

Legitimate Expectation

WEBINAR TRANSCRIPT

Overview

This webinar covers the public law topic of legitimate expectation. It gives an overview of key case law and shows how to minimise the risk of a successful legal challenge.

The training aims to educate viewers by covering:

- What the doctrine of legitimate expectation is
- When a substantive legitimate expectation might arise
- When a paradigm case of procedural legitimate expectation might arise
- When a secondary case of procedural expectation might arise
- When a public authority can resile from a legitimate expectation
- Common misconceptions and pitfalls

Introduction

Simon Ramsden: Welcome to this webinar on legitimate expectation. My name is Simon Ramsden and I am a lawyer at the Treasury Solicitor's Department. I am joined to explore the subject by Jason Whiston, a lawyer at Her Majesty's Revenue & Customs. And also by Arna Ostberg, a legal adviser at the Department of Energy & Climate Change.

We are going to consider six particular questions by reference to the decided cases. First of all, what is the doctrine of legitimate expectation? When might a substantive legitimate expectation arise? When might a paradigm case of procedural legitimate expectation arise? When might a secondary case of procedural legitimate expectation arise? When can a public authority resile from a legitimate expectation? And finally, what are the common misconceptions and difficulties in this area?

We are going to touch upon legitimate expectations that are protected by the European Convention on Human Rights, but we won't be dealing with those arising in EU law.

So, Jason, first of all what is the doctrine of legitimate expectation?

Jason Whiston: Well as your introduction suggested, Simon, there are three distinct types of legitimate expectation: substantive expectation; procedural expectation; and secondary procedural expectation. We will be dealing with those in turn, but overall the doctrine can be seen as a distinct application of the concept of abuse of power. It has also been described in the context of procedural legitimate expectation as a principle of good administration linked to the requirement for public authorities to act consistently.

In the Court of Appeal case of *Unilever [1996] STC 681*, Lord Justice Simon Brown discussed abuse of power. This was in the context of some inconsistent treatment of a taxpayer by the Inland Revenue. He said that *"it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power."* He emphasised that the doctrine was not really about any private law concepts such as estoppel; it was not primarily about keeping a public authority to its promises; it was ultimately an impression of unfairness in all the circumstances.

The judgment of Lord Justice Laws in *Bhatt Murphy [2008] EWCA Civ 755* contains, I think, a useful overview of the doctrine. He summarised it as follows:

"The power of public authorities to change policy is constrained by the legal duty to be fair and other constraints which the law imposes. A change of policy which would otherwise be legally unexceptional may be held to be unfair by reason of prior action, or inaction, by the authority".

So where an authority has issued a promise or engaged in a practice which amounts to a representation of how it might act in a given area it will usually have to stick to that promise. I say usually because there are some cases where a public authority can resile from its legitimate expectation and we will come to those later. It will therefore usually be relevant to examine the whole of the conduct and aims of the public authority. And finally, it is worth noting that the law of legitimate expectation is evolving and there are likely to be further developments.

Substantive expectation

Let us begin by looking at substantive legitimate expectation. This arises where an authority wants to change the substance of an existing policy or practice. It arises where the court would allow a claim to enforce the enjoyment of the policy or practice now or in the future. And this can be distinguished from a procedural right, such as the right to have notice or to be consulted upon a change of policy. Let us look at a policy arising from a promise. The promise can be express or implied, but it must be a clear and unambiguous representation made to an individual or group that the policy can be enjoyed.

So how do we decide whether the representation is sufficiently clear? This routinely gives rise to difficulties in practice. It is necessary to determine whether it was reasonable for the claimant to rely on it. The difficulty here is in identifying the appropriate evidence base. What appears to be a clear statement in document 'A' might, on a proper examination of all the documents, be qualified by another statement or a practice. The source and purpose of the documents may also have to be considered. For example, in identifying a promise it is fundamental to distinguish between guidance as to policy in a sense of a statement as to how a particular discretion is going to be exercised and practical internal guidance to administrators working in the department

The distinction can be central in assessing whether a legitimate expectation arises and the extent to which it arises. For example, internal guidance which is published to the world at large has been held in some cases not to give rise to a legitimate expectation. By contrast, guidance which has been published with a specific intention of being relied upon might in some cases be able to create an expectation, even where the guidance rests upon a mistaken view of the law – assuming that the guidance is lawful.

Now let us turn to an expectation that arises from a practice of the public authority. Here the expectation can arise if the policy is settled and established in practice. What is needed is evidence that the practice was unambiguous, widespread, well established, well recognised. It must carry with it a commitment to the individual or group that they will be treated in accordance with the practice. The Supreme Court case of *Davies [2011] UKSC 47* is an interesting authority in this area.

So let us look at a couple of practical examples of substantive expectation. In the case of *Khan [1985] 1 All ER 40 (CA)* the Home Office had promulgated criteria for the admission of children into the UK for adoption, but there was also an unpublished criterion. The appellant sought entry to the UK for his prospective adopted child; he satisfied the published criteria but the unpublished policy was against him. The court found that he had an expectation which failed to be protected to be treated only in accordance with the published criteria regardless of the unpublished policy.

Another example, *Coughlan [1999] EWCA Civ 1871*, is considered to be a leading and particularly clear case, but even in such a case the court will carefully scrutinise the whole context. Miss Coughlan was a very severely disabled lady. She and seven other disabled patients had been given a clear promise by the health authority; this was that a residential home, Mardon House, would be their home for life. But the health authority decided to close Mardon House because it had become financially unviable.

The key findings of the court were the promise or representation was made in precise terms on a number of occasions. It was made to a small group of severely disabled persons; the individuals had been cared for over a significant period of time by the authority and the authority had made the representation for its own purposes in order to persuade the individuals to move into Mardon House. This case shows that the

expectation must in the words of the case be 'pressing and focused'. All the circumstances, including the conduct of the authority, the scope and nature of the representation and the group that were affected, had to be taken into account.

One particular point is of interest – the court said that it was difficult to imagine a case in which a substantive expectation would arise if the representation were made to a wide or diverse class rather than to a specific individual or group. That seems to be because the wider or more diverse the group the more likely it is that the interests of members of the group will be in conflict.

Simon Ramsden: Earlier we spoke to Andrew Jack who worked on one of the leading legitimate expectation cases. Here is what he had to say.

Andrew Jack: Well I think there is a simple fundamental point that is well illustrated by the *Building Schools for the Future* litigation, which is that – as everybody knows and as every potential claimant therefore knows – we have general elections and Government change. So there are clear limits to the extent to which what a past Government has said can create a substantive legitimate expectation about what this Government will do.

Paradigm procedural expectation

Simon Ramsden: So having looked at substantive legitimate expectation, let us look at procedural legitimate expectation. Arna?

Arna Ostberg: A public authority can also create a legitimate expectation as to the procedure the authority will follow before it makes any changes to its policy or practice. A procedural expectation is in practice more common than a substantive expectation and it is much harder for a public authority to show that it is fair for the authority not to follow a procedure which it has committed to.

As with substantive legitimate expectation, procedural legitimate expectation can be created in two main ways. The most common is for an express promise to follow a particular procedure, normally to consult, or a previous practice of doing so. The second is much more unusual. Here a public authority has not made such a promise or maintained such a practice, but nevertheless it conducts itself in such a way that it would be manifestly unfair to allow the public authority to change its policy or practice without first following a fair procedure. We will consider each in turn.

The first situation, where there is an express promise or maintained practice, was described by Lord Justice Laws in *Bhatt Murphy* as a paradigm case of legitimate expectation. This category of legitimate expectation is rooted in the requirements of good administration and the law on this one is fairly settled.

Simon Ramsden: So when might a paradigm case of procedural legitimate expectation arise, Arna?

Arna Ostberg: So as mentioned, it will normally arise where a public authority has provided an unequivocal assurance, whether by means of a promise or an established practice, that it will give notice or embark on a particular consultation before it changes an existing substantive policy. As stated by Lord Justice Laws in *Bhatt Murphy*, "*If the public authority has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult.*"

In *Bhatt Murphy* the claimant sought to rely on the Cabinet Office Code of Practice on Consultation as well as certain statements on the Home Office website. They claimed that these demonstrated a promise that the Home Office would consult before making any changes to its policy. The policies in question were compensation schemes for victims of miscarriages of justice and the Home Office had decided to withdraw the schemes. The Court of Appeal did not agree that a legitimate expectation had been created simply through these statements and through this Code of Practice, and considered that the statements relied on did no more than confirm that the Code would apply when it was decided as a matter of policy to have a public consultation. This did not represent a promise that a public consultation would be carried out before every policy change.

This reiterates the point that although a procedural legitimate expectation may be created more readily than a substantive expectation, in a paradigm case the promise or practice still must amount to an unequivocal assurance.

In contrast to *Bhatt Murphy*, the published statements by the public authority in *Majed [2009] EWCA Civ 1029* were sufficient to amount to an unequivocal assurance. In *Majed* the public authority had published a statement as part of its local development scheme as to the way in which it intended to involve local communities in the consideration of planning applications. But local communities were not then involved to the extent suggested by the statement when the authority took a planning decision affecting the claimant. The authority had consulted, but only to the extent required by the relevant statute. The Court of Appeal concluded that a legitimate expectation had been created by the statement as to community involvement.

As shown by this case, the promise to do more than is required by the statute was what gave rise to the legitimate expectation. This is something to bear in mind when considering mistaken promises, such as where a public authority misinterprets a relevant legislation. This is something we will touch on later.

Simon Ramsden: Given this, can an authority create a legitimate expectation as to the way in which the consultation is carried out?

Arna Ostberg: It certainly can. If it has given an unequivocal assurance that a particular process will be followed when a consultation is carried out, then the public authority might breach a procedural legitimate expectation if it carries out the consultation in a different way. This is shown by the *Greenpeace* case *[2007] EWHC 311 (Admin)*. In that case, the Secretary of State had made a substantial number of statements including published policy documents as to the need for an open consultation process before key decisions were taken about whether to proceed with new nuclear power. These statements included an assurance in a White Paper in 2003 that the fullest public consultation would be carried out before such decisions were taken. A consultation document was published in 2006 and various engagement events were carried out. The Secretary of State then published an energy review report in which it stated that new nuclear power has a role to play in the future UK generating mix and it sought views on specific issues.

Greenpeace claimed that the statements by the Secretary of State created a procedural legitimate expectation that the consultation would be carried out in a particular way. And it said that the process followed failed to live up to this promise of a fullest public consultation. Mr Justice Sullivan agreed taking the view that the consultation that had been carried out did not discharge the expectation that had been created.

These cases give a flavour of the sorts of situation in which a public authority's statements or practices may amount to an unequivocal assurance of the sort covered by this paradigm case of procedural legitimate expectation. They also give a sense of the potential implications of such an assurance. When considering whether a public authority has created a legitimate expectation through its practice, as shown by *Bhatt Murphy*, the fact that a public authority has previously consulted before changing certain policies, or even that it is committed to following a particular process when it consults does not in itself create an expectation. But caution is required if a public authority which has maintained a practice of consulting before each time it takes a certain type of decision, if it then seeks to take a similar decision without carrying out such a consultation.

Secondary procedural expectation

Simon Ramsden: Now let us consider the other way in which procedural legitimate expectation might arise.

Arna Ostberg: It is possible for a public authority to create a procedural legitimate expectation in the absence of an unequivocal assurance through a promise or a practice. This is where the public authority has conducted itself in such a way that to allow it to change its policy without giving the persons affected a chance to comment would otherwise be so unfair as to amount to an abuse of power. Lord Justice Laws described this as a secondary case of legitimate expectation. It is an exceptional category of case and will not easily be established.

In order for a public authority to create an expectation merely by its conduct, that conduct must go so far as to amount to a clear representation directed at the claimants. The impact of the public authority's conduct must be pressing and focused. And an individual or group must have substantial grounds to believe that the substance of the policy will continue for their particular benefit; not necessarily forever but at least for a substantial period of time. As a consequence, a change in policy cannot be abrupt. There must be notice or consultation with any individual or group affected; there may also be a need for transitional arrangements before the policy can be changed.

This category of legitimate expectation arose in the case of *Unilever*. Their case involved the former Inland Revenue's treatment of a taxpayer's claims for loss relief against Corporation Tax. A time limit for making such claims was stipulated in legislation, but the Revenue enjoyed a discretion to entertain late claims. And it did on 30 occasions over a period of more than 20 years; the taxpayer submitted late claims and the Revenue accepted them. But then with no prior notice, warning or consultation, the Revenue refused the taxpayer's claims on the ground that they were not made within the statutory time limit. The Court of Appeal held that to reject Unilever's claims without clear and general advanced notice was so unfair as to amount to an abuse of power; a procedural legitimate expectation had been created.

Another example of a case with secondary procedure expectation was established, it is the case of *Luton Borough Council [2011] EWHC 217 (Admin)*, also called the *Building Schools for the Future* case. In that case the Secretary of State decided to stop certain school building projects which were being undertaken by local authorities. These projects had been earmarked under the Building Schools for the Future programme and had received outline business case approval. The Secretary of State and the local authorities had been in continuous and intense dialogue right up until the closure of the projects. The

authorities had acted in reliance on this, including by spending significant sums of money. Although the Secretary of State had not expressly promised that the project would certainly be funded the Administrative Court concluded that the abrupt cessation of the projects without consultation breached a procedural legitimate expectation and amounted to an abuse of power. In that case, the fact that large amounts of money were at stake did reinforce the need for a consultation.

Now let us consider the case of *Cheshire East Borough [2011] EWHC 1975 (Admin)*, which is in stark contrast to the *Luton* decision. That case involved a challenge by certain local authorities including Cheshire to a decision by the Secretary of State not to provide private finance initiative funding for certain waste diversion projects. The Secretary of State had previously approved an outline case for funding submitted by Cheshire and announced a preferred bidder. In doing so the Secretary of State made clear that this should not be treated as a guarantee of the issue of the funding, which was subject to approvals but also to departmental policy and priorities. Cheshire nevertheless expended considerable sums of money in the belief that the project would proceed.

So in the context of the new Government's comprehensive spending review, the Secretary of State decided to review the relevant funding and subsequently it decided to refuse funding for Cheshire's project. The Administrative Court found that a procedural legitimate expectation had not been created. Mr Justice Langstaff emphasised the exceptional nature of the jurisdiction and that the requirements of fairness must be judged overall, not purely from the perspective of the claimant. In this case the judge accepted the Secretary of State's arguments that there were substantial time pressures, given the need to take a decision in time for the announcement of the spending review cuts, which were to include details of those affected. Any delay could have had an adverse effect on the market and could also have been counterproductive.

It is also worth noting from this decision that the court attached a good deal of weight to the rationality of the decision not to consult. This seems to have influenced the assessment as to whether a procedural legitimate expectation had been created in the first place. In any case, this is likely to be a key factor in deciding whether a public authority can, or should, resile from a legitimate expectation it has created. This is something which we will consider next.

Changes in policy

Simon Ramsden: The question of whether an expectation has been created by a public authority is not the end of the story. Jason, is a legitimate expectation always binding on a public authority?

Jason Whiston: Not always. A legitimate expectation can be frustrated by a public authority if there is a pressing need arising from public policy considerations. There are a number of relevant factors. But first, a word or two about the decision-making process.

What if a public authority considers that it hasn't made a legitimate expectation? Does it still then have to justify resiling from it? The answer seems to be yes. First, the public authority ought to acknowledge that it might have made a legitimate expectation. Secondly, it should attach appropriate weight to the legal and factual consequences of resiling from it. And thirdly, it should engage in a notional justification of defeating the legitimate expectation. Essentially it asks – if there were a legitimate expectation would it be justified

to resile from it? In answering that question, the public authority balances the public interest on the one hand with the claim to have the legitimate expectation honoured.

Simon Ramsden: Why is it helpful for a public authority to undertake that exercise?

Jason Whiston: Well that is because in due course the court might decide that there was in fact a legitimate expectation. If that happens then the public authority will have to show that it was justified in defeating the legitimate expectation, but also that it conducted its decision making process in a lawful manner. But we might like to note that the onus always shifts to the public authority once it has chosen to try to justify defeating the expectation by reference to an overriding public interest.

Simon Ramsden: It may be helpful to explain which factors are relevant in showing that the decision to frustrate a legitimate expectation was lawful.

Jason Whiston: Yes, well of course there may be a range of factors that are relevant depending upon the particular nature of the case. But, broadly, relevant factors include whether the decision is more within the policy arena, where the court will traditionally defer to the policy judgments, or instead more within the court's traditional area of competence. The proportionality of the measures that have been taken is also a factor and in general the care that has been taken by the public authority in coming to its decision. It is relevant to consider whether the expectation arose from a mistake, also whether the aggrieved person relied on the promise or practice to their detriment. And, in rare cases, whether the expectation is in relation to an act which would be ultra vires. The extent of the class of persons affected is also a relevant factor, potentially, and of course there may be other relevant factors.

Some of these last points, such as the relevance of detrimental reliance raise further questions and Arna will deal with those in the last section on misconceptions and pitfalls. But I shall now look at some practical examples of policy and proportionality matters where they were able to disappoint legitimate expectation.

First we will look at the question of deference to policy makers. The court is likely to defer to the decision of the public authority where the decision requires expertise in social and economic policy or has unforeseeable policy consequences or involves important or difficult policy choices. On the other hand the court will be more intrusive and more readily weigh up competing factors if it considers that the case discloses an issue of principle more within its traditional area of competence. Such an issue might for example be one of fundamental rights or there might simply be a case which discloses particularly clear factual and legal issues. The test can be seen as a sliding scale of deference from a traditional *Wednesbury* type of scrutiny through to anxious scrutiny of fairness and proportionality issues. The court is always the primary decision maker as to what is fair, but an authority may attempt to characterise its decision as more within its own competence rather than the competence of the court.

In *Cheshire*, the court held that there was an overriding public interest; there are some interesting passages in that judgment relevant to this discussion. For example, Mr Justice Langstaff said,

"The Government decided on a macro-political and macro-economic basis that spending had to be cut significantly and quickly. A plan for deficit reduction was to be set out in an emergency budget within 50 days." He went on to say, "In that context I accept that a decision maker in an individual

department of state must be accorded a wide margin of appreciation and a court must be reluctant to interfere with technical expert judgments".

In the same way, the court is likely to respect the particular knowledge and expertise of the state in the area of national security. In the *Council of Civil Service Unions [1983] UKHL 6* case it was accepted that the Government could frustrate the procedural expectation of employees at GCHQ to have a consultation in relation to the proposed removal of their right to join a trade union.

In the cases I have mentioned the test was very close to one of rationality, in the traditional *Wednesbury* sense. Although – as I have said – the court is the primary decision maker, it will generally be reluctant to interfere with a clear policy judgment. Related to this point is the point that the more general and diverse the class of people that are affected the more likely it is that policy considerations will trump any suggestion of legitimate expectation. That is because the group is unlikely to be speaking with one voice so it will be more likely that there are complex policy judgments to be made.

Also if a consultation would be counterproductive to the policy that would be consulted on then this may in itself amount to an overriding policy reason not to consult; this is shown by the *Cheshire* case and also by the case of *Trillium (Prime) Property [2011] EWHC 146 (Admin)*. In the *Trillium* case there was a real risk that consultation on the designation of an area as a conservation area would harm the proposed policy to designate that area; there was a risk that a particular building in that area would be demolished.

Turning to the requirements of proportionality, the more the authority can show that it exercised its own judgement carefully and proportionately, in assessing the countervailing public interests and the effect on the claimant, the more likely it is that the authority will be found to be able to frustrate a legitimate expectation.

In *R (on the application of W) v the Secretary of State for Education [2011] EWHC 3256 (Admin)* a teacher had a substantive legitimate expectation that no further action would be taken against him. But there was then a later decision by the Secretary of State to bar him from working with children; this resiled from the earlier decision. The court held that the decision to resile was legitimate and proportionate; the public interest in protecting children from the risk of sexual abuse was manifest and pressing, and the Secretary of State had devised fair procedures that would be followed. The availability of safeguards by way of an appeal on the merits was also relevant to the question of whether the Secretary of State's decision had been proportionate.

The overall position has been summarised in the case of *Bibi [2003] All ER 218*, where it was held that (and I quote):

"At the end of the day the court must decide whether, having regard to all the relevant circumstances including the reliance by the citizen, the impact on the interests of the citizen and the public, and considerations of proportionality, for the public body to resile would in all the circumstances, and applying the criteria referred to, be so unfair as to amount to an abuse of power."

Simon Ramsden: Part of exercising powers lawfully requires explanation and reasons, so here is Andrew again with some practical observations.

Andrew Jack: One thing we need to communicate particularly clearly to our policy colleagues is the importance of the audit trail of a decision should there be a judicial review of it. So it is crucial that the records of a decision, for instance the submissions that go to ministers, make clear what the relevant factors were that the minister took into account. If a minister is being advised that there is a risk that there is a legitimate expectation, either procedural or substantive, but there are good reasons not to honour that expectation, clearly it is vital that that is addressed clearly and that it is going to be clear from the submission what the countervailing reasons for not honouring the legitimate expectation were. If those things are done then meeting any subsequent challenge is going to be much, much easier.

Common misconceptions

Simon Ramsden: In this next section we are going to explore some common misconceptions about the law governing legitimate expectation. Let us turn first to detrimental reliance. Early authorities seem to suggest that it is essential to establishing a legitimate expectation, but Arna is that the case?

Arna Ostberg: Well if a person has changed their position of reliance on a promise or practice by a public authority then this is going to be very influential to the court, both when deciding whether a legitimate expectation has been created but also whether it is fair for a public authority to resile from it. So it will be a key consideration, but it is not a precondition. For instance, a person has a right to be treated in accordance with a policy which is enforced at a particular time. They may not have relied on it, they may not have even known that it existed, but the public authority still must treat them in accordance with that policy.

Where there is no concrete detrimental reliance the court has sometimes attached weight to what they have called moral reliance. This could even be something like a prolonged disappointment. And in such cases the court has still concluded that there is a legitimate expectation.

Simon Ramsden: What about the circumstances in which a public authority makes a mistake?

Arna Ostberg: A public authority can create a legitimate expectation on the back of a mistake as to effect or a question of law. So, for instance, if a public authority proceeds on a mistaken assumption that a discretionary power that it has to confer a benefit, say, is in fact a duty to do so.

The conduct of the person seeking to rely on the promise is also important, however. So if the person has sought that promise from the public authority and if that is to be based upon a particular set of facts the person must disclose everything that is of relevance to the public authority when it decides whether it wishes to create such an expectation. The person has to lay their cards face upwards on the table, though the precise extent of the disclosure they have to make does depend on the circumstances of the case.

Of course the circumstances of the public authority when making the promise is also relevant. Consider for instance the case of *Begbie [1999] EWCA Civ 2100*. In that case the Labour party, while in opposition, decided that they wanted to withdraw a scheme that paid school fees for certain children. Statements were made before and after the party came to power that children who were already on the scheme would be able to continue to receive support until their education was completed. But the assurances made about the applicant's daughter were actually based on a mistake as to the application of the policy; properly interpreted the policy did not apply to this child and in fact the relevant legislation was

incompatible with the promise. In concluding that a legitimate expectation had not been created, the Court of Appeal was influenced by the fact that various of these statements had been made while the party was in opposition. And so in such a case they would not necessarily know all of the relevant facts and ramifications of such a promise.

Simon Ramsden: Does it follow that an ultra vires promise cannot give rise to a legitimate expectation?

Arna Ostberg: Well there has been a lot of academic debate in this area, but it remains the case that ultra vires representations do not give rise to legitimate expectation in UK law. This can be contrasted with a case where a public authority has a discretion as to how they will exercise a power. So in such a case a legitimate expectation can create a situation where the public authority is either bound to do something where actually they have just got a discretion to do otherwise, or they may even be prevented from doing something which they have a power to do. But in the absence of relevant discretion the only expectation a person has is to be dealt with in accordance with the law.

But it is necessary to tread carefully in this area. In particular, an ultra vires promise can give rise to a position which is entitled to protection under Article 1, Protocol 1 of the European Convention on Human Rights; any interference with that right must then be proportionate and justified in accordance with the law. Consider for instance the case of *Rowland [2003] EWCA Civ 1885*. In that case both the claimant and the navigation authorities had formed the view that some water that ran through the claimant's land was in fact private water. And they both relied on this, so the authorities had allowed the erection of signs stating that the water was private. Unfortunately it was not and so under common law and statute the water, which was part of the River Thames, was actually public. And when the navigation authorities decided to start to enforce this right of public access the claimant challenged that decision.

Well the Court of Appeal held that an expectation had been created through these practices and statements, but it was not legitimate as the promises and practices were unlawful. The actions by the authorities did create a position which was protected under the Convention, but on the facts the interference was regarded as proportionate as it was intended to protect the rights of the public under law. In a case where a court does not regard interference with a right as being proportionate, of course it may well decide that damages are payable.

Simon Ramsden: Can a legitimate expectation created by one public authority bind another?

Arna Ostberg: Well in general a legitimate expectation is only binding on the authority that created it. I mean, that is consistent with this principle that you are trying to avoid an abuse of power. But this has to be approached with some care by Government lawyers because the Crown is regarded as one entity for these purposes. This is demonstrated by the case of *BAPIO [2008] 1 AC 1003*.

In that case, the Home Department had a scheme with the primary intention of filling vacancies in the NHS. Under the scheme, international medical graduates could obtain renewable leave to remain if they met certain specified conditions. As the Home Department allowed entrance onto the scheme they had created a legitimate expectation that the entrant would be permitted to have a fair opportunity to meet those scheme's conditions. And these included the ability to seek and obtain employment in the area of skill. But the Department of Health had a slightly different policy – they wished to give preference to British and EU

applicants when filling NHS vacancies. But in that case it was established that the legitimate expectation created by the Home Department was enforceable against the Department of Health.

Practical tips

Simon Ramsden: It is clear from everything that we have covered today that the subject of legitimate expectations is a significant one for Government lawyers. In this final section we are going to offer some practical tips of our own. But before we do, here is Andrew Jack with some of his own observations.

Andrew Jack: Some of the cases can be extremely document heavy. I think the court itself said in the *GCSE* case that it had been faced with 18 lever arch files; the court in the *Building Schools for the Future* litigation said there had been over 9,000 pages worth of documents before it. That poses real challenges, both for the officials working in the defendant department but also for advisory lawyers and litigation lawyers. Everybody needs to be extremely well organised about processing the documents and storing them, locating them, understanding them. And everyone needs to be sufficiently well resourced to be able to do that efficiently and in a timely fashion.

Simon Ramsden: So, Jason, what particular risks might we need to mitigate against?

Jason Whiston: Well departments could give assurances mistakenly or where they are not intended. For example, if there were insufficient coordination between divisions or departments. Or where policy are still being developed and any assurances are not expressed conditionally. Or perhaps policy is being developed on a mistaken understanding of the law. Or the department might not have thought through fully the policy and legal constraints. And the consequences of making a representation might not have been fully considered even where the department wishes to make one.

Simon Ramsden: Arna, are there any special circumstances in which we need to take particular care?

Arna Ostberg: Well I would say that if a department is considering making a concession, it is very important to consider this carefully because it could become a settled practice. Secondly, if when developing a policy, a department has been engaging closely with a particular person it is very likely that they are going to have to also consult that person before changing that policy. Finally, just carrying out a consultation will not always be enough when you have created a procedural legitimate expectation; it is necessary to consider whether any assurances have been given as to the way in which that consultation will be carried out.

Simon Ramsden: Well we hope you've found this webinar on legitimate expectation helpful. To test your understanding there is a quiz which accompanies this video online. And completion of that will entitle you to your continuous professional development points.

The law of course is still developing in this area, so if you have any queries or if you would like to share any new cases, then you will find contact details also on the website. You will also find all the major cases that we have discussed today. And it only remains for me to thank Arna, Jason, and Andrew, and you for watching.