Legitimate Expectation Revisited

'Legitimate expectation is now a well-known public law headline. But its reach in practice is still being explored'. So observed Lord Justice Laws on 9 July 2008 in *R (Bhatt Murphy (a firm) and others v Independent Assessor; R (Niazi and others) v Secretary of State for the Home Department [2008] EWCA Civ 755* before going on to undertake another penetrating exploration of this developing area.

Nadarajah

For Laws LJ is no stranger to this part of the public law city. It was he who on 22 November 2005 (in *R (Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363*) had led an expert tour round some of its major sights and had come to the view that:

‘...a public body’s promise or practice as to future conduct may only be denied, and thus may only be departed from, in circumstances where to do so is the public body’s legal duty, or is otherwise... a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.’

Proportionality will generally be judged:

‘...by the respective force of the competing interests arising in the case. Thus where the representation relied on amounts to an unambiguous promise; where there is detrimental reliance; where the promise is made to an individual or specific group; these are instances where denial of the expectation is likely to be harder to justify as a proportionate measure’.

However, Laws LJ had considered that judicial enforcement would ‘encounter a steeper climb’ where the government decision-maker is ‘concerned to raise wide-ranging or “macro-political” issues of policy’. He had also cautioned that the considerations then highlighted were pointers and not rules. For the ‘balance between an individual’s fair treatment in particular circumstances, and the vindication of other ends having a proper claim on the public interest (which is the essential dilemma posed by the law of legitimate expectation) is not precisely calculable, its measurement not exact’.

Some current strands

So what does Laws LJ consider to be the state of play some two and a half years later? Again he gave the caselaw authorities some skilful analysis noting in the process (amongst other things):

- The paradigm case of procedural legitimate expectation arises (per CCSU [1985] AC 374) where a public authority has provided an unequivocal assurance, (whether by means of an express promise or an established practice) that it will give notice or embark upon consultation before it changes an existing substantive policy.
- A substantive legitimate expectation arises where the court allows a claim to enforce the continued enjoyment of the content – the substance – of an existing practice or policy, in the face of the decision-maker’s ambition to change or abolish it. It is therefore to be distinguished from a merely procedural right.
- The doctrine of substantive legitimate expectation plainly cannot apply to every case where a public authority operates a policy over an appreciable period. That would expand the doctrine far beyond its proper limits. The establishment of any policy, new or substitute, by a public body is in principle subject to Wednesbury review. But a claim that a substitute policy has been
established in breach of a substantive legitimate expectation engages a much more rigorous standard. It will be adjudged by the court’s own view of what fairness requires.

- Public authorities typically, and central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel.

- However, subject to the overriding public interest, the court will insist that the decision-maker has regard to the views of an affected person whom it has not chosen to consult where the decision-maker’s proposed action would otherwise be so unfair as to amount to an abuse of power, by reason of the way in which it has earlier conducted itself.

- What is fair or unfair is of course notoriously sensitive to factual nuance. In applying the discipline of authority, therefore, it is as well to bear in mind the observation of Sir Thomas Bingham MR as he then was in *Ex Parte Unilever* [1996] STC 681 that “[t]he categories of unfairness are not closed, and precedent should act as a guide not a cage”.

- In the circumstances Laws LJ identified two types of substantive legitimate expectation.

  (i) The first is where the policy constitutes a specific undertaking, directed at a particular individual or group, by which the relevant policy’s continuance is assured. In essence, this is conduct ‘equivalent to a breach of contract or breach of representations’. *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 3 All ER 850 was cited as a ‘strong case’. There a severely disabled lady had been given a clear promise by the health authority that a residential facility would be her home for life but subsequently the health authority decided to close that facility. The Court of Appeal in *Coughlan* took the view that: ‘This is not a case where the Health Authority would, in keeping the promise, be acting inconsistently with its statutory or other public law duties. A decision not to honour it would be equivalent to a breach of contract in private law’.

  (ii) The second is the exceptional instance where a decision-maker will be required before effecting a change of policy to afford potentially affected persons an opportunity to comment on the proposed change and the reasons for it, although there has been no previous promise or practice of notice or consultation. For this to arise, the impact of the authority’s past conduct on potentially affected persons must be ‘pressing and focussed’. An individual or group would need to demonstrate 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. In such case an abrupt change cannot lawfully be made in the absence of notification and consultation.

- Where there has been no assurance either of consultation (the paradigm case of procedural expectation) or as to the continuance of the policy (substantive expectation), there will generally be nothing in the case save a decision by the authority in question to effect a change in its approach to one or more of its functions. And generally, there can be no objection to that, for it involves no abuse of power. Per Lord Woolf in *Coughlan*:

  “In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process.”

**Current position summarised**

In the light of his conceptual and caselaw analysis, Laws LJ offered the following ‘very broad summary of the place of legitimate expectations in public law’.

- The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority.

- For a public authority to do otherwise than as indicated, in any of the following instances, would be to act so unfairly as to perpetrate an abuse of power:
  - If the authority has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation).
  - If the authority has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation).
  - If, without any promise, the authority has established a policy distinctly and substantially affecting a specific person or group who in the

Continued on reverse
circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation).

• There are doubtless refinements and qualifications to the above and there may be other cases. In addition major questions can arise as to the circumstances in which the public interest will, in the court’s view, allow the change of policy despite its unfair effects

• Per Nadarajah the idea that the underlying principle of good administration which requires public bodies to deal straightforwardly and consistently with the public (and by that token commends the doctrine of legitimate expectation) should be treated as a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. Any departure from it must therefore be justified by reference among other things to the requirement of proportionality

Conclusion

As Laws LJ made clear, legitimate expectation is essentially a feature of the duty upon public authorities to act fairly and not abuse their powers. There is of course a tension between the requirement for local authorities to act properly within the ambit of their statutory powers (not fettering their discretion) and the doctrine of legitimate expectation which may under certain circumstances compel an authority in fairness to behave as it may reasonably be expected to do, even though this may not accord with its corporate wishes.

The developing concept owes something to the equitable doctrine of estoppel which had been developed so energetically by former Master of the Rolls, Lord Denning. But as Lord Hoffman pointed out in the Reprotech case back in Winter 2002 (R v East Sussex County Council, ex p Reprotech (Pebsham) Ltd; Reprotech (Pebsham) Ltd v East Sussex County Council [2002] UKHL 8) whilst equitable estoppel and legitimate expectation may be cousins they do have rather different personalities:

‘There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power . . . [Coughlan. . . ] But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote’.

Fairness is a creature of particular sets of circumstances and these are as infinitely variable as human beings and indeed human nature itself. But given the fact that claimants in a fix will naturally look to any suitable remedy within reach, the pronouncements by Laws LJ on legitimate expectation are unlikely to be the last word.

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