

‘LEGITIMATE EXPECTATION’ AND THE RULES OF NATURAL JUSTICE

BY J. L. CALDWELL B.A., LL.B. (HONS) (*Cantuar*), LL.B. (*Cantab.*)

In recent years the nature and boundaries of “the duty to act fairly” has been the predominant subject of judicial and academic concern in any discussion on the application of the rules of natural justice. Now that the “fairness” controversy has subsided (due to the highest judicial pronouncements that natural justice and fairness are synonymous) a new debate on the application of natural justice seems likely. This new debate will centre over the nature and boundaries of the concept of a “legitimate expectation” as the basis of an entitlement to a hearing. And any remaining doubts as to the existence or relevance of this concept have now been exploded by the recent adoption of the notion not only by the Privy Council in *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 246, and the House of Lords in *O’Reilly v Mackman* [1982] 3 All ER 1124, 1126-1127, but also by the New Zealand Court of Appeal in *Webster v Auckland Harbour Board* (unreported) Court of Appeal, CA 5/82, 19 April 1983 and *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, 143.

Lord Atkin’s dictum

For a period of 40 years the courts in determining whether the rules of natural justice applied seemed somewhat mesmerised by a dictum of Lord Atkin. In his judgment in *R v Electricity Commissioners* [1924] 1 KB 171, 204-205, Lord Atkin had declared that the prerogative writs would issue to “any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially”.

A strict adherence to this dictum resulted in a highly conceptual approach to natural justice. Thus apart from the judicial insistence on the need for the decision maker to be “acting judicially”, an unfortunate Hofeldian approach was applied by the Courts to the determination of what were “rights”. Thus in *Nakkuda Ali v Jayaratne* [1951] AC 66 the Privy Council held, obiter, that the decision to revoke a textile dealer’s licence did not involve a question affecting his “rights” as the decision merely withdrew a privilege. The Privy Council therefore concluded that the rules of natural justice were not applicable.

However after the landmark case of *Ridge v Baldwin* [1964] AC 40 and *Durayappah v Fernando* [1967] 2 AC 337 such arid distinctions ceased to have much relevance (see *James Aviation Ltd v Air Services Licensing Appeal Authority* [1979] 1 NZLR 481). Nevertheless as the Court of Appeal noted in *Daganayasi v Minister of Immigration* (supra) even the Privy Council opinion in *Durayappah v Fernando* was dominated by what is now seen as a C19th concentration on the rights of property. A new analysis was needed and this seems to have been provided by the “legitimate expectation” concept.

History of the concept

The notion of a "legitimate expectation" was first implanted into this area of law by Lord Denning in *Schmidt v Secretary of State for the Home Department* [1969] 2 Ch. 149. In that case alien students of "scientology" were refused extensions to their entry permits without being given a hearing. In the course of his judgment Lord Denning proffered the view at p.170 that the application of the rules of natural justice depended on "... whether he has some right or interest or I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say". In this way the notion was introduced without any analysis or fanfare.

Not surprisingly it was also Lord Denning who nurtured his creation. In a dissenting opinion in *Breen v Amalgamated Union of Engineering Workers* [1971] 2 QB 175, 191 Lord Denning declared that if a person has "some right or interest or some legitimate expectation of which it would not be fair to deprive him without a hearing or reasons given then these should be afforded him. . . ." Although Lord Denning was in the minority in this case it is clear that Edmund-Davies LJ agreed with him on the question of entitlement to natural justice and it is Lord Denning's judgment which has been frequently cited since. Again in *R v Liverpool Corporation ex parte Liverpool Taxi Fleet Operators Association* [1972] 2 QB 299 Lord Denning referred, in argument, at p.304 to a "settled expectation" as a thing of value, conferring rights.

However, an obvious defect with the concept was its lack of precision. Perhaps for this reason the notion lay dormant until the High Court of Australia made the first real attempt to explore its meaning in *Salemi v Minister for Immigration* (1977) 51 ALJR 538. The facts of the case were straightforward but the legal difficulties were such that the High Court divided 3-3 with Barwick CJ's view consequently prevailing. In that case the respondent, through press releases, had promised an amnesty for overstayers provided they met certain conditions. The plaintiff, who appeared to meet these conditions, applied for an amnesty. Instead of being granted such he was deported without a hearing. Barwick CJ in his judgment placed great emphasis on the aspect of legitimacy. By equating "legitimate" with "lawful" Barwick CJ found that the concept added little, if anything, to the concept of a legal right. Thus Barwick CJ considered that an applicant must possess an expectation based on an enforceable legal right before an entitlement to a hearing arose. However Stephen J in the leading dissenting judgment provided a more imaginative analysis of the concept. That learned judge defined "legitimate" as "reasonable" and stated that "well-founded" expectations should be accorded the same protection of natural justice as a person's rights or interests. He explained that the source and reason for this principle was quite simply the doctrine of fairness.

Just a few months after *Salemi's* case the High Court of Australia reconsidered the notion of "legitimate expectation" in *Heatley v Tasmanian Racing Commission* (1977) 51 ALJR 703. This time Barwick CJ's cautious approach was rejected by a majority of 5-1. The respondents acting under statutory powers had banned the applicant from entering race-courses.

This was done without affording him any hearing. In the leading judgment Aickin J argued that while the applicant could not be said to have had an enforceable legal right to enter race-courses he nevertheless did have a legitimate expectation of entering them after a payment of a fee. Thus in the majority's view the Commission could not disappoint that legitimate expectation without a hearing.

Most recently in *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 246 the Privy Council dealt with a fact situation strikingly similar to that of *Salemi's* case. In this important opinion the Privy Council also expressly rejected Barwick CJ's approach and held that the term "legitimate" should be equated with the term "reasonable". Their Lordships therefore concluded at p.350 that "legitimate expectations. . . .are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis".

With that unequivocal dictum the highest judicial approval has been given for a broad approach to be taken.

Uncertainty of the Concept

The task of the courts is now to provide some parameters for this concept because there is still considerable uncertainty concerning its nature. For instance it is unclear whether the relevant "legitimate expectation" is an expectation of a favourable decision or simply of a hearing. Most dicta assume the legitimate expectation is of a favourable decision — see for example, *Heatley v Tasmanian Racing Commission* (supra) at p.711, *Salemi v Minister of Immigration* (supra) per Stephen J at p.554, *Chandra v Minister of Immigration* [1978] 2 NZLR 559 at p.572, *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 at p.143 and *Cunningham v Cole* (1983) 44 ALR 334 at 343. However there are certainly authoritative dicta suggesting the expectation is simply of a hearing — see, for example, *Attorney-General of Hong Kong v Ng Yuen Shiu* (supra) at 6.350, *Webster v Auckland Harbour Board* (unreported) Court of Appeal, CA 5/82, 19th April 1893, *Cinnamon v British Airports Authority* [1980] 2 All ER 368 at p.375 and *Nicol v Attorney General for the State of Victoria* [1982] VR 353 at 357. Although there may often be little difference in the practical result, this later formulation presumably provides a less rigorous test to satisfy.

The uncertainty of the concept is compounded by interesting dicta suggesting that it may be used in areas of administrative law other than natural justice. This is discussed below.

Some Conclusions

Despite the confusion there are some tentative conclusions which can be derived from the cases.

Firstly it seems tolerably clear that a "legitimate expectation" can only arise from some feature which is substantial, external, and prior to the decision in question. Thus in the cases of *Salemi v Minister of Immigration* (supra) and *Attorney-General of Hong Kong v Ng Yuen Shiu* it was the express assurances which created an expectation. In *Heatley v Tasmanian Racing Commission* (supra) and *O'Reilly v Mackman* [1982] 3 All ER

1124 it was the respective parties knowledge of the usual practice in the particular circumstances which created it. In *Breen v Amalgamated Union of Engineering Workers* (supra) it was the fact of the plaintiff's election to shop steward (subject to the approval of the district committee) which, according to Lord Denning, raised a "legitimate expectation" requiring natural justice before a decision to disapprove. Similarly in the context of licensing Megarry VC usefully suggested in *McInnes v Onslow Fane* [1978] 3 All ER 211 at p.268 that apart from the categories of an application or revocation of a licence there is an intermediate category where a person applies for a renewal of a licence and "...the applicant has some legitimate expectation from what has already happened that his application will be granted". For, as Barwick CJ had previously said in *Salemi v Minister for Immigration* a lawful expectation may arise where the licensee has fulfilled the obligations of the licence. The analysis of Megarry VC was adopted by Vautier J in *Smitty's Industries v Attorney-General* [1980] 1 NZLR 351.

In all the above examples the applicant's "legitimate expectation" was founded upon some act, practice, or situation prior to the decision. It would therefore not be possible to argue that a "legitimate expectation" arose simply because of the decisionmaker's power to decide in a way adverse to the person (see *Nashua v Cannon* (1981) 36 ALR 215).

A person may have a subjective hope that an adverse determination would not be made but that in itself is generally not a "legitimate expectation" (*Nichol v Attorney General for Victoria* (supra)). In the words of Cooke J in the New Zealand Court of Appeal the applicant must have "bona fide and substantial grounds", for believing a statutory decision would be made in the applicant's favour (*Daganayasi v Minister of Immigration* (supra) at 145).

The case of *Nashua v Cannon* also illustrates that the events prior to the decision could well indicate a positive absence of any "legitimate expectation". In this case the applicant argued that a Ministerial determination granting a tariff concession for a fixed period could not be revoked during that period without a hearing because, it was argued, revocation would disappoint the applicant's legitimate expectation of continuance. The argument was unsuccessful. Prior to the determination the Department had indicated that the power of revocation was exercisable at any time and therefore Lee J held there was no legitimate expectation of continuance. Similarly in *Cinnamond v British Airports Authority* [1980] 2 All ER 368, Lord Denning held that a history of convictions and prior misconduct on the part of a group of taxidriviers meant they had no legitimate expectation of a hearing before a decision was made which prohibited them from Heathrow airport.

A second conclusion can be drawn from the cases. This is the obvious point that a broad approach to the concept of a "legitimate expectation" will inevitably broaden the ambit of the rules of natural justice. Thus even if a person does not possess some interest attracting the rules of natural justice under the approach of *Durayappa v Fernando* [1967] 2 AC 337 the person may possess a "legitimate expectation" attracting the protection of natural justice and thereby render an otherwise nonjusticiable decision justiciable (see *Paterson v Dunedin City Council* [1981] 2 NZLR 619). For

example although natural justice might not normally be applicable to a decision because of its high policy content, the existence of a "legitimate expectation" might necessitate a hearing in the particular circumstances of a case (see *Salemi v Minister for Immigration* (supra), *Chandra v Minister of Immigration* (supra) and *Attorney-General for Hong Kong v Ng Yuen Shiu*). A further example of the consequences of a "legitimate expectation" is seen on the recent Australian case of *Cunningham v Cole* (1983) 44 ALR 334. In that case a person who had applied for reappointment to the Public Service had his application refused on the basis of allegations of misconduct which were not revealed to him. Sitting in the Federal Court Ellicot J noted that normally a person who applied or reapplied for a position in the Public Service had no right to a hearing on such questions as to whether he was a fit and proper person for the position. However he continued to hold that the special facts of the case created a "legitimate expectation". The applicant had previously been informed he would be offered a position and the allegations were grave — he was therefore entitled to a hearing.

Scope Beyond Natural Justice?

It has been stated emphatically by Hardie-Boys J in *Paterson v Dunedin City* (supra) that the notion of "legitimate expectation" is confined in scope to creating a circumstance where the audi alteram partem rule may be applicable. It is also certainly true that most of the cases would support this view. However there have been some intriguing indications that the notion of "legitimate expectation" may (like the notion of "fairness") spread from its origins of natural justice into other areas of administrative law. In particular there are dicta hinting that the concept may be used as a test for determining what is a "sufficient interest" to give either locus standi or grounds of review to an applicant for any type of judicial review. In *Paterson's* case itself Hardie-Boys J seemed to perceive some connection with the issue of locus standi (albeit in the context of the audi alteram partem rule) when he declared at p.624 that "[t]he essential feature of [the legitimate expectation] is the direct and personal effect the exercise of the power has upon the individual who comes to Court for redress".

More significantly Lord Diplock in *O'Reilly v Mackman* (supra) propounded the view at 1126 that:—

"In public law as distinguished from private law. . . such legitimate expectation gave to each appellant a sufficient interest to challenge the legality of the adverse disciplinary award made against him by the board on the ground that in one way or another the board in reaching its decision had acted outwith the powers conferred on it by the legislation under which it was acting; and such grounds would include the board's failure to observe the rules of natural justice. . . ."

It therefore seems from that passage that Lord Diplock regarded the concept as being relevant in determining a "sufficient interest" for the purposes of review even where the issue was not a breach of natural justice.

Similar sentiments are apparent in the judgment of Casey J in *Jim Harris Ltd v Minister of Energy* [1980] 2 NZLR 299. In that case the applicant sought review of a decision not to award him a contract of coal cartage after

a period of twenty-three years during which he had successfully tendered for it. He applied for an interim order under section 8 of the Judicature Amendment Act 1972 and he argued that a "statutory power of decision" as defined in s.3(b) of the Act was at issue. Statutory power of decision is defined therein as a power to make a decision deciding, prescribing, or affecting (inter alia) the rights or privileges of any person, or his eligibility to receive a benefit or licence, whether he is legally entitled to it or not. The respondent argued that the decision did not affect any rights, privileges or eligibility to receive a licence. Casey J however responded by stating at p.296: ". . .these words in their ordinary meaning are wide ranging, and I think 'privilege' and 'benefit' import the concept of 'legitimate expectations' which has found favour with the courts in England and Australia in determining the ability of a person to apply for review of an administrative decision."

Again it is apparent that this learned judge felt a "legitimate expectation" could provide the basis for judicial review on grounds other than natural justice and it is noteworthy that in the Court of Appeal's brief discussion of the concept in *Webster v Auckland Harbour Board* (supra) the Court cited the *Jim Harris* case without disapproval.

The Notion of "Fairness"

However with the concept far from fully settled it may be safer to assume that it will in the meantime retain its connection with the rules of natural justice. And if so, it seems that the notion of "fairness" will determine whether an expectation can be categorised as "legitimate" so as to warrant a hearing (see *Salemi v Minister for Immigration* (supra) per Stephen J at p.555 and *Cunringham v Cole* (supra) per Ellicot J at p.344). In this way the criterion of fairness will become not only the dominating criterion in the description of content of natural justice but also in the determination of its application. Thus the judicial emphasis on the flexibility of natural justice and the trend towards widening its ambit will be confirmed.

Nevertheless the importance placed on "fairness" and "reasonableness" ensures that judicial regard is paid to the necessity of good, efficient, administration. Naturally a concern with good administration may work in the applicant's favour as is evident in the Privy Council opinion of *Attorney-General of Hong Kong v Ng Yuen Shiu* (supra). But equally not all expectations will be held to be legitimate or reasonable. For example in *Cunringham v Cole* (supra) Ellicot J suggested, obiter, that if an alternative means of redress existed to remove the effects of an adverse decision then a legitimate expectation might not exist. Similarly in *Nashua v Cannon* (supra) Lee J noted how an applicant could not reasonably expect to be heard on the reasons for the withdrawal of a particular concession in light of the wide spectrum of broad policy considerations which could motivate such a decision.

However it is mistaken to view the concept of a "legitimate expectation" as a potential fetter on efficient, good administration. If there is a "legitimate expectation" it merely requires the decisionmaker to act with fair procedure and this can only be an aid to fair and informed decisionmaking.