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Case No: CO/260/2012 & CO/1087/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/08/2012

Before :

MR JUSTICE FOSKETT

- -

Between :

THE QUEEN on the application of CAITLIN REILLY and JAMIESON WILSON	**Claimants**
- and –	
THE SECRETARY OF STATE FOR WORK AND PENSIONS	**Defendant**

- -
- -

Nathalie Lieven QC and Tom Hickman (instructed by **Public Interest Lawyers Limited**) for the **Claimants**
Paul Nicholls QC (instructed by **DWP/DH Litigation and Employment Division**) for the **Defendant**

Hearing dates: 26-27 June 2012
Further written submissions: 24-30 July 2012

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Approved Judgment

MR JUSTICE FOSKETT:

Introduction

1. These proceedings involve a challenge to the validity of the Jobseeker's Allowance (Employment and Enterprise) Regulations 2011 ('the Regulations') and two schemes made by the Secretary of State for Work and Pensions ('the Secretary of State') purportedly under the powers conferred by the Regulations. The two schemes or programmes directly under challenge are the sector-based work academy scheme (known as 'the sbwa scheme') and the Community Action Programme (known as 'the CAP') although it is clear that other schemes and programmes have been put in place pursuant to these regulations (see paragraph 25 below).

2. The proceedings are brought by Miss Caitlin Reilly in relation to the sbwa scheme and Mr Jamieson Wilson in relation to the CAP.

3. The matter came before me on a "rolled up" basis pursuant to a direction of Ouseley J made on 14 March 2012.

4. On the basis of the submissions I have received, both claims are arguable and I grant permission to apply for judicial review.

The challenges advanced

5. The first ground of challenge is that the Regulations are *ultra vires* the governing statutory provision, namely, section 17A of the Jobseekers Act 1995 ('the 1995 Act'), because the Regulations fail to prescribe a description of each scheme or the circumstances in which an individual can be required to participate in the scheme as, it is argued, section 17A requires. There is, it is argued, therefore, no legislative authority for either scheme. It is a root and branch challenge to the Regulations which, it is contended, should be quashed.

6. By way of an alternative contention if the first ground of challenge fails, it is argued that the Secretary of State must set out each scheme in a published policy that explains clearly the features of the scheme, including what type of work a person can be compelled to undertake, the circumstances in which they can be required to undertake such work and the period for which they can be required to do so, as well as the consequences of not participating, and that he has failed to do so in respect of either scheme. It is said that in consequence each scheme should be quashed.

7. The third ground for challenge arises from Regulation 4 of the Regulations which requires specific notice to be given to individuals of various matters including the details of what is required by way of their personal participation in a particular scheme and notice of the consequences of not participating. In Mr Wilson's case there is a dispute about whether this regulation was complied with which, it is said, gives rise to an issue of general importance as to what precisely Regulation 4 does require. In Miss Reilly's case it is accepted that there was non-compliance with Regulation 4, but there is a dispute about the consequences.

8. Finally, both Claimants raise issues about the scheme they either had embarked upon (in Miss Reilly's case) or was expected to embark upon (in Mr Wilson's case) under

the Human Rights Act 1998, claiming that each scheme involved violation of Article 4 of the European Convention on Human Rights ('the ECHR') in that it required the performance of "forced or compulsory labour".

9. Each ground is contested by the Secretary of State.

10. For completeness I should record that during the hearing before me the question arose of whether the Regulations had been passed correctly in Parliament by using the negative resolution procedure. I gave the parties time to consider this after the completion of the hearing and it was confirmed subsequently that it was agreed that this was the correct procedure.

11. I will deal with the facts of each individual case later (see paragraphs 91-113) when I have considered the more general statutory and legislative background, but in summary Miss Reilly's case is that she participated in the sbwa scheme against her wishes, working for two weeks in a branch of Poundland, a budget retail outlet, and Mr Wilson's case is that he refused to participate in what for him was the compulsory CAP, under which he was required to undertake up to six months unpaid work for up to 30 hours per week, a refusal that led initially to the imposition of sanctions in the form of depriving him of his jobseeker's allowance for six months.

12. I should also say that I propose to deal with each of these grounds on its merits. I will return later to the arguments advanced by Mr Paul Nicholls QC on behalf of the Secretary of State that the claims are variously out of time, academic or are precluded by the availability of another remedy.

The statutory background

13. Section 1(1) and (2) of the 1995 Act make provision for a "jobseeker's allowance" to be payable to an individual if certain conditions are met which include that he or she is available for employment, has entered a jobseeker's agreement which remains in force and is actively seeking employment.

14. The Welfare Reform Act 2009 ('the 2009 Act'), section 1, introduced a new section 17A into the 1995 Act which provides as follows:

> **Schemes for assisting persons to obtain employment: "work for your benefit" schemes etc.**
>
> (1) Regulations may make provision for or in connection with imposing on claimants in prescribed circumstances a requirement to participate in schemes of any prescribed description that are designed to assist them to obtain employment.
>
> (2) Regulations under this section may, in particular, require participants to undertake work, or work-related activity, during any prescribed period with a view to improving their prospects of obtaining employment.

(3) In subsection (2) "work-related activity", in relation to any person, means activity which makes it more likely that the person will obtain or remain in work or be able to do so.

(4) Regulations under this section may not require a person to participate in a scheme unless the person would (apart from the regulations) be required to meet the jobseeking conditions.

(5) Regulations under this section may, in particular, make provision—

(a) for notifying participants of the requirement to participate in a scheme within subsection (1);

(b) for securing that participants are not required to meet the jobseeking conditions or are not required to meet such of those conditions as are specified in the regulations;

(c) for suspending any jobseeker's agreement to which a person is a party for any period during which the person is a participant;

(d) for securing that the appropriate consequence follows if a participant has failed to comply with the regulations and it is not shown, within a prescribed period, that the participant had good cause for the failure;

(e) prescribing matters which are, or are not, to be taken into account in determining whether a participant has good cause for any failure to comply with the regulations;

(f) prescribing circumstances in which a participant is, or is not, to be regarded as having good cause for any failure to comply with the regulations.

(6) In the case of a jobseeker's allowance other than a joint-claim jobseeker's allowance, the appropriate consequence for the purposes of subsection (5)(d) is that the allowance is not payable for such period (of at least one week but not more than 26 weeks) as may be prescribed.

(7) In the case of a joint-claim jobseeker's allowance, the appropriate consequence for the purposes of subsection (5)(d) is that the participant is to be treated as subject to sanctions for the purposes of section 20A for such period (of at least one week but not more than 26 weeks) as may be prescribed.

(8) Regulations under this section may make provision for an income-based jobseeker's allowance to be payable in

prescribed circumstances even though other provision made by the regulations would prevent payment of it.

This subsection does not apply in the case of a joint-claim jobseeker's allowance (corresponding provision for which is made by section 20B(4)).

(9) The provision that may be made by the regulations by virtue of subsection (8) includes, in particular, provision for the allowance to be—

(a) payable only if prescribed requirements as to the provision of information are complied with;

(b) payable at a prescribed rate;

(c) payable for a prescribed period (which may differ from any period mentioned in subsection (6)).

(10) In this section—

"claimant", in relation to a joint-claim couple claiming a joint-claim jobseeker's allowance, means either or both of the members of the couple;

"the jobseeking conditions" means the conditions set out in section 1(2)(a) to (c);

"participant", in relation to any time, means any person who is required at that time to participate in a scheme within subsection (1)."

15. The word "prescribed" is defined in section 35 of the 2009 Act as "specified in or determined in accordance with regulations."

16. Section 17B is in these terms:

"**Section 17A: supplemental**

(1) For the purposes of, or in connection with, any scheme within section 17A(1) the Secretary of State may—

(a) make arrangements (whether or not with other persons) for the provision of facilities;

(b) provide support (by whatever means) for arrangements made by other persons for the provision of facilities;

(c) make payments (by way of fees, grants, loans or otherwise) to persons undertaking the provision of facilities under arrangements within paragraph (a) or (b);

> (d) make payments (by way of grants, loans or otherwise) to persons participating in the scheme;
>
> (e) make payments in respect of incidental expenses.
>
> …."

17. I understand that these statutory provisions were, at least to some extent, built upon proposals contained in two White Papers published in 2008, namely, "No-one Written Off: Reforming Welfare to Reward Responsibility" (Cm.7363) and "Raising Expectations and Increasing Support: Reforming Welfare for the Future" (Cm.7506), together with the recommendations of the "Gregg Report", "Realising Potential: A Vision for Personalised Conditionality and Support", also published in 2008.

18. Although the Act received Royal Assent on 12 November 2009, which was the day upon which section 1 came into force, the Regulations with which this case is concerned were not made until 2011. They were made by the Secretary of State on 28 March 2011 and came into effect on 20 May 2011.

19. It is clear from the dates thus given that the Regulations have been made by the present administration pursuant to legislation enacted under its predecessor administration in what, on any view, is potentially a politically sensitive area. Whilst it is a statement of the obvious, it is a statement that it is sometimes necessary to repeat, namely, that the court is wholly unconcerned with any political dimension if there is one: it is concerned solely with the legal challenges it has been invited on behalf of the Claimants to consider.

20. Part 1 of the Regulations includes at Regulation 2 a definition provision of which there are two potentially material aspects:

> "the Scheme" means the Employment, Skills and Enterprise Scheme"
>
> …
>
> "the Employment, Skills and Enterprise Scheme" means a scheme within section 17A (schemes for assisting persons to obtain employment: "work for your benefit" schemes etc.) of the Act known by that name and provided pursuant to arrangements made by the Secretary of State that is designed to assist claimants to obtain employment or self-employment, and which may include for any individual work-related activity (including work experience or job search)."

21. Part 2 sets out provisions for "Selection for and participation in the Employment, Skills and Enterprise Scheme". Regulations 3 and 4 provide as follows:

> "**3. Selection for participation in the Scheme**
>
> The Secretary of State may select a claimant for participation in the Scheme.

> **4. Requirement to participate and notification**
>
> (1) Subject to regulation 5, a claimant ("C") selected under regulation 3 is required to participate in the Scheme where the Secretary of State gives C a notice in writing complying with paragraph (2).
>
> (2) The notice must specify—
>
> (a) that C is required to participate in the Scheme;
>
> (b) the day on which C's participation will start;
>
> (c) details of what C is required to do by way of participation in the Scheme;
>
> (d) that the requirement to participate in the Scheme will continue until C is given notice by the Secretary of State that C's participation is no longer required, or C's award of jobseeker's allowance terminates, whichever is earlier;
>
> (e) information about the consequences of failing to participate in the Scheme.
>
> (3) Any changes made to the requirements mentioned in paragraph (2)(c) after the date on which C's participation starts must be notified to C in writing."

22. Regulation 5 deals with the circumstances in which the requirement to participate in "the Scheme" is suspended or ceases to apply.

23. Regulations 6, 7 and 8 provide as follows:

> **"Failure to participate in the Scheme**
>
> 6. A claimant who fails to comply with any requirement notified under regulation 4 is to be regarded as having failed to participate in the Scheme.
>
> **Good cause**
>
> 7. (1) A claimant ("C") who fails to participate in the Scheme must show good cause for that failure within 5 working days of the date on which the Secretary of State notifies C of the failure.
>
> (2) The Secretary of State must determine whether C has failed to participate in the Scheme and, if so, whether C has shown good cause for the failure.
>
> (3) In deciding whether C has shown good cause for the failure, the Secretary of State must take account of all the

circumstances of the case, including in particular C's physical or mental health or condition.

Consequences of failure to participate in the Scheme

8. (1) Where the Secretary of State determines that a claimant ("C") has failed to participate in the Scheme, and C has not shown good cause for the failure in accordance with regulation 7, the appropriate consequence for the purpose of section 17A of the Act is as follows.

(2) In the case of a jobseeker's allowance other than a joint-claim allowance, the appropriate consequence is that C's allowance is not payable for the period specified in paragraphs (4) to (7) ("the specified period").

(3) In the case of a joint-claim jobseeker's allowance, the appropriate consequence is that C is to be treated as subject to sanctions for the purposes of section 20A (denial or reduction of a joint-claim jobseeker's allowance) of the Act for the specified period.

(4) The period is 2 weeks in a case which does not fall within paragraph (5), (6) or (7).

(5) The period is 4 weeks where—

(a) on a previous occasion the Secretary of State determined that C's jobseeker's allowance was not payable or was payable at a lower rate because C failed without good cause to participate in the Scheme ("the first determination"), and

(b) a subsequent determination is made no more than 12 months after the date on which C's jobseeker's allowance was not payable or was payable at a lower rate following the first determination.

(6) Subject to paragraph (7), the period is 26 weeks where—

(a) on two or more previous occasions the Secretary of State determined that C's jobseeker's allowance was not payable or was payable at a lower rate because C failed without good cause to participate in the Scheme, and

(b) a subsequent determination is made no more than 12 months after the date on which C's jobseeker's allowance was not payable or was payable at a lower rate following the most recent previous determination.

(7) Where paragraph (6) applies but the Secretary of State is satisfied that C has re-complied in accordance with paragraph (8), the period is either—

(a) 4 weeks, or

(b) 4 weeks plus a period which ends with the last day of the benefit week in which C re-complies,

whichever is longer.

(8) C will be taken to have re-complied where, after the date on which the Secretary of State determines that C has failed to participate in the Scheme, C complies with—

(a) the requirement as to participation in the Scheme to which the determination relates, or

(b) such other requirement as to participation as may be made by the Secretary of State and notified to C in accordance with regulation 4.

(9) The specified period begins—

(a) where, in accordance with regulation 26A(1) of the Social Security (Claims and Payments) Regulations 1987, C's jobseeker's allowance is paid otherwise than fortnightly in arrears, on the day following the end of the last benefit week in respect of which that allowance was paid, and

(b) in any other case, on the first day of the benefit week following the date on which C's jobseeker's allowance is determined not to be payable or to be payable at a lower rate.

(10) Paragraphs (4) to (7) are subject to paragraph (11).

(11) Where the Secretary of State notifies C during the specified period that C is no longer required to participate in the Scheme, the specified period terminates at the end of—

(a) one week beginning with the date of the notice, or

(b) the benefit week in which the requirement to participate ceases to apply,

whichever is later.

(12) In this regulation "benefit week" has the same meaning as in regulation 1(3) of the Jobseeker's Allowance Regulations."

The first issue

24. The first issue to consider (which arises independently of the factual circumstances of either Claimant's case) is whether the scheme or programme in which each was expected to take part was a scheme to which a "prescribed description" was applied in the Regulations (as required by section 17A(1) of the Act) and, of course, as part of that issue answering the question of what the Act did indeed require by way of description within Regulations made pursuant to it.

25. It is not in dispute that neither what is called 'the sbwa scheme' nor what is known as 'the CAP' (see paragraph 1 above) are described as such in the Regulations. It is also clear from the 1st witness statement of Mr Iain Walsh, the Deputy Director for the Labour Market Interventions Strategy Division in the Department for Work and Pensions, that other schemes or programmes have been set in place pursuant to the Regulations, "Work experience" being one and "New Enterprise Allowance" being another. It is possible that there are others including "the Work Programme".

26. Whilst this case concerns the two schemes specified above, it is likely that all schemes or programmes made in pursuance of the Regulations will be invalid, or potentially invalid, if the first issue is resolved in favour of the argument advanced by Miss Nathalie Lieven QC and Mr Tom Hickman for the Claimants because none is described in detail (or indeed at all) in the Regulations.

27. Their essential contention is that Parliament's intention, to be deduced from the terms of section 17A, is that a scheme under the legislation should be prescribed by statutory instrument. They argue that, taking the statutory provisions as a whole, including the fact that they purport to authorise the exercise of "coercive powers" against those claiming jobseeker's allowance, this must be deduced as the Parliamentary intention. By "coercive powers" they are referring to the power (provided by section 17A) for regulations to be made for "imposing on claimants" a "requirement" to "participate in schemes … designed to assist them to obtain employment". This can, they suggest, have a very significant impact on claimants and, accordingly, they submit that the requirement for a "prescribed description" of the scheme is, therefore, mandatory.

28. They supplement these submissions with the contention that the term "prescribed", as defined in section 35 (see paragraph 15 above), namely, "specified in or determined in accordance with regulations", results in the conclusion that the Regulations must specify a description of the scheme or require a determination to be made in a specified manner setting out a description of the scheme. They submit that by failing to say anything about the scheme upon which a claimant is required to embark means that the Regulations do not specify a description of the scheme or specify a means for such a description to be determined.

29. They suggest that what has happened is that the Secretary of State has established very contrasting types of scheme from time to time, entirely outside the Regulations, but has sought to rely upon the sanctions regime provided for under the Regulations. What was required under the Act, it is argued, was that the Secretary of State should set out in a statutory instrument a description of any scheme, a description that would include the criteria for what individuals could be required to do by way of compulsory labour, and since the Secretary of State has, it is suggested, not gone any way along the path of doing so in the Regulations, those Regulations fail to comply with section 17A(1) and are, therefore, invalid. They acknowledge that the Regulations set out

provisions prescribing the circumstances in which an individual is required to participate in a scheme (regulations 4, 5 and 7) and the consequences of failing to participate (regulations 6 and 8), but the Regulations are entirely silent as to what a scheme is or entails.

30. Reliance is placed also on the well-established concern of the courts (see, e.g., *Blackpool Corporation v Locker* [1948] 1 KB 349, 361-362 and 369) about what is effectively sub-delegated legislation made by internal circular or guidance rather than delegated legislation made by way of statutory instrument which is thus open to Parliamentary scrutiny. It is argued in the context of this particular legislation that the latter approach also limits executive discretion in respect of any scheme adopted, ensures that the nature of a scheme is set out publicly in an accessible form and would provide a clear legislative basis for what is said to be the "draconian power" to take away the right to what is, in many respects, a subsistence-level payment.

31. These are, of course, powerful submissions. However, Mr Paul Nicholls QC, for the Secretary of State, argues that the Regulations are in accordance with the enabling Act and that detail of the sort suggested on behalf of the Claimants is not required in the Regulations. His principal submission in terms of the wording of the Act and the wording of the Regulations is that the Regulations do prescribe a description of the schemes. That description is to be found in the definition provision within the Regulations to which I referred in paragraph 20 above. What this submission amounts to is that, notwithstanding the wording of section 17A (which refers to "schemes"), there is in fact only one scheme, namely, the Employment Skills and Enterprise Scheme, under the umbrella of which are the various programmes (some called "schemes"), but the generic "scheme" is sufficiently described in the definition of the Employment Skills and Enterprise Scheme set out in paragraph 20 above. In other words, anyone who interests him or herself with the Regulations will know that the Employment Skills and Enterprise Scheme is a scheme "provided pursuant to arrangements made by the Secretary of State that is designed to assist claimants to obtain employment or self-employment, and which may include for any individual work-related activity (including work experience or job search)". He contends that the description thus given is sufficient to comply with section 17A because it describes the scheme and it identifies the type of scheme which the Secretary of State proposes to run. He submits that section 17A does not require the scheme or schemes to be described with any particular level of detail.

32. Mr Nicholls makes the additional point that it would be possible to describe a scheme in a number of different ways and with varying levels of detail, including the manner for which the Claimants contend. However, in order to succeed in the argument that the Secretary of State's description is unlawful, it would need to be demonstrated that the way they contend that the description should be applied is the only means of describing the scheme. There is, he submits, nothing in the statutory language that would justify that conclusion. He accepts that the schemes must be of a prescribed description, but the manner in which the Secretary of State describes the schemes is a matter for him.

33. In their response to this aspect of Mr Nicholls' submissions, Miss Lieven and Mr Hickman submit that if Parliament had intended by virtue of section 17A to leave to the Secretary of State the ability to create a number of schemes of whatever (varying) nature he wished, section 17A(1) would have been phrased as follows:

> Regulations may make provision for or in connection with imposing on claimants in prescribed circumstances a requirement to participate in schemes established by the Secretary of State (*or* such schemes as the Secretary of State sees fit) that are designed to assist them to obtain employment.

34. They submit that this would be perfectly normal statutory language, but it was not the language used in section 17A and, accordingly, Parliament must be understood to have had a good reason for requiring the description to appear in a statutory instrument. They add also that regulation 2 is not intended to be more than a definition provision and should not be seen to afford the basis for a "prescribed description" of the relevant scheme.

35. Whilst, as I have said, there is force in what Miss Lieven and Mr Hickman suggest, I think that Mr Nicholls' answer does largely deal with the essential contention they advance, although I consider the emphasis is slightly different from the way he put it. Mr Nicholls did, as I recall, mention the Interpretation Act 1978 in passing during his submissions although he did not take me to it specifically. Most of us will recall, without the need for reminder, that by virtue of the Act, the singular is deemed to include the plural unless the contrary intention appears: section 6(c). Not all of us would recall without specific reminder that the same provision states that "words in the plural include the singular" unless the contrary intention appears. Bennion on Statutory Interpretation, Fifth Edition, asserts (at p.580) that this provision is frequently overlooked in practice and refers to two specific cases where this appears to have occurred.

36. Now, of course, it could be said that where Parliament uses an expression in the plural, it is meant to be regarded as having a plural quality. However, the same could be said when Parliament uses the singular. It follows that in order to find a contrary intention, it is necessary to look beyond the particular words that are either used in the singular or the plural whose interpretation is in issue.

37. It seems to me that section 17A(1) could quite readily be understood in the singular sense. Changing the words that connote a plural quality into words that connote a singular quality, that subsection could be read as follows:

> Regulations may make provision for or in connection with imposing on claimants in prescribed circumstances a requirement to participate in [a scheme] of [a] prescribed description that [is] designed to assist them to obtain employment.

38. For my part, I cannot see any other feature of section 17A that dictates that Parliament was speaking unambiguously in the plural sense. In subsections 4, 5(a) and 10 the expression "a scheme" is used which, arguably, would have been phrased "the scheme" if only one scheme was contemplated. However, this is probably no more than a reflection of the use of, in its context, an expression with a plural meaning which, with the grammatical change of the indefinite article to the definite article before the word "scheme", readily changes to a singular meaning.

39. If all this reflects too convoluted process of reasoning, I can see no reason, in principle, why the Parliamentary intention at the time section 17A was enacted was that there should be more than one scheme, but when it came to its implementation in the Regulations, the decision was made to have only one umbrella scheme as I have described it, the essential qualities of which are adequately, if shortly, described in the Regulations.

40. Miss Lieven and Mr Hickman, of course, contend that the arguments relied upon by the Secretary of State (and indeed the reasoning to which I have referred), if accepted, would result in the conclusion that the requirement that the scheme should be of a "prescribed description" would effectively have no meaning or effect. For my part, I consider that the description given in the definition provision (paragraph 20 above) is adequate, albeit only just adequate. I agree with Miss Lieven and Mr Hickman that it is not the most natural habitat for a "prescribed description", but I do not think that can really be said to undermine its validity: if it is there it is there.

41. They say also in this connection that section 17A(2) also requires that that the Regulations should prescribe the period for which individuals can be required to undertake compulsory labour and that the failure to specify any "prescribed period" leaves it entirely to executive discretion whether to impose requirements on individuals to work for two weeks or for two years. They suggest that Mr Nicholls did not answer this argument satisfactorily – or at least had no answer to it.

42. Section 17A(2) does, of course, deal with something different from a "prescribed description" of the scheme (or "*a* scheme"); it deals with a "prescribed period" which, by reason of being "prescribed", must be set out in the Regulations or determined in accordance with them: see paragraph 28 above. To that extent, if there is a deficiency in the Regulations in this respect, it is not something that goes directly to the challenge mounted in this case. However, Mr Nicholls' answer to the point raised was that Regulation 4(2) gives the basis upon which the "prescribed period" can be determined in accordance with the Regulations in the sense that once the notice is received by the claimant, he or she will know what period he or she is expected to work on or within the scheme.

43. I am inclined to agree with Miss Lieven and Mr Hickman that Regulation 4(2) does not purport to "prescribe" anything and that it constitutes nothing more than a notification to an individual of the requirements in his or her case. The link back to section 17A(2) is undoubtedly tenuous, but it seems to me that it is sufficiently there to justify the conclusion that the Regulation does conform with the enabling legislation.

44. Although no reference was made to its proceedings during the hearing before me, the 29th Report of The House of Lords Select Committee on the Merits of Statutory Instruments was in the bundle for the hearing and aspects of it featured in the pre-action protocol letters written on behalf of each Claimant. That Committee considered the Regulations in issue in these proceedings between being made by the Secretary of State and coming into effect (see paragraph 18 above). The link to the 29th Report is –

> http://www.publications.parliament.uk/pa/ld201012/ldselect/ldmerit/137/13703.htm

45. It is plain that the Committee had concerns about the Regulations and in particular the adequacy of the Explanatory Memorandum. I will take the liberty of quoting, first of all, two paragraphs to show how the Committee viewed the content of the statutory instrument:

> "2. The instrument sets up the conditionality and sanctions framework for Jobseeker's Allowance claimants under the Employment, Skills and Enterprise Scheme ("the Scheme"), which includes the Work Programme and three other initiatives. These Regulations also provide for Jobcentre Plus personal advisers to have discretion to require that a Jobseeker's Allowance (JSA) claimant participates in the Scheme and sets sanctions for those who fail to participate without good cause.
>
> 3. The four elements of the Scheme are only sketchily explained in the [Explanatory Memorandum] but broadly they are:
>
> - Work Programme - will provide both back-to-work and in work support for those claiming a range of benefits including Jobseeker's Allowance;
> - Skills conditionality - will offer assistance to those with an identified skills need, e.g. literacy;
> - Service Academies - will provide 6 week courses for specific in-demand skills or work experience; and
> - New Enterprise Allowance - will provide a mentoring system to help the unemployed to become self-employed."

46. I will quote two further parts of the report from under the sub-heading 'Breadth of scope' that provide an interesting reflection on certain of the issues I have been invited to consider:

> "9. Under Regulation 3 any claimant for Jobseeker's Allowance may be required to participate in the Scheme. We note that paragraph 7.4 of the [Explanatory Memorandum] states that participation in certain elements, for example the Service Academies, is to be by mutual consent, but this does not appear to be borne out by the legislation. DWP explain that *"this aspect of support and conditionality for customers is not reflected directly in these Regulations because it applies before a Jobseeker's Allowance recipient is referred to any of the initiatives covered by the Scheme"* (Q7). It is not clear what provision there is to prevent a harsher system being implemented administratively at a later date.

> 10. These regulations interpret the Act very broadly so that future changes to the Scheme could be made administratively without any reference to Parliament. Although an undertaking is given in the EM that the Department will consult the [Social Security Advisory Committee] should future extensions be proposed, there is no such undertaking given to inform Parliament."

47. The strongly expressed conclusion of the Committee was in these terms:

> "19. Because the original Explanatory Memorandum was deficient in providing Parliament with the information it needs for scrutiny, we have had to put an unprecedented number of direct questions and call on a range of sources to jigsaw together an outline of how the Scheme might operate, although gaps remain and a number of the areas are still unclear. It is evident that DWP have better information than their initial Explanatory Memorandum included. We note that the DWP justify their decision to merge the various elements into one complex set of regulations to the [Social Security Advisery Committee] on the grounds that they should not waste public resource unnecessarily (paragraph 17 page 7 of the Command Paper). Yet the Department's repeated failure to include adequate data to support their case or the basis for their assumptions in the [Explanatory Memorandum] wastes Parliamentary time in searching it out. **We draw the attention of the House to DWP's failure to provide an adequate level of information in its Explanatory Memorandum which inhibits the House's ability to exercise its scrutiny function**." (Emphasis as in the original)

48. Not that it is of direct relevance to my task, given that plainly I must form my own view of the situation on the basis of the arguments advanced before me, it is interesting to note that the Committee did not express any view that the Regulations were *ultra vires*, but did express the view (a) that they were inadequately explained in the Explanatory Memorandum and (b) that there were risks perceived "that future changes to the Scheme could be made administratively without any reference to Parliament." (I will return to the observations of the Committee on the responsibilities of the Jobcentre Advisers at a later stage: see paragraph 76 below.)

49. The task of the court in deciding whether the Regulations comply with the enabling section of the Act involves a relatively narrow analysis of the wording of the Regulations in relation to the wording of the Act. My conclusion, albeit with some hesitation, is that the Regulations do just comply with the requirements of section 17A.

50. If one looks at the position more broadly than the narrow analysis my task involves, it is tolerably easy to see why those who have the executive responsibility for administering the Employment, Skills and Enterprise Scheme would wish to preserve some flexibility in the way it operates or its constituent schemes or programmes operate. Having to secure regulatory authority for every nuance of the large variety of

programmes put forward would, or at least could, stultify an initiative designed, at least in substantial part, to assist the unemployed to get into (or back into) work. Mr Walsh put it thus:

> "Several of the … programmes, including the … sector-based work academies … and the CAP are delivered through the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011, which are flexible enough to enable the provision of a variety of support programmes tailored to specific sets of circumstances and which recognise the different categories of unemployed person and the needs of such persons. The ability to be able to customise employment and skills support to particular groups of claimants without having to lay fresh regulations enables the Department to react to a changing labour market and the demands of those who use its services; for example, by developing employer-specific sector-based work academies for those companies which have specific recruitment needs."

51. Mr Nicholls, in his Skeleton Argument, submitted that there may be a range of different circumstances in which the Secretary of State might wish to act and that this is demonstrated by the two schemes in this case, one a voluntary scheme for those close to the job market and one a mandatory scheme for the long-term unemployed. His ability to put in place schemes to address diverse needs may depend on the facilities made available by employers and others. Flexibility to deal with the different circumstances that may arise is necessary.

52. There is considerable force in that submission and the evidence of Mr Walsh supports it, but I am inclined to think that a more straightforward process than that adopted could have been utilised to achieve the objective. However, the sole question for present purposes is whether the Regulations comply with the Act: on balance, I consider that they do. Whilst the arguments advanced concerning the *vires* of the Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations 2011 (also made pursuant to section 17A) in *R (Nikiforova) v Secretary of State for Work and Pensions* [2012] EWHC 805 (Admin) were somewhat different, Bean J concluded that it was not arguable on the basis of the case advanced before him that those Regulations were "irrational or in any sense *ultra vires*." I have been told that the Court of Appeal refused permission to appeal both on the papers and at a subsequent renewed oral application on 10 July. That lends some collateral support for the conclusion I have reached. I will return to that case in another context later (see paragraph 175 below).

53. I should, perhaps, say for completeness that I did not consider that Mr Nicholls' reliance on the provisions of section 17B advanced his argument. As I understood it, it was to the effect that, if something was done pursuant to section 17B, it was not something that required to be described in the Regulations. That may be so, but it does not overcome any obligation imposed by the principal enabling provision (section 17A) to "prescribe" anything required to be prescribed in the Regulations by that provision. Miss Lieven and Mr Hickman were, in my view, correct to say that section 17A is the enabling provision whereas section 17B provides authority to make supplemental arrangements.

Lack of published policy

54. I turn to the alternative argument foreshadowed in paragraph 6 above, having rejected the first ground of challenge.

55. Relying principally on the statements of principle by the Supreme Court in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245, Miss Lieven and Mr Hickman contend that it is incumbent on the Secretary of State to have a clear policy setting out the nature of the sbwa scheme and the CAP (together with the terms and conditions of the scheme) which is made public.

56. They submit that the purpose of the requirement to that effect is so that individuals can understand what is required of them on any scheme of the type under consideration and so that a check can be maintained on whether there is a consistent and transparent exercise of executive power concerning the implementation of any such scheme. They argue that this is particularly important where (as they suggest is the case here) the Secretary of State has delegated what they describe as "coercive power" (see paragraph 27 above) to numerous officials (namely, Jobseekers advisers) around the country. They repeat the submission that the potential withdrawal of a means-tested benefit is a draconian feature of the policy underlying the scheme (or schemes) and that, in the context to which I will refer shortly (see paragraphs 64-66), anyone affected has the right to make representations about the appropriateness of the scheme to them. The failure of the Secretary of State to have done so, as they allege has occurred, is unlawful, they submit.

57. They suggest that the sbwa scheme is not set out in a published policy, merely in the sbwa Internal Guidance for Jobcentre Advisers. The CAP is not set out in any published policy. It is set out in guidance documents intended for companies and organisations that supply work placements, but that does not provide policy guidance to jobseekers and advisers to know what the CAP entails and what can be required of persons under the scheme.

58. I will turn to Mr Nicholls' response to these arguments shortly, but I should refer first to *Lumba.*

59. *Lumba* concerned the policy applied by the Secretary of State for the Home Department to the detention of foreign nationals who had been convicted of criminal offences and who had served terms of imprisonment pending their deportation at the expiration of the prison sentences. This was a case where there was a published policy concerning the matter in question, but there was (as, in due course, it was revealed) an unpublished policy that was at variance with the published policy. The majority of the Supreme Court (Lord Phillips of Worth Matravers PSC dissenting) held, on the issue of publication, (i) that the Home Secretary's unpublished policy was unlawful because it was a blanket policy which admitted of no exceptions and was inconsistent with the published policy and (ii) that the Home Secretary had a duty to publish the current policy and to follow that published policy so that a person who was affected by it could make informed and meaningful representations before a decision was made.

60. Miss Lieven and Mr Hickman drew attention, in particular, to what Lord Dyson JSC (with whom the majority agreed on this issue) said about the publication of policy. It

is, perhaps, important to preface the quotations from his judgment with a description of the context in which his observations were made. He drew attention to the fact that, although the point had not been argued in the Court of Appeal, the Court of Appeal had dealt with the issue of whether there is a general rule of law that policies must be published. It came to the conclusion that there was no such rule (see paragraphs 70–79 of their judgment: [2010] 1 WLR 2168). The Supreme Court disagreed. Lord Dyson JSC said this:

> "34. The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements.
>
> 35. The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see *In re Findlay* [1985] AC 318, 338E. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it. In *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604, para 26 Lord Steyn said:
>
> > "Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice."
> >
> > …
>
> 38. The precise extent of how much detail of a policy is required to be disclosed was the subject of some debate before us. It is not practicable to attempt an exhaustive definition. It is common ground that there is no obligation to publish drafts when a policy is evolving and that there might be compelling reasons not to publish some policies, for example, where national security issues are in play. Nor is it necessary to publish details which are irrelevant to the substance of decisions made pursuant to the policy. What must, however, be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made."

61. In the context of the issues in the present case, paragraph 38 does seem to me, with respect, to be highly relevant. In essence, it affirms that there is no set formula by

which to judge how much detail of any policy should be disseminated publicly and, as it seems to me, no set mechanism by which such information as is to be made public is itself to be disseminated. A formal policy statement is, of course, one method. An issue that may fall to be considered in this case is whether something less formal is sufficient. The general context of the observations in *Lumba* is, of course, to be noted: it concerned issues surrounding the liberty of the subject and what, upon the recitation of the background facts, appears to have been a deliberate decision of the Secretary of State to pursue an unlawful, unpublished, policy which conflicted with the published policy. It was, accordingly, a strong case on its facts.

62. Notwithstanding those observations, the general expressions of principle are, of course, to be applied in other comparable or analogous situations.

63. As I understood his argument, Mr Nicholls does suggest that the context needs to be considered. As with the submissions to which I referred earlier (see paragraph 32), he emphasised that the very nature of the initiative reflected in the overall scheme (namely, the Employment, Skills and Enterprise Scheme) involves the consideration of a myriad of individual circumstances: the circumstances of each individual engaged in the process, together with the circumstances of the local employer, need to be taken into account. It cannot reasonably or sensibly be expected, he contends, that there should be a detailed publicly available statement endeavouring to spell out what may turn out to have many variables. That does seem to me to have force, but it goes, in my view, to the question of what needs to be said (and perhaps how it is said) to an individual before embarking on a programme under the overall scheme rather than on whether anything needs to be said at all.

64. I will turn in due course to Mr Nicholls' submission that the Secretary of State has, to the extent necessary, in fact "published" details about the two schemes in issue in this case. However, I should deal with what, as I understood the argument, was a suggested distinction between the present case and a case such as *Lumba*. In *Lumba*, as Lord Dyson explained, the need for a publicly available policy was to enable a person affected by the implementation of the policy to make informed and meaningful representations to the decision-maker before a decision is made. Mr Nicholls' argument is that neither Claimant (and thus no-one who might embark on either scheme) has a right to make representations about the contents of the schemes, the terms and conditions of the schemes or the bases upon which or the criteria by which those chosen for the scheme are selected for inclusion. On that basis he argues that there was no obligation on the Secretary of State to publish any policy concerning details of the schemes to the Claimants or indeed, I assume he would say, to anyone else.

65. Miss Lieven and Mr Hickman reject the distinction sought to be made and respond by saying that, since a right of appeal is provided against decisions made (see paragraph 154 below), an individual could not assess whether to appeal and, if so, upon what grounds unless the underlying policy has been laid out clearly. That point does not seem to me to add a great deal to the general proposition that ordinarily someone is entitled to know the basis upon which a decision adverse to his or her interests might be made before it is made so that appropriate representations can be made. Whether there is a prescribed avenue of appeal or the only recourse is to judicial review, the underlying policy does need to be known.

66. But how do these competing arguments fall to be resolved in this case? In the first place, the context is important. As I have already indicated, I consider that Mr Nicholls' argument about the many kinds of circumstances that have to be considered in any deployment of an individual under any feature of the overall scheme has considerable force and is supported by the evidence (see paragraph 50 above). It means that the provision publicly of closely particularised details of each scheme or programme within the overall scheme would be impracticable. However, subject to the right of Parliament to permit the Secretary of State to put in place what is said to be a "compulsory work" scheme (see paragraphs 169-175 below) on the part of certain holders of jobseeker's allowance, where the system introduced does involve the possibility of the individual opting out of what is put forward on the Secretary of State's behalf (but being required to see it through on the threat of losing benefits once agreeing to participate in it), it seems to me to be consistent with all the established principles of fairness and openness, including that emphasised in *Lumba*, that the parameters in which the individual has a choice should be made clear before the choice is made. The consequence of a system that does not set out those parameters where a choice is possible means that someone can become "locked in" to a programme that may have adverse individual consequences without having had a chance to consider the position. If there is a true choice about participating in a programme, then it is not really a question of making representations (in the *Lumba* sense), but simply of having the opportunity to make an informed choice about whether to become engaged in the programme at all.

67. Mr Nicholls places reliance in this context on the role of the Jobcentre advisers as a means by which information can be communicated to those considering embarking on a particular scheme or programme about particular schemes or programmes and an assessment can be made about whether an individual wishes to participate. Sector based work academies vary from employer to employer. Discussions between the claimant and the Jobcentre Plus adviser enable the adviser to explain the features of a particular scheme.

The sbwa scheme

68. This approach is backed up by the evidence of Mr Walsh to the following effect about the sbwa scheme:

> "27. The scheme is administered by Jobcentre Plus advisers in accordance with guidance …. Participation is possible for JSA claimants and ESA [Employment and Support Allowance] claimants who have been assessed as capable of carrying out work-related activity and is aimed at those who do not have any serious barriers to finding work, but who nevertheless would benefit from a short period of work-focused training and a work-experience placement linked to a genuine job vacancy.
>
> …
>
> 32. The main way in which information is provided to claimants about the scheme is through personal meetings with the Jobcentre Plus adviser prior to a referral. It is hard to be too prescriptive about the information provided as sector-based

> work academy schemes vary from employer to employer. For example, some employers may decide to deliver the pre-employment training in the workplace and combine it with work experience, while others may make use of classroom-based training ahead of a placement with an employer. More general information and an overview of the scheme are available on the DirectGov website …."

69. I should emphasise that this deals with the sbwa scheme and not the CAP. I will return to the CAP below (paragraphs 78-87). The information on the Direct Gov website about the sbwa scheme, which was initially provided from August 2011 and was, therefore, extant at the times material to Miss Reilly's claim, was as I shall describe. The preamble read as follows:

> "If you're getting Jobseeker's Allowance or Employment and Support Allowance, sector-based work academies could improve your chances of finding work. The decision to take part is voluntary and gives you the opportunity of training, work experience and a guaranteed interview for a job or apprenticeship. Find out more, including who can take part."

70. Then, under the heading 'Sector-based work academies - what it is', the following appeared:

> "Sector-based work academies are one of the services that Jobcentre Plus offers to help you get back into work.
>
> Sector-based work academies are currently available in England and Scotland. A similar type of help may soon be available in Wales. If you are in Wales please talk to your Jobcentre Plus adviser for updates.
>
> If you join a sector-based work academy you will get the chance to:
>
> - take part in training relevant to the type of work that is available in your area
> - achieve units towards a relevant qualification in some circumstances
> - take up a work experience placement with an employer that has work that matches the training that you've done
> - go to a guaranteed job interview
>
> The training and work experience will be tailored to help you prepare for an actual job vacancy.

> Sector-based work academies involve partnership working between:
>
> - Jobcentre Plus
> - employers
> - colleges
> - training providers"

71. The next heading on the web page is 'Taking part in sector-based work academies' and the information given was as follows:

> "Speak to a Jobcentre Plus adviser if you are interested in taking part in sector-based work academies. They will be able to:
>
> - explain how sector-based work academies could improve your chances of finding work
> - give you information about sector-based work academies in your area
> - explain what will happen when you start
> - explain what will happen when it ends"

72. Under the heading 'Who can take part?' the following appears:

> "You might be able to take part in sector-based work academies if:
>
> - you're aged 18 or over and claiming Jobseeker's Allowance
> - you're claiming Employment and Support Allowance and in the Work-Related Activity Group
>
> Taking part in sector-based work academies is entirely voluntary, but once you accept a place you must complete the process. Your benefits may be affected if you do not complete the process. Taking part in sector-based work academies can last up to six weeks."

73. The penultimate heading is 'Jobseeker's Allowance and sector-based work academies' and the information given was as follows:

> "To continue to get Jobseeker's Allowance while attending a sector-based work academy you must continue to attend your regular jobsearch reviews.

> To help while you're taking part, Jobcentre Plus will be able to offer you different times to attend your regular jobsearch reviews. For example, you may be allowed to attend your reviews earlier or later in the day than usual."

74. The final heading was 'Employment and Support Allowance and sector-based work academies' where the information given was that:

> "You will continue to get Employment and Support Allowance as long as you meet the rules that you agreed to get the benefit."

75. In so far as there is a requirement to give information about the swba scheme, is there anything unlawful about giving it in the form of what appears on that website or indeed in the form of the discussion between the individual interested in the scheme and the job centre adviser? I cannot, for my part, see why that should not be so. The information on the website is obviously "fixed" in the sense that it is designed to cater for all who are interested in the scheme and it directs their attention to the broad parameters of the particular scheme. The website says specifically that anyone interested in the scheme should "speak to a job centre adviser". Accordingly, it directs the interested person directly to that source of information.

76. As I have said, the question is whether that is sufficient to discharge the Secretary of State's legal obligation to make relevant information available to the person interested. I conclude that it is. Whether it is an entirely satisfactory method is not the question I have to address. However, it is an obvious comment that its effectiveness as a means of communicating relevant information is dependent upon how well the advisers are briefed and how well and accurately they communicate that information to the interested person. It appears that in Miss Reilly's case (see paragraphs 91-105 below) that she was misinformed about a crucial feature. However, whatever other implications may arise from that, it does not render the system unlawful *per se.* The potential practical issues arising were, if I may say so, clearly highlighted in this extract from the Merits of Standing Orders Committee at paragraph 8:

> "Analysis of previous schemes has highlighted the importance of claimants understanding what they are signing up to both in terms of the personal benefit they derive from it and in reducing the risk of financial sanction for non-compliance. Effective communication between the Adviser and claimant is key …."

77. My conclusion, therefore, is that the swba scheme does not fall to be quashed on ground 2 and neither should it be made subject to a declaration that the Secretary of State should issue some other form of public guidance about it.

The CAP

78. I will turn now to the CAP. I think I should set out what Mr Walsh says about that programme because there are two material differences between it and the swba scheme. In the first place, it is a scheme designed to target the long-term unemployed.

Second, once selected for the scheme, it is in effect compulsory for the individual to attend. In relation to that aspect he says this:

> "… Participation in CAP is mandatory for those who are selected in the sense that claimants who are referred to providers are required to complete the programme properly and risk having the application of sanctions in respect of their benefits if they fail to participate in the programme in accordance with its terms."

79. Mr Walsh says that the programme is part of a wider trial scheme known as the "Support for the Long Term Unemployed Trailblazer". He says that the CAP provides "an extended (26 week) placement combined with provider-led supported job search." It was launched in November 2011 (albeit trailed publicly prior thereto) and was due to run for around 10 months in four designated Jobcentre Plus Districts (Derbyshire, Lincolnshire, Rutland and Nottinghamshire, East Anglia and Leicestershire and Northamptonshire). Mr Walsh says that the programme is "currently being delivered by two providers", Atos IT Services UK Ltd ('Atos') in the East of England area (which includes Norfolk) and by Ingeus UK Ltd ('Ingeus') in the East Midlands area. Atos and Ingeus (together with "sub-contracted partners", 'Pinnacle People' and 'Enable', 'Pinnacle People' and 'Intraining' respectively) are responsible for sourcing placements for the claimants and providing supported jobsearch. The other element of support being tested as part of this trial is what is known as 'Ongoing Case Management' which Mr Walsh describes as "a more intensive offer of Jobcentre Plus led support delivered over 26 weeks and with access to further resources, building on the new flexible and personalised approach within Jobcentre Plus to focus on allowing claimants to overcome specific barriers to work."

80. Mr Walsh states clearly that much of the funding made available to Atos and Ingeus is "contingent on their meeting performance expectations and will only be paid on results being demonstrated." This means, he says, "that participating providers will have invested resources up front in order to provide the support required."

81. He describes the programme in more detail thus:

> "35. The CAP forms one part of a trial of different types of support aimed at helping long-term unemployed JSA claimants into work. The aim of the trial is to test and evaluate the effectiveness of this support in achieving that aim in order that appropriate support may be put in place to help those claimants who reach the end of the Work Programme without finding sustainable employment and remain on benefits looking for work. The trial will run until July 2012 and will be fully evaluated to determine the impact of the CAP and Ongoing Case Management on the benefit outcomes of claimants who have received this support. Final evaluation results will be available in 2013.
>
> 36. Selection for participation in the CAP trial is done by random allocation of JSA claimants who are eligible for one of three elements of Support for the Very Long Term

> Unemployed, within the designated districts. Each claimant is allocated to either CAP … or the control group, who receive the regular Jobcentre Plus regime. Each claimant received written confirmation on this, including subsequent follow-up letters which detailed the details of their participation.
>
> 37. All eligible claimants have previously received support through both Jobcentre Plus and through the (former) Flexible New Deal programme without having found employment. Random allocation is recognised as the most reliable way of determining whether a cause and effect relationship exists between different elements of the trial. Once selected to participate in the trailblazer, claimants are required to participate as part of the conditions attached to the ongoing receipt of Jobseeker's Allowance. However, there are certain situations in which a claimant would be exempt from taking part in the trailblazer, for example claimants who are pregnant and within 3 months of their expected due date, or claimants for whom specialist disability provision is identified as a more suitable option.
>
> 38. The purpose of the CAP is to offer claimants who have been out of the labour market for some considerable time the opportunity to gain sustained experience of a working environment; and to capitalise on the experience they gain whilst participating in the programme through additional supported job search activities. The CAP affords providers the freedom to determine how best to support these claimants in their search for work. These activities might include improving communication skills, creating CVs, completing application forms, interview practice, and training. The flexibility allows providers to tailor job search activities to meet individual's needs.
>
> …
>
> 40. Placements under the CAP scheme must also be of some benefit to the local community. Placement hosts include local voluntary and charitable sector organisations and environmental projects …."

82. In relation to the way details of the CAP scheme are published Mr Walsh says this:

> "The main way that information about the CAP is conveyed is through discussions and correspondence between Jobcentre Plus and the claimant (prior to referral) and the provider and the claimant (following a referral). General information about the trailblazer, including the CAP provider guidance and the Department's Equality Impact Assessment are published on the Department for Work and Pensions website. As the CAP is still at a trial stage and is running in only four Jobcentre Plus

> Districts information about the programme is not currently included on the DirectGov website."

83. The CAP scheme is mandatory if the person selected (at random) wishes to avoid the risk of a reduction in, or loss of, his or her benefits. On the assumption for present purposes that Parliament has not acted in breach of the ECHR in authorising such a scheme to be implemented, have sufficient details been made public for the Secretary of State to have fulfilled such obligation of openness as he is required by law to discharge?

84. Unlike the sbwa scheme, there is no option but to take part in the programme if selected unless the person selected is prepared to risk the loss of or reduction in benefit or unless the person belongs to one of the exempted categories (see paragraph 37 in Mr Walsh's statement). In relation to the manner that people are chosen to participate in such a scheme, there are no representations that could be made in advance of the choice being made. However, it is clear that once selected in this way, the opportunity to demonstrate membership of one of the exempted categories exists. The issue does not arise in Mr Wilson's case because he would not suggest that he belongs to any such category, but there is no evidence to suggest that someone who does belong to such a category would fail to be identified.

85. Furthermore, it is clear from the correspondence I have seen in Mr Wilson's case that, subject only to the arguments I will deal with in paragraphs 106-145 below, the consequences of not taking part in the programme were spelt out clearly. Indeed Mr Wilson's evidence demonstrates that in his case he was sufficiently fully and accurately informed about the scheme that he was able to make the conscious decision, in the light of that information, not to take part in the programme.

86. As I have said before (see paragraph 61), it is possible to give information such as that required to discharge the Secretary of State's duty of openness in various ways; but the crucial question is whether utilising the Jobcentre advisers and correspondence as is done in the context of the CAP is an inadequate way of dealing with the process. I do not see how this could be said to be so irrespective of the fact that arguably other ways may have been better or more effective and irrespective of whether, in any individual case, the process resulted in insufficient information being given.

87. On that basis, and for those reasons, the challenge to the CAP, as founded on an alleged breach of duty by the Secretary of State to make relevant details public, must fail.

88. It follows that the fundamental challenges reflected in grounds 1 and 2 fail. There are aspects of ground 4 that might be seen as a fundamental challenge to the whole scheme, in so far as it is said to involve breaches of Article 4 of the ECHR, and thus might logically have been dealt with before considering the matters said to affect each Claimant arising from alleged breaches of Regulation 4 (see paragraph 7 above). However, those matters were argued first and I will, for convenience, maintain that sequence.

Alleged breaches of Regulation 4

89. Regulation 4(2) contains the fundamental notification requirement on the part of the Secretary of State in relation to anyone chosen (either by the essentially voluntary process concerning the sbwa scheme or the essentially compulsory process concerning the CAP). In summary, it demands that an individual is told in writing that he or she is required to participate in the scheme, the date on which that participation will start, details of what will be required by way of participation in the scheme, the duration of that participation and information about the consequences of failing to participate in the scheme.

90. Given that this ground raises issues concerning each individual Claimant, I need to summarise the essential factual background concerning each of them.

Miss Reilly

91. Miss Reilly graduated from Birmingham University with a BSc degree in Geology in June 2010. She first claimed jobseeker's allowance in about August 2010 soon after she graduated. Her ambition was (and remains) to work in the museum sector having acquired some knowledge and experience in that sector during her degree course. In November 2010 she was assigned to a paid work experience placement at The Pen Room, a museum in Birmingham. She was paid the minimum wage during this placement which was funded by the Government's 'Future Jobs Fund' scheme. When the paid placement ended in May 2011 she continued to carry out voluntary work at The Pen Room because of her wish to pursue a career in museums.

92. She explains in her first witness statement that the museum sector is extremely competitive and that it is difficult to find paid employment within it. In order to have any chance at interviews a great deal of work experience is required.

93. She made her second claim for jobseeker's allowance on 22 July 2011. She asserts, and it is not disputed, that she has always complied with the "jobseeking conditions" and no-one has questioned her level of effort in seeking employment. On 20 October 2011 her Jobcentre Plus adviser told her of what she described as an "opportunity" to attend an "open day" in Yardley, Birmingham, at which retail jobs would be available. She says that this was presented to her as a choice and that there was no suggestion of any adverse consequences if she decided not to attend. She says she was happy to do so despite her wish to work in museums given that she was unemployed and wanted to start earning money again. Retail is one of the areas set out in her Jobseeker's Agreement and she was happy to look for and to undertake paid retail work even though it was (and is) not her first choice career.

94. She says that her adviser said that if she accepted a position advertised at the open day she would then undergo a week's training followed by a guaranteed job interview with an organisation like 'Poundland', the well-known discount retailer. There was no suggestion during this meeting, she says, that she would have to carry out any work as opposed to "training" although the specific details of this training were not discussed. She says that nothing was said to lead her to believe that what was being offered involved unpaid work.

95. Her adviser gave her a letter dated 20 October 2011 which stated that she had "been referred to the following Opportunity: RETAIL ASSISTANTS – OPEN DAY", that the open day would take place on 24 October 2011 and that she should report to

someone associated with an organisation called "Seetec". She was also given a flyer entitled 'ERG/21299 Retail sbwa with Seetec leading to employment with Poundland/Poundstretcher' with the following text:

> "RETAIL SALES ASSISTANTS
>
> Full Time Hours between 8 am and 6pm.
>
> Applicants will be required to work full time hours
>
> (This will include some weekends on a rota basis)
>
> Full time Retail Sales Assistant roles available within the Birmingham area. No experience necessary as full training will be provided.
>
> Interested applicants should attend the Open Day on 24th October 2011 …
>
> Pre-employment training, Work Experience Placement and Guaranteed Job Interviews will be offered to successful Customers."

96. She attended the open day (at which there were about twenty-five other jobseekers present) and they were told that the "training" would last for up to six weeks. They were set mathematics and literacy tests to complete.

97. She was concerned at the news of the six-week training period, given what she had been told by her adviser, and felt that it was much too long. It would mean also that she would be unable to continue with her voluntary work at The Pen Museum.

98. A few days later she received a message to the effect that she was considered suitable for "training" and that this would start on 31 October 2011. At her next regular appointment with her Jobcentre Plus adviser she told her that she was not happy with the length of the proposed training period and that she would prefer to look for work on her own and to continue the voluntary work at The Pen Museum. She says in her witness statement that she had previously had "a constructive relationship" with her Job Centre Plus adviser who was aware of her career plans and the importance of her voluntary work to those plans. According to Miss Reilly, her adviser stressed that the "training" would be a good opportunity and that she would gain valuable experience. She said that it would "look good" on her CV and that she "might as well do it". Miss Reilly says that she appeared to be trying to talk her into it, but she explained again that she had plenty of retail experience (having worked in a jewellery shop and in a cafe/gardening supplies shop previously) and that she did not want to participate in the scheme.

99. According to Miss Reilly, her adviser then told her that her participation was "mandatory – you have to do it anyway" and that she risked "sanctions" if she did not do so which she amplified by saying that she may lose her jobseeker's allowance entitlement or have her payments reduced. She did not explain by how much or for what period. Her adviser expressed surprise when told that Seetec said the training

could last for up to six weeks. Miss Reilly says that she realised that in reality she had no choice but to participate in the "training" because she could not contemplate losing her only source of income even for a short period and that it was obviously not worth raising her concerns again: she felt she had no alternative to undertaking the placement despite her objections.

100. Her witness statement goes on to describe the "training" she received for a week starting on 31 October 2011. She felt it was of no value to her. After the week of training, she was placed at the Poundland store in Kings Heath from 7 November 2011 for two weeks. She says she was required to work for five hours per day, five days per week for no pay, and that it was only on this first day at Poundland that it became apparent that she would be working instead of training. From her perspective it was neither a happy nor a rewarding experience: she and the other jobseekers were often left completely unsupervised and without direction and the work was basic and menial. After these two weeks she was required to carry out a further week of training from 21 November 2011 which, she says, was more or less a repeat of the first week's training in terms of its content.

101. On 8 December 2011, which would have been during her sixth week on the scheme, she noted a missed call on her mobile phone which was to the effect that Poundland wanted to arrange an interview. She said she called back the next day and left a voicemail message, but no one ever called her back.

102. She indicates in her statement that her position attracted media coverage and she took the opportunity in that statement of correcting something apparently said in the *Sunday Times* on 8 January 2012 where it stated that she was told by her "jobseeker adviser that she was required to accept a two week unpaid placement stacking shelves in Poundland". She says that her adviser did not tell her this, but she had expected to be shown how to undertake a variety of tasks in a retail environment which, given what I have recorded above of her experience, did not materialise.

103. I have recorded this account for completeness. However, the only point of direct relevance to the legal argument that has been developed on her behalf is that she was not given proper notice under Regulation 4. That has been admitted on behalf of the Secretary of State. It is also the case, contrary to what she was told, that it was <u>not</u> mandatory for her to have participated in the sbwa scheme at all, although once she had agreed to embark on the training element it became mandatory (see paragraph 72 above).

104. Not unnaturally, Miss Reilly feels that she was misinformed about the scheme and, had she been correctly informed about it, would have exercised her right not to participate in it.

105. I will return to the admitted breach of Regulation 4 in her case when I have set out the circumstances of Mr Wilson's case.

<u>Mr Wilson</u>

106. Mr Wilson is aged 40 and lives in Nottingham although he was born in Birmingham.

107. He acquired a heavy goods vehicle (HGV) licence having taken the test and from 1994 until 2008 he worked as an HGV driver, holding various jobs for different companies and also working as an agency worker. During the spring and summer months he would often stop working as an HGV driver and work instead as a landscape gardener. Unfortunately, his marriage (from which he had three children) broke down and his wife returned to live in Ireland with the children. They have since divorced.

108. In 2008 his eldest daughter, then aged about 15, moved to live with him in Nottingham. Towards the end of that year he was laid off after working as an HGV driver for British Gypsum through an employment agency. He became worried about being able to afford to support his daughter and signed on to receive income support and child benefit. Delays in setting up the child benefit payments caused his financial circumstances to deteriorate and his daughter moved back to Ireland to live with her mother.

109. At about that time he started receiving jobseeker's allowance. He emphasises in his witness statement (and I do not understand there to be any dispute about it) that he has always complied with the conditions attached to his jobseeker's allowance. He says that he has always actively sought (and continues actively to seek) work. Ideally, he would like to work in a role that involves working with other people and not return to the isolated work of an HGV driver. This, he says, would help him to regain his self-esteem which decreased steadily over the years since the breakdown of his marriage and, in particular, since he was made redundant. He has his preferences for work but says that he is happy to take any paid work and has been happy to do so throughout his time on jobseeker's allowance. He says that it is extremely difficult to live on his weekly jobseeker's allowance payment.

110. On 24 August 2011 his Jobcentre Plus adviser told him that in order for him to continue to receive his jobseeker's allowance he would be required to take part in a new programme that was being trialled in his area. (He had taken part the previous year in a programme known as "Working Links", but it had not led to employment.) He was given a letter stating that if he did not find a job within three months he would be referred to the CAP which would "involve up to six months of near full-time work experience with additional weekly job search support requirements." It warned him that a refusal to participate could result in the loss of his benefit. As he put it, it was a case of "do it, or you'll lose your jobseeker's allowance". The letter stated that if he had any questions he should ask his personal adviser. At a meeting on 21 September 2011, his adviser gave him another letter stating that if he had not found a job in two months, the CAP would commence. Again, it repeated the warning that he might "lose his benefit" if he did not participate in the CAP. On 19 October 2011, at another meeting with his adviser, he was given a letter to similar effect with the period of one month being specified as the deadline.

111. On 16 November 2011 his Jobcentre Plus adviser told him that he had to take part in the CAP and gave him a letter in the following terms:

> "At your interview today, you adviser explained that you had to take part in the Community Action Programme from 16/11/11. Ingeus will be in touch with you shortly to arrange this.

> The Community Action Programme will involve doing up to six months of near full-time work experience, with some additional weekly job search support. The Community Action Programme is an employment programme established in law under the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) regulations 2011.
>
> To keep getting Jobseeker's Allowance, you will need to take part in the Community Action Programme until you are told otherwise or your award of jobseeker's allowance comes to an end; and complete any activities that Ingeus asks you to do.
>
> If you don't take part in the Community Action Programme, under the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 your Jobseeker's Allowance may be stopped for up to 26 weeks. You could also lose your National Insurance credits.
>
> …
>
> If you are unsure what this means for you or would like more information, you can find out more by talking to your adviser at the Jobcentre."

112. At this meeting he was told that he had to have a "Welcome Induction" with the programme provider, Ingeus. He attended that meeting a week later and was told that his placement would begin on 28 November 2011 and that he was being sent to an organisation that collects disused furniture, renovates it and distributes it to needy people in the local community. These details were never set out in writing, he said. He was told that he would be required to work for 30 hours per week for 26 weeks or until he found employment of 16 hours per week or more. His attitude was that, whilst it sounded like a very worthwhile organisation and one that he would be happy to support, he was not prepared to work for free, particularly for such a long period of time. Requiring people to work unpaid for six months was (and is), in his view, particularly unfair. His attitude from his personal perspective is summed up in this passage from his witness statement:

> "If I was offered a training course that could lead to some concrete benefit then I would jump at the chance, but this just seems to be pointless work that has not been arranged by looking at my own needs and what is keeping me from entering the job market."

113. As I have indicated previously (see paragraph 85 above), Mr Wilson does not claim he was substantially misled at that stage about the consequences of not participating in the CAP. He has a fundamental objection to it (which will be dealt with in the context of the Article 4 arguments in paragraphs 169-175 below), but also asserts, through Miss Lieven and Mr Hickman, that contrary to Regulation 4(2)(c) (which requires that the notice must specify "details of what C is required to do by way of participation in the Scheme") the letter did not provide any details, or indeed any information at all, about what he was required to do by way of participation in the

CAP. They also submit that he was not provided with information about the true consequences of failing to participate in the scheme because of the "incorrect and misleading" information that his jobseeker's allowance could be "stopped for up to 26 weeks" and that he could "lose [his] National Insurance credits". In relation to the first of these matters it is said that under Regulation 8 his allowance could only be stopped for 2 weeks if he failed to participate in the scheme and in relation to the second no explanation for why he would lose his National Insurance credits was given.

114. Regulation 4(2)(e) requires that the notification should include "information about the consequences of failing to participate in the Scheme", by which one must assume that the information was intended to be accurate. Mr Nicholls' response to this feature of the argument is that the words used concerning jobseeker's allowance is an accurate reflection of Regulation 8 which provides for deductions from benefit for up to 26 weeks.

115. Whilst I accept that, from a literal point of view that is correct, I do not accept that words such as that are sufficiently clear and precise to comply with Regulation 8. Reference to Regulation 8, paragraphs 5-7, shows that there is a graduated level of benefit reduction which essentially increases with the consistency of someone's failure to participate in the scheme. Someone like Mr Wilson would only have faced a 2-week period in the first instance because none of what might be termed the aggravating factors applied in his case - indeed, as I have already recorded, he took part in a scheme (obviously not put in place under these Regulations) the previous year.

116. I had formed that general conclusion before having invited further assistance from the parties in writing whilst considering this judgment. My view has been reinforced by receipt of those submissions. I will record, in the first instance, what the Department says about the rules relating to sanctions. This is what was said in a letter sent to me on behalf of the Department after I had raised a question:

> "Under reg. 8(4), the specified period in a case which does not fall in regs. 8(5), (6) or (7) is 2 weeks.
>
> By reg. 8(5), the period is 4 weeks where the claimant had, on a previous occasion within a year prior to a later sanction, failed without good cause to participate in the scheme.
>
> Under reg. 8(6), the period is 26 weeks where a person had on two or more occasions failed without good cause to participate in the scheme and then, within a year of the time when jobseeker's allowance was last determined not to be payable, the claimant is again subject to sanction.
>
> Therefore the regime is a 2 week sanction for the first failure to attend, 4 weeks for a second failure to participate within a year and 26 weeks for 3 failures to participate in a year."

117. That does indeed set out what appears to be the effect of the Regulations concerning sanctions. However, it does not assist with the question of whether repeated failure to

participate without good cause in the particular scheme or programme for which the claimant has been chosen is sufficient for the sanctions regime to be activated or whether he or she must be chosen for separate schemes or programmes within the overall scheme for this to occur. Presumably, it is not intended that someone should be exposed to the full 26-week sanction because he or she refuses to take part in a particular work placement on three separate occasions, those three separate occasions taking place against the background of three separate letters requiring participation in the same programme written on three consecutive days. Or, perhaps it is so intended. At all events, the Regulations do raise some questions.

118. I intend no discourtesy to those who may find themselves the subject of a requirement to participate in the CAP, but it is likely that a fair number may be relatively unsophisticated and will need clear guidance about the consequences for them of non-participation to enable them to make an informed choice about whether to take part. I do not think that a "catch all" suggestion of "up to 26 weeks" meets the requirements of people in that category. Indeed I consider that anyone, whatever their position or background, is entitled to a straightforward letter dealing with his or her personal position. It should not be necessary for them to ferret around for what for most people would be inaccessible Regulations to find out his or her position: by inaccessible I mean (a) finding the Regulations in order to consult them and (b) endeavouring to interpret them, which even a trained lawyer may find a challenge in some respects (see, for example, paragraphs 8-11 of Regulation 8). It would, of course, be open to anyone to ask their adviser about the position, but Regulation 4 makes it clear that for someone to be "required to participate in the Scheme" (and by "required" one must understand it as "legitimately required") the Secretary of State must give that person a notice in writing complying with paragraph (2); mere reliance on what the adviser says is not sufficient to discharge the obligation under the Regulations.

119. In my judgment, the initial letter to Mr Wilson did not in the respect I have identified meet that obligation. I do not think it is fair, sufficient or accurate to tell someone who could only at that stage be sanctioned for 2 weeks that he or she could be sanctioned for "up to 26 weeks". The letter should spell out that, having failed without good cause to participate in the CAP on one occasion, the sanction if a sanction was applied would be one of 2 weeks' loss of benefit and that thereafter the period would increase with further separate failures to participate. I emphasise the underlined words because the words used in the letter received by Mr Wilson were that his benefits "may be stopped", perhaps conveying the impression that sanctions are not necessarily automatic. However, it seems to me that the clear intention of the Regulations is that the sanctions are mandatory. This conclusion is derived from the words in Regulation 8(1) which state that "the appropriate consequence for the purpose of section 17A of the Act is as follows" (my emphasis) once it has been decided that no good cause for the failure to participate in the scheme has been demonstrated. If that is the correct interpretation of the Regulations (and I do not think Mr Nicholls has suggested to the contrary and neither does Mr Walsh's second witness statement), then the letter ought, in my view, to be more explicit in this respect. (I might add also that the passage in the letter dealing with the appeal process, whilst arguably accurate as it stands, might be made more clear and open given what has been said by the Department concerning the wide ambit of the appeal process: see paragraph 155 below.)

120. I will deal with the consequences of this shortly (see paragraphs 160-168 below).

121. Given that conclusion, I do not need to consider the issue about National Insurance credits which, in many respects, is a non-issue in the case. Mr Nicholls says that those who are in receipt of benefit are generally credited with National Insurance contributions, but a person sanctioned pursuant to these Regulations is not entitled to National Insurance credits during the period of sanction and draws attention to Regulation 8A(5)(ba), Social Security (Credits) Regulations 1975 (S.I. 1975/556). I have not heard any argument about this, nor have I been taken specifically to those Regulations. I have no reason to doubt what Mr Nicholls says. However, if that is what those Regulations provide, then the letter is substantially accurate although if it be the case that National Insurance credits are automatically withdrawn during the period of sanction, it is at least arguable that the sentence in the letter saying "You could also lose your National Insurance credits" should be replaced with "If this happens you will also lose your National Insurance credits". This would mirror the way in which the warning as to loss of jobseeker's allowance should be phrased (see paragraph 119 above).

122. Miss Lieven and Mr Hickman also contend that the letter did not provide any details, or indeed any information at all, about what Mr Wilson was required to do by way of participation in the CAP. Mr Nicholls says that it does and draws attention to the third paragraph in the letter (quoted at paragraph 111 above) that says that Mr Wilson will need to "complete any activities that Ingeus asks [him] to do". It might be said that this information is sparse, but consistent with the proposition that, because of the individualised circumstances of each constituent part of the CAP, it is difficult to see what else could be said. Furthermore, against the background of what he was told by his adviser (see paragraph 112 above), this seems to me to be sufficient.

123. Mr Wilson was initially made the subject of sanctions because of his non-participation in the CAP in the circumstances I will summarise in paragraphs 126-144 below. Those sanctions were lifted after the hearing before me and whilst I was considering the terms of this reserved judgment. I have been told that they were lifted pursuant to a decision made by a decision maker on 27 July following the attendance by Mr Wilson on 11 July at an interview for a Work Programme which, it is said, counts as "re-compliance" for the purposes of Regulation 8(7) and (8) (see paragraph 23 above). I was told that this decision was made on a "re-consideration". I merely report in this judgment what I have been told. It is not something about which I have invited further assistance in view of my desire to complete this judgment for handing down as soon as possible. I will, however, confess to not understanding fully how "re-compliance" can result in a complete lifting of sanctions that have otherwise properly been imposed: paragraph 7 of Regulation 8 appears to suggest that the minimum period is 4 weeks or possibly a little more even if re-compliance is demonstrated. Equally, according to the letters sent out informing someone that he or she has been "sanctioned" (see paragraph 130 below), a "re-consideration" is a process prompted by a request from the individual affected. I am not aware of Mr Wilson having made such a request unless his proposed appeal and/or these proceedings have been treated as such.

124. At all events, the decision made on 27 July means that Mr Wilson's concerns about the sanctions from his personal point of view become academic. However, since I

have heard full argument on the overall issues in this area, it is appropriate that I should indicate my conclusions.

125. Mr Nicholls had submitted that the issue of whether sanctions should have been applied should be the subject of a remedy other than judicial review, namely, an appeal to the Social Entitlement Chamber of the First-tier Tribunal. Mr Wilson, incidentally, had lodged such an appeal, in effect without prejudice to his argument that the challenge could be mounted by way of judicial review.

126. I will return to this later (see paragraphs 154-159), but I propose to set out briefly the facts so far as Mr Wilson's case is concerned. Whatever my conclusion on the "alternative route" argument, I am inclined to think that what has occurred in Mr Wilson's case (unless it is an unhappy aberration) serves to support my view, as expressed above, that the information given concerning sanctions is unclear and opaque. I will intersperse the narrative with the explanation given by Mr Walsh of what occurred and why.

127. As will appear from paragraph 112 above, Mr Wilson had been required to start on the CAP initially on 28 November, but he told the provider (Pinnacle People) that he did not intend to participate because of his strong objection to being required to do so. The provider put back the deadline for a couple of days in case he changed his mind, but he remained unwilling and, of course, this constituted a failure to participate in the CAP and, accordingly, the provider of the work contemplated for him was obliged to report him for non-compliance.

128. He either had instructed, or shortly after this instructed, solicitors who wrote a pre-action protocol letter dated 23 December 2011. There was correspondence thereafter, but his claim for judicial review was issued on 1 February 2012. On 13 February he received a letter from the Department asking for his written reasons for not participating in the CAP, the letter also indicating that this failure to participate raised "a doubt" over his entitlement to jobseeker's allowance. His solicitors wrote on his behalf on 14 February to the DWP Legal Division (copying it to the sender of the letter of 13 February) asking to be informed if his benefit was to be reduced or suspended. On 19 March he received the first of a number of letters from "Pinnacle People", referring to the fact that he did not attend his last CAP session and inviting him to attend an appointment at a local community centre. He received four other letters to like effect.

129. He then received a letter from the Leicester Benefits Centre dated 3 May 2012 which said as follows:

> "We cannot pay you Jobseeker's Allowance from 3 May 2012.
>
> This is because we recently told you that a decision would be made about a doubt:
>
> - on whether you failed to take advantage of a place on an employment programme. We have now decided that you did not take advantage of a place on an employment programme and that you did not have sufficiently good

> reasons for doing so. This decision applies from 3 May 2012 to 16 May 2012."

130. The letter (which, according to Mr Walsh, reflected a decision made on 1 May) also referred to the ability to seek a re-consideration of the decision (provided that the request for a re-consideration was made within one month of the date of the letter) and of an appeal process to an "independent appeal tribunal" details of which could be obtained from his Jobcentre or Social Security office. The letter contained in this paragraph:

> "If the decision is wrong, the independent appeal tribunal can change it. But the independent appeal tribunal cannot:
>
> - change the law that the decision is based on;
> - pay more money than the law allows;
> - check or change your contribution record."

131. The letter also says that he could not be paid jobseeker's allowance from 17 May because he had not paid, or been credited with, enough Class 1 National Insurance contributions. In his second witness statement Mr Walsh explains this part of the letter thus:

> "… This is because at the end of the sanction period Mr Wilson will not qualify for contribution-based JSA as he has not paid enough National Insurance contributions in the relevant income tax years to qualify. As Mr Wilson was claiming income-based JSA he would normally receive a letter when the sanction period ended advising him when and at what rate income based JSA becomes payable."

132. Mr Wilson went to see the Jobcentre plus adviser in Loughborough after receiving the letter and was told that he was being sanctioned by losing his benefits for two weeks. He also saw the Jobcentre manager who told him that she could see on their system that there were more sanction decisions waiting to be made and that he was likely to lose his benefits for a much longer period than two weeks.

133. He then received a further letter from the Leicester Benefits Centre dated 10 May 2012 which set out a long list of the levels of jobseeker's allowance to which he was entitled starting in December 2009 and finishing in April 2012 and which then contained the following passage:

> "We cannot pay you Jobseeker's Allowance from 3 May 2012.
>
> This is because we recently told you that a decision would be made about a doubt:
>
> on whether you failed to attend an interview with an Employment Service advisor or officer on the date specified. We have now decided that this decision no longer applies.

> We cannot award National Insurance contribution credits for this period.
>
> We cannot pay you Jobseeker's Allowance from 17 May 2012.
>
> We cannot pay you because you have not paid, or been credited with, enough Class 1 National Insurance contribution credits for this period".

134. The letter contained the same paragraph concerning a possible appeal as the previous letter.

135. Perhaps not surprisingly Mr Wilson has said that he "did not and still [does] not understand exactly what was meant by this letter and particularly the sentence "*We have now decided that this decision no longer applies*" when [he] in fact was stripped of [his] benefits for two weeks." Furthermore, according to Mr Walsh, the second sanction decision, as he described it, was made on the same day as that letter was sent. This decision was made because Mr Wilson had failed to attend a jobsearch session with Pinnacle People on 11 April, the invitation to that session having been made in a letter dated 4 April, the second letter in the sequence of matters to which I referred in paragraph 128 above.

136. Mr Walsh says that because "the decision [was not put] into the payment system which generates a notification to the claimant" it was "not actually notified to Mr Wilson until 8th June" when a letter of that date was sent. I will refer to that letter in paragraph 141 below, but in the meantime he had been into the Jobcentre before the Jubilee weekend and was told that he would be paid jobseeker's allowance on 1 June 2012 (this was his fortnightly payment due on Monday 4 June but due to the intervening bank holiday period it was to be paid on Friday 1 June 2012). He says that he asked them to check what he was told twice and it was confirmed that the information was correct and indeed he received his fortnightly allowance on 1 June. It was on that day that his solicitors submitted an appeal against the sanctions imposed to date. In fact unbeknown to him (and presumably to those in the Jobcentre) the third sanction decision had been made on 30 May. I will refer to this in paragraphs 140-141 below.

137. However, before he received the letter of 8 June he had received a letter dated 6 June in what by now was the familiar format which said this:

> "We cannot pay you Jobseeker's Allowance from 31 May 2012.
>
> This is because we recently told you that a decision would be made about a doubt:
>
> - on whether you failed to take advantage of an employment programme. We have now decided that you did not take advantage of a place on an employment programme and that you did not have sufficiently good reasons for doing so. This decision applies from 31 May 2012 to 27 June 2012.

…

> We cannot award National Insurance contribution credits this period.
>
> We cannot pay you Jobseeker's Allowance from 28 June 2012."

138. Mr Wilson says that he was confused by this letter because he had, as I have indicated, received a fortnightly payment of jobseeker's allowance on 1 June 2012 (due 4 June 2012) which, from his perspective, suggested that this sanction had not been imposed. In fact the letter of 6 June was conveying the news of the third sanction decision (see paragraph 140 below).

139. In fact, according to Ms Walsh, the payment of jobseeker's allowance on 1 June was made in error. In his second witness statement he said this:

> "The period of this second sanction is four weeks, i.e. 17th May 2012 to 13th June 2012. Unfortunately, for reasons that are not clear, this second sanction decision was not notified immediately to the DWP office responsible for processing payments. As a result the second sanction decision was not put into effect on the date that it should have been, and Mr Wilson continued to receive JSA for the period from 17th to 30th May."

140. I referred in paragraph 138 above to the third sanction decision. Mr Walsh explains it thus:

> "The third sanction was originally made on 30th May 2012 and notified to Mr Wilson on 6th June 2012, but this was wrongly stated to be only for a 4 week sanction period from 31st May to 27th June 2012. This error arose due to the earlier 2nd sanction not having been input to the payment system by the processing team. When this error was noticed the 2nd sanction decision was input and notified to Mr Wilson on 8th June 2012."

141. Mr Walsh also says that the third sanction decision arose from Mr Wilson's failure to attend a jobsearch session with Pinnacle People on 18 April 2012 to which he was invited in a letter of 12 April, the fourth letter in the sequence to which I referred in paragraph 128 above. However, as he correctly observes, a period of a third sanction is 26 weeks (which would have been from 31 May to 28 November) and since the earlier second sanction period had not been inputted into the system, only a 4-week sanction (namely, from 31 May to 27 June) was imposed initially. The error was noted on 8 June and Mr Walsh says this:

> "To correct this error, on 8th June a further notification (technically known as a reconsideration) was sent in relation to the 3rd sanction, with a revised sanction period of 26 weeks from 31st May 2012 to 28th November 2012."

142. Although, for the reasons given in paragraph 123 above, the appeal to the First-tier Tribunal is no longer necessary, it was this eventual sanction decision, together with the other sanction decisions made, that would (by agreement between the Department and his solicitors) have formed the subject-matter of that appeal. As I understand it, the total period of sanctions imposed exceeded 26 weeks.

143. Miss Lieven was plainly entitled to describe the events concerning the sanctions in Mr Wilson's case as reflecting a "catalogue of errors". Some of those errors obviously arose from an initial mistake in failing to input an earlier decision with the effect that erroneous subsequent decisions were generated by the computer programme. Furthermore, the fact that there were errors does not of itself mean that Regulation 4 had not been complied with. By the time a sanction decision is made Regulation 4 will either have been complied with in an individual case or it will not. However, the sequence of events to which I have referred gives a sense that those administering the scheme are themselves uncertain about how to interpret the rules. I cite in that connection the sentence in the letter of 10 May (see paragraphs 133-134 above) which I do not believe has been explained fully. Equally, the final decision setting aside all the sanctions imposed on the grounds of "re-compliance" is not immediately easy to explain having regard to the phraseology of the Regulations (see paragraph 123 above).

144. My essential conclusion, however, for the reasons given in paragraphs 115 and 118-119 above is that the initial letter sent (see paragraph 111 above) did not fairly set out the information that should have been provided. Someone such as Mr Wilson might say, in the light of a letter telling him that if he did not participate in the CAP he would lose two weeks' benefit unless he could show reasonable cause, that he would, in protest, not take part and thus sacrifice that two-week period of benefit if it had been made clear to him that he would not face a longer period of loss unless he continued to fail to participate. Although what was said in the letter did not have this impact on Mr Wilson, stating that the period of loss could be 26 weeks might persuade someone who otherwise might wish to register a protest not to do so.

145. I will deal with the consequence of a failure to comply with Regulations 4 in the next section of this judgment.

How should issues like this be raised and what are the consequences of a failure to comply with Regulation 4?

146. Because the issue of non-compliance with Regulation 4(2) is before me I have dealt with it on its merits and, so far as the alleged breaches are concerned in the two cases before me, (a) the non-supply of a written notice is admitted in Miss Reilly's case and (b) I have concluded that there was non-compliance in the respect I have identified in Mr Wilson's case. It is the Secretary of State's case that there are alternative remedies available in respect of these matters and that, as a last resort remedy, permission to apply for judicial review should not be granted. Because these two cases came before me on a "rolled up" basis and because of the way the arguments have been developed, it has seemed to me unrealistic to decline permission in either case on this ground. In Miss Reilly's case, for example, it is accepted that none of the other three grounds could be dealt with on the basis of an alternative remedy. However, notwithstanding that, the argument advanced by Mr Nicholls is a serious one and needs addressing because, if valid, it would be an answer to other cases in

which issues about compliance with Regulation 4 might arise. So far as these two cases are concerned, if persuaded of the validity of the arguments to which I will refer in the next paragraph, that would be a matter I could take into account in respect of remedy.

147. In Miss Reilly's case, it is suggested that, in respect of this particular breach of the Regulations, she has the alternative remedy of the Department's complaints procedure which, when exhausted, could lead to a complaint to the Independent Case Examiner. In Mr Wilson's case it is argued that he has an alternative remedy in relation to the sanction imposed, namely, that he can appeal to the First-tier Tribunal (possibly after seeking a re-consideration) and challenge the application of the sanction on the ground that he was not sent the correct notice. (As previously indicated, he did indeed lodge such an appeal to protect his position, but was awaiting the outcome of this application before proceeding further, but, for the reasons given in paragraph 123, that appeal is no longer necessary.)

148. I will deal with each separately.

Independent Case Examiner

149. The role of the Independent Case Examiner (the 'ICE') was considered by Goldring J, as he then was, in *Humphries v SSWP* [2008] EWHC 1585 (Admin). At paragraph 38 Goldring J refers to the powers possessed by the ICE. He said this:

> "As to the ICE's powers, Mr. Hanlon [the then independent case examiner] states:
>
> "15 … I can make recommendations about what I consider needs to be done. This can include an apology, an explanation, an assurance (eg as to future steps to be taken), a recommendation that financial redress be offered or a combination of these.
>
> 16 Redress recommendations are made in accordance with the … guide and can include;
>
> - advanced payments,
> - consolatory payments…
> - financial loss for either income or costs
> - interest for monies paid…
>
> 17 In accordance with the … guide, financial loss recommendations are aimed at putting a complainant in the position they (sic) would have been had maladministration not occurred."

150. In an earlier paragraph (paragraph 34) Goldring J summarised the history of the office of the ICE in this way:

> " … It was set up in April 1997 following a recommendation of the then Parliamentary Commissioner for Administration (the Ombudsman). The ombudsman had been receiving a large number of referrals from Members of Parliament on behalf of constituents who were dissatisfied with the service they received from the Agency. He recommended an additional level of independent review for complaints. The ICE's role was later extended to other "customers" of the Department."

151. In that case one of the objections to the submission that it comprised an alternative remedy was that complaints to the ICE take a very long time to determine. It appears that there was evidence in that case that enabled Goldring J to conclude that they took no longer than applications for judicial review at that time and that "indeed … they are dealt with quicker" (paragraph 100). I have no evidence before me to make the equivalent comparison at the present time, but it is general knowledge that getting a substantive judicial review case before the Administrative Court in London can take a considerable time given the present state of the lists. From my perspective, on the basis of the material before me, it seems clear that what is needed in response to the kind of issue raised by someone who claims not to have received the proper notice under Regulation 4 is an informal, cost effective and reasonably speedy resolution. Whilst one supposes that some delay is inevitable under the ICE procedure, it seems unarguably ordinarily to be the most appropriate avenue for seeking redress when something has gone wrong in this fashion. The whole panoply of judicial review proceedings seems entirely out of place in the ordinary case. If the ICE procedure is flawed, then judicial review might be open.

152. In *Humphries* Goldring J recorded what the then ICE said about the system:

> "The service is free to complainants … relatively fast … informal … inquisitorial … Easy to use … allows [complaints] to be resolved amicably… Through casework, patterns of complaint can be identified… It is less stressful than court proceedings for many complainants."

153. Miss Lieven did argue that the ICE cannot give someone back their 6 weeks of participation in a scheme if sent on it invalidly or erroneously. But that is no less true of the remedy of judicial review. The ICE does have quite wide powers of recommending financial redress (which the Administrative Court does not) which may be particularly appropriate if someone has been wrongly induced to take part in a scheme because the proper information has not been given and it has resulted in financial loss. I do not know (and express no view) whether some claim might be fashioned for consideration in the Small Claims Court if this avenue led nowhere following a valid complaint, but I am of the clear view that a complaint to the ICE should in the ordinary case be pursued before seeking permission to apply for judicial review.

First-tier Tribunal

154. It is not in issue that someone to whom sanctions are applied under these Regulations may appeal to the Social Entitlement Chamber of the First-tier Tribunal pursuant to section 12 of the Social Security Act 1998. Section 12(2) creates a right of appeal in

claims to which that section applies. Section 12(1)(b) provides that the section applies to claims which (amongst other things) fall within Schedule 3 to the Act. Paragraph 3(da) of Schedule 3 – which was inserted by section 1(4) of the Welfare Reform Act 2009 – refers to decisions that benefit is not payable made under, amongst others, section 17A of the Jobseekers Act 1995.

155. The Department's position is that an appeal brought under this provision is to be treated as a re-hearing, not merely a review of the decision under appeal. The tribunal, it is said, stands in the shoes of the decision-maker and has the power to consider any issue – including all relevant issues of fact and law – and to make any decision the decision-maker could have made. There is, it is said, no statutory limit in section 12 of the 1998 Act (or under section 3 to the Tribunals, Courts and Enforcement Act 2007) to the grounds of appeal that may be advanced or considered by the First-tier Tribunal in a social security appeal that it has jurisdiction to entertain.

156. The First-tier Tribunal may also, it is said, determine issues going to the *vires* of the legislative provisions on which the Secretary of State relied in imposing the sanction: *Chief Adjudication Officer v Foster* [1993] AC 754. Having considered the judgment of the Court of Appeal (which was to a different effect) Lord Bridge of Harwich (with whom all their Lordships agreed) said this at pp. 766-767:

> "My conclusion is that the commissioners have undoubted jurisdiction to determine any challenge to the vires of a provision in regulations made by the Secretary of State as being beyond the scope of the enabling power whenever it is necessary to do so in determining whether a decision under appeal was erroneous in point of law. I am pleased to reach that conclusion for two reasons. First, it avoids a cumbrous duplicity of proceedings which could only add to the already overburdened list of applications for judicial review awaiting determination by the Divisional Court. Secondly, it is, in my view, highly desirable that when the Court of Appeal, or indeed your Lordships House, are called upon to determine an issue of the kind in question they should have the benefit of the views upon it of one or more of the commissioners, who have great expertise in this somewhat esoteric area of the law."

157. It is suggested that the reasoning in that case applies notwithstanding the replacement of the Social Security Appeal Tribunal and the Social Security Commissioners by the First-tier Tribunal and the Upper Tribunal respectively and, presumably, that the rationale mentioned by Lord Bridge applies as much in today's times as it did in 1992/3.

158. Miss Lieven and Mr Hickman accept that *Foster* shows that the issue of *vires* could be raised before the First-tier Tribunal and the Upper Tribunal. That route might have been available to Mr Wilson and, of course, had he taken it the ultimate appeal on any such issue would have been determined by the Court of Appeal and the Supreme Court, just as it would be from the first instance decision in a judicial review case. It is, as I understand it, accepted by Mr Nicholls that there is no way that Miss Reilly could have challenged the *vires* of the Regulations other than by judicial review. The issue is, therefore, largely academic in the context of Mr Wilson's case because the

point has been argued legitimately in Miss Reilly's claim for judicial review. All I think I need say for present purposes is that it seems to be common ground that the issue could have been raised before the First-tier Tribunal and the Upper Tribunal. I do not, in the circumstances, need to go on to consider whether it should have been so raised in Mr Wilson's case.

159. This case (whether by my decision or by the decision of the Court of Appeal or beyond) will determine the question of the *vires* of the Regulations. All issues concerning matters other than that issue should henceforth ordinarily go to the First-tier Tribunal because Parliament has determined that that is the appropriate forum and it has a wide jurisdiction to interfere with an erroneous decision and, in the process, "stands in the shoes of the decision-maker". I do not know whether provision is made for a suspension of any sanction pending an appeal, but that is plainly an area that requires consideration given the subsistence levels of payment concerned.

The effect of a breach of Regulation 4

160. Miss Lieven and Mr Hickman contend that a failure to comply with the notice provision contained in Regulation 4 is that there is no power for the Secretary of State to require an individual to participate in a scheme. By requiring an individual to participate in such a scheme they argue that the Secretary of State acts unlawfully. Mr Nicholls submits that the only consequence of the failure to comply with the notice provision contained in Regulation 4 is that the Secretary of State would not have been able to impose sanctions for the failure to participate upon the basis of which the decision to impose sanctions was based.

161. My conclusion, of course, is that it is only in respect of the sanction consequences of non-participation in the CAP that there was non-compliance with Regulation 4 in Mr Wilson's case. He did not participate and, accordingly, the only issue would have been one of whether the sanctions fell away as a result. Whilst the issue is now academic, the answer to my mind is plainly that there could be no question of sanctions being validly imposed if no proper notice of the sanction consequences was given. I do not think that Mr Nicholls suggests otherwise. Whilst it is not, strictly speaking, a matter for me, I would have anticipated that the First-tier Tribunal would have allowed Mr Wilson's appeal if it had arrived at the same conclusion as the conclusion I have arrived at concerning the adequacy of the notice he was given.

162. In Miss Reilly's case she received no written notice at all. (It is not possible, therefore, to know whether she would have been told of her right to make a complaint and then pursue matters to the ICE if the complaint did not resolve any issue she may have had.) In her case, of course, no sanctions were imposed because she participated in the scheme. The argument advanced on her behalf is that the Secretary of State has acted unlawfully in requiring her to participate.

163. Had she been given proper notification under Regulation 4 she would have appreciated that the scheme was not mandatory in the sense previously discussed (see paragraph 83 above). This is, in a sense, part and parcel of her complaint that she was told that the scheme was compulsory otherwise she risked losing her benefits. In other words, she was "required" to participate when there was in reality no compulsion upon her to do so. Does that mean that she can assert, as against the Secretary of State, that she was unlawfully required to participate? As Mr Nicholls says, it is not

wholly clear what consequence it is said would flow from this conclusion. She merely seeks a declaration to that effect. He accepts that if her participation was unlawful, she could not be subject to sanctions (as was accepted in relation to Mr Wilson), but he says that that is accepted as a matter of the construction of the Regulations in any event. His submission is that what I will for this purpose characterise as an "invalid" requirement to participate goes no further than that - it is not to be characterised as unlawful. He submits that there is no doubt as to the consequences of non-compliance and that the Regulations spell them out. There is, he says, a complete code to explain what is to happen if there is a breach of the notification provision and it is neither necessary nor appropriate for the Court to augment that code with additional consequences for which Parliament has not provided.

164. Both sides have drawn attention to *R v Soneji* [2006] 1 AC 340 and, in particular, to paragraphs 14 and 15 of the speech of Lord Steyn (with which Lords Carswell and Brown of Eaton-under-Heywood agreed expressly). I will not extend this judgment by setting them out in full. Suffice it to say that the once fairly rigid demarcation between rules that were "mandatory" and "directory" was confirmed to be less so. Relying upon the dictum of Lord Hailsham in *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182, 189E-190C, Lord Steyn said this:

> "This was an important and influential dictum. It led to the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity. In framing the question in this way it is necessary to have regard to the fact that Parliament ex hypothesi did not consider the point of the ultimate outcome. Inevitably one must be considering objectively what intention should be imputed to Parliament."

165. Later, at paragraph 23, he said this:

> "Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead … the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction …."

166. Miss Lieven suggests that the Parliamentary intention can be found in Regulation 4(1) and that with no proper notification there can be no lawful requirement to participate and, accordingly, that "total invalidity" was contemplated. I have already identified Mr Nicholls' contention.

167. Endeavouring to look at this issue in the context of the Act and the Regulations as a whole, and taking what one hopes is a realistic and sensible view, I do not consider that it is possible to spell out of the statutory and regulatory provisions an intention that a requirement to participate is unlawful (and thus "totally invalid") if Regulation

4 is not complied with. Undoubtedly, no sanction for non-compliance could lawfully be levied in such circumstances and I agree with Mr Nicholls that this is what the Regulations say expressly. In one sense, any other consequences are left particularised. That does not mean that someone who has been incorrectly (a more neutral word than "unlawfully") required to participate has no remedy even if not made the subject of sanctions. The right to complain to the ICE exists and, as I have said (see paragraph 153 above), there is the possibility of a recommendation for recompense if financial loss could be shown. I suspect it would be in very few cases that any true financial loss could be demonstrated, but the possibility of a recommendation exists.

168. For those reasons I decline to make the declaration sought on Miss Reilly's behalf.

Article 4

169. Article 4 of the ECHR is in the following terms:

> "Article 4 – Prohibition of slavery and forced labour
>
> 1. No one shall be held in slavery or servitude.
>
> 2. No one shall be required to perform forced or compulsory labour.
>
> 3. For the purpose of this article the term "forced or compulsory labour" shall not include:
>
> a. any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
>
> b. any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
>
> c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
>
> d. any work or service which forms part of normal civic obligations."

170. The argument on behalf of Mr Wilson is that the CAP scheme is incompatible with Article 4. It is not suggested that Parliament could not design a scheme that requires individuals to undertake work as a condition for entitlement to benefit that could be consistent with Article 4, but the submission is that the CAP is not such a scheme because it imposes very onerous obligations on individuals, requiring them to work for up to six months for 30 hours a week without pay at any time of the day or at weekends on pain of losing all of their jobseeker's allowance. This would leave them without any means by which to live unless they happen to have their own savings.

171. In Miss Reilly's case the argument is that there has been a violation of Article 4 by virtue of the fact that she was not given the option whether to participate in a scheme that involved unpaid work for a private company and that the work she undertook was under the threat of a penalty.

172. Miss Lieven and Mr Hickman draw attention to *Van der Mussele v Belgium* (1983) 6 EHRR 163 where the European Court of Human Rights had to consider whether a professional requirement of the Ordre des avocats (Bar Association) in Belgium that trainee advocates should take cases for free for those in need of legal aid constituted "forced labour" contrary to Article 4. Paragraph 32 of the judgment provides some illuminating guidance on the interpretation of Article 4 in this context:

> "Article 4 ... does not define what is meant by "forced or compulsory labour" and no guidance on this point is to be found in the various Council of Europe documents relating to the preparatory work of the European Convention.
>
> As the Commission and the Government pointed out, it is evident that the authors of the European Convention - following the example of the authors of Article 8 of the draft International Covenant on Civil and Political Rights - based themselves, to a large extent, on an earlier treaty of the International Labour Organisation, namely Convention No. 29 concerning Forced or Compulsory Labour.
>
> Under the latter Convention (which was adopted on 28 June 1930, entered into force on 1 May 1932 and was modified - as regards the final clauses - in 1946), States undertook "to suppress the use of forced or compulsory labour in all its forms within the shortest possible period" (Article 1 § 1); with a view to "complete suppression" of such labour, States were permitted to have recourse thereto during a "transitional period", but "for public purposes only and as an exceptional measure, subject to the conditions and guarantees" laid down in Articles 4 et seq. (Article 1 § 2). The main aim of the Convention was originally to prevent the exploitation of labour in colonies, which were still numerous at that time. Convention No. 105 of 25 June 1957, which entered into force on 17 January 1959, complemented Convention No. 29, by prescribing "the immediate and complete abolition of forced or compulsory labour" in certain specified cases.
>
> Subject to Article 4 § 3 (art. 4-3), the European Convention, for its part, lays down a general and absolute prohibition of forced or compulsory labour.
>
> The Court will nevertheless take into account the above-mentioned ILO Conventions - which are binding on nearly all the member States of the Council of Europe, including Belgium - and especially Convention No. 29. There is in fact a striking similarity, which is not accidental, between paragraph 3 of

> Article 4 ... of the European Convention and paragraph 2 of Article 2 of Convention No. 29. Paragraph 1 of the last-mentioned Article provides that "for the purposes" of the latter Convention, the term "forced or compulsory labour" shall mean "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". This definition can provide a starting-point for interpretation of Article 4 ... of the European Convention. However, sight should not be lost of that Convention's special features or of the fact that it is a living instrument to be read "in the light of the notions currently prevailing in democratic States" (see, inter alia, the Guzzardi judgment of 6 November 1980, Series A no. 39, p. 34, § 95)."

173. Reliance is placed, both on behalf of Mr Wilson and Miss Reilly, on the words "menace of any penalty". The Court said (in paragraph 35) that running the risk of having the Council of the Ordre strike the applicant's name off the roll of pupils or reject his application for entry on the register of avocats was sufficiently daunting to be capable of constituting "the menace of [a] penalty". However, ultimately the Court decided that having regard to the standards still generally obtaining in Belgium and in other democratic societies "there was ... no compulsory labour for the purposes of [Article 4(2)] of the Convention". In reaching that conclusion the Court took into account the fact that the services were within the normal activities of an advocate, there was a "compensatory factor" in terms of the access to the profession and contribution to professional training, the obligation was a means of ensuring individuals had access to legal representation guaranteed to them by Article 6 of the Convention and finally that the burden imposed on the applicant was not disproportionate because he had "sufficient time for performance of paid work".

174. Miss Lieven and Mr Hickman sought to distinguish the considerations taken into account by the Court in that case and what was expected of Miss Reilly. She was not given the option whether to participate in a scheme that involved unpaid work for a private company and, it is argued, undoubtedly undertook the work under "menace of a penalty". For my part, I do not see any material distinction in principle between *Van der Mussele* in terms of the matters considered in that case by the Court to render the requirement on the applicant lawful and the schemes or programmes under challenge in the present case: each can be seen as a step towards obtaining eventual employment for the person concerned. But whether that assessment is correct or not, it does have to be said that the sbwa scheme, and indeed the CAP, are a very long way removed from the kind of colonial exploitation of labour that led to the formulation of Article 4. The Convention is, of course, a living instrument, capable of development to meet modern conditions, and views may reasonably differ about the merits of a scheme that requires individuals to "work for their benefits" as a means of assisting them back into the workplace. However, characterising such a scheme as involving or being analogous to "slavery" or "forced labour" seems to me to be a long way from contemporary thinking. Mr Walsh's first witness statement refers to details of research which it is suggested shows that schemes like the CAP can and do have a beneficial effect in relation to the obtaining of work by the long-term unemployed. It is no part of the court's function to evaluate that evidence or to comment on its

validity. However, if valid, its existence would reinforce the view that a scheme like the CAP does not offend Article 4.

175. Whilst the argument in *Nikiforova* concerned different Regulations (see paragraph 52 above), the approach of Bean J and the Court of Appeal in that case supports this conclusion.

176. For these reasons, briefly stated, I do not consider that either scheme is contrary to Article 4, nor do I consider that there has been any breach in Miss Reilly's case.

Other matters

177. In the light of my conclusions on Grounds 1, 2 and 4, I do not have to consider Mr Nicholls' argument that the claims are out of time and/or that, even if persuaded that the regulations are *ultra vires*, I should exercise my discretion to refuse relief because of the large numbers of people who have already engaged in both schemes.

178. Those points would, of course, be open to the Secretary of State to rely upon if my primary decisions are challenged successfully in the Court of Appeal. For completeness, I express very short views on each.

179. As to the delay, I do not consider that it could be said that either Miss Reilly or Mr Wilson delayed in bringing their claims. The primary suggestion of Mr Nicholls is that the clock started ticking for an *ultra vires* and/or Article 4 challenge when the Regulations were first published and that a judicial review claim should have been brought within three months of that. For reasons I will give shortly, my view (uninfluenced by authority) would have been that it is open for anyone to take an *ultra vires* point at any time for the simple reason that a piece of subordinate legislation either is or is not *ultra vires*. If it is not, that is the end of the matter. If it is, it does not become validated by the passage of time. However, there is clear authority in the form of *Howker v Work & Pensions Secretary* [2003] ICR 495 that demonstrates that an *ultra vires* point may be taken by someone when first affected by the relevant piece of the challenged subordinate legislation. Miss Reilly and Mr Wilson did that and neither delayed in bringing forward these proceedings having (correctly and appropriately) had pre-action protocols letters sent on their behalves. I might also add that since the sbwa scheme commenced on 1 August 2011 (some 2½ months after the Regulations came into effect and 4 months after they were made by the Secretary of State), Miss Reilly could not have been affected until at least August 2011. As I have indicated previously, the CAP was introduced on a trial basis in November 2011 so it follows also that Mr Wilson could not have been affected until then. It is, of course, possible that some organisation might have tried to take the *ultra vires* point if it had been identified, but at the end of the day it is likely to have been an individual affected by a feature of the Employment, Skills and Enterprise Scheme who would be the catalyst for proceedings designed to test the point.

180. Mr Nicholls contended that it would be inappropriate to consider these challenges, which he characterised as "late-presented", because of the number of people who have already participated in the schemes in issue. The evidence is that between August and November 2011 3,470 people participated in the sbwa scheme (7,390 to February 2012). Around 4,000 have participated in the CAP, presumably since it was launched in November 2011. He submitted that each scheme involves not only the

individuals assigned to them but also the employers, providers and others involved in delivering the schemes. It would, he said, be disruptive and detrimental to good administration for the legality of these schemes "retrospectively to be called into question by proceedings in which the Claimants now seek to quash the Regulations".

181. I have no doubt that it would be extremely inconvenient if the Regulations under which those schemes were put in place were quashed. However, for my part, I can see no basis for the court, as it were, closing its eyes to the invalidity of the Regulations if persuaded that they are indeed invalid simply on the grounds of convenience. I have little doubt that, had I been so persuaded (or if any higher court was so persuaded), regulations correcting the position could and would be promulgated very rapidly.

182. As I have said, the issues are academic given my previously expressed conclusions, but I would not have been persuaded that they would have prevented the quashing of the Regulations had I determined that they were *ultra vires*.

Conclusion

183. For the reasons I have given, Grounds 1, 2 and 4 fail. It has not been in dispute that Ground 3, so far as Miss Reilly is concerned, is established, but the argument was that there was an alternative remedy open to her, namely, a complaint to the ICE. I have concluded that such an avenue was open to her, but it would, in the circumstances of her more fundamental challenge to the Regulations, have been unrealistic to take that individual point to the ICE. In the circumstances, I would be inclined to grant her a declaration that there was a breach of Regulation 4(2) in her case even though it had been admitted. Given the importance attached to notification in the Regulations, my present view is that it would be right to mark the breach by a declaration. However, I will consider the issue further if the Secretary of State wishes to contend that a declaration would be inappropriate.

184. In Mr Wilson's case, I have also concluded that there was a breach of Regulation 4(2) in that the information he was given about sanctions was inadequate. My conclusion is that that was an issue that could have been taken before the First-tier tribunal (and certainly from now on issues such as that should, in my view, be taken in that forum if a request for re-consideration of the original decision does not prompt a change of view). What would have been his appeal to the First-tier Tribunal has been rendered unnecessary because of the reconsideration to which I have referred in paragraph 123 above. Since that decision was made for reasons other than a breach of Regulation 4(2), again I am inclined to grant Mr Wilson a declaration concerning that breach. If the Secretary of State wishes to contend otherwise, I will consider the matter on the basis of written submissions.

Concluding remarks

185. I have been made aware that this case may have a wider interest than merely for the result in the two individual cases. I conclude with the following general observations.

186. In relation to Miss Reilly and to Mr Wilson it is important that it is appreciated that each has been actively looking for work: they have not taken their objections to the overall scheme as a means of avoiding employment and seeking simply to rely on benefits. Miss Reilly had (and, one hopes, still has) a primary career ambition. Her

original complaint arose from what she was wrongly told was a compulsory placement on a scheme that (a) impeded her voluntary efforts to maintain and advance her primary career ambition and (b) having embarked upon it, from her perspective, did not offer any worthwhile experience on an alternative career path. It is not difficult to sympathise with her position from that point of view. Mr Wilson had more fundamental objections to a compulsory unpaid scheme (which indeed it was in his case) which, from his perspective, was not tailored to his own needs and would impede his continuing efforts to find employment, but again there is no suggestion in his case that he would not take suitable employment if he could find it.

187. However, in order to provide a balanced picture, it will need to be appreciated that their cases are the only two cases before the court. Each arose from events that occurred in the early stages of the Employment, Skills and Enterprise Scheme when the advisers with whom they communicated were less experienced in the new scheme than they will be now and the internal guidance given to them was in its infancy. Some changes to the scheme (in particular, the sbwa scheme) have already been made. Furthermore, steps may have been taken to improve the content of some of the standard letters concerning potential sanctions. Whilst there may be others who have experienced similar issues and have had similar problems, the evidence is that a large number of other individuals will have taken part in the scheme, some of whom would doubtless say they have benefited from it.

188. Whether the problems in Miss Reilly's case and Mr Wilson's case were merely "teething problems" remains to be seen. The issues raised in their respective cases were properly raised even though the principal contentions advanced have been rejected.

189. I am grateful to all counsel for their helpful and interesting submissions.