unwillingness to pay plus assessment as to ability to pay could contribute to delay in arranging after-care, resulting in continued loss of liberty. In contrast, the majority of the precedents concerning scarce resources, for example in education, nursing care or accommodation, relate to potential recipients of services who positively seek those services and are not at risk of continued detention due to non-compliance. They are of course at risk of other losses but not of that very English freedom, liberty.

Lord Steyn's analysis identifies the section 117 duty, in contrast to other welfare services provided by public authorities, as incontrovertibly free-standing. Why then did public authorities defend charges for section 117 services when explicit advices to the contrary exist and the relevant statutory provisions are not ambiguous? The answer must lie in the familiar attempt by public authorities to conserve their scarce financial resources. When this issue has arisen before, the courts have either decided in favour of the authority and limited access to necessary services or, as in *ex p. Tandy*, by narrow interpretation of needs and assessment, carved out niches in which authorities must provide necessary services. However, in *Stennett*, the court was not constrained by its traditional refusal to question resource allocation policies because the question before it was one of raising revenue, not spending or allocating resources. Nonetheless, Lord Steyn goes beyond a simple exposition of statutory interpretation to give a strong defence of the needs of the vulnerable. Sadly however, given the specific statutory provisions relevant to this case, this defence is unlikely to be extended to other vulnerable groups. Thus cases representing the full spectrum of welfare needs are likely to parade before the courts until the problem of scarce resources is addressed, not by the courts, but by the proper forum: Parliament.

ANNE SCULLY

THE END OF ESTOPPEL IN PUBLIC LAW?

THE prospective buyers of a waste treatment plant ("Reprotech") wished to use the site to generate electricity from the waste produced. They asked the Chief Planning Officer of the local council whether this would be a material change of use, for which planning permission would be required, and were assured that it would not. After they bought the land, the council insisted that the Officer lacked authority to make such a determination and required a formal application for planning permission; this was met by local

opposition. Must the buyers make such an application and suffer a reduction in the value of the land if the application is unsuccessful, or should the public bear the consequences of the unauthorised act of the Officer? This was one of the questions facing the House of Lords in *R.* v. *East Sussex County Council, ex p. Reprotech (Pebsham) Ltd.* [2002] UKHL 8, [2002] 4 All E.R. 58. Their Lordships denied that there had been a "determination" for the purposes of the Town and Country Planning Act 1990, s. 64, upon which Reprotech sought to rely, but the obiter discussion of the proper role of estoppel in public law is the focus of this note.

On one view, based on the decision of Denning J. in *Robertson* v. *Minister of Pensions* [1949] 1 K.B. 227, the council ought to be estopped in the same way as a private party, since the loss suffered by the private party is the same regardless of the nature of the representor it seeks to estop. Furthermore, in *Lever Finance* v. *Westminster London Borough Council* [1971] 1 Q.B. 222, 231 Lord Denning M.R. pointed to the difficulties faced by individuals in discovering the lack of actual authority of the representor.

An alternative view is that to give effect to the decisions of officers made beyond their powers would allow an expansion of the powers conferred by the legislature, contrary to the ultra vires principle (see *Minister of Agriculture and Food* v. *Matthews* [1950] 1 K.B. 148, 154). This stricter view forms the basis of the leading Opinion of the United States Supreme Court in this area, *Federal Crop* v. *Merrill* 332 U.S. 380 (1947).

The impossibility of reconciling such divergent views is evident from the decision of the Court of Appeal in *Western Fish Products* v. *Penwith District Council* [1981] 2 All E.R. 204. Megaw L.J. held that the general principle was that estoppel had no place in public law, but that two exceptions to this existed: first, where the public authority had delegated the making of a particular decision to an officer; and secondly, where the public authority waived a procedural requirement in its decision-making process. It has been doubted whether the first exception is an example of estoppel at all, and the scope of the second exception is unclear. In particular, the separation of procedural and substantive requirements has been questioned in the United States (see *Schweiker* v. *Hansen* 450 U.S. 785 (1981)).

While it is clear that their Lordships did not approve of the *Lever* case and its kin, it is unclear whether they wished to exclude estoppel from public law entirely. On the one hand, Lord Hoffmann (with whom all their Lordships agreed) and Lord Mackay remarked that it was time for public law to "stand upon its own two feet". The Court of Appeal in *South Bucks. District*

Council v. *Flanagan* [2002] EWCA Civ 690, [2002] 1 W.L.R. 2601 has since affirmed that there is "no longer a place for the private law doctrine of estoppel in public law". However, instead of arguing from the ultra vires principle, their Lordships in *Reprotech* preferred the view that there is a public interest in ensuring that the detailed planning procedures involving public consultation should not be circumvented, regardless of the injustice suffered by the applicant.

The arguments for this position are strong in planning law: the advisory role of planning officers and the desirability of public consultation are important public interests, while the private party is likely to have legal advice, and so the burden of checking the scope of the officer's authority is light. However, their Lordships' argument leaves open the possibility that, in some cases, the balance of the public interest might favour giving effect to an estoppel. For example, where the private party claims a social security benefit, as in *Robertson*, the harm suffered by the public is more diffuse and the individual is less likely to have been legally advised. The experience in the United States, where there may remain a place for estoppel in "extreme circumstances", perhaps in cases of "affirmative misconduct", may be useful in considering the scope of this reservation. Since both *Reprotech* and *South Bucks.* were planning law cases, it seems that the possibility of relying upon estoppel arguments in other areas remains, with the attendant difficulties of such a balancing of public interests.

Reprotech is also an interesting development in the relationship between the doctrines of legitimate expectations and estoppel. The orthodox conception of the relationship was that estoppel operated in cases involving unauthorised representations, whilst legitimate expectations arguments were reserved for authorised representations. Lord Hoffmann remarked that the doctrines were therefore only "analogous". However, His Lordship then explained that, in the past, estoppel filled a gap in the protection of citizens that legitimate expectations could now fill alone. This remark is premised upon an overlap of the doctrines, and it is evident from recent cases that the doctrines, and the tests for each, are regarded as interchangeable (see *South Bucks.*). This is interesting for three reasons.

First, it assumes that reliance, and hence knowledge, is required to found a legitimate expectation; this is questionable if legitimate expectations are conceived as objective constructs designed to uphold principles of good administration: see de Smith, Woolf and Jowell, *Principles of Judicial Review* (1999), para. 7–058. Secondly, the reliance upon legitimate expectations in

South Bucks., where the relevant officer had only ostensible authority, suggests that factual scenarios that were once argued using estoppel might now be argued using legitimate expectations. Hence, *Reprotech* may not effect as significant a curtailment of estoppel arguments as their Lordships contemplated. Thirdly, the case requires a re-evaluation of the theoretical justifications for giving effect to legitimate expectations. In particular, one of the main justifications—the moral force of a lawful promise made by a public authority—is less compelling in the case of unauthorised representations, and this ought now to be considered when deciding whether an expectation is "legitimate". If legitimate expectations are no longer restricted to cases concerning *authorised* representations made by public authorities, a new rationale for the broader doctrine will be required. Such justification might be found, for example, by focusing upon the *public* interest in certainty when dealing with public authorities, rather than the *private* interest of the individual in the particular case. Whilst the clarification of the role of estoppel in public law is helpful, this encouragement to reassess the theoretical justification for the legitimate expectations doctrine will be the most useful legacy of *Reprotech*, and will be essential for the doctrine to mature in its new field of application.

SIMON ATRILL

ARBITRARY DETENTION IN GUANTANAMO BAY: LEGAL LIMBO IN THE LAND OF THE FREE

THE dramatic terrorist attacks in the United States in September 2001 all too clearly illustrated the threat posed by international terrorism. Understandably, politicians are provoked into taking tough measures to protect their citizens from terrorist enemies. In times of danger the civil liberties implications of such measures can easily play second fiddle to security needs. Indeed, we need look no further in our jurisprudence than the discredited majority decision in *Liversidge* v. *Anderson* [1942] A.C. 206. Recently, Lord Woolf has warned that "the mistakes which have been made in the past, in relation to internment of aliens at the outbreak of war, should not be forgotten" (*A* v. *Secretary of State for the Home Department* [2002] EWCA Civ 1502 at para. [9]).

The Court of Appeal's judgment in *R. (on the application of Abbasi)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 addresses this tension between the