blanket change to Legal Help rates might be seen as irrational. But the premise which underlay that was that the Assessor continued to intend to allow reasonable and proportionate rates intended to compensate claimants in full for their solicitors' costs. On

examination that premise is not correct. The Assessor does not intend to pay full solicitors' costs in all (or perhaps even any) cases and his policy is to reduce the amount paid in costs. I do not on reflection consider that to be irrational. The question rather is whether assessing compensation on this basis and with this component transgresses the Assessor's statutory function. I do not think it does in the light of the very broadly defined discretionary power which the statute confers. Absent a legitimate expectation, which cannot be found, and absent irrationality, which I do not in the end find, this was not in my judgment an unlawful decision nor one reached by an unfair or unlawful process. The concession made by Mr Swift in the course of the hearing with reference to *British Oxygen* sufficiently covers the complaint of fettering discretion. I am not persuaded that there is a case for violation of Article 6 of the European Convention on Human Rights. Applicants are not prevented and should not be deterred from presenting their claims for which the equivalent of full legal aid is not a prerequisite. They are at risk of recovering no costs if their claims are not accepted. If their claims are accepted, they will normally receive compensation and solicitors' costs at Legal Help rates. No sensible claimant should be deterred by the Legal Help rate element of this from pursuing a claim and instructing a solicitor to act for him in doing so.

Conclusion

59. For these reasons, I would dismiss these applications.

Mr Justice Gray:

60. In relation to the first issue, namely the challenge to the legality of the decision by the Secretary of State to withdraw the discretionary scheme for the payment of compensation to those who had suffered miscarriages of justice, I respectfully agree with the conclusion expressed by Lord Justice May at paragraph 45 of his judgment and with the reasons given by him for arriving at that conclusion.
61. The second issue which arises for decision is the legality of the decision of the Independent Assessor, announced on 19 April 2006, that the costs of solicitors representing applicants for compensation under the statutory scheme would thenceforth be paid at the CLS Legal Help rate.
62. Like my Lord, I too initially considered that there was considerable force in the contention advanced on behalf of the solicitors by Rabinder Singh QC that the decision of the Assessor to reduce the legal costs to be paid in relation to applications for compensation was open to challenge on rationality grounds or, failing that, on grounds that the decision unlawfully frustrated the claimants' legitimate expectation or otherwise amounted to a breach of his duty to act fairly towards them.
63. The policy which had been adopted some years ago and which continued until 19 April 2006 had been to pay successful applicants under the scheme the costs incurred by their solicitors at their standard rates for private work. That practice was adopted on the footing that payment at that rate was both reasonable and proportionate. Yet, by virtue

of the decision announced on 19 April 2006, solicitors' costs would thereafter and with immediate effect be paid at what is conceded to be the greatly reduced rate of about £50 per hour. That is the rate generally payable for routine, low level work. The evidence suggests that part at least of the work which requires to be undertaken in connection with many applications under the scheme requires painstaking and difficult gathering and analysis of evidence and sometimes specialist legal skill. It may well be that prospective applicants will be unable to find solicitors who are willing at such levels of remuneration to act for them in preparing applications for compensation under the scheme.

64. As has already been explained, however, in the course of oral argument Mr Jonathan Swift expressly conceded on behalf of the Secretary of State that the Assessor would (notwithstanding the terms of his statement on 19 April) be prepared to consider representations that a particular case might merit the payment of solicitors' costs above the Legal Help rate. I accept that this concession is not to be understood as obliging the Assessor to consider paying costs at a higher rate on a case by case basis. Nonetheless, as it appears to me, there will in future be a degree of flexibility as to the rate of remuneration where the circumstances so require.
65. It is in my judgment important to bear in mind that section 133 of the 1988 Act confers on applicants no right to recover their legal costs. Moreover the Assessor has a broad discretion as to the amount of costs payable. I accept, on reflection, that Mr Swift is right in his submission that the mere fact that the Assessor has in the past exercised such a discretion on a particular basis does not of itself give rise to any expectation that it will continue so to be exercised for ever. He was entitled to reconsider the policy. The reasons underlying the decision are to be found in the Ministerial Statement of 19 April 2006 and in the witness statement of Mr Paul Jackson on behalf of the Department.
66. Having considered those reasons and bearing in mind both the statutory framework and the concession which has been made on behalf of the Assessor, I have concluded, not without some hesitation, that none of the challenges to the decision of the Assessor as to the amount of costs payable in respect of solicitors' costs can succeed. As to the contention that the decision violates claimants' rights of access to the court, I am satisfied in the light of *Airey v Ireland* 2 EHRR 305 that Article 6 is not engaged in the circumstances of the present case.
67. Accordingly I agree that both applications must be dismissed.