

Principles of Public Law

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FOUNDATIONS OF JUDICIAL REVIEW III: LEGITIMATE EXPECTATION

14.1 Introduction

The doctrine of legitimate expectation is a recent development, even by fast moving public law standards. The term was first mentioned in an English case in 1969 (in *Schmidt v Secretary of State for Home Affairs*; it was an emergent doctrine in Continental legal systems and European Community law before then), but it was not until the early to mid 1980s that the doctrine had settled into anything like a clear body of law. It is fair to say that that 'settling down' process has now occurred, and the legitimate expectation is now a familiar and frequently invoked ground of challenge on applications for judicial review. However, real uncertainties, particularly relating to the ambit of the substantive legitimate expectation, still remain.

The basis of the doctrine is rather like the principle underlying estoppel in private law: that, if possible, the law ought to require people to keep to their promises or representations, even where the promise does not constitute a contract. More specifically, where a public authority has represented to an individual that it will or will not do something, then (even though the authority has not formally bound itself to follow that representation), it ought not to be permitted to depart from the representation, at least unless it first gives the individual a hearing.

14.2 The doctrine

The most useful definition of the legitimate expectation is contained in the *GCHQ* case (*Council of Civil Service Unions v Minister for the Civil Service* (1985)). It is worth quoting from two of the judgments. First, Lord Diplock stated that, for a legitimate expectation to arise, the decision:

... must affect [the individual] ... 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he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn [pp 408–09].

Lord Fraser put it rather more simply:

Legitimate ... expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue [p 401].

Drawing on these two passages, we can summarise the basic doctrine of legitimate expectation in a number of propositions:

- (a) *a legitimate expectation always arises from the conduct of the decision maker*. It is always something which the decision maker does or says which gives rise to the expectation;
- (b) the expectation may arise in one of two ways. First, it may arise *from an express promise given by the decision maker* that, for example, a benefit will be continued, or not withdrawn;
- (c) secondly, it may arise *from conduct on the part of the decision maker*, such as a regular past practice or pattern of settled conduct by the decision maker, which the individual can reasonably or legitimately expect will continue;
- (d) the legitimate expectation appears (at least from the quotation from Lord Diplock, above) to be only an expectation of having an *opportunity to make representations* before the benefit is withdrawn (that is, before the expectation is disappointed). Thus, on this view, it is only a 'procedural' concept, because all that one can obtain if one establishes a legitimate expectation is an opportunity to put one's case at a hearing. We will consider later whether there is more to the doctrine: whether (and when) one can claim a legitimate expectation of a '*substantive benefit*', and not just of a hearing.

We can illustrate the doctrine by reference to our example from Chapter 12.

The MTLB issues a policy statement, which it sends to all applicants, in which it states that 'if we decide to grant you a licence, then the licence will run for at least a year, and will be renewable thereafter'. The empowering Act is silent on the question of the term of licences. Paul applies for a licence, and the MTLB grants him one for six months only.

Paul has a legitimate expectation (based on the express promise contained in the MTLB's policy statement) that, if he is granted a licence, it will have a term of at least a year. The MTLB cannot withdraw this 'benefit' without first giving Paul an opportunity to make representations on why the MTLB ought not to depart from its stated policy. Since it has not given him such an opportunity, Paul would have a good case for applying to quash the decision on judicial review. (We reserve for now the question of whether Paul could claim not simply an opportunity to make representations, but rather the substantive benefit: a year-long licence.)

Let us look at some examples of legitimate expectation in practice. First, examples of the 'express promise' type of case. In *AG of Hong Kong v Ng Yuen*

Shiu (1983), a senior immigration officer made an announcement of government policy that, in future, before illegal immigrants were repatriated, they would be interviewed, and further, that each case would be treated 'on its merits'. The Privy Council held that this announcement gave the applicant, who was an illegal immigrant, a legitimate expectation that he would be able, before the decision to repatriate him was taken, to state his case as to why he should not be repatriated.

In *R v Liverpool Corporation ex p Liverpool Taxi Operators' Association* (1972), Liverpool Corporation was responsible for issuing taxi licences in the Liverpool area. It promised the LTOA that it would be consulted before a decision was taken to grant new taxi licences (the LTOA was worried that to increase the total number of licences would have an adverse impact on its members). When the corporation went ahead and increased the number of licences without giving the LTOA a hearing, the Court of Appeal quashed the decision, effectively on the basis that the corporation could not depart from its promise (in fact, the reasoning in the case is not entirely clear – but note the early date of this case relative to the age of the doctrine).

The best example of the 'past practice' limb of the doctrine is the *GCHQ* case itself (1985). The government had, for many years, consulted the Civil Service unions which represented employees at GCHQ, Cheltenham, about proposed changes to employees' terms and conditions of employment. Although there had never been any formal agreement as to this consultation, this was 'the way things were done'. The government decided to change the employees' conditions by removing their right to trade union membership, and purported to do so without consulting the unions first. The unions challenged the government's action, and the House of Lords held that the unions did indeed have a legitimate expectation, based on the past practice of consultation, that they would be consulted before any major alteration to employees' conditions, such as the removal of the right to trade union membership. However, on the facts, it was held that this entitlement to consultation was defeated by national security considerations.

Identifying a past practice which gives rise to a legitimate expectation is not always easy. It is important to resist the temptation to conclude that a legitimate expectation exists merely because something has occurred more than once in the past. In *GCHQ*, it was not merely the fact that the unions had been consulted in the past that gave rise to the expectation, but rather the practice, combined with the general recognition of all involved that that was the 'way things were done'. In contrast, in *R v Secretary of State for the Environment ex p Kent* (1988), a past practice did not give rise to a legitimate expectation. There, a person who was affected by someone else's planning application was not notified of either the council hearing of the application, nor of the subsequent appeal to the Secretary of State. The council had, in the past, notified people of hearings and appeals relating to applications affecting them. The court held, however, that there was no legitimate expectation of

such notification; the mere fact that the council had notified people in the past was not sufficient.

These examples demonstrate some further characteristics of legitimate expectations which we can summarise:

- (a) *The express assurance or the conduct which gives rise to the expectation does not need to be personally directed at the individual applicant.* It is enough that the expectation is directed at a group of people of whom the applicant is one. Thus, for example, in *Shiu*, the applicant was one of a group (alleged illegal immigrants) at whom the circular was directed. In each case, the question is: was it reasonable, or legitimate, for the individual applicant to rely on the representation?
- (b) *In the ordinary case, it is not necessary for the individual applicant to demonstrate that he has relied upon the representation or assurance to his detriment before he can rely upon a legitimate expectation.* In *Shiu*, for example, there was no evidence that the applicant had done, or had not done, anything in reliance upon the announcement of government policy; similarly in the other cases. This is an important difference between the doctrine of legitimate expectation and the private law concept of estoppel, where detrimental reliance is ordinarily required. Indeed, it is not even clear that it is necessary, in order to establish a legitimate expectation, to show that the applicant was aware of the relevant representation or assurance. In the Australian case of *Minister of Ethnic Affairs v Teoh* (1995), the High Court of Australia held that the applicant did not have to show that he was aware of the international treaty upon which the expectation was founded, nor that he personally entertained the expectation: it was enough that the expectation was reasonable.

Teoh illustrates one other facet of the doctrine; namely, its potential power and width of application. Legitimate expectations are not confined to specific promises or representations in defined policy contexts. Rather, they may have potential effects for a great many recipients across a wide range of individual circumstances. In *Teoh*, for example, the court held that the ratification of a treaty by the Australian Government created a legitimate expectation that executive government and its agencies would act in accordance with the treaty provisions, even though the treaty had not been incorporated into national law. An individual was therefore entitled to be consulted before the government treated him in a way which was not in accordance with the treaty (compare Lester (Lord), 'Government compliance with international human rights law: a new year's legitimate expectation' [1996] PL 187).

14.3 Distinguishing legitimate expectations from the right to a fair hearing

We have now looked at two different ways by which a person may become entitled to a hearing before a decision adverse to him or her is taken. First, an entitlement may arise by virtue of the rules of natural justice/fairness (examined in Chapter 13). Secondly, the person may be entitled to a hearing by virtue of a legitimate expectation which they hold. Both these routes to a fair hearing depend, in the final analysis, upon the concept of 'fairness'. The doctrine of legitimate expectation is often described as being a facet of the public decision maker's general duty of fairness: 'the doctrine is rooted in the ideal of fairness' (per Laws J in *R v Secretary of State for Transport ex p Richmond-upon-Thames LBC* (1994)). It is for this reason that we have included it as a ground of review under the head of 'procedural impropriety'.

However, it is very important to distinguish between these two different routes to a fair hearing, because within the general concept of fairness, they are based on quite different arguments. A hearing flowing from the rules of natural justice arises because the right or interest which the applicant seeks to claim or protect is considered so important that it merits protection (in the form of a hearing) before it is taken away or not granted (for example, in *Ridge v Baldwin*, the applicant was entitled to a hearing because of the effect of the decision on his livelihood and reputation). What is crucial is that the hearing is granted because of *the importance of the interest affected*. By contrast, the doctrine of legitimate expectation does not generate an entitlement to a hearing because of the importance of the interest, but simply because of the *way in which the decision maker has acted* – because he has encouraged the expectation.

The best way to appreciate this distinction is to look at a case which involves both natural justice and a legitimate expectation. In *R v Great Yarmouth BC ex p Botton Brothers* (1987), the applicants were amusement arcade owners. They claimed that they should have been permitted to make representations to the council before it granted planning permission for a new amusement arcade – they feared that the new arcade would reduce their own custom. The Divisional Court held, first, that the applicants did not have a legitimate expectation to a hearing. The council had never made an express promise of a hearing, and there was no past practice in the *GCHQ* sense of the term. Thus, there was nothing upon which a legitimate expectation could be founded. However, the court went on to find that the council was in breach of its duty to give the arcade owners an opportunity to make representations. It reasoned that, because they would be substantially prejudiced by the new arcade, which would have a potentially serious effect on their livelihoods, they were entitled, in the unusual circumstances of the case, to a fair hearing before the decision was taken. The entitlement to a hearing thus arose from the rules of natural justice, not from the doctrine of legitimate expectation.

14.4 Substantive protection of legitimate expectations?

We must now return to the question which we postponed when considering the example of Paul and the MTLB (above, 14.2): can an individual ever rely upon a legitimate expectation to claim not simply an opportunity to make representations, but rather to claim the substantive ‘thing’ that was promised? In some cases, this question simply does not arise, because the individual was never promised more than a hearing. For example, in *AG of Hong Kong v Ng Yuen Shiu* (1983) (above), the promise was simply that illegal immigrants would be interviewed before they were repatriated; in the *GCHQ* case, the past practice upon which the unions relied was that there had always been consultation before changes were made to employees’ conditions of employment. In such cases, the substance of the legitimate expectation was only ever of a hearing or of consultation, and so, if successful, the individual is obviously only entitled to a hearing.

Sometimes, however, the assurance or promise upon which the alleged legitimate expectation is based is not of a hearing, but of a ‘substantive benefit’. For example, in *R v Secretary of State for the Home Department ex p Khan* (1984), the Home Secretary had issued a circular specifying the criteria upon which he would exercise his discretion to allow parents to bring a foreign child to the UK for adoption. The circular specified four conditions which intending adoptive parents would have to satisfy. The Khans fulfilled all the four conditions, but were still refused permission to bring a child to the UK for adoption, the Home Secretary turning them down for a reason which was not contained in the circular. The Court of Appeal held that the circular gave the Khans a legitimate expectation that entry decisions for such children would be made in accordance with the circular; that is, that the Home Secretary would not refuse entry for a reason not contained in the circular.

But the court was then faced with the question of what remedy it could grant. If the doctrine of legitimate expectation is merely procedural, then it would follow that the Khans would only be entitled to a *hearing* before the Home Secretary disappointed their expectation; that is, they would get a chance to persuade him not to refuse their application for a reason not contained in the circular (but he could go on to do just that if he was not persuaded by them). The Khans argued, however, that they were entitled to a *substantive* remedy; in other words, to an order from the court restraining the Home Secretary from refusing their application for a reason not contained in the circular. This would be, in effect, to force the Home Secretary to apply the circular.

You might think that there is a major difficulty with the Khan’s argument. If the Home Secretary was forced by the court to apply his own circular, without even the power to depart from it if he considered the case to be exceptional, would he not thereby have unlawfully fettered his own discretion

(see above, 12.6)? The Home Secretary might appear to be in an impossible position; accused of fettering his discretion if he automatically followed his policy; accused of breaching a legitimate expectation if he did not! This might make it impossible for any public decision maker to adopt a policy.

The Court of Appeal in *Khan* adopted a middle course. It held, by a majority, that the Home Secretary ought not to have disappointed the Khan's legitimate expectation as he did, and quashed the decision refusing entry. In an important passage, Parker LJ stated:

... the Secretary of State, if he undertakes to allow in persons if certain conditions are satisfied, should not in my view be entitled to resile from that undertaking *without affording interested persons a hearing, and then only if the overriding public interest demands it* ... The Secretary of State is, of course, at liberty to change the policy but, in my view, vis à vis the [holder of an existing legitimate expectation], the new policy can only be implemented after such a recipient has been given a full and serious consideration whether there is some overriding public interest which justifies a departure from the procedures stated in the letter.

The decision in *Khan* therefore did two things:

- (a) it allowed a measure of substantive protection to substantive legitimate expectations: it held that a decision maker cannot depart from an assurance previously given (whether contained in a policy or elsewhere) unless he can point to overriding public interest reasons for doing so;
- (b) it sought to avoid conflict with the rule against the fettering of discretion by ensuring that a decision maker *can*, in exceptional cases, depart from the legitimate expectation.

The decision in *Khan* (which itself was not unanimous) has been followed by a number of cases which have continued to grapple with the boundaries, and indeed the concept, of the substantive legitimate expectation. The number of decisions which have unambiguously endorsed the doctrine are still – more than 15 years after *Khan* – remarkably few.

In *R v Home Secretary ex p Ruddock* (1987), various officers of the Campaign for Nuclear Disarmament discovered that their telephones had been tapped by the security services. They contended that the interceptions were ordered by the Home Secretary in breach of their legitimate expectation that interceptions would only be ordered when certain criteria published in a government circular were met. The Divisional Court held:

- (a) that the doctrine of legitimate expectation was *not* restricted to cases where the expectation was merely of a hearing, or of consultation;
- (b) that the applicants did have a legitimate expectation that the Home Secretary would only authorise interceptions where the criteria set out in the published circular had been met; but

(c) that, on the facts, there was no evidence that the Home Secretary had deliberately flouted the criteria.

This is a case where obviously there could be no 'procedural' protection of the legitimate expectation: one could not imagine a court ordering the Home Secretary to consult with the applicants before he authorised the tapping of their telephones. The case did not, however, raise the more difficult question of whether the Home Secretary was entitled to change his policy as embodied in the circular.

In *R v Inland Revenue Comrs ex p Preston* (1985), the Revenue had agreed with the applicant that it would not press certain tax demands against him if he abandoned certain claims for tax relief. Later, when it was too late for applicant to claim the reliefs, the Revenue changed its mind and sought to reinstate the claims against him. Preston challenged the claims as an 'abuse of power'. The House of Lords held that, in principle, it would be an unfairness amounting to an abuse of power for the Revenue not to honour its undertaking – but that, on the facts, the applicant had not been entirely open with the Revenue at the time that the earlier agreement was made, and therefore the Revenue was justified in going back on its word.

It should be noted that the term 'legitimate expectation' was not used at all in their Lordships' judgments; the ground of review which succeeded was described as 'abuse of power'. Nevertheless, commentators have pointed out that, in essence, Preston was arguing that he had a legitimate expectation (based on an express promise: the Revenue's agreement) that he would not be pursued for the tax claims (a substantive expectation), and the House of Lords in effect found that such a claim was in principle valid, but that, on the facts, his expectation was not 'legitimate' because of his non-disclosure. Thus, in principle, *ex p Preston* would appear to support the concept of a substantive legitimate expectation, even though the term was not mentioned in the case. Indeed, the decision was followed in *R v Inland Revenue Comrs ex p MFK Underwriting Agencies Ltd* (1990), where the Divisional Court did use the language of 'legitimate expectations'.

On the other hand, the House of Lords has more recently upheld and followed *ex p Preston* without mentioning the doctrine of legitimate expectation, and analysing the position solely in terms of 'abuse of power' (*Matrix-Securities Ltd v Inland Revenue Comrs* (1994)). And the Court of Appeal in *R v Inland Revenue Comrs ex p Unilever* (1996) preferred, in finding that a settled past practice by the IRC of allowing Unilever to file tax claims late precluded the IRC from refusing a claim simply on the basis that it was filed late, to rest its decision upon grounds of *Wednesbury* unreasonableness rather than a straightforward legitimate expectation.

A number of recent decisions have considered whether the doctrine of substantive expectation is available in the context of changes of government policy. In *R v Ministry of Agriculture, Fisheries and Foods ex p Hamble Fisheries*

(*Offshore*) Ltd (1994), fishermen who had purchased two small boats under the expectation that they could (under government policy) transfer the boats' fishing licences to one larger vessel claimed a substantive legitimate expectation when that policy was changed to prevent them doing so. Sedley J rejected the claim, on the basis that the fishermen could not have a legitimate expectation that the minister would not change his policy. The judge suggested, however, that where a respondent claims to be entitled to change or depart from a policy which is relied upon by an applicant as giving rise to a substantive legitimate expectation, the court should perform a balancing exercise to determine whether or not it was 'legitimate' for the applicant to rely upon the policy in the particular circumstances.

This approach was, however, overruled by the Court of Appeal in *R v Secretary of State for the Home Department ex p Hargreaves* (1997). In this case, prisoners sought to rely upon a written 'compact' signed by a representative of the prison governor as founding a substantive expectation that they would become entitled to home leave after having served only a third of their sentences. The Home Secretary had, after the date of the compact, altered the policy so that home leave was only available after half the sentence had been served. The Court of Appeal rejected the application, holding (*inter alia*) that the approach of Sedley J in *ex p Hamble* was 'heresy'. Where a substantive, rather than a procedural expectation is claimed, it is for the decision maker, not the court, to judge whether or not that expectation should be protected or whether the public interest necessitates the overriding of the interest, subject only to the court's control on grounds of perversity or irrationality (upholding another first instance decision in *R v Secretary of State for Transport ex p Richmond-upon-Thames LBC* (1994)).

However, the position has changed once again, following the very recent decision of the Court of Appeal in *R v North and East Devon Health Authority ex p Coughlan* (1999). Here, the Court of Appeal disapproved of the criticisms of *ex p Hamble* expressed by the Court in *ex p Hargreaves* (pointing out that they were *obiter*), and embarked upon an extensive and important review of the development of the substantive legitimate expectation. In particular, the Court relied upon *Preston* and the 'abuse of power' cases to hold that, where an individual holds a 'substantive' legitimate expectation (at least if it is personally directed at the individual), it is for the court to decide whether it would be an abuse of power for the respondent to disappoint the expectation or whether the respondent has demonstrated sufficient reasons of overriding public interest. The court's decision is not limited to ensuring that the respondent has acted reasonably in the *Wednesbury* sense; rather, the court has to weigh the matter as a substantive question of fairness.

Ex p Hargreaves and *ex p Richmond* clearly appeared to signal a more restrictive approach to the substantive legitimate expectation (for a commentary, see Forsyth, C [1997] PL 375), whereas *ex p Coughlan* suggests precisely the opposite. However, it should be borne in mind that *ex p Hargreaves* was a case concerned with whether the minister was entitled to

change his policy, so as to affect those already in prison and, furthermore, to change his policy generally, rather than disappointing the individual expectations of the applicants. As such, it does not appear that the decision in *Hargreaves* is inconsistent with *Coughlan*, although the reasoning plainly is. To seek to sum up what is still an unsettled area:

- (a) where a public authority has created a legitimate expectation of a substantive benefit, by express promise or past practice, then in principle it appears that (subject to what follows), that expectation may be 'substantively protected' (*ex p Khan*; *ex p Ruddock*; *Preston*) – that is, the public authority can be compelled to fulfil that expectation;
- (b) no individual can legitimately expect the discharge of public duties to stand still, or that policies will not change (*Hamble*). Where a public authority decides to change its policy, an individual will not normally have a legitimate expectation to be dealt with under the old policy, subject only to the requirement that the change of policy be rational and not perverse (*Hargreaves*). The position may be different, however, if the individual has been given a particular promise of continued treatment under the old policy (*ex p Coughlan*);
- (c) where a public decision maker has adopted a policy, then a person affected by that policy has a substantive legitimate expectation that, while the policy remains in existence, he or she will be treated in accordance with its terms, and this expectation can be substantively enforced (*ex p Ruddock*). Similarly, a promise that an existing state of affairs will continue may generate a substantive expectations (*Coughlan*). A respondent may, however, be permitted to disappoint such an expectation where it can demonstrate that there is an 'overriding public interest' that it be allowed to depart from the policy. Whether the existence of an 'overriding public interest' is ultimately a question for the decision maker (subject to rationality: *Hargreaves*) or for the court (*Khan/Hamble*) is not entirely clear, although *Coughlan*, as the most recent decision at Court of Appeal level, certainly suggests the latter;
- (d) in any event, where a decision maker claims to be entitled to depart from an existing policy on grounds of 'overriding public interest', it may well be that fairness requires that the affected individual should be consulted before the policy is changed (*ex p Richmond* (1994), p 596b–c; *Khan*). This point was not specifically addressed in *Hargreaves*;
- (e) the existence of the entire doctrine of substantive expectation still, however, awaits endorsement by the House of Lords. In the taxation cases which have reached the Lords, there has been no inclination to adopt the language of the substantive expectation.

GROUNDS OF JUDICIAL REVIEW III: LEGITIMATE EXPECTATION

A legitimate expectation always arises from the conduct of the decision maker, and is, thus, quite distinct from the fair hearing considered in Chapter 13, which is based upon an individual's protectable rights or interests (see above, 13.3). The legitimate expectation arises (*per* Lord Fraser in *GCHQ*) either from:

- (a) an *express promise* given by the decision maker; or from
- (b) the *existence of a regular past practice which the claimant can reasonably expect to continue* (this does not mean any past practice, but one which is sufficiently well established).

If such a legitimate expectation exists, then general principles of fairness will ordinarily mean that a decision maker cannot disappoint the expectation, at least without offering the applicant a hearing ('a *procedural expectation*'), and sometimes even then ('*substantive protection*').

The legitimate expectation does not depend for its enforcement upon the applicant proving:

- (a) that the express assurance or conduct which gave rise to the expectation was 'personally directed' at him or her (that is, a general policy is sufficient);
- (b) that he or she has relied upon the representation to his or her detriment.

If a person has a legitimate expectation of a *substantive benefit* (that is, if the public authority promises the person not simply 'a hearing', but rather that he or she will receive a benefit), then the court may offer substantive protection of the legitimate expectation by restraining the public authority from acting otherwise than in accordance with that expectation. However:

- (a) a public authority is ordinarily entitled to change its policy; normally an individual cannot have a legitimate expectation that he or she will be unaffected by such a change of policy (*ex p Hamble* (1994); *ex p Hargreaves* (1997)), subject only to the authority establishing the rationality of the change and subject to any particular promise to the applicant (*ex p Coughlan* (1999)). There may be a right to be consulted over such a change: *ex p Richmond* (1994), p 596b–c; not addressed in *ex p Hargreaves*;
- (b) a substantive expectation that an existing policy will be applied in an individual case may be protected unless the public authority can demonstrate that there is an 'overriding public interest' that it be allowed to depart from the policy, and that it has consulted (*Khan* (1984)). It may be that the judgment of public interest is, ultimately, for the decision maker subject to establishing rationality (*Hargreaves*), but the better view appears

to be that it is a matter for the court to determine on grounds of fairness (*Coughlan*);

- (c) this is a new development, and is still potentially vulnerable to a reconsideration of the law by the House of Lords.