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THE DOCTRINE OF SUBSTANTIVE LEGITIMATE
EXPECTATION: THE SIGNIFICANCE OF *NG SIU TUNG*
AND *OTHERS V DIRECTOR OF IMMIGRATION*



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In Ng Siu Tung and Others v Director of Immigration, the Court of Final Appeal delivered a landmark judgment, holding that several representations made by the Hong Kong Special Administrative Region Government in the long-running right of abode saga had created substantive legitimate expectations in certain classes of claimants, and the failure of the Government to honour those representations amounted to an abuse of power. As a result, the removal orders were quashed and cases were directed to the Immigration Department for reconsideration. The decision stands as the first authority approving and applying the doctrine of substantive legitimate expectation at the final appellate court level in any common law jurisdiction. This article critically examines the reasoning of the judgment and the impact of the doctrine on the development of administrative law.

Introduction

The Court of Final Appeal's (CFA) decision in *Ng Siu Tung and Others v Director of Immigration* is important in several aspects.¹ It brought an end to the long-running right of abode saga which dates back to the controversial decision in *Ng Ka-Ling and Others v Director of Immigration*.² That case led the Government of the Hong Kong Special Administrative Region (HKSAR) to seek an interpretation of the Basic Law from the Standing Committee of the National People's Congress (NPCSC) and brought Hong Kong to a constitutional crisis.³ *Ng Siu Tung* is also a landmark case in constitutional law on the

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¹ [2002] 1 HKLRD 561.

² [1999] 1 HKLRD 315.

³ The Interpretation by the NPCSC of Arts 22(4) and 24(2)(3) of the Basic Law of the HKSAR of the PRC, adopted by the Standing Committee of the Ninth National People's Congress at its Tenth Session on 26 June 1999.

proper interpretation of Article 158 of the Basic Law of the HKSAR, adding another valuable precedent to Hong Kong's short constitutional history. It is in the field of administrative law, however, that the case is of greatest significance and novelty – not only in the jurisprudence of Hong Kong but that of the Commonwealth – and it is on this aspect of the case that this article focuses.

Ng Siu Tung is the first authority approving *and* applying the doctrine of substantive legitimate expectation at the final appellate court level in any common law jurisdiction. Before discussing the actual decision itself, it is necessary to examine the meaning of the doctrine and its evolution from a purely procedural to its present substantive form.

The Doctrine of Substantive Legitimate Expectation

The Meaning of Substantive Legitimate Expectation

Li CJ in *Ng Siu Tung* summarised the doctrine succinctly:

“The doctrine recognizes that, in the absence of an overriding reason of law or policy excluding its operation, situations may arise in which persons may have a legitimate expectation of a substantive outcome or benefit, in which event failing to honour the expectation may, in particular circumstances, result in such unfairness to individuals as to amount to an abuse of power justifying intervention by the court.”⁴

Hence, for the doctrine to operate so as to accord substantive benefits to claimants, the precondition is the existence of a “legitimate expectation”.⁵ Generally speaking, the expectation may arise “as a result of a promise, representation, practice or policy made, adopted or announced by or on behalf of government or a public authority”.⁶ So where a public authority made a promise and subsequently reneged upon the promise, resulting in such unfairness to individuals as to amount to an abuse of power, principles of good administration and fairness require the public authority to be held to its promise unless there are overriding reasons of public interest to the contrary.

⁴ *Ng Siu Tung* (n 1 above), p 600, para 92.

⁵ Legitimate expectations are widely recognised in the domestic law of some European nations, notably Germany. See Y. Cripps, “Some Effects of European Law on English Administrative Law” (1994) 2 *Indiana Journal of Global Legal Studies* 213, 222. See also C. F. Forsyth, “The Provenance and Protection of Legitimate Expectations” [1988] 47 *Cambridge Law Journal* 238, 241–245.

⁶ *Ng Siu Tung* (n 1 above), p 600, para 92.

Procedural Legitimate Expectation

Despite the embryonic stage in which the doctrine of substantive legitimate expectation remains, the principle of legitimate expectation giving rise to procedural benefits has a longer history⁷ and was already firmly established prior to the *Ng Siu Tung* decision.⁸ That doctrine was developed to supplement the classic situation which gives rise to the application of the principles of natural justice – where some legal right, liberty or interest is affected. Even in the absence of such established legal right, liberty or interest, there are *other circumstances* where good administration requires public authorities to observe the principles of natural justice, of which *a legitimate expectation to be treated fairly* is one.⁹ As Lord Bridge observed in *Re Westminster CC*:

“The courts have developed a relatively novel doctrine in public law that a *duty of consultation* may arise from a legitimate expectation aroused either by a promise or by an established practice of consultation.”¹⁰

It is worth noting that when an applicant claims for procedural benefits, that is, an opportunity to be heard or consulted on the basis of a legitimate expectation, the expectation can be divided into two types depending on the content of the promise, representation or practice that has been relied upon. The first situation is where the public authority made a promise that certain procedures would be complied with before arriving at a decision: see, for example, *Attorney General v Ng Yuen Shiu*.¹¹ In such a case, fairness requires the procedures promised to be followed. The second situation is where the public authority promised certain substantive benefits; in such a case, the *substantive* expectations are protected *procedurally* by providing the claimant an opportunity to be heard or consulted before his expectation is dashed.

Evolution to Substantive Legitimate Expectation

In the second situation mentioned above, there are occasions where *procedural* safeguards are not sufficient to protect *substantive* expectations. As Bokhary PJ in the *Ng Siu Tung* case recognised:

“[A]fter all, the legitimate expectation itself will always be substantive except where the representation itself is no more than that the person will

⁷ The principle first emerged in Lord Denning MR's decision in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149.

⁸ It was approved by the Privy Council in *AG v Ng Yuen Shiu* [1983] 2 AC 629. See also the discussion in H. W. R. Wade and C. F. Forsyth, *Administrative Law* (Oxford: Oxford University Press, 8th edn, 2000), pp 494–500.

⁹ Wade and Forsyth, *ibid.*, p 494.

¹⁰ [1986] AC 668, p 692. Emphasis added.

¹¹ *Ng Yuen Shiu* (n 8 above).

be given an opportunity to be heard. And even then the ultimate objective would still be substantive. An opportunity to be heard is only a means of attaining that objective.”¹²

Hence, “it was only *natural* that the question would eventually arise as to whether the courts would order or allow protection of a substantive legitimate expectation”.¹³

At first, the issue was controversial.¹⁴ But beginning with *R v North and East Devon Health Authority, Ex parte Coughlan*,¹⁵ there developed at least a line of authorities from the Court of Appeal which approved and further clarified the doctrine¹⁶ which was approved by the CFA in the *Ng Siu Tung* case.¹⁷

Before *Coughlan*, support for the existence of the doctrine can clearly be found in a line of tax authorities.¹⁸ The House of Lords’ decision in *R v IRC, ex parte Preston* provided authority for the proposition that frustrating a legitimate expectation can amount to an abuse of power.¹⁹ There, the Revenue made a promise to the applicant that it would not further inquire on certain tax affairs if the applicant agreed to forgo interest relief and to pay a certain sum in capital gains tax. The House of Lords held that the Revenue could not renege upon its promise because to do so would be so unfair to the applicant as to amount to an abuse of power:

“[T]he taxpayer is entitled to relief by way of judicial review for ‘unfairness’ amounting to *abuse of power* if the commissioners have been guilty of conduct equivalent to a breach of contract or breach of representation on their part.”²⁰

However, whether the doctrine existed in branches of administrative law other than revenue cases had been doubted. The problem, as recognised in *Coughlan*, is that “while *Preston* has been followed in tax cases, using the

¹² *Ng Siu Tung* (n 1 above), p 659, para 337, per Bokhary PJ.

¹³ *Ibid.*, p 599, para 89, per Li CJ. Emphasis added.

¹⁴ For a detailed account of the conflicting decisions, see P. Craig and S. Schonberg, “Substantive Legitimate Expectations after *Coughlan*” [2000] *Public Law* 684.

¹⁵ [1999] LGR 703, CA.

¹⁶ It is to be noted that at or about the same time, there also existed a strong line of dissenting cases starting with *R v Home Secretary, ex parte Hargreaves* [1997] 1 WLR 906; *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115, discussed at p 476.

¹⁷ *Ng Siu Tung* (n 1 above), p 599, para 90.

¹⁸ For example, *R v Inland Revenue Commissioners, ex parte Preston* [1985] AC 835, HL; *R v Inland Revenue Commissioners, ex p MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545; *R v Inland Revenue Commissioners, ex parte Unilever Plc* [1996] STC 681. Craig and Schonberg (n 14 above), p 685.

¹⁹ *Preston, ibid.*

²⁰ *Ibid.*, pp 866–867. Emphasis added.

vocabulary of abuse of power, in other fields of public law analogous challenges, couched in the language of legitimate expectation, have not all been approached in the same way”.²¹ The most notable example of authorities that went the other way is *R v Home Secretary, ex parte Hargreaves*,²² where the Home Secretary changed the policy of allowing prisoners home leave due to concerns over crimes committed by them during leave. The Court of Appeal condemned the doctrine as “heresy” and “wrong in principle”,²³ and limited the standard of review to *Wednesbury* unreasonableness. Central to the reasons for those decisions that refused a wider ground of substantive review was the principle that the government or public authority should have freedom to change its policy and the court should not trammel executive policy-making.

Coughlan is the watershed in the development of the doctrine. It concerned the decision of the Health Authority to close down Mardon House, a National Health Service (NHS) facility designed to house severely disabled persons requiring long-term care, in which the applicant resided. Before the applicant and several other patients moved into Mardon House, they resided in the Newcourt Hospital. It was on the strength of the express assurance by the Health Authority – that they could live there for “as long as they chose” – that the applicant and others agreed to move into Mardon House. However, the Authority, after a process of consultation, subsequently decided to close the House down. The applicant challenged the decision by way of judicial review. The Court of Appeal held that the Authority had created in the applicant a legitimate expectation of having a home for life in Mardon House and to frustrate that expectation would be unfair. The burden of proving overriding public interests to justify the breach lay on the Authority, which had failed to weigh the interests correctly. In drawing the balance of conflicting interests, “the court will not only accept the policy change without demur but will pay the closest attention to the assessment made by the public body itself”.²⁴

It is very well for the court to say that the public authority had created a legitimate expectation in the applicant and that it would be wrong to frustrate it, but the court still faced a dilemma when it came to practical consideration. What was the court supposed to do? Should it prevent the Health Authority from pulling down the facilities or compel the Health Authority to allow the applicant to stay in the House for life as she was so “promised”?

²¹ Craig and Schonberg (n 14 above), para 61.

²² *Hargreaves* (n 16 above).

²³ *Ibid.*, p 921.

²⁴ Craig and Schonberg (n 14 above), para 89.

The Court of Appeal, in holding that the decision to close down Mardon House was an “unjustified breach” of a clear promise given by the Health Authority predecessor to the applicant that she should have a home for life at Mardon House, dismissed the appeal brought by the Health Authority. It upheld the trial judge’s order of *certiorari* quashing the closure decision. A recent search on the Internet confirms that Mardon House still stands today and forms part of the facilities of the North and East Devon Health Authority. One hopes that the applicant, Ms Coughlan, together with others to which the promise was originally made, are still living happily inside the House as a result of the Court of Appeal decision. What *Coughlan* has demonstrated is that the doctrine of substantive legitimate expectation, when properly applied, can lead to *substantive* benefits actually being preserved and enjoyed by those who come within the ambit of the doctrine.

Coughlan was considered in *R v Secretary of State for Education and Employment, ex parte Begbie*.²⁵ The case concerned a change in education policy after the Labour Party came to power in May 1997. The applicant, then aged nine, was offered a place at an independent school which educated people up to the age of 18 under a state-funded assisted places scheme. In its election platform, the opposition party announced its plan to dismantle the scheme, but gave undertakings that existing assisted students would not be affected. Following its victory in the election, the new government passed the Education (Schools) Act 1997 which provided that existing assisted students receiving primary education were to continue to be funded only until the primary stage was completed, save that the Secretary of State could exercise discretion to extend the period in individual cases. The applicant sought an order of *certiorari* to quash the Secretary of State’s refusal to so exercise his discretion on the grounds that the undertakings had created a legitimate expectation that the applicant would enjoy the benefits of the scheme until the completion of her education at that school (ie until the age of 18), and breach of those undertakings was unfair and unreasonable. The Court of Appeal affirmed the decision in *Coughlan*, but refused to apply the doctrine to the facts of that case because to give effect to the legitimate expectation would require the public authority to exercise its discretion in a way which undermined the statutory purpose, in effect providing assisted places to all those pupils whose assisted places were not saved by the statute itself. Moreover, the Court of Appeal pointed out that the Labour Party was not yet in power when the statements were made; it followed that the undertakings did not arise from a public authority so as to fall within the ambit of judicial review, and “when a

²⁵ *Begbie* (n 16 above).

party elected into office fails to keep its elected promises, the consequences should be political and not legal".²⁶

The next case that came before the Court of Appeal was *R (on the application of Zeqiri) v Secretary of State for the Home Department*.²⁷ The case is worthy of in-depth discussion, not only because of the striking similarity between its facts and that of *Ng Siu Tung*, but also because the House of Lords subsequently reached a contrary conclusion (discussed later). The background to the case was the outbreak of violence between the Serbs and Albanians leading to Yugoslavia's invasion of Kosovo in 1998–1999. During that period, many Albanian Kosovars fled the territory to claim asylum as refugees in other European countries. Both the United Kingdom and Germany were parties to the Dublin Convention 1990 which determines the State responsible for examining applications for asylum lodged in one of the member States, the basic principle being that the first member State that receives the alien has responsibility for examining the alien's application for asylum. The applicant, who had first claimed asylum in Germany before arriving in the United Kingdom, was directed by the Secretary of State to be returned to Germany for substantive determination. He applied for judicial review to challenge the decision. His application, like 114 similar cases, was stayed pending the progress of a test case, *R v Secretary of State for the Home Department, ex parte Besnik Gashi*,²⁸ which was decided in favour of the asylum seeker by the Court of Appeal. The Secretary of State obtained leave to appeal to the House of Lords, but due to changing circumstances, he withdrew the appeal a year later and reissued a certificate to remove the applicant from the United Kingdom. The applicant applied for judicial review challenging the new decision on several grounds, *inter alia*, that by treating *Besnik Gashi* as a test case, the Secretary of State led him legitimately to expect that he would not be removed to Germany if *Besnik Gashi's* application succeeded. This was also reinforced by the conduct of the Secretary of State in pursuing, up until October 2000, an appeal to the House of Lords. The Court of Appeal upheld the legitimate expectation of the applicant and ordered that the substantive entitlement was to be determined in the United Kingdom. The decision was remarkable in two aspects. Firstly, it agreed with *Coughlan* that the distinction between procedural and substantive legitimate expectation is blurred. In the case, the applicant was arguing for an opportunity to have his asylum application determined in the United Kingdom, which was in the immediate sense a procedural question, "but it may well be that applicants considered that there were benefits of substance in remaining to have [their applications] determined in England rather than being removed to Germany".²⁹ The

²⁶ *Ibid.*, p 1126D.

²⁷ [2001] EWCA Civ 342, CA.

²⁸ [1999] INLR 276, CA.

²⁹ *Begbie* (n 16 above), para 60.

impracticality of distinguishing between the two reinforces the view mentioned earlier that the movement from procedural to substantive legitimate expectation is an inevitable and irreversible trend. Secondly, the court considered that there were two approaches to the standard of review: that of considering whether there were any public interests outweighing the unfairness of frustrating the legitimate expectation as recognised in *Coughlan*, and the conventional *Wednesbury* unreasonableness approach. It did not, however, come to a conclusion as to which test should be adopted, and held that the result would be the same no matter which approach was taken. It also pointed out that in the instant case, where human rights were in play, a rigorous examination of the decision was required.

The most recent decision prior to *Ng Siu Tung* was *R (Bibi) v Newham London Borough Council; R (Al-Nashed) v Newham London Borough Council*.³⁰ The applicants and their families were refugees accepted by the local council as unintentionally homeless and in priority need. The council provided temporary accommodation to the applicants, erroneously believing that it had the duty to do so, and promised to provide them legally secure accommodation within 18 months. Later, the council did not honour its promise following a House of Lords' ruling that it did not have a duty to accept the applicants as in priority need. The applicants then challenged the council's inaction by way of judicial review. The trial judge held that the applicants had a legitimate expectation and granted a declaration that the council was bound to provide the applicants with such legally secure accommodation as promised. On appeal to the Court of Appeal, it affirmed the trial judge's decision with respect to the existence of a legitimate expectation. The court, however, disagreed with the remedy that the trial judge granted. It did not take the substantive decision itself, but remitted the matter to the council to decide afresh, coupled with a declaration that the council had a *duty* to take the legitimate expectation into account. This decision created a new remedy in enforcing a substantive legitimate expectation, which was later adopted in *Ng Siu Tung* (on which point see below).

Despite the emergence of a consistent line of Court of Appeal decisions upholding the doctrine of substantive legitimate expectation, the doctrine had not yet been examined by the House of Lords at the time of *Ng Siu Tung*. References to the doctrine, however, were made in *R v Secretary of State for the Home Department, ex parte Hindley*,³¹ where Lord Hobhouse described Lord Woolf's judgment in *Coughlan* as "valuable".³² These recent authorities paved the way for the *Ng Siu Tung* decision.

³⁰ [2001] EWCA Civ 607, [2002] 1 WLR 237.

³¹ [2001] 1 AC 410, HL.

³² *Ibid.*, pp 419 and 421.

Ng Siu Tung and Others v Director of Immigration

The facts of the *Ng Siu Tung* case were rather complicated. They follow from the CFA's judgments in *Ng Ka Ling* and *Chan Kam Nga v Director of Immigration*,³³ which involved the interpretation of Articles 22(4) and 24(2)(3) of the Basic Law. In summary, the *Ng Ka Ling* case decided that children born outside Hong Kong by Chinese nationals who were residents of the HKSAR enjoyed the right of abode without the need to hold a one way permit as required by the Immigration (Amendment) (No 3) Ordinance 1997. The *Chan Kam Nga* case decided that Chinese nationals born on the Mainland, even before one parent had become a permanent resident, could enjoy the right of abode. The decisions were later overturned by the NPCSC, which issued a free-standing interpretation on the relevant provisions, with the effect that those who would have been entitled to enjoy the right of abode and stay in Hong Kong under the *Ng Ka Ling* and *Chan Kam Nga* judgments had to return to mainland China. Article 158 of the Basic Law states that an interpretation by the NPCSC shall not affect "judgment previously rendered". Over 5,000 people, in similar positions to the parties in *Ng Ka Ling* or *Chan Kam Nga*, applied for judicial review on various grounds. It was held by the majority, Bokhary PJ dissenting, that "judgment previously rendered" only refers to actual parties to the litigation and so would not avail the applicants. The doctrine of substantive legitimate expectation was also relied on. It was contended that, as a result of the public statements and representations made by various government officials to the applicants and the manner in which the *Ng Ka Ling* and *Chan Kam Nga* litigations were conducted, the applicants had a legitimate expectation, to which effect should be given, that they would receive the same treatment as the parties in those two cases.

The panel of judges,³⁴ led by Li CJ, agreed unanimously that the doctrine of substantive legitimate expectation "forms part of the administrative law of Hong Kong"³⁵ and "occupies an important place in the armamentarium of a public law system like ours".³⁶ Affirming the recent line of English Court of Appeal authorities mentioned earlier, the CFA summarised the law in the following points:

- 1 "The law requires that a legitimate expectation arising from a promise or representation ... be properly taken into account in the decision-making process so long as to do so falls within the power, statutory or otherwise, of the decision-maker."³⁷

³³ (1999) 2 HKCFAR 82, CFA.

³⁴ The panel of judges included Li CJ, Bokhary PJ, Chan PJ, Ribeiro PJ and Sir Anthony Mason NPJ.

³⁵ *Ng Siu Tung* (n 1 above), p 600, para 91.

³⁶ *Ibid.*, p 659, para 337, per Bokhary PJ.

³⁷ *Ibid.*, p 601, para 94.

- 2 “Unless there are reasons recognized by law for not giving effect to legitimate expectations ... effect should be given to them.”³⁸ If effect is not given to the expectation, fairness requires reasons to be given expressly by the decision-maker so that the court can test them in the event that the decision is challenged.
- 3 “Even if the decision involves the making of a political choice by reference to policy considerations, the decision-maker *must* make the choice in the light of the legitimate expectation of the parties.”³⁹
- 4 Failure of the decision-maker to take into account a legitimate expectation constitutes an abuse of power such that the court can properly call upon the decision-maker to exercise his discretion by taking the legitimate expectation into account, unless the court is satisfied that the failure has not affected the decision.⁴⁰

The majority (with Bokhary PJ coming to a different view) then applied these principles to the general and specific representations that were relied on. These fell into three categories:⁴¹

- 1 three general statements made by the Chief Executive, together with another made by the Director of Immigration, that the Government recognised the consequences flowing from the test case character of the two cases;
- 2 specific representations in the Legal Aid pro forma replies sent to individual applicants for legal aid which reassured them of the Government stance and stated that it was unnecessary to commence further proceedings or join in proceedings; and
- 3 a reply from the Secretary for Security to an applicant containing a clear representation that the Department of Immigration “will follow the final judgment of the Courts in dealing with applications for certificate of entitlement”.

The majority concluded that all three categories of representation were capable of producing legitimate expectations, being expectations that are

³⁸ *Ibid.*, p 601, para 95.

³⁹ *Ibid.*, p 601, para 96.

⁴⁰ *Ibid.*, p 601, para 97.

⁴¹ The court ruled out some general statements made by the Chief Executive and the Director of Immigration before, during and after the delivery of the *Ng Ka Ling* and *Chan Kam Nga* judgments which “said nothing more than any responsible government would say, namely, it respects the rule of law” (*ibid.*, p 598, para 82) and specific representations made in the standard reply sent by the Immigration Department to applicants for the right of abode which “did no more than state that, as the litigation was ongoing, decisions on applications for right of abode could not be made for the time being” (*ibid.*, pp 598–599, para 85).

reasonable,⁴² clear and unambiguous.⁴³ The legitimate expectation was that the applicants would be treated as if they were litigants in the *Ng Ka Ling* and *Chan Kam Nga* cases. Although their expectations were “unlawful” in light of the interpretation by the NPCSC, the majority held that the Director of Immigration could satisfy them to some extent by exercising his discretion to allow the applicants to enter and reside in Hong Kong, which is not contrary to law. In exercising his discretion, the Director had a *duty* to take the legitimate expectation into account. He would not be bound to exercise his discretion in such a way as to undermine the statutory scheme as a whole, however, and hence it must follow that he could not exercise his discretion, being exceptional powers, in favour of all the representees who relied on the category one representations – an innominate class which might consist of more than 600,000 members. But the situation was different for representees who relied on categories two and three, as those representees constituted a discrete and ascertainable class. The Director’s contention that the decision would not have been materially affected even if the expectation were taken into account was rejected, as the burden of proving such an inevitable outcome lay on him, and he had failed to discharge it. The court therefore quashed the removal orders with respect to applicants who had relied on categories two and three and declared that the Director ought to exercise his discretionary powers in their favour so as to allow them to reside in Hong Kong, giving *substantial weight* to the legitimate expectations.

A Closer Examination of the Decision

The decision itself is significant in many aspects and raises interesting issues which warrant further deliberation. Four issues have been chosen for discussion, namely, the rationale behind the doctrine, the remedy, the standard of review and the question of whether general representations will ever succeed in legitimate expectation challenges.

The Rationale Behind the Doctrine of Substantive Legitimate Expectation

Taking cognisance of the doctrine in Hong Kong, the CFA found its roots in the notion of fairness and abuse of power:

“the doctrine is an important element in the exercise of the court’s inherent supervisory jurisdiction to ensure, first, that statutory powers are exercised *lawfully* and are *not abused* and, secondly, that they are exercised

⁴² *Ibid.*, p 602, para 101.

⁴³ *Ibid.*, p 603, para 103.

so as to result in *administrative fairness in relation to both procedural and substantive benefits*.”⁴⁴

“The essential function of the doctrine commonly called ‘the doctrine of legitimate expectation’ is to give judicial relief against abuse of executive power. If one were to name this doctrine after its *raison d’être*, it could be called ‘the doctrine against abuse of power’ ”.⁴⁵

The above rationale seems straightforward and readily comprehensible. Indeed, the doctrine has been well recognised in the domestic laws of some European States. One may think it rather odd that the doctrine was only recently recognised under the common law. This is due to the particular context in which our administrative law has developed. It is therefore revealing to revisit the traditional shackles and elucidate how the court managed to free itself from them.

According to Professor Craig, the reception of the doctrine was impossible in the past owing to the difficulty in reconciling the existing conceptual framework of administrative law with two distinct but related problems – fettering of policy and estoppel.⁴⁶

Fettering of policy

The fettering of policy problem manifests itself in our constitutional arrangement of separation of powers, where the government or public authority must remain free to change its policy in the light of public interests, with the fettering of it being *ultra vires*. This is clearly explained by Professor Craig:

“The rationale for denying relief to the individual is based upon a particular application of the *ultra vires* principle. Neither of the public body’s policy choices is itself *ultra vires*, in the sense of being outside the power of the relevant body. The *ultra vires* principle manifests itself in a different guise in this type of case. A public body should not, so the argument goes, be able to fetter its discretion. If it does so then it will be held to have acted beyond its powers.”⁴⁷

Thus, the doctrine of substantive legitimate expectation can never flourish if the *principle of legality* (ie that the public authority acts *intra vires*) is the

⁴⁴ *Ibid.*, p 600, para 91. Emphasis added.

⁴⁵ *Ibid.*, p 657, para 330.

⁴⁶ P. P. Craig, “Legitimate Expectations: A Conceptual Analysis” (1992) 108 *Law Quarterly Review* 79, 87.

⁴⁷ P. P. Craig, “Substantive Legitimate Expectations in Domestic and Community Law” [1996] *Cambridge Law Journal* 289, 298.

sole value upheld by administrative law. However, Professor Craig argues that our system also embraces the *principle of certainty*, which requires administrative authorities to act with sufficient degree of certainty and predictability conducive to advance planning and maintaining public confidence in the administration. It follows that if both values are taken into account, a completely different outcome, which allows the doctrine to take root, will result.

This conceptual problem did not escape the attention of the Court of Appeal in *Coughlan*. The court did not, however, analyse the matter in the same depth as Professor Craig, instead approaching it by relying on the ground of “abuse of power”. Citing *Preston*, the court was of the view that “it is *unimportant* whether the unfairness is analytically *within* or *beyond* the power conferred by law: on either view public law today reaches it”.⁴⁸ Moreover, it referred to the judgment of Lord Templeman in that case:

“Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or *abuses its powers*.”⁴⁹

After quoting the paragraph, the court acknowledged that abuse of power may take many forms, of which breach of a legitimate expectation is one. The recognition of this is very significant, because the court seems to have recognised a fourth ground of judicial review, namely, abuse of power by a public authority, in addition to the conventional grounds of illegality, irrationality and procedural impropriety, hence freeing itself from the constraints formerly imposed.

Nevertheless, “abuse of power” itself is a vague concept and to fully understand its force in the context of legitimate expectation requires further clarification. In an ordinary case, it may well be difficult to see why a decision of the executive to strive for a policy goal should be deemed an abuse of power, provided that it is legal, rational and reached by a lawful process. Hence, the conventional approach demands a decision to be impeached substantively only when it is *Wednesbury* unreasonable. But in the case of legitimate expectation, the situation clearly becomes different. As pointed out in *Coughlan*, it involves not *one* but *two* exercises of power by the same public authority, with consequences for individuals trapped between the two.⁵⁰ The abuse of power arises only when one considers the impact of the latter decision in light of the earlier one. It is here that Craig’s principle of certainty

⁴⁸ *Coughlan* (n 15 above), para 68. Emphasis added.

⁴⁹ *Preston* (n 18 above), p 337. Emphasis added.

⁵⁰ *Coughlan* (n 15 above), para 66.

becomes relevant. It is also this fundamental aspect that generates space for the development of the doctrine and justifies the court stepping into the substantive province of an administrative decision.

Even if the court is able to resolve the historical conundrum, however, it cannot deny the truth that by asking whether the public authority had taken a legitimate expectation into account and whether public interests justify its denial, it is moving a step closer to “a more or less intrusive quality of review”.⁵¹ The question is to what extent the government or public authority must remain free to change its policy in light of public interests which fall within the four corners of its statutory powers? On the one hand, the CFA is willing to acknowledge that “the adoption of a new policy does not relieve a decision-maker from his *duty* to take account of a legitimate expectation” and the new role of the court,⁵² as stated in *Coughlan*, is “to reconcile [the executive’s] continuing need to initiate and respond to change with the legitimate ... expectations of citizens ... who have relied, and have been justified in relying, on a current policy or an extant promise”.⁵³ On the other hand, with the destruction of the old balance, a new balance inevitably has to be struck. In this respect, cases have developed in a sporadic and less principled manner. This is understandable, not only because of the wide scope of the doctrine with potential application to an array of administrative decisions, but because these cases essentially involve choosing and balancing between conflicting values. For example, the Court of Appeal in *Bibi* commented:

“As Professor Craig makes clear in his perceptive discussion ... it is important to recognise that there is often a tension between several values in these cases. A choice may need to be made as to which good we attain and which we forgo. There are administrative and democratic gains in preserving for the authority the possibility in the future of coming to different conclusions as to the allocation of resources from those to which it is currently wedded. On the other hand there is value in holding authorities to promises which they have made, thus upholding responsible public administration and allowing people to plan their lives sensibly. The task for the law in this area is to *establish who makes the choice of priorities and what principles are to be followed*.”⁵⁴

Moreover, as a result of the traditional discomfort of the court in engaging explicitly in judgment of values in administrative reviews, the court seems to

⁵¹ *Begbie* (n 16 above), p 1130G.

⁵² *Ng Siu Tung* (n 1 above), p 600, para 93.

⁵³ *Coughlan* (n 15 above), para 65.

⁵⁴ *Bibi* (n 30 above), para 24. Emphasis added.

recoil when sensitive political issues or a decision affecting a large number of people are involved. For instance, Laws LJ in *Begbie* commented, *obiter*, that:

“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 ... ; here the judges may well be in no position to adjudicate save at most on a bare *Wednesbury* basis, without themselves donning the garb of policy-maker, which they cannot wear.”⁵⁵

This comment can be subject to criticism that it is logically wrong, for if the ground of review is abuse of power, should it not be the case that the court ought to be more vigilant when general policy affecting the public at large is involved, in view of the importance of the interest, the large number of people affected and the fatal blow to public confidence if the mass remained unfairly aggrieved? On the other hand, if the court takes on this new role, would it not destroy the already blurred line between legality and desirability of policy?

One can argue that Laws LJ in *Begbie* was referring to the fact that the public interest reasons for change might affect a “large class of people”, rather than “the class of those aggrieved being large”. If the latter is true, it could be argued that the political process is likely to provide them with a sufficient means of protecting their interests – which is not the case in the classic legitimate expectation case, such as *Coughlan*, where the interests of a small number of people are set against those of the public generally – hence, there is no real justification for the court stepping in to determine the validity of the eventual outcome of that process.

The court’s awareness that it had intruded into the province of merits review also induced it to cloak its decision under the magic coat of illegality, with which it felt more comfortable. For example, in *Bibi*, the court held that the legitimate expectation was a *relevant consideration* which the authority had failed to take into account and which was “*an error of law*”;⁵⁶ the decision of the authority should be quashed because it was *illegal*. This is a dubious proposition, particularly as only a few years before the court held that substantive enforcement of legitimate expectation was “heretical”, not to mention outside the authority’s power.

⁵⁵ *Begbie* (n 16 above), p 1130G–H.

⁵⁶ *Bibi* (n 30 above), para 49.

Estoppel

The second conventional problem raised by Professor Craig is the undesirability of applying principles of estoppel, which the concept of legitimate expectation closely resembles, in public law. In the past, authorities have placed severe restrictions upon the scope of estoppel in public law. To borrow the words of Professor Craig:

“[It] is concerned with the situation where the representation is *ultra vires* the public body or the particular officer who makes the representation ... If the representation is held to bind the public body then there is a fear that such bodies could extend their powers by making representations outside their statutory limits which would then be binding on them through the medium of estoppel. Moreover, the effect of allowing estoppel to operate could be to prevent the relevant body from exercising the powers accorded to it by Parliament.”⁵⁷

In addition, the similarity between estoppel and legitimate expectation also raises the question of the role *reliance* or *detriment* should play. The conundrum has been solved in some cases by the court, which simply dissociated the two concepts. It was argued that private law and public law have different functions and serve different purposes, and the latter “go to fairness and through fairness to possible abuse of power”.⁵⁸ The principle of good administration requires public authority to adhere to its promise and prohibits it from acting with “capricious unfairness”.

As to the requirement of reliance or detriment, however, the cases showed a divergence in opinion. While all agreed that it is not a condition precedent, *Begbie* held that it would be an *exception* rather than the general rule that the court found itself prepared to uphold legitimate expectations without detrimental reliance. It highlighted the dual relevance of detriment: firstly, it serves as evidence of the existence or extent of a legitimate expectation; secondly, it demonstrates the unfairness to the individual if the legitimate expectation is frustrated. On that basis, the court in *Begbie*, refusing to uphold the legitimate expectation, held *obiter* that it would have been prepared to do so had there been reliance or detriment in consequence. A different sentiment prevailed in *Bibi*, however, where the court held that the significance of reliance and consequent detriment was *factual* rather than *legal*. Referring to *Begbie*, it agreed that in the circumstances of that case both requirements were *critical*; but it did not follow that in a strong case, reliance without detriment would

⁵⁷ Craig (n 46 above), p 87.

⁵⁸ *Bibi* (n 30 above), para 55.

automatically prevent the court from upholding a legitimate expectation. In *Ng Siu Tung*, the majority declined to rule on this point. The authors would submit that the latter view, being preferable, should be adopted. This is because the mere breach of a promise or departure from established policy without *any or adequate* justifications is of itself unfair, and the rule of law requires laws and those acts deriving their authority from law to be predictable and certain.⁵⁹ Moreover, the *emotional disappointment* that one suffers from the frustration of a legitimate expectation is itself a detriment. The actual ruling in *Bibi* illustrates this point, where the local authority represented to the applicants that they would have priority in legally secured accommodation and subsequently renege upon the representation. The court referred to the “moral detriment” which should not be lightly dismissed, including the prolonged disappointment which had ensued and the lost opportunity for the applicant to settle in another area where accommodation was less hard to come by.

Although the relationship between legitimate expectation and estoppel has been severed, the conventional concern of whether a public authority can be held to perform its former *ultra vires* promise has not yet been solved. Cases seem to suggest that if a public authority made a promise which was not within its statutory power to deliver, or which was originally within its statutory power, but for some reason subsequently became outside its statutory limit, the authority cannot be held to perform the promise. The promise is simply outside its power prescribed by the legislature, which our constitution would not allow. Thus, in *Begbie*, the court would not force the authority to exercise its discretion in a way which would defeat the statutory scheme. However, it does not mean the authority could go free. The court will ensure, so long as possible, that the authority is held to its promise by looking for other possible ways to redress the unfairness. A good example is *Ng Siu Tung*. The majority held that in light of the NPCSC interpretation, the claimants could no longer be accorded the right of abode as originally expected, simply because no authority had the legal capacity to do so. But the legitimate expectations of the claimants could at least be fulfilled to some extent by requiring the Director of Immigration to exercise his discretion to allow them to stay. Of course, this is again subject to the limit that the discretion cannot be exercised to defeat the statutory purpose as a whole. While some may say that such an approach is commendable because it not only accords with our constitutional framework, but encourages public authorities to exercise care and make appropriate accommodations in advance where their policies are expected to affect citizens unfairly, other critics will say that such logic is circular and does not really give the claimants what they were seeking. Those claimants for whom the

⁵⁹ Craig and Schonberg (n 14 above), pp 696–697.

Director eventually exercised his discretion favourably turned out to be in the minority only.

Remedies Available to Satisfy a Legitimate Expectation

Where the executive has breached a substantive promise or changed its policy, the ultimate question is what role the court should take. In *Coughlan*, the Court of Appeal identified three possible outcomes:⁶⁰

- 1 The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. This means the court is confined to reviewing the decision on *Wednesbury* grounds.
- 2 The court may decide that the applicant shall be given an opportunity to be heard or consulted before the decision is made. This means the legitimate expectation is protected procedurally.
- 3 The court may decide to enforce directly the substantive benefits legitimately expected.

However, in *Ng Siu Tung*, a fourth outcome, which emerged from *Bibi*, was adopted. The court, in quashing the removal orders against categories two and three applicants, remitted the cases back to the Immigration Department for a fresh decision, declaring that the Director was *obliged* to consider whether in light of the legitimate expectations he ought to exercise his discretionary powers in favour of the applicants so as to allow them to reside in Hong Kong.

It is not surprising that *Ng Siu Tung* took a course different to that of *Coughlan*,⁶¹ because in *Coughlan* the Health Authority had already taken into account the legitimate expectation in reaching its decision, while in *Ng Siu Tung* the Director had not. This new course is significant because it allowed the court to avoid taking the decisions itself, instead leaving them to the decision-maker, which conforms with the doctrine of the separation of powers and the legislative intent. At first glance, it seems no greater difference than the *Wednesbury* grounds, requiring the decision-maker to bear in mind the relevant legitimate expectations before making the decision. However, a closer examination will reveal a *critical difference*: in the *Wednesbury* case, the decision-maker remains free to accord the legitimate expectation *the weight it thinks right*; but in *Ng Siu Tung*, the decision-maker is *obliged* to give *substantial*

⁶⁰ *Coughlan* (n 15 above), para 57.

⁶¹ Of course, the court could not directly grant the applicants a right of abode because this was already held to be unlawful, but the court still had the alternative of exercising the relevant discretion itself, as had been done by the trial judge in *Bibi*.

weight to the legitimate expectation. The decision of the Director might well pass the *Wednesbury* test, because when exercising his discretion in the ordinary course of duty he necessarily has a range of factors to bear in mind. As counsel on behalf of the Director had argued, “all such factors, like humanitarian grounds, are matters to which he can have regard, if he so chooses, but he is not bound to take them into account”,⁶² and the *Wednesbury* test will be passed in so far as the decision is not one which is so unreasonable that no reasonable public authority would have come to it. The court rejected the argument and commented:

“[I]f the circumstances are such as to raise a legitimate expectation, *the common law itself imposes a duty* on the decision-maker, grounds in the principle of good administration and the duty to act fairly, to take that legitimate expectation into account”⁶³

In effect, the fourth remedy may achieve an outcome very close to direct enforcement, because the burden now lies on the Director to justify his failure to honour the legitimate expectation. The court was also unwilling to accept the Director’s contention that even if the expectations were taken into account, it would not have materially affected the decision, which shows how high a standard the court had set to allow a frustration of legitimate expectations generated by public authorities. However, in real life, does it work out as the court had hoped? Whilst the actual figures are not available of how many of the claimants for whom the Director exercised his discretion were eventually allowed to stay in the HKSAR as a result of the judgment in *Ng Siu Tung*, the authors understand that the actual numbers are not large. They are in the hundreds rather than thousands. This represents a practical constraint of the doctrine when it comes to remedy. Once the court accepts that legitimate expectation cannot frustrate the discharge of statutory duty, then what it can do is rather limited. While it can lay down a “high standard” it may expect the Director to follow when exercising his discretion, in practice it cannot, and should not, interfere with the ultimate exercise of that discretion, which is, in the end, an administrative decision.

Standard of Review

The standard of review is the test by which the court judges whether the substance of an executive decision calls for judicial intervention. In other words, taking into account the legitimate expectation, *when* will the court hold that an executive decision is an abuse of power and hence unlawful?

⁶² *Ng Siu Tung* (n 1 above), para 129.

⁶³ *Ibid.* Emphasis added.

As the Director in *Ng Siu Tung* had *never taken into account* the legitimate expectations, such failure was clearly an abuse of power. What remains unclear is when the decision-maker *has taken into account* the legitimate expectations but takes a course that frustrates those expectations – can the court nevertheless uphold them? If so, under what circumstances? The majority, quite understandably, was silent on this. Bokhary PJ, on the other hand, mentioned five options:⁶⁴

- 1 reviewing abuse of power in and of itself;
- 2 reviewing the traditional *Wednesbury* unreasonableness suggested by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp*,⁶⁵ that is, whether a decision is “so unreasonable that no reasonable authority could ever have come to it”;⁶⁶
- 3 reviewing *Wednesbury* unreasonableness as reformulated by Lord Cooke of Thorndon in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd*,⁶⁷ that is, “whether the decision in question was one which a reasonable authority could reach”;⁶⁸
- 4 reviewing disproportionality; or
- 5 reviewing imbalance between fairness to the person having a legitimate expectation and the overriding interests relied upon by the executive to justify disappointing that expectation.

Bokhary PJ said that at the present state of the litigation it was not necessary finally to decide the standard of review, but that it was necessary at least to consider what the appropriate standard may be because that was material to the Director of Immigration's alternative argument that the appellants would fail even if legitimate expectations were taken into account. As to what the standard should be, Bokhary PJ said that “the one constant is that the constitutional foundation of such review is always formed by the rule of law, the dictates of fairness and the duty of the courts to provide judicial relief against abuse of executive power”. Bokhary PJ also said that because of the important role the doctrine of legitimate expectation plays in the preservation of the rule of law, the standard of review in these cases should always be *intense*, particularly where an entrenched constitutional right like the right of abode is involved. He referred to *R (Daly) v Secretary of State for the Home Department* where the proportionality test (option four) was said to have led to a

⁶⁴ These options were initially raised in the article by Craig and Schonberg (n 14 above).

⁶⁵ [1948] 1 KB 223.

⁶⁶ *Ibid.*, p 230.

⁶⁷ [1999] 2 AC 418.

⁶⁸ *Ibid.*, p 452.

different result from the *Wednesbury* test.⁶⁹ He took the view that Basic Law rights, like those under the European Convention on Human Rights, called for reduced judicial deference to administrative expertise and convenience.

We would argue that the *Wednesbury* unreasonableness test (option two) or its modified version (option three) should not be adopted as the standard of review because, as explained above, legitimate expectation cases involve two lawful exercises of power for which the *Wednesbury* test did not cater. As expressed clearly in *Coughlan*, the decision of an authority in these cases would well be able to pass a *Wednesbury* test, but “a bare rationality test would constitute the public authority as judge in its own cause, for a decision to prioritise a change over legitimate expectations will almost always be rational from where the authority stands, even if objectively it is arbitrary or unfair”.⁷⁰ The proportionality test might not be desirable as a *universal* standard of review for legitimate expectation cases because not every administrative case involves an endangered constitutional right.⁷¹ The strict proportionality test, which starts from a fundamental right and steps backward to ask whether it is justifiable to derogate from the right, is tilted too much in favour of the applicant and may excessively impede executive freedom to change policies. Instead, the standard of review should be flexible; a sliding scale depending on a variety of factors, including the nature of the legitimate interests, the circumstances under which the representations are made, the unfairness of the outcome to the individual and the overriding public interests which justify the frustration of a legitimate expectation. Thus, it is submitted that the test applied in *Coughlan*, that is, reviewing the imbalance between *fairness* to the person having a legitimate expectation and the *overriding interests* relied upon by the executive to justify the disappointment of that expectation, should be adopted. The court will look at the circumstances of each case when engaging in the balancing exercise. Of course, when human rights or entrenched constitutional rights are involved or promised, the deprivation of these rights will be intrinsically and substantially unfair. The court will require overwhelming public interests to justify their deprivation.⁷²

⁶⁹ *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

⁷⁰ *Coughlan* (n 15 above), para 66.

⁷¹ J. Jowell, “Beyond the Rule of Law: Towards Constitutional Judicial Review” [2000] *Public Law* 671: the author discusses the proportionality test as a sophisticated four-stage process which involves the following four questions:

- 1 Did the action pursue a legitimate aim?
- 2 Were the means employed suitable to achieve that aim?
- 3 Could the aim have been achieved by a less restrictive alternative?
- 4 Is the derogation justified overall in the interests of a democratic society?

⁷² The usual objection to anything other than a *Wednesbury* standard of review – in addition to the legitimacy argument – is that the courts have insufficient information to determine what would have been the best course of action in relation to polycentric decisions. For the same reasons, it can also be argued that flexible review standards are inappropriate, because judges are equally incapable of determining accurately what sort of case is before them.

It is observed that the majority in *Ng Siu Tung* had in effect endorsed this standard of review, albeit this was not mentioned expressly. They couched the doctrine in terms of “abuse of power”, “unfairness” and “overriding reason of law or policy excluding its operation”.⁷³ In articulating its reasons not to fulfil the legitimate expectation of category one applicants, it commented that “their expectation, arising as it does only from general statements made by or on behalf of the government, is overridden by the overwhelming force of the immigration policy which underlies the legislation validated by the Interpretation”.⁷⁴ In rejecting the argument on behalf of the Director, that even if the expectation of representees who relied on category two and three representations were taken into account it would not have materially affected the decision, the court held, on the one hand, that the Director failed to establish an overwhelming public interest; and on the other hand, that “the departure from the applicants’ expectation based on the specific representations involved a very substantial degree of unfairness”.⁷⁵ The balancing exercise pervaded the whole judgment.

Will General Representations Ever Succeed in Legitimate Expectation Challenges?

The CFA ruling with respect to representees who relied on category one representations, ie the three general statements made by the Chief Executive and one made by the Director of Immigration,⁷⁶ raised a very interesting question: will those who rely on general representations ever succeed in legitimate expectation challenges? In *Coughlan*, the fact that the promise was limited to a few individuals was relied on by the Court of Appeal as a reason in upholding it. In *Begbie*, a test case in which there were between 1,200 and 1,500 people sharing similar circumstances to those of the applicant, the Court of Appeal refused to hold the Labour Party to its promise. In *Ng Siu Tung*, where the potential claimants based on category one representation were estimated to be more than 600,000 in number, the CFA again refused to enforce the legitimate expectations of that class. General representations have three characteristics: (a) they are directed to an *innominate* class of persons; (b) they are often addressed to and received by *a large number* of representees; and (c) some of the representees might not even know about the representation before they make their claims. In such situations, the court is often presented with a dilemma: on the one hand, principles of fairness and good administration require the public authority to be held to its promise; on the

⁷³ See, for example, para 92 of the judgment (n 1 above).

⁷⁴ *Ng Siu Tung* (n 1 above), para 136.

⁷⁵ *Ibid.*, para 141.

⁷⁶ See the discussion under the heading “*Ng Siu Tung and Others v Director of Immigration*” above.

other hand, the large class of representees and that their situations are indistinguishable from one another mean that giving effect to the legitimate expectation of one is equivalent to giving effect to all, with the consequence that the public authority effectively cannot change its policy and its ability to carry out its statutory duties is substantially undermined. Of course, as explained above, a public authority cannot be required to exercise its statutory powers in such a way as to undermine the statutory scheme as a whole. However, the way in which the majority distinguished between the three classes of representees in *Ng Siu Tung* cannot escape criticism. The majority overlooked the critical fact that it was the Government itself which was responsible for creating the innominate category of class one representees. Moreover, the majority seemed to have engaged in a comparison between the unfairness to persons in the three classes, where it held that in relation to the specific representees, “the disappointment of the original legitimate expectation of members of this class has given rise to a very substantial degree of unfairness”.⁷⁷ The logic behind this conclusion is, however, unclear. One would have thought that the degree of unfairness to all three classes was more or less the same; if so, the general representees were penalised only because they failed to pursue their claims more actively. The failure of the majority to detect its flawed logic may also be due to their refusal to analyse the concept of reliance and detriment mentioned earlier. Interestingly, *Bibi* provides a meaningful discussion on the weight that ought to be given to the lack of a change of position. In *Ng Siu Tung*, by inquiring into their status and obtaining replies from the relevant authorities, the specific representees can be said to have “changed their position”. However, as was noted in *Bibi*, “the fact that someone has not changed his position after a promise has been made to him does not mean that he has not relied on the promise”.⁷⁸ The court illustrated the point by an example where an actor in a play points a gun at another actor – the actor to whom the gun pointed may refrain from changing his position just because he has been given a promise that the gun only contains blanks. In *Ng Siu Tung*, the majority of the abode claimants did not actively inquire about their status precisely because the government had encouraged them not to take any action. As the court in *Bibi* commented:

“To disregard the legitimate expectation because no concrete detriment can be shown would be to place the weakest in society at a particular disadvantage. It would mean that those who have a choice and the means to exercise it in reliance on some official practice or promise would gain a legal toehold inaccessible to those who, lacking any means of escape,

⁷⁷ *Ng Siu Tung* (n 1 above), para 138.

⁷⁸ *Bibi* (n 30 above), para 53.

are compelled simply to place their trust in what has been represented to them.”⁷⁹

Of course, one can understand the difficulties the CFA faced in such sensitive immigration cases. Clearly, the decision has a political connotation because if the CFA allowed all claimants to succeed, it would in effect defy the authority of the NPCSC which had formerly given an interpretation requiring the abode claimants to return to the Mainland and may have led to yet another constitutional crisis: “[t]he more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court’s supervision.”⁸⁰

The authors would submit that it is this very innominate class of persons the court should seek to protect where it is perceived that the administration might have disappointed them. The public authority should be held to its promise even if such promise was made generally and to a large class of persons. Should the administration find that fulfilling such promise may create an unbearable burden on the administration or society as a whole, it is for the administration to take other administrative or legislative measures to solve the problems arising from the legitimate expectations given to the applicants in the first place. The court should not be shy in making the public authority keep its promise to this class of persons. Failing to do so would expose this vulnerable group of persons to an injustice which was not of their own making.

The *Zeqiri* Case: A Comparison

Approximately two weeks after the delivery of the *Ng Siu Tung* judgment, the House of Lords handed down its judgment in *R v Secretary of State for the Home Department, ex parte Zeqiri (FC)*.⁸¹ As mentioned, the facts of the two cases were very similar. Both ultimately involved the right of the applicants to stay in the country. Both involved legitimate expectations arising from a previous “test case”. In both cases, there were intervening circumstances that barred the applicants from enjoying the benefits of the original judgments, although the actual litigants to the test cases were allowed to stay. The English Court of Appeal decision in *Zeqiri* enforced the legitimate expectation and the principle enunciated in that case was approved by the CFA in Hong Kong. However, the House of Lords reversed the English Court of Appeal decision. So, do the decisions conflict or can they be reconciled?

⁷⁹ *Ibid.*, para 55.

⁸⁰ *Begbie* (n 16 above), p 1131C-D.

⁸¹ [2002] UKHL 3, HL.

It is difficult to understand how these two very similar cases on facts could have produced such different results. When the House of Lords upheld the doctrine of substantive legitimate expectation, it did so based upon the notion of abuse of power. Referring to its earlier decision in the *Preston* case, it said:

“It is *well established* that conduct by an officer of state equivalent to a breach of contract or breach of representation may be an abuse of power for which judicial review is the appropriate remedy: see Lord Templeman in *R v IRC, Ex p Preston* ... This particular form of the more general concept of abuse of power has been characterized as the denial of a legitimate expectation ... The question is not whether it would have founded an estoppel in private law but the broader question of whether ... a public authority acting contrary to the representation would be acting ‘with conspicuous unfairness’ and in that sense abusing its power.”⁸²

Hence, the House of Lords differed from the Court of Appeal not so much in terms of legal principles, but in its conclusion as to the facts. And it was this different conclusion as to facts which led to a very different result for the applicants. To the authors, this highlights the point that in the infancy of the development of the doctrine of substantive legitimate expectation, we are going to see very divergent results even when the courts are asked to apply the doctrine to very similar situations. Only time will tell whether this doctrine will take root and become another cornerstone of administrative law.

Some may argue that although the facts of *Zeqiri* and *Ng Siu Tung* were similar, they were not indistinguishable from each other. Unlike *Ng Siu Tung*, there were never any express representations directed to the applicants in *Zeqiri*. What was relied upon was an implied representation that was alleged to have arisen out of the conduct of adversarial litigation and the nature of a test case made to the applicants’ legal representatives. Moreover, at the time of the alleged representation, the test case had only reached the Court of Appeal and leave for appeal to the House of Lords had been obtained. The Secretary of State, in replying to the inquiries concerning the effect of the test case, indicated not only that he was contemplating an appeal, but also that he wished to obtain legal advice on the effect of the judgment. Therefore, the argument goes, the House of Lords was well justified in concluding that there was no conduct which amounted to a sufficiently clear representation that the public authority would abide by whatever the test case decided.

Such arguments are, in the authors’ view, rather artificial. A representation is a representation. It does not matter whether it is express or implied.

⁸² *Ibid.*, para 44. Emphasis added.

The question is rather whether the representation is clear and unequivocal. In the authors' view, whether it is express or implied representation can hardly justify the very different treatments received by the applicants in the two cases.

Conclusion

The doctrine of legitimate expectation is a powerful concept and may open up challenges in different aspects of public law. It is now sufficiently clear that the CFA in Hong Kong and subsequently the House of Lords in the United Kingdom has endorsed the doctrine, although its limits are yet to be determined. The landmark decision of *Ng Siu Tung* should be celebrated in this respect: it will certainly play a significant role in enhancing the rule of law and, one hopes, the quality of public administration in Hong Kong in the future.