[COURT OF APPEAL]

*REGINA v. SECRETARY OF STATE FOR EDUCATION AND EMPLOYMENT, *Ex parte* BEGBIE

1999 Aug. 19; 20

Peter Gibson, Laws and Sedley L.JJ.

Judicial Review—Public authority—Legitimate expectation—Schools assisted places scheme—Opposition party resolving to abolish scheme but giving undertaking to continue funding for existing recipients—Subsequent statutory scheme abolishing funding at end of primary stage save where Secretary of State directing otherwise—Applicant under scheme receiving primary education at school providing education to age 18—Whether Secretary of State required to continue funding beyond primary stage on ground of applicant's legitimate expectation—Whether discontinuance of funding contrary to right to education—Education (Schools) Act 1997 (c. 59), s. 2—Convention for the Protection of Human Rights and Fundamental Freedoms, First Protocol, art. 2

In February 1997 the applicant, then aged nine, was offered a place at an independent school, which educated pupils up to the age of 18, under a state-funded assisted places scheme. The main opposition party had resolved to abolish the scheme but had given undertakings that children already holding places under the scheme would continue to receive funding. In May 1997, following a general election, the opposition party was elected to government and thereafter the Education (Schools) Act 1997[1] was passed to abolish the assisted places scheme. By section 2 of the Act, existing assisted pupils receiving primary education were to continue to be funded only until the end of the year in which the primary stage was completed, save where the Secretary of State determined in an individual case that a longer period should apply. The Secretary of State decided against exercising his discretion so as to allow the applicant to be funded beyond the age of 11. By her mother and next friend, the applicant sought an order of certiorari to quash the Secretary of State's decision on the grounds that the undertakings given had created a legitimate expectation that he would exercise his discretion to allow the applicant to enjoy the benefit of her assisted place until the conclusion of her education at that school, so that his decision to the contrary was unfair and unreasonable; and that the effective removal of the applicant's extant right to an assisted place infringed her right to education under article 2 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.[2] The judge dismissed the application.

On the applicant's appeal:—

Held, dismissing the appeal, that the courts would not give effect to a legitimate expectation if it would require a public authority to act contrary to the terms of a statute and any requirement for the Secretary of State to implement section 2(2)(*b*) of the Act of 1997 in favour of all children in the applicant's position would be contrary to the statute having therein conferred on him a discretion to reach a decision on the facts of an individual case; that, in any event, pre-election statements were not to be treated as giving rise to legal effect and, if made by a party in opposition, did not arise from a public authority so as to fall within the ambit of judicial review; that, further, the removal of funding for a particular school would not

[1] Education (Schools) Act 1997, s. 2: see post, pp. 1118H-1119B.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, First Protocol, art. 2: "No person shall be denied the right to education . . ."

breach article 2 of the First Protocol to the Convention when alternative education was to be provided at public expense; and that, accordingly, there were no grounds on which the Secretary of State's decision not to continue the applicant's funding could be quashed (post, pp. 1125B-D, F-G, 1126C-D, 1127A-B, E-F, 1128H, 1129A-B, D-E, 1131G-H, 1132A-B, 1133E-F, 1134B-C).

Reg. v. North and East Devon Health Authority, Ex parte Coughlan [2000] 2 W.L.R. 622, C.A. considered.

Decision of Maurice Kay J. affirmed.

The following cases are referred to in the judgments:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Belgian Linguistic Case (No. 2) (1968) 1 E.H.R.R. 252

Bromley London Borough Council v. Greater London Council [1983] 1 A.C. 768; [1982] 2 W.L.R. 62; [1982] 1 All E.R. 129, C.A. and H.L.(E.)

Council for 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, H.L.(E.)

Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694, H.L.(E.)

Reg. v. Ministry of Defence, Ex parte Smith [1996] Q.B. 517; [1996] 2 W.L.R. 305; [1996] 1 All E.R. 257, C.A.

Reg. v. North and East Devon Health Authority, Ex parte Coughlan [2000] 2 W.L.R. 622, C.A.

Reg. v. Secretary of State for the Environment, Ex parte Hammersmith and Fulham London Borough Council [1991] 1 A.C. 521; [1990] 3 W.L.R. 898; [1990] 3 All E.R. 589, D.C., C.A. and H.L.(E.)

Reg. v. Secretary of State for the Home Department, Ex parte Hargreaves [1997] 1 W.L.R. 906; [1997] 1 All E.R. 397, C.A.

Secretary of State for Education and Science v. Tameside Metropolitan Borough Council [1977] A.C. 1014; [1976] 3 W.L.R. 641; [1976] 3 All E.R. 665, C.A. and H.L.(E.)

Simpson v. United Kingdom (1989) 64 D. & R. 188

W. and K.L. v. Sweden (1985) 45 D. & R. 143

The following additional cases were referred to in the skeleton arguments:

Attorney-General of Hong Kong v. Ng Yuen Shiu [1983] 2 A.C. 629; [1983] 2 W.L.R. 735; [1983] 2 All E.R. 346, P.C.

Findlay, In re [1985] A.C. 318; [1984] 3 W.L.R. 1159; [1984] 3 All E.R. 801, H.L.(E.)

H.T.V. Ltd. v. Price Commission [1976] I.C.R. 170, Mocatta J. and C.A.

Laker Airways Ltd. v. Department of Trade [1977] Q.B. 643; [1977] 2 W.L.R. 234; [1977] 2 All E.R. 182, C.A.

Reg. v. Devon County Council, Ex parte Baker [1995] 1 All E.R. 73, C.A.

Reg. v. Director of Public Prosecutions, Ex parte Kebilene [1999] 3 W.L.R. 175; [1999] 4 All E.R. 801, D.C.

Reg. v. Governor of Brockhill Prison, Ex parte Evans (No. 2) [1999] Q.B. 1043; [1999] 2 W.L.R. 103; [1998] 4 All E.R. 933, C.A.

Reg. v. Inland Revenue Commissioners, Ex parte Preston [1985] A.C. 835; [1985] 2 W.L.R. 836; [1985] 2 All E.R. 327, H.L.(E.)

Reg. v. Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association [1972] 2 Q.B. 299; [1972] 2 W.L.R. 1262; [1972] 2 All E.R. 589, C.A.

Reg. v. Secretary of State for Health, Ex parte United States Tobacco International Inc. [1992] Q.B. 353; [1991] 3 W.L.R. 529; [1992] 1 All E.R. 212, D.C.

Reg. v. Secretary of State for the Home Department, Ex parte Asif Mahmood Khan [1984] 1 W.L.R. 1337; [1985] 1 All E.R. 40, C.A.

X v. United Kingdom (1978) 14 D. & R. 179

A APPEAL from Maurice Kay J.

By a notice of application dated 19 November 1998 the applicant, Heather Charis Begbie, by her mother and next friend, Rachel Begbie, sought (i) an order of certiorari to quash the decision of the Secretary of State for Education and Employment, dated 30 October 1998, not to exercise his discretion under section 2(2)(*b*) of the Education (Schools) Act 1997 so as to permit the applicant to continue with her assisted place at B The Leys School, Cambridge for the duration of her secondary education or, alternatively, until the end of the school year in which she had her thirteenth birthday; or (ii) a declaration that the Secretary of State had acted unfairly or unlawfully in the exercise of his discretion. On 10 July 1999 Maurice Kay J. dismissed the application.

By a notice of appeal dated 29 July 1999 the applicant appealed on the C grounds, inter alia, that the judge erred in law in holding that (i) promises made by prominent members of the Labour Government both in opposition and following election to office did not create a legitimate expectation so as to require the Secretary of State to exercise his statutory discretion under the Act of 1997 in accordance with those promises; (ii) pre-election promises made on behalf of the Labour Party were to be disregarded as a matter of law; (iii) to adhere to those promises would be to D interfere with the exercise of the Secretary of State's statutory duty under the Act of 1997; and (iv) article 2 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms did not preclude the removal of the applicant's right to an assisted place.

The facts are stated in the judgment of Peter Gibson L.J.

E *Michael Beloff Q.C.* and *Philip Engelman* for the applicant.
Philip Havers Q.C. and *Neil Garnham* for the Secretary of State.

Cur. adv. vult.

20 August. The following judgments were read.

F PETER GIBSON L.J. The appellant, Heather Begbie ("Heather"), appeals with the leave of Maurice Kay J. from his dismissal on 10 July 1999 of her application for judicial review of the decision of the Secretary of State for Education and Employment not to permit her to continue with her assisted place at The Leys School, Cambridge ("The Leys"), for the duration of her secondary education. We are told that this is a test case and that between 1,200 and 1,500 children are in circumstances similar to those G of Heather. The issues raised are therefore of some general importance.

The facts are these. Heather was born on 7 July 1988. She lives with her parents in Cambridge. She went to a local primary school. But that did not serve her well and in February 1997 it failed its OFSTED inspection. Heather's parents accordingly sought to transfer her to The Leys. It has an integral junior school known as St. Faith's. The Leys is an independent H school and at the time it was a participant in the Assisted Places Scheme ("the A.P.S."). The A.P.S. is a scheme whereby some pupils at independent schools have their school fees paid out of public funds. It originated under the terms of the Education Act 1980. Until 25 August 1996 the A.P.S. was only available to those over the age of 11 receiving education at schools providing secondary education, but on that date the A.P.S. was extended to children who had attained the age of five years and received education at schools which provided both primary and secondary education:

regulation 3 of the Education (Assisted Places) (Amendment) Regulations 1996 (S.I. 1996 No. 2113) amending regulation 5(1) of the Education (Assisted Places) Regulations 1995 (S.I. 1995 No. 2016). Those within that extension have been referred to as "the first tranche." On 4 April 1997 the A.P.S. was further extended to apply to primary schools by virtue of section 1 of the Education Act 1997. Those within that further extension have been referred to as "the second tranche."

Before 1 November 1996 the Labour Party, then the opposition, made it clear publicly that if it regained power it would dismantle the A.P.S. so as to redirect the saving in public expenditure towards reducing class sizes in the public sector of education. That day Mr. Tony Blair M.P., the Leader of the Opposition, caused a letter to be written to an interested parent, Dr. Tillson, about the Labour Party's proposed policy on the A.P.S., in which it was said: "We do not believe the scheme is a good use of inevitably scarce resources . . . However, we do not wish to disrupt the education of individual pupils and any children already on the scheme will continue to receive support in their education." Other similar statements were made on behalf of the Leader of the Opposition to an interested grandparent, Mrs. Treadwell, on 6 December 1996 and to an interested parent, Mrs. Williams, on 27 January 1997. Also on 27 February 1997 Mr. John Trickett M.P. wrote to one of his constituents who was a parent of a child with an assisted place at a school with an integral junior school, Mrs. Brookes, outlining Labour's policy on the A.P.S., and saying: "David Blunkett's office have confirmed that Labour will honour those existing places which have already been given; your child will not be forced to move school."

On 24 February 1997 The Leys offered Heather a place on the basis of the A.P.S. The offer was for a place at St. Faith's in the autumn term 1997 for four years to be followed by a move to The Leys in the autumn term of 2001. That offer was accepted by letter dated 27 February. On 1 April 1997 the Shadow Minister for Schools, Mr. Peter Kilfoyle M.P., wrote a letter ("the Kilfoyle letter") to the chairman of the Independent Association of Preparatory Schools ("the I.A.P.S.") stating:

> "I shall try to resolve any confusion between us. Much will obviously depend on the school to which a child has been admitted. If a child has a place at a school which runs to age 13, then that place will be honoured through to 13. Similarly, we will honour an assisted place given to a child at secondary school and who remains at school until the age of 18. However, as you will recognise, we have made it absolutely clear that no new assisted places will be awarded under a Labour government."

On 4 April 1997, the Education Act 1997 was passed, extending the A.P.S. to primary schools. On 1 May 1997 the General Election took place and the Labour Party formed the new government. One of the first pieces of legislation enacted thereafter was the Education (Schools) Act 1997, which came into force on 31 July 1997. By section 1 of the Act the A.P.S. was abolished. Section 2, headed "Transitional arrangements for existing assisted pupils," contained the following provisions:

> "(1) A former participating school may provide assisted places at the school for the 1997–98 school year or a subsequent school year, but may only do so—(*a*) for existing assisted pupils at the school; and (*b*) subject to and in accordance with subsection (2) and regulations

A under section 3. (2) If a pupil is provided with an assisted place under subsection (1) at a time when he is receiving primary education, he shall cease to hold that place—(*a*) at the end of the school year in which he completes his primary education; or (*b*) if the Secretary of State, where he is satisfied that it is reasonable to do so in view of any particular circumstances relating to that pupil, determines that he should continue to hold that place for a further period during which B he receives secondary education, at the end of that period."

On 30 September 1997 the Department of Education and Employment ("the Department") sent to head teachers a circular relating to the A.P.S. The effect of the new statutory provisions on those within the A.P.S. was explained:

C "7. The Government's continuing responsibility to children holding assisted places at the start of the 1997–98 school year is to provide support for the remainder of the current phase of their education, or until they have completed their education at their current school, if this is earlier. Therefore support is confined to the current phase of the child's education and the school they currently attend . . . 9. Thus a child holding an assisted place at the beginning D of the autumn term 1997 and who is in receipt of secondary education, is entitled to retain his place until he reaches the upper age limit of the school. For example, an 11-year-old pupil in receipt of secondary education in a school which takes pupils to age 13 will be eligible to keep his place until the end of the school year in which he reaches that age, but will not be able to transfer to a different school after that age with his assisted place. An 11-year-old child in receipt E of secondary education in a school which takes pupils to age 18 will be eligible to keep his place to that age. 10. In general, children in receipt of primary education will hold their places until the end of their primary education. For example a 7-year-old will hold his place until he has completed his primary education, which will normally be the end of the school year in which he reaches age 11. There is a F discretionary power which provides for extended support beyond the end of primary education. Details are in paragraphs 15–16 below."

Paragraphs 15 and 16 dealt with applications for the exercise of discretion under section 2(2)(*b*):

"15. The Secretary of State has a discretionary power to allow G assisted pupils in receipt of primary education at the start of the 1997–98 school year to continue to hold their assisted places for a further period in which they receive secondary education. The discretion can be exercised in favour of a child only where the Secretary of State is satisfied that it is reasonable to do so in view of the particular circumstances relating to that child. 16. All applications for the exercise of discretion will be considered on their individual H merits. As ministers made clear during the parliamentary proceedings on the legislation, it will normally be their policy to exercise discretion in the following circumstances: (a) where the pupil is *resident* in an area where a middle school system operates in the maintained sector but transfers from middle to secondary school later than age 11; (b) in respect of a pupil allocated an age 10 *entry* place to one of the 12 A.P.S. schools with a specific allocation at that age for accelerated entry into secondary education at that school; (c) in respect of a pupil

> in a *free-standing* preparatory school who was given a clear promise of a place through to age 13 on the understanding that the new Government had given such an undertaking."

It is not in dispute that Heather does not come within any of those provisions for the exercise of discretion, as The Leys (including St Faith's) is an "all-through" school and St. Faith's is not a "free-standing preparatory school."

The effect for Heather therefore of the Act of 1997 and that policy on the exercise of discretion was that she was entitled to keep her assisted place until the end of the year in which she completed her primary education, but thereafter she would not be so entitled unless the Secretary of State could be persuaded that on the individual merits of her case it was reasonable for her to continue to hold her assisted place while she was receiving secondary education. That the Secretary of State retained the power to exercise discretion in cases not within sub-paragraphs (a), (b) or (c) is apparent from the word "normally" in the second sentence of paragraph 16.

On 12 February 1998 the Prime Minister in an article in the "Evening Standard" said: "No child currently at private school under the scheme or who has already got a place has lost out. They will be able to continue their education." On 10 March 1998 the Secretary of State for Education and Employment, Mr. David Blunkett M.P., wrote a letter ("the Teed letter") to an interested grandparent, Mrs. Teed, in the following terms:

> "We have fulfilled every pledge we have made on education. In relation to the A.P.S., we have gone further. We could have stopped those taking up primary education for the first time (the previous government had not operated a scheme which ran through from the primary to the end of secondary), but we chose not to do so. To have blocked the opportunity of children taking up the place that they had already been offered last September would, in our view, have been wrong as it would have damaged the chances of the youngsters who would by then have missed the opportunity of going to the school of their parents' preference in their locality. By accepting, therefore, that we would honour the primary school provision, we left ourselves with a dilemma. Should we, therefore, accept that a child entering primary education under the A.P.S. (at prep school) automatically receives a place all the way through to the time they [sic] left education at the age of 18? Where there was provision of an 'all through' school and where there had been a clear promise of a place through to the age of 18, we have agreed to honour that promise. Where a child entered a school which concluded at the normal transfer age for secondary schools, we have agreed to pay through to that point in time. This is, in fact, what was said before the election and specifically by the former shadow schools minister, Peter Kilfoyle's commitment."

Although it is not in evidence we have been told by Mr. Beloff, appearing with Mr. Engelman for Heather, that Heather's mother saw a copy of the Teed letter about 18 March. On 1 March 1998 Mrs. Begbie had written a letter to "The Times" and sent a copy to the office of the Secretary of State under cover of a letter in which she commented that the government were confusing, on the one hand, schools with integral junior departments which were awarded places taken up in the autumn of 1996 and, on the other, those free-standing preparatory schools which did not receive places

until the autumn of 1997. On 11 March 1998 the Secretary of State replied to Mrs. Begbie:

> "I am aware of the difference and we gave clear assurances through the passage of the assisted places scheme legislation as to which category we would be dealing with in respect of 'all-through' education from the point of entry. In other words, the difference between the operation of the new assisted places scheme applying to primary education and those entering the scheme with an expectation and promise of continuance until the age of 16 or 18 (at the point of leaving). The commitments we gave last year on the passage of the Bill and in the light of the Prime Minister's letter and the commitments made by Peter Kilfoyle in his letter of 1 April last year are being dealt with. My reply was not inaccurate. There was, of course, a second A.P.S. scheme dealing with those entering primary education and where this particular level of schooling did not automatically entitle a pupil to continuance on the scheme through to the age of 18. There was, of course, a change to the Education Act in respect of primary schooling only applying from September 1997 (in fact, it was on my decision that children who had been offered a place under the second tranche, were allowed to take it up as it would have been perfectly feasible and practical if educationally and morally incorrect, to have stopped the programme there and then, and referred the youngsters back into the admissions process). I repeat, the undertakings given (including by me) during the passage of the Bill phasing out the A.P.S. will be met."

A letter containing terms identical to those which I have cited was sent by the Secretary of State to another interested parent, Mrs. Cutler, on 18 March. Mrs. Begbie, on 20 March 1998, wrote to the Secretary of State, saying, with justification, that she was "still rather confused by what is being said." She sought clarification, pointing out that Heather was offered a place not under the second tranche but under the first tranche. She said that it appeared that the Secretary of State understood the difference between those children at junior schools on integral assisted places under the first tranche and those at free-standing preparatory schools with places offered in the second tranche, and that it therefore followed that the commitment to those children would be honoured to the age of 18 "as we were all led to believe." The Secretary of State on 8 April acknowledged Mrs. Begbie's letter and said that he was discussing her case with the Minister of State, that he understood what she was saying and would ensure that they got back to her as quickly as possible. But despite chasing letters by her, save for an apology for the delay from the Secretary of State on 1 July 1998 no further letter came from the Secretary of State himself to her. The Secretary of State on 2 April had also written to Mrs. Cutler in similar terms, adding "I do want to make it clear that it is my intention to adhere to the commitments made in Hansard as part of the debate in Parliament and where possible to use that discretion generously."

On 21 April 1998 Mr. Wardle, the Principal Private Secretary to the Secretary of State, wrote to Mrs. Teed a letter which, as the judge observed, reads as something of a contradiction to the Teed letter. It states:

"The Government's commitment to children holding assisted places in secondary education is that they will be entitled to support until they have completed their education at their school. Their continuing responsibility to primary age children holding assisted places in the junior department of a senior school is to the end of their primary education, that is normally at age 11. However, the Secretary of State holds a discretionary power to allow primary aged children to hold their assisted places for a further period in which they receive secondary education where it is reasonable to do so in view of the particular circumstances relating to that child."

Mrs. Begbie saw this letter, as she refers to it in a letter to the Secretary of State on 2 July 1998.

Ms Mackenzie administers the A.P.S. in the Department. In her first affidavit of 22 January 1999 she has made clear that the Teed letter did not state Government policy correctly. She said:

"The [Teed] letter . . . was sent by the Secretary of State from his parliamentary office where he did not have access to all the relevant papers. It did not accurately state his policy in that it implied a commitment to extend through to age 18 assisted places held in junior departments of 'all through' schools: this was not among the circumstances, set out in the 30 September 1997 letter, in which it was his policy normally to exercise discretion in favour of a child. It follows from this that the Secretary of State acknowledges that what was said in the letter of 10 March was not his policy. The policy remains as set out in the department's letter dated 30 September 1997. . . . On 21 April 1998 Mr. Wardle . . . wrote to Mrs. Teed providing a summary of the Secretary of State's policy."

Ms Mackenzie, in her second affidavit of 11 May 1999, said that the references in the letter of 11 March 1998 from the Secretary of State to Mrs. Begbie and in the corresponding letter of 18 March 1998 to Mrs. Cutler to certain commitments or undertakings being dealt with or met were not intended to represent any change in the policy of the Secretary of State. In that affidavit Ms Mackenzie also said that the reference in the "Evening Standard" article by the Prime Minister to the position of existing assisted place holders did not, and was not intended to, represent a change of policy by the Secretary of State as regards the extension of assisted places for children after completion of the primary phase of their education.

On 18 June 1998 an application was made on behalf of Heather for a discretionary extension under section 2(2)(*b*) of the Act of 1997 of the period during which she would be provided an assisted place while receiving secondary education. An initial refusal by the Secretary of State by letter dated 3 July 1998 was sent to The Leys and Mr. Wardle on 4 August 1998 wrote to Mrs. Begbie that the Secretary of State would reconsider Heather's case if medical evidence supporting her application were submitted. Further correspondence followed. But Ms Estelle Morris M.P., the Minister of State for School Standards, on 23 September 1998 wrote to express the Department's conclusion that there was no reason in Heather's case which would warrant an extension of her assisted place, adding that Heather would not have to return to her previous primary school. After a further exchange of letters, notification was given to Mrs. Begbie by a letter dated 30 October 1998 from the Department

A that for the reasons given in the letter of 23 September 1998 the Secretary of State had decided not to exercise his discretion under section 2(2)(*b*) in favour of Heather and that the application of 18 June 1998 was formally refused.

On 19 November the application for judicial review of the decision of 30 October was made. In its amended form the application is to quash the decision and for a declaration that the Secretary of State has acted unfairly B or unlawfully or irrationally in the exercise of his discretion and/or that the Act of 1997 or the exercise of discretion thereunder is inconsistent with article 2 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and is therefore unfair and/or unlawful and/or irrational.

The application to the judge was made on three bases: (1) the exercise C by the Secretary of State of discretion was inconsistent with statements which were made by or on behalf of the present government both before and since the general election of 1 May 1997 and which gave rise to a legitimate expectation, or something akin to one, that Heather would retain her assisted place until she completed her education at The Leys; (2) the government's policy was not logical or consistent, and in particular was inconsistent with the Kilfoyle letter; and (3) the exercise of discretion D was inconsistent with article 2 of the Convention.

On the first ground of challenge, the judge criticised the way the matter had been dealt with by the government, saying: "It is a very sorry state of affairs when a Secretary of State has to explain away his own letters as mistaken or unclear and a statement of the Prime Minister as an inaccurate representation of policy, taken out of context." But he pointed E out that the question he had to consider was whether this ground of challenge was sound in law. He held that a Secretary of State was not bound by what was said by himself or others in opposition and that by the time it came for him to exercise discretion, the Secretary of State was bound by the terms of the statute as further explained in the policy contained in the circular of 30 September 1997. The judge said that the Teed letter and the letter to Mrs. Begbie did the Secretary of State no F credit, but they did not provide a legal platform from which the first challenge could be successfully launched.

On the second ground of challenge the judge accepted that the policy was more advantageous to some than to others and that its application included anomalies, but he said that whilst some anomalies were unfortunate in their application they were not susceptible to challenge as G irrational.

On the third ground of challenge, the judge found nothing in the authorities on, or in the language of, article 2 to suggest that there was a foundation in the Convention upon which Heather could build. He held that there was no breach of article 2 and so dismissed that ground. Accordingly he dismissed Heather's application.

Before this court Mr. Beloff, who did not appear before the judge, H advances similar grounds of challenge.

1. Legitimate expectation

Mr. Beloff submits: (i) the rule that a public authority should not defeat a person's legitimate expectation is an aspect of the rule that it must act fairly and reasonably; (ii) the rule operates in the field of substantive as well as procedural rights; (iii) the categories of unfairness are not closed;

(iv) the making of an unambiguous and unqualified representation is a sufficient, but not necessary, trigger of the duty to act fairly; (v) it is not necessary for a person to have changed his position as a result of such representations for an obligation to fulfil a legitimate expectation to subsist; the principle of good administration prima facie requires adherence by public authorities to their promises. He cites authority in support of all these submissions and for my part I am prepared to accept them as correct, so far as they go. I would however add a few words by way of comment on his fifth proposition, as in my judgment it would be wrong to understate the significance of reliance in this area of the law. It is very much the exception, rather than the rule, that detrimental reliance will not be present when the court finds unfairness in the defeating of a legitimate expectation. In *de Smith, Woolf & Jowell, Judicial Review of Administrative Action*, 5th ed. (1995), p. 574, para. 13-030, the position is summarised in this way:

> "Although detrimental reliance should not therefore be a condition precedent to the protection of a substantive legitimate expectation, it may be relevant in two situations: first, it might provide evidence of the existence or extent of an expectation. In that sense it can be a consideration to be taken into account in deciding whether a person was in fact led to believe that the authority would be bound by the representations. Second, detrimental reliance may be relevant to the decision of the authority whether to revoke a representation."

Mr. Beloff also referred to the recent decision of this court on 16 July 1999, *Reg. v. North and East Devon Health Authority, Ex parte Coughlan* [2000] 2 W.L.R. 622, which contains a useful distillation of the authorities on legitimate expectation. Three categories of case were there identified, of which the third was, in Mr. Beloff's submission, applicable to the present case. That category was described by Lord Woolf M.R. (giving the judgment of the court consisting of himself, Mummery and Sedley L.JJ.), at p. 645:

> "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."

Mr. Beloff argues that the statements of prominent Labour Party politicians both in opposition and in office created a legitimate expectation that Heather would enjoy the benefit of the A.P.S. until conclusion of her education at The Leys. He relies in particular in relation to the pre-election period on the letters of the Leader of the Opposition on 1 November 1996 to Dr. Tillson, on 6 December 1996 to Mrs. Treadwell, and on 27 January 1997 to Mrs. Williams; Mr. Trickett's letter of 27 February 1997; and the Kilfoyle letter. And, in relation to the post-election period, the Prime Minister's "Evening Standard" article, the Teed letter and the letter of 11 March 1998 from the Secretary of State to Mrs. Begbie. Mr. Beloff accepts that under the Act of 1997 the Secretary of State has a discretion and that he was entitled to formulate a policy on how the discretion would

A normally be exercised, but Mr. Beloff points to the fact that, as the word "normally" in paragraph 16 of the letter of 30 September 1997 recognises, the Secretary of State could admit further exceptions to the policy. Mr. Beloff submits that the Teed letter was a promise that those in the like circumstances to Heather would be allowed to keep their assisted places until the completion of their education, but that when the Secretary of State came to exercise his discretion in Heather's case, he reneged on that B promise, consistent though that promise was with the other representations, thereby defeating legitimate expectations and that constituted an abuse of power which this court should not permit.

Persuasively and skilfully though these submissions were advanced by Mr. Beloff, I am not able to accept them. No doubt statements such as those made by the Leader of the Opposition before May 1997 did give rise C to an expectation that children already on the A.P.S., from which group children at "all through" schools were not excepted, would continue to receive support in their education until it was completed, and it may be that the clear and specific statement in the Teed letter did likewise, at any rate for a time. But the question for the court is whether those statements give rise to a legitimate expectation, in the sense of an expectation which will be protected by law.

D I do not think that they did. As Mr. Havers, appearing with Mr. Garnham for the Crown pointed out, the starting point must be the Act of 1997. It is common ground that any expectation must yield to the terms of the statute under which the Secretary of State is required to act. Section 2(1) limits the ability of a school to provide assisted places to the circumstances provided for in subsection (2). That subsection requires a E child with an assisted place who is receiving primary education to cease to hold that place at the end of the year in which the child completes his or her primary education unless discretion is exercised by the Secretary of State under paragraph *(b)*. That paragraph is plainly intended to cater for the exceptional case where, having regard to particular circumstances of a particular child, it is reasonable in the eyes of the Secretary of State to make an exception for the child. As Mr. Havers submitted, if the Teed F letter promise is implemented, virtually all children receiving primary education at "all through" schools would have to be allowed to keep their assisted places till the end of their secondary education. It is not in dispute that the Secretary of State is obliged to act in an even-handed manner and that if Heather were allowed to keep her assisted place, so must all others in the like circumstances. To treat the Secretary of State as bound to implement the promise in the Teed letter for all in Heather's position G would plainly be outside the contemplation of the section, and contrary to what must have been intended by section 2(2)(*b*).

There are further difficulties in Mr. Beloff's way. His reliance on the pre-election statements founders on the fact that such statements were not made on behalf of a public authority. In *Council for Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 401 Lord Fraser of H Tullybelton said of legitimate expectations which may be protected by judicial review as a matter of public law: "Legitimate, or reasonable, 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." An opposition spokesman, even the Leader of the Opposition, does not speak on behalf of a public authority. A further difficulty relates to the effect in law of a pre-election promise by politicians anxious to win the votes of electors. In *Bromley*

London Borough Council v. Greater London Council [1983] 1 A.C. 768, 829 Lord Diplock said that elected representatives must not treat themselves as irrevocably bound to carry out pre-announced policies contained in election manifestos. True it is, as Mr. Beloff pointed out, that Lord Diplock a little earlier on the same page recognised that an elected member "ought" to give considerable weight, when deciding with the other elected members whether to implement policies put forward in a manifesto, to the factor that he received the support of the electors when he fought the election on the basis of the manifesto policies. But I do not read Lord Diplock as suggesting that the obligation in the word "ought" was a legal one or giving rise to legal effects. No case has been shown to us of the court treating such a promise as of binding effect or otherwise as having legal consequences. There are good practical reasons why this should be so. As was explained on behalf of the Labour Party on 18 July 1997 in a letter to Mrs. Cutler: "Only once the new Government had full access to information on A.P.S. numbers and projected spending, was it possible to present more details on our policy of phasing out the A.P.S." It is obvious that a party in opposition will not know all the facts and ramifications of a promise until it achieves office. To hold that the pre-election promises bound a newly-elected government could well be inimical to good government. I intend no encouragement to politicians to be extravagant in their pre-election promises, but when a party elected into office fails to keep its election promises, the consequences should be political and not legal.

Of the post-election statements to which Mr. Beloff points, the Prime Minister's words in the "Evening Standard" article must be read in their context. Most of the article was concerned with the honouring by the new government of the manifesto pledge to reduce the size of infant classes in state primary schools and the reallocation of money to achieve that. It was explained that the phasing out of the A.P.S. was funding that programme. Only in the short paragraph which I have quoted was there reference to the impact on children with existing assisted places. The words used are very general and in one sense are literally true because every child on an assisted place was allowed to continue at least for a while. But no reasonable informed reader of the article could believe that it was the announcement of a change of the policy in detailed form already promulgated. And there is Ms Mackenzie's evidence that it was not so intended. Nor is there evidence of any detrimental reliance by Heather's parents on the Prime Minister's words. On the contrary, they were, very reasonably, about this time trying to obtain, through their own M.P. as well as by other means, a clear and specific statement of what the Secretary of State was intending to do about those like Heather at "all through" schools, but the indications from government were not encouraging. Indeed one Labour M.P., Mr. Ben Bradshaw, was complaining to the Secretary of State that the government's policy was not what the Prime Minister had promised before the election.

The Teed letter does contain an unambiguous representation in terms applicable to a person in Heather's position: "Where there was provision of an 'all through' school and where there has been a clear promise of a place through to the age of 18, we have agreed to honour that promise." But it was corrected some five weeks later by the letter from Mr. Wardle, acting on behalf of the Secretary of State, and there is no evidence that in the interim Heather's parents relied on the representation to change their

position. Further there is no evidence that the Secretary of State intended to create a new category of children who would continue to keep their assisted places and there is clear evidence from Ms Mackenzie that the Secretary of State in the Teed letter misstated by mistake what his own policy was.

For my part I cannot accept that the mere fact that a clear and unequivocal statement such as that made in the Teed letter was made is enough to establish a legitimate expectation in accordance with that statement such that the expectation cannot be allowed to be defeated. All the circumstances must be considered. Where the court is satisfied that a mistake was made by the minister or other person making the statement, the court should be slow to fix the public authority permanently with the consequences of that mistake. That is not to say that a promise made by mistake will never have legal consequences. It may be that a mistaken statement will, even if subsequently sought to be corrected, give rise to a legitimate expectation, whether in the person to whom the statement is made or in others who learnt of it, for example where there has been detrimental reliance on the statement before it was corrected. The court must be alive to the possibility of such unfairness to the individual by the public authority in its conduct as to amount to an abuse of power. But that is not this case.

As for the letter of 11 March 1998 from the Secretary of State to Mrs. Begbie, while she sought to extract from it what he was saying, on her own account it left her confused (and she is plainly of high intelligence) and the Secretary of State never confirmed her understanding of the letter. He promised to return to her on it, but when belatedly there was a clear decision, that ran counter to any expectation which she had arising from that letter. In short, the letter contained no clear representation and could never reasonably have been relied on; nor was it because of Mrs. Begbie's wholly justified attempts to obtain clarification. I have to say that the way the Secretary of State dealt with the proper concerns of parents like Mrs. Begbie reflects no credit whatsoever on him. But I cannot say that his statements gave rise to a legitimate expectation, still less that there was an abuse of power.

For these reasons therefore I am of the opinion that the first ground of challenge fails.

2. Irrationality

Mr. Beloff made a brief submission under this head. He argues that the promise contained in the Kilfoyle letter, as purportedly incorporated into sub-paragraph (c) of paragraph 16 of the letter of 30 September 1997 was irrational in that the promise was restricted to free-standing preparatory schools and not to "all through" schools. He also asks why the Kilfoyle letter should govern the policy of the Secretary of State, when the Leader of the Opposition made a wider promise and yet no effect is given to it. He points to a number of anomalies, including those to which Heather's parents have themselves drawn to the attention of their M.P., Ms Anne Campbell, in a letter of 21 October 1997, viz.:

> "(1) 11-year-olds receiving seven years' funding. (2) Five plus holders receiving at least seven years' state funding. (3) Some 10-year-olds getting funding to 18 . . . (4) A small number of children of eight plus, some with promises to 13, others to 18, who will only get a maximum of three years' funding, and in some cases as little as one

> year . . . (5) At the same school you could find children who live in one area having funding withdrawn at 11, whilst others who live a few miles away with a middle school structure could get funding until 13 on appeal."

Mr. Havers convincingly demonstrated that the framing of policy by reference to the Kilfoyle letter was not irrational. It is apparent from the terms of the letter that it dealt with children with assisted places at free-standing preparatory schools (as well as with children with assisted places at secondary schools), but said nothing about "all through" schools. The letter was the culmination of exchanges with the I.A.P.S. about the position of free-standing preparatory schools, which had been newly admitted to the A.P.S. Ministers gave a commitment to Parliament that when a child in a free-standing preparatory school had been given a clear promise by a school on the strength of the Kilfoyle letter that he or she could keep the place through to age 13, discretion would be exercised so as to permit the continuance of the place until the child reached that age. Ms Mackenzie in her second affidavit explained that the decision to give that commitment was influenced by, amongst other things, the evidence from the I.A.P.S. that in reliance on the Kilfoyle letter preparatory schools had made specific promises to a particular category of children which had then been accepted by parents in good faith before the details of the Bill which became the Act of 1997 became known. In contrast, Ms Mackenzie's evidence is that the Secretary of State was not aware of any evidence to show that offers of primary assisted places were made by "all through" schools in reliance on either the Kilfoyle letter or any other promises of a similar nature. That evidence is not challenged.

It is never easy to establish irrationality, and in my judgment the judge was right to reject this ground of challenge too.

3. The Convention

Mr. Beloff in his skeleton argument advanced short submissions on this point but did not add to them by way of oral submissions. I can therefore deal with it shortly. Mr. Beloff relies on article 2 to the First Protocol to the Convention, the first sentence of which reads: "No person shall be denied the right to education." He further relies on the *Belgian Linguistic Case (No. 2)* (1968) 1 E.H.R.R. 252, 257, as confirming that article 2 incorporated a positive obligation, viz. that of:

> "guaranteeing . . . the right, in principle, to avail themselves of the means of instruction existing at a given time . . . The first sentence of article 2 . . . consequently guarantees . . . a right of access to educational institutions existing at a given time . . ."

He argues that Heather's means of instruction was education at The Leys where she was and is financed by the state under the A.P.S.; as she cannot avail herself of that means of instruction if the finance is withdrawn, that withdrawal deprives her of a right guaranteed by the first sentence of article 2. He submits that the Convention must, even now, before the Human Rights Act 1998 comes into force, inform the exercise of discretion.

I confess that I find it startling that it should be suggested that in a country where education is available in a state school at public expense it should be a breach of the Convention for the state not to continue to provide the funding for a child to go to a private school. Nor in my

judgment is that suggestion supported by the jurisprudence of the European Court of Human Rights. In the *Belgian Linguistic* case it was stated, at p. 281, that: "the contracting parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level." The Protocol proceeded from the premise that each member state possessed a state system of education and article 2 was designed to ensure that access to that system was not denied. Other decisions of that court support this: see *W. and K.L. v. Sweden* (1985) 45 D. & R. 143 and *Simpson v. United Kingdom* (1989) 64 D. & R. 188.

In my judgment in agreement with the judge I can see no breach of the Convention. It follows that this ground of challenge must also be rejected.

I cannot conclude without expressing my considerable sympathy with Heather and her parents and indeed all others in a similar position. Few things matter more to properly concerned parents with children of school age than that their children should have the best possible chance in life through the best education that can be arranged for them. The hopes of many of seeing their children complete their education under the A.P.S. were raised by the general statements made by politicians in opposition and have been cruelly disappointed by the policy adopted by the same politicians when in government, and their aggrieved feelings will not have been lessened by the erroneous, confused and contradictory statements made by the Government while they were trying to obtain clarification of the policy. But for the reasons which I have given I regret that I can see no way in which redress in law can be given them for their grievance. I would therefore dismiss this appeal.

LAWS L.J. I agree that this appeal should be dismissed on the short ground that to give effect to Mr. Beloff's argument would entail our requiring the Secretary of State to act inconsistently with section 2 of the Education (Schools) Act 1997. I agree also with what Peter Gilson L.J. has said about the other two heads of challenge advanced on Mrs. Begbie's behalf. I would add a few words of my own upon the application of the legal principles relating to legitimate expectations, were the door not shut to Mr. Beloff by the statute.

Abuse of power has become, or is fast becoming, the root concept which governs and conditions our general principles of public law. It may be said to be the rationale of the doctrines enshrined in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223 and *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997, of illegality as a ground of challenge, of the requirement of proportionality, and of the court's insistence on procedural fairness. It informs all three categories of legitimate expectation cases as they have been expounded by this court in *Reg. v. North and East Devon Health Authority, Ex parte Coughlan* [2000] 2 W.L.R. 622.

The difficulty, and at once therefore the challenge, in translating this root concept or first principle into hard clear law is to be found in this question, to which the court addressed itself in the *Coughlan* case: where a breach of a legitimate expectation is established, how may the breach be justified to this court? In the first of the three categories given in *Ex parte Coughlan*, the test is limited to the *Wednesbury* principle. But in the third (where there is a legitimate expectation of a substantive benefit) the court must decide "whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power:" [2000]

2 W.L.R. 622, 645, para. 57. However the first category may also involve deprivation of a substantive benefit. What marks the true difference between the two? In the *Coughlan* case this court allotted the facts of the case before it to the third category, for these reasons, at p. 646, para. 60:

> "First, the importance of what was promised to Miss Coughlan . . . second, the fact that promise was limited to a few individuals, and the fact that the consequences to the health authority of requiring it to honour its promise are likely to be financial only."

Fairness and reasonableness (and their contraries) are objective concepts; otherwise there would be no public law, or if there were it would be palm tree justice. But each is a spectrum, not a single point, and they shade into one another. It is now well established that the *Wednesbury* principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake: see for example, in the field of human rights, the observations of Sir Thomas Bingham M.R. in *Reg. v. Ministry of Defence, Ex parte Smith* [1996] Q.B. 517. The court's review of the authorities in the *Coughlan* case [2000] 2 W.L.R. 622 shows, as was said at p. 648, para. 69, that abuse of power may take many forms; and, at p. 651, para. 74:

> "Nowhere in this body of authority, nor in *Reg. v. Inland Revenue Commissioners, Ex parte Preston* [1985] A.C. 835, nor in *In re Findlay* [1985] A.C. 318, is there any suggestion that judicial review of a decision which frustrates a substantive legitimate expectation is confined to the rationality of the decision. But in *Reg. v. Secretary of State for the Home Department, Ex parte Hargreaves* [1997] 1 W.L.R. 906, 921, 925 Hirst L.J. (with whom Peter Gibson L.J. agreed) was persuaded to reject the notion of scrutiny for fairness as heretical, and Pill L.J. to reject it as 'wrong in principle.'"

The court proceeded, at p. 652, para. 76 to distinguish *Reg. v. Secretary of State for the Home Department, Ex parte Hargreaves* [1997] 1 W.L.R. 906 on the basis that: "fairness in the statutory context required more of the decision-maker than in *Ex parte Hargreaves* where the sole legitimate expectation possessed by the prisoners had been met."

As it seems to me the first and third categories explained in the *Coughlan* case [2000] 2 W.L.R. 622 are not hermetically sealed. The facts of the case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review. In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no position to adjudicate save at most on a bare *Wednesbury* basis, without themselves donning the garb of policy-maker, which they cannot wear. The local government finance cases, such as *Reg. v. Secretary of State for the Environment, Ex parte Hammersmith and Fulham London Borough Council* [1991] 1 A.C. 521, exemplify this. As Wade and Forsyth observe (*Administrative Law*, 7th ed. (1994), p. 404):

> "Ministers' decisions on important matters of policy are not on that account sacrosanct against the unreasonableness doctrine, though the court must take special care, for constitutional reasons, not to pass judgment on action which is essentially political."

In other cases the act or omission complained of may take place on a much smaller stage, with far fewer players. Here, with respect, lies the importance of the fact in the *Coughlan* case [2000] 2 W.L.R. 622 that few individuals were affected by the promise in question. The case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes. In such a case the court's condemnation of what is done as an abuse of power, justifiable (or rather, falling to be relieved of its character as abusive) only if an overriding public interest is shown of which the court is the judge, offers no offence to the claims of democratic power.

There will of course be a multitude of cases falling within these extremes, or sharing the characteristics of one or other. The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy.

The present case does not lie in the macro-political field. It concerns a relatively small, certainly identifiable, number of persons. If there has been an abuse of power, I would grant appropriate relief unless an overriding public interest is shown, and none to my mind has been demonstrated. But the real question in the case is whether there has been an abuse of power at all. The government's policy was misrepresented through incompetence. It is not in truth a case of change of policy at all. Mrs. Begbie, who has conducted herself throughout with dignity, restraint, and a clarity of mind which contrasts with the letter to her from the Secretary of State of 11 March, did not alter her or her daughter's position in reliance on the misrepresentation. The mistake was corrected five weeks or so after the "Teed" letter. The issue is whether the *correction* amounted to an abuse of power; or whether the Secretary of State should be compelled to allocate public resources to the grant of assisted places inconsistently with his perfectly lawful policy.

If there had been reliance and detriment in consequence, I would have been prepared to hold that it would be abusive for the Secretary of State not to make the earlier representations good. But there has not. Bitter disappointment, certainly; but I cannot see that this, though it excites one's strongest sympathy, is enough to elevate the Secretary of State's correction of his error into an abuse of power. We do not sit here to punish public authorities for incompetence, though incompetence may most certainly sometimes have effects in public law.

For my part I am driven, with great regret, to conclude, as I have said, that this appeal must be dismissed.

SEDLEY L.J. I agree with the conclusion of Peter Gibson L.J. that this appeal must fail and with his and Laws L.J.'s reasons for reaching that conclusion. In view, however, of the considerable interest of some of the arguments we have listened to, I venture to add some remarks of my own.

Policy: consistency and arbitrariness

The discretion to make residual transitional provisions given to the Secretary of State by section 2(2)(*b*) of the Education (Schools) Act 1997 has to be exercised with careful regard to a number of principles, not all of them easily reconciled with one another.

First, the discretion must not be exercised in a way which undermines the statutory purpose. In the present case this means that it cannot be used simply to provide assisted places for effectively all those pupils whose assisted places are not saved by the statute itself. To do so would plainly be to defy Parliament's intent. I agree with Peter Gibson and Laws L.JJ. that this principle is dispositive of the present case. Secondly, the discretion must be exercised by reference to the circumstances of individual pupils. This is not true of all statutory discretions, but it is spelt out in relation to this one. Thirdly, it must not be exercised arbitrarily or inconsistently as between one pupil and another. This is why a policy for its exercise is not only legally permissible but a practical necessity. Fourthly, there are today cogent objections to the operation of undisclosed policies affecting individuals' entitlements or expectations. It is right and proper that a policy such as this be published, as was done on 30 September 1997. The necessary consequence and indeed purpose of publication is that people will, where appropriate, rely upon it. Fifthly, both for the foregoing reason and because a policy is just that, it must not be treated by its custodians as a set of rules. Hence the wisdom of including the word "normally" in pararaph 16 of the policy statement. There may be admissible reasons for excluding a pupil who is otherwise within categories (a), (b) or (c); or for including a pupil who is in none of them. The difficulty which can arise is that such a departure may be open to attack as arbitrary or inconsistent, while a refusal to depart is open to attack for rigidity. Everything therefore depends on there being adequate factual reasons for either agreeing or declining to depart from a policy. So regarded, and so supervised by law, a policy has virtues of flexibility which rules lack, and virtues of consistency which discretion lacks.

I offer these reflections because they explain why I do not accept Mr. Beloff's argument that the Secretary of State cannot object to the inclusion of all-through pupils like Heather Begbie on the ground that to do so will impermissibly create a class, when by his own policy he has created three other classes.

To have done less than is done by paragraph 16 of the policy, for example by simply saying that every case would be considered on its merits, would have been to court challenge on the ground of inconsistency when families of assisted places pupils compared the outcomes of their applications. To have done more, at least if it went the distance for which Mr. Beloff contends, would have been to fill by discretion the very space created by the legislation. The choice of the three specified fact situations for discretionary relief as against that of the 1,200 or more pupils in the applicant's position is explained by the history of the legislation, and in particular by the Kilfoyle letter. The prima facie exclusion of all-through pupils of primary age is neither arbitrary nor irrational, hard though it is upon them. To describe differential outcomes as anomalies, as Mr. Beloff does, begs the question: are the disparities irrational or arbitrary, or are they choices lying along the parameters of a lawful policy? For the reasons which have been given, the outcome in Heather's case is, unhappily for her, in the latter class.

Legitimate expectation: reliance

Mr. Beloff's narrower way of putting his case is to treat the Teed letter as a representation as to how the policy will be operated. He is entitled, particularly in the presence of the word "normally," to argue that the policy contains room for movement, as indeed it must, and that the letter created a legitimate expectation that assisted place pupils in Heather Begbie's situation would be accommodated within it.

Even if this submission did not fall foul of the construction issue, it would in my view fail. I do not think that the nature and circumstances of this particular representation are capable of having generated a legitimate expectation in the Begbie family, for at least two reasons. One is that the representation was not made to them. We are told that a copy of it reached Mrs. Begbie on 18 March 1998, about five weeks before it was withdrawn as incorrect. She did not mention it in the letter she wrote two days later to the Secretary of State, in which, replying to his letter of 11 March, she expressed herself "still rather confused"—unsurprisingly, given the opacity of the Secretary of State's letter. This is a very long way from the making and acceptance of a representation assuring Heather's assisted place for the remainder of her schooling.

But, Mr. Beloff submits, reliance is not a necessary precondition of enforcement of a legitimate expectation. He cites the passage at paragraph 13-030 of *de Smith, Woolf & Jowell, Judicial Review of Administrative Action*, 5th ed., p. 574, from which Peter Gibson L.J. has quoted the key passage. I have no difficulty with the proposition that in cases where government has made known how it intends to exercise powers which affect the public at large it may be held to its word irrespective of whether the applicant had been relying specifically upon it. The legitimate expectation in such a case is that government will behave towards its citizens as it says it will. But where the basis of the claim is, as it is here, that a pupil-specific discretion should be exercised in certain pupils' favour, I find it difficult to see how a person who has not clearly understood and accepted a representation of the decision-maker to that effect can be said to have such an expectation at all. A hope no doubt, but not an expectation.

If this be wrong and if the Begbie family can rightly be said to have acquired an expectation from their sight of the Teed letter, then the expectation cannot legitimately have outlived the correction of the letter and the reversion to the original policy signalled by the Wardle letter of 21 April 1998. It follows, I do not doubt, that if in the interim Heather's position had shifted to her detriment in reliance on the representation or misrepresentation—for example, by turning down an alternative school place in the belief that her assisted place was now secure—the court might well have held resiling from it to be, in her case, an abuse of power. But all this depends first on there having been a representation sufficient to generate a true expectation and secondly on something—acting in reliance on it, for example—giving it legitimacy. Mr. Beloff accepts that legitimacy of expectation may include, though it will not be limited to, the reasonableness of relying upon the representation.

It may be that the question of mistake in relation to the abuse of power will need to be revisited in other fact situations, but I agree entirely with Peter Gibson L.J.'s analysis of its materiality in the present case. It may be, too, as Laws L.J. suggests, that the distinction drawn in *Reg. v. North and East Devon Health Authority, Ex parte Coughlan* [2000]

2 W.L.R. 622 between the first and third categories of legitimate expectation deserves further examination.

Election promises

It is one thing to say, as the House of Lords has done both in *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] A.C. 1014 and in *Bromley London Borough Council v. Greater London Council* [1983] 1 A.C. 768, that an administration may properly and morally ought to have regard to its pre-election promises. It is another to say, as Mr. Beloff has sought to do, that it *must* have regard to them and a yet further thing to say that it must ordinarily act on them. The law goes nowhere near this.

A pre-election promise may of course be expressly adopted by a new administration once in office, but then it acquires a new character with, no doubt, consequences analogous to those of any other representation made by a public authority. In the present case I agree with Peter Gibson L.J. that there was no such adoption. At best the prehistory is relevant as casting some evidential light on the possible meaning of some of the post-election letters. But the significance of these is in the end self-defining; there was a clear policy, an inadvertent suggestion in a single letter that the policy went wider than it did, and a correction of it within a few weeks during which no harm had occurred through reliance upon the error.

Appeal dismissed.
No order as to costs
Leave to appeal refused.

Solicitors: Teacher Stern Selby; Treasury Solicitor.

C. T. B.