



Neutral Citation Number: [2011] EWHC 3175 (Admin)

Case No: CO/3570/2011
And Case No: CO/4082/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/12/2011

Before :

LORD JUSTICE ELIAS
MR JUSTICE McCOMBE
MR JUSTICE SALES

Between :

- The Queen on the application of**
- 1. THE STAFF SIDE OF THE POLICE
NEGOTIATING BOARD**
 - 2. THE POLICE FEDERATION OF
ENGLAND & WALES**
 - 3. IAN RENNIE**
 - 4. NATIONAL ASSOCIATION OF RETIRED
POLICE OFFICERS**
 - 5. CLINT ELLIOTT**
 - 6. FDA**
 - 7. PROSPECT**
 - 8. CIVIL SERVICE PENSIONERS
ALLIANCE**
 - 9. JAMES DUNLOP**
 - 10. GMB**
 - 11. NATIONAL UNION OF TEACHERS**
 - 12. ASSOCIATION OF PRINCIPAL FIRE
OFFICERS**
 - 13. NATIONAL FEDERATION OF
OCCUPATIONAL PENSIONERS**

First Claimants

Second Claimants

- 1. VALERIE PIPER**
- 2. FIRE BRIGADES UNION**
- 3. NASUWT**
- 4. PCS**
- 5. PRISON OFFICERS ASSOCIATION**

- and -

**SECRETARY OF STATE FOR WORK AND
PENSIONS & HM TREASURY & OTHERS**

Defendants

Mr Michael Beloff QC and Mr Martin Westgate QC (instructed by **Messrs Russell,
Jones & Walker**)

for the **First Claimants**

Mr Nigel Giffin QC and Mr Nicholas Randall (instructed by **Messrs Thompsons**)

for the **Second Claimants**

Mr James Eadie QC, Mr Clive Sheldon QC and Ms Amy Rogers (instructed by **The
Treasury Solicitor**) for the **Defendants**

Hearing dates: 25, 26, 27 October 2011

Approved Judgment

Lord Justice Elias :

1. This is the judgment of the court, to which all members have contributed. There is a difference between us on one issue – issue (2) (irrelevant consideration / improper purpose), discussed below. In relation to that issue, McCombe J dissents and explains his reasons for doing so in a separate judgment which follows.
2. The Government has altered the basis upon which public service pensions are adjusted to take account of inflation. Hitherto the adjustments were made in line with the Retail Price Index (“RPI”). From April 2011 they are to be made in accordance with the Consumer Price Index (“CPI”). Some of the schemes fix pensions by reference to an employee’s final salary and newer schemes fix it by reference to the average salary over the employee’s career. In both cases the change affects the value of pensions in payment, and in the case of career average schemes, it also affects the way in which the career average is calculated. The question in this application is whether the decision to change the index, and the statutory orders implementing that decision, were lawfully taken and made.
3. There are two separate applications for Judicial Review. In the Piper case the claimants are Mrs Piper, a civil servant, and six trade unions representing staff belonging to a variety of public sector schemes, all established under statute. These are pension schemes covering the civil service, firefighters, teachers, the NHS and local Government. These are all public service pension schemes within the meaning of section 1 of the Pension Schemes Act 1993 and, as a consequence of legislative provisions which we discuss below, they are schemes affected by the change in policy.
4. The second claim is brought by the Staff Side of the Police Negotiating Board and various other bodies, including a number of trade unions, the FDA, the GMB, the NUT and the Association of Principal Fire Officers. Some of these bodies were joined at the start of the hearing.

Background.

5. Although the court was inundated with documents relating to the decision under challenge, the essential facts are not in dispute and can be relatively shortly stated.
6. Until the implementation of the recent decision the uplift in pensions was measured by reference to the RPI. The move to CPI has had, and will have, a detrimental effect on pensioners because although there may be some years where CPI will yield a higher increase than RPI, the overall picture is that RPI is typically in the region of 0.75-1% higher than CPI. It has been estimated that the change from RPI to CPI may, through the compounding effect over time, reduce the value of benefits to pension scheme members by as much as 15% on average. The change will affect both pension income and the lump sum which pensioners may take by commuting part of their pension as soon as they retire.

RPI and CPI.

7. Both RPI and CPI measure the change in the level of prices; contrary to the submission of the Claimants, neither is a cost of living index. RPI in its current form dates back to the 1950s. CPI was introduced in 1996. It is an index which is governed by EU regulations and was designed to create an internationally recognised inflation measure which enables inflation levels across different European countries to be compared. CPI was adopted by the Bank of England as the headline measure for price inflation on 10 December 2003. If the Bank of England's targeted inflation measure exceeds a certain level then it is obliged to make a report to the Chancellor.
8. The statistics which are used to determine both the RPI and the CPI are produced by the Office of National Statistics ("ONS") which is an independent public body responsible for producing a range of national statistics. It is an executive office of the UK Statistics Authority, which now has statutory status and reports directly to Parliament.
9. There are a number of similarities in the ways in which RPI and CPI are determined. They are both calculated by reference to representative goods and services. Each year the ONS identifies what might be conceived as a "shopping basket" of around 700 representative goods and services on which consumers typically spend their money. The items will be changed each year so as to ensure that they reflect changes in the pattern of consumer spending. It is the movement in the price of these goods which is used to measure the relevant price changes. Prices are obtained from many outlets although there is a system of validation to ensure that what are termed "outliers", that is apparently rogue prices which appear wholly atypical, are excluded from the calculations. An overall inflation rate is worked out by a process of, first, aggregating particular items into defined categories of products and calculating an inflation rate within each category, and then by weighting those categories and the inflation rates within them so as to produce a single overall figure for inflation.
10. There are three principal differences between the two indices. First, they are weighted differently in that they reflect different population bases. The population base used in calculating the RPI is narrower than that which is used for determining the CPI. The CPI includes all UK private households and foreign visitors to the UK. In contrast, the RPI excludes a number of households including those households where income is in the top 4%. It also excludes pension households mainly dependent on state benefits, which constitute some 20% of pension households. The CPI excludes none of these.
11. Second, there are certain differences in the goods and services which fill the relevant baskets. So, for example, university accommodation fees are included in CPI but not RPI, and CPI does not include direct taxes such as TV licences, road tax, or council tax. CPI also excludes a number of housing costs, such as mortgage interest payments, building insurance, and depreciation.
12. Third, the basis for aggregation of rates of increase in the prices of items in the basket is different as between the two indices. The RPI uses an arithmetic mean to combine prices within each category of product at the first stage of aggregation whereas the CPI uses that for only around 30% of the categories. For the remaining 70% it uses an alternative method known as the "geometric mean". It has been estimated that this difference in methodology accounts for about 5/8ths of the average difference between the two indices since 1997.

13. The fundamental difference between the two means of aggregation is that adopting a geometric mean implies the substitution by consumers of products in a particular category within the year under review whereas the arithmetic mean does not. If, for example, there is an exceptional increase in price of a particular item in the basket, such as a particular variety of bread roll, the geometric mean assumes that some consumers will act rationally and switch to another cheaper type of bread roll. It only assumes substitution of products within each category at the lowest level of classification in constructing the index, and not more widely as between different categories. It does not assume that consumers will switch from bread to some other carbohydrate, such as pasta or rice, but only from one roll to another. The consequence of adopting the geometric mean is to dampen the effect of the more significant rates of price increase within each category because it gives them less weight when calculating the mean rate of price change than is given to other items in the same category of goods which have smaller rates of price change. By contrast, the arithmetic approach gives the same weight to the price increase rates for every item in the category. The use of the geometric mean produces a lower average price rise than the arithmetic mean would do.
14. The 30% of CPI goods which are subject to the arithmetic mean are those goods where the ONS has assessed that there will be few opportunities for consumers to switch to a substitute product. An assumption of substitution is made with respect to the other 70%. By contrast, the arithmetic mean makes no allowance for the possibility that substitution might take place with respect to any items in the basket.
15. There is some controversy both as to the extent to which substitution is possible or occurs in practice and as to whether it is in principle appropriate to allow for it at all. Nonetheless the desirability of incorporating this principle into the index is supported by a significant number of professional economists, who consider it a better method of assessing consumer choice over the requisite period. Indeed, we were told that there is currently under consideration the possibility that RPI might use the geometric mean, at least with respect to some of its goods.

The move to CPI.

16. The Coalition Government was formed on 11 May 2010. The Government had to reduce the deficit and considered a range of options to achieve that objective. One particular concern was the cost of social security payments. Various means of achieving savings in that budget were under active consideration, but the Secretary of State for Work and Pensions (“the Secretary of State”) and the Chancellor concluded that the most practicable option was to change the index used for adjusting social security and state pension benefits to take account of inflation. They decided that an across the board move from RPI to CPI was the best way of delivering savings in the short and medium term. Because of the statutory link between social security benefits and pensions which is outlined below, the effect of introducing this new index for determining the benefit uplift was that it was automatically applied to public service pensions also.
17. The Chancellor announced in his budget statement on 22 June 2010 that CPI would be used as the basis for the annual indexation of benefits, tax credits and public service pensions from April 2011. He said this:

“So from next year, with the exception of the State pension and pension credit, we will switch to a system where we uprate benefits, tax credits, some public service pensions in line with consumer prices rather than retail prices. The consumer price index not only reflects everyday prices better, but it is of course now the inflation measure targeted by the Bank of England. This will save over £6 billion a year by the end of the Parliament. I believe that this is a fairer approach than a benefits’ freeze.”

18. Following the budget there was correspondence with various individuals and interest groups who had contacted the Department of Work and Pensions (“the Department”) about this change. For example, the Civil Service Pensioners’ Alliance, one of the claimants in this action, published a briefing on the switch to CPI in its 2010 Newsletter which led to considerable correspondence with the Department. There was a specific consultation exercise from 12 August 2010 to 3 November 2010 in relation to the Pension Protection Scheme and the Financial Assistance Scheme, following which the Government explained why they were resolved to maintain their position that CPI was the most appropriate index. The proposed change was fully debated in Parliament.
19. The ONS released the September 2010 inflation figures on 12 October 2010. These formed the basis of the following year’s uplift for benefits and pensions. The CPI annual rate of inflation was 3.1%, compared with 4.6% calculated in accordance with the RPI methodology. The Secretary of State approved the draft up-rating order incorporating the CPI increase. The draft order was laid before both Houses of Parliament on 3 February 2011. It was approved by the House of Commons on 17 February and by the House of Lords on 14 March 2011. This order was subject to the affirmative resolution procedure, and there were debates in both Houses. The order was finally made on 16 March 2011 as the Social Security Benefits Up-rating Order 2011 (“the Up-rating Order”). It is the first of the orders under challenge in these proceedings. The Treasury then made a consequential pensions order (the Pensions Increase (Review) Order 2011 – “the Pensions Order”) increasing pensions by the same amount. That is the second order under challenge in these proceedings.
20. The Treasury conducted a specific equality impact assessment in relation to the switch from RPI to CPI in September 2010, covering both benefits and public service pensions (“the September EIA”). The Department had conducted an equality assessment with respect to certain social security benefits in February 2011 but that assessment stated in terms that it did not cover public service pensions. It does not appear from the evidence that the September EIA was seen by the Secretary of State or the Department before the Up-rating Order was made.
21. The September EIA was prepared by the Treasury and reviewed by the Chancellor personally before the Up-rating Order and the Pensions Order were made. It had a section on public sector pensions which referred to the proposed switch to using CPI for up-rating such pensions and accurately identified this as something which would apply to active, deferred and pensioner members of public sector pension schemes. It set out the following information:

“Active members are currently employed and members of the pension scheme; deferred members have left the scheme but not yet reached retirement; pensioners and dependants are currently in receipt of a pension. The switch to CPI has the greatest impact on those for whom index linking applies to for the longest. So the greatest impact is on deferred members of pension schemes, followed by active members and then pensioners and dependants of deceased pensioners. See below for the numbers affected and a breakdown of these groups by gender.

Table 2: Gender split for public service pension members

	Male	Female	Total
Active	35%	65%	5,400,000
Deferred	35%	65%	3,000,000
Pensioners and dependants	40%	60%	3,500,000

The value of a pension depends on unique individual factors such as work history, salary and personal financial decisions. Therefore it would not be possible to give an assessment of the financial impact of the switch by gender without making large and sweeping assumptions about a complex set of inter-relating factors.”

22. The Claimants complain that there was a breach of the equality duty contained in section 76A of the Sex Discrimination Act 1975 (“the SDA”). The issues which arise on this part of the case include whether the September EIA was adequate or properly considered by the appropriate Minister or government department.

The reasons for the change to CPI.

23. There can be no doubt that the immediate driving force behind the change from RPI to CPI was the need to secure cuts in the welfare budget. The witness statement from Dr Richardson, Director of Public Spending at HM Treasury, set out in detail the macro-economic background to the Pensions Order and the overriding need to cut the deficit so as to stabilise government finances. The change in indexation announced in the Budget was seen as “a key element of the wider efforts by the Coalition Government to bring about long-term macro-economic stability by deficit reduction.”
24. Mr Cunniffe, the senior policy advisor to the Department, also confirmed that the savings were “highly significant” for the government, but he identified what were perceived to be other advantages too. He said this:

“As well as the considerable savings that could be made by the switch from the RPI to the CPI, the Secretary of State considered that the switch would have other advantages: (a) the

fact that CPI was already the headline measure for price inflation, used by the Bank of England, and so a more widely recognised measure of the general level of prices; and (b) our view that the CPI was more suitable than the RPI as a measure of inflation for benefit claimants, as it excludes mortgage interest payments but includes all the pensioner households.”

25. He then went on to describe how the RPI had moved into negative growth in 2009 as a result of the fall in mortgage and interest rates and was more volatile than the CPI. The Secretary of State therefore considered that it was not a reasonable benchmark for price inflation and that the CPI, which excluded mortgage interest, was a more appropriate index. Mr Cunniffe also states that it was noted that the geometric mean better reflected substitution behaviour in appropriate categories of goods. It was recognised that the CPI suffered from the disadvantage that many pensioners paid council tax which was not in the CPI basket, but overall:

“whilst it was recognised that no index can perfectly capture everyone’s experience of inflation,.. it was considered that a single index should be used for up-rating and the CPI was considered the most appropriate.”

26. Mr Cunniffe focused on the implications for state benefits (the particular area for which the Department had responsibility and oversight). Dr Richardson confirmed that the Treasury also considered that CPI was superior for the reasons given by Mr Cunniffe for all benefits, tax credits and public service pensions. The Treasury had reached the same conclusion that “CPI provides a fairer reflection of inflation experience than RPI over the longer term, including, for example, because it used the geometric mean.” Dr Richardson also stated that in 2009 - that is, even before the 2010 election - once it had become widely anticipated that RPI inflation to September 2009 would be negative, the Treasury had formed the view that a move to CPI would “better reflect the experience of those affected by up-rating measures, i.e. benefit and public service pension recipients.” He also said this:

“The policy imperative of a move to indexation by the CPI such as we had considered in 2009 became particularly urgent in early to mid 2010 given: (i) the need to ensure long term fiscal savings ...”

The majority on the court read this as saying that the serious economic circumstances were the occasion for the change, and in significant part a reason for it, but it was a change which had already been mooted by the Treasury and which in principle the Treasury considered to be desirable.

27. Finally, we refer to the statement of the Minister of State (Steve Webb MP) in the House of Commons when introducing the draft Up-rating Order, which succinctly provides contemporaneous evidence about the Government’s reasons for making the change:

“... As the Chancellor said in his autumn statement, we have taken

“decisive action to take Britain out of the financial danger zone.”

[Official Report, 29 November 2010; Vol. 519, c. 530.]

Our decisions today about up-rating are part of the plan to ensure we both get on track and stay on track, now and in future.

... For 2010, additional pensions and benefits were held at their 2009 levels because the retail prices index - the RPI - was negative, at minus 1.4%. In those circumstances, many people saw no increase in their pensions or benefit. Why did the RPI fall? It was mainly because of falling mortgage interest payments, but only 7% of pensioners have a mortgage. People with earnings-related pensions lost out because of a fall in costs that did not benefit them. Had the CPI been used to measure the change in prices last year, benefits such as additional state pension would have been increased.

The CPI is the headline measure of inflation in the UK as well as the target measure used by the Bank of England, and it is internationally recognised. The CPI uses a methodology that takes better account of consumer behaviour in response to price increases. The Government believe that it is right to use one appropriate index for uprating additional state pensions, public and private pensions and social security benefits, and that CPI is a more appropriate measure of changes in the cost of living of pensioners and benefit recipients than RPI. In addition, the House may be surprised to learn that the RPI excludes the spending patterns of the poorest pensioners.

For all those reasons, the Government have decided to move to the CPI. ...”

A similar statement was made by Lord Freud, the Parliamentary Under-Secretary of State at the Department, when introducing the draft Up-rating Order in the House of Lords.

The relevant statutory framework.

28. Public service pensions, including those for the civil service, police, the NHS and local government, may be increased in accordance with the rules established under the Pensions (Increase) Act 1971. That Act creates a link between public sector pensions and certain state benefits. The effect is that when benefits are increased to take account of the rise in prices that same rate is used to increase public service pensions.

29. The mechanism works as follows. Section 150(1) of the Social Security Administration Act 1992 obliges the Secretary of State to review certain sums annually
- “in order to determine whether they have retained their value in relation to the general level of prices obtaining in Great Britain estimated in such manner as the Secretary of State thinks fit.”
30. Section 150(2) then sets out what the Secretary of State must do if there has been a rise in the general level of prices:
- “Where it appears to the Secretary of State that the general level of prices is greater at the end of the period under review than it was at the beginning of that period, he shall lay before Parliament the draft of an uprating order –
- (a) which increases each of the sums to which sub-section (3) below applies by a percentage not less than the percentage by which the general level of prices is greater at the end of the period than it was at the beginning;
 - (b) if he considers it appropriate, having regard to the national economic situation and any other matters which he considers relevant, which also increases by such a percentage or percentages as he thinks fit any of the sums mentioned in subsection (1) above, but to which subsection (3) below does not apply; and
 - (c) stating the amount of any sums which are mentioned in subsection (1) above but which the order does not increase.”
31. Section 150(3) then sets out certain benefits in social security legislation, such as the additional state pension. The effect, therefore, is that certain benefits are automatically up-rated in line with the percentage price increase whereas in the case of other benefits there is a discretion whether to give effect to that increase or not, and one of the factors the Secretary of State is required to consider in the latter case is the national economic situation.
32. Section 150(9) provides that the Secretary of State shall make an order in the form of the draft if it is approved by a resolution of each House.
33. Section 189(8) of the 1992 Act provides that an order under section 150 “shall not be made by the Secretary of State without the consent of the Treasury.”
34. Where an up-rating order is made under section 150 of the 1992 Act, section 59(1) of the Social Security Pensions Act 1975 then requires the Treasury to make an order applying the same up-rating percentage used for the additional state pension (which is listed at section 150(1)(c) of the 1992 Act) to what are described as official state

pensions, as defined in the Pensions (Increase) Act 1971, which include the relevant pension schemes in issue in this case. So far as relevant, section 59(1) states:

“Where by virtue of section 150(1) of the Administration Act a direction is given that the sums mentioned in section 150(1)(c) of that Act are to be increased by a specified percentage the Minister for the Civil Service shall by order provide that the annual rate of an official pension may if a qualifying condition is satisfied or the pension is a derivative or substituted pension or a relevant injury pension, be increased ... by the same percentage as that specified in the direction.”

35. It is no longer the Minister for the Civil Service who exercises that power, but the Treasury, pursuant to the Transfer of Functions (Minister for the Civil Service & Treasury) Order 1981.
36. Section 59(6) of the 1975 Act provides that an order made under this section has to be made by statutory instrument and shall be laid before both Houses of Parliament after being made.
37. The Up-rating Order was made under the 1992 Act. By Article 4(4) it directed that specific benefits, including the state additional pension, should be increased by 3.1% (in line with CPI). It came into force on 11 April 2011, the relevant date specified in Article 1 of the Order. The Pensions Order was made under the 1975 Act on 16 March 2011 and laid before Parliament on 17 March. It applied the percentage increase in the Up-rating Order to public service pensions in the way indicated above. As provided in Article 1 of the Pensions Order it too came into force on 11 April 2011.

The grounds of challenge.

38. There are four distinct grounds of challenge to the introduction of CPI as the up-rating measure for public sector pensions. The first and fundamental challenge to the whole exercise is that the CPI is not an index which the Secretary of State was entitled to adopt in compliance with the obligation under section 150(1) and (2). It is submitted that the obligation under the statute is to compare prices directly. The effect of adopting CPI, because it uses the geometric mean, is that the comparison is not simply as between prices but also takes account - albeit at a low level within the aggregation process (namely, within each category of goods and services in the basket) - of consumer reaction to the increase in price. That is the effect of having regard to the fact that if prices of some items increase at a fast rate lower priced goods of the same kind may be substituted.
39. Second, it is submitted that the decision to switch from RPI to CPI was in any event taken having regard to irrelevant considerations or for an improper purpose. The Secretary of State ought to have determined the best method for determining the general increase in prices. What in fact he has done is to pay no regard to that obligation and instead to make a determination which has been driven by the need to make economic savings. That was an improper consideration and the decision

involved using the power for an improper purpose contrary to the well known principle enunciated in *Padfield v Minister of Agriculture* [1968] AC 997. In addition, but perhaps *sotto voce*, it is also contended that the Secretary of State was wrong to have regard to the fact that CPI is used as the headline index for assessing inflation by the Bank of England.

40. Third, it is contended that there have been a series of representations made to relevant trade unions representing public sector workers and to public service employees and pensioners, both through pension scheme guidance documents and in the course of negotiations with the trade unions, to the effect that RPI would continue in the future to be adopted as the method for determining the relevant up-rate in pension benefits. Mr Giffin QC, counsel for the Piper claimants, who took the lead in advancing this argument, submitted that this had both substantive and procedural aspects. He realistically accepted that even if such a legitimate expectation has been established, the Government would have been entitled to override that promise on the grounds that it was in the national interest that the savings resulting from the switch to CPI were, in the Treasury's view, necessary. He says, however, that the Secretary of State never properly addressed his mind to the fact that there were legitimate expectations which were being overridden. Accordingly, in accordance with the decision of the Privy Council in *Paponette v AG of Trinidad and Tobago* [2010] UKPC 32; [2011] 3 WLR 219, the decision was not lawful. The Secretary of State never properly recognised that by switching the index he was frustrating the legitimate expectations of millions of people. The court should not assume that the decision would have been the same had he recognised that the alleged promises made to these pensioners carried moral force which should be overridden only by very strong countervailing considerations.
41. In this context he further submits that the legitimate expectations created a procedural obligation of consultation before they could be overridden. Such consultation ought at least to have been carried out with the relevant trade unions before it was decided to switch the index.
42. Finally, it is submitted that the Secretary of State did not comply with the statutory duty under section 76A(1) of the SDA to have due regard to the need to promote equality of opportunity between men and women ("the public sector sex equality duty"). He failed to have regard to the fact that the effect of the changes would have a particularly marked adverse impact upon women, who constitute a significant proportion of pensioners. Mr Giffin, who also took the lead for the claimants in this part of the argument, recognises that there was an assessment of the adverse impact in the September EIA which was considered by the Chancellor, but he relies upon the fact that there is no evidence that it was considered by the Secretary of State who formally had to make the decision in relation to the Up-rating Order. He further submits that the September EIA which sought to analyse the effect of the decision to up-rate pensions in line with the CPI was inadequate and failed properly to reflect or analyse the full adverse impact which this change would be likely to have on women. A preliminary issue arising under this particular ground is whether the Secretary of State was in fact subject to the public sector sex equality duty when exercising his function to make the Up-rating Order, since section 76A(4) provides that the duty shall not apply to the exercise of "a function in connection with proceedings in the House of Commons or the House of Lords". Mr Eadie QC, for the Defendants,

submits that the making of an order to be laid before both Houses of Parliament falls within that exception.

43. We turn to consider each of these grounds.

(1) *Is the adoption of CPI consistent with the statutory obligation in section 150?*

44. Mr Beloff QC, who took the lead for the claimants in this part of the case, submits that the CPI is not a permissible index for the Secretary of State to adopt when exercising his functions under section 150 of the 1992 Act. He does not complain about two of the three differences between that index and the RPI. He accepts that the more limited coverage and the exclusion of certain services from the basket do not render the index inappropriate. His case is that the use of the geometric mean as opposed to the arithmetic mean in aggregating price increase rates within categories of products is incompatible with the language in section 150(2). He does not say that adopting the CPI in making the Up-rating Order was irrational, simply that it was illegal since it does not involve comparing “the general level of prices” at two distinct periods of time. He says that the use of the geometric mean is premised on the notion that there will be a degree of substitution by consumers within the relevant period under review. That concept therefore factors consumer reaction to the increase in price into the calculation of rates of price changes. That is an illegitimate approach: it means that the comparison is no longer price as against price and therefore like is no longer being compared with like, which is what the exercise under section 150(2) requires.

45. Mr Beloff also contends that there is controversy about the extent to which goods are capable of substitution, and indeed whether it is in principle an appropriate concept to adopt in assessing price changes, and (relying on a passage in the speech of Lord Scarman in *R v Barnet London Borough Council, ex p. Shah* [1983] 2 AC 309 at 347E) submits that it is unlikely that Parliament would have intended that a controversial index of this kind could properly be adopted.

46. He also points out that historically the legislation dealing with up-rating public service pensions first required the uplift to be by reference to the cost of living (see section 2(1) of the Pensions (Increase) Act 1971 as originally enacted) and then the more favourable of prices or earnings (see section 39(1)(3) of the Social Security Act 1973 and then section 125(1) of the Social Security Act 1975, governing up-rating of state benefits, which up-rate was also then applied to public sector pensions), and finally prices alone (from the introduction of section 1(1) of the Social Security Act 1980). The submission is that in effect the CPI is a cost of living index, or at least has elements of that, because it has regard to how consumers respond to price increases within the year under review. Parliament has deliberately eschewed that approach, and the Secretary of State should not reintroduce it under semblance of adopting a prices index.

47. We reject this analysis, essentially for the reasons given by Mr Eadie in response. CPI has become a well established method of assessing the relative increase in prices. It is not an index which measures the cost of living as such, as the ONS and the EU Commission have both made clear in official statements. As Mr Eadie says, it would be remarkable if Parliament had intended to exclude from consideration any price index which attracts widespread support from professional economists in the field.

We do not accept that the fact that some experts may have doubts over the legitimacy of the substitution principle when framing a prices index (if that is the case) could begin to justify the inference that Parliament must have intended it to be excluded from the range of legitimate options available to the Secretary of State. There is also controversy about whether the arithmetic mean adopted in the RPI is appropriate and we were told that there is active consideration whether it should switch to using the geometric mean methodology. Each index has its supporters and critics among the technical community of statisticians and economists and if indices are excluded on the grounds that they are controversial, there may be none that fits the bill. Both the CPI and the RPI are readily available to the Secretary of State as possible measures which he can use “to establish without undue difficulty” (see *ex p. Shah* [1983] 2 AC at 347E) the increase in the general level of prices.

48. Each of the RPI and the CPI has to be constructed from basic information about prices, using a process of successive evaluative judgments made by economists and statisticians at the ONS, any one of which may be more or less controversial or debateable: see paras [9]-[11] above for a short outline of the process involved. Moreover, part of the object of the exercise, in relation to both the RPI and the CPI, is to seek to model the spending patterns and behaviour of average consumers or households, so as to assess the impact of inflation on them. This is the objective which informs judgments about what goes into the basket, whether the consumer patterns of particular groups of individuals should be taken into consideration or not, how the categories of products are identified and how the different rates of price increase in each category are then weighted in an aggregation process leading to the production of a single overall inflation figure. Since the methodology for production of any single overall inflation figure is inevitably shot through with these sorts of judgments, made by expert economists and statisticians, it is implausible to suppose that Parliament intended, in enacting section 150(2) of the 1992 Act, to exclude in principle the use of the geometric mean for aggregating rates of price increases within categories of products, which is simply one more statistical evaluative technique for reflecting consumption patterns and the likely impact of price increases on consumers.
49. Furthermore, the purpose of the up-rating is to ensure that the purchasing power of pensions keeps up with price inflation; to use the language of section 150(1), the exercise is carried out “in order to determine whether [pensions] have retained their value in relation to the general level of prices obtaining in Great Britain.” The adoption of a methodology which incorporates a substitution principle is entirely consistent with, and serves to promote, that objective.
50. We do not, therefore, accept that the weighting based on use of the geometric mean involved in the CPI methodology is at odds with Parliament’s intention. The obligation is to make a comparison of the general level of prices and that is what is being done; like is being compared with like. Moreover, in fact all the items in each category of product in the basket are being valued: the price of each item in the category at the beginning of the relevant period is compared with its price at the end to identify the rate of change in price for that item - no item is treated as dropping out of the category in that period, nor is any item added to it. The use of the geometric mean does not affect this; it just means that the rate of change in price of each item is not weighted equally. If it appears to the Secretary of State that this is a proper way

to ensure that pensions retain their value, without pensioners receiving either too much or too little, we can see no reason why he should not adopt that index.

51. Accordingly, in the judgment of the court, this submission fails.

(2) *Irrelevant considerations and improper purpose.*

52. The claimants submit that the Secretary of State erred in law in having regard to economic considerations when deciding to switch to the CPI index. The submission is that the obligation under section 150(1) and (2) is to determine what as a matter of fact is the increase in the general level of prices over the year. It is implicit in that obligation that the Secretary of State must make the best estimate of the increase in the general level of prices that he can. Parliament cannot have intended to permit him deliberately to make an inferior estimate or one that he thinks will less truly reflect the increase in the general level of prices simply because the state of the national economy justifies it. That would frustrate the object of the exercise and would involve acting for an improper purpose contrary to *Padfield*.

53. Both Mr Beloff and Mr Giffin conceded that if after having made a conscientious attempt to determine the best way of measuring the increase in the general level of prices the Secretary of State was genuinely left with two or more options, then at that stage, but at that stage only, he would be entitled to have regard to other considerations, including the state of the national economy. (Although it is right to record that Mr Giffin submitted that he could not envisage that situation arising.) But that discretion arises only after he has first conscientiously sought to identify the best measure for making the relevant assessment. Here he never did that. As Mr Beloff graphically put it, the Secretary of State has put the economic cart before the statutory horse. The need to make savings was the dominant factor driving the choice of methodology. There never was a proper comparison of RPI and CPI shorn of national economic considerations to determine which index the Secretary of State genuinely thought would best achieve the statutory purpose. This was a consideration that inexorably tainted the determination. Moreover, where Parliament had intended the national economic situation to bear upon the decision of the Secretary of State it said so. That is the striking contrast between section 150(2)(a) and 150(2)(b) of the 1992 Act. The latter expressly entitles the Secretary of State to have regard to the national economic situation. The former does not. It cannot be implied, therefore, that this was a relevant factor for the Secretary of State to take into consideration.

54. Mr Eadie submits that this is a misconstruction of the statutory obligation. Parliament has not obliged the Secretary of State to determine the “best method”. The obligation is to adopt a method which fairly and genuinely measures the rate of increase of prices. The CPI is a legitimate measure widely adopted for that very purpose. Once it is accepted that the method adopted by the Secretary of State is one which satisfies the statutory criterion, then he is perfectly at liberty to adopt that method and he may select it in preference to other potential competitors on the ground that it will involve a smaller claim on the public purse.

55. It is in relation to this issue that there is a difference of view between us. McCombe J gives his reasons for dissenting on this issue in the judgment which follows. Paragraphs [56] to [67] below set out the reasons and conclusion of Elias LJ and Sales J.

56. We recognise the force of the Claimants' submission but ultimately we are not persuaded by it. The assumption underlying the analysis is that an assessment of the change in the general level of prices is a simple matter of fact. Some methods are better at determining what the answer is than others and the Secretary of State should adopt what he thinks will be most likely to yield the right answer. Mr Giffin said that an appropriate analogy was conducting a scientific experiment to determine some fact. However, that is not, in our view, a proper description of the nature of the exercise being undertaken.
57. A determination of the increase in the general level of prices is, within certain parameters, a question of judgment which depends on a myriad of decisions taken by experts who are independent of government: see para [48] above. Depending on the choices they make, there may be a range of assessments yielding slightly different results, yet each can legitimately be said to determine the general level of price rise. There is no single or simple right answer.
58. Moreover, if the Secretary of State had to adopt the best method, we do not see why he should restrict his choice to either RPI or CPI as they are currently applied. He would need to keep under constant review the appropriateness of the index being used and to consider whether variations in its methodology would better achieve the statutory objective. But there is nothing in section 150(1) or (2) which suggests that Parliament intended to impose such an obligation. Rather, Parliament clearly intended that the Secretary of State should be entitled to use any measure which lay readily to hand and which appeared to him to be suitable. For many years, RPI was the main index in the field, and so the obvious candidate; but since 1996 RPI and CPI have both been reasonable candidates either of which might be chosen.
59. In our judgment, if the Secretary of State is satisfied that a particular measure is a fair and genuine method for making the relevant determination, so that it can legitimately be said that it achieves the objective of protecting the purchasing power of the relevant benefits and pensions, he can adopt that method even if his reason for preferring it over other potential candidates is that it draws less on the public purse.
60. The statute leaves it to him to decide what method he wishes to adopt. Plainly he could not use a method which he did not genuinely and rationally believe could fairly be said to preserve the purchasing power of the pension merely because it would be cheaper to do so. That would indeed be to allow economic considerations to frustrate the statutory purpose contrary to the *Padfield* principle. But it cannot conceivably be said that the CPI, a reputable index of a kind adopted throughout Europe, falls into that category. It seems to us that the Secretary of State can perfectly properly say that there are at least two indices (and perhaps more) which significant bodies of experts say properly measure the change in the general level of prices and will protect the purchasing power of benefits and pensions, and that he accepts that either achieve that objective. Once that decision is reached, he can lend his support to one rather than the other for any rational reason.
61. We do not consider that the contrast between section 150(2)(a) and section 150(2)(b) has the significance which the Claimants contend it has. The latter confers a discretion on the Secretary of State to uplift specified benefits by something less than (or more than) the change in the level of prices, and he is required to have regard to the state of the national economy when exercising that discretion. Plainly there is no similar

discretion when the Secretary of State is exercising his function under 150(2)(a). He is statutorily obliged to give effect by an Up-rating Order to the relevant increase in the level of prices which has been determined according to the method he has chosen. Nobody is suggesting that the state of the national economy can influence the actual calculation of the price rise, nor that the Secretary of State can do other than give effect to it once it has been determined by some suitable method. But there is nothing in section 150(2)(a) which forbids him from having regard to national economic factors in all circumstances when exercising his powers under that provision. The fact that the state of the national economy is a mandatory relevant consideration under section 150(2)(b) does not imply that it cannot be a permissible relevant consideration when making a choice between two suitable measurement methodologies for the purposes of section 150(2)(a). Indeed, the concession rightly made by the Claimants to the effect that the Secretary of State could have regard to national economic conditions in the event of a tie-break implicitly accepts the correctness of this analysis.

62. If we are wrong about that the question arises whether the Secretary of State would in any event have made the same decision had he not taken into consideration economic considerations. The relevant principle here was set out by May LJ in *R v Broadcasting Complaints Commission, ex p. Owen* [1985] 1 QB 1153, at 1126-7. The Claimants contend, and McCombe J agrees, that it cannot be said with a requisite degree of confidence that the Secretary of State would have made the same decision to use CPI if he had had no regard to economic considerations. The Chancellor was casting around for a different method which would make cost savings and this may have tainted his assessment of the merits of the CPI scheme. There is no evidence that he ever asked the simple question whether CPI was a better scheme than RPI independently of economic considerations.
63. We do not accept that submission. In our judgment, the evidence from Mr Cunniffe and Dr Richardson set out above makes it plain that both the Secretary of State and the Chancellor independently came to the view that the CPI scheme better reflected the effect of inflation on the spending power of benefits and pensions, for a variety of reasons quite independently of cost. The good faith of the Government has not been impugned and there is no basis for contending that these were not genuinely held views.
64. We do recognise why the Claimants say that the courts should look with a highly critical eye at an assessment of the merits of two schemes when the Government was already strongly disposed to favour CPI over RPI. We also recognise that but for the need to make savings, it may well be the case that there would have been no focus on this issue at all, at any rate at the particular time when the Orders were made. In his closing submissions Mr Beloff said that but for the national economic situation the Secretary of State would not at that time have made the switch to the CPI. We would not dissent from that. There is no doubt that the economic situation was the occasion for the change. It does not follow, however, that because the credit crisis caused a careful re-examination of the appropriate index to adopt that the Secretary of State did not genuinely believe, on careful analysis, that the CPI did in fact constitute the more appropriate index, even if that was a conclusion he was wanting to reach. In our judgment, the evidence sustains that view. Indeed, it seems to us that in the light of

the evidence on this, the submission to the contrary effectively involves challenging the good faith of the Secretary of State.

65. We would therefore be prepared to conclude that had the Secretary of State been obliged (contrary to our view) to consider the “best” scheme (see para [56] above), he would have concluded that CPI did most fairly assess the amount by which pensions would need to be increased to retain their purchasing power. In those circumstances it would be inappropriate to require the decision to be reconsidered in any event.
66. In short, even if the Secretary of State was wrong to have regard to economic considerations when deciding which of the two available indices to adopt, we are satisfied that to the high standard required, he would have chosen CPI in any event.
67. For these reasons, we reject this ground of challenge.

CPI as a headline Index for inflation.

68. Mr Beloff also submitted that the Secretary of State was not entitled to have regard to the fact that the Bank of England uses the CPI index when determining the rate of inflation. If inflation is above a certain level then the Bank of England is under an obligation to notify the Chancellor. CPI is the measure adopted for that purpose. Mr Beloff says this is entirely irrelevant to the exercise which the Secretary of State must carry out under section 150 of the 1992 Act.
69. We accept, of course, that it would not be legitimate to select this index merely because it is employed by the Bank of England. The Secretary of State would have to be satisfied that it met the objectives of section 150. But essentially for the reasons we have given in respect of having regard to economic considerations, in our judgment, once the Secretary of State has considered that CPI is an appropriate method for determining the general increase in the level of prices, then the fact that this is used elsewhere, and in particular by the Bank of England, is a factor which he is entitled to take into account when deciding that this is the scheme which he wishes to adopt. It demonstrates the legitimacy of the index, and it is in our judgment a potentially relevant, if no doubt relatively minor, consideration that the index which is most prominent in the public eye is appropriate for benefits and public sector pensions too. It avoids the potential for public confusion and also the possible disappointment which can arise when the CPI and RPI rates diverge to the detriment of pensioners and those in receipt of benefits. We see no error in the approach of the Secretary of State in this respect.

(3) *Legitimate Expectation.*

70. There was little difference between the parties on the legal principles applicable. In his skeleton argument Mr Giffin (who took the lead for the Claimants in presenting this part of the case) cited three cases where those principles could be found. It suffices to quote only one. That is *R (Nadarajah & anor.) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 where Laws LJ said that the theme running through the legitimate expectation cases could be expressed as follows (paras [68]-[69]):

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

69. This approach makes no distinction between procedural and substantive expectations. Nor should it. The dichotomy between procedure and substance has nothing to say about the reach of the duty of good administration. Of course there will be cases where the public body in question justifiably concludes that its statutory duty (it will be statutory in nearly every case) requires it to override an expectation of substantive benefit which it has itself generated. So also there will be cases where a procedural benefit may justifiably be overridden. The difference between the two is not a difference of principle. Statutory duty may perhaps more often dictate the frustration of a substantive expectation. Otherwise the question in either case will be whether denial of the expectation is in the circumstances proportionate to a legitimate aim pursued. Proportionality will be judged, as it is generally to be judged, by the respective force of the competing interests arising in the case. 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. They are included in Mr Underwood's list of factors, all of which will be material, where they arise, to the assessment of proportionality. 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. It is no surprise that, as I ventured to suggest in *Begbie*, "the first and third categories explained in the *Coughlan* case... are not hermetically sealed". These cases have to be judged in the round."

71. The Claimants contend that four matters render it unfair or an abuse of power to go back upon the general understanding that RPI would be used for the up-rating review under section 150 of the 1992 Act. First, the Claimants point to statements in the explanatory literature for pension scheme members published by the defendants that the scheme benefits would be up-rated from time to time by reference to RPI. Secondly, it is said that in the course of negotiations with the trade unions, assumptions were made by both sides that RPI would be the yardstick for up-rating. Thirdly, it is argued that individual scheme members buying into the public service schemes and those making purchases of augmented benefits did that on the basis of actuarial calculations assuming the use of the RPI for statutory up-rating purposes. Fourthly, they claimed that there was an assurance to be spelled out of past practice in up-rating pensions by reference to the RPI that the same would be done in future.
72. It is pertinent to bear in mind the nature of the promise which it is alleged was made here. It is said to be an open-ended promise to maintain the RPI indefinitely, constraining the Secretary of State from effecting a change of policy in an area bearing significantly on the public purse. In principle there is no reason why a legitimate expectation cannot be created in such circumstances; there are a small number of cases where the courts have accepted that it could apply to changes of policy: see e.g. *R v Ministry of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All E.R. 714. But in our judgment there would have to be very cogent evidence indeed of such a promise where it is intrinsically unlikely that the Government would have been willing or intending to make one. No doubt the pension beneficiaries would have had an expectation that the established policy would continue. But absent a clear and unequivocal promise to the contrary, the only legitimate expectation is that the beneficiaries will be treated in accordance with whatever is the lawful policy in place at any particular time: see the observations of Lord Scarman in *In re Findlay* [1985] 1 A.C. 318, 338. Moreover, as the observation of Laws LJ in the above quotation makes clear, the more far reaching are the consequences of holding Government to the promise, the easier it will be for the

Government to establish that the countervailing public interest is sufficiently strong to justify the promise being overridden.

73. Bearing these considerations in mind, and whether the alleged sources of the promise are taken collectively or in turn, it seems to us that in each case the claim based on the legitimate expectation principle must fail. In our judgment there was never any promise or assurance given, or any practice adopted amounting to any such promise or assurance, which was “clear, unambiguous and devoid of relevant qualification” that RPI would be the index of review in perpetuity. The absence of such a promise or assurance is fatal to a claim based upon legitimate expectation: see, e.g., *R v Inland Revenue Commissioners, ex p. MFK Underwriting* [1990] 1 WLR 1545, 1569 per Bingham LJ (as he then was); *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755, at [43] per Laws LJ; *Paponette v A-G of Trinidad & Tobago* [2010] UKPC 32; [2011] 3 WLR 2625 at [28]-[30]; and *R (Davies) v HM Revenue and Customs Commissioners* [2011] UKSC 47; [2011] 1 WLR 2625, [28]-[29] and [49] per Lord Wilson JSC.
74. In the case of pension scheme literature, we were shown various examples of statements referring to the up-rating of benefits by reference to RPI in the papers before the court. So far as we are able to tell from the brief review that was conducted, each explanatory document indicated that it had to be read subject to the more detailed provisions of the scheme rules and legislation. Nowhere was the impression given that the requirements of review contained in the Act were to be encumbered by an inflexible adherence *ad infinitum* to RPI. No reasonable reader of this material could have thought that this index would be used for up-rating purposes whatever the changes to it that might develop or whatever schemes for measuring price inflation might emerge in the future. We accept Mr Eadie’s submission for the Defendants that the references to RPI were no more than references to the up-rating machinery used for the time being.
75. Again, looking at the evidence relating to the negotiations between Government and the trade unions, it must surely have been the position that the trade union representatives, experienced as they were, knew of the legislative machinery under which up-rating took place and the fact that no specific revaluation index was identified in the 1992 Act. That must have been taken as read and each side worked on the basis of the index that had, in fact, been used for a number of years. It can hardly be thought that the parties based their discussions and conclusions upon the basis that RPI would be the up-rating mechanism for ever. Certainly nothing was said in the negotiations which amounted to a clear, unambiguous and unqualified representation that RPI would always be the index adopted by the Secretary of State for the purposes of the up-rating exercise each year.
76. With regard to individual transfers and benefit purchases, as Mr Giffin made clear in his skeleton argument, the Claimants disavow any private law claims by the individuals concerned because the relevant transactions must be taken to have occurred on the terms of the individual schemes and the legislation. In our judgment, this disclaimer of individual private law rights (which one might think could be rather stronger than a claim based upon a promise to a collection of members) also undermines the public law claim. If individuals who “buy in” or purchase additional

benefits on the basis of a mutual understanding that RPI is likely to continue but are defeated by the detailed legal position under the schemes, scheme members generally can hardly be in any better position. Any representations about the index to be used were all reasonably to be read as qualified by the legislation and scheme rules.

77. The claim to a legitimate expectation founded on past practice is weaker still, for reasons similar to those set out by Lord Wilson JSC in *Davies* at [49]. As in that case, the Claimants are unable to point to evidence that the previous practice of using RPI for up-rating benefits and pensions “was so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment” to pension scheme members “of treatment in accordance with it”.
78. For these reasons, we consider that the legitimate expectation claims do not get off the ground and must fail. However, even if the “promises” or assurances” could get beyond this threshold, the claims based on the principle of legitimate expectation face further difficulties.
79. Even if the Claimants had been able to establish a legitimate expectation, that would not have been sufficient to succeed in a claim that the expectation must be honoured by adhering now and in the future to use of the RPI. Such an expectation can be overridden if the wider public interest requires it. Mr Giffin realistically accepted that on the premise – which necessarily underlies the legitimate expectation argument – that the Secretary of State was entitled to have regard to economic factors when selecting which of two legitimate indices to choose, it would have been open to the Secretary of State to override any promise to the pensioners and to change to CPI. Therefore, he did not contend that it would be disproportionate to fail to give effect to the legitimate expectation with the consequence that the only appropriate order was to confirm that the Secretary of State was obliged to adopt the RPI. Rather he adopted the more modest submission that the Secretary of State had not had proper regard to the legitimate expectation when making the decision and accordingly the decision should be quashed. The Secretary of State should then be entitled to reconsider it giving due weight to that factor. He relied upon the following observations of Lord Dyson JSC giving the judgment of the majority of the Judicial Committee of the Privy Council in *Paponette v A-G of Trinidad & Tobago* [2010] UKPC 32; [2011] 3 WLR 2625, at para.[46]:
- “Where an authority is considering whether to act inconsistently with a representation or promise which it has made and which has given rise to a legitimate expectation, good administration as well as elementary fairness demands that it takes into account the fact that the proposed act will amount to a breach of the promise. Put in public law terms, the promise and the fact that the proposed act will amount to a breach of it must be taken into account.”
80. Mr Giffin accepted that the evidence demonstrated, as Mr Eadie asserted, that the Government had undertaken a review of the scheme literature and had recognised that some might consider that a legitimate expectation to continue to use RPI had been created. But he contended that on the assumption that there was in fact a legitimate expectation in law, it was not a proper compliance with the Government’s legal obligation simply to have some regard to the fact that others believed that the

expectation existed. The point about a promise is that in the normal way it should be honoured. It has a moral force which should be given substantial weight in the decision making process. It should only be overridden where a countervailing public interest justifies it. This demands, as the judgment of Lord Dyson indicates, that the legitimate expectation is properly and fully taken into account.

81. We think there is considerable force in that submission. The weight given to a promise generating a legitimate expectation would naturally be expected to be greater than the weight, if any, given to the fact that the Government recognises that some may think (wrongly, in the Government's view) that there was a promise.
 82. Of course, on this analysis, it would always be open to a decision-maker to consider that even if, contrary to its own belief, there were a promise amounting to a legitimate expectation, nonetheless the public interest would justify it being overridden; but that was not the Defendants' approach in this case. On the other hand, as Mr Eadie contended for the Defendants, it might be said that, even though they did not accept that promises had in fact been made and so did not confront the moral force associated with that, they considered the issue responsibly and reasonably, so that it could not fairly be said that their conduct in this respect amounted to an abuse of power. Since on our findings of fact the issue does not arise, we do not think it is necessary or appropriate to consider further this hypothetical situation.
 83. Finally, again on the basis that promises were made to them or pension scheme members regarding the future use of RPI for up-rating, the Claimants assert that they had a right to be consulted before their substantive expectations based on such promises were defeated. In support of this contention, Mr Giffin relied on *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755. This claim again fails because the Claimants cannot establish that relevant promises about the future use of the RPI were made to them. In any event, we consider that it is clear from the evidence that the relevant unions (who Mr Giffin accepted would have been the appropriate consultees) did engage in vigorous representations to Ministers after the initial policy change was announced but before the Orders were made. In our view, if there had been an obligation to consult, it would have been satisfied by the process of debate with the unions which did in fact occur. The unions had their opportunity to deploy the same arguments in the period of months between the budget in June 2010 and the making of the statutory orders in March 2011 that would have arisen in the consultative process which the Claimants contend was necessary.
 84. For all these reasons, the claims based upon legitimate expectation must fail.
- (4) *The public sector sex equality duty.*
85. Section 76A of the SDA provides in relevant part as follows:
 - “(1) A public authority shall in carrying out its functions have due regard to the need –
 - (a) to eliminate unlawful discrimination, harassment and victimisation and
 - (b) to promote equality of opportunity between men and women.

- (2) In subsection (1) -
 - (a) “public authority” includes any person who has functions of a public nature (subject to subsections (3) and (4),
 - (b) “functions” means functions of a public nature ...
- (3) The duty in subsection (1) shall not apply to –
 - (a) the House of Commons,
 - (b) the House of Lords,
 - (c) the Scottish Parliament,
 - (ca) the National Assembly for Wales ...
- (4) The duty in subsection (1) shall not apply to the exercise of-
 - (a) a function in connection with proceedings in the House of Commons or the House of Lords ...
- (5) Subsection (1)(b) is without prejudice to the effect of any exception to or limitation of the law about sex discrimination ...”

86. Mr Giffin submits that there was a breach of the duty in section 76A(1) for two reasons. First, there was no proper consideration of this duty by the Secretary of State at all but only by the Treasury. Second, the Treasury did not properly assess the full adverse impact which the change would have on women. Mr Eadie asserted that neither of these complaints was sustainable, but in addition he made the more fundamental submission that the duty was not engaged at all because the making of these particular orders was a function “in connection with proceedings in Parliament” within the meaning of section 76A(4)(a). He further contended in written submissions made after the oral hearing that the duty was also excluded by virtue of section 21A of the SDA. For reasons we now give, we conclude that even if the duty did arise, it was satisfied in the circumstances of this case. Accordingly the question whether the duty was engaged does not strictly need to be resolved. However, since we received detailed written submissions on the point from Mr Giffin, and given the potential significance of the point, we will sketch out our response to the arguments. We are strongly inclined to the view that in the particular circumstances of this case the duty did not in fact arise. We will first deal with Mr Giffin’s arguments premised on the assumption that it did.
87. In our judgment, the focus of the inquiry must be the Up-rating Order. The reason is this. If an Up-rating order is made under section 150, the Treasury is subject to a mandatory duty under section 59(1) of the 1975 Act to make an equivalent pensions order. That being so, if the Up-rating Order is struck down for failure to comply with section 76A(1), then as a consequence of that the Pensions Order would also have to be quashed, since the Treasury acted on the assumption that it was subject to a duty which would (on this hypothesis) not have arisen. On the other hand, if the Up-rating

Order is not vulnerable to attack under section 76A(1), then nor will the Pensions Order be, since in those circumstances the Treasury had no option but to make the Pensions Order.

88. Mr Giffin's first submission was that the Secretary of State himself never had regard to the impact on pensions; only the Chancellor did that (see para [20] above). So there was a clear breach of the relevant duty. The September EIA was carried out by the Treasury and considered by the Chancellor. There was no evidence that either the Secretary of State or the officials in his department even considered it.
89. We reject that submission. In our judgment, it was appropriate for the PSED to be implemented in the way it was (assuming it applied). It is true that there is a division of responsibility which places all public sector pensions under the control of the Treasury and social security benefits under the control of the Department. This is reflected in the fact that the Secretary of State made the Up-rating Order and the Treasury made the Pensions Order. However, under section 189 of the 1992 Act the Treasury must give its consent before an up-rating order is made. In our view, on the assumption that the public sector sex equality duty applied, this power of veto would be sufficient to oblige the Treasury to comply with it, quite independently of the Secretary of State. But the Treasury did comply with it, and in our judgment it would be elevating form over substance to require the Secretary of State to do so as well. On usual principles under *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560, a Minister may rely on workings and a review of effects carried out within his department to satisfy the "due regard" requirement in section 76A(1) or similar provisions, without having personally to read an impact assessment, so long as the task has been assigned to officials at an appropriate level of seniority or expertise. Equally, in our view, the "due regard" duty can be discharged by a Minister if he can be satisfied that the relevant equality assessment has been carried out by another Government department as well or better placed than his own to undertake the task, particularly where that other department has policy responsibility in relation to the effects under review. In such a situation, the obligation to have "due regard" to the relevant matter will have been satisfied as a matter of substance, as required by section 76A(1). Accordingly, we reject this part of Mr Giffin's case.
90. The alternative ground on which he alleged breach of the duty was that the September EIA was defective in that it did not go into sufficient detail to analyse the full adverse impact which the change to CPI would have on women. Mr Giffin accepts that the September EIA did recognise that the greater proportion of public sector workers were women, but he submitted that part-timers were also adversely affected, and these were largely women, yet there was no reference to that. In our view this is too nit picking. It was plain from the September EIA (the relevant part of which is set out above at para [21]) that the Government well understood that in broad terms more women would be adversely affected than men. However, for the reasons given it was not feasible to say anything more precise than that. Anything more would have been speculation and guess work and would have added little or nothing to the basic picture which the EIA already painted. So we reject this argument also.

Was the duty under Section 76A engaged?

91. Mr Eadie submitted that the duty was not engaged for two reasons. First, the making and laying of the instrument before Parliament were acts connected with proceedings

in Parliament and therefore were exempt by section 76A(4)(a). Second, in written submissions made subsequent to the hearing he also contended that the duty was excluded by the fact that the relevant Ministers were excluded from the non-discrimination duty by section 21A of the SDA. We will deal with this latter argument first.

The section 21A exclusion.

92. Section 21A was introduced into the SDA by amendment under the Equality Act 2006 at the same time as section 76A. Section 21A(1) provides that it is unlawful for a public authority exercising a function to do any act which constitutes discrimination or harassment; subsection (3) provides that the prohibition shall not apply to various bodies, including the House of Commons and the House of Lords; and subsection (4) provides that the prohibition shall not apply to functions and actions listed in a Table of Exceptions set out at subsection (9), which includes at paragraph 1 “Preparing, making or considering” Acts of Parliament, Acts of the Scottish Parliament and Measures of the National Assembly for Wales and at paragraph 2 “Preparing, making, confirming, approving or considering legislation made or to be made” by various persons or bodies, including “(a) by a Minister of the Crown”. This latter provision means that the making of any kind of subordinate legislation by a Minister, by whatever process the governing legislation dictates, is exempt from the general non-discrimination duty on public authorities set out in section 21A(1) in the same way as is the making of an Act of Parliament.
93. The contention is that since the Secretary of State is relieved from the duty as a public body not to discriminate, it follows that he is wholly outwith the SDA, including the duty imposed by section 76A. We reject that submission. In our view, Mr Giffin gave a simple and decisive answer to it. There is no basis whatever to read this limited exception to the section 21A duty as intending to apply to the different duty under section 76A. There is nothing intrinsically inconsistent with requiring the Secretary of State to have to comply with the “due regard” duty in section 76A(1) when considering the potential impact of subordinate legislation whilst at the same time not being subject to the non-discrimination duty himself when making the legislation. The scope of that duty may be restricted because section 76A(1)(a) requires the Secretary of State to have regard to the elimination of *unlawful* discrimination, but section 21A prevents the legislative proposals from being unlawful. But that does not mean that the duty is wholly disapplied.

The section 76A(4)(a) exclusion.

94. This raises an important issue. We did not have the advantage of full submissions on this point. Mr Giffin focused on it in his written submissions post hearing, but Mr Eadie then concentrated on the section 21A argument. Hence we have had no detailed response to Mr Giffin’s arguments. However, we express some provisional views in case it may assist in future cases or, indeed, in case this argument is taken on appeal in this case.
95. Mr Giffin advanced three reasons why this provision did not exclude the making of the orders in this case. He submitted that the exemption in section 76A(4)(a) was

intended only to apply to matters covered by Parliamentary privilege and should be so construed; that where the formula used in section 76(A)(4)(a) had been used previously in connection with other “due regard” duties it had not covered the making of subordinate legislation by Ministers (and it should be interpreted in a similar way when used in the SDA); and that his contention is reinforced by consideration of the exemption from the new public sector equality duty in section 149(1) of the Equality Act 2010, contained in section 149(2) of that Act. We consider them in turn.

Proceedings in Parliament.

96. Mr Giffin contended that the section is concerned solely with Parliamentary privilege. It is making express what would in any event be outwith the control of the courts. The making of secondary legislation and the laying of an instrument before Parliament was not of itself connected with proceedings in Parliament. Mr Giffin submitted that the origin of this section was section 6(3) of the Human Rights Act 1998 (“the HRA”) which uses the same language and that this did not create an exception for making subordinate legislation of the kind occurring here.
97. We agree that section 6 of the HRA is the origin of the exemption. However, we do not agree that the rationale of section 6(3) was simply to preserve Parliamentary privilege. It is pertinent to note that the Notes on Clauses for the Human Rights Bill in both the House of Commons and the House of Lords stated in relation to section 6(3):

“However the subsection excludes from being a public authority either House of Parliament and a person exercising functions in connection with proceedings in Parliament (e.g. Her Majesty the Queen passing Royal Assent to a Bill). Parliament is excluded because it would be contrary to the principle of Parliamentary sovereignty if actions of Parliament became subject to challenge in the courts”.
98. It appears from this that the phrase was not introduced simply in order to protect matters covered by Parliamentary privilege. Moreover, the words “in connection with” proceedings in Parliament indicate that activities going beyond proceedings in Parliament themselves are intended to be covered. It should be noted that the Notes on Clauses are not themselves an aid to construction of section 6(3) of the HRA (see *R (Public and Commercial Services Union) v Minister for the Civil Service* [2010] EWHC 1027 (Admin); [2010] ICR 1198 at [42] and [53]-[55]); but they suggest that something along these lines may well have been said by Ministers in Parliament which could operate as an aid to construction. We did not have the benefit of a search of *Hansard* to check on this.
99. Furthermore, it is common ground that the public sector sex equality duty would not apply to the making of primary legislation. Yet the giving of Royal Assent is not the subject of Parliamentary privilege, and - since by virtue of section 85(3B) of the SDA

section 76A applies to the Crown - the best explanation for why the Queen is not subject to the duty when giving Royal Assent is that she is protected by section 76A(4)(a). That is indeed the explanation given in the Notes on Clauses for the HRA above.

100. Once it is appreciated that the purpose of section 76A(4)(a) might be to preserve the sovereignty of Parliament rather than, or at least in addition to, the privileges of Parliament, that necessarily affects the construction of the subsection. However, it is not necessarily every instrument of subordinate legislation which requires Parliamentary involvement to a degree sufficient to justify the conclusion that the making of the instrument is connected to a proceeding in Parliament. Statutory instruments take a very wide variety of forms. The Parliamentary input ranges from none at all (where subordinate legislation is made without being required to be laid before Parliament), through a requirement to lay an instrument before Parliament once made, through different versions of a negative resolution procedure (e.g. a requirement to lay before Parliament an instrument which takes immediate effect, but is subject to annulment by resolution of either House), to various forms of an affirmative resolution procedure (e.g. a requirement that an instrument be laid before Parliament after it has been made, to come into effect only when approved by affirmative resolution of both Houses, or where an instrument can only be made once so approved): see A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law*, 13th ed. (2003), pp. 656-658. Only some of these procedures will be sufficiently connected with procedures in Parliament to attract the exemption and there is a difficult line to draw between those which do and those which do not.
101. However, whatever difficulties there may be in other cases, here the role of Parliament is very significant. The procedure stipulated in section 150(2) and (9) of the 1992 Act is a particularly strong example of a case where an instrument can only be made after affirmative resolution of both Houses. Having regard to the obligation on the Secretary of State under section 150(9) to make the order once approved, it engages the decision-making authority of Parliament even more directly than usual provisions to invoke the affirmative resolution procedure (see e.g. that under consideration in *R (Asif Javed) v Secretary of State for the Home Department* [2002] QB 129, set out at [2] – an order shall not be made “unless a draft of the order has been laid before and approved by a resolution of each House of Parliament”).
102. It is a reasonable inference that the reason that the affirmative resolution procedure is stipulated in this particularly strong form is that once an Up-rating Order is made, additional charges will be made against central public funds. These charges will be on both the Consolidated Fund, in relation to non-contributory benefits and public sector pension payments, and on the National Insurance Fund, in relation to contributory benefits (and certain limited elements in relation to some public sector pension payments). Such an order therefore engages a central aspect of Parliamentary authority and responsibility, namely control of taxation and expenditure. In relation to charges on the Consolidated Fund, legislation will in due course be required to authorise the payments out of that Fund to meet the increased expenditure contemplated by an up-rating order and to top up the National Insurance Fund under section 2 of the Social Security Act 1993 as well if that is required (see *Erskine May, Parliamentary Practice*, 24th ed., 2011, pp. 746-747). Overall, therefore, Parliament’s involvement is almost as complete as in primary legislation itself.

103. Moreover, there is authority to support the proposition that section 6(3) of the HRA is designed to preserve and protect Parliamentary sovereignty. This is the decision in *R (Rose) v Secretary of State for Health* [2002] EWHC 1593 (Admin). This concerned the application of section 6(6)(a) of the HRA, which provides that for the purposes of section 6(1) of the HRA an “act” includes a failure to act “but does not include a failure to ... introduce in, or lay before, Parliament a proposal for legislation ...”.
104. In *Rose* the court observed that section 6(6)(a) is intended to remove from control under section 6(1) those acts where the legislative authority of the Houses of Parliament would directly be in issue, including in particular where the parent primary legislation provides that a statutory instrument containing subordinate legislation may not be made unless authorised by affirmative resolution, and that the distinction in section 6(6)(a) “reflects the general concern in the [HRA] to preserve and protect Parliamentary sovereignty; Parliamentary sovereignty is more closely engaged where subordinate legislation cannot be made without direct approval by Parliament”: at [51] per Scott Baker J (as he then was), referring in this regard to a Joint Note by Mr Robin Allen QC and Mr Philip Sales for the Court of Appeal (published in [2000] *Public Law* 361) at paragraph 21, which was accepted as containing an accurate statement of the law. It is also worth pointing out that as the introduction to the Joint Note at [2000] *Public Law* at p. 360 explains, instructions were taken from all relevant Government departments for the purposes of setting out the position in the Joint Note). That being the underlying rationale for the distinction in section 6(6)(a) where there is a failure to take action, *a fortiori* one would expect that the same distinction would inform the interpretation of section 6(3) when action *is* taken by way of putting a proposal for subordinate legislation before Parliament and Parliament itself approves the making of that legislation. It is an interpretation of section 6(3) which is properly informed by the general, well-known structural feature of the HRA, namely that it was intended to preserve the sovereignty of Parliament (meaning, in this context, the positive decision-making powers of Parliament with respect to making binding law). There may be scope for argument about where on the spectrum of processes referred to in para [100] above (which reflect different levels of involvement by Parliament and different levels of application of its decision-making authority) the cut-off point inherent in the distinction invoked in section 6(3) and 6(6)(a) might operate. However, there can be little doubt that the particularly strong form of affirmative resolution procedure called for by section 150 of the 1992 Act, reflecting the need for Parliamentary control of public expenditure, is at a point which is protected from general review under section 6 of the HRA (although not from its application in any particular case: see paragraphs 15-16 of the Joint Note). It would follow that the section 76A public sector sex equality duty would be excluded in the circumstances of this case.

Previous legislation.

105. Mr Giffin made submissions based on the development of equalities legislation to support his case. The first duty for public authorities (including Ministers) to have “due regard” to the need to promote equality in particular ways was by amendments to section 71 of the Race Relations Act 1976 (“the RRA”) introduced by the Race Relations (Amendment) Act 2000 as part of the then Government’s response to the report of the Stephen Lawrence Inquiry. Those amendments were introduced with a new section 19B, which introduced a general prohibition on discrimination by public

authorities similar to that later introduced into the SDA in the form of section 21A. Section 19B(2)(a) stated that “public authority” included any person certain of whose functions were functions of a public nature, but did not include anyone mentioned in subsection (3), which included “(a) either House of Parliament; (b) a person exercising functions in connection with proceedings in Parliament ...”. Section 75(2B) of the RRA provided that section 19B bound the Crown. Section 19C(2) provided that section 19B did not apply “to any act of, or relating to, making, confirming or approving any enactment or Order in Council or any instrument made by a Minister of the Crown under an enactment”.

106. This provision plainly exempted the making of all subordinate legislation by Ministers under a parent Act from the prohibition in section 19B. Mr Giffin relies on this to submit: “if the making of such legislation was a function in connection with proceedings in Parliament, then the s.19C(2) exception would have been unnecessary, because the Minister in taking such a step would already have been excluded from the definition of a public authority by s.19B(3)(b)”. We do not think that this follows. The exemption in section 19C(2) covers the making of any subordinate legislation, including legislation made pursuant to procedures which do not involve Parliament in any way. By contrast, if the above analysis is correct, only certain secondary legislation would be caught by the exemption relating to functions connected with proceedings in Parliament. Therefore, section 19C is not an otiose or redundant provision as Mr Giffin contends. (The same observation answers the equivalent submission made by Mr Giffin about the operation of section 21B(3)(b) and section 21C(2)(b)(i) of the Disability Discrimination Act 1995 – “the DDA” - which followed a similar pattern).
107. In other respects little can be gleaned from the similar due regard duty found in section 71(1) of the RRA precisely because there is no equivalent to the exemption in section 76A(4) of the SDA. Similarly, we found nothing in Mr Giffin’s arguments with respect to the similar due regard duty in the Disability Discrimination Act 1995 which advanced his case.
108. In relation to all these statutes, despite the efforts of Counsel (for which we are grateful) we were shown nothing in the Parliamentary debates which shed any significant light on the issue under review or would satisfy the requirements of *Pepper v Hart* [1993] AC 593. Nor were we shown any pertinent or helpful explanations in any Explanatory Notes. (The Court was able to identify the relevant part in the Notes on Clauses for the HRA by its own research).
109. One may draw the different strands of argument derived from this review of the legislation together as follows. The formula used in section 76A(4)(a) derived from the use of a similar expression in section 6(3) of the HRA. That background supports the submission of the Defendants that the exemption is directed to protection of Parliamentary sovereignty (in the sense of application of Parliament’s decision-making authority), and is not confined to protection of Parliamentary privilege. Moreover, simply giving the normal meaning to the words used in section 76(4)(a), we find it difficult to see why they should not cover the making of an order under section 150(2) and (9) of the 1992 Act. There are significant differences between each of the RRA, the DDA and the SDA and we do not think that either the RRA or the DDA casts any light on the proper scope of the section 76(4)(a) exception.

The Equality Act 2010.

110. Finally, although recognising that it is difficult to draw on a later statute as an aid to construction of a much older statute, Mr Giffin sought to support his submission regarding the interpretation of section 76A(4)(a) by comparing the operation of the new, general public sector equality duty in section 149 of the Equality Act 2010, which has replaced the various “due regard” duties in the RRA, DDA and SDA referred to above. Section 149(1) of the 2010 Act provides that a public authority must, in the exercise of its functions, have due regard to the need to, inter alia, advance equality of opportunity between various categories of person, such as men and women etc. Section 149(2) provides that a person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1). Section 149(9) provides that Schedule 18 to the Act has effect in relation to exemptions.
111. Section 149 operates alongside other provisions which make certain forms of discriminatory behaviour unlawful. Section 29(1) and (6) of the 2010 Act prohibits any person who provides a service to the public or who exercises a public function from, inter alia, discriminating against persons in an unlawful way (this is broadly equivalent to the prohibition in section 19B of the RRA, section 21B of the DDA and section 21A of the SDA). Section 31(10) provides that Schedule 3 (exceptions) to the Act has effect. As with the RRA that schedule provides exceptions both for a function exercisable in connection with proceedings in Parliament (para 1(1)(b)); and for “preparing, making, confirming, approving or considering an instrument which is made under an enactment” by a Minister of the Crown (para 2(1)). In our view these provisions would interact in the way we have indicated above when considering the duty under the RRA.
112. Schedule 18 to the 2010 Act does not include any general exemption for public authorities (to whom section 149(1) applies) in relation to functions in connection with proceedings in Parliament. Since Ministers are defined as public authorities it follows that there is no equivalent of section 76A(4) applicable to the making of subordinate legislation. (Paragraph 4 of Schedule 18 does provide an equivalent for non-public authorities exercising public functions, and it seems that it is under this provision that the Crown is immune from the duty when giving Royal Assent to legislation). So for the future, the difficult arguments with which we are engaged in this case will not arise and the courts will not have to trace the potentially awkward dividing line between different types of subordinate legislation when determining the application of section 76A. But it is not sustainable to try to argue back from the position at which Parliament has now arrived to say that Parliament must always be taken to have intended to achieve this result.
113. For these reasons, if necessary we would have been minded to conclude that the exemption in section 76A(4) of the SDA applied and that the making of the Up-rating Order and the Pensions Order was not subject to the public sector sex equality duty in section 76A(1). This is a further reason why this ground of challenge must fail.

Section 149 of the Equality Act.

114. Mr Giffin made a further distinct point based on section 149 of the 2010 Act. He floated the argument that the Claimants were entitled to rely directly on this provision

to contend that the Up-rating Order and the Pensions Order were made unlawfully. However, section 149 only came into force on 5 April 2011, whereas the Up-rating Order and the Pensions Order had both been made in March 2011. It is true that they only came into force on 11 April 2011, but in each case that was by virtue of mandatory provision to that effect in the Order itself, and was not the result of any further exercise of a discretion or performance of any function by the Secretary of State. Accordingly, we do not consider that section 149 of the Equality Act 2010 has any direct application in this case.

115. For all the reasons set out above, in relation both to the facts and to the law, this last ground of challenge is dismissed.

Conclusion.

116. For the reasons given above, the Court dismisses the Claimants' application for judicial review of both the Up-rating Order and the Pensions Order. It does so unanimously in relation to grounds of challenge (1), (3) and (4). It does so by a majority in relation to ground of challenge (2) (irrelevant consideration/improper purpose).

Mr Justice McCombe:

117. I join in the judgment of the court just given on three of the four points of challenge. On challenge (2) (irrelevant consideration / improper purpose), I regret that I cannot agree. I therefore do not join in paragraphs [56]-[67] in the judgment above. As a result of my conclusion on challenge (2), I would hold that the Orders under challenge are unlawful and should be quashed.
118. I have reached the conclusion that the Claimants are correct in their contention that it was impermissible, in conducting a review under section 150(1) of the 1992 Act, to employ public expenditure considerations as the primary and substantial reason for selecting one method of review as opposed to another. This, to my mind, is what the Minister did. I also reject the argument of the Secretary of State that, notwithstanding any such illegality that might be found, no relief should be granted. As Sales J agrees with Elias LJ on these issues, the claims fall to be dismissed, but I should explain shortly my reasons for having reached a different view.
119. It is common ground between the parties before the Court that the relevant principles are as stated by Lord Reid in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030:

“Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole, and construction is always a matter of law for the court.”

Further, as Lord Bridge said in *Tower Hamlets LBC v Chetnik Developments Ltd.* [1988] AC 858, 873,

“...before deciding whether a discretion has been exercised for good or bad reasons, the court must first construe the enactment by which the discretion is conferred. Some statutory discretions may be so wide that they can, for practical purposes, only be challenged if shown to have been exercised irrationally or in bad faith. But if the purpose which the discretion is intended to serve is clear, the discretion can only be validly exercised for reasons relevant to the achievement of that purpose”.

120. The statutory provisions have been set out already and do not need to be repeated. Section 150(1) states expressly the purpose of the “review” required by the section. It is “in order to determine whether [the sums identified in the section] have retained their value in relation to the general level of prices obtaining in Great Britain”. The discretion to determine the manner in which the determination is to be made is dictated by that purpose and no other. Thereafter, the Minister is required (by section 150(2)) to lay a draft up-rating order before Parliament if it appears to him that “the general level of prices is greater at the end of the period under review than it was at the beginning of that period”.
121. The sole purpose of the review is to enable the Minister to decide whether or not he is obliged to lay such a draft order before Parliament. The sole criterion for the decision is whether the relevant benefits have or have not retained their value. That is a succinct and clear exercise of estimation for the purpose of which the Minister has a discretion to find an appropriate method. However, in my judgment, the statutory purpose expressly identified in the section requires him to try to find what is, in his judgment, the best practicable (or at least an appropriate) method of making the necessary estimate, without regard to extraneous considerations. Potential savings to the public purse are outside the exercise enjoined by the statute. Whether one describes the requirement as a need to look for “the best” or “an appropriate” method of estimation, the result is the same. The requirement is still to conduct the search unhindered by legally irrelevant considerations. The obligation is to conduct the review to determine whether benefits have retained their value; it is not to find a method that will produce savings and then see whether it can be said properly to measure the relationship between the benefits and prices.
122. The construction of the Act for which Mr Eadie QC for the Defendants contended seemed to be that it was enough for the Secretary of State to identify one or more possible approaches to estimating whether benefits had retained their value against prices and that he could then pick any of those that he saw fit. For my part, I do not accept that. However, in my judgment, the Minister did something else: he decided, quite understandably, that substantial savings could be achieved by using the CPI and used that as the driving feature for his choice of that manner of carrying out the statutory review.
123. In the words of Lord Reid in *Padfield* “the policy and objects of the Act” in this respect are to enable the Minister to decide whether or not the relevant benefits have retained their value in the period under review. Those are the sole “policy and objects” of this provision and no others. The potential result of the review and consequently whether or not the Minister is required to lay an up-rating order before

Parliament and the relative quantum of any benefit increases by alternative methods are not material to the statutory purpose. The Minister is not entitled to have an eye on the likely result of the review before choosing the method of carrying it out.

124. If following a conscientious attempt to determine the best (or at least an appropriate) method of making the estimate required by the Act the Minister is genuinely left with two or more equally viable methods for making the statutory estimation then it may be that economic considerations and other rational grounds may become relevant. However, in my judgment, in reaching that position the Minister is only entitled to have regard to the express purpose identified in section 150(1). I do not consider that it is lawful for the Minister to search out the means of measuring price movements with the express purpose of procuring savings. It is not a correct exercise to search out generally acceptable methods of estimation and to make the selection guided by exterior considerations such as a desire to make savings.
125. It is urged upon the Court, and my Lords accept, that an independent judgment was made as to the superiority of the CPI as a measure of the general level of prices. I do not for one moment doubt that, in due course, Ministers took the view that there were distinct advantages, in up-rating exercises of various types, in deploying the CPI. The Claimants do not impugn the Minister's good faith, and neither do I. I do not agree, however, that the Claimants' submission involves challenging the good faith of the Secretary of State, as my Lords conclude in paragraph 63 above. However, the problem is that I do not find anywhere in the evidence a true demonstration that the section 150 review was carried out with sole regard to the express statutory purpose, untrammelled by the extraneous objective of reducing expenditure. Quite the contrary, at every stage the evidence discloses that (understandably) savings were the prime mover and that the other characteristics of the CPI, as perceived benefits, came second. Never was the second matter divorced from the first as a distinct statutory exercise.
126. In this respect, I accept the submission of Mr Beloff QC for the PNB Claimants in reply that,

“On any fair reading of the evidence the need for deficit reduction was the driver, the other merits of the CPI [were] essentially deployed in order publicly to justify the switch.”

As he pointed out, in the first of the defendants' disclosure documents, a memorandum of a meeting with the Secretary of State as early as 13 May 2010 (two days after the formation of the government), one finds the following:

“We met yesterday to discuss uprating. You were not attracted to pursuing legislation to recoup the 1.5% advance that some benefit recipients received following last year's Pre-Budget Report. You asked us to come back to you with advice on

- alternative uprating levers we could use to achieve savings, together with their likely impacts on individuals and families; and

- other ways in which we might make AME savings, without primary legislation...

Recommendation:

To consider whether any of the alternative options for realising savings are ones you would wish us to consider further...

Options

Current legislation requires that you use the same index for all benefits which are subject to mandatory uprating but it does not prevent you from increasing any of these benefits by more than inflation as measured by that index. Legislation does not define which index must be used, so it is possible to switch indices provided that there is a legally sustainable justification. Nor does legislation require uprating of the income-related benefits in line with a particular index. Changes in these areas are therefore the main options for achieving savings without new legislation..."

127. Mr Beloff submitted, on the basis of this paper (and others), that this approach “put the economic cart before the statutory horse”. I agree, and I do not see any perceptible shift in that approach throughout the period to date. In so saying, I am conscious of the cautious approach that one must take in reading advice to Ministers: one must not assume that the advice tendered reflects the Minister’s final thinking. Mr Eadie QC for the Defendants placed strong reliance on the careful explanation of the principal characteristics of CPI, given to Parliament by the Parliamentary Under-Secretary of State (Lord Freud) on 14 March 2011, when laying the draft order before the House of Lords, as showing that the CPI had been adopted for distinct economic reasons. However, even there Lord Freud pointed out at the outset of his explanation to the House that “...the move will save almost £6 billion a year by 2014”.
128. Finally, in my judgment, the explanations of the move to CPI in the Defendants’ evidence before this court reflect the same approach. Mr Cunniffe, the senior policy advisor at the Department of Work and Pensions, faithfully recounts the situation facing the Secretary of State on taking office, much as appears in the memorandum from which I have quoted above. At paragraph 47 of his witness statement he explains that “in addressing the clawback issue” (i.e. the clawback of the 1.5% increase given in 2009/10) “the Secretary of State examined a *range of options that would enable more substantial reductions to be made in social security payments*, thereby assisting with the Government’s *aim of deficit reduction*” (emphasis added). One of these options was a change to CPI for up-rating purposes. After dealing with those options, Mr Cunniffe states in paragraph 50,

“It was adjudged by the Secretary of State that an across-the-board move to the CPI was *the most practicable option for delivering savings in the short and medium term....*” (Emphasis again added).

There is nothing there about the statutory test. Mr Cunniffe then goes on to deal with “Other advantages of a switch from RPI to CPI” in paragraphs 53 to 60 of the statement.

129. In his evidence Dr James Richardson, the Director of Public Spending at the Treasury gives a fascinating explanation of the “Macro-Economic Background to the Pensions Order” in paragraphs 41 to 50 of his witness statement. He then moves on to explain the more detailed decision to move to CPI up-rating in much the same terms as Mr Cunniffe. Like Mr Cunniffe he explains that consideration was given to temporary freezes to benefits, tax credits and pensions but states that these were rejected. “[G]iven the need for significant, and ongoing, savings from welfare spending” longer term options were considered “e.g. switching benefits, tax credits and additional pensions and public service pensions to indexation by the CPI or by the “Rossi” index from 2011 or 2012”. In paragraph 49 Dr Richardson states:

“It was fundamental to the Government’s overall fiscal plan that proposed savings were seen as credible and deliverable in the markets...Proposed savings are more likely to be seen as credible where the savings are generated sooner rather than later, and where the political and technical risks to implementation are low. Benefit indexation reforms are simple and quick to deliver.”

There is nothing there either about the statutory test of estimating the retention of the value of benefits in relation to the general level of prices.

130. In paragraphs 51 and following of the statement, Dr Richardson helpfully sets out six reasons in the Treasury’s thinking for the adoption of the CPI for up-rating purposes. Before doing so he states that the Treasury considered and accepted the matters explained by Mr Cunniffe in paragraphs 50-57 “as to the superiority of the CPI as a general level of prices in the UK”. Of course, at the forefront of those paragraphs is the statement by Mr Cunniffe in paragraph 50, that I have quoted in my paragraph 128 above, as to the CPI being the most practicable option for delivering savings.
131. Dr Richardson’s six points in favour of the switch are these (with emphases again added):
- “First, such an indexation switch is extremely broad based (i.e. it would affect a large number of people), meaning that it would be *an effective way of making savings quickly* from the welfare system in a way that kept individual impacts relatively low...”
 - “Second, the Treasury considered that a switch to the CPI would *substantially increase the long-term sustainability of benefits and public service pensions expenditure...*”
 - “Third, as already mentioned, the Treasury considered that indexation reform would be *relatively quick and straightforward to implement*, with negligible administrative cost or risk...”

- “Fourth, savings from a change in indexation would continue growing in future years...”
- “Fifth...In a switch to CPI benefit claimants would see their benefits rise in response to any VAT rise.”
- “Finally... switching to CPI indexation would ensure that up-rating was carried out in a way which better reflected the inflation experience of pensioners...”

In my judgment, only this sixth point approaches the statutory test. Even then, rather than addressing “the general level of prices”, the yardstick is “the inflation experience of pensioners”.

132. The concluding paragraph of Dr Richardson’s statement is to this effect:

“The move to the CPI for up-rating benefits and public service pensions is a key element of the Government’s deficit reduction programme introduced to address the serious macro-economic situation faced by the UK in May 2010. A number of options for reducing benefits and pensions spending were carefully considered by the Treasury and by the Department for Work and Pensions and between the announcement and implementation of the policy change the Government also considered representations and answered questions from many unions and pensioners’ organisations. For the reasons set out in this statement the Treasury believe that the change in indexation is the most effective and appropriate of those options [viz. for reducing benefits and pensions spending] and justified policy response in these difficult economic circumstances.”

133. Nowhere in this evidence, as far as I can see, is there any indication that the following simple, “stand-alone” question was posed: “How can we determine appropriately, for the purposes of the review under section 150(1), whether benefits/pensions have retained their value in relation to the general level of prices obtaining in Great Britain?” At every stage, up to and including the evidence before the Court, all the indications to me are that that question was cumbered about with, and usually preceded by, other considerations, especially the quite understandable broader economic need to make savings. I repeat that I do not question in any way the good faith in which the decision was taken. As the careful arguments of Counsel have shown, these are difficult legal issues which, to my mind, were not sufficiently taken into account in the decision making process.

134. Two further questions remain. First, it is argued that, if the Secretary of State had put aside what I have found to be irrelevant considerations, he would still have made the same decision at the time of the decision under challenge. Secondly, it is argued that even if the order was unlawful, then no substantive relief should be granted because the same decision would still be made today.

135. On the first question, I do not think that there was dissent from Mr Beloff's submission that the law was encapsulated in the judgment of May LJ (with the agreement of Taylor J (as he then was)) in *R v Broadcasting Complaints Commission, ex p. Owen* [1985] 1 QB 1153, 1126-7 where his lordship cited the comments of Forbes J in *R v Rochdale Metropolitan BC, Ex p. Cromer Ring Ltd.* [1982] 3 All ER 761, 769-770:

“ [After reference to one earlier case, Forbes J continued] ... the case wholly supports the formulation in Professor de Smith's book: “If the influence of irrelevant factors is established, it does not appear to be necessary to prove that they were the sole or even the dominant influence; it seems to be enough to prove that their influence was substantial ” ...

“...I respectfully agree that the material law is as stated by Forbes J, but with one qualification...Where the reasons given by a statutory body for taking or not taking a particular course of action are not mixed and can clearly be disentangled, but where the court is quite satisfied that even though one reason be bad in law, nevertheless the statutory body would have reached precisely the same decision on the other valid reasons, then this court will not interfere by way of judicial review. In such a case looked at realistically and with justice, such a decision of such a body ought not to be disturbed.”

(See also the cases collected in the *Judicial Review Handbook* (M. Fordham QC), 5th Edition (2008), paragraph 52.2.6, page 490).

136. It seems to me difficult to assume that the same decision would have been taken in any event, given the driving force in the process of the savings imperative – and the existence of the CPI since 1996 and its use in the UK for some purposes since 2003, but its exclusion from all previous reviews under section 150. It is notable that no witness on the Defendants' side states unequivocally that the same decision would indeed have been taken.
137. Much the same answer must, to my mind, follow in respect of the argument that the Court should not now grant relief. I cannot conclude that it is clear that the same decision would be taken now, if the budget savings considerations are excluded from the equation. Since those considerations were at the heart of the initial decision from beginning to end, I do not think that the Court should arrive at conclusions on matters which are for a Minister, no doubt guided by economic/statistical expertise, on which (the evidence shows) there remains significant debate between the experts, for example on the desirability of including housing costs in such an index. As is noted in the main judgment, the CPI excludes these and with them Council Tax which no doubt forms a distinct part of what Dr Richardson calls “the inflation experience of pensioners”. It is perhaps an oddity that two indices, which are candidates for this review exercise, should produce, first, such different results in the comparison of the retention of value of benefits with the general level of prices and, secondly, such different results over time for individual pensioners. Yet it is said that each is a proper measure for determining the statutory question. It seems to me that it is well possible that RPI was wrong for the purpose of the statutory exercise between 1996 and 2010

or that CPI is wrong now. Hence, I do not assume readily, and in the absence of specific evidence, that the same decision would be made on a “stand alone” application of the statutory test.

138. Mr Beloff reminded us of the passage from the judgment of Megarry J (as he then was) in *John v Rees* [1970] Ch. 345. 402, cited with approval by Lord Steyn in *R (Amin) v Secretary of State for the Home Department* [2004 1 AC 653, para [52], to this effect (about the argument often advanced by a decision-maker under challenge that “it will make no difference”, even if the full legalities are observed):

“As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained and unalterable determinations that, by discussion, change. ”

Further, I do not consider that the Courts should be astute, as a matter of discretion, to save a decision from the consequences of the unlawfulness of a substantial motive behind that decision, simply on an assumption that a lawful approach to the process would inevitably produce precisely the same result. Again, I think that that view of the matter is supported by the absence of evidence from any deponent for the Defendants stating the same decision would now be taken, on lawful grounds, even if the orders were to be quashed.

139. In the circumstances, it is not necessary for me to go into the point about the use of the phrase “having regard to the national economic situation” in section 150(2)(b) and its absence from section 150(2)(a). I incline to the view that this difference in statutory language is also in favour of the Claimants’ approach to the relevant criteria to be applied by the Minister. However, for the reasons already given, I would grant this application for judicial review and would quash the orders under challenge.