§ Law in Context

Law and Administration

THIRD EDITION

CAROL HARLOW AND
RICHARD RAWLINGS

CAMBRIDGE

CAMBRIDGE www.cambridge.org/9780521197076

5

Rules and discretion

Contents

1. Law and 'soft law'
2. Some reasons for rules
3. Structuring discretion
4. Rules, principles and discretion
   (a) Discretion to rules
   (b) Rules to discretion
5. Rules, individuation and consistency
6. Bucking the rules

1. Law and 'soft law'

Towards the end of World War II, Robert Megarry, a young English barrister specialising in property law, came across Inland Revenue (IR) guidance on concessions to the taxpayer. Megarry was intrigued by these 'administrative notifications'. Were they enforceable? Were they or were they not 'law'? In his view the arrangements:

> operating in favour of the individuals concerned at the expense of taxpayers as a whole, are technically not law, but although no Court would enforce them, no official body would fail to honour them, and as they are not merely concessions in individual cases but are intended to apply generally to all who fall within their scope, the description of 'quasi-legislation' is perhaps not inept. Announcements operating against the individuals concerned, on the other hand, will normally be open to challenge in the Courts and so can be said to have the practical effect of legislation only to the extent that the expense, delays and uncertainties of litigation in general, and of opposing the unlimited resources of the Administration in particular, make those affected prefer to be submissive rather than stiff-necked.[1]

[1] R. Megarry, 'Administrative quasi-legislation' (1944) 60 *LQR* 125.

Subsequent case law showed courts at first looking on the IR concessions with disfavour. In *Cook*,[2] for example, the IR had agreed, as a concession, to accept excise duty in instalments rather than by a single, immediate payment. The Lord Chief Justice remarked: 'One approaches this case on the basis, and I confess for my part an alarming basis, that the word of the Minister is outweighing the law of the land.' Yet the court did not actually halt the 'illegal' practice. In the celebrated *Federation* case (p. 696 below) where third parties tried to challenge a discretionary IR concession, the House of Lords treated it as reasonable and sensible. Parliament too has condoned similar practices: for example, the Select Committee on the PCA has encouraged the IR to make concessions without express statutory authority while, perhaps more importantly, the Public Accounts Committee long ago accepted the need for extra-statutory concessions.[3]

The world in which Megarry operated (or more precisely, in which he thought he was operating) was the world of law and regulation described in the previous chapter. This body of law was arranged hierarchically and classified, as we saw in *Jackson*, by the way it was made: statutes made by Parliament, statutory instruments approved by Parliament and so on through a 'ragbag' of rules, regulations, orders, etc., which does not need parliamentary approval but was identified by Griffith and Street as delegated legislation. This ragbag was also classified by source; to constitute law a text must be traceable to and authorised by a superior rule of law; otherwise it could be declared ultra vires and invalidated by a court. Unlike the term 'statutory instrument', however, 'quasi-legislation' was not, as Ganz observed, a term of art. It covered:

> a wide spectrum of rules whose only common factor is that they are not directly enforceable through criminal or civil proceedings. This is where the line between law and quasi-legislation becomes blurred because there are degrees of legal force and many of the rules to be discussed do have some legal effect. It is also not possible to draw a clear distinction between law and quasi-legislation on purely formal lines i.e. the mechanism by which it is made. A legally binding provision may be contained in a circular whilst a code of practice may be embodied in a statutory instrument. We draw the line at rules which have a limited legal effect at one end of the spectrum and purely voluntary rules at the other end.[4]

Megarry's concern as a practising lawyer was with issues very like those that prompted the Statutory Instruments Act 1946. The SIA regularised provision

[2] *R v Customs and Excise Commissioners, ex p. Cook* [1970] 1 WLR 450. (The applicants were held not to have standing); *IRC v National Federation of Self-Employed and Small Businesses* [1981] 2 All ER 93.

[3] PAC, HC 300 (1970/1), pp. 408–10.

[4] G. Ganz, *Quasi-Legislation: recent developments in secondary legislation* (Sweet & Maxwell, 1987), p. 1. The Australian government prefers the term 'Grey-letter law': see Commonwealth Interdepartmental Committee on Quasi-regulation, *Grey-letter Law*, (Canberra, 1997); R. Creyke and J. McMillan, 'Soft law in Australian administrative law' in Pearson, Taggart and Harlow (eds), *Law in a Changing State* (Hart Publishing, 2008).

for parliamentary scrutiny of statutory instruments and provided for publication. In contrast, neither oversight nor publication was stipulated in respect of the mass of 'announcements by administrative and official bodies' that lay largely out of sight on the fringes of the law. Neither the rules nor the policies they incorporated were, in today's terminology, 'transparent'. Megarry called for 'some uniform official method of publication'. In this he was unsuccessful. There is still no equivalent of the American Administrative Procedure Act to regulate administrative rule-making. There is no European-style Official Journal in existence, and no register of documents such as the EU institutions now maintain is held or promulgated by government institutions. 'E-governance' and ICT have, however, made an important contribution in this respect. Many of the rules and policies discussed in this chapter, including the IR concessions, are directly available online to the public, and accessed easily through *Directgov* and departmental or local government websites.

We should not assume, however, that further unpublished rules are not in circulation behind the scenes. The 'ragbag' of delegated legislation is paralleled in a litter of 'rules, manuals, directives, codes, guidelines, memoranda, correspondence, circulars, protocols, bulletins, employee handbooks and training materials'[5] that clutter the desks (and computer files) of bureaucrats. Rules of this type are not really, as Megarry saw them, 'quasi-legislation'. All have some claim to the term 'rule' but not all can claim to be 'law' nor would they find a place within the legal hierarchy of rules. 'Soft law', as it has come to be called, is a term that covers 'any written or unwritten rule which has the purpose or effect of influencing bureaucratic decision-making in a non-trivial fashion'[6] or, to put this differently, 'rules of conduct that, in principle, have no legally binding force but which nevertheless may have practical effects'.[7] Rule-making is a natural and autonomous administrative function which, in tandem with regulation, has become one of the four 'output functions' of modern government, the others being rule application and rule interpretation.[8] Rule-making is 'the most important way in which bureaucracy creates policy' and in some respects 'rivals even the legislative process in its significance as a form of governmental output'.[9] As we shall see, the rules are usually tempered by discretion.

Soft law may be used in preference to hard law because it is simply not worth setting the lawmaking process in operation; this is particularly true of the EU, where the lawmaking procedures are exceptionally complex. On other occasions, resort to rules may be deliberate, to evade the openness of the law-

[5] From L. Sossin and C. Smith, 'Hard choices and soft law: Ethical codes, policy guidelines and the role of the courts in regulating government' (2003) 40 *Alberta Law Rev*. 871.

[6] *Ibid*.

[7] F. Snyder, 'Soft law and institutional practice in the European Community' in S. Martin (ed.), *The Construction of Europe: Essays in honour of Emile Noël* (Kluwer International, 1994), p. 197.

[8] D. Easton, 'An approach to the analysis of political systems' (1957) 9 *World Politics* 383.

[9] W. West, 'Administrative rule-making: An old and emerging literature' (2005) 65 *Pub. Admin. Review* 655.

making process. Inside government departments, where much rule-making happens, decisions to make rules are not always taken on rational grounds. Rules are 'bargained over and they are built'; choice is constrained by the political, legal and regulatory context.[10] Legislation based on a broad consensus may, for example, seem right for a change in the law affecting civil liberties but if government senses parliamentary opposition or parliamentary time is in short supply, it may give way to the temptation to avoid the parliamentary process. It may turn first to ministerial regulation (less parliamentary scrutiny) or, where even this seems difficult, use internal, departmental policy-making to supplement or subvert the law; cases such as *Anufrijeva* (p. 210 below) suggest, for example, that practices like this are common within the Home Office immigration service. Again, soft law may form part of an official legal hierarchy in which secondary or delegated legislation is used by the executive to flesh out Acts of Parliament or make procedural rules, which need to be amplified, interpreted or expanded by soft law in the form of guidance or circulars.

For centuries, to use a simple example, police procedures were governed by the common law, which governed matters such as arrest or detention. The law was expressed as broad general concepts, using terms such as 'reasonable suspicion', 'excessive force' or 'within a reasonable time'. From time to time, case law established boundaries: at what point someone must be told the grounds for his arrest, for example.[11] This left much scope or 'strong discretion' for individual officers to decide how to proceed. During the nineteenth century, as professional police forces were gradually set in place, the common law was amplified by specific local statutes and bylaws governing police practices in different parts of the country. Occasional general statutes, such as the Criminal Law Act 1967, which dealt with arrest in serious cases, applied countrywide. In 1978, the decision was taken to tidy up the mess and codify police procedures and a Royal Commission was appointed with a view to standardisation and greater transparency.[12] The subsequent Police and Criminal Evidence Act 1984 (PACE) codified the common law principles, replacing them by a hierarchy of rules. PACE is more specific than the common law, setting out in detail the procedures governing search, seizure, detention and arrest. PACE also authorises the Home Secretary to issue Codes of Practice, which are statutory instruments and must be laid in draft before Parliament for approval. The Home Office (HO) Codes of Practice are published and available on-line. Together, they 'provide the core framework of police powers and safeguards around stop and search, arrest, detention, investigation, identification and interviewing detainees'.

But the HO also issues 'guidance' on important police practices such as arrest, stop-and-search or caution. These are addressed primarily to those who

[10] J. Black, '"Which arrow?": Rule type and regulatory policy' [1995] *PL* 94, 95.
[11] *Christie v Leachinsky* [1947] AC 573.
[12] *Report of the Royal Commission on Criminal Procedure*, Cmnd 8092 (1981).

have to operate the codes or have an interest in knowing how they are operated ('stakeholders'). The Prosecution Team Manual of Guidance (available online) was, for example:

> prepared for use by members of the prosecution team, police officers and Crown Prosecutors concerned with the preparation, processing and submission of prosecution files. It contains advice and guidance about how to complete each of the constituent manual of guidance forms, along with a description of each type of prosecution file and its application in practice on matters such as arrest, questioning and cautioning suspects.

The code is transparent in the sense of being available on the HO website and accessible by the general public, who are not, be it noted, consulted on its content (Arnstein, rung 3). HO circulars also regularly provide guidance to chief constables on changes in the law or important judicial decisions. Further guidance to officials may be contained in unpublished departmental memorandums or even letters to junior officials answering specific inquiries on departmental policy. Whether or not a lawyer would characterise these informal documents as 'rules' is questionable but they are certainly intended by their authors to have some practical effect.

Not every code of practice has a statutory basis like the PACE codes. The model procedural code sponsored by the Council on Tribunals in 1991 was advisory only; as we shall see in Chapter 11, however, legislation has recently introduced a formal rule-making power. The PCA's 'Principles of Good Administration' (see Chapter 12) and the more detailed codes of good administrative practice negotiated with local authorities by the local government ombudsmen (see Chapter 10) are other important examples of this type of soft law. Self-regulatory bodies such as the Advertising Standards Authority or Press Council issue similar codes of practice to formulate their policies and explain and communicate them to stakeholders and the public (see Chapter 7). Look at the website of the Health and Safety Executive (HSE) and you will find many different examples of soft law. There is, for example, interpretative guidance on the Adventure Activities Licensing Regulations and the set of highly technical rules of good practice dealing with hazardous substances, aimed at and comprehensible only to experts. It is often hard for the public to know whether guidance of this type is *prescriptive*, as it may be where the agency possesses statutory rule-making powers, or a voluntary code, indicative of good practice but not binding. The HSE also publishes on its website its internal operational instructions and guidance used 'to carry out its core operational work of inspecting, investigating, permissioning and enforcing', said to be presented 'essentially in the same way as it is made available to HSE staff but with some additional explanation for an external audience'. There are further references to operational circulars, minutes and inspection packs, available online. These could be rules addressed to the regulators (in this case HSE inspectors) or notifications of rules addressed to the regulated (stakeholders)

to instruct them on compliance with the law. They could also be aimed at the general public to provide information on the work of the agency or even to give guidance on third-party rights. The legal status of this type of rule may then cause difficulty. If, for example, the HSE specifies operational procedures for inspections, what is the position if an inspectorate departs from the established procedures in making an inspection? Are the rules binding? Can they be challenged? Does the guidance give rise to third-party rights? We shall see later how the courts have tried to deal with problems of this kind.

The Highway Code deals specifically with this point. Breach of the Highway Code is not in itself an offence because it does not have statutory or regulatory force. Its provisions, which have no formal legal basis, are 'good practice' standards, issued for purposes of guidance, though they may nonetheless be taken into account in judging criminal and civil liability. Breach of some of the provisions, contained in Road Traffic Acts or regulations made under the Acts, is an offence however. The function of the Highway Code in this case is to inform the public on the law. The website of the Department for Transport, responsible for the Highway Code, clarifies the position:

> Many of the rules in the Code are legal requirements, and if you disobey these rules you are committing a criminal offence. You may be fined, given penalty points on your licence or be disqualified from driving. In the most serious cases you may be sent to prison. Such rules are identified by the use of the words **'MUST/MUST NOT'**. In addition, the rule includes an abbreviated reference to the legislation which creates the offence. An explanation of the abbreviations can be found in 'The road user and the law'.
>
> Although failure to comply with the other rules of the Code will not, in itself, cause a person to be prosecuted, The Highway Code may be used in evidence in any court proceedings under the Traffic Acts (see 'The road user and the law') to establish liability. This includes rules which use advisory wording such as 'should/should not' or 'do/do not'.

The informal nature of the Code and the fact that its text may change is reinforced by the warning that 'In any proceedings, whether civil or criminal, only the Department for Transport's current printed version of the Code should be relied upon.'

2. Some reasons for rules

One reason for the juridification that Teubner sees as characteristic of post-modern society is that rules are really the only efficient way to organise complex societies and carry out the diverse functions that in previous chapters we associated with the state. Just as regulation and risk regulation depend on rule-making so too do the complex mass systems of service delivery in welfare and social services or of tax collection and immigration control. Administration becomes a cycle of juridification in which policies expressed as rules move up to the lawmaker and down to rule interpretation and rule

application by the administration. Rules are used to manage rule application by junior officials (the 'line' or 'street level' bureaucrats) who 'individuate' rules by using their discretion to apply them to specific cases. Rule application leads up in case of dispute to rule interpretation by hierarchical superiors, then outwards to tribunals and courts. The cycle recurs if an adjudication calls for further interpretative rules, or provokes the bureaucrat to produce more, and more specific, rules. This may be done by formal rule-change or interpretative circulars and guidance.

In this account of juridification, rule-making is portrayed as a bureaucratic phenomenon, springing up inside and motivated by bureaucracy and its needs. We here assume a Weberian interpretation of bureaucracy as inherently hierarchical: senior managers formulate policies or record policy and practice as rules for the 'line bureaucracy' to apply. Similarly, the doctrine of ministerial responsibility assumes that ministers and 'mandarins' make policy decisions while rule application, implementation and routine decision-making are delegated to subordinates: the 'Carltona model' of public administration.[13] This widely-accepted stereotype has made a powerful contribution to the way in which rules are perceived but recent research suggests that it may be misleading. We should not so readily assume that:

> 'policy' – the broad strategic direction of government – is set by the top, whether politicians or civil servants, and the detailed elaboration of this policy is, to use a phrase coined in a different context, 'embellishment and detail'. The top deals with the broad issues, and the narrow gauge work is done lower down . . .
>
> [T]here is prima facie evidence to challenge the assumption that a hierarchy in the importance of decisions coincides with organisational hierarchy. Many important strategic policy issues involve settling detail, many strategic policy decisions emerge from the work of those developing detail, and those working at this level have substantial discretion and influence in shaping policy in this sense.[14]

Policy, in other words, is not necessarily imposed from the top; it may evolve at ground level and permeate upwards. Similarly the choice of rule-type is not always made by ministers, experienced senior civil servants, parliamentary draftsmen or legal advisers. It may be a matter of happenstance, involving no more than rubber-stamping of the decision of a junior civil servant, who decides not only what the minister 'needs to see and what he does not need to see' but also what can be done informally by rule-making and what requires the stamp of ministerial and legislative approval. Rule-making is not a wholly rational process though it ought to exhibit some elements of rationality.

The introduction of ICT and evolution of e-governance (see Chapter 2) have

[13] *Carltona v Commissioner of Works* [1943] 2 All ER 560 (CA).

[14] E. Page, 'The civil servant as legislator: Lawmaking in British administration' (2003) 81 *Pub. Admin*. 651; E. Page and B. Jenkins, *Policy Bureaucracy: Government with a cast of thousands* (Oxford University Press, 2005), pp. 2 and 72–108.

brought about fundamental changes in the way large-scale service-delivery agencies operate. In the world of K. C. Davis, whose influential work on rule-making is discussed below, police officers and public service workers were *individuals* who interacted directly with individual citizens. They possessed and, unlike computers, were capable of using, substantial discretion in allocating or withholding benefits and services, in problem-solving and sometimes in imposing sanctions. Contrast the modern office, where:

> window clerks are being replaced by Web sites, and advanced information and expert systems are taking over the role of case managers and adjudicating officers. Instead of noisy, disorganized decision-making factories populated by fickle officials, many of these executive agencies are fast becoming quiet information refineries, in which nearly all decisions are pre-programmed by algorithms and digital decision trees. Today, a more true-to-life vision of the term "bureaucracy" would be a room filled with softly humming servers, dotted here and there with a system manager behind a screen.[15]

The decision-making process has been 'routinised' and has evolved into a two-way process in which a computer screen (or mobile telephone) always connects implementing officials to the organisation. Insofar as they are directly in contact with citizens, this is always through or in the presence of these contacts. A step further and the organisation is translated into a 'system-level bureaucracy', where:

> routine cases are handled without human interference. Expert systems have replaced professional workers. Apart from the occasional public information officer and the help desk staff, there are no other street-level bureaucrats . . . The process of issuing decisions is carried out – virtually from beginning to end – by computer systems.[16]

Whether or not ICT is wiping out the discretion of street-level bureaucrats, as Bovens and Zouridis maintain, is contestable; their functions have, however, certainly changed, very much to the profit of supervisors.[17] Rules, as we saw in Chapter 2, play a central part in NPM methodology, which is highly dependent on rules. Not only do rules allow street-level bureaucrats to be guided and directed, they also allow them to be tested and controlled; with the help of rules, their work can be audited, measured and evaluated in the ways described by Power. So long as NPM remains the predominant mode of public administration therefore, rules are likely to remain an indispensable tool.[18]

[15] M. Bovens and S. Zouridis, 'From street-level to system-level bureaucracies: How information and communication technology is transforming administrative discretion and constitutional control' (2002) 62 *Pub. Admin. Rev*. 174, 175.

[16] *Ibid*., p. 180. The term 'street-level bureaucracy' was introduced by M. Lipsky, *Street-level Bureaucracy: Dilemmas of the individual in public services* (Russell Sage Foundation, 1980) in an era of face-to-face encounters between individuals.

[17] F. Jorna and P. Wagenaar, 'The "iron cage" strengthened? Discretion and digital discipline' (2007) 85 *Pub. Admin.* 214.

[18] C. Hood and C. Scott, 'Bureaucratic regulation and new public management in the United Kingdom: Mirror-image developments?' (1996) 23 *JLS* 321.

Computers are not designed for the exercise of discretion, so that automation, which facilitates standardisation, also demands it. Computers, in other words, speak the language of rules. This 'fourth generation legislation', however, takes the form of the algorithms, decision-trees and checklists that make up computer programs, an innovation that has radically changed the balance of power between ministers and mandarins and the computer programmers and expert technicians responsible for the implementation of policy.[19] The former may now have to take responsibility for systems that they can neither operate nor understand – a deficiency enough in itself to explain the many public procurement failures and technological breakdowns met with in the Child Support Agency and NHS. Nor are our democratic representatives well equipped to deal with the technological revolution; as we saw in Chapter 4, they are experiencing difficulty in catching up. Bovens and Zouridis argue that democratic control over the executive can only be restored by opening up to public scrutiny 'the electronic forms, decision trees, and checklists used by the organisation to make decisions'.[20] This will allow independent experts to act as monitors, a view of e-governance that relates surprisingly closely to Foucault's concept of 'governmentality' (p. 75 below).

Recent changes in the organisational structure of government have also hastened the trend to administration through rules. The downloading of administration to executive agencies is conducted, as we saw, through 'pseudo-contracts', whose terms are simply a privatised form of rule. As functions have been hived-off to agencies and devolved to regional government, the quest for equality has meant that locally administered services are supervised by and subjected to the policy guidance of central government or inspected, monitored and regulated by a regulator. Equally, the 'joined up government' initiatives and creation of 'hyper-ministries' and 'super-agencies' (see Chapter 7) depend on the ability of diverse organisations to communicate with each other. They communicate with rules: the circulars, guidance and memorandums met already but also through concordats and other agreements between the public servants who work in central and devolved government and help to hold the British state together.

One process in which authorities at several levels have to collaborate is land-use planning. Central and regional government, district, county and metropolitan district councils all exercise planning functions as well as national parks authorities. Several central government departments are also involved. The principal responsibility rests with the Department of Communities and Local Government (DCLG) but the Department of Environment (now DEFRA) has some responsibilities and many 'stakeholder' interests and the Department for Transport deals with major projects for roads, railways and, highly controversial, airports. In recent years too, responsibility for environmental policy

[19] R. de Mulder, 'The digital revolution: From trias to tetras politica' in Snellen and van de Donk (eds.), *Public Administration in an Information Age: A handbook* (IOS Press, 1998).

[20] Bovens and Zouridis, 'From street-level to system-level bureaucracies', p. 183.

has increasingly been transferred to the EU, adding a further link to the communication chain.[21] For many years, the complex administrative structure was knit together by a set of interpretative circulars issued to planning authorities by central government, published as *The Encyclopedia of Planning Law*. This loose-leaf publication, updated regularly and available to the general public through public libraries, is supplemented in the era of e-governance by the publication of all regulations, codes, circulars and official letters on the DCLG website. Elements of this body of soft law may be questioned and fall to be judicially interpreted, as in the *Newbury* case,[22] where the minister relied heavily on a departmental circular in deciding a planning appeal. Newbury argued that the circular glossed the law and was inaccurate. Lord Fraser called the circular 'erroneous in law' and the House agreed in thinking that the minister's decision, if based on it, would have been unlawful.

The EU, with few service-delivery functions or duties of direct administration, which are largely exercised by national or regional administrations, is a regime devoted to regulation and held together by rules; one view of its chief executive body, the European Commission, is as a super-regulator, whose main function is rule-making, standardisation and the harmonisation of rules.[23] The network of administrations and European agencies of which the Commission is the focal point is held together by committees and rules. The setting-up of EU agencies, with important liaison functions with national administrations, third states and agencies, has added to the need for rules which, as EU agencies possess neither legislative nor executive functions, are advisory and interpretative.[24] In recent years too, governance in the EU has come increasingly to rely on a 'soft governance' format, the 'Open Method of Co-ordination', in which guidelines, codes of practice and other informal instruments agreed between the Commission and representatives of national governments are substituted for formal EU legislation made by 'the Community method'.[25] A tissue of non-binding or not fully binding inter-institutional agreements, codes of conduct, frameworks, resolutions, declarations, guidance notes, circulars, codes of practice, communications and no doubt other forms of 'soft law' has come into being.[26] Although technically not binding, these texts, though usually

[21] C. Demke and M. Unfried, *European Environmental Policy: The administrative challenge for the Member States* (European Institute of Public Administration, 2001).

[22] *Newbury District Council v Environment Secretary* [1980] 2 WLR 379.

[23] G. Majone, 'The rise of the regulatory state in Europe' (1994) 17 *W. European Politics* 77.

[24] G. Majone, 'Managing Europeanization: The European agencies' in Peterson and Shackleton, *The Institutions of the European Union*, 2nd edn (Oxford University Press, 2006).

[25] J. Scott and D. Trubek, 'Mind the gap: Law and new approaches to governance in the European Union' (2002) 8 *ELJ* 1; D. Trubek and L. Trubek, 'Hard and soft law in the construction of social Europe: The role of the open method of coordination' (2005) 11 *ELJ* 343.

[26] K. Wellens and G. Borchardt, 'Soft law in European Community law' (1989) 14 *EL Rev.* 267; M. Cini, From Soft Law to Hard Law? Discretion and Rule-making in the Commission's State Aid Regime, EUI, RSC 2000/35 (2000); L. Barani, 'Hard and soft law in the European Union: The case of social policy and the open method of coordination' W*ebpapers on Constitutionalism and Governance beyond the State* 2 (2006), available online.

published, are enforceable largely through peer-group pressure; from time to time they may surface and fall to be interpreted by the ECJ or national courts.[27]

A final explanation for the pervasiveness of rules in contemporary society takes us outside bureaucracy into civil society in an era of human rights. The advent of New Labour to government in 1997 brought greater commitment to an equal and inclusive society, which we find illustrated in the wording of the Equality Act 2006.[28] The overriding general duty laid on the new Commission for Equality and Human Rights is to exercise its functions:

> with a view to encouraging and supporting the development of a society in which:
>
> (a) people's ability to achieve their potential is not limited by prejudice or discrimination
> (b) there is respect for and protection of each individual's human rights
> (c) there is respect for the dignity and worth of each individual
> (d) each individual has an equal opportunity to participate in society
> (e) there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

Prioritising values connected with equality has had the incidental effect of greatly enhancing the case for rules. There is a widely held belief that rules support fairness, consistency and equal treatment; contrariwise, administrative discretion contributes to inconsistency and inequality of treatment. Rule-making can also be portrayed as contributing indirectly to equality by extending the possibility of participation in the policy-making process from stakeholders to the public at large. On the other hand, the fact that rules operate 'in all-or-nothing fashion' (as Dworkin has put it) creates serious conflict with the principle of 'individuation' favoured by courts; rules may maintain consistency while giving rise to unfairness. The world of rules is neither consistent nor symmetrical and West, summarising the qualities for which rule-making is valued, concludes that most of its goals 'conflict with most of the others'.[29]

3. Structuring discretion

Red light theorists, we saw in Chapter 1, have always put their trust in courts as the *primary* means of controlling what Lord Hewart once called 'administrative lawlessness';[30] green light theorists prefer legislation and 'firewatching' techniques. American professor Kenneth Culp Davis was emphatically not a

[27] J. Klabbers, 'Informal instruments before the ECJ' (1994) 31 *CML Rev.* 997; O. Treib *et al.*, *Complying with Europe: European Union harmonization and soft law in the Member States* (Cambridge University Press, 2005).

[28] The Act replaced three earlier agencies, the Commission for Racial Equality, the Equal Opportunities Commission, and the Disability Rights Commission, with a new umbrella agency, the CEHR.

[29] West, 'Administrative rule-making', p. 659.

[30] Lord Hewart, *The New Despotism* (Ernest Benn, 1929), Ch. 4.

red light theorist; indeed, his celebrated book, *Discretionary Justice*, opened by dissociating its author from Dicey's 'extravagant version of the rule of law'.[31] Davis saw that the control courts purported to exercise was inadequate; it was largely retrospective; it was external; it operated on the surface, 'pushing bricks on the nice part of the house'. He was concerned to bring inside the parameters of administrative law the 'dark and windowless' areas of administration, such as policing, pre-trial, parole and immigration procedures. It troubled Davis that administrative lawyers were focusing narrowly on areas of administrative activity – judicial review, tribunals and inquiries – that were already relatively open and controlled. He wanted to open windows on the arbitrariness that, he believed, thrives in darkness:

> If we stay within the comfortable areas where jurisprudence scholars work and concern ourselves mostly with statutory and judge-made law, we can at best accomplish no more than to refine what is already tolerably good. To do more than that we have to open our eyes to the reality that justice to individual parties is administered more outside courts than in them, and we have to penetrate the unpleasant areas of discretionary determinations by police and prosecutors and other administrators, where huge concentrations of injustice invite drastic reforms.[32]

Davis focused on the widely dispersed administrative discretion in the hands of the 'street-level bureaucracy' whose decisions he thought were, all too often, unlawful. He saw rule-making as the most effective technique for controlling the arbitrary decisions of the police and immigration officers whose practices he had studied. Rule-making would open up the administrative process and procure fairer, more consistent decisions. Rules, because they were written down and could be published, assisted transparency; they were more easily accessible than unpublished policies formulated in terms of wide administrative discretion. Because rules were general, rule-making encouraged comprehensive solutions to problems that 'go beyond the facts of individual cases'. It permitted broader participation by stakeholders and provided opportunities for public participation; indeed, Davis described bureaucratic rule-making hopefully as 'a miniature democratic process'. (We have to remember that Davis was thinking in terms of the American Administrative Procedure Act (AAPA), which prescribes a more open and participatory rule-making procedure than that found at the time in Britain).

These ideas gained ground rapidly with administrative lawyers, who saw Davis's approach as advantageous in terms both of individual and collective fairness and effective policy development.[33] Rules were 'rational' and sat more

[31] K. Culp Davis, *Discretionary Justice* (Greenwood Press, 1969).
[32] *Ibid*., p. 215
[33] West, 'Administrative rule-making'.

easily with Herbert Simon's model of rational administration. Rule-making was more efficient than individuated decision-making, enabling agencies to accomplish their statutory objectives more expeditiously than incremental policy development through individuated, adjudicated decisions.[34] Discretion permitted discrimination and was capable of unexpected and capricious change. Rules *structured* discretion and helped to ensure that policies approved by the public were actually implemented and observed; they were therefore a more effective weapon for control of administrative discretion than courts could ever be. The influence of these ideas cannot be overestimated. For a decade or more they became the perceived wisdom, prompting a large literature and inducing the belief that control of discretionary power was administrative law's paramount task.[35] The potential disadvantages of complexity and rigidity were downplayed.

The essential novelty of Davis's thesis lay in his conclusion that 'the degree of administrative discretion should often be more restricted; some of the restricting can be done by *legislators* but most of this task must be performed by *administrators*'.[36] His definition of discretion was simple and pragmatic. 'A public officer has discretion whenever the effective limits of his power leave him free to make a choice among possible courses of action and inaction.'[37] Discretion derived in the first instance from legislation or regulations but it did not stop there: 'The degree of discretion depends not only on grants of authority to administrators but also on what they do to enlarge their power.'[38] Davis saw that street-level bureaucrats possessed relatively high degrees of discretion unfettered by hierarchical, organisational authority. He focused on internal control through the hierarchical structures of the bureaucracy itself, arguing that it should be encouraged to 'structure' its discretion by formulating its policies as rules. The rules would not only be used internally for the guidance of the line- or street-level officials but also by the public, which would be able to access them for purposes of evaluation – very much the function of modern freedom of information legislation. Davis did not, however, argue that discretion could or should be eliminated; it was an essential part of a decision-making process:

> Even when rules can be written, discretion is often better. Rules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases. The justification for discretion is often the need for individualized justice. This is so in the judicial process as well as in the administrative process.

[34] See further, J. Mashaw, *Bureaucratic Justice* (Yale University Press, 1983).

[35] West, 'Administrative rule-making'. And see R. Baldwin and J. Hawkins, 'Discretionary justice: Davis reconsidered' [1984] *PL* 570; D. Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1990); K. Hawkins (ed.), *The Uses of Discretion* (Clarendon Press, 1991).

[36] Culp Davis, *Discretionary Justice*, p. 215 (emphasis ours).

[37] *Ibid.*, p. 4.

[38] *Ibid.*, p. 215.

> Every governmental and legal system in world history has involved both rules and discretion. No government has ever been a government of laws and not of men in the sense of eliminating all discretionary power.[39]

In his celebrated metaphor of discretion as 'the hole in the doughnut', Dworkin expressed the realisation that discretion is always shaped and structured by rules. 'Discretion does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept. It always makes sense to ask, "Discretion under which standards?" or "Discretion as to which authority?"'[40] Davis, on the other hand, thought in linear terms, believing it was possible 'not merely to choose between rules and discretion but to find the optimum point on the rule-to-discretion scale'.[41] This might suggest that rule-making is, as some economists think, a rational or largely rational process.[42] Many attempts have been made, mostly by those who write about regulatory theory, to fit rule-type to function and select the most appropriate rule-type from the toolkit of rules (see Chapter 6). Braithwaite has suggested, for example, that precise rules are better suited to regulating simple matters but that, as the situation or phenomena become more complex, principles deliver more consistency than rules.[43] But even when rule-makers try to be scientific, they often fail: their rules may, for example, be premised on mistaken assumptions as to how people will act, or fail properly to take into consideration the views of stakeholders.[44] This hints at important problems not only for rule-making but also for the supposedly scientific techniques of impact assessment discussed in Chapter 4 and, still more severe as we shall see in Chapter 6, for risk regulation.

4. Rules, principles and discretion

(a) Discretion to rules

At this point we need to think a little more deeply about the nature and quality of rules. We have so far been thinking in terms of Megarry's procedural distinction between 'law' and 'quasi-law' or, as we termed it, 'soft law'. This, however, is not the only way rules can be classified. Legal theorists distinguish 'rules', defined as applicable generally or 'across the board', from 'principles', which are less specific and more flexible, leaving a greater degree of discretion to the decision-maker – one reason why they recommend themselves to judges. Rules operate 'in all-or-nothing fashion'[45] or 'attach a definite detailed

[39] *Ibid.*, p. 17.
[40] R. Dworkin, *Taking Rights Seriously* (Duckworth, 1978), p. 31.
[41] Culp Davies, *Discretionary Justice*, p. 215.
[42] C. Diver, 'The optimal precision of administrative rules' (1983) 93 *Yale LJ* 65.
[43] J. Braithwaite, 'Rules and principles: A theory of legal certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47.
[44] R. Baldwin, *Rules and Government* (Clarendon Press, 1995), pp. 140–1.
[45] R. Dworkin, 'The model of rules I' in Dworkin, *Taking Rights Seriously* (Duckworth, 1978), p. 24.

legal consequence to a definite detailed state of fact'.[46] This is certainly a quality of the statutory drafting discussed in Chapter 4.

Rules embody policies which, according to Jowell, are transformed into rules by a 'process of legalisation':

> Policies are broad statements of general objectives, such as 'To provide decent, safe and sanitary housing,' 'To prevent unsafe driving.' The policy is legalised as the various elements of housing and driving are specified, providing, for example, for hot and cold running water, indoor toilets, maximum speed limits and one-way streets. A rule thus is the most precise form of general direction, since it requires for its application nothing more or less than the happening or non-happening of a physical event. For the application of the maximum speed rule, all we need do is determine factually whether or not the driver was exceeding thirty miles per hour . . . [47]

Dworkin famously distinguished 'policy' from 'principle'. A government may (as we saw) accept the 'abstract egalitarian principle' that it must treat its citizens as equals. (This broad general principle, we should note, is open to many different interpretations.) It then uses the principle to shape legislative strategies. 'Decisions in pursuit of these strategies, judged one by one, are matters of policy, not principle; they must be tested by asking whether they advance the overall goal, not whether they give each citizen what he is entitled to have as an individual.'[48] Principles, on the other hand, embody *rights* which act as 'trumps' over these decisions of policy in that government is required to respect them on a case-by-case, decision-by-decision basis.

Principles, according to Jowell, differ from rules in that they 'prescribe highly unspecific actions'. In a distinction reminiscent of Dworkin, Jowell tells us that principles:[49]

> arise mainly in the context of judicial decision-making. They involve normative moral standards by which rules might be evaluated. They are frequently expressed in maxims, such as 'No man shall profit by his own wrong,' 'He who comes to court shall come with clean hands.' They have developed in the judicial context over time, and are less suited to administrative decision making because they do not address themselves to economic, social or political criteria, but to justice and fairness largely in the judicial situation. A principle that may arise in the administrative context would be the maxim: 'Like cases shall receive like treatment.'

Perhaps more relevant to our subject are the principles that citizens should be equally treated by the administration; that policies should be consistent and

[46] J. Raz, 'Legal principles and the limits of law' 81 *Yale LJ* 823 (1972).
[47] J. Jowell, 'The legal control of administrative discretion' [1973] *PL* 178, 201.
[48] R. Dworkin, *Law's Empire* (Fontana, 1986), p. 223.
[49] A well-known definition by Roscoe Pound cited by J. Jowell, 'The legal control of administrative discretion'.

consistently administered; that intervention with citizen's rights should be proportionate to administrative policy-goals, etc.

As Jowell explains, rules are not simply the antithesis of discretion but are points on a continuum:

> Discretion is rarely absolute, and rarely absent. It is a matter of degree, and ranges along a continuum between high and low. Where he has a high degree of discretion, the decision-maker will normally be guided by reference to such vague standards as 'public interest' and 'fair and reasonable'. Where his discretion is low, the decision-maker will be limited by rules that do not allow much scope for interpretation. For example, a police officer's discretion is high when he has the power to regulate traffic at crossroads 'as he thinks fit.' If he were required to allow traffic to pass from East to West for three minutes and then from North to South for two minutes, subject to exceptional circumstances, then his discretion would be greatly reduced. A traffic light possesses no discretion at all.[50]

While some rules, like Jowell's example, are highly specific and not malleable, others are open-textured and flexible, leaving more room for discretion. Rules normally embody discretion because they can seldom be formulated with sufficient precision to eliminate it. Rules may also incorporate principles, just as principles may modify rules and reduce their specificity. Rules are also subject to interpretation, a judicial activity leaving much room for discretion.

Let us test these ideas against the hypothetical case of Anne, an unsighted woman who wishes to go into a café in a public park owned by Parktown local council with her guide dog.[51] A park bylaw provides: 'No dog may enter an establishment where food is served', a highly specific instruction leaving minimal room for interpretation. Would it apply, for example, to tables in front of a stall serving only cold drinks, tea and coffee? A notice on the café door repeats the bylaw. Yolande, a waitress, refuses to let the guide dog in. Anne objects and calls the manageress, Mrs Brown, arguing that the bylaw contravenes s. 22 (3) of the Disability Discrimination Act 1995 (DDA), which provides:

> It is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises—
>
> (a) in the way he permits the disabled person to make use of any benefits or facilities;
> (b) by refusing or deliberately omitting to permit the disabled person to make use of any benefits or facilities.

Mrs Brown thinks that Yolande has not discriminated. She has applied the rule literally: no dogs are admitted under any circumstances. But s. 24(1) of the DDA states that a person does discriminate against a disabled person if:

[50] *Ibid*.

[51] For further examples and explanation of the way rules operate, see W. Twining and D. Miers, *How to Do Things with Rules*, 4th edn (Butterworths, 1999).

> (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and
> (b) he cannot show that the treatment in question is justified.

This rather tortuous wording leaves much space for 'judgement discretion'. Technically perhaps, Mrs Brown's interpretation satisfies (a) but it certainly seems to gainsay the legislative intention.

So, can Yolande prove justification? By s. 24(3)(a), treatment is justified when action is taken 'in order not to endanger the health or safety of any person (which may include that of the disabled person)'. This rule embodies discretion, which is very lightly 'structured'; it comes towards the 'strong' end of Jowell's scale. Yolande may refuse to admit the guide dog if she is sure in her own mind that health or safety could be endangered; in the light of *Padfield* (p. 101 above), however, she will have to give reasons for her belief. *Padfield* passes discretion to the adjudicator. What is the applicable standard? Must the risk be low, high or very high? Is it enough that Yolande believes it to be high? Here the *Wednesbury* principle, according to which Yolande's discretion can be reviewed if it is manifestly unreasonable, is applicable.

But s. 24(3)(a) goes on to provide that the defence can only be claimed if 'it is reasonable, in all the circumstances of the case for [the defendant] to hold that opinion'. This formula transfers strong discretion to the adjudicator or judge reviewing the case, who is left to decide what is 'reasonable'. This 'judgement discretion' is structured first by reference to the *Wednesbury* principle that Yolande's conduct must not be so unreasonable that no reasonable waitress would act like that and, secondly, to 'vague standards' as to what conduct actually meets this test. This, John Griffith would argue, is what judges do every day (see p. 105).

A further possibility is opened by the fact that this incident took place in a public park. The DDA 2005 modifies the 1995 Act, inserting a new s. 49A. This specifies the duties of public authorities, amongst which we find a general duty to have due regard in carrying out its functions to:

> the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons.

Perhaps Parktown's bylaw offends this provision? If so, Parktown should have issued guidance to employees. But how detailed should that guidance be? Is it enough to set out or draw attention to the provisions of s. 49A? Should the guidance be interpretative, reformulating the section in simple language? Should it deal specifically with guide dogs? If it is too general, those at whom it is aimed (the street-level bureaucracy) may not understand it; if it is too detailed, they may not bother to read it, or may not understand it if they do. Perhaps, the bored and bemused reader might observe, it would be better to

rely on the good sense of the manageress; from which we might deduce either that there is no optimum point on the rules/discretion scale or that rules are not the optimal means of administration.[52] To Taggart:

> the line between law and discretion is unstable, and has broken down in important respects in recent years . . . [I]n truth there is no bright line separating law and discretion. The key is to recognise that, both in interpreting particular words in statutes and in divining the limits of broadly conferred discretionary powers, lawyers and judges are engaged in exactly the same interpretative process.[53]

So, we might add, with equal justification, are officials, administrators and other members of the street-level bureaucracy.

(b) Rules to discretion

Our 'No dogs' rule is a classic example of an 'over-inclusive rule' that does not admit of any exceptions. There are several ways to mitigate the harsh effects of over-inclusive rules. The first is to pile rule upon rule. Our bylaw could, for example, be amended to read: 'No dogs other than guide dogs may enter an establishment where food is served.' One reason why modern legislation tends to be too specific is precisely this wish to cover every possible contingency. Specific amendments may, however, store up problems for the future, opening the way (for example) to arguments over the meaning of the words 'establishment' and 'guide dog'. Another solution is a change of rule-type as Braithwaite (above) recommends: to turn from specific rules to principles. A more general notice – 'Dogs can enter this café only with the manager's permission' – would allow staff to admit dogs at their discretion. In exercising discretion, Mrs Brown would then be subject to Jowell's 'normative moral standards by which the rules might be evaluated'. These would include the statutory equality principle, general common law principles and prevalent community values, all of which are sufficiently flexible to allow the admission of guide dogs.

In the real world of the British social security system, where protagonists of rule-based administration were especially vocal during the 1960s, Titmuss emerged as a major advocate for discretion. Titmuss saw that welfare systems needed discretion for two fundamental reasons:

> First, because as far as we can see ahead and on the basis of all we know about human weaknesses and diversities, a society without some element of means-testing and discretion is an unattainable goal. It is stupid and dangerous to pretend that such an element need not exist . . . Secondly, we need this element of individualised justice in order to allow

[52] Baldwin, *Rules and Government* , p. 16; K. Hawkins, 'The use of legal discretion: Perspectives from law and social science' in Hawkins (ed.), *The Uses of Discretion*.

[53] M. Taggart, 'Australian exceptionalism in judicial review' (2008) 36 *Federal Law Review* 1, 13.

> a universal rights scheme, based on principles of equity, to be as precise and inflexible as possible. These characteristics of precision, inflexibility and universality depend for their sustenance and strength on the existence of some element of flexible, individualised justice.[54]

Consistency, in other words, is not always a desirable goal.

The third solution to our guide dog problem, which most people would see as most sensible, is simply to waive the over-inclusive rule. This is the discretionary power of 'selective enforcement', which sociologists see as necessary to deal with over-inclusive rules. We would all condemn a policeman for prosecuting an ambulance driver who breaks the speed limit when rushing to A&E. Again, the Licensing Act 2003 provides that a licence to sell alcohol lapses automatically on death of the licensee unless a transfer is applied for within seven days. When the Neath Council applied this provision to a grieving widow who had failed to apply within the statutory period, the local MP called the decision 'shockingly offensive', castigating the council for applying the law in 'such a rigid and insensitive way'. Quite correctly the council replied that it had no discretion in the matter, but local opinion was so clearly on the side of the bereaved family that it had to find some way out of the impasse. It did not resort to 'selective enforcement'; this might have interfered with the rights of third parties and is, in any event, much harder in these days of transparency, accountability, audit and inspection. Instead, it advised the licensee how to operate within the rules by serving food and beverages but not alcohol until a new licence could be applied for and granted – a solution that the MP thought inadequate.

We need to be careful here. It is one thing to applaud selective enforcement when it is used to mitigate the severity of a rule that has created a 'hard case'. It is important to bear in mind, however, that this is not the only or even the most usual way in which powers of selective enforcement can be used. It was indeed the selective enforcement by police officers of the rules supposed to govern stop-and-search procedures to target unpopular groups such as drug users that prompted Davis's rule-making theory. Quite correctly, Davis suspected that police officers routinely disregard the rules in favour of their own belief that some classes of people are simply undesirable and ought, if the officer wants to do this, to be stopped and searched at the officer's whim. (We shall pick this point up in *Gillan*, see p. 215 below). So civil libertarians are right to be afraid of police discretion because it can be so easily abused; and welfare lawyers are right to be frightened of discretion because of its potency as a weapon for social control. Welfare lawyers in particular have always stressed the need for consistency and equal treatment in decision-taking and pointed to the lack of transparency and opportunities for arbitrariness in discretionary decision-making.[55] (Note how the argument is becoming circular.)

[54] R. Titmuss, 'Welfare "rights", law and discretion' (1971) 42 *Pol. Q.* 113, 131.

[55] M. Partington, 'Rules and discretion in British social security law' in Gamillsheg (ed.), *In Memoriam Sir Otto Kahn Freund* (Stevens, 1980), p. 621.

Was Davis unduly optimistic about the power of rules to counter misuse of discretion? Reiss, a sociologist, thought he had closed his eyes to how people really behave:

> Davis relies on rule making as the principal means for confining discretion, on openness of discretionary processes as the major means for structuring discretion, and on supervision and review as the major means for checking discretion. These are, of course, the classic means and processes operating in modern bureaucracies. What is absent from his treatment, however – a deficiency that may puzzle behavioural scientists – is both a consideration of the relative importance of these factors and a consideration of how bureaucracies can turn these means to ends of justice or can find ways to circumvent them so that decisions go against the interests of individual parties.[56]

Goodin takes this argument to its logical conclusion, arguing that problems of bad faith or deficient institutional culture cannot be overcome merely by replacing discretion with rules.[57] One reason is that rules can never be drafted with sufficient precision, another that some discretion is 'inevitable' in the sense of being 'logically necessary to the operation of a system of rules at all'. Such discretions are inherent to the system: the choice to make rules ('policy discretion') can, for example, be shifted all around the system: 'from lower-level officials to higher ones, or onto judges, or onto Parliament, or whatever'. It cannot, however, ever entirely be eliminated. 'Judgement discretion', used whenever rules are interpreted, is equally hard to eliminate. Judges, as Cohen once remarked, are not slot-machines.[58] Even when the rules a court has to apply are apparently specific, judges have at their disposal principles, including the general principles of administrative and human rights law, to modify the rules. (See Lord Steyn in *Anufrijeva*, p. 210 below).

All the objectionable features of discretion – secrecy, inaccessibility, unfairness, arbitrariness – are possible in a rule-based system. Goodin instances a discretion that is objectionable because reasons do not have to be given for its use, such as a dress code in a bar or restaurant. Reasons are demanded; officials circumvent the rule by providing only 'boiler plate reasons', which re-state the reasons in terms of the rule ('you cannot come in because you are not properly dressed'.) The considerations that dictate abuse of discretion will drive the administrator to use rules in identical fashion. The question of rules and discretion is thus largely immaterial because only changes in administrative culture will bring about real change. 'Rules cannot, at least without substantial costs in other respects, prevent arbitrariness and other vices; for much the

[56] A. Reiss, 'Book review of K. C. Davis, *Discretionary Justice*' (1970) 68 *Michigan L. Rev.* 789, 795.

[57] R. Goodin, 'Welfare, rights and discretion' (1986) 6 *OJLS* 232.

[58] F. Cohen, 'Transcendental nonsense and the functional approach' (1935) 35 *Col. Law Rev.* 809.

same reasons that discretionary decisions display those attributes, rule-based decisions *can,* and *probably will*.'

> 'Bad' clients find that officials stand on the letter of the law or lodge unnecessary appeals designed to postpone payment; 'good' clients may receive the benefit of loopholes and ambiguities. Some seek to 'neutralize administration' by tying it in its own rules; e.g. by lodging unnecessary appeals which use up resources and time and may even be designed to overload the system to provoke concessions. Consultation procedures may be contested at every stage in the hope that a development plan or new regulations can be postponed indefinitely.[59]

In short, badly disposed officials and badly disposed welfare clients understand only too well how to play games with rules. Goodin's conclusions are reinforced by modern studies of accountability, which tend to show that work conditions and professional willingness to conform make it hard to control the behaviour of police and public servants simply by recourse to rules.[60]

In *Anufrijeva*,[61] Miss A was an asylum seeker entitled to income support pending a decision on her application. The rules applicable were laid down in the Income Support (General) Regulations 1987, which provided that a person lost the right to income support on ceasing to be an asylum seeker and ceased to be an asylum seeker on the date when the claim was 'recorded by the Secretary of State as having been determined'. A negative decision was recorded in her file together with the reasons for the officer's decision: 'This woman has cited numerous mishaps throughout the 1990s and puts her woes down to an encounter her father had with a drunken solicitor in 1991. There is no credibility in any of this and no Convention reason anyway.' The decision was notified directly to the Benefits Agency but was not at the time notified to the applicant. Unknowingly, Miss A went to claim benefit and was told that she had been struck off. Following a determination that she was not entitled to asylum, the case was returned to an immigration officer to consider her case for 'exceptional leave to remain'. It was not until she had failed to attend two interviews that Miss A received formal notice of the decision recorded in her file.

The Immigration Rules prescribe that someone refused leave to enter following the refusal of an asylum application shall be provided with a notice informing him of the decision and of the reasons for refusal. The notice of refusal shall also explain any rights of appeal available to the applicant and inform him of the means by which he may exercise those rights. Miss A therefore claimed entitlement to income support on the ground that these provisions were incompatible with the view that a decision that had not been notified was final; until notification, it remained provisional.

[59] Goodin, 'Welfare, rights and discretion'.
[60] See, e.g., R. Reiner, *The Politics of the Police*, 3rd edn (Oxford University Press, 2000.
[61] *R v Home Secretary, ex p. Anufrijeva* [2003] UKHL 36.

Though somewhat cynical of the HO justification of expense and administrative convenience for what had become a routine procedure, Lord Bingham found the wording clear and unambiguous. Parliamentary draftsmen had no difficulty in distinguishing between the *making* of a determination or decision and *giving notice of it* to the party affected. The words did not say and could not be fairly understood to mean 'recorded by the Secretary of State as having been determined . . . on the date on which it is so recorded and notice given to the applicant'. That would be to rewrite the rules. Furthermore, while Lord Bingham was willing to accept that the Home Secretary was 'subject to a public law duty to notify the appellant of his decision on her asylum application and, if it was adverse, his reasons for refusing it', any implied duty would be to give notice within a reasonable time. Failure to give notice within a reasonable time would be a breach of the Home Secretary's public law duty but would not necessarily nullify or invalidate his decision.

In strong contrast, Lord Steyn's speech for the majority described HO practice as a clear breach of a constitutional principle requiring access to the courts and of the rule of law: whatever the 'niceties of statutory language . . . the semantic arguments . . . cannot displace the constitutional principles'. Lord Steyn went on to say:

> In oral argument before the House counsel stated that the Secretary of State did not condone delay in notification of a decision on asylum. These were weasel words. There was no unintended lapse. The practice of not notifying asylum seekers of the fact of withdrawal of income support was consistently and deliberately adopted. There simply is no rational explanation for such a policy. Having abandoned this practice the Secretary of State still seeks to justify it as lawful. It provides a peep into contemporary standards of public administration. Transparency is not its hallmark. It is not an encouraging picture . . .
>
> The arguments for the Home Secretary ignore fundamental principles of our law. Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system . . .
>
> This view is reinforced by the constitutional principle requiring the rule of law to be observed. That principle too requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected. The antithesis of such a state was described by Kafka: a state where the rights of individuals are overridden by hole in the corner decisions or knocks on doors in the early hours. That is not our system. I accept, of course, that there must be exceptions to this approach, notably in the criminal field, e.g. arrests and search warrants, where notification is not possible. But it is difficult to visualise a rational argument which could even arguably justify putting the present case in the exceptional category.[62]

[62] [2003] UKHL 36 [24] [26] [28].

These contrasting methods of interpretation tell us more about the relationship of 'principles' and 'rules'. Lord Steyn would certainly support the textbook statement that 'the standards applied by the courts in judicial review must ultimately be justified by constitutional principle, which governs the proper exercise of public power in any democracy'.[63] With Dworkin and Jowell, he clearly sees both rules and policies as giving way to principles that embody human rights; principles 'trump' rules, in Dworkin's phrase. Lord Bingham's guiding principle differs. He believes that, under the rule of law:

> Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purposes for which the powers were conferred and without exceeding the limits of such powers.[64]

This classical principle of English judicial review points towards his more conservative style of judicial interpretation according to which statutory texts, unless clearly ambiguous, must be interpreted literally.

The principle ultimately applied by the House of Lords, that a decision comes into force only when notified, is far-reaching and will need amplification by further rules. It may be sufficient to issue guidance to immigration officials that notice of determinations must be given to persons affected, a policy change easily underpinned by ICT: computers can be programmed to generate letters of notice whenever a final determination is filed. But has the decision wider implications? If so, circulars akin to HO circulars to the police may be necessary, warning officials of the new judicial requirement.

Lord Steyn's picture of a 'consistent and deliberately adopted *practice*' of non-notification suggests much deeper problems. It reminds us of the *Afghan hijackers* case (p. 134 above), where a HO minister and his senior officials deliberately timed their decision-making with a view to defeating an asylum claim. It is not so much systemic incompetence in an immigration service characterized by a previous Home Secretary as 'unfit for purpose' (p. 65 above) as systemic wrongdoing stemming from a HO culture of hostility to asylum seekers. This picture receives confirmation from an external review of the Border and Immigration Agency (now the UK Border Agency) conducted by the Independent Asylum Commission (IAC).[65] The IAC called the immigration service 'shameful for the UK' and a 'shameful blemish on the UK's reputation' – strong words, only slightly mitigated by its overall finding that the service was 'improved and improving'. The service still 'denies sanctu-

[63] S. A. de Smith, Lord Woolf and J. Jowell, *Judicial Review of Administrative Action*, 6th edn (Sweet & Maxwell, 2007), [1-016], part of an introductory chapter in the last edition that seems to align the authors with common law constitutionalism.

[64] T. Bingham, 'The rule of law' (2007) 66 *CLJ* 67.

[65] Interim findings of the IAC, *Fit for Purpose Yet?* (2007). The IAC, set up by the Citizen Organising Foundation with the support of London Citizen, is funded by charitable organisations. See also JCHR, *The Treatment of Asylum Seekers*, HC 60 (2006/7) and *Government Response*, HC 47 (2006/7).

ary to some who genuinely need it and ought to be entitled to it; is not firm enough in returning those whose claims are refused; and is marred by inhumanity in its treatment of the vulnerable'. The IAC was particularly concerned by the quality of initial decisions, largely made (as we saw in *Anufrijeva*) on the subjective impressions of a single caseworker, whose opinion as to the reliability of testimony was often based on prejudice.[66] Coupled with an adversarial stance in the appeals process, this operated to prejudice asylum seekers, who were often unable to do justice to their case because of ignorance and vulnerability. The prevalent 'culture of disbelief' amongst decision-makers, exacerbated by inadequate qualifications and training, led to 'some perverse and unjust decisions'.

This directly supports Goodin's view that the best hope of administrative change lies in changing the street-level culture, reinforcing changes with street-level accountability regimes.[67] This is how the Agency hopes to improve the immigration process: first, it is recruiting higher calibre staff with improved qualifications; and, secondly, it is testing a new asylum model whereby a single asylum case worker 'owns' a case from its initiation until final outcome: not more rules but greater discretion based on trust and responsibility in the 'street-level bureaucracy'. This is a shift away from modern management-controlled, juridified bureaucracy back towards the discretionary administrative processes preferred by Titmuss.

In the *Prague Airport* case,[68] the HO feared a flood of East European Roma asylum seekers at British airports. Immigration officers were therefore stationed at Prague airport to give pre-entry clearance to passengers before boarding. The Race Relations (Amendment) Act 2000, passed to apply the Race Relations Act 1976 to public authorities, contained substantial exceptions for immigration, and the Immigration (Leave to Enter and Remain) Order 2000 was widely drafted so as to give immigration officers 'strong discretion' in the matter. Art. 7(1) stated:

> An immigration officer, whether or not in the United Kingdom, may give or refuse a person leave to enter the United Kingdom at any time before his departure for, or in the course of his journey to, the United Kingdom.

The Minister followed this up with an authorisation, made under the 1976 Act, permitting officials to subject persons to a 'more rigorous examination than other persons in the same circumstances' by reason of that person's ethnic or

[66] See also NAO, *Improving the Speed and Quality of Immigration Decisions* HC 535 (2003/4); R. Thomas, 'Assessing the credibility of asylum claims: EU and UK approaches examined' (2006) 8 *Eur. J. of Migration and Law* 79.

[67] P. Hupe and M. Hill, 'Street-level bureaucracy and public accountability' (2007) 85 *Pub. Admin.* 279, 291–2.

[68] *European Roma Rights Centre v Immigration Officer at Prague Airport* [2004] UKHL 55 noted in R. Singh, 'Equality: The neglected virtue' (2004) *EHRLR* 141.

national origin. The HO expanded this regulatory framework with internal guidance to make the instructions more specific. The guidance, as Lord Steyn read it, was designed to show immigration officers how to carry out their functions at Prague Airport. It stated:

> The fact that a passenger belongs to one of these ethnic or national groups [including Roma] will be sufficient to justify discrimination – without reference to additional statistical or intelligence information – if an immigration officer considers such discrimination is warranted.

Acting for the Roma, the ERRC complained that the procedures were carried out in an unlawfully discriminatory manner, in that would-be travellers of Roma origin were subjected to longer and more intrusive questioning than non-Roma, required to provide proof of matters taken on trust from non-Roma and far more of them were refused leave to enter than were non-Roma. Perhaps surprisingly, the HO chose not to stand on the ministerial authorisation but argued that their procedures did not in any event amount to discrimination: 'individual differences in treatment were explicable, not by ethnic difference, but by more suspicious behaviour'.

By a majority, the House of Lords held that it was discriminatory to single out a particular group of immigrants for harsher treatment on the ground that they were more likely to be asylum seekers. Such conduct is 'the reverse of the rational behaviour we now expect from government and the state . . . If distinctions are to be drawn, particularly upon a group basis, it is an important discipline to look for a rational basis for those distinctions.' As Lady Hale put it:

> The Court of Appeal accepted that the judge was entitled to find that the immigration officers tried to give both Roma and non-Roma a fair and equal opportunity to satisfy them that they were coming to the United Kingdom for a permitted purpose and not to claim asylum once here. But they considered it 'wholly inevitable' that, being aware that Roma have a much greater incentive to claim asylum and that the vast majority, if not all, of those seeking asylum from the Czech Republic are Roma, immigration officers will treat their answers with greater scepticism, will be less easily persuaded that they are coming for a permitted purpose, and that 'generally, therefore, Roma are questioned for longer and more intensively than non-Roma and are more likely to be refused leave to enter than non-Roma' . . . The Roma were being treated more sceptically than the non-Roma. There was a good reason for this. How did the immigration officers know to treat them more sceptically? Because they were Roma. That is acting on racial grounds. If a person acts on racial grounds, the reason why he does so is irrelevant . . . The law reports are full of examples of obviously discriminatory treatment which was in no way motivated by racism or sexism and often brought about by pressures beyond the discriminators' control: the council which sacked a black road sweeper to whom the union objected in order to avoid industrial action, the council which for historical reasons provided fewer selective school places for girls than for

> boys. [69] But it goes further than this. The person may be acting on belief or assumptions about members of the sex or racial group involved which are often true and which if true would provide a good reason for the less favourable treatment in question. But 'what may be true of a group may not be true of a significant number of individuals within that group' [fn omitted]. The object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group . . .
>
> The combination of the objective of the whole Prague operation and a very recent ministerial Authorisation of discrimination against Roma was, it is suggested, to create such a high risk that the Prague officers would consciously or unconsciously treat Roma less favourably than others that very specific instructions were needed to counteract this. Officers should have been told that the Directorate did not regard the operation as one which was covered by the Authorisation. They should therefore have been given careful instructions in how to treat all would-be passengers in the same way, only subjecting them to more intrusive questioning if there was specific reason to suspect their intentions from the answers they had given to standard questions which were put to everyone.
>
> It is worth remembering that good equal opportunities practice may not come naturally. Many will think it contrary to common sense to approach all applicants with an equally open mind, irrespective of the very good reasons there may be to suspect some of them more than others. But that is what is required by a law which tries to ensure that individuals are not disadvantaged by the general characteristics of the group to which they belong. In 2001, when the operation with which we are concerned began, the race relations legislation had only just been extended to cover the activities of the immigration service. It would scarcely be surprising if officers acting under considerable pressure of time found it difficult to conform in all respects to procedures and expectations which employers have been struggling to get right for more than quarter of a century.[70]

Once again we find emphasis on culture: this time the culture of discrimination. Whether or not the ministerial authorisation was operative at Prague Airport, the thinking that underlay it remained the same so that the rules structured and defined the officials' discretion. The culture would continue to infuse the institutional decision-making; only a change of heart and rigorous training could eliminate it.

Lord Brown, who (as Simon Brown LJ) had contributed to the Court of Appeal decision in *Prague Airport*, advanced the opposite side of this argument in *Gillan*.[71] The allegation was that police had used stop-and-search powers under s. 44 of the Terrorism Act 2000 in a case to which it was not applicable; they had also used the powers in a discriminatory fashion to pick out and search one of the defendants because he was from an ethnic minority. Lord Brown thought the common police practice of 'intuitive

[69] See *R v Commission for Racial Equality, ex p. Westminster City Council*) [1985] ICR 827; *R v Birmingham CC, ex p. Equal Opportunities Commission* [1989] AC 1155.

[70] [2004] UKHL 55 [81–5].

[71] *R (Gillan) v Metropolitan Police Commissioner* [2006] UKHL 12 [77] [84]. The two viewpoints resurfaced in *AL(Serbia) v Home Secretary* [2008] 1 WLR 1434, where the problems of the consistency principle were again addressed.

stop-and-search' well justified. It was not wrong to take ethnic origin into account provided always, as the HO guidance authorised by PACE provided, that the power was used sensitively and the selection made for reasons connected with the perceived terrorist threat and not on grounds of racial discrimination:

> Imagine that following the London Underground bombings last July the police had attempted to stop and search everyone entering an underground station or indeed every tenth (or hundredth) such person. Not only would such a task have been well nigh impossible but it would to my mind thwart the real purpose and value of this power. That, as Lord Bingham puts it . . . is not 'to stop and search people who are obviously not terrorist suspects, which would be futile and time-wasting [but rather] to ensure that a constable is not deterred from stopping and searching a person whom he does suspect as a potential terrorist by the fear that he could not show reasonable grounds for his suspicion.' It is to be hoped, first, that potential terrorists will be deterred (certainly from carrying the tools of their trade) by knowing of the risk they run of being randomly searched, and, secondly, that by the exercise of this power police officers may on occasion (if only very rarely) find such materials and thereby disrupt or avert a proposed terrorist attack. Neither of these aims will be served by police officers searching those who seem to them least likely to present a risk instead of those they have a hunch may be intent on terrorist action.

Lord Brown accused the House of supporting practice that was 'not merely wrong but also silly':

> [I]t is important, indeed imperative, not to imperil good community relations, not to exacerbate a minority's feelings of alienation and victimisation, so that the use of these supposed preventative powers could tend actually to promote rather than counter the present terrorist threat. I repeat . . . that these stop and search powers ought to be used only sparingly. But I cannot accept that, thus used, they can be impugned either as arbitrary or as 'inherently and systematically discriminatory' . . . simply because they are used selectively to target those regarded by the police as most likely to be carrying terrorist connected articles, even if this leads, as usually it will, to the deployment of this power against a higher proportion of people from one ethnic group than another. I conclude rather that not merely is such selective use of the power legitimate; it is its *only* legitimate use. To stop and search those regarded as presenting no conceivable threat whatever (particularly when that leaves officers unable to stop those about whom they feel an instinctive unease) would itself constitute an abuse of the power. Then indeed would the power be being exercised arbitrarily.

Davis may have been over-optimistic in thinking that rules would radically change the behaviour of the New York drugs squad by structuring the discretion. Whether or not it was rule-based, police conduct would display much the same attributes as their discretionary decisions. Rules that undermine bureaucratic efficiency, principles or values that are seen as too costly or cut across the prevailing administrative ethos will be pushed to one side and simply ignored.

Thus doubt is cast both on rule-making as a tool for structuring and confining discretion and on the juridified world of rules and rule-change, where conduct that falls outside the rules is seen as capable of being corrected by a further flurry of rule-making. In the real world, as Goodin recognised, the strongest influences on decision-making are social conditioning, group morality, attitudes of mind and prejudices. Something much more difficult and subtle than blind obedience to rules is required of street-level bureaucrats as well as judges.

5. Rules, individuation and consistency

The due-process principles that prevailed in *Anufrijeva* are designed for the protection of individuals: they grant to the 'individual or groups against whom government decisions operate' the chance to make their views known and participate in the decision-making process.[72] They are part of the adjudicative value of 'individuation', by which we mean that someone entrusted with discretionary power has an obligation to consider the merits of the *specific case* with which he is confronted; he cannot simply apply a rule. In English administrative law, this is expressed in the classical principle that 'a decision-making body exercising public functions which is entrusted with discretion must not, by the adoption of a fixed rule or policy, disable itself from exercising its discretion in individual cases. It may not "fetter" its discretion.'[73] In the *Lavender* case,[74] for example, the Minister of Housing and Local Government adopted a policy whereby he would not exercise his statutory power to grant planning permission for mineral working 'unless the Minister of Agriculture is not opposed to working'. Unless the agricultural objection had been waived, the minister simply refused planning permission. This somewhat extreme application of the 'joined up government' policy was quashed as illegal by the High Court.

The suggestion is then that every rule may have an exception and that discretion involves at least a limited power of free choice that must be personally exercised. (This belief informed our earlier, common-sense qualification of the 'No dogs' rule that guide dogs should be treated as exceptional.) As Galligan puts it:

> There is an idea buried deep in the hearts of various constitutional theorists and judges that 'to discipline administrative discretion by rule and rote is somehow to denature it'. According to this idea, there is something about the nature of discretionary power which requires each decision to be made according to the circumstances of the particular situation,

[72] They are often described as 'dignitary values': see J. Mashaw, 'Dignitary Process: A political psychology of liberal democratic citizenship' (1987) 39 *Univ. of Florida LR* 433. And see below, Ch. 14.

[73] de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* [9-002].

[74] *H. Lavender & Son v Minister of Housing and Local Government* [1970] 1 WLR 1231.

> free from the constraints of preconceived policies as to the ends and goals to be achieved by such power. The circumstances of the situation will indicate the proper decision and policy choices must remain in the background.[75]

As we saw earlier, the 'non-fettering' view of discretionary power encouraged lawyers to look coldly at the practice of 'quasi-legislation' and it was not until the 1970s that courts took the first steps towards getting to grips with the phenomenon of bureaucratic rule-making. In the *British Oxygen* case, the Board of Trade had power to award investment grants in respect of new 'plant'. BOC asked for £4 million in respect of gas cylinders each valued at £20 but was refused because the Board had a rule of practice not to approve grants on items valued individually at less than £25. The House of Lords upheld the practice and Lord Reid made this important statement of the individuation principle:

> It was argued . . . that the Minister is not entitled to make a rule for himself as to how he will in future exercise his discretion . . . The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application' . . . I do not think there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented arguing a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say – of course I do not mean to say that there need be an oral hearing. In the present case the respondent's officers have carefully considered all the appellants have had to say and I have no doubt that they will continue to do so.[76]

Here the House of Lords acknowledged that discretion entails a power in the decision-maker to make policy choices, not just to deal with the individual case, but to develop a coherent and consistent set of guidelines which seek to achieve ends and goals within the scope of powers. In short, 'discretion' must include the discretion to make rules.[77]

With the evolution of mass, ITC-based administrative systems, matched by judicial development of the consistency, or equal treatment, principle, the 'no-fettering' rule has become increasingly hard to apply. In the recent *Ealing* case, it crept into the contemporary world of audit only to be sidelined.[78] The Audit Commission was required by s. 99 of the Local Government Act 2003 to 'produce a report on its findings in relation to the performance of English local

[75] D. Galligan, 'The Nature and function of policies within discretionary power' [1976] *PL* 332.
[76] *British Oxygen Co Ltd v Ministry of Technology* [1970] 3 WLR 488.
[77] Galligan, 'The Nature and function of policies within discretionary power', p. 332.
[78] *Audit Commission v Ealing Borough Council* [2005] EWCA Civ 556. See also *R (Ahmad) v Newham LBC* [2009] UKHL 14.

authorities in exercising their functions'. In 2004 the Audit Commission had, after extensive consultation, published a document entitled *Comprehensive Performance Assessment Framework 2004*, extracts from which read:

10. The CPA framework brings together judgements about:

    - Core service performance in education, social services, housing environment, libraries and leisure, benefits, and use of resources; and
    - The council's ability measured through a corporate assessment.

    . . .

12. Each of the individual service judgements and the use of resources judgement are awarded a score of 1 to 4, with 1 being the lowest score and 4 being the highest. These are then combined into an overall **core service performance score** of 1 to 4.
13. Each of the themes scored within the corporate assessment (ambition, prioritisation, focus, capacity, performance management, achievement of improvement, investment, learning and future plans) are also awarded scores of 1 to 4. These are then combined to reach an overall **council ability score** ranging from 1 to 4.
14. The overall CPA category ('excellent', 'good', 'fair', 'weak' and 'poor') is reached by combining the overall core service performance and council ability scores in the form of a matrix (see below). Where a council has not yet achieved a specified level of performance on education, social care or financial management (or scores a 1 on any other service), rules apply which limit a council's overall category, see paragraphs 29–30.

CORE SERVICE PERFORMANCE

Scores		1	2	3	4
COUNCIL ABILITY	1	poor	poor	weak	fair
	2	poor	weak	fair	good
	3	weak	fair	good	excellent
	4	fair	good	excellent	excellent

. . .

Rules

29. Rules limit a council's overall CPA category where a council's score falls below a specified level on education, social care or financial standing, or scores a 1 on any other service.
30. The rules are as follows:

    - [Rule 1] A council must score at least 3 (2 stars) on education, social services star rating, and financial standing to achieve a category of 'excellent' overall;
    - [Rule 2] A council must score at least 2 (1 star) on education, social services star rating and financial standing to achieve a category of 'fair' or above; and
    - [Rule 3] A council must score at least 2 (1 star) on all other core services to achieve a category of 'excellent' overall.

Ealing achieved scores of 3 on each of core service performance and council ability. Applying the approach set out at paragraph 14 of the CPA Framework it would have been categorised as 'good', if the matter had stopped at that point. However, Ealing had received a zero star rating from the Commission for Social Care Inspection (CSCI) with the result that under Rule 2 Ealing could not be categorised as better overall than 'weak', effectively dropping two categories. Notified that its performance was 'weak', Ealing LBC applied for judicial review.

Following *Lavender*, Walker J held that by simply accepting the verdict of the CSCI, another statutory body, in respect of Ealing's social services performance, the Audit Commission had fettered or unlawfully delegated its discretionary powers. The Court of Appeal disagreed:

> The principle that a body given a statutory power by Parliament must exercise that power itself and not delegate its exercise to another is well-established in administrative law . . . The real issue is whether the Audit Commission's approach as set out in rule 2 offends against the principle. It is conceded by Ealing that the Audit Commission is entitled to adopt the professional judgments of the CSCI, as embodied in the assessments on the vertical and horizontal axes of the annexed matrix, as its own. That is an understandable concession, since the CSCI is the inspectorate specialising in the assessment of local authorities' social care performance. It would be absurd for the Audit Commission to have to re-assess all those findings itself, and that cannot have been Parliament's intention.
>
> Does this mean that the Audit Commission has unlawfully delegated its s. 99 decision to the CSCI? On reflection we have concluded that it does not. The matrix which embodied these weightings or trade-offs was publicly available in the SSI/CSCI Operating Policies document and it must be the case that the Audit Commission was familiar with it and with the weightings attached to the various 'scores' on the two axes. The Audit Commission must be taken to have been content with those weightings and to have adopted them. This is not a case where the CSCI made its own separate judgments from time to time about the star rating of an individual authority. The star ratings follow automatically from the 'scores', to which Ealing takes no objection. It is a mechanical exercise, once one has the scores and the matrix. As the . . . Audit Commission puts it at paragraph 4(c):
>
> > the social services star rating is not based on the subjective judgment of the Chief Inspector, but is arrived at by the application of a set of transparent and objective rules to those judgments. There is no discretion involved in translating those judgments into a star rating.
>
> This is, therefore, a very different case from *Lavender*. There the relevant Minister's policy was to allow his decision to be dictated by what another Minister decided *in any individual case*. Here the Audit Commission has in effect adopted as its own a series of weightings, produced by the CSCI, which result in a star rating in an entirely predictable way. In our view it is entitled to do that. It is not delegating its decision in any individual case to the CSCI, since the CSCI does not make any such individual decision once it has arrived at the 'scores'. It is simply that the Audit Commission has itself decided to adopt certain principles for achieving its categorisation.

Commenting on the fact that Ealing had chosen not to challenge the CSCI decision about its score, the Court of Appeal decided that no real prejudice had been suffered. Does this suggest that the only way to challenge rules is by resort to a second-stage adjudicative process, more discretionary, more individuated and better able to handle exceptions?

That computerised mass service delivery makes insufficient allowance for special circumstances and is thus incompatible with the *individuated* decision-making required by the administrative law watchdogs was the concern of the Australian Administrative Review Council in a report on automated assistance. The AARC thought that automated assistance could offend 'the administrative law values of lawfulness and fairness because it could fetter the decision maker in the exercise of their discretionary power'. Conceding its use 'as a tool to guide officers', the AARC set out firm guidelines: officers trained to 'understand the relevant legislation', able 'to explain a decision to the affected person', and capable of making the decision manually, should always be on hand.[79] In one sense, this undercuts the benefits of ICT. It is just because trained and expert officials are *not* on hand in sufficient numbers that we turn to ICT to deal with mass administrative systems. It is a mistake to think that ICT can be programmed for 'individuation'; it is for equal treatment and consistency that we turn to its data storage and retrieval capacities.

To balance consistency with individual treatment in such situations is an almost impossible task, as shown by a study of the effects of computerisation on administrative decision-making conducted for the then UK Department of Social Security.[80] Not unexpectedly, this revealed that computerisation pushed departmental decision-making towards the 'bureaucratic justice' model of administrative decision-making, in which the goal is the consistent and accurate application of rules and the means of redress are administrative and hierarchical:

> Thus it was likely to lead to an even more bureaucratized system rather than one that was more sensitive to the needs and circumstances of claimants or one that made it easier for them to assert their rights. The main reasons for this were that the DSS adopted a 'top-down' orientation to computerisation that gave priority to the interests of the government rather than a 'bottom-up' orientation that would have given priority to the interests of the claimants or staff; and that the aim of the programme was to make administrative savings rather than to improve quality of service (whatever that might mean).[81]

With automated systems, rules have taken over from discretion and individuation. The emphasis is managerial with heavy reliance on audit and other

[79] AARC, *Automated Assistance in Administrative Decision Making* (Commonwealth of Australia, 2004) [16] [17].

[80] M. Adler and P. Henman, 'Computerisation and e-government in social security: A comparative international study' (2003) 23 *Critical Social Policy* 139.

[81] M. Adler, 'Fairness in context' (2006) 33 *JLS* 615, 626.

performance measures to bring about improvements in service delivery. Once again, we find a clash of values between the 'top-down', managerial or bureaucratic model of accountability through rules and 'the legal and consumerist models of administrative justice that embody "bottom-up" orientations.'[82]

6. Bucking the rules

The previous cases have in common that they involve challenge to the idea of policy-making through rules. But what is to happen in the reverse case, where the administration wishes to depart from rules or policies on which a third party seeks to rely? In the *US Tobacco* case,[83] UST had negotiated permission to market oral snuff, subject to the condition that it would not be marketed to young persons. On the strength of this assurance, UST built a factory in Scotland. Later, the minister, acting on the advice of an expert advisory committee, changed the rules by making regulations to ban oral snuff. Although the regulations were subject to annulment by negative resolution, had been laid before the House of Commons and were not annulled, UST argued that they were ultra vires the parent Consumer Protection Act 1987, which did not cover public-health issues. When this argument failed, UST contended that it had been led to believe that it could market snuff, had acted on this expectation, and the concession could consequently not be withdrawn so long as the original conditions were observed. This is the notion of 'administrative estoppel', according to which a promise or representation is held to bind the promisor where the promisee acts on it to his detriment even though the conditions necessary to constitute a binding contract are not fulfilled.[84] Estoppel effectively fetters the administrative discretion and is capable of creating substantive rights. Rightly, this argument failed also; it was held that the Minister could not fetter his statutory discretion to take action in the public interest unless the action taken was unfair or unreasonable. All that UST achieved was the classical 'halfway house' of natural justice (see Chapter 14). It had not had access to the scientific advice underpinning the ministerial decision hence had no real opportunity to combat it; 'such a draconian step should not be taken unless procedural propriety has been observed and those most concerned have been treated fairly'.

The outcome, similar to the *BOC* case, sets in place a sensible framework within which courts and administration can operate. On the one hand, public authorities must be capable of acting in the public interest, retaining the power to change their policies, as they justifiably did in the *US Tobacco* case. The role of the courts is procedural; it is their duty to ensure that any individual whose

[82] *Ibid.*, p. 634.

[83] *R v Health Secretary, ex p. United States Tobacco International Inc.* [1982] QB 353.

[84] See *R v Liverpool Corpn, ex p. Liverpool Taxi Fleet* Operators' *Association* [1972] 2 WLR 1262; *Lever Finance Ltd v Westminster City Council* [1971] 1 QB 222; *Western Fish Products Ltd v Penrith District Council* [1981] 2 All ER 204.

interests are affected receives a fair hearing. There is a strong case, however, against allowing ultra vires decisions to stand. Public bodies do not always act honourably: consider, for example, the case of a local authority which sets out to bind its successor to a policy that it had contested in local elections; or look forward to the cases in Chapter 8, which show public authorities dealing with public funds in a way that courts thought entirely improper. Thus the classical rule is that not even contract is strong enough to bind an authority to an unlawful decision; courts should be slow, as the Court of Appeal remarked in *Rowland*,[85] 'to fix a public authority permanently with the consequences of a mistake, particularly when it would deprive the public of their rights'. Finding that it had been mistaken in treating a reach of the Thames as private water, the Thames Water Authority removed the 'Private' notices, allowing the public access. The Court of Appeal held this action to be lawful and taken in the public interest, though it recognised that a shark had recently swum into the national waters. In *Stretch v United Kingdom*,[86] S had been granted a building lease with an option to renew, which turned out, when he sought to exercise it, to have been beyond the powers of the local authority. The ECtHR ruled that a 'legitimate expectation' had been created, treating this as a disproportionate deprivation of 'property' under ECHR Protocol 1.

We first met the idea of legitimate expectation in the *GCHQ* case (p. 107 above), where it was held that a trade union must be consulted before any sudden change of policy (removal of the right to belong to a trade union) was taken. In *AG of Hong Kong v Ng Yuen Shiu*,[87] the Hong Kong government had announced changes in its policy of repatriating illegal immigrants. The promise of a personal interview and individual consideration of each case was made, on the strength of which illegal immigrants were asked to give themselves up. When the applicant responded, he was given no opportunity to present a case. The Privy Council ruled that the promise had created procedural expectations which must be observed; no repatriation without interview. The Privy Council did not, however, rule on the substantive issue.

These 'halfway house' cases imply procedural rights to make a case, not substantive entitlements; the decision is returned to the allotted decision-maker, which, in the light of the existing policy, may or may not be a right worth having. As Lord Reid put it somewhat wryly in *British Oxygen*, 'In the present case the respondent's officers have carefully considered all the appellants have had to say and I have no doubt that they will continue to do so.' Only occasionally is there a hint of something better, as in the exceptional *Khan* case,[88] where the Khans had written to the Home Office to inform themselves about current policy on entry for adoption. A reply set out four conditions to be

[85] *Rowland v Environment Agency* [2003] EWCA Civ 1885.
[86] *Stretch v UK* (2004) 38 EHHR 12 noted in Blundell, 'Ultra vires legitimate expectations' [2005] *Judicial Review* 147. In *Rowland*, the CA held the action taken to be proportionate.
[87] *AG of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629.
[88] *R v Home Secretary, ex p. Asif Khan* [1985] 1 All ER 40.

satisfied. The Khans' application to adopt satisfied all four conditions but was rejected on another ground. The Court of Appeal held that the HO was held to its guidance on policy, unless there had been proper notification of policy change and the Khans had been given an opportunity to make representations, which should be seriously considered, as to the added condition. This is 'procedure plus', carrying the implication that the new decision must be favourable.

The new and stronger doctrine of substantive legitimate expectation derives from *Coughlan* where C, a severely disabled elderly woman, went to live in a nursing home run by a health authority, acting on an assurance that this would be her 'home for life'.[89] Later, the authority decided for financial reasons to close the home. Challenged, it argued that the overriding public interest entitled it to break the 'home for life' assurance. Lord Woolf speaking for the court first disposed of the 'no fettering' argument as one that would 'today have no prospect of success' and then outlined three possible outcomes, the first two uncontentious, the third contestable:

> (a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on *Wednesbury* grounds.
> (b) The court could decide that the promise or practice induced a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require an opportunity for consultation unless there is an overriding reason to resile from it. The court itself will judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires.
> (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive,* not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.

In the instant case, the authority knew of the promise and its seriousness; it referred to its new policies and the reasons for them; it knew that something had to yield, and it made a choice which, whatever else can be said of it, could not easily be challenged as irrational. Could the court go further? Lord Woolf thought that it could:[90]

[89] *R v North and East Devon Health Authority, ex p. Coughlan* [2000] 2 WLR 622 [57] noted in Craig and Schonberg, 'Substantive legitimate expectation after *Coughlan*' [2000] *PL* 684.

[90] [2000] 2 WLR 622 [66] [71], citing *R v IRC, ex p. Unilever plc* [1996] STC 681; R *v IRC, ex p. Preston* [1985] AC 835 and *R v MAFF, ex p. Hamble (Offshore) Fisheries Ltd* [1996] 2 All ER 714.

> In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process. The present class of case is visibly different. It involves not one but two lawful exercises of power (the promise and the policy change) by the same public authority, with consequences for individuals trapped between the two. The policy decision may well, and often does, make as many exceptions as are proper and feasible to protect individual expectations . . . If it does not . . . the court is there to ensure that the power to make and alter policy has not been abused by unfairly frustrating legitimate individual expectations. In such a situation a bare rationality test would constitute the public authority judge in its own cause, for a decision to prioritise a policy change over legitimate expectations will almost always be rational from where the authority stands, even if objectively it is arbitrary or unfair . . .
>
> Fairness in such a situation, if it is to mean anything, must for the reasons we have considered include fairness of outcome. This in turn is why the doctrine of legitimate expectation has emerged as a distinct application of the concept of abuse of power in relation to substantive as well as procedural benefits, representing a second approach to the same problem. If this is the position in the case of the third category, why is it not also the position in relation to the first category? Legitimate expectation may play different parts in different aspects of public law. The limits to its role have yet to be finally determined by the courts. Its application is still being developed on a case by case basis. Even where it reflects procedural expectations, for example concerning consultation, it may be affected by an overriding public interest. It may operate as an aspect of good administration, qualifying the intrinsic rationality of policy choices. And without injury to the *Wednesbury* doctrine it may furnish a proper basis for the application of the now established concept of abuse of power . . .

Drawing on EC law, where substantive legitimate expectation is a well-recognised principle,[91] the Court of Appeal ruled that to resile from the clear promise of a 'home for life' was unjustified and constituted 'unfairness amounting to an abuse of power'. Admitting with some justification that the courts' role in relation to category (c) was 'still controversial', Lord Woolf felt that they could nonetheless 'avoid jeopardising the important principle that the executive's policy-making powers should not be trammelled by the courts'. How precisely?

That the representations made to C should have figured (as they did) in the local authority assessment is not in dispute; we know that rational decision-making and procedural fairness are standard requirements of administrative law and we have seen too how far a court may take 'hard look review'. The problem comes, as the Court of Appeal explained in the later case of *Bibi*, at the stage when the court has to decide what to do. There the council, acting under a mistake of law, indicated that it would allocate publicly funded housing with

[91] In *Hamble (Offshore) Fisheries Ltd* (above), Sedley LJ had reviewed the EC jurisprudence. See further, J. Schwarze, *European Administrative Law* (Sweet & Maxwell, 1992), pp. 1134–5; P. Craig, 'Substantive legitimate expectations in domestic and community law' [1996] *CLJ* 289.

security of tenure to B; when the mistake came to light, the assurance was withdrawn. Seeking to dispel the fog surrounding the subject, Schiemann LJ specified 'three practical questions' that arose in all legitimate expectation cases:

- First, what has the public authority, whether by practice or by promise, committed itself to? This involves only evaluation of the facts.
- Secondly, has the authority acted or does it propose to act unlawfully in relation to its commitment? At this stage, he explained:

> The law requires that any legitimate expectation be properly taken into account in the decision making process. It has not been in the present case and therefore the Authority has acted unlawfully . . . when the Authority looks at the matter again it must take into account the legitimate expectations. Unless there are reasons recognised by law for not giving effect to those legitimate expectations then effect should be given to them. In circumstances such as the present where the conduct of the Authority has given rise to a legitimate expectation then fairness requires that, if the Authority decides not to give effect to that expectation, the Authority articulate its reasons so that their propriety may be tested by the court if that is what the disappointed person requires.[92]

- Third, what should the court do? Can it come to a substantive decision itself? Must it send the matter back for a new decision? This was the solution the Court of Appeal chose:

> The court, even where it finds that the applicant has a legitimate expectation of some benefit, will not order the authority to honour its promise where to do so would be to assume the powers of the executive. Once the court has established such an abuse it may ask the decision taker to take the legitimate expectation properly into account in the decision making process.

We might call this outcome 'procedural fairness plus'. It does not, as the Court of Appeal emphasised, *tie* the authority to its assurances; it remained free to take the same decision again in the light of 'the current statutory framework, the allocation scheme, the legitimate expectations of other people, its assets both in terms of what housing it has at its disposal and in terms of what assets it has or could have available'. It must, however, throw the assurances it had given into the balance, which had not in the instant case been done. This is the right outcome, because the primary duty of a public body is a *collective* duty to constituents and the public at large.[93] Moreover, a polycentric decision or decision with 'spin off' is involved as indicated in the phrase 'the legitimate expectations *of other people*'.

Coughlan, where the authority had taken its assurance into account in

[92] *R(Bibi and Al-Nashid) v Newham LBC* [2002] 1 WLR 237 [22] [46–8].
[93] See *O'Rourke v Camden LBC* [1997] 3 WLR 86 (Lord Hoffmann).

arriving at the decision to close, effectively gives the court two bites at the same cherry: first the court looks at the procedure by which the decision was taken; then it goes on to review the decision itself, applying a test of fairness and rationality, tying the authority to its assurance as though a contract had been signed. Unanimously, the Court of Appeal concluded:

> The decision to move Miss Coughlan against her will and in breach of the Health Authority's own promise was in the circumstances unfair. It was unfair because it frustrated her legitimate expectation of having a home for life in Mardon House. There was no overriding public interest which justified it. In drawing the balance of conflicting interests the court will not only accept the policy change without demur but will pay the closest attention to the assessment made by the public body itself. Here, however, as we have already indicated, the Health Authority failed to weigh the conflicting interests correctly. Furthermore, we do not know . . . the quality of the alternative accommodation and services which will be offered to Miss Coughlan. We cannot prejudge what would be the result if there was on offer accommodation which could be said to be reasonably equivalent to Mardon House and the Health Authority made a properly considered decision in favour of closure in the light of that offer. However, absent such an offer, here there was unfairness amounting to an abuse of power by the Health Authority.

In terms of outcome, the Court of Appeal said only that the saving in closing the home would be 'in terms of economic and logistical efficiency in the use respectively of Mardon House and the local authority home'. But if the effect were to tie the authority indefinitely to the retention of an uneconomic facility, then this outcome must appear unrealistic and based on unconvincing reasoning that violates principles of economic and efficient public management. For public-service managers who, in contrast to unelected judges, are asked to combine the delivery of high quality, efficient, helpful and user-friendly public services with the requirements of VFM, it invokes the spectre of open-ended financial commitments, where assurances offered in different economic and legal climates have to be redeemed at great cost to the public. Times change and space must be left for policy-makers to change their mind, as Sales and Steyn argue:

> Legal protection for legitimate expectation . . . means that, in effect, the decision-maker is taken to have acted with (to some degree) binding effect at the earlier point in time when it promulgated the policy or assurance, so that the policy or assurance determines how it must act at the later stage when an actual decision in a particular case is called for. And this is so even though at that later stage the decision-maker, on further reflection, would otherwise treat as relevant to (and, it may be, determinative of) its decision factors which are not recognised as such in the statement of policy or the assurance. It is not uncommon for a decision-maker to change its mind when it has more information about the consequences of a decision, or a better understanding of the views and interests of those affected by the decision (who may have had no awareness of or opportunity to comment

> on the assurance when it was given). Or it may simply be confronted with unanticipated situations falling within the scope of the policy or assurance. What seemed like a good idea at the time the policy or assurance was promulgated may not seem like a good idea in all the circumstances when the time for action arises.[94]

After *Coughlan*, Craig identified four main situations that might give rise to a legitimate expectation:[95]

1. A general norm or policy choice, which an individual has relied on, has been replaced by a different policy choice.
2. A general norm or policy choice has been departed from in the circumstances of a particular case.
3. There has been an individual representation relied on by a person, which the administration seeks to resile from in the light of a shift in general policy.
4. There has been an individualised representation that has been relied on. The administrative body then changes its mind and makes an individualised decision that is inconsistent with the original representation.

Unpicking this classification, we can see for example that situations 1 and 3 both involve the power to change administrative policy to which, in the public interest, the 'no fettering principle' ought to apply. In *Re Findlay*,[96] for example, the Home Secretary, changing the settled practice whereby the first review of a life sentence came after three years, announced in a speech to the Conservative Party conference that in future reviews would be held back until three years before the expiry of the 'tariff' period, while certain murders would automatically carry minimum sentences of not less than twenty years. It was argued that this policy could not apply retrospectively to prisoners who had acquired a 'legitimate expectation' that their cases would be considered at a certain time, which could not be retracted. A strong case one might think and, dissenting in the Court of Appeal, Browne-Wilkinson LJ certainly thought so. The House of Lords, on the other hand, did not consider that the Home Secretary had acted unlawfully. Lord Scarman envisaged a two-stage process, the first general, the second individuated:

> The most that a convicted prisoner can legitimately expect is that his case will be examined individually in the light of whatever policy the Secretary of State sees fit to adopt provided always that the adopted policy is a lawful exercise of the discretion conferred upon him by the statute. Any other view would entail the conclusion that the unfettered

[94] P. Sales and K. Steyn, 'Legitimate expectations in English public law: An analysis' [2004] *PL* 564, 569. But see Y. Dotan, 'Why administrators should be bound by their policies' (1997)17 *OJLS* 23.

[95] P. Craig, *Administrative Law*, 5th edn (Sweet & Maxwell, 2003), p. 641, judicially approved in *R (Rashid) v Home Secretary* [2005] EWCA Civ 744 [44]. And see I. Steele, 'Substantive legitimate expectations: Striking the right balance?' (2005) 121 *LQR* 300; M. Elliott, 'Legitimate expectations and the search for principle' [2006] *Judicial Review* 281.

[96] *Re Findlay* [1985] AC 318. See also *R v Home Secretary, ex p. Hargreaves* [1997] 1 All ER 397.

> discretion conferred by the statute upon the minister can in some cases be restricted so as to hamper, or even to prevent, changes of policy. Bearing in mind the complexity of the issues which the Secretary of State has to consider and the importance of the public interest in the administration of parole I cannot think that Parliament intended the discretion to be restricted in this way.

So the prisoners failed and if the outcome seems harsh, it is because it seems to breach the well-known rule of law principle against retrospectivity; the review date of existing prisoners ought in fairness to have been preserved. In *Walker* too,[97] a case involving policy changes in the application of the criminal injuries compensation scheme to members of the armed forces, Lord Slynn summarised the applicant's legitimate expectations as being: 'to have the policy in force at the time of the incident applied to him and to be given the opportunity to make representations that he was in the scheme and outside the exclusion', both of which he had. It 'would have been better' to give similar publicity to the change as had been given to the original proposal but this did not amount to 'unfairness which would justify the courts interfering'. In practice too, most cases of general policy change will fail on the grounds either, as in *Findlay* and *Walker*, that no one has 'acted to their detriment',[98] or that the representations are insufficiently specific and not aimed at individuals. In *Begbie*,[99] for example, B took advantage of the Conservative government's assisted-places scheme for private education on the strength of statements made by the Opposition as to their intentions if elected. When made, the transitional arrangements were found not to cover her situation but a challenge based on the earlier statements failed.

Craig's situations 3 and 4 both involve some form of individual representation. In both, there is a clear expectation of a chance to argue that a policy change should not apply to one's case. Situation 4 cases are special and bear a strong family resemblance to estoppel, which is narrower and more clear-cut than the concept of substantive legitimate expectation which has replaced it. Substantive legitimate expectation extends to 'enforce the continued enjoyment of the content – the substance – of *an existing practice or policy*, in the face of the decision-maker's ambition to change or abolish it',[100] a wider and notably inchoate category. Perhaps the belief that public law has 'already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel'[101] is incorrect.

In *Naharajah and Abdi*,[102] Laws LJ tried to counter concern over the breadth of judicial discretion by recourse to proportionality. Asserting that public

[97] *R v Ministry of Defence, ex p. Walker* [2000] 1 WLR 806 (Lord Slynn).
[98] See also *R (Bancoult) v Foreign Secretary* [2008] UKHL 61.
[99] *R (Begbie) v Department of Education and Employment* [1999] EWCA Civ 2100.
[100] *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA 755 [32] (emphasis ours).
[101] *R v Sussex CC, ex p. Reprotech (Pebsham) Ltd* [2003] 1 WLR 348 [33–5].
[102] *R (Naharajah and Abdi) v Home Secretary* [2005] EWCA Civ 1363 [68].

bodies ought to deal straightforwardly and consistently with the public (a standard which he compared to a Convention right), he contrasted individual promises (situation 4) with general policy change:

> Thus where the representation relied on amounts to an unambiguous promise; where there is detrimental reliance; where the promise is made to an individual or specific group; these are instances where denial of the expectation is likely to be harder to justify as a proportionate measure . . . On the other hand where the government decision-maker is concerned to raise wide-ranging or 'macro-political' issues of policy, the expectation's enforcement in the courts will encounter a steeper climb. All these considerations, whatever their direction, are pointers not rules. The balance between an individual's fair treatment in particular circumstances, and the vindication of other ends having a proper claim on the public interest (which is the essential dilemma posed by the law of legitimate expectation) is not precisely calculable, its measurement not exact.

Almost immediately, the distinction was blurred in *Rashid*,[103] where the Court of Appeal learned that implementation of a policy not to relocate asylum seekers to the Kurdish autonomous zone of Iraq had been patchy and, despite internal inquiries, the HO had 'never got to the bottom of how some caseworkers knew and some did not'. Asked to reconsider R's case on the ground that he had not had the benefit of the policy, the HO chose to take into consideration changed circumstances which, three years later, had purportedly rendered Iraq a safe destination. Counsel asked the Court of Appeal not be fixated with labels but to take an overall view, which it did, quashing the decision simply as a 'conspicuous unfairness requiring the intervention of the court'. The case was 'not the typical case of legitimate expectation'; it was quite irrelevant that R, who was unaware of the policy, did not rely on it; he was entitled to rely on it and it must be applied.

In *Bhatt Murphy*,[104] the Court of Appeal flatly turned down an attempt to hold ministers to the terms of a compensation scheme subsequently withdrawn and replaced. Unfortunately, this did not deter Laws LJ from another trawl through the unsatisfactory cases:

> A very broad summary of the place of legitimate expectations in public law might be expressed as follows. The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. If it has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation). If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise

[103] *R (Rashid) v Home Secretary* [2005] EWCA Civ 744.
[104] [2008] EWCA 755 [50].

> (substantive expectation). If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation). To do otherwise, in any of these instances, would be to act so unfairly as to perpetrate an abuse of power.

In *SSHD v R(S)*,[105] however, a differently constituted Court of Appeal tackled the issue more robustly. A backlog of undecided immigration cases had been postponed to allow administrative targets to be met. Dismissing 'abuse of power' as 'a magic ingredient, able to achieve remedial results which other forms of illegality cannot match', the court focused on *remedy*. Carnwath LJ took a *Padfield* approach, insisting that 'the issue is not so much whether the unfairness is obvious or conspicuous, but whether it amounts to illegality which on reconsideration the Department has the power to correct. If it has such power, and there are no countervailing considerations, it should do so'. The case would be remitted for re-determination, though in the expectation that the outcome would be indefinite leave to remain. Lightman J added:

> I have the gravest difficulty seeing how the fact that the challenged administrative act or decision falls within one category of unlawfulness as distinguished from another, and in particular the fact that it constitutes an abuse of power giving rise to conspicuous unfairness, can extend the remedies available to the court. It may of course be relevant in the choice of the available remedy and the terms of the guidance to the administrative body on any reconsideration of its previous decision or of the appropriate action to be taken.

We shall pick this valuable reminder up in a later chapter.

Legal certainty is to be judged, a legal positivist would insist, by the ability of the judges clearly to articulate and consistently to apply a dependable body of legal principle. This they are manifestly failing to do here. Craig's four situations overlap because they are descriptive rather than prescriptive; they fluctuate in tune with a fluctuating case law based on concepts devoid of hard legal content. The reasoning is replete with what Groves calls 'motherhood statements', designed to lend legitimacy to limp reasoning by tying it into some unassailable notion of 'goodness':

> The phrase 'abuse of power' suggests that there has been a breach of a basic tenet of public law but it is usually used in a conclusionary rather than an explanatory manner. This approach enables abuse of power to be used as a motherhood statement that can be invoked as a wider principle or justification in English public law without any clear explanation of what might constitute an abuse of power or whether a new ground of review can be said to fall within the scope of that term.[106]

[105] *SSHD v R(S)* [2007] EWCA Civ 546 [60] [74].

[106] M. Groves, 'The surrogacy principle and motherhood statements in administrative law' in Pearson, Harlow and Taggart (eds.), *Law in a Changing State* (Hart Publishing, 2008), p. 90.

Less forcefully, Elliott reads *Rashid* as implying 'a possibility of intervention simply where something has gone badly wrong, even if the court cannot quite put its finger on it'. Substantive legitimate expectation operates:

> in the light of exceptional circumstances, to liberalise the application of existing heads of review (thus ensuring the protection of the norms underpinning them) by facilitating intervention in circumstances closely analogous to, but technically outwith, those in which such heads of review would usually operate.[107]

When public bodies fail or unfairly decline, as in *Rashid*, to redress the situation of those trapped by policy change or misleading representations, there is a temptation for judges to step in and redress the grievance; this is, after all, an aspect of their age-old constitutional function. They are well justified in demanding procedural fairness. Within limits (discussed in Chapter 3) review based on the established principles of illegality and irrationality is also justifiable. They can legitimately remit, making it hard to deny the applicant a favourable outcome; we have called this procedural fairness plus. They might even take the extra step of requiring the decision-maker to consider transitional arrangements, something which, taking into account what was said in Chapter 4 about impact assessment, would certainly be good administrative practice. Further they should not go.

The situation of administrators is not helped by principles of judicial review that are contradictory and confusing. Currently, courts are telling administrators to act consistently but never to 'fetter their discretion'. They are to follow the rules and apply them consistently and without discrimination but must not refuse to listen to representations. They must where appropriate consider making exceptions even at the expense of consistency. Rule-making, we learned earlier in this chapter, is supposed to be a procedurally fair, rational, reasoned and consistent process. Rules are designed to help administrators towards the approved values of consistency, fairness and equal treatment. The same must surely be true of judicial rule-making. If the judiciary wishes to introduce a reserve or equitable category of relief for exceptional cases, judges should say so openly. At least that would give the opportunity for a principled and rational debate in which we could all participate.

[107] M. Elliott, 'Legitimate Expectation, Consistency and Abuse of Power' [2005] *Judicial Review* 281, 285.