Neutral Citation Number: [2018] EWCA Civ 2137

Case No: C1/2017/3462

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION, PLANNING COURT
Mrs Justice Lang
CO/20123/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/10/2018

Before :

PRESIDENT OF THE FAMILY DIVISION
(Sir Andrew McFarlane)
LORD JUSTICE SINGH
and
LORD JUSTICE COULSON

- -

Between :

The Queen on the application of Save Britain's Heritage	**Appellant**
- and -	
The Secretary of State for Communities and Local Government	**1st Respondent**
- and -	
Westminster City Council	**Interested Party/ 2nd Respondent**
- and -	
Great Western Developments Limited	**Interested Party/ 3rd Respondent**

- -

Richard Harwood QC (instructed by **Harrison Grant Solicitors**) for the **Appellant**
Nathalie Lieven QC & Mark Westmoreland Smith (instructed by **Government Legal Department**) for the **1st Respondent**

Hearing date: Thursday 13th September 2018

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Judgment Approved by the court for handing down (subject to editorial corrections)

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Lord Justice Coulson :

1. Introduction

1. There are now only two parties to this appeal: the appellant (whom I shall call 'SAVE'), and the first respondent (whom I shall call 'the SoS'). The appeal concerns the SoS' decision, dated 15 March 2017, not to "call in" certain planning applications dealing with the proposed re-development at 31 London Street, London W2, known as the 'Paddington Cube' ("the development"). It is SAVE's case that the SoS was required in law to give reasons for that decision, and failed to do so.

2. SAVE's case is put in two ways. The first relies on what is said to have been a legitimate expectation that reasons would be provided, based on a promise made by the relevant Minister in Parliament in 2001. Although the SoS accepts that it was the practice for many years to give reasons for not calling in an application (pursuant to s.77 of the Town and Country Planning Act 1990), the SoS argues that this practice came to an end in 2014 and that SAVE knew or ought to have known about that change. SAVE maintains that, as a matter of principle, a published policy cannot be withdrawn or overturned by an unpublished practice.

3. The second ground of appeal is based on SAVE's case that the SoS had a general duty at common law to give reasons for any decision under s.77 and/or that there was such a duty on the particular facts of this case. This argument is contrary to a number of first instance decisions and is advanced principally by reference to the recent decision of the Supreme Court in *Dover District Council v CPRE Kent* [2017] UKSC 79. Since the second ground of appeal asserts a general obligation on the part of the SoS, whilst the first ground relies on specific factors giving rise to the alleged legitimate expectation, I have found it convenient to address the second ground first.

4. It is important to note at the outset that, on 14 August 2017, Westminster CC granted the developer planning permission and listed building consent for the development. Thus, as Lewison LJ noted when giving limited permission to appeal, the challenge relating to the s.77 decision has become academic. It would be an abuse of process to use an appeal against the SoS' decision not to call in the application to mount a collateral attack on the subsequent grant of planning permission. However, Lewison LJ went on to note that the question of whether the SoS could adopt a policy or practice which did not conform with the published policy was important, as was SAVE's argument about the wider duty and the effect of the decision in *CPRE*. Accordingly, he granted permission to appeal, but limited that appeal to SAVE's claim for a declaration "that the SoS was required to give reasons for any decision whether or not to call in applications for planning permission and/or listed building consent for his own determination under s.77".

2. The Statutory Framework

5. Section 77(1) of the Town and Country Planning Act 1990 permits the respondent to 'call in' for his own determination, planning applications which are before local planning authorities ("LPAs"). The power is in these terms:

> "The Secretary of State may give directions requiring applications for planning permission... to be referred to him instead of being dealt with by local planning authorities."

6. In December 2001, the then Secretary of State for Transport, Local Government and the Regions issued a Green Paper which, at paragraph 6.18, promised that "in the interest of greater transparency, we will now, as from today, give reasons for not calling in individual cases and to put copies of these letters on the Department's website".

7. On 12 December 2001, the then Planning Minister, Lord Falconer, said:

> "My Right Honourable friend the Secretary of State gives reasons where applications are called but, up to now, they have not been given when he has decided not to call in an application. In the interests of greater openness he shall, from today, give reasons in both circumstances."

On the same day, the change was announced in both the House of Commons and the House of Lords. In the latter chamber, Lord Falconer said:

> "As part of our fundamental review of the planning system, we have decided that as from today we shall give reasons for our decision not to call in planning applications. This decision, which forms part of the raft of measures in our Planning Green Paper published today, is in the interest of transparency, good administration and best practice. The courts have established that there is no legal obligation to provide reasons for not calling in an application..."

8. In March 2010, a review conducted by the SoS stated expressly that decision letters under s.77 would set out "reasons for either call in or non-intervention", thereby confirming the policy announced 9 years earlier. On 26 October 2012, although the policy criteria for calling in applications were amended in a Written Ministerial Statement ("the WMS"), there was no change to or modification of the policy of giving reasons for either call in or non-intervention. The altered criteria are set out at paragraph 32 below. The WMS stated that the policy was to be "very selective about calling in planning applications", and the SoS would only consider the use of his calling in powers "if planning issues of more than local importance are involved".

9. It is the SoS' case that, at some unknown date early in 2014, a decision was taken not to give reasons for a decision declining to call in an application and that, since then, such decision letters have been issued without giving reasons. The confused circumstances in which this change came about, and the extent to which it could fairly be said to be a change of policy at all, are dealt with in greater detail in **Section 5** below.

3. The Factual Background

10. The development involves a 24-storey glass tower, designed by Renzo Piano to replace the former Royal Mail sorting office, designed by Henry Tanner, immediately

adjacent to Paddington Station. It will also occupy the site of the current station access ramp, which is currently the main pedestrian access to the station. The development will provide for the welcome refurbishment of the Bakerloo Line station at Paddington, but concerns have been expressed about the lack of any other similar buildings in the area and the close juxtaposition of the tower with the iconic terminus buildings[1].

11. However, whatever the rights and wrongs of the campaign against the development, it has to be acknowledged that the development is now likely to go ahead. The sequence of relevant events is set out below.

12. On 6 December 2016, Westminster CC granted conditional planning permission and listed building consent for the development. A week later, on 13 December 2016, SAVE (amongst others) asked the SoS to call in the development for his own determination, on the grounds that the application met the stated criteria for a call in. The letter set out detailed reasons why it was said that the criteria were met. On 20 February 2017, the SoS made a direction prohibiting Westminster CC from granting final permission on the applications without specific authorisation.

13. In a letter dated 15 March 2017, the SoS notified Westminster CC that he would not be calling in the applications, and he lifted the prohibition on granting planning permission. The letter was in the following terms:

> "**Town and Country Planning Act 1990**
>
> **Redevelopment of Paddington Sorting and Delivery Office**
>
> **Application numbers – 16/09050/FUL & 16/08052/LBC**
>
> I refer to the above application which has been the subject of third party requests to call in for determination by the Secretary of State for Communities and Local Government.
>
> The Secretary of State has carefully considered this case against call-in policy, as set out in the Written Ministerial Statement by Nick Boles on 26 October 2012. The policy makes it clear that the power to call in a case will only be used very selectively.
>
> The Government is committed to give more power to councils and communities to make their own decisions on planning issues, and believes planning decisions should be made at the local level wherever possible.
>
> In deciding whether to call in this application, the Secretary of State has considered his policy on calling in planning applications. This policy gives examples of the types of issues which may lead him to conclude, in his opinion that the application should be called in. The Secretary of State has decided, having had regard to this policy, not to call in this

[1] As depicted in *The Railway Station*, the mid-Victorian masterpiece by W.F Frith (1819-1909)

> application. He is content that it should be determined by the local planning authority.
>
> In considering whether to exercise the discretion to call in this application, the Secretary of State has not considered the matter of whether this application is EIA Development for the purposes of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011.
>
> The local planning authority responsible for determining this application remains the relevant authority for considering whether these Regulations apply to this proposed development and, if so, for ensuring that the requirements of the Regulations are complied with.
>
> The Article 31 Direction issued pursuant to the Secretary of State's letter of 20 February 2017 is hereby withdrawn."

14. In addition, on the same day, a copy of this letter was sent to SAVE under cover of a letter from the SoS which confirmed that the power to call in an application would only be used very selectively and that the SoS was satisfied that this application "should be determined at a local level".

15. On 26 April 2017, SAVE commenced judicial review proceedings. The only ground of challenge related to the failure by the SoS to give reasons for his decision not to call in the application under s.77.

16. On 14 August 2017, Westminster CC granted the developer planning permission and listed building consent for the development. SAVE did not issue any proceedings against Westminster CC to challenge that decision, nor did they seek an injunction to prevent the development from proceeding.

17. The hearing of the judicial review application took place on 1 November 2017. The judgment of Lang J was handed down on 29 November at [2017] EWHC 3059 (Admin). She accepted at [32] that the statements made in 2001 (paragraphs 6-7 above) "could well have given rise to a legitimate expectation that reasons would be given for non-intervention". However, she went on to find at [33] – [40] that the practice changed, and the established practice became one whereby "reasons would not be given". She found that the earlier statements and practice relied upon by the appellant had been superseded by 2016/2017 "and so could no longer found an expectation that reasons would be given" [33]. She decided (without elaboration) that there was no legal requirement to announce the change publicly, "even though it may have been good practice to do so" [34]. She also found that, because of SAVE's active role in planning matters, it should have been aware of the change [37] which manifested itself "in the content of the standard non-intervention from other cases, and the lack of any case-specific reasons" [36].

18. As to the general duty to give reasons, as part of a common law requirement of fairness, Lang J rejected that ground of challenge for the detailed reasons set out at [42] – [54] of her judgment. She referred to a number of first instance decisions in which it had been said in terms that the SoS was under no duty to give reasons for a

decision not to call in an application under s.77. As I have indicated, I propose to deal with that ground of appeal first.

4. The Duty To Give Reasons

4.1 General

19. It is convenient to start by considering this question from first principles, absent any reference to statute or case law. Is it necessary, in order to deal fairly with requests under s.77, for the SoS to give reasons when he decides not to call in an application? As a matter of common sense, it seems to me that the answer to that question must be No. A decision under s.77 is not a substantive decision. It is not one that goes to the detail of the application, and its merits or demerits from a planning perspective. It does not affect anyone's substantive rights. It is not directly determinative of the planning application itself. Instead, it is a procedural decision going to the straightforward question of who should deal with the planning application: the LPA, or the SoS? It would be unnecessary and burdensome if the SoS had to give reasons every time he decided not to call in an application under s.77, particularly in circumstances where that is the default position which is departed from only rarely: as the WMS made plain, the policy has long been that most planning applications should be dealt with at a local level.

20. During the course of the hearing, leading counsel drew attention to the common practice whereby an LPA will deal with a planning application almost to the end of the process but then, when it has indicated that its intention is to grant planning permission, a request is made to the SoS to call in the application under s.77. Indeed, there is secondary legislation in the form of The Town and Country Planning (Consultation) (England) Direction 2009 (which was not shown to us) which enshrines the practice of requiring the LPA to refer particular applications to the SoS "in respect of which the authority does not propose to refuse planning permission". In this way, it might be said that s.77 is being used as a *de facto* appeal process (albeit one that is triggered before there is a final determination by the LPA, and only where it seems likely that planning permission will otherwise be granted).

21. Speaking for myself, I am not persuaded that this is what s.77 was originally intended to provide. The section postulates a simple binary choice as to whether it is the SoS or the LPA who "deals with" an application. The practice to which we were referred might be said to involve both the LPA and the SoS "dealing with" a single application: the LPA up to the indication of the likely outcome (if that does not involve a refusal), and the SoS thereafter. In this context, I remind myself of what Dyson LJ said in *R (Adlard) v SSTLGR* [2002] 1 WLR 2515 at [49], that s.77 was not intended to be a means to "make good any shortcomings in the process undertaken by the planning authority", nor is it a process to "exercise some supervising control over the process by which local planning authorities perform their functions in individual cases".

22. However, regardless of my unease about the practice which has grown up around s.77, it makes no difference to my underlying conclusion that, as matter of statutory language, the intent behind s.77(1) was to provide a simple choice between the SoS and the LPA as to which of them would be the ultimate decision-maker. Accordingly, it seems to me that, as a matter of common sense, there can be no general duty on the

part of the respondent to give reasons for that procedural decision. Is that conclusion supported or undermined by statutory provisions or the authorities?

23. Looking first at s.77, I note that there is no express requirement for reasons to be given for refusing to call in a planning application. That is important. As Sales LJ pointed out in *R (Oakley) v South Cambridgeshire District Council* [2017] EWCA Civ 71 at [76], "this court should be wary of stepping in to impose a general duty where Parliament has chosen not to do so".

24. Turning to the case law, there is no authority for the proposition that reasons are required under s.77. Indeed, all of the authorities are to the opposite effect. Thus:

i) In *R v Secretary of State for the Environment (ex parte Newprop)* [1983] JPL 386, Forbes J said that there was no duty on the Secretary of State to give reasons for a refusal to exercise his discretion to call in an application. The judge's remark in that case that a s.77 decision could only be challenged if it was "wildly perverse" should not, however, be regarded as imposing some higher test than what might be called the ordinary yardstick of irrationality.

ii) In *Asda Stores Limited v The Secretary of State for Scotland* [1997] SLT 1286 (Outer House), Lord Nimmo-Smith stated that there was no duty to give reasons for any call in decision. By the time of the appeal at [1998] PLCR 233, this proposition was accepted by all parties.

iii) In *R v Secretary of State for the Environment, Transport and the Regions ex parte Carter* [1998] PLCR 125, the deputy judge said: "there was no obligation to give reasons for a decision not to call in an application". It seems likely that Lord Falconer must have had *Asda* and *Carter* in mind when he commented that the courts had confirmed that there was no duty to give reasons (see paragraph 7 above).

iv) In *R (Persimmon Homes Limited) v Secretary of State for Communities and Local Government* [2007] EWHC 1985 (Admin); [2008] JPL 323 the Minister had given a reasoned decision not to call-in a mixed-use development. The case proceeded on the basis that, because reasons had been given, they could be examined to see if they disclosed any error of law. Sullivan J noted at [40] that there was no requirement to give such reasons.

v) In *Saunders v Secretary of State for Communities and Local Government* [2011] EWHC 3756, Edwards-Stuart J accepted at [48] counsel's formulation of the relevant legal principles. These included the statement that "there is no duty to give reasons for a decision not to call-in an application under s.77" and that "the decision under s.77 is not a decision to grant permission, but it is the exercise of a procedural discretion which deals with the responsibility for the determination of the application".

vi) In *Westminster City Council v Secretary of State for Communities and Local Government* [2014] EWHC 708 (Admin) Collins J noted that it was common ground that the discretion conferred by s.77 "is very wide and there is no duty to give reasons for any decision". The somewhat confused backdrop to the

decision in this case is relevant when considering the 'legitimate expectation' argument, at **Section 5** below.

vii) In *R (Shirley) v Secretary of State for Communities and Local Government* [2017] EWHC 2306 (Admin); [2018] JPL 298 at [19], Dove J noted a number of the cases to which I have already referred and concluded that the respondent's discretion under s.77 was very broad "and pre-eminently a matter of planning judgment" for the SoS.

25. In my view, these statements of law are correct. A decision under s.77 is, in the words of Edwards-Stuart J, "the exercise of a procedural discretion", and reasons are not required.

26. Furthermore, I do not consider that Mr Harwood QC, on behalf of SAVE, derives any assistance from those cases concerned, not with s.77, but with substantive planning decisions. *R v Aylesbury Vale DC ex parte Chaplin* [1998] 76 P&CR 207 is authority for the proposition that there is no general duty to provide reasons in relation to substantive decisions in planning cases. That general proposition was not ultimately modified or altered by the Court of Appeal in *R (Oakley)*, although Elias LJ had clearly been tempted to do so. At [76] Sales LJ noted that the court should be wary of imposing a general duty where Parliament has not done so, and went on:

> "In my view, the common law should only identify a duty to give reasons where there is a sufficient accumulation of reasons of particular force and weight in relation to the particular circumstances of an individual case."

27. Mr Harwood QC placed particular reliance on the recent decision of the Supreme Court in *CPRE*. However, I do not consider that the part of the judgment of Lord Carnwath JSC to which we were taken (which was in any event *obiter*, because it was found, in that case, that the Environmental Impact Assessment Regulations imposed an obligation to give reasons in any event) is of any real assistance to SAVE in the present case. The principles to be derived from that part of Lord Carnwath's judgment can perhaps be summarised as follows:

(a) Public authorities are under no general common law duty to give reasons for their decisions [51];

(b) Fairness may in some circumstances require reasons to be given, even where there is no express statutory duty [51], [54];

(c) In the planning context, an LPA is generally under no common law duty to give reasons for the grant of planning permission [52], although special circumstances may require it [52], [57];

(d) The common law principle of open justice or transparency also applies to whether reasons are required to be given for a planning decision [55];

(e) In deciding whether reasons should be given, the court should "respect the exercise of Ministerial discretion, in designating certain categories of decision for a formal statement of reasons" but recognise that "the present system of

rules has developed piecemeal and without any apparent pretence of overall coherence" [58].

(f) "It is appropriate for the common law to fill the gaps [and require reasons to be given] but to limit that intervention to circumstances where the legal policy reasons are particularly strong" [58].

28. On an application of those principles to a decision under s.77, I am in no doubt that there was no requirement to give reasons. There are no good legal policy reasons (let alone strong ones) which require reasons to be given for a decision which is procedural only, and which is not directly determinative of the relevant parties' rights and obligations.

29. Finally on this topic, it seems to me that the logical consequence of SAVE's argument was that, simply for reasons of transparency and fairness, any decision by the Executive would have to be accompanied by reasons, even in circumstances where Parliament did not intend that such reasons should be provided. With respect, such a submission cannot be right. The common law may, in certain circumstances, impose a duty to give reasons "to fill the gaps" (in Lord Carnwath's phrase) but that could never be on the sort of blanket scale envisaged by Mr Harwood QC.

30. For all these reasons, therefore, I consider that there is no general duty on the part of the SoS to give reasons for a decision not to call in an application under s.77. The related issue under this ground of appeal is whether there are any features of this particular case which suggest that the common law should intervene and require such reasons to be given.

4.2 This Particular Case

31. The WMS (paragraph 8 above) restated the s.77 call in criteria in the following terms:

> "The Secretary of State will, in general, only consider the use of his call-in powers if planning issues of more than local importance are involved. Such cases may include, for example, those which in his opinion:
>
> May conflict with national policies on important matters;
>
> May have significant long-term impact on economic growth and meeting housing needs across a wider area than a single local authority;
>
> Could have significant effects beyond their immediate locality;
>
> Give rise to substantial cross-boundary or national controversy;
>
> Raise significant architectural and urban design issues;
>
> Or may involve the interests of national security or a foreign government.

> However, each case will continue to be considered on its individual merits."

32. In her judgment at [27], Lang J summarised Mr Harwood QC's submissions as to how and why a number of these criteria were met in this case. For my own part I am quite happy to accept that at least some of the criteria applied to the present case: in particular, the development is of more than local importance and has an effect on listed buildings and on an historic environment. It is on any view controversial. However, the mere fact that some of these criteria may be satisfied does not mean that reasons have to be given, should the SoS decide not to call in the application. The one does not follow from the other. All that the SoS' policy says is that such cases are ones in which he may "consider" exercising his call-in power.

33. That also provides an answer to Mr Harwood QC's related submission, to the effect that, because the documents show that, in this case, the decision not to call in the application was taken by the Minister himself, reasons for that decision should have been provided. In my view, given the controversial nature of the development and the fact that some of the criteria for call in were met, it is entirely unsurprising that the decision was taken by the Minister himself. But that again does not mean that the common law should impose upon him a duty to give reasons for that decision.

34. Accordingly, I consider that the particular facts of this case do not require the common law to impose a duty to give reasons when none would otherwise exist. But that is not the end of the appeal. The remaining issue is whether, because of the events which occurred between 2001 and 2017, SAVE had a legitimate expectation that such reasons would be given.

5. Legitimate Expectation

5.1 The Law

35. There are two different ways in which a legitimate expectation claim can arise. The expectation can be generated by an express *promise*: see *AG of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629. The principle behind the promise cases was broadly summarised by Lord Neuberger in *United Policyholders Group v A-G of Trinidad and Tobago* [2016] UKPC 17 at paragraph 37 as being based on the proposition that "where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts". Secondly, a legitimate expectation can be generated by a *practice*, even where there has been no promise or assurance that a particular procedure will be followed: see for example *CCSU v Minister for the Civil Service* [1985] AC 374. It is common ground that legitimate expectation can arise (in either way) in the planning context: see *R (Majed) v London Borough of Camden* [2009] EWCA Civ 1029 at [14].

36. These two types of case are different, and it is important to keep their differences in mind. Many of what might be termed the practice cases, such as those concerned with a failure to consult prior to a change of policy or procedure, stress the omission of any relevant promise or assurance: see, for example, the decision of this court in *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755. In my view, the present case

is a straightforward promise case, so the different considerations introduced by the practice cases do not arise here.

37. The two principal promise cases are *AG of Hong Kong*, and *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245. In the former, a senior immigration officer announced that government policy was that each illegal entrant from Macau would be interviewed and his case 'treated on its merits'. The applicant was detained and not given the opportunity of making representations as to why he should not be removed. The House of Lords held that, where a public authority charged with the duty of making a decision promised to follow a certain procedure before reaching that decision, good administration required that it should act by implementing the promise, provided the implementation did not conflict with the authority's statutory duties. Lord Fraser of Tullybelton said (page 638 E – G):

> "The justification for it is primarily, that when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representation from interested parties and as a general rule that is correct.
>
> In the opinion of their Lordships the principle that a public authority is bound by its undertakings as to the procedure it will follow, provided they do not conflict with its duty, it is applicable to the undertaking given by the Government of Hong Kong to the applicant, along with other illegal immigrants from Macau, in the announcement outside the Government House on 28 October, that each case would be considered on its merits..."

38. In *Lumba*, the Supreme Court arrived at the same answer, albeit by a different route (indeed, it appears that *AG of Hong Kong* was not cited to them). In that case, the published policy was that prisoners who were foreign nationals would be detained only when their continued detention was justified. However, between 2006 and 2008 the Home Secretary had applied an unpublished policy of blanket detention. Lord Dyson JSC said at paragraph 26 that "a decision-maker must follow his published policy... unless there are good reasons for not doing so". This statement of principle was not linked to specific knowledge of the policy on the part of any individual. He went on:

> "35. The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see *In re Findlay* [1985] AC 318, 338E. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it. In *R (Anufrijeva) v*

> *Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604, para 26 Lord Steyn said:
>
> "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.
>
> 36. Precisely the same is true of a detention policy. Notice is required so that the individual knows the criteria that are being applied and is able to challenge an adverse decision. I would endorse the statement made by Stanley Burnton J in *R (Salih) v Secretary of State for the Home Department* [2003] EWHC 2273 at para 52 that "it is in general inconsistent with the constitutional imperative that statute law be made known for the government to withhold information about its policy relating to the exercise of a power conferred by statute." At para 72 of the judgment of the Court of Appeal in the present case, this statement was distinguished on the basis that it was made "in the quite different context of the Secretary of State's decision to withhold from the individuals concerned an internal policy relating to a statutory scheme designed for their benefit". This is not a satisfactory ground of distinction. The terms of a scheme which imposes penalties or other detriments are at least as important as one which confers benefits. As Mr Fordham puts it: why should it be impermissible to keep secret a policy of compensating those who have been unlawfully detained, but permissible to keep secret a policy which prescribes the criteria for their detention in the first place?"

39. Accordingly, there is the highest possible authority for the proposition that, if a public body indicates a clear and unequivocal policy that will be followed and applied in a particular type of case, then an individual is entitled to expect that policy to be operated, unless and until a reasonable decision is taken that the policy be modified or withdrawn (*United Policyholders*), or implementation interferes with that body's other statutory duties (*A-G of Hong Kong*).

5.2 The Circumstances of This Case

40. I have set out the relevant events in 2001 (paragraphs 6 –7 above). There can be no doubt that they constitute an express promise that reasons would be given for decisions not to call in an application under s.77. That promise was reiterated in 2010 (paragraph 8 above). That promise was not withdrawn or modified by the WMS in 2012. Lang J found at [32] that, in consequence, these events 'could well have given rise' to a legitimate expectation that reasons would be given for non-intervention. I agree with that: on my analysis, they plainly did.

41. However, I respectfully differ from the learned judge in that I do not consider that the relevant promise has ever been withdrawn. There has been no WMS or any other

public announcement to say that the 2001 promise would no longer be honoured, and that reasons would not now be given for declining to call in applications. Indeed, the only formal documents drawn to our attention that post-date the WMS of 2012 are the House of Commons Library Briefing Papers entitled 'Calling-In Planning Applications', published as recently as 2016 and 2017. These both state in terms that reasons would be given for a refusal to call in an application under s.77. That is doubtless because the compilers noted that there had been a public promise of 2001, which was reiterated in 2010, and which had not been changed. On the face of it, therefore, the legitimate expectation argument has been made out.

42. Lang J decided against SAVE because she said that the promise which gave rise to the legitimate expectation was subsequently changed. At [33] she said that, by 2016/2017, "there was no longer an established practice that reasons would be given for a decision not to call-in an application. On the contrary, the established practice was that reasons would not be given.". For the reasons noted below, I consider that that conclusion was erroneous.

43. First, the judge's reasoning may appear to confuse the promise cases with the practice cases. I accept that, if a legitimate expectation was created as a result of a particular practice then, if that practice was changed, the legitimate expectation might well disappear with it. But that is not this case. This case is based on the unequivocal promise made by the relevant Minister in Parliament which has never been publicly changed.

44. Secondly, it is a recipe for administrative chaos if a legitimate expectation can be generated by an unequivocal ministerial *promise*, only for it then to be lost as a result of an unadvertised change of *practice*. Even at its highest, the SoS' case stops short of the suggestion that the alleged change of practice was advertised as such when it occurred in 2014. Ms Lieven QC properly accepted that it was not a change that could be said to have been 'published' at all.

45. Thirdly, it is worth noting how and why the SoS says that this change of practice occurred. It appears that, in the *Westminster* case, the Minister had given reasons for not calling in the decision which were plainly wrong on their face. As a result of this error, somebody (and it is quite unclear who) within the Department for Communities and Local Government decided that it would be more prudent for reasons not to be given under s.77. In consequence, changes were made to the template letter sent out (to the relevant LPAs, or to the objectors who had requested call in) when a decision was made not to call in an application under s.77. Mr Harwood QC was therefore right to say that this was not an open or transparent way to withdraw a public ministerial promise made in Parliament.

46. I should add that I was unpersuaded that the alleged change made to the template letter was of any real significance. The reasons for not calling in a decision given in the letters sent out before 2014 were very briefly stated. In one of the examples in the bundle, the letter identified the relevant policies and simply said that "the application does not, in the SoS' view, raise issues of such wider significance requiring a determination by him". The letters sent out after the alleged change were in very similar form: so similar in fact that, at an earlier stage of these proceedings, it was argued that the post-2014 letters also contained brief reasons for the decision not to call in. A typical passage in one of the post-change sample letters again referred to the

relevant policies and went on to say that, having regard to those policies, the SoS "has decided ... not to call in this application. He is content that it should be determined by the [LPA]". In my view, therefore, a close textural analysis of the samples included in the court bundle only serves to confirm that the alleged change of *practice* relied on by the SoS was negligible.

47. From the SoS' point of view, therefore, so far, so bad: but it gets worse. Ms Lieven QC was counsel for the SoS in the *Westminster* case. When Lang J asked her how it was that the change in practice had occurred, it was apparent from her answers (given on instructions) that, at the time of the *Westminster* case in 2014, nobody in the Department recalled or had in mind the unequivocal promise made in 2001 (and repeated in 2010). Thus, Mr Harwood QC was right to submit that the change in practice relied on by the SoS was brought about in ignorance of the 2001 policy promise. So, even on the SoS' case, the promise to give reasons was never consciously withdrawn, whether for good reason or not; it had instead been forgotten altogether. In consequence, neither of the typical answers to a legitimate expectation claim identified in paragraph 39 above (a conflict with other statutory duties or a reasonable decision not, after all, to honour the promise) can arise on the facts of this case. It is difficult to see how a person can be said to have changed a policy of which they were unaware at the relevant time.

48. Lang J rejected at [39] Mr Harwood QC's submission that, because the promised policy of giving reasons had not been formally and publicly revoked, it remained in force. Her reason appears to have been that public bodies could not lawfully fetter the future exercise of their discretion. That of course is right, but it does not address the particular point that Mr Harwood QC makes. Since a promise had been made to operate a particular procedure then, as a matter of good administration and transparent governance, any change to that policy also had to be announced publicly. It is a not a question of fettering the future exercise of discretion, but simply making public the decision that something which had been promised and provided in the past would not be provided in the future. In my view, good administration and transparent government required nothing less. Of course, this did not happen here because no-one in the Department knew that they were changing a promised policy (because they had forgotten about it).

49. Lang J also suggested at [36] that SAVE, as a body regularly involved in planning matters, should have been aware of the change of practice, and thus can have had no legitimate expectation. Again, I consider that she may have been running together the promise cases and the practice cases. Since this was a promise that had never been publicly withdrawn, it does not seem to me that, as a result of the content of particular letters relating to other planning applications (the vast majority of which an organisation like SAVE would never even have seen), SAVE were no longer entitled to rely on the promised policy. More widely, I do not accept the proposition that a policy which has been promised can then be withdrawn simply by a change in the template of letters sent privately to individual LPAs and objectors, particularly where, as here, the alleged change is itself very difficult to discern.

50. Finally, I should deal with Ms Lieven QC's related submission that SAVE were not entitled to run the legitimate expectation argument because they could not show any detrimental reliance. There is no hard and fast rule about reliance in these cases: see *Nadarajah Abdi v SoSHD* [2005] EWCA Civ 1363, paragraph 70. In any event, I do

not accept the suggestion that, in promise cases, the applicant needs to show specific reliance on the particular promise and/or that he or she has suffered detriment in consequence. A promise made to the world is enough to found a legislative expectation claim (as both *AG of Hong Kong* and *Lumba* make clear). In those circumstances, a public law claim based on an unequivocal promise is not to be treated as if it were some species of estoppel.

51. Accordingly, it seems to me that the legitimate expectation rightly identified by Lang J did not come to an end as a result of the confusion and muddle generated by the *Westminster* case and/or the apparent decision to make, at best, minor changes to the template letter. An unequivocal promise was made, and that unequivocal promise should have been publicly withdrawn when (or if) a conscious decision was taken no longer to give reasons for not calling in applications under s.77. For these reasons, I consider that SAVE's legitimate expectation case has been made out. I would therefore grant the declaration sought, with the qualification that this was because of the 2001 promise and the claim based on legitimate expectation, and not the result of any general duty imposed by the common law.

Lord Justice Singh :

52. I agree that this appeal should be allowed on the first ground for the reasons given by Coulson LJ. I also agree with him that the appeal should be dismissed on the second ground (which he has addressed first). However, I would not necessarily accept the apparent breadth of the principle mentioned (at paragraphs 25 and 28 above) that the common law would never impose a duty to give reasons for the exercise of a discretion simply because it can be characterised as a "procedural" discretion. I entirely agree with Coulson LJ that the common law does not impose a duty to give reasons in this particular context, for the other reasons he has set out in more detail in his judgment. However, I would prefer to leave the question of whether there can ever be such a duty in cases of procedural discretion to be decided in each particular context where the issue may arise in the future.

The President of the Family Division :

53. I also agree.