

Promises promises?

The scope of legitimate expectation in judicial review

there must be a commitment which can be characterised as a “promise”¹

Introduction

1. Since the phrase “legitimate expectation” first emerged in its modern public law context in the judgment of Lord Denning in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 170, it has gained an ever more prominent presence in the case reports.² Despite this increasing visibility, however, many of its features remain undefined. The conceptual basis underpinning the doctrine, the elements necessary to establish a claim to legitimate expectation and the application of the principle have all proven notably perplexing to the courts. Paul Reynolds in a recent article in *Public Law* claims that “there has been a lack of conceptual exploration of the doctrine: it has been assimilated into administrative law without any real attempt to explain its purpose and to sufficiently identify principles which underpin this purpose”.³
2. Indeed, it is striking that having been described as a “developing” doctrine by Bingham LJ as far back as 1990,⁴ legitimate expectation was again depicted using the same term by Lord Woolf MR in the seminal case of *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213⁵, a description echoed in identical form by Laws LJ in *R (Bhatt Murphy) v The Independent Assessor* [2008] EWCA Civ 755.⁶ As recently as July 2011, in *R (Cheshire East*

¹ *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin) at [63].

² A case search on Westlaw incorporating the terms “legitimate expectation” and “judicial review” produced 158 results (for all dates prior to 1 January 1990), 403 (between 1 January 1990 and 1 January 2000) and 975 (between 1 January 2000 and 1 January 2010). Clearly an imprecise measure but suggestive nonetheless.

³ Paul Reynolds “Legitimate expectations and the protection of trust in public officials” PL 2011, Apr, 330-352.

⁴ *R v Inland Revenue Comrs, ex p MFK Underwriting* [1990] 1 WLR 1545, 1569.

⁵ At [59].

⁶ At [27].

Borough Council) v Secretary of State for the Environment Food & Rural Affairs, Langstaff J reiterated Laws LJ in the *Bhatt Murphy* case who had said that “the reach of legitimate expectation in practice is still being explored.”⁷

3. The task of identifying the roots from which the doctrine developed, and the form into which it is developing, is not an easy one. Indeed, it is in part because the principled basis on which it is founded has been defined in so many different ways that the outcomes in any given case can be difficult to predict. While in early cases legitimate expectation can be seen as an offshoot of natural justice⁸, it subsequently drew on more general principles such as *Wednesbury* unreasonableness,⁹ fairness¹⁰ and abuse of power¹¹. Laws LJ, critical of the lack of guidance offered by these terms (despite the fact that they were developed in his own judgment in *Begbie*), propounded the aspiration of “good administration” as a justification for the legitimate expectation principle¹². More recently, Professor Christopher Forsyth has identified “trust” as a more precise and well-defined foundation.¹³
4. Amid this shifting backdrop, the context in which the principle operates is at least relatively clear, and it is worth sketching this out at this stage. A legitimate expectation may bite where a public body changes (or proposes to change) some policy or practice, in circumstances where it would be unfair or an abuse of power to effect such a change. In these circumstances the decision-maker may be required to honour an expectation of a procedural nature (that is, of the opportunity to be consulted or to make representations prior to the implementation of the proposed change) or of a substantive kind (namely, the provision of a particular concrete benefit).

⁷ [2011] EWHC 1975 (Admin).

⁸ See *Schmidt*.

⁹ See *R v Commissioners of the Inland Revenue, ex p Unilever* [1996] STC 681

¹⁰ See *Council of Civil Service Unions v Minister of Civil Service* [1985] AC 374, 415C-G per Lord Roskill.

¹¹ See *R v Secretary of State for Education ex p Begbie* [2000] 1 WLR 1115, 1129.

¹² See *Nadarajah*.

¹³ Christopher Forsyth, “Legitimate Expectations Revisited”, ALBA / BEG Paper, May 2011; see also Reynolds, fn 3 above.

5. It is increasingly clear that the legal analysis applied by the court will be driven in large part by the form of expectation contended for. This paper will therefore begin by setting out in a little more detail the two categories of legitimate expectation referred to above. It will then address the constituent elements typically held to be necessary to make out a legitimate expectation claim, before reviewing the application of these principles in cases where a claim has been successful on the facts and those in which it has not. The paper ends by suggesting some possible future trends in the development of this doctrine.

Types of legitimate expectation

Procedural legitimate expectation

6. True to its origins in the principle of natural justice, legitimate expectation initially protected the procedural interests of the individual. Thus it would typically give rise to an entitlement to be consulted or make representations prior to a public body's decision to alter a relevant policy or practice, but not to right to any substantive outcome. This remains the more common form of legitimate expectation case. This sub-division can itself be split into two: a legitimate expectation deriving from an express assurance of such consultation, and one founded not in explicit language but in the existence of a settled policy which would require such procedural steps prior to a material change.¹⁴
7. Thus, in the first type, described by Laws LJ as the "paradigm case of procedural expectation",¹⁵ where a promise to consult has been made to those who may be affected by a

¹⁴ *Council of Civil Service Unions v Minister of Civil Service* [1985] AC 374, 401B.

¹⁵ *Bhatt Murphy* at [50].

change of policy or practice, “ordinarily” the decision-maker will be held to that promise in advance of the implementation of that change.¹⁶

8. The second stems from the wider concept of administrative fairness, rather than the need to hold an authority to its word. Here, the nature of the benefit enjoyed by an individual will be such as to prevent any termination in the absence of consultation. Thus in *ex p Schemet* [1993] 1 FCR 306, the payment by a local authority of a child’s school transport costs could not be withdrawn unless the child’s parents had been notified of a rational ground and given an opportunity to make representations. This was the case even though no promise of such an opportunity had been made. As discussed by Laws LJ, the scope for contending for this type of procedural legitimate expectation will be limited. The impact on potentially affected persons must be “pressing and focussed” and any such group must “have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit: not necessarily for ever, but at least for a reasonable period, to provide a cushion against the change”.¹⁷

Substantive legitimate expectation

9. The early cases on legitimate expectation repeatedly held that the doctrine was not capable of committing public bodies to any promise of a substantive benefit because this would impede the decision-maker’s unfettered discretion to act in the public interest.¹⁸ Although prefigured by Sedley J’s decision in *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 (subsequently reversed on appeal), it was the important case of *ex p Coughlan* (discussed in more detail below) which provided a forceful challenge to this orthodoxy. In this case substantive legitimate expectation was the basis on

¹⁶ *Ibid.*

¹⁷ *Bhatt Murphy* at [49].

¹⁸ See, for instance, *AG of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, 638B, *ex p Hargreaves* [1997] 1 WLR 906 and *ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 AER 714.

which the court quashed the health authority's decision to close a residential unit for disabled unit, following its earlier representations to the effect that the residents would have a "home for life" there.

10. Most recently the Privy Council has provided its own endorsement of the substantive nature of legitimate expectation interests. (It is notable that in a field thick with Court of Appeal judgments over the past decade, there is precious little in the way of considered analysis on this topic from the House of Lords or Supreme Court.)¹⁹ In *Paponette v Attorney-General of Trinidad and Tobago* [2010] UKPC 32, the Privy Council quashed the government's decision to impose fees on an association of taxi operators on the basis of contrary assurances previously made towards the operators by the government. Along with the quashing order, the damages granted to the appellants at first instance were restored. It would seem, however, that the damages award was founded on the violation of the appellants' constitutional rights procured by the thwarting of the substantive legitimate expectation rather than on the legitimate expectation ground taken alone.

Anatomy of a legitimate expectation

11. The stress placed in many of the early judgments on somewhat malleable principles ("fairness", "abuse of power") means that legitimate expectation does not always lend itself to tightly structured discussion. Nevertheless, while often displaying these flexible elements, the authorities also seek to tie their reasoning to rules and structure which might provide guidance in future cases. Indeed, sometimes both tendencies will be visible within a single paragraph of

¹⁹ For some brief disquisitions on this question in the House of Lords, see *Council of Civil Service Unions v Minister for the Home Service* [1985] AC 374, *R (BAPIO) v Secretary of State for the Home Department* [2008] UKHL 27 and *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 at [177]-[183] *per* Lord Mance.

a judgment.²⁰ One useful way of approaching the reasoning process generally taken by the courts in this context is to break down the constituent parts in which it is generally formulated: “a representation giving rise to a legitimate expectation from which it would be unfair or an abuse of power to resile.”

“*A representation...*”

12. Reynolds points out that legitimate expectation bites “where interests have crystallised into protectable rights by virtue of some action of the decision-makers”.²¹ In making this observation, he reflects the dictum in *R (Bibi) v Newham LBC*²² that “if the public body has done nothing and said nothing which can legitimately have generated the expectation that is advanced to the court, the case ends there”.

13. Typically, the court will require a representation which is “clear, unambiguous and devoid of relevant qualification” as reasonably interpreted by those to whom it was directed.²³ Plainly, therefore, the court will need to give close attention to the meaning of any such representation and will consider whether, for instance, any promise is time-limited or subject to an implication that it is for no more than a reasonable period.²⁴

14. The form which such a representation may take can vary. At its most straightforward, it can consist of an assurance given personally to the claimant as to how a decision-maker will exercise his or her discretion. More general statements contained in policy documents may also

²⁰ See *Nadarajah* at [67] *per* Laws LJ, who found against the existence of a legitimate expectation “on the simple ground that the merits of the Secretary of State’s case press harder than the appellant’s, given the way the points on either side were respectively developed by counsel.” before admitting, “But I find it very unsatisfactory to leave the case there. The conclusion is not merely simple, but simplistic. It is little distance from a purely subjective adjudication.” His Lordship then went on to undertake a more searching (and *obiter*) attempt to define deeper matters of principle.

²¹ Fn 3 above.

²² [2001] EWCA Civ 607; [2002] 1 WLR 237 at [21].

²³ *Paponette* at [30].

²⁴ *Paponette* at [44].

suffice. Unsurprisingly, the latter kind of case appears to be more prevalent in the reported case law, but successful reliance in judicial review proceedings on the former kind of promise (personal assurance) is not unknown. Thus, by way of example, it appears that the guidance on the Highly Skilled Migrant Programme (now defunct) was treated (in its context) as giving rise to a personal assurance to migrants that once they had embarked on the scheme, they would enjoy its benefits according to the terms at the date of joining.²⁵

15. There is also some authority to suggest that the UK's obligations under unincorporated treaties may give rise to legitimate expectations of the procedural kind. Lord Hoffman in the Privy Council case *Higgs v Minister of National Security* [2000] 2 AC 228, 241F-G said:

“the existence of a treaty may give rise to a legitimate expectation on the part of citizens that the government, in its acts affecting them, will observe the terms of the treaty: see *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273. In this respect there is nothing special about a treaty. Such legitimate expectations may arise from any course of conduct which the executive has made it known that it will follow. And, as the High Court of Australia made clear in *Teoh's* case, the legal effect of creating such a legitimate expectation is purely procedural. The executive cannot depart from the expected course of conduct unless it has given notice that intends to do so and has given the person affected an opportunity to make representations”.²⁶

16. In addition, a public body may foster a legitimate expectation through the maintenance of a pattern of conduct, in the absence of any verbal assurance. Thus in a tax case, *ex p Unilever* the Inland Revenue's departure from its consistent practice of disregarding time-limits in the assessment of Unilever's profits gave rise to a legitimate expectation from which it had been irrational to resile. In *R (BAPIO) v Secretary of State for the Home Department* [2008] UKHL 27, it was the grant of highly skilled migrant status to international medical graduates by the Home Secretary which gave rise to a legitimate expectation that they would be able to seek and

²⁵ [2008] EWHC 664 (Admin); [2008] INLR 262 at [57].

²⁶ For the contrary view, see Sales and Clement “International Law in Domestic Courts: The Developing Framework” (2008) 124 LQR 388, 407-413.

obtain employment in the fields of their skill. This was unlawfully thwarted by the guidance which had been issued by the Secretary of State for Health to contrary effect.

17. *BAPIO* is an example of a finding in favour of a substantive legitimate expectation in circumstances where the class of affected persons is relatively wide and the representation broadly formulated. In this respect it represents something of a departure from the conventional thinking, as regards substantive legitimate expectation in particular, that a representation should usually be “pressing and focussed” and addressed to a small number of recipients.²⁷ It appears in fact that the judgment is informed as much by a separate principle of consistent decision-making across different departments of government as much as legitimate expectation.²⁸

18. While the whole of the present concept is framed around the idea of an “expectation”, in certain circumstances, there exists no absolute need for any claimant subjectively to have held an expectation at the time the impugned decision was made. In *R (Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744, a breach of the claimant’s substantive legitimate expectation was found on the basis that, in refusing his asylum claim, the Home Secretary had not applied his policy that internal relocation to the former Kurdish Autonomous Zone from government controlled Iraq would not be advanced as a reason to refuse a claim for refugee status. The legitimate expectation arose even though the claimant had been unaware of this policy (and thereby could not have expected it to be applied) and that by the time the claim was adjudicated on, the defendant’s policy was no longer in force.

²⁷ See, for instance, *Paponette* at [49], *Nadarajah* at [46] and *Bhatt Murphy* at [43].

²⁸ See for instance Lord Mance at [60]: “by issuing the guidance, the Secretary of State for Health as one emanation of the Crown was exercising her prerogative to give informal guidance inconsistently with the legitimate expectations generated by the Immigration Rules and practice adopted by another emanation of the Crown, the Home Secretary. In my opinion, the inconsistency and its effects were so profound as to render such guidance invalid.” Note too that only Lord Rodger and Lord Mance of the majority ruled against the guidance on legitimate expectation grounds.

19. It is not clear whether this proposition (since reiterated in *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546 at [34]) is such as to unseat Sedley LJ's comments in *R (Begbie) v Secretary of State for Education and Employment* [2000] 1 WLR 1115, 1133 to the effect that it would be difficult for a person who has not "clearly understood and accepted a representation of the decision-maker... can be said to have such an expectation at all. A hope no doubt, but not an expectation." Perhaps it is safest to say that this question depends to a significant extent on the facts is issue. Therefore, as Sedley LJ says in *Begbie*, whereas a general public commitment may bind a decision-maker irrespective of whether reliance (or even awareness) by him is established, a statement of more limited publication not expressed to the claimant may not be capable of founding a legitimate expectation.

20. The question of the "legitimacy" of any such expectation is frequently elided with the subsequent issue of the fairness of the public body's decision to thwart the expectation. Many such considerations are therefore discussed in the next section below. However there are certain factors which relate specifically to this question of legitimacy.

21. The first is the unsurprising observation that there is no legitimacy in an expectation that a public body will act in breach of its statutory duty.²⁹ However, it is only where the statute is in direct conflict with the representation that the former will preclude the latter. A statutory provision which permits but does not oblige the decision-maker to breach an expectation will not necessarily justify any such breach.³⁰

22. The second is that the source of the relevant representation must have "actual or ostensible authority" to make it on the public body's behalf. While an assurance made by someone

²⁹ *R v Director of Public Prosecutions ex p Kebilene* [2000] 2 AC 326, 368E.

³⁰ *R (X) v The Headteachers of Y School* [2007] EWHC 298 (Admin) at [115]-[116] *per* Silber J.

lacking in the relevant authority may provoke a subjective expectation on the part of the recipient, it would lack legitimacy such as to bind the decision-maker.³¹

“...from which it would unfair or an abuse of power to resile”

23. Application of the final component in the legitimate expectation analysis frequently throws up the most difficulties and, as Laws LJ put it, may tend to risk a “purely subjective adjudication”³² under the cover of fairness or abuse of power. As foreshadowed above, it is clear that this can also involve a highly fact-specific exercise. However, in the course of such assessments the courts can be seen to be guided by a number of recurrent factors.

24. Frequently the courts formulate the question of whether a public body will be entitled to thwart a claimant’s legitimate expectation by reference to the presence, or absence, of an “overriding public interest”.³³ The Privy Council in *Paponette* held that, once the legitimacy of the expectation has been established by a claimant, the onus shifts to the defendant to establish a public interest of sufficient force to justify the frustration of that expectation. The court must then “weigh the requirements of fairness against that interest”.³⁴ In the absence of any evidence and reasons advanced by the decision-maker to explain a breach of a representation or promise, it is unlikely the public body’s position will prevail.³⁵

25. It is reasonable to suggest that a public body will be more readily justified in resiling from a substantive legitimate expectation than a procedural one, not least because natural justice may provide a separate basis for requiring some form of consultation prior to the making of an adverse decision.³⁶ However, reasons which have specifically justified a decision by a public

³¹ *South Bucks District Council v Flanagan* [2002] EWCA Civ 690 at [18]; *Rowland v Environment Agency* [2003] EWCA Civ 1885 at [67].

³² See, for instance, *Nadarajah* at [67].

³³ *ex p Coughlan* at [52] and [57].

³⁴ At [37].

³⁵ At [42].

³⁶ *Lloyd v McMahon* [1987] AC 625, 702-703 *per* Lord Bridge. See Jonathan Moffett, “Resiling from Legitimate Expectations”, ALBA Lecture, July 2008.

body to fail to honour a procedural legitimate expectation include national security³⁷ and urgency such that consultation would have been ineffective.³⁸

26. As regards failures to honour substantive legitimate expectations, a broad range of considerations may impact upon the process of weighing-up the fairness to the individual against the public interest. Among the factors and approaches which have contributed to this balancing process are the following:

- i. Where the public body's "change of tack", though unfair to the claimant, "may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court)" or where the decision lies within the "macro-political field" the court will be less ready to accede to a challenge.³⁹
- ii. At the other end of the spectrum are cases where the act or omission complained of takes place "on a much smaller stage, with far fewer players", with "no wide-ranging issues of general policy, or none with multi-layered effects" and where the court "may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes in favour of the claimant".⁴⁰
- iii. Between these two extremes lie a spectrum of cases, in which a fact-sensitive approach will need to be taken as to the questions of fairness and abuse of power.⁴¹
- iv. The question of detrimental reliance may well weigh in the balance although its importance is likely to depend on the factual context of the case. Earlier *dicta* from *Begbie* referred to cases of unfairness where a claimant had not established detrimental

³⁷ *CCSU v Minister for the Civil Service*.

³⁸ *R v Lord Chancellor ex p Law Society* (1993) 6 Admin LR 833.

³⁹ *Begbie* at p 1130-1, upheld on this point by Lord Hoffmann for the majority in *Bancoult* at [63]— although of the dissenting judgments of Lords Bingham and Mance.

⁴⁰ *Begbie* at p 1131.

⁴¹ *ibid.*

reliance on a legitimate expectation as “very much the exception, rather than the rule”⁴². However, Sedley LJ doubted this in his judgment in the same case⁴³ and in *Bibi v Newham LBC* [2002] 1 WLR 237 a more nuanced approach was identified. While detrimental reliance (though not monetary loss or anything equivalent) will normally be required, this is not the case where an agency seeks to depart from an established policy in relation to a particular person because of the premium put on consistency and equality.⁴⁴ The discussion set out above relating to the possibility that a claimant, who is unaware of a particular policy, may be able to establish a legitimate expectation chimes with this view. More recently Laws LJ has expressed the view that there is “no hard and fast rule about reliance” which is “in principle no more than a factor to be considered in weighing the question whether denial of the expectation is justified”.⁴⁵

- v. Less contentiously perhaps, a bald failure by a public body even to consider the fact that it is acting so as to thwart a legitimate expectation has frequently been held to be unlawful. This factor weighed strongly in the Court of Appeal’s decision in *Coughlan*,⁴⁶ and was reflected in a clear statement of principle in *Bibi*.⁴⁷ The approach was approved in *Paponette* in the following terms: “the promise and the fact that the proposed act will amount to a breach of it are relevant factors which must be taken into account.”⁴⁸
- vi. More recently Laws LJ has attempted to formulate a new test based on the EU and ECHR requirement of proportionality: “whether denial of the expectation is in the

⁴² *Begbie* at p 1124

⁴³ At page 1133D-F

⁴⁴ At [29]-[30].

⁴⁵ *Nadarajah* at [70]

⁴⁶ At [89].

⁴⁷ At [39]: “: “on any view, if an authority, without even considering the fact that it is in breach of a promise which has given rise to a legitimate expectation that it will be honoured, makes a decision to adopt a course of action at variance with that promise then the authority is abusing its powers.”

⁴⁸ At [46].

circumstances proportionate to a legitimate aim pursued.”⁴⁹ In *Bancoult*, the House of Lords resisted the temptation to endorse this new test, Lord Mance referring to its “overtones of another area of public law”.⁵⁰ However in *Paponette* the Privy Council endorsed Laws LJ’s observation that the aim of good administration in holding governments to their promises would be undermined “if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances”.⁵¹ While technically not binding, the apparent approval of the proportionality approach may well prefigure future developments in the approach taken by the courts in this context.

Prisoner cases

27. The scope of legitimate expectation is also conditioned by the constitutional principle that the government may and indeed should “formulate and re-formulate policy”.⁵² The power to make such changes “is something that is inherent in our constitutional form of government”.⁵³ This principle has nowhere been more rigorously applied than in the prison cases, even where individual liberty is at stake. The leading case remains *In re Findlay* [1985] 1 AC 318 in which four prisoners challenged major changes in the administration of the parole system. Lord Scarman referred to the “shattering impact” upon the prisoners of the Secretary of State’s policy statement to Parliament that had augured in the changes and their understandable hopes of release under the old policy. However, in concluding that the prisoners had no expectation to be dealt with under the old policy, he held:

⁴⁹ *Nadarajah* at [69].

⁵⁰ At [182].

⁵¹ At [38].

⁵² Sedley LJ in the *BAPIO* case [2007] EWCA Civ 1139 at [43].

⁵³ *Hughes v Department of Health and Social Security* [1985] AC 776, 788 per Lord Diplock.

“It is said that the refusal to except them from the new policy was an unlawful act on the part of the Secretary of State in that his decision frustrated their expectation. But what was their *legitimate* expectation? Given the substance and purpose of the legislative provisions governing parole, the most that a convicted prisoner can legitimately expect is that his case will be examined individually in the light of whatever policy the Secretary of State sees fit to adopt provided always that the adopted policy is a lawful exercise of the discretion conferred upon him by the statute. Any other view would entail the conclusion that the unfettered discretion conferred by the statute upon the minister can in some cases be restricted so as to hamper, or even to prevent, changes of policy. Bearing in mind the complexity of the issues which the Secretary of State has to consider and the importance of the public interest in the administration of parole I cannot think that Parliament intended the discretion to be restricted in this way”.⁵⁴

28. Lord Scarman’s speech means that a prisoner is only entitled to be treated in accordance with policy as it is in force. There is no legitimate expectation to be treated in accordance with superseded policy even if it is more favourable to the prisoner. *In re Findlay* has been followed on numerous occasions and in numerous contexts in prison law. It was applied in *R v Secretary of State for the Home Department Ex p Hargreaves* [1997] 1 WLR 906, which held that the only legitimate expectation that the prisoner applicants might have was that their applications for home leave would be examined individually in the light of the policy applying at the date of application.

29. *In Findlay* nevertheless makes plain that a prisoner has a legitimate expectation to be treated in accordance with policy as in force. Security categorisation is therefore to be determined in accordance with the relevant policy and should not be changed because one prison governor disagrees with another.⁵⁵

30. In *Vary*, the prisoner’s claim that a revised policy on categorisation breached his legitimate expectation was rejected on the principle of *In re Findlay*, but the court commented that, in light of case law subsequent to *Findlay*, “the time is approaching in which it will be

⁵⁴ [1985] 1 AC 318 at 338E-G.

⁵⁵ *R (Lowe) v Governor HMP Liverpool* [2008] EWHC 2167 (Admin); [2009] Prison L.R. 197.

appropriate to revisit the limited nature of the expectations engendered by the application of prison service policies that are regarded as ‘legitimate’ for the purpose of the principle of legitimate expectation”.⁵⁶

Successful cases: claimant wins

31. As well as the conceptual launch-pad for much of the important recent case-law, *ex p Coughlan* is a notable example in which the Court felt able to order relief of a far-reaching nature. The case, which has since been identified as “particularly strong”⁵⁷ in a subsequent authority, was brought by an applicant, who had been rendered tetraplegic by a severe road accident and had subsequently transferred from Mardon House Hospital to Mardon House, a purpose-built facility for disabled people. Miss Coughlan, and other patients at Mardon House, had agreed to this transfer on the strength of a number of representations from senior officers of the health authority that they could live there “for as long as they chose”. The health authority later decided to close Mardon House.

32. The court held that this was a case in which a legitimate expectation of a substantive benefit had arisen on the basis of (i) the importance of the content of the promise to Miss Coughlan, (ii) the limitation of the promise to a few individuals and (iii) the fact that honouring the promise would give rise only to financial consequences for the health authority.⁵⁸ In deciding whether this could be resiled from, the court noted that the health authority had, in its decision-making, failed to appreciate that Miss Coughlan’s expectation was for a home for life, rather than just care funding and that the quality of any future accommodation proposed by the health

⁵⁶ *R (Vary) v Secretary of State for the Home Department* [2004] EWHC 2251 (Admin) at [78].

⁵⁷ *Bhatt Murphy* at [69].

⁵⁸ At [60].

authority was unknown.⁵⁹ The court held that given the nature of the promise, “[s]trong reasons”⁶⁰ were required to justify a departure. However, no overriding reason of public interest justified it and the health authority’s conduct had constituted unfairness amounting to an abuse of power”.⁶¹

33. In *Bibi v Newham LBC* [2002] 1 WLR 237, a local authority had committed itself to providing secure accommodation to the applicants. The question for the Court of Appeal was whether the authority should be held to its promise, which had been made in the erroneous belief that it was under a legal duty to provide such accommodation. Neither party argued that it was beyond the powers of the authority to provide secure accommodation and the Court decided the case on the basis that it would not be unlawful for the applicants to receive secure housing.

34. The Court held that reliance without detriment may found a claim to legitimate expectation as a means of avoiding unfairness, while also commenting that in strong cases the applicant would be able to show both reliance and detriment. A promise, though, is not in itself sufficient to found a legitimate expectation: public authorities have duties wider than their promises to individuals and must take account of the different and competing interests of those they serve. Thus, on the facts of *Bibi*, the Court recognised the competing interests of other meritorious housing applicants and the limited housing stock available to the local authority.

35. The Court in *Bibi* also limited the reach of legitimate expectation to fit into the edifice of public law. This edifice respects the different institutional competences of the courts and the executive, such that even if the court finds that the applicant has a legitimate expectation of some benefit, it will not require the authority to adhere to its promise “where to do so would be to assume the powers of the executive. Once the court has established such an abuse it may ask

⁵⁹ At [89]

⁶⁰ At [86]

⁶¹ At [89]

the decision taker *to take the legitimate expectation properly into account* in the decision making process”.⁶² The failure to take into account the applicants’ legitimate expectations rendered unlawful the authority’s decision to refuse to grant them secure accommodation.

36. In general, legitimate expectations should be honoured unless “there are reasons recognised by law for not giving effect to those legitimate expectations”⁶³ but the court granting relief will bear in mind that housing allocation involves invidious choices that are political not judicial.⁶⁴ In the circumstances, the Court simply made a declaration that the local authority was under a duty to consider the applicants’ applications for housing on the basis that they have a legitimate expectation that they will be provided with a secure tenancy. The case is a very good example of the courts balancing, on the one hand, fairness to individuals who have been promised an important benefit by a public authority and, on the other hand, a recognition of the complex decision-making processes that public authorities, constrained by resource limitations, must undertake in the wider public interest.

37. Of much current interest, the issue of legitimate expectation may squarely arise in the context of Government cuts. In *R (Luton Borough Council & ors) v Secretary of State for Education* [2011] EWHC 217 (Admin), it was held on the facts that the Secretary of State had not made a promise to fund improvements to schools in certain local authority areas under the Building Schools for the Future programme. Launched by the Labour administration, the Coalition Government had stopped the BSF programme. The Court held that even if there is an expectation that one government will honour its assurances, a new government may legitimately introduce new policies; otherwise, one government would unlawfully bind a future government. Absent a binding commitment (which would have been in the circumstances of the case a promissory note under the terms of the BSF programme), no substantive legitimate

⁶² At [41]; emphasis added.

⁶³ At [59].

⁶⁴ At [64].

expectation may arise. On the fact, however, the Secretary of State had breached the authorities' legitimate expectation on procedural grounds through the abrupt termination of the programme and a failure to consult. The Judge rejected the Secretary of State's claim that consultation would have been unduly time consuming and emphasised that building projects of the scale envisaged under the BSF will involve substantial investment and contractual liabilities on the part of the local authorities. In this way, the case can be characterised as one of reliance and detriment. Despite this successful outcome, the judgment ends with the warning that the applicant local authorities should not gain false hope as the final decision, on reconsideration in accordance with the judgment, would rest with the Secretary of State.

Some recent unsuccessful cases: claimant loses

38. Reviewing the cases of the last year or so does not reveal a high success rate for applicants. In the case about changes to civil service pensions, an argument based on legitimate expectation failed on the ground that the Government's justification for the changes overrode any expectation that the old scheme would remain in force: *PCSU v Minister for the Civil Service* [2011] EWHC 2041 (QB); (2011) 108(33) LSG. 27.

39. In *R (Elayathamby) v Secretary of State for the Home Department*, Sales J concluded (perhaps unsurprisingly) that the Home Office policy on mandate refugees did not mean that the provisions of the Dublin Regulation would not be applied to the applicant who had no legitimate expectation that his asylum claim would be considered by the UK.⁶⁵ The claimed expectation was classified by Sales J as substantive (consideration of the asylum claim in the UK being a substantive benefit).

⁶⁵ [2011] EWHC 2182 (Admin).

40. In *Secretary of State for the Home Department v Rahman* [2011] EWCA Civ 814, one issue was whether the withdrawal of the seven-year child concession (applicable to families under immigration law) had been unlawful because there had been no prior consultation about its withdrawal. Giving the only reasoned judgment – with which the other members of the Court agreed – Stanley Burnton LJ reiterated that it will only be in extremely narrow circumstances that a court will imply a duty to consult where there has been no express or implied promise or practice to consult. He went as far as to say that “it would be wholly unreasonable to impose a duty on the Secretary of State to consult those whose presence in this country is at best irregular, and at worst has been secured by deception, or those representing such persons” (at [40]). This case is therefore another very good example of public policy considerations ousting any prospect of legitimate expectation.

Advising clients

41. The legalistic nature, and uncertain scope, of the law of legitimate expectation makes this a field in which it is more than usually difficult to give advice to clients with certainty. Past success may not augur future wins: “A similarity of factual circumstance may be an unreliable guide: it is the principles applied in one case which form the precedent”.⁶⁶ The courts use fairness as a barometer but context is important too: the prisoner cases show that policy considerations may trump a promise. The Court of Appeal in *Bibi* is probably right to say that reliance and detriment will found the stronger cases but it is now established that these ingredients are not necessary in all cases. Advisers will want to demonstrate by evidence any reliance and detriment and also to explain clearly and fully any unfairness or harm to an applicant should the promise not be honoured.

⁶⁶ *Cheshire East Borough Council* [2011] EWHC 1975 (Admin) at [44].

42. As in other public law cases, the greater the expertise of the decision-maker *vis-a-vis* the court (as elaborated in cases concerning deference or institutional competence), the more likely the court is to conclude that the authority, rather than the court, must take the ultimate decision on the substance of the case. Resources, fairness, context: these themes are familiar to public lawyers in cases raising *Wednesbury* and other planks of public law and perhaps legitimate expectation cases become less daunting if put into this broader framework. But this may be easier said than done.

Future directions?

43. What then, of the future development of the doctrine of legitimate expectation? Notwithstanding a succession of important and elucidating cases (*Nadarajah*, *BAPIO*, *Bhatt Murphy*, *Paponette*), the vista is not yet clear. However, we venture to suggest a number of broad conclusions that seem to us emerge from an analysis of the case law.

44. First, public policy in this area may dictate case outcomes. We have set out above how the courts will preserve the rights of the executive to formulate, revise and apply policy in the public interest. It is a small step from this underlying consideration to the proposition that core public interests may defeat individual expectations more readily than others. Secondly, case outcomes are likely to remain fact-sensitive and dependant on context: while legitimate expectation is not co-extensive with fairness in public law, it is likely that outcomes will continue to be driven by judicial conceptions of what is fair in the circumstances and context of a particular case.

45. Finally, it is plain that public sector promises – by words, policy or practice – have become a permanent feature of the legal landscape. To this extent, the entrenchment of legitimate

expectation as a ground of challenge in public law is consistent with the sort of judicial activism that has made administrative law such a fast-growing, dynamic field in the past few decades.

JUDITH FARBEY QC

BEN SILVERSTONE

Doughty Street Chambers

(Law as at 11th October 2011)