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LEGITIMATE EXPECTATIONS, POLICY, AND THE PRINCIPLE OF CONSISTENCY

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IN *R.* v. *North and East Devon HA ex p. Coughlan*[1] the Court of Appeal significantly clarified the doctrine of substantive legitimate expectations. The facts of the case are familiar. The applicant had been very severely disabled in a road traffic accident in 1971 and was subsequently placed in the care of a local area health authority. In 1993 she and seven other seriously disabled patients were moved by the health authority with their consent to a new facility at Mardon House after receiving an assurance that they could live there "for as long as they chose". Following a public consultation in 1998, the health authority decided to close Mardon House and transfer the applicant to a local authority home.

Miss Coughlan brought judicial review proceedings, and Hidden J. found that she and the other patients had received a clear promise that Mardon House would be their home for life. The Court of Appeal held that if a public body induced a legitimate expectation of a benefit which was substantive, frustrating that expectation might be so unfair as to amount to an abuse of power. In such circumstances the court had to determine whether there was a sufficient public interest to justify a departure from what had been promised; and the Court of Appeal concluded on the facts that the decision to close Mardon House could not be justified.

In *Coughlan* the Court of Appeal appears to have resolved two issues concerning legitimate expectations. First and foremost, *Coughlan* has affirmed substantive legitimate expectation as a mainstream principle of administrative law.[2] The doctrine itself has always been controversial; those who have doubted its existence

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[1] [2001] Q.B. 213.

[2] At para. 52 the Court of Appeal stated:

> It has been common ground throughout these proceedings that in public law the health authority could break its promise to Miss Coughlan that Mardon House would be her home for life if, and only if, an overriding public interest required it. Both [counsel] adopted the position that, while the initial judgment on this question has to be made by the health authority, it can be impugned if improperly reached. We consider it is for the court

include, in particular, Laws L.J.[3] However, it is highly improbable that the House of Lords will repudiate the principle in the future. Secondly, the jurisprudential basis for the doctrine has been resolved. Although legitimate expectation is rooted in the doctrine of fairness,[4] there was some support for the view that it should be explained as an aspect of *Wednesbury* unreasonableness;[5] and should be treated as a *mandatory* relevant consideration when a discretion comes to be exercised.[6] The conventional classification of public law challenge by Lord Diplock in the *GCHQ* case[7] is now widely recognised as being overly rigid;[8] and in *Coughlan*[9] the Court of Appeal stressed:

> [W]e do not consider it necessary to explain the modern doctrine in *Wednesbury* terms, helpful though this is in terms of received jurisprudence (cf. Dunn L.J. in *R.* v. *Secretary of State ex p. Khan*:[10] "an unfair action can seldom be a reasonable one"). We would prefer to regard the *Wednesbury* categories themselves as the major instances (not necessarily the sole ones: see *Council of Civil Service Unions* v. *Minister for the Civil Service*,[11] per Lord Diplock) of how public power may be misused. Once it is recognised that conduct which is an

to decide in an arguable case whether such a judgment, albeit properly arrived at, strike a proper balance between the public and the private interest.

[3] See his submissions as Counsel for the Home Office opposing Stephen Sedley Q.C. in *R.* v. *Secretary of the Home Office ex p. Ruddock* [1987] 1 W.L.R. 1482; sceptic in *R.* v. *Secretary of State for Transport ex p. Richmond LBC* [1996] 1 W.L.R. 1460; contrast his concurring judgment in *R.* v. *Secretary of State for Education ex p. Begbie* [2000] 1 W.L.R. 1115.

[4] *R.* v. *Inland Revenue Commissioners ex p. MFK Underwriting* [1990] 1 W.L.R. 1545, 1570 *per* Bingham L.J.; in *CCSU* v. *Minister for the Civil Service* [1985] A.C. 374, 415 Lord Roskill described legitimate expectation as a "manifestation of the duty to act fairly".

[5] See *e.g. R.* v. *Secretary of State for the Home Department ex p. Khan* [1984] 1 W.L.R. 1337. In *R.* v. *Inland Revenue Commissioners ex p. Unilever* [1996] S.T.C. 681, 695 where Simon Brown L.J. suggested "I regard [abuse of power cases exemplified by *R.* v. *Inland Revenue Commissioners ex p. MFK Underwriters* [1990] 1 W.L.R. 1545] as essentially but a head of *Wednesbury* unreasonableness, but not essentially exhaustive of the grounds upon which a successful substantive unfairness challenge may be based."

[6] See *e.g. R.* v. *Metropolitan Police Commissioner ex p. P* (1996) 8 Admin. L.R. 6 where a caution issued by the police was quashed on the basis that it was issued in breach of the relevant guidelines.

[7] *CCSU* v. *Minister for the Civil Service* [1985] A.C. 374.

[8] See *e.g. Boddington* v. *British Transport Police* [1999] 2 A.C. 143, 152 where Lord Irvine L.C. said

> Challenge to the lawfulness of subordinate legislation or administrative decisions and acts may take many forms, compendiously grouped by Lord Diplock in *CCSU* v. *Minister for the Civil Service* [1985] A.C. 374 under the headings of illegality, procedural impropriety and irrationality. Categorisation of types of challenge assist in an orderly exposition of the principles underlying our developing public law. But these are not watertight compartments because the various grounds for judicial review run together. The exercise of a power for an improper purpose may involve taking irrelevant circumstances into account, or ignoring relevant considerations; and either may lead to an irrational result. The failure to grant a person affected by a decision a hearing, in breach of principles of procedural fairness, may result in a failure to take into account relevant considerations.

[9] [2001] Q.B. 213, at para. 82; see also *R.* v. *Inland Revenue Commissioners ex p. Unilever* [1996] S.T.C. 681, 690 per Sir Thomas Bingham M.R.: "The categories of unfairness are not closed, and precedent should act as a guide and not a cage."

[10] [1984] 1 W.L.R. 1337, 1352.

[11] [1985] A.C. 374, 410.

abuse of power is contrary to law its existence must be for the court to determine.

However, *Coughlan* has created a further complication. In the course of its judgment the Court of Appeal accepted that policy induced expectations fall within the scope of the principle of legitimate expectation; but it did so in somewhat obscure terms. I shall argue that the approach in *Coughlan* may have extended the idea of legitimate expectations beyond its proper bounds; that expectations based on policy should be differentiated from those based on assurances or representations; and that policy based expectations are more satisfactorily analysed as illustrations of the principle of consistency rather than the principle of substantive legitimate expectations.

But before embarking on this exercise, it may be helpful to explain what I mean by the doctrine of legitimate expectation, properly understood.

The nature of a substantive legitimate expectation

A substantive expectation arises where a favourable decision of one kind or another is expected,[12] where the applicant seeks a particular benefit or commodity such as a welfare benefit or licence.[13] The phrase denotes a substantive right, an entitlement that the claimant asserts cannot be denied him.[14] However, the basic concept imports the concept of legitimacy—so the applicant must be reasonably entitled to expect a favourable decision.[15] It is useful when analysing the implications of the doctrine to distinguish between three categories of legitimate expectation.[16]

The first situation arises where a public body makes a *representation* to the claimant (by an express promise or by pursuing a course of action) which it subsequently retracts. This type of legitimate expectation is epitomised by the Inland Revenue cases: *R.* v. *Inland Revenue Commissioners ex p. Preston*[17] in which the House of Lords decided that it would be an abuse of power if the Inland Revenue were to go back on an assurance that it would not investigate certain tax affairs if the taxpayer agreed to

[12] C. Forsyth, "*Wednesbury* protection of legitimate expectation" [1997] P.L. 375.
[13] P. Craig, "Substantive Legitimate Expectations in Domestic and Community Law" [1996] C.L.J. 291.
[14] *R.* v. *Devon County Council ex p. Baker* [1995] 1 All E.R. 73, 88 *per* Simon Brown L.J.
[15] See *A-G of Hong Kong* v. *Ny Yuen Shiu* [1983] A.C. 629 at 636 *per* Lord Fraser: "'legitimate expectations' in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis: see *R.* v. *Criminal Injuries Compensation Board ex p. Lain* [1967] 2 Q.B. 864."
[16] P. Craig and Soren Schonberg, "Substantive legitimate expectation after *Coughlan*" [2000] P.L. 684. In *Legitimate Expectations in Administrative Law* (Oxford 2000) Schonberg identifies a further category of revocation of administrative decisions which I do not propose to discuss.
[17] [1985] A.C. 835.

forgo interest relief which it claimed and to pay monies as capital gains tax; *R.* v. *Inland Revenue Commissioners ex p. MFK Underwriting*[18] in which Bingham L.J. held the Revenue could not withdraw from a representation if this would cause substantial hardship if the conditions for relying on the representation had been fulfilled; *R.* v. *Inland Revenue Commissioners ex p. Matrix Securities*[19] in which the House of Lords decided there was no abuse of power to allow the Revenue to withdraw assurances given by a tax inspector; *R.* v. *Inland Revenue Commissioners ex p. Unilever*[20] in which the Court of Appeal refused to permit the Revenue without prior warning to withdraw a 25 year practice of accepting annual tax refund claims after the statutory time limit had expired.

Secondly, a legitimate expectation may be created where a public body *departs* from a general policy or practice in the circumstances of a particular case. This kind of legitimate expectation was recognised in *R.* v. *Secretary of State for the Home Department ex p. Khan*[21] in which the Court of Appeal would not permit the Home Office to go back on its adoption policy concerning the adoption of family members from abroad; and again in *R.* v. *Secretary of State for the Home Department ex p. Ruddock*[22] where the applicants unsuccessfully argued that their telephones had been tapped in breach of published guidelines.

Thirdly, a legitimate expectation can be established where a public body *replaces* one general policy or practice with a another new policy or practice—although this proposition remains contentious. In *R.* v. *Ministry of Food and Agriculture ex p. Hamble*[23] Sedley J. stated that a change of policy concerning the issue of fishing licences gave rise to an expectation which "has a legitimacy which in fairness outtops the policy choice".[24] By contrast, the Court of Appeal in *R.* v. *Secretary of State for the Home Department ex p. Hargreaves*[25] rejected a claim in which the policy on prisoners' home leave was changed with immediate effect. It took the view that the legitimate expectation the prisoners had was for their case to be considered in the light of whatever the

[18] [1990] 1 W.L.R. 1545.
[19] [1994] 1 W.L.R. 354.
[20] [1996] S.T.C. 681.
[21] [1984] 1 W.L.R. 1337.
[22] [1987] 1 W.L.R. 1482.
[23] [1995] 1 All E.R. 714.
[24] *Ibid.*, at p. 731.
[25] [1997] 1 W.L.R. 906.

current policy was,[26] and went on to hold that the court would only intervene where there was a policy change if the decision to apply the new policy was *Wednesbury* irrational.

The different forms of substantive legitimate expectation are important for the analysis that follows. The distinctions support my contention that policy induced expectations should not properly be regarded as illustrations of the doctrine of legitimate expectations.

What is the proper test for the court to use for deciding whether an expectation should override the public interest?

In *Coughlan*[27] the Court of Appeal explained the court's role in legitimate expectation in these terms:

> [T]he starting point has to be to ask what in the circumstances the member of the public could legitimate expect ... Where there is a dispute as to this, the dispute has to be determined by the court ... This can involve a detailed examination of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.
>
> There are at least three possible outcomes. (a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on *Wednesbury* grounds.[28] This has been held to be the effect of changes in policy in cases involving the early release of prisoners: see *In re Findlay*;[29] *R.* v. *Secretary of State for the Home Department ex p. Hargreaves*.[30] (b) On the other hand, the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require the *opportunity for consultation* to be given unless there is an overriding reason to resile from it[31] in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires. (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not

[26] *Ibid.*, at p. 918. The court applied the dictum of Lord Scarman in *Re Findlay* [1985] A.C. 318, 338 in relation to prisoners affected by a change of parole policy:

> But what was their *legitimate* expectation? ... [T]he 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 feels fit to adopt provided always that the adopted policy is a lawful exercise of discretion conferred on 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.

[27] [2001] Q.B. 213, at paras. 56, 57.

[28] *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223.

[29] [1985] A.C. 318.

[30] [1997] 1 W.L.R. 906.

[31] See *A-G of Hong Kong* v. *Ng Yuen Shiu* [1983] A.C. 629.

> simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied on for the change of policy.[32]

The Court of Appeal[33] went on to state that the third category was likely to be cases where the expectation was confined to a few people, giving the promise or representation the character of a contract.[34] It found[35] that the promise of a home for life came within the third category because of the importance of the promise to Miss Coughlan (underlined by the need to respect her right to a home under the Human Rights Act), the fact that the promise was limited to a few individuals and the fact that the consequences for the health authority of honouring the promise were financial only.

The important passage I have just quoted from the judgment raises at least one question, what is the proper dividing line between the first and third category of legitimate expectation.

Distinguishing between the first and third category of legitimate expectation

The difference between these two types of legitimate expectation as described in *Coughlan* is slightly obscure. To some extent this reflects a decision by the Court of Appeal to be careful to leave the door open for future developments.[36]

Laws L.J in *R.* v. *Secretary for Education and Employment ex p. Begbie*[37] pointed out that both categories involve the deprivation of a substantive benefit. He went on to observe *obiter*:[38]

> [T]he first and third categories explained in the *Coughlan* case are not hermetically sealed. The facts of the case, viewed

[32] [2001] Q.B. 213, at paras. 56, 57 (emphasis in original).

[33] [2001] Q.B. 213, at para. 59.

[34] Nevertheless, as Simon Brown L.J. stressed in *R.* v. *Inland Revenue Commissioners ex p. Unilever* ([1996] S.T.C. 681, 695):

> "Unfairness amounting to an abuse of power" as envisaged in *Preston* and the other Revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power. As Lord Donaldson MR said in *R.* v. *ITC ex p. TSW*: "The test in public law is fairness, not an adaptation of the law of contract or estoppel."

[35] [2001] Q.B. 213, at para. 60.

[36] [2001] Q.B. 213, at para. 71: "Legitimate expectations may play different roles in different aspects of public law. The limits to its role have yet to be determined by the courts. Its application is still being developed in a case by case basis."

[37] [2000] 1 W.L.R. 1115, 1130.

[38] *Ibid.*, at pp. 1130, 1131; see also the remarks of Sedley L.J. at pp. 1133, 1134: "It may be, as Laws L.J. suggests, that the distinction drawn in ... *Coughlan* between the first and third categories of legitimate expectation deserve further examination."

> always in their statutory context, will steer the court to a more or less intrusive quality of review. In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no better position to adjudicate save at the most on a bare *Wednesbury* basis, without donning the garb of the policy-maker, which they cannot wear....
>
> In other cases the act or omission complained of may take place on a much smaller stage, with far fewer players. Here, with respect, lies the importance of the fact in the *Coughlan* case that few individuals were affected by the promise in question. The case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes. In such a case the court's condemnation of what is done as an abuse of power, justifiable (or rather, failing to be relieved of its character as abusive) only if an overriding public interest is shown of which the court is the judge, offers no offence to the claims of democratic power.

In *Begbie* itself a child had been offered a place at an independent school up to 18 under the state funded assisted places scheme. The Labour Party in opposition made a commitment to abolish the scheme but undertook that children already holding places would receive funding. Following the election in 1992, the Labour Party in government decided to continue funding for assisted children in primary schools only until the conclusion of primary schools; but the Secretary of State retained a discretion to entertain applications for a longer period in individual cases. The complaint that the change of policy breached the child's legitimate expectation was dismissed on several grounds.

Laws L.J. in his judgment took the view that the expectation generated in *Begbie* did not lie in the macro-economic field; and concerned a relatively small and identifiable number of individuals. If there had been an abuse of power, he would have granted relief unless an overriding public interest was shown; and none had been demonstrated.[39]

The analysis of Laws L.J. is not entirely satisfactory, not least because he seems to stepped beyond the principles set out in *Coughlan* by regarding the legitimate expectation in *Begbie* as equivalent to that in *Coughlan*.[40] He focuses, in particular, on two

[39] *Ibid.*
[40] *Ibid.*, at p. 1131.

criteria: the *number* of individuals affected by the expectation; and the *nature* of the policy that has created the expectation.

But focusing on the number of individuals affected by the expectation is an uncertain yardstick. If the many children affected by the Labour Party's change of policy on assisted school places qualifies for the third category of expectations in *Coughlan*, then it is not easy to see where the line should be drawn. Thus, in the recent case of *Ng Siu Tong* v. *Director of Immigration*[41] the Hong Kong Court of Final Appeal decided that a legitimate expectation claim could successfully be made by over 1,000 claimants who had relied on *pro forma* replies from the Legal Aid Board which stated that they need not bring an individual claim but could rely on a test case then being heard by the Court.

The second factor identified by Laws L.J. is equally problematic. Although the language of *Coughlan* is far from clear,[42] the critical passage quoted earlier suggests that policy as such should be the decisive factor distinguishing the first from the third category; and a principled justification for this approach is not difficult to formulate. First, it is generally recognised that policy cannot not be applied inflexibly to all cases: hence the rule against fettering a discretion. Secondly, it is an inherent characteristic of policy that it is capable of being changed in the future.[43] Thus, it is one thing for the courts to uphold expectations by imposing a requirement to give in effect advance notice of the new policy;[44] and quite another for the courts to impose a substantial brake on the capacity of public bodies to modify their own policies. Instead, however, Laws L.J. suggests[45] that general policy exemplified by the local government finances cases[46] fall within the first category whereas *Begbie*, in principle, does not.

The difficulties of the analysis are demonstrated by attempting to explain the reasoning or result in *Hargreaves*.[47] The applicant was a prisoner who had signed a "compact" with the prison authorities in which he promised to be of good behaviour in return for an opportunity to apply for home leave. When the compact was

[41] 10 January 2002.
[42] See *e.g.* [2001] Q.B. 213, at para. 82.
[43] As Lord Diplock put it in *Hughes* v. *Department of Social Security* [1985] A.C. 776, 788: "Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government."
[44] *R.* v. *Secretary of State for the Home Department ex p. Khan* [1984] 1 W.L.R. 1337, 1347, *per* Parker L.J.; 1352, *per* Dunn L.J.; *R.* v. *Inland Revenue Commissioners ex p. Unilever* [1996] S.T.C. 681, 690, 691, *per* Sir Thomas Bingham M.R.; 693, 695 *per* Simon Brown L.J.
[45] [2001] 1 W.L.R. 1115, 1130.
[46] *e.g. R.* v. *Secretary of State for the Environment ex p. Hammersmith and Fulham LBC* [1991] 1 A.C. 521.
[47] [1997] 1 W.L.R. 906.

signed, he could apply for home leave after serving one third of his sentence. However, the Home Secretary subsequently decided that the system was being abused; that prisoners were committing offences while on leave; that some were absconding; and that public confidence in the administration of justice was being undermined by prisoners being given leave shortly after being sentenced. A new policy was notified to prisoners and prisoners then became eligible for home leave after serving half their sentence; the applicant himself became eligible for home leave one year after he expected.

The Court of Appealed rejected the argument that the court should apply a fairness test when considering whether it should intervene to force the Home Secretary to abide by the original policy. Hirst L.J.[48] stated:

> "[Counsel] characterised Sedley's J.'s approach as heresy, and in my judgment he was right to do so. On matters of substance (as contrasted with procedure) *Wednesbury* provides the correct test. It follows that while Sedley J.'s actual decision in the *Hamble* case[49] stands, his ratio in so far as he propounds a balancing exercise to be undertaken by the court should in my judgment be overruled."

As Pill L.J. put it:[50]

> Where I cannot agree with [counsel] is in his submission that the court can take and act upon an overall view of the fairness of the respondent's decision of substance. The court can quash the decision only if, in relation to the expectation and in all the circumstances, the decision to apply the new policy in the particular case was unreasonable in the *Wednesbury* sense.... The claim to a broader power to judge the fairness of a decision of substance, which I understand Sedley J. to be making in *R.* v. *MAFF ex p. Hamble* is in my view, wrong in principle.

Peter Gibson L.J. gave a concurring judgment.

The way in which *Hargreaves* is distinguished in *Coughlan* is unconvincing. It is said[51] that the views expressed in relation to *Wednesbury* were *obiter* because the only expectation the prisoners enjoyed was to be considered in terms of whatever policy was in force at the time. However, characterising the effect of the expectation in this way is circular: it does not depend on a construction of the assurance alleged; but is said to arise in some unspecified way from the underlying policy.

[48] *Ibid.*, at p. 921.
[49] [1995] 1 All E.R. 714.
[50] [1997] 1 W.L.R. 906, 924, 925.
[51] [2001] Q.B. 213, at para. 77.

If it is to be argued that expectations arising out of policy can, in principle, be within the third *Coughlan* category; and *Begbie* is one such case, then it is not self evident why *Hargreaves* should be analysed differently.[52]

The value of differentiating between representations and policy

If, on the other hand, it is accepted as a matter of *principle* that policy based expectations cannot amount to a substantive legitimate expectation capable of being overridden only where unfairness results in an abuse of power, then a number of debates about the doctrine of legitimate expectation become easier to analyse.

One issue that generates disagreement is whether the claimant must be subjectively aware of the legitimate expectation he says he has relied on. The English courts have tended to take the view that where a legitimate expectation is based on an assurance or representation a claimant must himself have known the representation and understood it.[53] It is argued that if a claimant does not expect anything, then even if others might expect something, the claimant's legitimate expectation cannot be protected since there is nothing to protect.[54] This view has considerable force in relation to individual assurance cases, which have strong similarities to the principles which apply to estoppel.[55]

On the other hand, if the expectation in question is a general policy or practice, the rationale for this subjective requirement is not so obvious. Those who rely on published guidelines by public bodies are clearly entitled to expect them to be followed. But there are a number of additional reasons why administrators should be duty bound to do adhere to their own policies even whether there is no reliance or even appreciation of the policy.[56] The principle of good administration demands that public bodies adhere to the

[52] See T.R.S. Allan, "Procedure and Substance in Judicial Review" [1997] C.L.J. 246 "In a constitutional state in which the executive is responsible to Parliament for the wise pursuit of public policy, it is surely in guaranteeing the fairness of a policy's application to particular individuals that judicial review finds its primary justification."

[53] In *Lloyd* v. *MacMahon* [1987] 1 A.C. 625, 714 Lord Templeman remarked:

> [Counsel] urged that although the appellants did not request an oral hearing, they were deprived of a "legitimate expectation" of being invited to an oral hearing. [Counsel] does not allege that the appellants in fact expected to be invited to an oral hearing and does not speculate on whether they would have accepted an invitation. [Counsel] submits that a legitimate expectation of being invited to an oral hearing is an objective fundamental right which, if not afforded, results in a breach of law or breach of natural justice which invalidates any decision based on written material. This extravagant language does not tempt me to elevate a catch-phrase into a principle.

See *e.g. R.* v. *Minister of Defence ex p. Walker* [1999] 1 W.L.R. 1209, 1221; *R.* v. *Secretary of State for the Home Department ex p. Zeqiri* The Times, 15 February 2002.

[54] C. Forsyth, "*Wednesbury* Protection of Legitimate Expectation" [1997] P.L. 375.

[55] See, generally, N. Bamforth, "Legitimate Expectation and Estoppel" [1998] J.R. 196.

[56] See generally, Y. Dotan, "Why Administrators should be Bound by their Policies" (1997) 17 O.J.L.S. 23.

policies they promulgate. Equality of treatment requires that public bodies treat like cases equally, *irrespective* of whether a particular claimant's state of mind. Maintaining general rules avoids the danger of an administrator engaging in *ad hoc* decision making which may call into question his impartiality and fairness. And there is no clear reason why should it be fair to treat people differently on the grounds of their knowledge of the policy.[57] As a result, the cases suggest that there is no need for those who rely on assurances based on policy to show they subjectively appreciated that an assurance had been made.[58]

Secondly, once it is acknowledged that policy based expectations can never fall within the third *Coughlan* category, the analysis that follows has the benefit of being consistent with the orthodox administrative law principle that the court cannot gainsay policy decisions except on *Wednesbury* grounds.

Thirdly, confining the principle for overriding policy expectations to *Wednesbury* grounds also means that the approach used is that same as that which applies to the second type of substantive legitimate expectation identified earlier, cases where it is argued that a public body should not depart from a legitimate expectation created by its own policy. Thus, in *R.* v. *Secretary of the Home Department ex p. Gangadeen*[59] the Court of Appeal reasserted that in ordinary circumstances the Home Secretary is obliged to act in accordance with his published policy; and that he had a wide margin of discretion when making his decision which could only be overturned on *Wednesbury* grounds. The Court of Appeal therefore rejected[60] the more interventionist approach favoured by Sedley J. in *R.* v. *Secretary of State for the Home Department ex p. Urmaza*.[61]

[57] R. Singh and K. Steyn. "Legitimate Expectations in 1996: Where now?" [1996] J.R. 17.

[58] See *e.g.* the decision of the High Court of Australia in *Ministry of Immigration and Ethnic Affairs* v. *Teoh* (1995) 128 A.L.R. 353; *R.* v. *Secretary of State for Wales ex p. Emery* [1996] 4 All E.R. 1, 16, 17; and contrast the more complex approach taken by Sedley L.J. in *Begbie* [2000] 1 W.L.R. 1115, 1133.

[59] [1998] 1 F.L.R. 762.

[60] Hirst L.J. at 770 held in favour of "the approach of Auld J. in [*R.* v. *Secretary of State for the Home Department ex p. Ozminnos* [1994] Imm A.R. 287 (where he took the view that it was a matter for the Home Secretary to construe his own policy and to apply it, subject always to the power of the court to intervene on *Wednesbury* grounds)] rather than that of Sedley J. in *Urmaza* in so far as the latter may have tended to suggest that the court's role is now more closely supervisory than hitherto."

[61] [1996] C.O.D. 479, 483 where Sedley J. stated:

> This throws up a fundamental question about the reach of the jurisdiction of a court of judicial review when asked to enforce adherence by the executive to a department policy. There is a coherent line of authority to the broad effect that policy means what it says, and that its meaning can ordinarily be established by the court and the decision-maker be held to it: see *R.* v. *Criminal Injuries Compensation Board ex p. Lain* [1967] 2 Q.B. 864, *per* Diplock L.J. at p. 866; *R.* v. *Criminal Injuries Compensation Board ex p. Schofield* [1971] 1 W.L.R. 926; *R.* v. *Secretary of State for the Home Office ex p. Lancashire Police Authority* [1992] C.O.D. 161; and *Gransden* v. *Secretary of State for the Environment* [1986] J.P.L.

Finally, it is sometimes claimed that the doctrine of legitimate expectations imposes unacceptable constitutional restrictions on the ability of public bodies change its policies. *Coughlan*, it is said, is out of step with the broader constitutional framework because it oversteps the limits between the judiciary and the executive;[62] and because it utilises a highly intrusive standard of review which is out of line with the *Wednesbury* analysis (albeit modified) which is suitable for administrative law cases raising human rights issues.[63]

By contrast, representation legitimate expectation cases do not raise broad constitutional implications. It is difficult to identify any principle which is emperilled where the courts restrain public bodies from reneging on promises of homes for life to elderly residents in a care home.

Policy, legitimate expectations and the principle of consistency

In fact, analytical simplicity could be more readily achieved if expectations generated by policy were explained on some juridical basis other than legitimate expectations. Indeed, the unfairness which results from departures from policy is difficult to defend not so much because of the injustice afforded to particular individuals but because they offend general principles of good administration. The rationale for requiring public bodies to adhere to their policies is therefore probably best explained as an application of the principle of consistency,[64] that consistency creates a presumption that in the ordinary way a public body will follow his own policy,[65] and that inconsistency should be treated as a facet of *Wednesbury* unreasonableness.[66] As Lord Hoffmann observed in *Matadeen* v. *Pointu*:[67]

> "Equality before the law requires that people should be uniformly treated, unless there is some valid reason to treat them differently." Their Lordships do not doubt that such a

519. It will accordingly be subject to the applicable principles of public law. In some cases this means that regard must be had to the policy as a material factor; in other cases, that discretion must not be exercised arbitrarily or partially (which is why policies are needed); in other cases, that policy must not be applied with such rigidity as to exclude consideration of special cases (in other words, so as to forfeit all discretion); and in yet other cases, that effect is to be given to legitimate expectations which policy or practice have generated. These legal controls upon the deployment of discretion and the implementation of policy demonstrate that the court does not limit itself to a bare rationality test.

[62] M. Elliott, "*Coughlan*: Substantive Protection of Legitimate Expectations Revisited" [2000] J.R. 27.

[63] See *e.g. R.* v. *Ministry of Defence ex p. Smith* [1996] Q.B. 517.

[64] See *e.g.* K. Steyn, "Consistency—a Principle of Public Law?" [1977] J.R. 22.

[65] *Per* Sedley J. in *R.* v. *Secretary of State for the Home Department ex p. Urmaza* [1996] C.O.D. 479, citing *Kruse* v. *Johnson* [1898] 2 K.B. 91 and De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, paras. 13–036 to 13–045.

[66] See *e.g. HTV* v. *Price Commission* [1976] I.C.R. 170.

[67] [1999] 1 A.C. 98, 109.

> principle is one of the building blocks of democracy and necessarily permeates any democratic constitution.... [T]reating like cases alike and unlike cases differently is a general axiom of rational behaviour.

Shifting the emphasis away from individualised injustice towards broader administrative considerations places policy induced expectations within a well defined framework which reflects the underlying values in play: the principle of consistency ensures that real weight is given to the policy promulgated whilst acknowledging that a public body has a right to alter policy provided it does not act irrationally.

Conclusion

The principle of legitimate expectation has evolved a very long way since it apparently emerged out of Lord Denning's head[68] in *Schmidt* v. *Secretary of State for Home Affairs*,[69] and the Court of Appeal in *Coughlan* has provided principled answers to a number of important questions. However, there is also a danger that *Coughlan* has led to the doctrine of legitimate expectations becoming overly extended.

Greater rigour would be achieved if expectations based on policy were taken outside the remit of legitimate expectation; and explained as manifestations of the principle of consistency. It is often said in legitimate expectation cases that the first task is to identify why an expectation is legitimate. However, the logically prior question is to decide whether the promise made by a public body can properly be characterised as a legitimate expectation in the first place.

[68] C. Forsyth, "The Provenance and Protection of Legitimate Expectations" [1998] C.L.J. 238, 241 note 17, which quotes Lord Denning in a letter to the author writing he felt "sure it came out of my own head and not from any continental or other source".
[69] [1969] 2 Ch. 149.