

**“LEGITIMATE EXPECTATION” - A SOUND  
FOUNDATION IN MALAYSIA —  
J.P. BERTHELSEN V. DIRECTOR-GENERAL  
OF IMMIGRATION, MALAYSIA & ORS\***

No one would be happier than Lord Denning to find that the seed of a doctrine which he sowed in *Schmidt and Another v. Secretary of State for Home Affairs*<sup>1</sup> would strike strong roots not only in England but also in other countries like Australia, India, Hong Kong, Canada and Malaysia. The plant is hardly eighteen years old but it has spread over a large part of the globe and with the speed of development, it may result into a well entrenched principle of administrative law.

In *Schmidt's* case, the question arose whether there was a duty to give an alien an opportunity of being heard before a decision was made refusing an application for an extension of permission to remain in the United Kingdom. It was held that *Schmidt* had 'no right' and 'no legitimate expectation' of being allowed to stay. Moreover, *Schmidt* had had an opportunity of making representations and so he was not treated unfairly. Lord Denning made a distinction between a case where a residence permit has expired and a case where a residence permit is revoked before its expiry date. Whereas in the former there is no legitimate expectation, in the latter there is. In his own words:

“If his permit is revoked before the time limit expires, he ought, I think to be given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted time. Except in such a case, a foreign alien has no right ... and, I would add, no legitimate expectation ... of being allowed to stay. He can be refused without reasons given and without a hearing.”

\* [1987] 1 MLJ 134.

<sup>1</sup>[1969] 2 Ch 149.

<sup>2</sup>*Id.* at 171.

It is interesting to note that the idea of 'legitimate expectation' came by way of elucidation of the holding in *Ridge v. Baldwin*.<sup>3</sup> Lord Denning observed:

"The speeches in *Ridge v. Baldwin* [1964] A.C. 40 show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends 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."<sup>4</sup>

It appears that Lord Denning was just clarifying the ratio of *Ridge v. Baldwin*, probably quite unaware of the fact that his elucidation would give rise to what is popularly known as the doctrine of "legitimate expectation", though some call it as "reasonable expectation", "well-founded expectation", "natural expectation", "settled expectation", "understanding" and simply "expectation".<sup>5</sup>

It has opened a new vista in Administrative law in relation to *audi alteram partem* rule and thus widened its application. Being based on human psychology, it is highly susceptible to various interpretations and therefore, it contains a great potency for expansion on the one hand and for flexibility on the other. Only the future development of law on it would show how much it could be made a serviceable tool to meet the ends of justice in various situations, particularly when the situations in which a hearing must be given still remain more or less unclassifiable.

Lord Upjohn had observed in *Durayappah v. Fernando*<sup>6</sup> that it would be wrong to attempt to give an exhaustive classification of the cases where the principle of *audi alteram partem* should be applied. After observing that no general rule can be laid

<sup>3</sup>[1964] A.C. 40.

<sup>4</sup>*Schmidt & Anor. v. Secretary of State for Home Affairs* [1969] 2 Ch. 149 at 171.

<sup>5</sup>Johnson, G., "Natural Justice and Legitimate Expectation in Australia" (1985) 59 A.L.J. p. 33 at 43.

<sup>6</sup>[1967] 2 A.C. 337 at 349.

down in regard to *audi alteram partem* rule, his Lordship enumerated three matters which must be borne in mind in considering whether the principle should be applied or not. These were: (a) the nature of the property, the office held, the status enjoyed or the services to be performed by the complainant of injustice; (b) in what circumstances or upon what occasions was the person claiming to be entitled to exercise the measure of control entitled to intervene; and (c) upon proving the right to intervene what sanctions in fact was the latter entitled to impose on the complainant. It was upon the consideration of all these matters that a court could hold whether a hearing should be given or not. These are very broad matters and ultimately it is the judge who forms his opinion. Schmidt's case amplifies the main ground of consideration by specifying an item, namely, legitimate expectation.

The doctrine of "legitimate expectation" was well elucidated and expounded in *A.G. of Hong Kong v. Ng Yuen Shiu*<sup>7</sup> by the Privy Council. It would be in order to set out the facts of this case in somewhat details to see a situation of "legitimate expectation".

The applicant entered Hong Kong from Macau illegally in 1967. In 1976, the authorities passed a removal order against him to remove him to Macau. In April 1976, he re-entered Hong Kong illegally. To begin with, he was an industrial worker but by 1980, he had become part owner of a small garment factory. On October 28, 1980, a group of illegal immigrants who had entered from Macau submitted a petition to the Governor of Hong Kong outside Government House where a senior immigration officer announced that the illegal immigrants from Macau would be treated in accordance with procedures for illegal immigrants from anywhere other than China, that they will be interviewed in due course and each case would be treated on its merits, with no guarantee that they may not be subsequently removed. The applicant was not present in the gathering but he saw a television programme about the subject in the evening.

<sup>7</sup>[1983] 2 A.C. 629.

Thereafter the applicant was called for an interview where he was asked to reply to a question put to him. The applicant wanted to present humanitarian grounds for consideration of the immigration authorities, in particular, that he was not a worker but a partner. But the interviewing officer did not give him any opportunity to say anything more than the reply to his question. The applicant was detained after the interview on October 29 until October 31 on which day a removal order was passed against him.

The applicant's appeal to the Immigration Tribunal was dismissed without hearing him. Then he applied for a writ of *habeas corpus* and he was released on bail on November 6. The applicant applied to the High court which quashed the writ of *habeas corpus* and refused the application for *certiorari* and prohibition but the removal order was to stay on condition that the applicant's appeal from the decision was entered within seven days. The Court of Appeal allowed his appeal in part, granting him an order of prohibition against the Director of Immigration prohibiting him from executing the removal order of October 21, 1980, before an opportunity had been given to the applicant of putting all the circumstances of his case before the director. The Attorney General appealed to the Privy Council against the order and the applicant cross-appealed on the issue of whether he was an illegal immigrant. As no oral arguments were submitted, the Board expressed no opinion on this question. The Board answered the two questions put to it. First, whether an alien who enters Hong Kong illegally has, as a general rule, a right to a hearing, conducted fairly and in accordance with the rules of natural justice before a removal order is made against him. The second question was whether a person is entitled to a fair hearing before a decision adversely affecting his interests is made by a public official or body, if he has a "legitimate expectation" of being recorded such a hearing. The Board replied in the negative to the first question but in the affirmative to the second.

Referring to *Salemi v. Muckellar*,<sup>8</sup> the Board observed that Barwick C.J., construed the word "legitimate" as expressing the

<sup>8</sup>(1977) 137 C.L.R. 396.

concept of "entitlement or recognition by law" and thus adding little, if anything, to the concept of right. The Board made it explicit by observing that the word "legitimate" in this expression falls to be read as meaning reasonable. "Accordingly, legitimate expectations" in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis."<sup>9</sup> The Board reinforced this conclusion by reference to *Reg. v. Board of Visitors of Hull Prison, Ex parte St. Germain*,<sup>10</sup> where it was held that a prisoner is entitled to challenge, by judicial review, a decision by a prison board of visitors, awarding him loss of remission of sentence, although he has no legal right to remission, but only a reasonable expectation of receiving it. Also the Board cited from *Reg. v. Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operator's Association*.<sup>11</sup>

The principle that if a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties but it does not mean that a corporation can give an undertaking and break it as they please. In fact, so long as the performance of the undertaking is compatible with their public duty, the corporation must honour it.<sup>12</sup> The Court observed further:

"Their Lordships see no reason why the principle should not be applicable when the person who will be affected by the decision is an alien, just as much as he is a British subject. The justification for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration

<sup>9</sup>[1983] 2 A.C. p. 636.

<sup>10</sup>[1979] 1 W.L.R. 1041.

<sup>11</sup>[1972] 2 Q.B. 299.

<sup>12</sup>*Id.* at 638.

that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct."<sup>13</sup>

The Board held that the above principle was applicable to the Government of Hong Kong in that the government did not fulfil its undertaking to the applicant, along with other illegal immigrants, that each case would be considered on its merits. In this case the applicant was not given the opportunity to explain the humanitarian ground to an official of the Immigration Department at the time he was interviewed.

The doctrine of "legitimate expectation" being well expounded and sanctified in *A.G. of Hong Kong v. Ng Yuen Shiu*, the question arose in *J.P. Berthelsen v. Director General of Immigration, Malaysia & Ors.*,<sup>14</sup> whether the same should be adopted in Malaysia. The Supreme Court considered the question and opted for its application. Abdoolcader S.C.J., who delivered the judgment of the Court, traced the history of the development of the doctrine of "legitimate expectation", explaining some of the cases which gave rise to some confusion as to the meaning and nature of "legitimate expectation". In a short but clear judgment, Abdoolcader S.C.J. presented an excellent analysis of the situations in which the doctrine is applicable. The facts of *Berthelsen's* case were that Berthelsen, a citizen of the United States of America, was a staff correspondent of the *Asian Wall Street Journal*. He was granted an employment pass for a period of two years which was to expire on November 2, 1986. But on September 26, 1986, he was served with a notice cancelling his employment pass forthwith under Regulation 19 of the Immigration Regulations, 1963. He was issued at the same time a special pass to remain in the country up to 3 p.m. on September 28, 1986 — this date was later on extended up to October 1, 1986. The notice of cancellation recited that the respondent was

<sup>13</sup>*Id.* at

<sup>14</sup>[1987] 1 M.L.J. 134.

satisfied that the appellant had contravened or failed to comply with the Immigration Act, 1963 and the Regulations, and that his presence in the Federation was prejudicial to the security of the country. The appellant's application for an order of *certiorari* and prohibition was rejected by the High Court. Therefore the appellant left the country on that day but lodged an appeal to the Supreme Court. The main question considered by the Supreme Court was whether the appellant should have been afforded an opportunity to be heard before his pass was cancelled.

The Court adopted Lord Denning's view in *Schmidt's*<sup>15</sup> case that an administrative body is bound to give a person affected by its decision an opportunity of making representation, if, although lacking any right or interest, that person possesses some "legitimate expectation" of which it would not be fair to deprive him without hearing what he has to say.

In the circumstances of the case in hand the court held that the appellant was entitled to a hearing as he had legitimate expectation to stay in the country until his pass expired. Of course, after the date of expiry of the pass, the person would have no legitimate expectation or right to stay in the country. The Court observed:

"The position in the present appeal is wholly different: the appellant was lawfully in the country under the sanction of an employment pass validly issued for a stipulated period, and he clearly had a legitimate expectation to be entitled to remain in this country at least until the expiry of the prescribed duration, and any action to curtail that expectation would in law attract the application of the rules of natural justice requiring that he be given an opportunity of making whatever representations he thought necessary in the circumstances."<sup>16</sup>

<sup>15</sup>[1969] 2 Ch. 149.

<sup>16</sup>[1987] 1 M.L.J. 134 at 137.

In adopting the doctrine of legitimate expectation, the Supreme Court purged it of some confusion which arose in Australia. Barwick C.J. after expressing doubt as to the extent of the doctrine held that the legitimacy of the doctrine depended upon the legality. In his words:

"No matter how far the phrase may have been intended to reach, at its centre is the concept of legality, that is to say it is a lawful expectation which is in mind. I cannot attribute any other meaning in the language of a lawyer to the word legitimate than a meaning which expresses the concept of entitlement or recognition by law. So understood, the expression probably adds little, if anything, to the concept of a right."<sup>17</sup>

Stephen J. in the above judgment denied any requirement of an enforceable legal right as a foundation of the expectation. He took the view that the concept of expectation was an extension of interests beyond mere property rights which should be protected by natural justice.

The Privy Council also took a similar view as did Stephen J. Lord Fraser of Tullybelton observed:

"Accordingly 'legitimate expectations' in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis: See *Reg. v. Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864. So it was held in *Reg. v. Board of Visitors of Hull Prison, Ex parte St. Germain (No 2)* [1979] 1 W.L.R. 1041 that a prisoner is entitled to challenge, by judicial review, a decision by a prison board of visitors, awarding him loss of remission of sentence, although he has no legal right to remission, but only a reasonable expectation of receiving it."<sup>18</sup>

It is clear that "legitimate expectation" refers to an expectation which is not covered by law or which is not recognised by law

<sup>17</sup>(1977) 137 C.L.R. 396 at 404.

<sup>18</sup>[1983] 2 A.C. 629 at 636.



because if it is confined to any legal interests on legally enforceable interests, it loses its meaning as such interests already require the observance of the principles of natural justice according to the *Durayappah* holding. The purpose of the doctrine seems to be that if an interest is not legally protected, still the holder of the interest should be given an opportunity of hearing provided he has a legitimate expectation of it. It is for the court to determine whether the situation is such as can be characterised as 'legitimate expectation' or not. Of course, the value judgments of the judge concerned would come into play and ultimately it turns out to be a question of judicial policy. The doctrine keeps the door open for an interest to be accorded a hearing if there is legitimate expectation on the part of the holder of it. The pan of 'legitimate expectation' would expand or contract depending upon the values, policies and standards which the judges may choose to apply. "Legitimate expectation" is a label that is fixed on a situation which is approved as such by the judge and the approval may proceed on value judgments, public policy or considerations of various sorts.

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