THE
CAMBRIDGE LAW JOURNAL

VOLUME 59, PART 3 NOVEMBER 2000

CASE AND COMMENT

HOUSE OF LORDS DECISIONS

NOTES on the Court of Appeal decisions in the cases listed below appear in earlier numbers of the *Journal*. Appeals to the House of Lords in these cases have now been disposed of as shown:

Attorney-General v. *Blake*, noted [1998] C.L.J. 258. Appeal dismissed: [2000] 3 W.L.R. 625.

Hamilton v. *Al Fayed*, noted [1999] C.L.J. 471. Appeal dismissed: [2000] 2 W.L.R. 609.

Jolley v. *Sutton London Borough Council*, noted [1999] C.L.J. 12. Appeal allowed: [2000] 1 W.L.R. 1082.

McAlpine Construction Ltd. v. *Panatown Ltd.*, noted [1998] C.L.J. 250. Appeal allowed: [2000] 3 W.L.R. 946.

Phelps v. *Hillingdon London Borough Council*, noted [1999] C.L.J. 270. Appeal allowed: [2000] 3 W.L.R. 776.

R. v. *Smith*, noted [1999] C.L.J. 7. Appeal dismissed: [2000] 3 W.L.R. 654.

LEGITIMATE EXPECTATION: THE SUBSTANTIVE DIMENSION

THE need to redress the inequality of power between the citizen and the State, which lies at the heart of public law, is illustrated nowhere more clearly than in the facts of *R.* v. *North and East Devon Health Authority, ex p. Coughlan* [2000] 2 W.L.R. 622. As a result of her severe disability Pamela Coughlan was, for many years, looked after as a hospital in-patient. In 1993, however, she agreed to move to a purpose-built care facility on the strength of the respondent's promise that it would be her "home for life"; yet, only five years later, the health authority decided to close the new home, citing financial reasons. That the applicant possessed a

https://doi.org/10.1017/S0008197300210209 Published online by Cambridge University Press

legitimate expectation which would be breached by closure of the home was not in doubt. The difficult question was how the expectation could be protected. Courts have long been willing to enforce procedural promises and to safeguard expectations of substantive benefits by requiring the adoption of a fair procedure (typically consultation) before the benefit is denied. *Coughlan*, however, makes it clear that courts may go further than this by substantively protecting substantive expectations.

This is a sensitive issue, given its implications for the autonomy of executive bodies. Reviewing courts have traditionally attempted to preserve agency freedom by focusing primarily on how decisions are made rather than on their content. This vision of how judges and decision-makers ought to relate to one another, which English administrative law has long embodied, gave rise to the *Wednesbury* principle which heavily circumscribes the courts' role: only if the content of the decision is manifestly unreasonable does *Wednesbury* sanction judicial intervention.

Prior to *Coughlan* it appeared that the doctrine of legitimate expectation fitted comfortably into this framework. Provided that they acted rationally, public authorities were free to determine where the balance lay between the policy factors pointing towards frustration of the expectation and the unfairness which would thereby be occasioned to the representee (see, *e.g., Richmond-upon-Thames L.B.C.* [1994] 1 W.L.R. 74, 94, *per* Laws J.; *Hargreaves* [1997] 1 W.L.R. 906, 921, *per* Hirst L.J.). *Wednesbury* therefore supplied a wide zone of discretion within which agency action was immune from substantive review.

Coughlan, however, does not confine the courts' role thus. Lord Woolf M.R., giving the judgment of a Court of Appeal consisting also of Mummery and Sedley L.JJ., adopted a tripartite categorisation of legitimate expectation cases. First, the applicant may be entitled to expect merely that the executive will "bear in mind its previous policy before deciding whether to change course"; here, the court may intervene only if departure from the policy is irrational. Secondly, the expectation may relate simply to procedure, in which case the court will require the relevant procedure to be followed. Thirdly, however, as in *Coughlan* itself, the applicant may be entitled to expect that she will receive a substantive benefit or outcome. In such cases, "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 upon for the change of policy". On the facts the court concluded that the public interest arguments advanced by the respondent were insufficient to justify breach of the "home for life" promise.

https://doi.org/10.1017/S0008197300210209 Published online by Cambridge University Press

This is clearly inconsistent with the view that *Wednesbury* delimits the courts' role. Indeed, the standard of review applied in *Coughlan* resembles the interrelated concepts of proportionality and objective justification, which are commonplace in the jurisprudence of the European Court of Human Rights, much more closely than the unreasonableness doctrine. Although the Court of Appeal asserted that this approach was supported by authority, this is doubtful. While previous cases clearly envisaged that expectations could be afforded a measure of substantive protection (see, *e.g., Liverpool Taxi* [1972] Q.B. 299, 308, *per* Lord Denning M.R.; *Preston* [1985] A.C. 835, 866–867, *per* Lord Templeman; *M.F.K. Underwriting* [1990] 1 W.L.R. 1545, 1568, *per* Bingham L.J.), they did not squarely confront the *standard* of protection to be conferred: specifically, they did not clearly determine whether *Wednesbury*, or a more intrusive form of review, ought to apply.

However, outside the particular context of legitimate expectation, there is clear guidance concerning the standard of substantive review which has traditionally been considered appropriate. Decisions such as *Brind* [1991] 1 A.C. 696 and *Smith* [1996] Q.B. 517 supply detailed explanations both of the orthodox view that reviewing courts are constrained by *Wednesbury* and of the constitutional vision of the relationship between judges and decision-makers on which that model of substantive review is founded. In departing from that ethos without offering any principled constitutional justification for doing so, *Coughlan* is surprising but not unique. Cases such as *Witham* [1998] Q.B. 575 (noted (1997) 56 C.L.J. 474) and *Simms* [1999] 3 W.L.R. 328 (noted (2000) 59 C.L.J. 3) also exemplify a standard of substantive scrutiny which is more rigorous than that which *Wednesbury* commends, while making little attempt to explain why the strictures of cases such as *Brind* and *Smith* need not be adhered to.

In one sense this is very unsatisfactory. Since attachment to *Wednesbury* rests upon a particular constitutional ethos concerning the courts' role and their relationship with the executive, any alteration in the standard of curial intervention must logically reflect a judicial conviction that the underlying constitutional dynamics warrant such change. It is self-evidently desirable that such matters should be articulated openly by the courts. In another sense, however, the legitimacy of review which transcends *Wednesbury* scrutiny is not such a live issue as once it was. Irrespective of whether it has, to date, been appropriate for the courts to engage in such review, the Human Rights Act 1998 places the matter beyond doubt. In taking account of the Strasbourg Court's jurisprudence, as section 2 entitles them to do, English

https://doi.org/10.1017/S0008197300210209 Published online by Cambridge University Press

courts will inevitably shift from *Wednesbury* to proportionality review in cases concerning the Convention rights. Since the 1998 Act thus clearly establishes the legitimacy of high intensity review, the manner in which the courts are likely to engage in such review becomes the central issue.

In this regard, the Court of Appeal's decision in *R.* v. *Secretary of State for Education and Employment, ex p. Begbie* [2000] 1 W.L.R. 1115 is of interest. The applicant asserted a legitimate expectation that the Secretary of State would, in his discretion, provide her with continued assistance with her independent school fees following the abolition of the assisted places scheme; this was therefore a *Coughlan* category three claim of entitlement to a substantive benefit. *Begbie* is interesting for two reasons.

First, the court emphasised that the gateway through which those seeking to establish a legitimate expectation must pass is relatively narrow: the applicant failed because she relied, in part, on pre-election statements issued by the Labour Party which, said the court, could not give rise to a legitimate expectation. Moreover, to have required the Minister to act consistently with the asserted expectation would have frustrated the clear policy of the enabling legislation. As Peter Gibson L.J. pointed out, "any expectation must yield to the terms of the statute". Threshold considerations such as these assume a heightened relevance now that *Coughlan* has established that, once the threshold is crossed, a high level of review may apply which, in turn, can impact substantially on executive freedom. The courts will need to approach the Convention rights with similar vigilance, given that they, too, form the gateway to a potentially intrusive mode of judicial review.

Secondly, Laws L.J. emphasised (*obiter*) that, even when an applicant establishes a legitimate expectation, intensive *Coughlan*-style review may well be inappropriate. In particular, he offered a more sophisticated and nuanced analysis than the tripartite categorisation favoured in *Coughlan*, opining that the first and third *Coughlan* categories—which provide respectively for low-intensity *Wednesbury* and high-intensity proportionality review—are "not hermetically sealed". Rather, substantive review operates on a sliding scale which embraces many different levels of judicial intervention, with the standard of review being determined by the specific features of the case. Thus, if the matter in question lies in the "macro-political field", raises "wide-ranging issues of general policy" or is likely to have "multi-layered effects" which substantially reduce the government's freedom to formulate policy, a less intrusive form of review is called for.

Although, according to *Coughlan*, such matters are relevant to

https://doi.org/10.1017/S0008197300210209 Published online by Cambridge University Press

the categorisation of a case, Laws L.J.'s analysis is more appealing. Just as *Wednesbury* is a catholic, not a monolithic, principle, so proportionality conceals a variety of levels of intervention. Moreover, although *Wednesbury* and proportionality constitute distinct modes and levels of substantive review, in the final analysis they are merely different points on a single continuum of judicial intervention rather than wholly distinct species of review. *Begbie* therefore places *Coughlan* in context. Whereas the latter establishes the possibility of high intensity review in expectation cases, the former emphasises that such curial scrutiny merely represents one end of a spectrum which embraces many different shades of substantive review.

In itself, this conclusion is important to our understanding of the doctrine of legitimate expectation. However, it also has a wider resonance. The approach to substantive review advocated by Laws L.J. in *Begbie* highlights the fact that, just because the Human Rights Act places the proportionality test at the disposal of English courts, such an intrusive form of review will not be appropriate in all fundamental rights cases. Consequently, debate about whether the Act will mark the demise of *Wednesbury* is ultimately arid. The rationality and proportionality doctrines are not competitors that must be chosen between; they are, rather, complementary modes of substantive review which the courts will deploy as circumstances require. In this sense, *Coughlan* and *Begbie*, read together, are significant not only in the field of legitimate expectation, but also as a wider blueprint for sensitive judicial deployment of the new tools of substantive review which are now at the disposal of English courts.

MARK ELLIOTT

CONSTRAINING ARREST FOR BREACH OF THE PEACE

GIVEN that it was no more than a decision of the Divisional Court, and a pre-War decision at that, the case of *Duncan* v. *Jones* [1936] 1 K.B. 218 has exercised a remarkably enduring influence. The case appeared to give the police enormous operational discretion in dealing with actual and prospective breaches of the peace. When a constable reasonably apprehended a breach of the peace, he could take steps (arguably, only reasonable steps) to prevent it or its recurrence. This disarmingly simple formula made it very difficult to challenge, let alone control, the way in which the police

https://doi.org/10.1017/S0008197300210209 Published online by Cambridge University Press