

JERSEY / JUDGMENT

Clear Mobitel -v- JCRA [2011]

JRC 181 (22 September 2011)

[2011] JRC 181

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judgment

the bailiff: 1. This is an application by Clear Mobitel (Jersey) Limited ("Mobitel"), with leave of the Bailiff, to judicially review a decision by the Jersey Competition Regulatory Authority ("JCRA") on 14th March, 2011, to revoke a recommendation ("the Recommendation") which it had made to the UK Office of Communications ("Ofcom") in respect of the allocation to Mobitel of part of the 2600MHz spectrum band ("the Spectrum"). 2. The application raises issues as to the sort of "decisions" which can be the subject of judicial review and the circumstances in which a substantive legitimate expectation may be upheld. The factual

background

3. The Court has received three affidavits from Mr Andrew Elston , the Regulatory Affairs Director of Mobitel and one affidavit from Mr John Curran, who has been the Executive Director of the JCRA since September 2010. Some of the relevant events occurred before then at which time the executive director was Mr Chuck Webb. Mr Curran has also been the Director General of the Office of Utility Regulator in Guernsey ("OUR") since January 2005 and continues to be so. 4. On the basis of the evidence supplied to us, we would summarise the relevant factual background as follows. 5. At present, connection to the broadband internet in Jersey is either via a fixed copper wire network or via so called 3G (third generation) mobile networks. The Spectrum will operate entirely by way of radio waves and will permit much greater speeds of connection than are currently available. It will also facilitate the provision of new services which cannot currently be provided by either the copper wire or 3G mobile networks. 6. Licensing for any type of radio spectrum (including the Spectrum) in Jersey is the responsibility of Ofcom pursuant to the Wireless Telegraphy Act 2006 and the Communications Act 2003 as extended to Jersey by Order in Council. The JCRA has no authority in relation to the issue of such licenses. The Communications Act 2003 places a legal duty on Ofcom to optimise the efficient usage of spectrum within its control. 7. The JCRA's role in connection with telecommunications is established by the Telecommunications (Jersey) Law 2002 ("the 2002 Law"). Essentially, the JCRA is the regulator under that Law and has responsibility for issuing telecommunications licences to operators in Jersey. Under Article 7 its primary duty when performing its functions under

the Law is to perform those functions as it "...considers is best calculated to ensure that (so far as in its view is reasonably practicable) such telecommunications services are provided, both within Jersey and between Jersey and the rest of the world, as satisfy all current and prospective demands for them, wherever arising." 8. The power of the JCRA to cooperate with Ofcom in connection with allocation of the Spectrum is derived from Article 22 of the 2002 Law which provides:- "(1) In respect of the following matters, the Authority may conduct research, act as facilitator, co-operate with regulators or providers of telecommunications services, provide advice, assistance and services and establish or approve schemes, standards and arrangements:-

- (a) the matters listed in Article 16(4)(a) - (g); and
- (b)" Article 16(4)(b) includes:- "... use and allocation of the electro-magnetic spectrum". 9. In April 2008, Ofcom commenced a process in the UK to award licences for the spectrum in the UK. In relation to Jersey (and for that matter Guernsey) it is established practice that an allocation of spectrum is dealt with by way of a call for expressions of interest. This gives the JCRA and Ofcom a sense of the level of demand and what the demand is for. 10. On 3rd June, 2009, the JCRA commenced an exercise by way of a consultation document whereby it asked for expressions of interest from persons who wished to be considered for an allocation of the Spectrum. The consultation document asked for expressions of interest by 1st July and made it clear that Ofcom was responsible for the licensing of radio spectrum in Jersey. The JCRA would consider any expressions of interest received in response to the consultation and would make recommendations to Ofcom with regard to the granting of licenses in relation to the Spectrum. 11. The consultation document made clear that it would be a condition of any licence that operation under the Spectrum should not cause any interference with radar systems and that Ofcom was expected shortly to be issuing a statement regarding potential radar interference. This duly occurred and the information from Ofcom was passed to all interested parties by way of a public document placed on the JCRA's website on the 16th June, 2009. This made it clear that there were unresolved issues regarding interference between the Spectrum and certain radar systems ("the co-existence issue") and that any award by Ofcom of licences to utilise the Spectrum would most likely be delayed until the co-existence issue was satisfactorily resolved. The latest information from Ofcom at that time envisaged testing to continue to resolve the co-existence issue into the first quarter of 2010. 12. Expressions of interest were received from Cable and Wireless, Airtel, Jersey Telecom, Mobitel and Newtel. 13. The available Spectrum at that stage was divided into 14 FDD channels and 10 TDD channels. Having received the expressions of interest the JCRA spoke with Ofcom on the telephone on 20th August, 2009. Subsequently on 15th September, 2009, the JCRA passed its recommendations to Ofcom and informed the various operators of the recommendations ("the Recommendations"), which were also published on the JCRA's website on 17th September. No-one had applied for any TDD channels and the Recommendations for the FDD channels were 4 to each of Mobitel and Newtel and 2 to each of Cable and Wireless, Airtel and Jersey Telecom. The JCRA explained in its letter to Ofcom that it had a duty to ensure that telecommunications services in Jersey

satisfied all current and prospective demands and it also had a secondary duty to further both the short term and long term economic interests of Jersey through promoting competition where appropriate. It was therefore of the opinion that the rapid deployment of technologies that would enhance both the availability and quality of broadband services in Jersey was of prime importance. This suggested that applicants that had shown short term business deployment plans for the proposed Spectrum should take precedence in the allocation of licences and these were identified as being Mobitel and Newtel; hence the greater allocation to those two companies. 14. On 16th October, 2009, Ofcom responded to the Recommendations. The letter from Ofcom to the JCRA began by saying that Ofcom had some concerns. In effect it indicated that some of the operators had been in touch with Ofcom expressing concerns and possible changed positions. In addition there was difficulty because the consultation carried out by the JCRA did not expressly ask applicants to declare a desired bandwidth (i.e. where within the Spectrum their allocation would lie). The letter pointed out that Ofcom was required to seek the optimum use of the Spectrum and that accordingly before Ofcom could proceed with licensing, it needed the JCRA to clarify whether all five respondents were content to accept their allocated amounts or whether demand exceeded supply. A plan of action for JCRA in that respect was suggested by Ofcom. 15. For reasons which have not emerged, the JCRA appears to have done nothing about this letter. It did not engage on the further round of clarifications suggested by Ofcom nor did it even inform any of the companies that Ofcom had any reservations about the nature of the consultation exercise carried out by the JCRA which had given rise to the Recommendations. The existence of the letter referred to above was known only to the JCRA. 16. Following the making of the Recommendations, Mobitel became involved in detailed discussion with Ofcom and in due course on 28th September, 2010, it was granted a technology and development licence (T & D licence) by Ofcom which enabled Mobitel to carry out testing and development in respect of the Spectrum in Jersey. Mobitel has invested substantial sums in respect of the T & D licence and in reliance upon the Recommendation in the expectation that a licence from Ofcom would be granted in due course. The JCRA was aware of such investment and indeed Mr Webb provided supportive quotations for press releases issued by Mobitel in July and September 2010 as described in Mr Elston's third affidavit. 17. By the time of a board meeting on 14th December, 2009, JCRA had been informed that Airtel and Newtel wished to return their FDD allocation but would instead both like TDD Spectrum allocation. Furthermore, Mobitel indicated that it wished to have some TDD Spectrum as well. In an e-mail of 3rd February, 2010, to Newtel and others, Ofcom indicated that since it appeared that the amounts of Spectrum applied for did not exceed the available Spectrum, Ofcom was minded to confirm that it could accept the JCRA Recommendations but it was not in a position to grant licenses because of the co-existence issue. 18. In November 2009 at a meeting between Ofcom, JCRA and OUR, it was agreed that it would be useful to hold a pan Channel Island meeting with operators to discuss spectrum issues generally. This meeting was duly held on 15th June, 2010, in Guernsey under the auspices of Ofcom. 19. According to the affidavit of Mr Curran, there was discussion at the meeting about the need to review the Recommendations made to Ofcom and it is clear that

this was the understanding of a number of the operators present. Thus Mr Curran has exhibited to his affidavit correspondence immediately following the meeting from Jersey Telecom and Cable and Wireless to that effect. Mr Elston does not suggest to the contrary in his affidavit. 20. However Mr Elston refers to a discussion which took place between him and Mr Webb and Mr Curran outside the meeting, no doubt prompted by the talk of review in the meeting. He asserts that during that conversation Mr Webb, who was of course then the Executive Director of JCRA, specifically stated that the decision taken by the JCRA must stand and should not be altered. He said that it would be unfair for the decision to be changed as entities such as Mobitel may well have made commercial investment decisions on the strength of it. 21. In his affidavit, Mr Curran says that he does not recollect any such discussion. However, he says that he has spoken to Mr Webb who has said that his recollection of the discussion which took place between himself and Mr Elston is that he (Mr Webb) said that JCRA had no intention of making a Spectrum recommendation that was not wanted by an operator. However, any review of the Recommendations would have to take account of the fact that not all operators wanted their Recommendation to be withdrawn and that some operators had made commercial investment decisions on the basis of the JCRA's recommended Spectrum allocations. 22. At the hearing, Mobitel produced a document obtained from Ofcom which appears to be a redacted record of the meeting of 15th June, 2010. A key passage from that document reads as follows:- "All companies seemed to agree that future awards would be more effective if done on a pan-Island basis and some felt that the Jersey allocation exercise last year had been premature. Ofcom confirmed that it committed to honouring the provisional awards published by JCRA. However, by the time the radar issues are settled, equipment availability (FDD/ TDD) and company plans may have changed. JCRA said that some companies were already questioning the spectrum allocations proposed. We said that there was little point in revisiting allocations until the radar solution crystallises and probably then a solution for both islands could be considered. However, if any company insisted on retaining the Jersey-only award, we have said that we would honour it. We suggested that this was a matter for both Regulators to take up with companies individually and collectively." 23. In his affidavit, Mr Curran exhibits minutes of board meetings of JCRA on 14th December, 2009, and 17th May, 2010, which refer to the fact that some of the operators had requested amendments to their allocation of Spectrum and noting the JCRA would probably have to consult on an updated set of Recommendations. He said that in the light of that, it seemed unlikely that Mr Webb could have given any firm indication that there would be no future review of the Spectrum. However he goes on to say there may have been some misunderstanding as to the ability of JCRA both to address the requests of operators for amendments and to allow those who had not made such requests to retain their recommended allocation. He pointed out that the Spectrum is finite and, depending on how much one increased the allocation of one operator, it may have required the allocation of one or more others to be reduced. However, he accepts that by letter dated 1st July, 2010, to Cable and Wireless, Mr Webb had indicated that, where an operator had not made any request for a change to its Recommendation, the original Recommendation from the JCRA to Ofcom would stand. He said it was difficult to

reconcile these positions. It is right to point out of course that Mr Webb's letter of 1st July was to Cable and Wireless and was not known to Mobitel at that time. However, the fact that Mr Webb was willing to write in such terms to Cable and Wireless lends support to the fact that this is what he said in conversation to Mr Elston . That is supported by the document from Ofcom referred to above. Accordingly, on the basis of the information currently before it, the Court finds that Mr Webb did say orally to Mr Elston that, although there might well be a review of the Recommendations, the existing Recommendations of the JCRA to Ofcom would stand in those cases where the operator concerned did not wish any alteration to its Recommendation. 24. Nothing further material seems to have occurred until 28th February, 2011, when the board of the JCRA agreed to revoke the Recommendations. On 14th March, 2011, JCRA wrote an identical letter to all the operators informing them that the Recommendations had been revoked. It referred to three reasons in the letter. First, the continuing uncertainty concerning the co-existence issue, secondly the evolving technologies likely to utilise the Spectrum and thirdly the benefit of looking more closely at a pan-Channel Island allocation of the Spectrum. The letter went on to say that once these issues had been resolved and Ofcom was satisfied that it could release the Spectrum for use, the JCRA would run a fresh consultation. 25. This letter came out of the blue to Mobitel, who replied on 18th March protesting forcefully at the decision to revoke the Recommendation in relation to Mobitel, particularly given the substantial investment which Mobitel had made on the strength of the Recommendation, of which investment JCRA had been well aware. The letter referred also to the assurance given by Mr Webb at the June 2010 meeting in Guernsey. 26. The JCRA replied on 1st April pointing out that under the 2002 Law, it was under a duty to perform its functions in such manner as it considered was best calculated to ensure that telecommunications services are provided to satisfy all current and prospective demands for them. It repeated the three reasons given earlier for concluding that the Recommendations made in 2009 no longer took account of all of the relevant matters to which the regulator must have regard. It emphasised that it intended to keep the matter under review with Ofcom and, when there was greater clarity in relation to co-existence issue, it would re-consult on the appropriate way to allocate the Spectrum in a way which best fitted with the JCRA's duties to promote competition in the telecoms market. It pointed out that Mobitel would of course have every opportunity to take part in that consultation. 27. JCRA relies before us upon the same three reasons in support of its decision to revoke as were set out in the correspondence just referred to. It elaborated on the fact that it had originally been hoped that the co-existence issue would be resolved in 2010 but that the latest information from Ofcom was that it was unlikely to be resolved before 2013. There had therefore been a considerable delay in the granting of licences during which time the situation had developed. In relation to the third reason, JCRA emphasised its statutory obligation under the 2002 Law and the fact that JCRA and OUR were now working much more closely together on telecoms matters. There was therefore a strong public interest in seeking to address Spectrum issues on a pan-Channel Island basis. 28. Importantly, JCRA says that there was a fourth reason for the decision to revoke. In his affidavit, Mr Curran says that in recent discussions, Ofcom have confirmed that, while they would generally have

been happy to follow a recommendation from the JCRA, the process followed in 2009, as far as it got, would not have enabled them to make a licensing decision based on the JCRA's work to that point, because there remained unresolved issues with regard to what was to be licensed and as to whether demand exceeded supply. Ofcom was of the view that it could not proceed to award licenses until such time as the JCRA undertook further consultation with the interested parties in Jersey. In support of this Mr Curran referred to the fact that, although on 3rd February, 2010, (as set out in para 17 above) Ofcom had e-mailed the various companies indicating that "... since the amounts of Spectrum proposed above do not exceed the available Spectrum, Ofcom is minded to confirm that it can accept the JCRA recommendation and that these overall amounts should be granted to these operators...", a subsequent e-mail from Ofcom of 22nd March, 2011, had referred back to that e-mail and said that it had subsequently become apparent to Ofcom that not all operators were content to accept the amounts in the Recommendations. Mr Curran also referred to a note of a telephone conversation on 22nd March, 2011 which recorded Ofcom as confirming that it concluded that there may be a greater demand than supply and that this could potentially indicate some form of formal allocation process. Ofcom was also aware that technologies were still evolving and that it was perhaps too early to make definitive allocations. The note confirmed that Ofcom was therefore in agreement with the withdrawal of the Recommendations followed by a fresh allocation consultation. Mr Curran also exhibited the board paper for the meeting on 28th February, 2011, which referred to Ofcom's concerns about the original process leading to the Recommendations. In summary it was Mr Curran's opinion that Ofcom would not have accepted the Recommendation if it not been withdrawn and was extremely unlikely to do so even if it was re-instated. The JCRA did not wish to maintain a Recommendation which was going to be ignored by Ofcom. The nature of the case 29. Mobitel contends that the decision to revoke the Recommendation in relation to Mobitel was unreasonable and was also reached in a procedurally unfair manner. It seems to us that, on the basis of the parties' submissions, the following issues arise for our determination:- (i) Given that the revocation was only of a recommendation, is it capable of being judicially reviewed? (ii) Did Mobitel have a substantive legitimate expectation that its Recommendation would not be revoked? (iii) Was it procedurally unfair to revoke the Recommendation without giving Mobitel an opportunity to comment? (iv) Did JCRA fail to take into account a material consideration when deciding to revoke the Recommendation? (v) Was the decision to revoke Wednesbury unreasonable? We propose to consider these issues in turn. (i) Is the revocation subject to judicial review? 30. The JCRA argues that the Recommendation was not a "decision" for the purposes of judicial review. It had no legal consequences as the only decision maker in relation to the granting of a licence was Ofcom, which was free to accept or reject any Recommendation from JCRA. Only if Ofcom refused to grant a license in accordance with the Recommendation would a decision have been taken, at which stage Mobitel would have had a general right of appeal to the Royal Court against Ofcom's decision pursuant to the Communications Act 2003 as extended to Jersey and a further appeal on a point of law to the Court of Appeal. On the basis that the Recommendation was not a decision which was subject to judicial review, a revocation of

that Recommendation could similarly not be subject to judicial review. 31. Advocate Ruelle's starting point was the observation of Lord Diplock in *CCSU-v-Minister for the Civil Service*

[1984] 3 All ER 935 at 949:- "To qualify as a subject for judicial review the decision must have consequences which affect some person (or body or persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn... For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph." 32. However, it is clear that the law on judicial review has moved on since those observations of Lord Diplock. Thus de Smith *Judicial Review* (6th edition) at para 3 - 027 states:- "In other cases the court has been invited to decline to exercise its powers of review because the public authority's action is characterised as being without legal effect. The courts now take a broad view and it is no longer necessary for a claimant to demonstrate that a decision or action has direct legal consequences upon the claimant. Thus, a press release may constitute a reviewable decision. Similarly, the court may review policy guidance issued by public authorities." 33. Similarly, Supperstone and Goudie, *Judicial Review* (4th edition) says at para 16.3.2:- "The term 'decision' is used in this chapter for ease of reference only, as a quashing order may be granted in respect of not only decisions but also statutory instruments, rules, guidance, circulars, policies, advisory reports, advisory opinions and recommendations." 34. The boundaries of matters which are judicially reviewable have been considered in two cases in Northern Ireland. In *Re Kinnegar Residents' Action Group Applications*

[2007] NIQB 90, the applicants sought to judicially review recommendations contained in a report prepared by a panel appointed to look into certain planning issues relating to Belfast City Airport. The court held that the recommendations of the panel did not have any legal effect or consequences. They were not binding on the Department of the Environment as the ultimate decision maker. They were of course a very material consideration to be taken into account in the ultimate decision but the weight put upon them would ultimately be a matter for the judgment of the minister, taking account of all further consultations and other relevant matters. The court held that it would be inappropriate in an ongoing and incomplete process which had not reached the stage of a decision for the court to be drawn into the process of analysing arguments and evidence

which were going to be taken into account in the decision making process. 35. Similarly in re Kotrayenko No 1

- [2008] NIQB 118 the Court held that the description of the applicant in certain Home Office records as being a person of "nationality unspecified" was not an act, decision or determination having legal effects of consequences. The judge referred to the passage from Wade and Forsyth, Administrative Law, 9th Edition at p 611:- "It cannot be too clearly understood that the remedy by way of certiorari only lies to bring up to this court and quash something which is a determination or a decision ... As the law has developed certiorari and prohibition have become general remedies which may be granted in respect of any decisive exercise of discretion by an authority having public functions, whether individual or collective ... They will lie where there is some preliminary decision, as opposed to a mere recommendation, which is a prescribed step in a statutory process which leads to a decision affecting rights, even though the preliminary decision does not immediately affect rights itself." The Court held that what was in the Home Office records was not a decision which was subject to judicial review. 36. To the opposite effect is the decision in R-v-Agricultural Dwelling- House Advisory Committee for Bedfordshire, Cambridgeshire and Northamptonshire
- (1987) 19 HLR 367. In that case the decision in question fell to be taken by the local authority but, under the relevant statute, it was entitled if it wished to obtain advice from an Agricultural Dwelling-House Advisory Committee. The local authority decided to do so and the applicant contended that the procedure followed by the Advisory Committee in deciding upon its advice was reached in a procedurally unfair manner. The issue arose as to whether certiorari would go to quash an advisory decision of this nature when the determination itself was to be that of another body, namely the local authority. Hodgson J said this at page 374:- "In my judgment, particularly when one is considering the procedural impropriety or otherwise by which a decision of this nature - that is, one which is not finally determined
- can be subject to judicial review, one has to pay great regard to a consideration which appears in a sentence of de Smith at page 234: 'The degree of proximity between the investigation in question and an act or decision directly adverse to the interests of the person claiming entitlement to be heard may be important.' I think that is right. Merely because a decision to give advice, or the advice itself, is not finally determinative of a question is not in my view the determining factor. I think it is important to look at all the facts and see in general terms what part that sub-decision, if I can coin a phrase, plays in the making of the decision as a whole. If it is only a decision to give evidence one way or the other then plainly it would not be subject to judicial review. But where that advice is sought by the determining authority from a committee of whose decision the authority is required by statute to take full account, and where there is some evidence that in practice the advice is - to put no higher - highly likely to be followed, then I think it would be working (sic) to allow the proceedings to go further and require the applicant to wait until the decision of the

local authority is made against him, if it is, before attacking that decision on the basis that the material upon which it was based was flawed. That would seem to me to be a wholly unnecessary requirement, and I have no doubt on the facts of this case and within the context of this legislation that the court has power to interfere at this stage, and it is a power which it ought to exercise if it is satisfied that there has been a procedural impropriety. I am satisfied that there has been that procedural impropriety. I think that in my discretion I ought not to refuse the relief sought at this stage, and the consequence of that is that this decision of the committee must be brought up to this court and quashed." 37. The Court has not found this an easy decision. On the one hand, it is clear that the final authority rests with Ofcom and that, as a matter of technicality, Ofcom is not bound by any recommendation of the JCRA. As against that, Ofcom is concerned with the allocation of the Spectrum in Jersey and it seems highly likely that it will place very considerable weight on a recommendation from the regulator of the telecommunications industry in Jersey. Indeed this is clear from the record of the meeting of June 2010 where, notwithstanding that Ofcom had stated that it had considerable reservations about the process followed by the JCRA which had led to the making of the Recommendations, it indicated it would nevertheless honour those Recommendations in the case of any company which wished to retain a "Jersey only" award in those Recommendations. Applying the observations of Hodgson J in the Agricultural Dwelling-House Advisory Committee judgment, this is a case where, although there is no specific statutory role, there is a close proximity between recommendations made by JCRA and the ultimate decision by Ofcom. Ultimately there is no formulaic or straightforward answer to the question of what matters may be the subject of judicial review and each case must to an extent turn on its own particular facts. In this case the Court is satisfied that any recommendation from the JCRA will normally play an extremely significant part in any final decision by Ofcom. We also take account of the fact that any decision by Ofcom is clearly a long way off, so that there will be no immediate remedy by reference to any decision of Ofcom. Furthermore, a revocation of the Recommendation means that a very different recommendation may go to Ofcom which could be to the prejudice of Mobitel in circumstances where Mobitel has had no opportunity of making representations to the JCRA prior to its decision to revoke its existing Recommendation. 38. All in all, the Court is persuaded that this is one of those rare cases where a recommendation is nevertheless subject to judicial review. A revocation of that recommendation is therefore similarly subject to judicial review. (ii) Was there a substantive legitimate expectation that the Recommendation would not be revoked? 39. Legitimate expectations fall into two main categories. There is a procedural legitimate expectation where there is an expectation that a decision maker will not change his policy or decision without first giving those affected or potentially affected an opportunity of advancing reasons for contending that the policy or decision should not be changed to their detriment. In the case of a procedural legitimate expectation the Court is limited to ensuring that the person affected is given the promised opportunity to make submissions seeking to persuade the decision-maker not to change the policy or decision. There is a substantive legitimate expectation where there is an expectation that the policy or decision will not be changed. In the case of a substantive

legitimate expectation the Court will (in appropriate circumstances) not allow the decision-maker to frustrate the expectation; instead the decision-maker will be required to fulfil the expectation. 40. The only Jersey authority drawn to the Court's attention concerning the requirements for a substantive legitimate expectation is *Trump Holdings Limited-v-Planning and Environment Committee*

- [2004] JLR 232 where the Court of Appeal listed four requirements which must be met if a substantive legitimate expectation is to be established. These are:- (i) that a clear and unequivocal representation has been made; (ii) that the expectation is confined to one person or a few people, giving the representation the character of a contract; (iii) that it is reasonable for those who have the expectation to rely upon it and that they do so to their detriment; and (iv) that there is no overriding public interest that entitles the Representor (i.e. the decision maker) to frustrate that expectation. 41. Since then the law in England and Wales has moved on and, for example, it is no longer essential that the person affected should have knowledge of the representation in order to found a legitimate expectation (see *R (on the application of Rashid)-v-Secretary of State for the Home Department*
- [2005] EWCA Civ 744); nor is it necessary for a person to have changed his position or to have acted to his detriment in order to qualify as the holder of a legitimate expectation (see for example *de Smith Judicial Review* (6th edition) 12 - 040). However, both of these aspects may still be relevant when the Court decides whether to hold the decision-maker to his representation. 42. A recent convenient summary of what is involved in substantive legitimate expectation is to be found in the judgment of Laws LJ in *Re Bhatt Murphy*
- [2008] EWCA Civ 755 at para 43:- "43. Authority shows that where a substantive expectation is to run the promise or practice which is its genesis is not merely a reflection of the ordinary fact (as I have put it) that a policy with no terminal date or terminating event will continue in effect until rational grounds for its succession arise. Rather it must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured. Lord Templeman in *Preston* referred (866 - 867) to 'conduct [in that case, of the Commissioners of Inland Revenue] equivalent to a breach of contract or breach of representations!'" 43. In connection with the question of public interest, Laws LJ had this to say in *Ex P Begbie*
- [2000] 1 WLR 115 at 1130:- "In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no position to adjudicate save at most on a bare *Wednesbury* basis, without themselves donning the garb of policy-maker, which they cannot wear... In other cases the act or omission complained of may take place on a much smaller stage, with far fewer players... the case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy or none with multi-layered effects, upon whose merits the court is asked

to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes. In such a case the court's condemnation of what is done as an abuse of power justifiable ... only if an overriding public interest is shown of which the court is the judge, offers no offence to the claims of democratic power. There will of course be a multitude of cases falling within these extremes, or sharing the characteristics of one or other. The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it, changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy." 44. These observations were endorsed by the English Court of Appeal in *Rashid* (supra) where Dyson LJ said this at paras 49 and 50:- "49 ... the more the decision which is challenged lies in the field of pure policy, particularly in relation to issues which the court is ill-equipped to judge, the less likely it is that true abuse of power will be found.

50. The nature of the decision will, therefore, always be relevant to the question whether the frustration of an expectation is an abuse of power. The court will not only have regard to whether wide-ranging issues of policy are involved, but also whether holding the public body to its promise or policy has only limited temporal effect and whether the decision has implications for a large class of persons. ..." 45. In our judgment the making of the Recommendation in 2009 carried with it no clear and unequivocal representation that it would not be revoked. There was certainly no express representation to that effect. Nor, in our judgment, was there an implied representation. This was not a case of a longstanding published policy. It was a one off decision in relation to a specific issue. It was merely a recommendation to Ofcom as the decision-maker in circumstances where it was known that the decision might not be forthcoming for a while because of the co-existence issue. Circumstances might therefore change. 46. However the statement made by Mr Webb in June 2010 was rather different. He was the Executive Director of JCRA and we have found that, despite the fact that it was suggested at the meeting that there would be a review of the various Recommendations in relation to the Spectrum, an assurance was given to Mobitel by Mr Webb in the margins of the meeting that, even if there were such a review, where a company did not request a change to the Recommendation in relation to its Spectrum allocation, the original Recommendation to Ofcom would stand. As we have already said, that is what Mr Webb specifically said to Cable and Wireless in the letter of 1st July and it was consistent with the memo of Ofcom referred to earlier. We accept therefore that he made a comment to like effect to Mobitel. Such a statement does in our judgment amount to a clear and unequivocal representation, which is the essential pre-requisite for a substantive legitimate expectation. Furthermore, it was made to a small group, namely one or more of the telecommunication operators and in particular to Mobitel and it was reasonable for Mobitel to rely upon it. Thus the elements necessary for a substantive legitimate expectation were in place from June 2010. 47. Advocate Ruelle argued that it would be wrong to find a

clear and unequivocal representation on the basis of an informal conversation of the type relied upon on this occasion. In support, she referred us to *Begun-v-London Borough of Tower Hamlets*

[2006] EWCA Civ 733 at para 45 and *Corkteck Limited-v-HM Revenue and Customs*

[2009] EWHC 785 at para 30. In our judgment, the facts in those two cases were very different. In this case Mr Webb was the Executive Director of the JCRA and was therefore its senior executive. His remarks were made in the context of a meeting which had just occurred where it was said that the Recommendations would be subject to review. Mobitel was clearly seeking reassurance. The assurance given was clear and was of a sufficiently considered nature that Mr Webb was able to write a letter to like effect to Cable and Wireless on 1st July. The assurance was also consistent with the Ofcom memo. In all the circumstances we conclude that, notwithstanding the fairly informal surroundings in which the assurance was given, it was sufficiently clear and unequivocal to give rise to a substantive legitimate expectation. 48. The question then is whether there are sufficient public policy considerations to justify the change of position by the JCRA. 49. In our judgment, allocation of the Spectrum lies very much in the field of pure policy. Telecommunications is a fast evolving area where new technologies are being developed on a regular basis. In a digital age, where virtually all important information is capable of being transmitted electronically, the importance of modern and adequate telecommunications to the Island can hardly be overstated. In addition to the ordinary demands of the Island's residents, there is the additional factor that Jersey is an international finance centre. Its economy is very dependent on the business in this sector. Such businesses require and expect electronic services to the highest modern standards. The speed of access to broadband internet is very important for them. Thus the effective use of the radio spectrum for telecommunication purposes is a matter of high public interest for the Island. This is reflected in Article 7 of the 2002 Law, referred to earlier, which makes it clear that both the relevant minister and the JCRA have a primary duty to ensure as far as possible that telecommunications services are provided, both within Jersey and between Jersey and the rest of the world, as satisfy all current and prospective demands for them. In this context, allocation of the Spectrum goes far beyond the interests of one or more telecommunications operators. It is a matter of public policy to ensure that licenses to use the Spectrum are granted in such a way as to make the most efficient use of it and render the maximum benefit to the Island. There is therefore a strong public interest, in what is a very technical field, in achieving the most effective use of the Spectrum. Referring back to the observations of Laws LJ in *Begbie*, quoted above, the decisions of the JCRA in this field "... involve questions of general policy affecting the public at large...". It is against that background therefore that we must consider whether the decision of the JCRA to revoke the Recommendation was an abuse of power such that it should be held to its original Recommendation. 50. In considering whether the Court should hold the JCRA to its original decision, the Court must assess the grounds for the change of mind. Advocate Blakeley submits that the reasons put forward by the JCRA do

not stand up to scrutiny. 51. In relation to the first reason, namely the continuing uncertainty over the co-existence issue, Advocate Blakeley argues that this is completely irrelevant. It was known at the time of the original Recommendation in September 2009 that no licences would be granted by Ofcom until the co-existence issue was resolved. Whilst it may at that stage have been thought that it would be resolved comparatively early (perhaps 2010), it was known shortly afterwards that there was slippage in this timetable because in February 2010 Ofcom were indicating that the UK radar issues may not be resolved until 2013/14, although earlier clearance regionally might be possible. The fact that it was now estimated that the issue would not be resolved until 2013 did not change anything. The issue at the heart of the Recommendations was which operators should get how much of the Spectrum. When the licence could ultimately be granted and become operative was not relevant to this issue. Furthermore, the States had agreed to commit funds to the replacement of the radar system at Jersey Airport and this would resolve the co-existence issue for Jersey. All in all, said Advocate Blakeley, this reason was a red-herring. 52. As to the second reason, namely the evolving technologies likely to utilise the Spectrum, little detail had been given by the JCRA as to what exactly they were referring to. Nevertheless, technologies were always evolving and this must have been known in 2009. It did not amount to a proper reason for revoking the Recommendation at this stage. 53. As to the third reason, namely looking at whether a pan-Channel Island allocation of the Spectrum would be beneficial, Advocate Blakeley submitted that this was the real reason for the revocation. It was simply a change of policy on the part of the JCRA which considered that the Recommendation in respect of Mobitel stood in the way of this new policy. He submitted that the Recommendation would not prevent a pan-Channel Island allocation. No specific spot frequencies (i.e. whereabouts on the range of the Spectrum an operator's allocation would be situated) had been allocated and no allocations at all had been made in Guernsey. Accordingly, he submitted on behalf of Mobitel that a pan-Channel Island allocation could be achieved without revoking the Recommendation. He pointed out that, not long after the original Recommendations, Airtel said it wished to surrender its FDD channels in favour of TDD and Newtel admitted that they had made a mistake and only wanted TDD. Thus six out of the fourteen FDD channels had been freed up. There was therefore no question of more demand than supply in relation to the FDD channels and there was scope for a pan-Channel Island allocation even if Mobitel kept its allocation. Similarly, in relation to TDD, there were still applications for less than was available. 54. Finally, in relation to the fourth reason, namely that Ofcom was very unlikely to act on the Recommendation, Advocate Blakeley raised a preliminary objection that the Court should not take this into account because it was not referred to as one of the reasons in the correspondence issued at the time of the revocation. We accept that this was so, although we note that the board paper for the meeting on 28th February did refer to Ofcom's concerns about the original process. In support he referred to *R-v-Westminster City Council ex p Ermakov*

[1996] 2 All ER 302 . The facts of that case were very different but we accept the principle that the Court should be cautious about allowing a decision-maker to add a new reason to those supplied at the time. However, given the particular circumstance of this case, we think it would be unrealistic to refuse to take into account that reason which is relied upon by the JCRA. One cannot ignore the fact that what is at stake here is a Recommendation by the JCRA to Ofcom but that the final decision rests with Ofcom. The attitude of Ofcom to the Recommendation must therefore be a highly significant factor. 55. On the basis that the Court might be willing to take this ground into consideration, Advocate Blakeley submitted that the evidence in relation to Ofcom's position was, to say the least, confusing and unsatisfactory. He accepted that Ofcom had apparently expressed reservations about the original process back in 2009 (although this had not been known to Mobitel until these proceedings) but Ofcom seemed to have moved on since then. Thus in its e-mail of 3rd February, 2010 it said it was minded to confirm that it could accept the JCRA Recommendations; and in the memo concerning the meeting of 15th June, 2010, Ofcom said it would honour the Recommendations to the extent that any company insisted on retaining what it had been awarded in relation to Jersey. When one analysed the content of Mr Curran's affidavit, it really only amounted to his opinion that Ofcom would not now grant a licence on the basis of the Recommendation. 56. Thus, said Advocate Blakeley, none of the reasons relied upon by the JCRA for its change of mind were very convincing. As against that, there would be considerable unfairness for Mobitel if the Recommendation were revoked. Mobitel had invested a substantial sum (some £5.5 million) in reliance upon the Recommendation. It was accepted that not all of this would be "lost" if Mobitel was not granted a licence because some of it related to technology that could be utilised on other projects being carried out by companies in the group, but most of it would be. The fact that Mobitel was making this investment was known to the JCRA and indeed implicitly encouraged by Mr Webb's endorsement in the press releases referred to earlier. 57. It would also suffer unfairness on the basis that one of the reasons it had succeeded in obtaining a greater share of the Spectrum than all the other companies bar Newtel at the time of the Recommendations was that it had put together a very thorough and well developed plan for utilising the Spectrum which had impressed JCRA. By comparison, some of the other companies put in submissions along the lines of indicating that they would like to have some Spectrum but giving no very clear indication as to exactly what they would do with it and how this would benefit the community. If there were now to be a new round of consultation, the other companies would be up to speed and could be expected to put in better submissions than last time. This would prejudice Mobitel in that it might well therefore receive a smaller allocation of the Spectrum than on the first occasion. 58. In summary, said Advocate Blakeley, this was a case where the unfairness to Mobitel of revoking the Recommendation outweighed any public interest which the JCRA might assert as supporting its change of mind and therefore the Court should hold the JCRA to its original decision. 59. We have carefully considered all the submissions put forward most persuasively by Advocate Blakeley on behalf of Mobitel. However we are of the clear view that there are valid public interest

reasons for the JCRA's change of mind which outweigh any unfairness to Mobitel. We would summarise our reasons as follows:- (i) As already stated, this is an area where public policy is an extremely significant factor. It would be wrong to insist on the JCRA being held to a Recommendation which it now considered contrary to the interests of the public in such an important area, because allocation of the Spectrum is likely to have a significant effect on the public generally and on the economy of the Island. (ii) We accept that the fact that the co-existence issue has taken longer than originally envisaged to resolve is not of itself a reason to revoke the Recommendation. To that extent we agree with Mobitel. However the passage of time caused by the failure to resolve this issue has led to the emergence of other factors which are material. (iii) We accept that the JCRA and Ofcom now wish to pursue a pan-Channel Island allocation in respect of the Spectrum. The fact that there is a public interest in the two islands working more closely together in the telecommunications field is implicit from the appointment of Mr Curran as Executive Director of the JCRA in addition to his role as Director General of OUR. In our judgment this is an area of high policy in a technical area and a considerable margin of discretion has to be given to the JCRA and to Ofcom if they express the view that a pan-Channel Island allocation would lead to a more effective use of the Spectrum and therefore serve the public interest of both Jersey and Guernsey. Advocate Blakeley argued that the existence of the Recommendation did not prevent a pan-Channel Island allocation being achieved. In his written submissions he referred merely to the fact that no specific spot frequencies had been allocated to Jersey operators. In his oral submissions he elaborated as described earlier by seeking to show that there was spare capacity in the Spectrum which could be allocated, presumably to Guernsey operators or to other Jersey operators. However we are in no position to assess the accuracy of his assertion. As already indicated, this is an area of high policy in a technical area with extremely significant consequences for the public generally. (iv) If it is the case that Ofcom would in any event not act on the Recommendation, we consider that is a strong reason supporting the JCRA's decision to revoke the Recommendation. Respect and trust between regulators is important and we can well understand the JCRA not wishing to make a Recommendation which is regarded as unsatisfactory by Ofcom as decision-maker. Furthermore, if Ofcom is likely to reject the Recommendation in any event, there will be no prejudice to Mobitel as it would not obtain a licence even if the revocation of the Recommendation is quashed. We accept that the evidence in relation to Ofcom's attitude is not as clear as it might be. It is beyond doubt that Ofcom was not happy with the original process and expressed reservations at the time. However, it appears that, despite these reservations, it was willing to honour the Recommendations in February 2010 (see the e-mail referred to earlier) and at the time of the meeting in June 2010. Nevertheless it appears that Ofcom has probably changed its attitude since then and the Court accepts Mr Curran's evidence in this respect that, in the opinion of the JCRA, Ofcom is unlikely to act on the Recommendation. That is a strong factor supporting the JCRA's decision to revoke the Recommendation. (v) Whilst we accept that Mobitel has invested substantial sums on the basis of the Recommendation, it has not acted to its detriment in reliance upon the representation of June 2010, which is

the only representation which gives rise to the substantive legitimate expectation. It is conceded by Mobitel that its decision to invest was taken prior to that representation. (vi) The prejudice suffered by Mobitel will not necessarily be substantial. The result of allowing the Recommendation to be revoked is that there will be a new round of consultation in due course. It will at that stage be open to Mobitel to make full submissions as to why it should still be allocated the same amount of Spectrum. The JCRA was very supportive of Mobitel's plans in 2009 at the time of the original Recommendation and we were informed by counsel that it remains so on the basis that Mobitel has some very innovative plans. If, following the consultation, Mobitel receives the same amount of Spectrum, there will be no prejudice. We were informed by Advocate Blakeley that at present there is plenty of spare capacity in the FDD field because of the change of stance by Newtel and Airtel. If that is right, there must be a reasonable prospect of Mobitel receiving the same allocation in future. In summary, whilst of course there may be prejudice to Mobitel if it receives a lesser allocation on any new consultation, this is not a case where the entity affected by the change of decision will definitely suffer a prejudice. (vii) We have taken into consideration that the JCRA's approach has been less than satisfactory in a number of respects. We appreciate that there has been a change of personnel since most of these events but we urge the JCRA to give close attention to improving its procedural performance; (a) JCRA was told by Ofcom in October 2009 that Ofcom had concerns about the process which had led to the Recommendations and was told of the various steps which Ofcom felt should be taken in order to try and rectify the position. The letter was extremely clear. (b) Despite this, JCRA did nothing until March 2011 when it revoked the Recommendations out of the blue. It never acted upon the plan of action suggested by Ofcom. (c) More than this, it did not even tell the various operators that Ofcom had any concerns. Thus they all proceeded in blissful ignorance of those concerns. (d) The JCRA allowed Mobitel to invest monies on the strength of the Recommendation notwithstanding that it knew that Ofcom had concerns about the process. Indeed, Mr Webb went further by allowing himself to be quoted encouragingly in press releases issued by Mobitel. (e) The JCRA appears to have ended up facing in two opposite directions at the same time by the date of the meeting in June 2010. On the one hand it was indicating in the meeting that there would have to be a review but, in private, it was assuring Mobitel that it could keep its allocation if it wished to. Mr Curran conceded in his affidavit that it was difficult to reconcile these two positions. (f) Finally, the JCRA revoked the Recommendations without giving Mobitel or any of the other operators any opportunity of arguing against that course of action. (viii) Nevertheless, despite these failings by the JCRA, we are in no doubt that the JCRA was entitled to conclude that the public interest required it to revoke the Recommendations. In our judgment the public interest in allowing the JCRA to pursue a course intended to achieve the best outcome for the Island in terms of the use of the Spectrum outweighs any unfairness to Mobitel, so that there has been no abuse of power on the part of the JCRA. 60. For these reasons we decline to quash the revocation on the grounds of a substantive legitimate expectation. (iii) Was it procedurally unfair to revoke the Recommendation without giving Mobitel an

opportunity to comment? 61. We have no hesitation in concluding that, in the light of the nature of the Recommendation and of the representation made at the June 2010 meeting, it was unfair of the JCRA to revoke the Recommendation without at least giving Mobitel the opportunity of being heard. It is not disputed that the JCRA knew that Mobitel had invested considerable amounts in anticipation of receiving a permit from Ofcom on the strength of the Recommendation and also had the benefit of a T and D license from Ofcom. Indeed, as shown in Mr Elston's third affidavit, Mr Webb agreed to be quoted in two press releases relating to trials Mobitel was carrying out and to the grant of the T and D licence. 62. Advocate Blakeley accepted that the decision to invest was made on the strength of the Recommendation and not as a result of the specific representation at the June 2010 meeting but nevertheless the JCRA was aware of all these matters when it considered the revocation of the Recommendation in March 2011. In our judgment these circumstances gave rise to a legitimate expectation that the Recommendation would not be withdrawn without giving Mobitel an opportunity of arguing why it should not be withdrawn. Quite apart from any legitimate expectation, the circumstances were such that it was unfair to revoke in the absence of such an opportunity. It is conceded that the JCRA failed to give Mobitel such an opportunity. 63. Where such failure has occurred, the Court should be extremely slow to conclude that it would have made no difference if the person concerned had had an opportunity to comment. As the Court of Appeal said in *Re the X Children*

[2009] JLR 143 at paragraph 36:- "In our view, Mr Pollard's candid testimony constituted (unusually) an admission of a breach of the primary rule of natural justice, namely that a person potentially affected in his rights or interests by a decision should have a reasonable opportunity to see and comment on matters which might be deployed to his disadvantage. Save in exceptional circumstances, such a breach inevitably flaws the decision. The court should not, other than in such circumstances, assume that the disadvantaged person would have been unable to influence the decision if he had enjoyed the opportunity denied to him (*R-v-Chief Const (Thames Valley), ex p Cotton*)."

64. Advocate Ruelle argued that there would be no practical benefit in quashing the revocation and directing the JCRA to re-consider the matter. However, for the reasons given in *Re the X Children* we conclude that it would be wrong to deprive Mobitel of the opportunity of putting to the JCRA all its arguments for saying that the Recommendation should not be revoked. It will then be for the JCRA to consider those arguments in the light of all the other factors. We therefore quash the revocation of the Recommendation.

(iv) Did JCRA fail to take into account a material consideration? 65. Advocate Blakeley argued that it was clear from the evidence that, when considering whether to revoke the Recommendation, the JCRA took no account of the fact that Mobitel had invested substantial sums on the strength of the Recommendation. He submits that it should have been a material consideration when deciding whether to revoke the Recommendation. 66. Advocate Ruelle did not disagree that the JCRA had not taken account of this factor but submitted that it was impossible to do so as the JCRA could not consider Mobitel in

isolation from the other operators; it could not consider simply the investment made by Mobitel. 67. This was a case where, as Mr Curran accepts in his affidavit, the JCRA was aware that Mobitel had invested substantial sums on the strength of the Recommendation. Indeed, through Mr Webb, the JCRA had supported such investment by agreeing to be quoted supportively in the two press releases referred to earlier. It seems to us clear in those circumstances that this is a factor which at least ought to be weighed in the balance when deciding whether to revoke the Recommendation. We are not saying for one moment that it would be determinative but it is surely a factor which ought to be taken into consideration. It follows that the JCRA failed to take into account a relevant consideration. That is therefore an additional reason for quashing the decision to revoke the Recommendation and remitting the matter to the JCRA.

- (v) Was the decision to revoke Wednesbury unreasonable? 68. Advocate Blakeley submitted that there is no difference between the test to be applied in a statutory appeal (where the test is whether the original decision was unreasonable in all the circumstance of the case) and in judicial review. Thus, he says, in assessing whether the decision of the JCRA to revoke the recommendation was unreasonable for the purposes of these judicial review proceedings, the Court should apply the same test as it does in, for example, planning appeals. 69. Advocate Blakeley cited no authority to support his proposition except *Steenson -v-Minister of Planning and Environment*

[2009] JLR 427 . But in our judgment, far from supporting his proposition, that case contradicts it. The case concerned a planning appeal under the Planning and Building (Jersey) Law 2002 and at paragraph 20 the Court distinguished between the test on appeal and the test in judicial review in the following terms:- "... But it is also clear that the court should intervene if it considers that the decision taker has arrived at a decision which is unreasonable in all the circumstances of the case. This is not what is colloquially referred to as Wednesbury unreasonableness." 70. The argument put forward by Advocate Blakeley is identical to that submitted by the advocate for the appellant in *Anchor Trust Company Limited-v-Jersey Financial Services Commission*

[2005] JLR 428 which was an appeal under the Financial Services (Jersey) Law 1968 , where the grounds for allowing an appeal are that the original decision was unreasonable having regard to all the complications of the case. The Court rejected that submission in the following terms:- "11. Mr Kelleher submitted that the Court of Appeal in *Fairview Farm* had fallen into error in considering that there was a difference between unreasonableness and Wednesbury unreasonableness. ... he contended that where a statute only allowed the court to intervene on appeal on the ground that the decision was unreasonable there was no difference between the exercise of the appellate function and the exercise of a judicial review function. The test to be applied in deciding whether to allow the appeal or quash a decision subject to judicial review was the same.

12. We reject Mr Kelleher's submission. In our judgment, there is a difference of degree between unreasonableness and Wednesbury unreasonableness. ...
 13. In our judgment, these authorities confirm that there are at least three possible degrees of 'wrongness' which the court may find in respect of a decision under appeal. In ascending order of 'wrongness', they are as follows:-
 - (a) The decision was wrong in the sense that it is not the decision which the Jurats would themselves have reached.
 - (b) The decision was wrong to such an extent that the Jurats would categorise it as unreasonable.
 - (c) The decision was wrong to such an extent that it goes beyond merely being unreasonable and becomes a decision to which no reasonable decision-maker could have come, i.e. 'Wednesbury unreasonable' or 'irrational'.
 14. On an appeal under the 1998 Law (and any similarly-worded Law) the Jurats should dismiss the appeal if their conclusion falls within (a) of the preceding paragraph but should allow the appeal if it falls within (b). Contrary to Mr Kelleher's submissions, the decision does not have to be categorised as falling within (c) before an appeal can be successful." 71. This approach was accepted when the case of Anchor went to the Court of Appeal
- [2006] JCA 040 . 72. We therefore approach the case on the basis that, in order to show that the decision of the JCRA to revoke the Recommendation was unreasonable to the extent that it may be quashed, it has to be shown that the decision was Wednesbury unreasonable or "irrational" i.e. it was a decision to which no reasonable decision-maker could have come.
73. We propose to deal with this aspect very briefly. The arguments raised by Advocate Blakeley in support of this ground are exactly the same as those discussed at paragraphs 50 - 59 above in relation to whether the JCRA was entitled to change its mind in the context of a substantive legitimate expectation. For the reason set out in those paragraphs, the Court is in no doubt that, although the continuing delay in resolving the co-existence issue was not of itself a ground to revoke the recommendation and the evolving technologies reason was not developed to any great extent by the JCRA before the Court, the other two grounds for the decision to revoke, namely the desire for a pan-Channel Island solution and Ofcom's position, were entirely rational reasons for the JCRA deciding that it wished to revoke the Recommendations and re-run the process of consultation. In the circumstances, we do not think it necessary to lengthen this judgment by repeating any of the reasons which we have given in those paragraphs. It follows that we find that the decision to revoke was not Wednesbury unreasonable.

Conclusion

74. For the reasons given, we conclude that the JCRA acted in a procedurally unfair manner in revoking the Recommendation without giving Mobitel an opportunity of arguing against such a course of action. As described earlier, we therefore quash the decision to revoke the Recommendation. 75. The consequence of this is that the Recommendation in relation to Mobitel remains in place at present. The Recommendations in respect of the other operators remain revoked because there is no application before us in respect of them. However, because we have quashed the decision only on procedural grounds, it is open to the JCRA, if it so wishes, to reconsider whether to revoke its Recommendation. Before doing so, it may be helpful to obtain greater clarity as to Ofcom's position. Furthermore, if the JCRA decides that it is minded once again to revoke the Recommendation, it should write to Mobitel indicating the preliminary view which it has reached and setting out the reasons for that view in sufficient detail as will enable Mobitel to respond. Mobitel should then be given an opportunity to seek to persuade the JCRA to maintain the Recommendation. The JCRA must give proper consideration in good faith to any arguments which Mobitel may put forward at that stage. Authorities Wireless Telegraphy Act 2006. Communications Act 2003. Telecommunications (Jersey) Law 2002. CCSU-v-Minister for the Civil Service

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