

THE CURRENT STATUS OF THE LEGITIMATE EXPECTATION IN ADMINISTRATIVE LAW

BY D. C. HODGSON*

[One recently developed rule in administrative law which has contributed to the rapid expansion of the use of the principles of natural justice has been the idea that the possession of a legitimate expectation gives rise to a right to a hearing. The author looks at the doctrine as it has developed in Australia, the United Kingdom and New Zealand in relation to licensing, immigration and employment. The conclusion indicates that the doctrine is by no means limited to these areas, and suggests factors which may be taken into account when determining whether a right to be heard does in fact arise upon such a basis.]

I. INTRODUCTION

The recent decision of the Privy Council in *Attorney General of Hong Kong v. Ng Yuen Shiu*¹ has provided administrative lawyers with yet another example of the application of the legitimate expectation doctrine in the context of the implication of the rules of natural justice. This emerging principle of law is a relatively recent development attributed to a dictum of Lord Denning M.R. in a 1969 decision of the Court of Appeal.² Welcomed by some³ and roundly criticized by others,⁴ the formulation of this doctrine has expanded the area of operation of the rules of natural justice. As we shall see later, the notion that the possession of a legitimate expectation will found a right⁵ to a hearing is potentially of very wide application.⁶

Nevertheless, judicial implementation of the legitimate expectation doctrine has been hampered by its lack of precision. It has been described variously as a

* Faculty of Law, Monash University.

¹ [1983] 2 All E.R. 346.

² *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149.

³ E.g., Wade H.W.R., *Administrative Law* (5th ed., 1982) 465, where the learned author expresses the view that the doctrine of legitimate expectation provides judges with a flexible criterion for rejecting unmeritorious claims.

⁴ See in this connection the observations of Barwick C.J. in *Salemi v. Minister for Immigration and Ethnic Affairs (No. 2)* (1977) 137 C.L.R. 396, 404: 'It is therefore necessary to examine the eloquent phrase "legitimate expectation" . . . I am bound to say that I appreciate its literary quality better than I perceive its precise meaning and the perimeter of its application.' See also his critical remarks in *Heatley v. Tasmanian Racing and Gaming Commission* (1977) 137 C.L.R. 487, 491-2.

⁵ Addressing himself to the question of the basis upon which the possession of a legitimate expectation gives rise to a right to be accorded natural justice, Stephen J. had this to say in *Salemi v. Minister for Immigration and Ethnic Affairs (No. 2)* (1977) 137 C.L.R. 396, 438: 'It stems, no doubt, from the same fertile source as has nourished the concept that those who possess rights and interests should not, in the absence of express enactment, be deprived of them by the exercise of an arbitrary discretion and without observance of the rules of natural justice . . .'. Jacobs J. pointed out in the same case that 'the expectation is [not] itself the right. The right is the right to natural justice in certain circumstances and a "legitimate expectation" is one of those circumstances' (*ibid.* 452). In other words, a legitimate expectation would have the same effect as a right in the context of implying the rules of natural justice.

⁶ Legitimate expectations have been called in aid in, *inter alia*, licensing, immigration, disciplinary and employment cases.

'reasonable expectation'⁷, a 'settled expectation'⁸ and a 'well-founded expectation'⁹. This terminological inconsistency is overshadowed by the ambiguity arising from the cases in relation to whether the expectation relates to that of a fair hearing before an adverse decision is taken¹⁰ or, alternatively, of the benefit which is being sought.¹¹ Finally, the cases¹² are replete with statements echoing the sentiments expressed by Aickin J. that '[I]t cannot be said that the true extent of the notion that an expectation may be the foundation of a right to compel observance of the relevant principles of natural justice has yet been fully worked out or stated with precision'.¹³ By its very nature, the doctrine appears to eschew firm articulation in relation to its content and operation and the formulation of guidelines as to what provides an expectation with its 'legitimacy'.

Although the last word has yet to be said, it is perhaps timely in view of the Privy Council decision¹⁴ and a number of recent decisions of the Federal Court of Australia to undertake an examination of the English and Commonwealth authorities with a view to consolidating some of the principles that have emerged therefrom. In particular, is the legitimate expectation doctrine useful and judicially manageable or has it led to one more artificial area of the law? In which fields of human activity is it prone to manifest itself? Upon what bases can a legitimate expectation arise?

II. FROM RIGHTS TO EXPECTATIONS

Until the 1960s, the courts looked for a recognized right in determining the issue whether an authority was bound to comply with the *audi alteram partem* rule. In order to reap the benefits of the rules of natural justice, a complainant of injustice had to establish that his property, liberty or livelihood was being interfered with by the authority in question in the exercise of its powers. Thus, it was held in *Cooper*

⁷ *Heatley v. Tasmanian Racing and Gaming Commission* (1977) 137 C.L.R. 487, 508 per Aickin J.

⁸ *R. v. Liverpool Corporation: ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299, 304 per Lord Denning M.R.

⁹ *Salemi v. Minister for Immigration and Ethnic Affairs (No. 2)* (1977) 137 C.L.R. 396, 439 per Stephen J.

¹⁰ E.g., *Cinnamond v. British Airports Authority* [1980] 1 W.L.R. 582; *Ioannou v. Fowell* (1982) 43 A.L.J.R. 415, 433 where Sheppard J. regarded the applicant's submission that he had been deprived of a legitimate expectation of having his employment continued as being put on too high a basis — the preferable view being that the applicant had been merely deprived of a legitimate expectation that he would be heard before a decision was made.

¹¹ The majority of cases incline to this view: *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149, 171; *Breen v. Amalgamated Engineering Union* [1971] 2 Q.B. 175, 191; *McInnes v. Onslow-Fane* [1978] 1 W.L.R. 1520, 1529; *O'Reilly v. Mackman* [1982] 3 All E.R. 1124, 1126; *O'Rourke v. Miller* [1984] V.R. 277, 292; *Jim Harris Ltd v. Minister of Energy* [1980] 2 N.Z.L.R. 294, 297.

¹² E.g., *Attorney General of Hong Kong v. Ng Yuen Shiu* [1983] 2 All E.R. 346, 350 per Lord Fraser of Tullybelton (delivering the judgment of the Board); *F.A.I. Insurances Ltd v. Winneke* (1982) 56 A.L.J.R. 388, 410 per Wilson J. and 418 per Brennan J.; *Cole v. Cunningham* (1983) 49 A.L.J.R. 123, 129; *Nashua Australia Pty Ltd v. Channon* (1981) 36 A.L.J.R. 215, 224-5, where Lee J. described a legitimate expectation as a 'somewhat vague legal concept'; *Jim Harris Ltd v. Minister of Energy* [1980] 2 N.Z.L.R. 294, 297.

¹³ *Heatley v. Tasmanian Racing and Gaming Commission* (1977) 137 C.L.R. 487, 509 per Aickin J. See also *F.A.I. Insurances Ltd v. Winneke* (1982) 56 A.L.J.R. 388, 402, where Aickin J. repeats this observation.

¹⁴ *Attorney General of Hong Kong v. Ng Yuen Shiu* [1983] 2 All E.R. 346.

v. *Wandsworth Board of Works*¹⁵ that the exercise of a statutory power to demolish a house in default of written notice of intention to build was qualified by the affected person's right to be heard on the basis that 'no man shall be deprived of his property without an opportunity of being heard, . . .'.¹⁶ Although originally definitive of the sphere of operation of the prerogative writs of certiorari and prohibition, the 'Atkin formula'¹⁷ developed into a test to determine the applicability of the rules of natural justice. The right to be accorded natural justice was founded upon a legal right, and the common law rule that a statutory authority which has a power to affect the rights of a person is bound to hear him before exercising such power, is still firmly ensconced in the law.¹⁸ Nevertheless, such an unqualified rule excluded from its ambit those cases where a complainant could establish substantial hardship even though no right recognised by law was involved. Moreover, the necessary 'right' received a narrow interpretation in a number of cases including *Nakkuda Ali v. Jayaratne*¹⁹, where the Privy Council held that in cancelling a textile dealer's licence on the ground of unfitness, the Controller of Textiles had been under no legal duty to afford the dealer a hearing on the ground, *inter alia*, that the Controller was not determining a question affecting the dealer's rights but was merely 'taking executive action to withdraw a privilege'²⁰ when cancelling the licence.

In response to the rigours of an approach which insisted on 'rights' in the face of increasing governmental intervention in the activities of citizens,²¹ and in their desire to circumvent the rights/privileges dichotomy in relation to occupational licences, the courts adopted a more liberal policy in the 1960s by construing 'rights' broadly and abandoning a strict insistence on the existence of a right. In *Banks v. Transport Regulation Board (Vic.)*²², Barwick C.J. did not feel constrained by *Nakkuda Ali v. Jayaratne*²³ in holding that a taxi-cab licence is not a mere privilege but property which provides its holder with a means of livelihood.²⁴ One year earlier, the Divisional Court had demonstrated its willingness to intervene to protect against action which did not directly affect enforceable legal rights in *R. v. Criminal Injuries Compensation Board; ex parte Lain*²⁵. There the respondent Board had been established pursuant to the prerogative to determine

¹⁵ (1863) 14 C.B. (N.S.) 180.

¹⁶ *Ibid.* 189 *per* Erle C.J.

¹⁷ 'Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs [of prohibition and certiorari].': *per* Atkin L.J. in *R. v. Electricity Commissioners; ex parte London Electricity Joint Committee Co. (1920) Ltd* [1924] 1 K.B. 171, 205.

¹⁸ *Twist v. Randwick Municipal Council* (1976) 136 C.L.R. 106, 109 *per* Barwick C.J.

¹⁹ [1951] A.C. 66.

²⁰ *Ibid.* 78. See also *R. v. Metropolitan Police Commissioner; ex parte Parker* [1953] 1 W.L.R. 1150, 1154 where Lord Goddard C.J. regarded a London cab driver's licence as 'nothing but a permission' the revocation of which was not qualified by an obligation to comply with the rules of natural justice.

²¹ Sykes E. I., Lanham D. J. and Tracey R. R. S., *General Principles of Administrative Law* (2nd ed., 1984) 142.

²² (1968) 119 C.L.R. 222.

²³ [1951] A.C. 66.

²⁴ (1968) 119 C.L.R. 222, 233-4.

²⁵ [1967] 2 All E.R. 770.

the amounts of *ex gratia* payments to be made to victims of violent crimes. In rejecting a submission that the Board is not a body of persons having authority 'to determine questions affecting the rights of subjects' and therefore is not amenable to the supervisory jurisdiction of the courts, Lord Parker C.J. stated: 'I cannot think that Atkin L.J. intended to confine his principle to cases in which the determination affected rights in the sense of enforceable rights.'²⁶ Diplock L.J. delivered a concurring judgment adding that '[I]t is plain on the authorities that the tribunal need not be one whose determinations give rise directly to any legally enforceable right'²⁷ for its determinations to fall within the review jurisdiction of the High Court. In the same year, the Divisional Court held in *In re H. K. (An Infant)*²⁸ that immigration authorities were obliged to accord to a potential immigrant to the United Kingdom an opportunity of satisfying them that he fulfilled the entry requirements laid down by the relevant statute. Lord Parker C.J. noted the absence of any power to refuse admission to H. K. if he satisfied the immigration officer that he fulfilled these statutory criteria and held that as a matter of fairness, 'he [the immigration officer] must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him.'²⁹ Soon afterwards in *Schmidt v. Secretary of State for Home Affairs*³⁰, Lord Denning M.R. explained this decision on the basis that the right to be heard arose out of H. K.'s 'legitimate expectation' of admission to the United Kingdom since he would have had a right to such admission if he satisfied (as he claimed to) the statutory requirements.³¹

III. THE BIRTH OF A NEW DOCTRINE

A policy issue which confronted Lord Denning M.R. in *Schmidt's* case was whether an expectation should be accorded the same protection in law as a legal right in terms of natural justice.³² The breakthrough provided by Lord Denning's judgment was the express acknowledgment that the possession of a legitimate expectation could give rise to a right to be accorded natural justice, with the underlying policy reason therefor appearing to be the necessity to ensure fairness and justice. Schmidt was an alien student of Scientology who had been granted leave to enter the United Kingdom pursuant to the then Home Office policy of allowing aliens entry for the purpose of full-time study at a recognised educational

²⁶ *Ibid.* 777.

²⁷ *Ibid.* 779.

²⁸ [1967] 2 Q.B. 617.

²⁹ *Ibid.* 630.

³⁰ [1969] 2 Ch. 149.

³¹ *Ibid.* 170.

³² 'To accord to a well-founded expectation the same protection as the law will in such a case give to some right of property is to reflect what Megarry J. said in *John v. Rees* [1970] 1 Ch. 345 when, in dealing with a plaintiff's loss of honorary office in a branch of a political party, he rejected the notion "that the right to natural justice depends upon the right to a few pieces of silver" ([1970] 1 Ch. at 398);' per Stephen J. in *Salemi v. Minister for Immigration and Ethnic Affairs* (No. 2) (1977) 137 C.L.R. 396, 439. See the prefatory remarks in Lord Denning, *The Discipline of Law* (1979), which are suggestive of the basis of his Lordship's reasoning in *Schmidt* in this regard.

establishment. Application was made some months later to the Home Office for an extension of Schmidt's stay to enable him to complete his studies, but the Home Secretary rejected the application on the basis that the Government no longer regarded Scientology institutions as recognised educational establishments for the purposes of the policy. Schmidt claimed declarations that, *inter alia*, the Home Secretary was obliged to consider his application for an extension of stay upon its merits and in accordance with the principles of natural justice. In rejecting Schmidt's submission that the Home Secretary ought to have given him a hearing before refusing to extend his stay, Lord Denning M.R. stated:

I quite agree, of course, that where a public officer has power to deprive a person of his liberty or his property, the general principle is that it is not to be done without his being given an opportunity of being heard and of making representations on his own behalf. But in the case of aliens, it is rather different: for they have no right to be here except by licence of the Crown. . . . The speeches in *Ridge v. Baldwin* [1964] A.C. 40 show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, *or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.*³³

The possession of a mere legitimate expectation sufficed to provide its holder with an opportunity of making representations. His Lordship proceeded to distinguish *In re H. K. (An Infant)*³⁴ on the basis that a statutory right of admission to the United Kingdom was there at stake if the Commonwealth citizen was (as he claimed to be) under 16 years of age. Lord Denning M.R. juxtaposed this case with the unreported decision of Lord Parker C.J. in *R. v. Secretary of State for the Home Department; ex parte Avtar Singh*³⁵, where it was held that immigration authorities were under no duty to give a Commonwealth citizen who wanted to enter the United Kingdom for the purpose of marriage, an opportunity of making representations on the ground that he had no right at all to be admitted in the face of an absolute discretion to refuse. Lord Denning continued:

If such be the law for a commonwealth immigrant, it is all the more so for a foreign alien. He has no right to enter this country except by leave: and, if he is given leave to come for a limited period, he has no right to stay for a day longer than the permitted time. If his permit is revoked *before* the time limit expires, he ought, I think, to be given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted time. Except in such a case, a foreign alien has no right and, I would add, no legitimate expectation — of being allowed to stay. He can be refused without reasons given and without a hearing.³⁶

Schmidt had no right or legitimate expectation which was being affected by the Home Secretary since he was being allowed to remain in the United Kingdom for the period originally granted. However, in his Lordship's view, the result would have been different had his leave to remain been revoked during its currency. A revocation of an existing permission to remain which an alien expected he would enjoy throughout its stated term would lead to a frustration of such expectation and, in such cases, the courts should be willing to imply, on Lord Denning's

³³ *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149, 170 (emphasis added). The adjective 'legitimate' is defined in *Black's Law Dictionary* (5th ed., 1979) to mean 'that which is lawful, legal, recognized by law, or according to law'. *Jowitt's Dictionary of English Law* (2nd ed., 1977) and *The Concise Oxford Dictionary* (5th ed., 1964) also define the term to include the connotation of 'lawfulness'.

³⁴ [1967] 2 Q.B. 617.

³⁵ Divisional Court, 25 July 1967, unreported.

³⁶ *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149, 171.

analysis, as a matter of procedural fairness, a right to be heard for the benefit of the person about to be affected by the adverse decision.

Lord Denning's dictum has blossomed in the intervening years particularly (and perhaps not surprisingly) in immigration and licensing cases.³⁷ The product of Lord Denning's liberal view of the stake which a person must have before the courts will intervene has been the extension of the ambit of operation of the rules of natural justice. However, it is significant to note that Lord Denning was not prepared (in Schmidt's circumstances at least) to apply the legitimate expectation doctrine to extension or renewal of permission, which is contrary to the recent judicial trend in licensing cases. Moreover, the basis upon which a legitimate expectation could be said to arise were confined to the protection of an existing benefit held by Schmidt and an inchoate statutory right in H.K. In other words, the legitimate expectation in both instances was tied closely to a right.

In a concurring judgment, Widgery L.J. emphasized that an alien desiring either to enter or remain longer in the United Kingdom has no right or interest of any kind the infringement of which is amenable to curial protection.³⁸ Accordingly, the Home Secretary's consideration of Schmidt's application for an extension was not qualified in law by the requirement to provide a hearing or receive representations.³⁹ Russell L.J. dissented from the judgments of Lord Denning M.R. and Widgery L.J. on another ground⁴⁰ but the Appeal Committee of the House of Lords dismissed a petition for leave to appeal.⁴¹ In the result, *Schmidt's* case upheld the right of the Home Secretary not to extend the stay of such alien students without first hearing them. More importantly, for present purposes, Lord Denning's dictum recognized that a legitimate expectation has the same effect as a legal right in the limited context of implying a duty to accord natural justice.

IV. THE LICENSING CASES

Whether or not a person is entitled to a right to be heard in licensing cases prior to a decision being taken by the relevant authority depends in substantial measure today on whether the person is applying for the particular licence for the first time or whether an existing licence is being revoked during its currency or expires by way of non-renewal. Different considerations apply and it is therefore proposed to deal with these three situations separately.

(a) *Initial Applications*

As we have already seen, the English courts until very recently perceived a licence as a mere privilege or permission revocable virtually at the pleasure of the

³⁷ The analogy between entry permits for aliens and licences to pursue occupations, etc., seems analytically to be a close one, and both matters raise the questions of justiciability at three possible points: (1) initial grant or refusal; (2) subsequent renewal or non-renewal; and (3) revocation during currency. Note, (1969) 43 A.L.J. 235, 236.

³⁸ *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149, 172-3.

³⁹ Although Widgery L.J. was prepared to rely on the notion of a legitimate expectation in distinguishing between an initial application for a licence and a refusal to renew an existing licence, he could perceive no analogy to the instant case (*ibid.*).

⁴⁰ *Ibid.* 171, where his Lordship expressed himself to be dissatisfied with the appropriateness of the instant case for striking out the statement of claim under the Rules of the Supreme Court.

⁴¹ [1969] 2 Ch. 174.

grantor.⁴² Accordingly, little, if any, distinction was drawn between the grant, revocation or renewal of a licence.

In relation to first or initial applications for a licence, the applicant was perceived as being devoid of any legal right to it. Burbury C.J. stated in *In re Holden*⁴³ that 'as a determination to grant or refuse an original licence involves only the conferring or withholding of a privilege and not an adjudication upon any existing right'⁴⁴, the authority there concerned was under no duty to comply with the requirements of natural justice. This type of reasoning was based on the notion that a difference existed between taking away an existing right and refusing one which the applicant has never enjoyed. The general reluctance of courts to insist upon the observance of natural justice when a decision is taken to grant or refuse an initial application for a licence can be attributed to a number of factors. Apart from the fact that nothing is being taken away from the applicant, an initial application for a licence may raise general issues such as the fitness of the applicant for the licence in question which often do not involve allegations of specific instances of past misconduct necessitating an opportunity to be heard in answer thereto. Initial applications also frequently involve public policy issues not necessarily related to the conduct or character of the applicant as well as wide discretions which courts have been loath to interfere with in the past.

With the advent of the legitimate expectation arose the question whether the doctrine could apply not only to non-renewal and revocation cases but to initial applications as well. Although at first blush it would seem difficult to conceive of circumstances in which a first-time licence applicant could be said to have a legitimate expectation of its grant, there does not appear to be any strict rule against the implication of the rules of natural justice in such a situation. Although it is not in general correct to say that the *audi alteram partem* rule is inapplicable to decisions to grant a licence, nevertheless a duty to observe the rule will be more readily implied where an existing licence is not renewed or is revoked in circumstances where the licensee had a reasonable expectation that it would be retained than where a person is making an original application for a licence.⁴⁵ Whether or not a first-time applicant for a licence can be said to possess a legitimate expectation of its grant so as to entitle him to be heard prior to a decision will depend largely upon the circumstances of each case and the particular licensing scheme involved.⁴⁶

The English case of *McInnes v. Onslow-Fane*⁴⁷ provides an example of judicial unwillingness to imply a right to be heard on an initial application. The plaintiff had applied to the British Boxing Board of Control for a boxers' manager's licence

⁴² *Nakkuda Ali v. Jayaratne* [1951] A.C. 66; *R. v. Metropolitan Police Commissioner; ex parte Parker* [1953] 1 W.L.R. 1150.

⁴³ [1957] Tas. S.R. 16.

⁴⁴ *Ibid.* 18.

⁴⁵ 1 *Halsbury's Laws of England* (4th ed.) 90-2.

⁴⁶ A first-time applicant's expectation of being granted a licence (and, by corollary, the licensing authority's duty to accord natural justice) may be correspondingly weaker where the statutory licensing scheme prescribes a ceiling as to the number of licences that may be granted and fails to provide guidelines or criteria governing the approval of the applications. See Sykes, Lanham and Tracey, *op. cit.* 162.

⁴⁷ [1978] 1 W.L.R. 1520.

and requested an oral hearing and prior notification of anything that might militate against the grant of the licence. The plaintiff had made five previous unsuccessful applications for the same licence between 1972 and 1975 and, in fact, had never held such a licence. The Board refused the instant application without giving him an oral hearing or reasons for the refusal. In an action for a declaration that in so refusing the application, the Board had acted in breach of the rules of natural justice, Sir Robert Megarry V.-C. held that the Board were under no duty either to provide the plaintiff with even the gist of their reasons or grant him an oral hearing. In the course of his judgment, Sir Robert identified three categories of decision:

First, there are what may be called the forfeiture cases. In these, there is a decision which takes away some existing right or position, as where a member of an organisation is expelled or a licence is revoked. Second, at the other extreme there are what may be called the application cases. These are cases where the decision merely refuses to grant the applicant the right or position that he seeks, such as membership of the organisation, or a licence to do certain acts. Third, there is an intermediate category, which may be called the expectation cases, which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted. This head includes cases where an existing licence-holder applies for a renewal of his licence, or a person already elected or appointed to some position seeks confirmation from some confirming authority . . .⁴⁸

Since the plaintiff had never before held the licence applied for, clearly the case was not one of forfeiture of an existing right or benefit. Nor could he bring himself within the expectation cases in view of his five recent unsuccessful applications for a manager's licence. In the Vice-Chancellor's opinion, 'the case is plainly an application case in which the plaintiff is seeking to obtain a licence that he has never held and had no legitimate expectation of holding; he had only the hope . . . which any applicant for anything may always have.'⁴⁹

An indication of when a court might be prepared to invoke the legitimate expectation doctrine in the case of an initial application is provided by the decision of the Full Court of Queensland Supreme Court in *R. v. Murphy; ex parte Clift*⁵⁰. The prosecutor has applied for a firearms licence under the Firearms Acts (1927-67), for the purpose of carrying on a security business, but was refused at first instance without reasons and again on appeal to the Minister without a hearing. Although s. 4 of the Acts vested in the Inspector of Police an 'absolute discretion' to issue or refuse to issue the licence in question, it required him to direct his mind to whether the applicant had good reason for acquiring the licence applied for and whether the grant of a licence would pose any danger to the public. On an application for certiorari to quash the decision dismissing the prosecutor's appeal on the ground of breach of natural justice, the Full Court made absolute the order *nisi*. Although acknowledging that '[c]ases of revocation and refusal to renew periodic licences may obviously stand on a different footing from a refusal to grant a licence in the first instance'⁵¹, the Court concluded that an applicant such as the prosecutor who *prima facie* has good reason for requiring the licence, is a fit

⁴⁸ *Ibid.* 1529. This passage was recently cited with apparent approval in *R. v. Secretary of State for the Environment; ex parte Brent London Borough Council* [1983] 2 All E.R. 321, 354.

⁴⁹ *Ibid.* 1530. The South Australian case of *Sobey v. Commercial and Private Agents Board* (1979) 22 S.A.S.R. 70, similarly evidences a judicial reluctance to find a legitimate expectation on an initial application despite a relatively stronger expectation on the facts.

⁵⁰ [1980] Qd. R. 1

⁵¹ *Ibid.* 7.

person to carry a firearm without danger to the public, and does not fall within any of the statutory disqualifications, has a legitimate expectation that the licence will be granted.⁵² As the Minister possessed the statutory power to affect such legitimate expectation, he was under a duty to receive representations from the prosecutor before arriving at a decision. Despite the width of the discretion reposed in the licensing authority, the result is not surprising in view of the nature of the licensing scheme involved which laid down criteria and failed to limit the number of licences.⁵³

(b) *Renewal of Licences*

The legitimate expectation concept is particularly well suited to licence renewal cases, and its development since *Schmidt's* case has facilitated the application of the rules of natural justice to this area of the law. This was only made possible, however, by the rejection of a strict, technical approach that perceived the renewal of a licence as nothing more than a fresh grant of an expired licence. *Weinberger v. Inglis*⁵⁴ illustrates the earlier attitude of the courts. Members of the London Stock Exchange were elected on an annual basis and the plaintiff, a member since 1895, applied unsuccessfully to the appropriate committee in 1917 for re-election. The House of Lords held that a court had no jurisdiction to interfere in such circumstances. The views of Lord Atkinson were typical of those of their Lordships:

He [the plaintiff] simply gets a licence to enter the buildings of . . . the Stock Exchange undertaking, . . . during the year mentioned to transact the business named. . . . There is, in my view, no continuity or connection whatever between the membership of a member for one year and his membership for a succeeding year. An existing member has no legal or equitable right or claim to be re-elected for the year succeeding his year of actual membership, though no doubt he may hope or expect that he will be re-elected. . . .⁵⁵

In the result, the possession of a mere expectation of re-election did not suffice to warrant judicial intervention. Indeed, until fairly recently, the view that the renewal of an annual licence is but a fresh grant of a new licence rather than the continuance of the old, continued to manifest itself in the cases.⁵⁶ Gradually, however, courts discarded the legalistic assimilation of a renewal with a fresh grant of an expired licence as they began to recognize that different considerations might well apply as between an initial application for a licence and its subsequent

⁵² *Ibid.* 9.

⁵³ See *supra* n. 46.

⁵⁴ [1919] A.C. 606.

⁵⁵ *Ibid.* 622. See also *Gerraty v. McGavin* (1914) 18 C.L.R. 152, 163-4, *per* Isaacs J. where the strict approach that a renewal of a licence does not differ from the grant of a new licence was illustrated by the view that the renewal of a lease constitutes the grant of a new lease.

⁵⁶ *Ex parte Fanning; Re Commissioner for Motor Transport* [1964] N.S.W.R. 1110, 1112, *per* Sugarman J. (with whom Herron C.J. and Walsh J. agreed). This case concerned a refusal to renew a taxi-cab licence upon its expiry. After conceding the existence of practical differences between the initial grant of a licence and subsequent grants of new licences in respect of the same subject matter, Sugarman J. continued (at 1112): 'These, however, are merely practical differences; and, in the absence of express provision in the Statute, do not import any difference in the applicable legal principles or in the discretionary character of the grant. It is only because licensing bodies, taking a sensible and practical view of their functions, are usually prepared to renew a licence [*sic*], once granted, in the absence of countervailing cause, that renewal may often appear to be less a matter of discretion, and something more approximate to a matter of right, than initial grant.'

renewal. Courts began to treat a refusal to renew as being more akin to revocation than to a refusal of an initial application in view of the similar consequences entailed for the licensee.

An early case acknowledging the utility of such a distinction was that of *In re Holden*⁵⁷ which involved an appeal against the refusal to grant an application for the renewal of a licence under the Estate Agents Act 1926. Burbury C.J. held the view that in the case of a renewal of an existing estate agent's licence, the applicant's ability to continue to carry on a business organisation he had established under the initial licence could not be adversely affected unless a proper enquiry had been conducted by the licensing authority in accordance with the rules of natural justice.⁵⁸ Widgery L.J. also accepted in *Schmidt's* case that a renewal of a licence raises different considerations from the initial grant of the licence where renewal 'can reasonably be expected by the possessor of the licence . . .'⁵⁹. These views were consistent with the development of the notion that a licence-holder might well have a reasonable or justifiable expectation that his licence will be renewed at its expiry in the absence of some countervailing cause.⁶⁰ As Lord Denning M.R. pointed out in argument in *R. v. Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association*⁶¹, 'a person who has a licence has a settled expectation of having it renewed, and that it is a thing of value'⁶². In *Salemi's* case, Stephen J. explained the policy underlying the abandonment by the courts of the legalistic approach to renewal cases as follows:

When the discretionary grant of a licence, permit or the like carries with it a reasonable expectation of, although no legal right to, renewal or non-revocation, summarily to disappoint that expectation is seen as unfair; hence the requirement that the expectant person should first be heard and this no doubt as much to aid those who exercise discretions in pursuing the goal of a just result as to safeguard the interests of the expectant party.⁶³

In an oft-cited passage to be found in *de Smith's Judicial Review of Administrative Action*, the late Professor de Smith posited reasons why the rules of natural justice should be applied to licence renewal cases:

Non-renewal of an existing licence is usually a more serious matter than refusal to grant a licence in the first place. Unless the licensee has already been given to understand when he was granted the licence that renewal is not to be expected, non-renewal may seriously upset his plans, cause him economic loss and perhaps cast a slur on his reputation. It may therefore be right to imply a duty to hear before a decision not to renew when there is a legitimate expectation of renewal, even though no such duty is implied in the making of the original decision to grant or refuse the licence.⁶⁴

⁵⁷ [1957] Tas. S.R. 16.

⁵⁸ *Ibid.* 18.

⁵⁹ See *supra* n.39.

⁶⁰ See *Salemi's* case where Barwick C.J. commented at (1977) 137 C.L.R. 396, 405: 'Where a licence or permit is given for a fixed term in relation to a subject matter and in circumstances which carry the implication that if the licensee or permittee has fulfilled the obligation of the licence he may expect a renewal of the licence or permit, the grant will be construed as importing a term that at least the interests of the existing licensee will be considered before a renewal is refused.'

⁶¹ [1972] 2 Q.B. 299.

⁶² *Ibid.* 304.

⁶³ (1977) 137 C.L.R. 396, 439.

⁶⁴ de Smith S. A., *de Smith's Judicial Review of Administrative Action* (4th ed., 1980) 223-4. This paragraph was cited with approval by Scarman L.J. in *R. v. Barnsley Metropolitan Borough Council; ex parte Hook* [1976] 1 W.L.R. 1052, 1058, and by Mason J. in *F.A.I. Insurances Ltd v. Winneke* (1982) 56 A.L.J.R. 388, 395.

As we have already seen,⁶⁵ the distinction between the case of an initial application for a licence and that of an application for its renewal was accepted and applied by Megarry V.-C. in *McInnes'* case where the differences between 'expectation cases' (which include renewal of licences) and the 'application cases' (where the applicant is denied the benefit applied for) were noted. The Vice-Chancellor observed that 'the legitimate expectation of a renewal of the licence . . . is one which raises the question of what it is that has happened to make the applicant unsuitable for the . . . licence for which he was previously thought unsuitable.'⁶⁶ In relation to issues of character and conduct of the applicant, licence renewal cases would therefore appear to be more analogous to licence revocation cases than they would to initial application cases (where as a general rule the issues are not as narrowly confined) and, consequently, would more often necessitate a right to be heard on these issues. Economic and moral considerations, therefore, are the two major reasons put forward to justify the application of the rules of natural justice to the licence renewal cases via the legitimate expectation doctrine.

The leading Australian decision on the application of the legitimate expectation doctrine to an attempted renewal of approval is that of the High Court in *F.A.I. Insurances Ltd v. Winneke*⁶⁷. Pursuant to regulations promulgated under the Workers Compensation Act 1958 (Vic.), companies desiring to carry on any insurance business against workers' compensation liability were prohibited from doing so unless they had previously secured the approval of the Governor-in-Council. Such an approval operated for a period of one year and was renewable on application for a further one-year period in the discretion of the Governor-in-Council having particular regard to the financial position of the applicant. The appellant insurance company had carried on a workers' compensation insurance business for 20 years, having obtained all the necessary approvals. In late 1980, the appellant applied for renewal of its annual approval as an insurer and requested that it be given notice of any matter that might result in its approval not being renewed and an opportunity to make appropriate submissions. The appellant's request had been prompted by concern previously expressed by the Minister of Labour and Industry over the appellant's substantial investments in related bodies. The appellant's application was ultimately refused by the Governor-in-Council pursuant to the Minister's recommendation on, *inter alia*, this ground without any opportunity having been provided to the appellant to make representations in answer thereto. The appellant thereupon instituted proceedings under the Administrative Law Act 1978 (Vic.) seeking a declaration that the decision to refuse

⁶⁵ See *supra*, n.48.

⁶⁶ *McInnes v. Onslow-Fane* [1978] 1 W.L.R. 1520, 1529.

⁶⁷ (1982) 56 A.L.J.R. 388. In a recent New Zealand case similar on its facts in certain respects to the *F.A.I.* case, the court relied on a legitimate expectation to hold that the applicant had a right to seek judicial review. In *Jim Harris Ltd v. Minister of Energy* [1980] 2 N.Z.L.R. 294, the applicant company had successfully tendered for a period of 23 years for a contract for the transportation of coal, having expended considerable sums over the years in acquiring plant and equipment. Faced with its first unsuccessful tender, the applicant sought judicial review. Casey J. upheld its submission that the Minister's decision to award the contract to another company resulted in the frustration of a legitimate expectation about the way the contract was to be awarded (relief denied on another ground).

renewal was void upon the ground, *inter alia*, that the Governor-in-Council failed to give the appellant a reasonable opportunity to be heard and thereby breached the rules of natural justice. The central issue raised on these facts was whether the Governor-in-Council was under a legal duty when deciding whether to renew such approval to observe the rules of natural justice. Six out of the seven High Court justices⁶⁸ held that the appellant had a legitimate expectation that its approval would be renewed. Gibbs C.J. was primarily concerned with the economic hardship that an adverse decision would work on the appellant company:

[T]he refusal to renew an approval may have a seriously adverse effect on a company which was previously an approved insurer. In these circumstances, a company which becomes an approved insurer has a legitimate expectation that its approval will be renewed unless some good reason exists for refusing to renew it. It would not be fair to deprive a company of the ability to carry on its business without revealing the reason for doing so, and, . . . without allowing the company a full and fair opportunity of placing before the authority making the decision its case . . .⁶⁹

Therefore, the exercise of the statutory power to grant or refuse a renewal of the approval must be qualified by the common law right to be heard prior to the reaching of a decision in view of the considerable extent to which the appellant would be affected in its business by an adverse decision.

Mason J.⁷⁰ recognized that the rules of natural justice are not limited in their application to cases where the exercise of a statutory power affects rights in the strict sense but that they extend to an exercise of power which deprives a person of a 'legitimate expectation' as that concept was understood and applied by Lord Denning M.R. in *Schmidt's case*.⁷¹ After having noted the close resemblance between the appellant's application for the renewal of its approval and a licence renewal application, Mason J. cited with approval the above-quoted passage⁷² of Professor de Smith and concluded that an applicant for renewal of a licence generally has a legitimate expectation that his licence will be renewed⁷³ and that in the circumstances, 'the appellant had a legitimate expectation that its approval would be renewed or at the very least that it would not be refused without its having an opportunity of meeting objections raised against it.'⁷⁴

Contemporary judicial and academic opinion therefore appears more willing to favour the application of the rules of natural justice on the basis of the possession of a legitimate expectation in cases of applications for renewal of permission than in

⁶⁸ Murphy J. dissented on the ground that Parliament had not intended the decision in question to be subject to judicial review (*ibid.* 401).

⁶⁹ *Ibid.* 390.

⁷⁰ Stephen J. agreed with the judgment of Mason J. on the aspect of the applicability of the rules of natural justice on the basis of the appellant's legitimate expectation of its approval being renewed (*ibid.* 391).

⁷¹ *Ibid.* 395.

⁷² See *supra* n.64.

⁷³ *F.A.I. Insurances Ltd v. Winneke* (1982) 56 A.L.J.R. 388, 396.

⁷⁴ *Ibid.* 399. Brennan J. did not think that a hearing would be necessary where (unlike the instant case) the licence 'is of such an exceptional kind that non-renewal of it is unlikely to affect adversely the licensee's proprietary or financial interests or . . . his reputation.' (*ibid.* 418). Although his Honour did not provide examples, he might well have had in mind non-occupational licences the grant and renewal of which involve a substantial policy element. Brennan J.'s judgment is also noteworthy for the singular views expressed therein (*ibid.*) on the role played by the possession of a legitimate expectation to the effect that it cannot be relied on in relation to the implication of the rules of natural justice but is only useful in determining the 'content' of those rules (*i.e.*, what type of hearing would satisfy the obligation to accord natural justice in the particular circumstances of the case).

those of initial applications. This is particularly true of occupational and business licences. The differentiation in treatment rests primarily on considerations of economic hardship and damage to reputation associated with refusal to renew which are regarded as sufficient to rouse in the licence-holder an expectation that the licensing authority will not refuse a renewal without prior notification of its reasons for such a proposed course of action and provision of an opportunity to make appropriate representations.

(c) *Revocation of Licences*

Although the revocation of occupational and trading licences used to be considered an administrative act unqualified by any obligation to accord a hearing,⁷⁵ it is now authoritatively established that the exercise of a statutory power revoking a licence will attract the rules of natural justice when revocation results in the loss of a right to earn a livelihood or to carry on a financially rewarding activity,⁷⁶ or is based on the misconduct of the licence-holder.⁷⁷ In all of these cases, a valid revocation decision must be preceded by notice of the allegations made against the licence-holder and a sufficient opportunity to reply to them.

The practical consequences of revocation for the licence-holder will be just as serious as those associated with the refusal to renew an expiring licence. As in the non-renewal cases, revocation may involve a slur on the reputation of the licensee⁷⁸ or economic hardship.⁷⁹ Such consequences have been deemed by the courts to be sufficiently grave to warrant the requirements of prior notice and a hearing. Indeed, the distinction that courts have drawn between a decision to refuse a renewal of a licence and a decision to refuse an initial application may be *a fortiori* in the case of revocation. In *R. v. Barnsley Metropolitan Borough Council; ex parte Hook*,⁸⁰ Scarman L.J. after citing with approval the *de Smith* passage,⁸¹ dealing with the adverse consequences flowing from a refusal to renew, stated: 'The author [*de Smith*] is there dealing with non-renewal, but everything that he says about non-renewal applies with even greater force to revocation.'⁸² This is true in so far as non-renewal does not entail forfeiture of an existing benefit but merely an unsuccessful attempt at reacquiring a benefit that has expired. *Hook's* case involved an attempted revocation for misconduct of a market stall-holder's trading licence which enabled him to earn his living. Both Lord Denning

⁷⁵ See, e.g., *R. v. Metropolitan Police Commissioner; ex parte Parker* [1953] 1 W.L.R. 1150.

⁷⁶ *F.A.I. Insurances Ltd v. Winneke* (1982) 56 A.L.J.R. 388, 395 *per* Mason J.; see also *McInnes v. Jnslow-Fane* [1978] 1 W.L.R. 1520, 1529; *R. v. Barnsley Metropolitan Borough Council; ex parte Hook* [1976] 1 W.L.R. 1052; *Gardiner v. Land Agents Board* (1975) 12 S.A.S.R. 458; *Banks v. Transport Regulation Board (Vic.)* (1968) 119 C.L.R. 222, 233-4 where Barwick C.J. regarded the nature of the power given to the Board (revocation of a taxi-cab licence) and the consequences of its exercise (deprivation of the means of livelihood of the licence-holder) as sufficient to warrant the conclusion that the Board was bound to act judicially.

⁷⁷ *de Smith, op. cit.* 160-1.

⁷⁸ Numerous statutes provide for revocation of licences on the ground of 'misconduct'.

⁷⁹ E.g., where the licence entitles its holder to engage in a profession or trade or conduct a particular business activity.

⁸⁰ [1976] 1 W.L.R. 1052.

⁸¹ See *supra* n.64.

⁸² [1976] 1 W.L.R. 1052, 1058.

M.R. and Scarman L.J.⁸³ regarded the licence as regulating the common law right of members of the public to sell in a market, the revocation of which could only be effected by a prior observance of the rules of natural justice.⁸⁴ On the basis that the attempted revocation affected such common law right, the Court of Appeal had no need to resort to the language of legitimate expectation. Could the Court of Appeal, however, have achieved the same result by finding the appellant in possession of a reasonable expectation that his licence on which his livelihood depended would not be revoked before its stated duration on the ground of his misconduct without his first receiving adequate notice and an opportunity to make representations against the proposed revocation? To restate the question, do the rules of natural justice apply to revocation cases on the basis of the loss of a right, privilege, liberty or property, or do they so apply on the basis of a legitimate expectation? The answer is that the rules may apply to the revocation cases on both bases. Although Megarry V.-C. in *McInnes*' case regarded the revocation of a licence as properly belonging to the forfeiture cases involving the taking away of some existing right,⁸⁵ some judges have treated revocation as falling within the expectation cases as well.⁸⁶

The doctrine of legitimate expectation has been relied on in implying an obligation to comply with the rules of natural justice in cases involving the revocation of licences that do not directly affect the holder's livelihood. In *Heatley v. Tasmanian Racing and Gaming Commission*⁸⁷, the applicant was served by the respondent Commission with a written 'warning-off notice' pursuant to s. 39(3) of the Racing and Gaming Act 1952 (Tas.)⁸⁸ requiring him to refrain from entering any racecourse in Tasmania until such time as the notice was rescinded. The applicant was given no notice by the Commission of its intention to issue the notice nor of the grounds for its issue and he was not afforded any opportunity to make prior representations. On appeal from the discharge by the Supreme Court of Tasmania of an order *nisi* for a writ of certiorari to quash the notice on the ground of the Commission's failure to comply with the rules of natural justice, the High Court held that the Commission was bound to observe such rules in the exercise of its power to issue warning-off notices, whose effect was to deprive their subjects of a legitimate expectation of being allowed to enter racecourses on payment of the entry fee. The new ground broken by *Heatley's* case was that for the first time a majority of the High Court accepted that it was sufficient for the complainant to

⁸³ Scarman L.J. considered that the attempted revocation of the applicant's licence was 'something very like dismissing a man from his office, very like depriving him of his property' and that the appellant 'was . . . on trial for his livelihood'. (*ibid.* 1061).

⁸⁴ *Ibid.* 1056-7; 1059-60.

⁸⁵ See *supra* n. 48.

⁸⁶ *E.g.*, the statement of Stephen J. in *Salemi v. Minister for Immigration and Ethnic Affairs (No. 2)* (1977) 137 C.L.R. 396, 439: 'When the discretionary grant of a licence, permit or the like carries with it a reasonable expectation of, although no legal right to, renewal or non-revocation, summarily to disappoint that expectation is seen as unfair; hence the requirement that the expectant person should first be heard'

⁸⁷ (1977) 137 C.L.R. 487.

⁸⁸ Sub-section 39(3) is as follows: 'The [Tasmanian Racing and Gaming] Commission may, by notice in writing, require a person to refrain from entering any racecourse or racecourses specified in the notice, or from racecourses generally, on any specified day or days, or generally, while the notice is in force.'

have merely a legitimate expectation of an entitlement to a benefit, as opposed to a right or privilege, so as to attract the operation of the rules of natural justice in relation to the exercise of a statutory power.

Aickin J. delivered the majority judgement⁸⁹ in which he described the concept as one of 'a reasonable expectation' of some entitlement, *i.e.* an expectation that some form of right or liberty will be available, or will not be taken away without an opportunity for the subject to put his case to the relevant governmental authority . . .⁹⁰ On the particular facts, a member of the public entering a racecourse with its owner's consent possessed a mere revocable licence *vis-à-vis* the owner which at law entitled the former to remain at the racecourse subject to the overriding statutory exception contained in sub-s. 39(3).⁹¹ However, in his Honour's view:

It is also true to say that any member of the public has a legitimate expectation that upon payment of the appropriate charge he will be admitted to racecourses. They are in a practical sense 'open to the public' and indeed by announcements and advertising their owners invite and seek to encourage the public to attend. This is not an expectation that the Commission will act in some particular way but an expectation by members of the public that they will be able to enjoy the right or liberty granted to them by the owner to go onto the racecourse, *i.e.* that they will be permitted to enter along with other members of the public in response to the owner's implied invitation. That expectation exists by reason of the nature of the premises and the fact that members of the public are invited to attend and freely admitted on payment of a stated charge.⁹²

Accordingly, the rules of natural justice were attracted on the basis that the issue of a warning-off notice pursuant to s. 39(3) would defeat the applicant's legitimate expectation as a member of the public that he would be admitted to racecourses on payment of the requisite charge. *Heatley's* case was complicated by the interposition of the racecourse proprietors between the complainant and the statutory authority. The legitimate expectation was perceived, therefore, not so much as a claim against the authority⁹³ but rather more as a feature of the relationship between the complainant as a member of the public and the racecourse proprietors with which the authority could only interfere by first complying with the rules of natural justice.⁹⁴

In a lone dissenting opinion, Barwick C.J. stressed that the common law rules as to natural justice related to the exercise of powers which affected rights of property or of the person and refused to regard the legitimate doctrine as extending that rule because, in his words, 'the expectation must spring from or be associated with legal right'⁹⁵. In his view, the applicant *qua* a member of the public has no legal right of entry to a racecourse or to remain once therein but merely a revocable

⁸⁹ Stephen and Mason JJ. concurred with Aickin J. while Murphy J. did not deal with the legitimate expectation aspect of the case.

⁹⁰ (1977) 137 C.L.R. 487, 508. Aickin J. referred in his judgment to Scarman L.J.'s judgment in *Hook's* case wherein his Lordship considered that the factors listed by Professor de Smith favouring the implication of natural justice in renewal cases applied with even greater force to revocation cases. (*ibid.* 509).

⁹¹ *Ibid.* 507.

⁹² *Ibid.* 507-8.

⁹³ Aickin J. emphasized that the instant case was more concerned with what might be termed a 'public expectation' than with an expectation of the kind dealt with in a number of English decisions (including *Hook's* case) that the governmental authority would exercise its statutory power in a particular manner (*ibid.* 508).

⁹⁴ Cane P., 'Natural Justice and Legitimate Expectation' (1980) 54 A.L.J. 546.

⁹⁵ (1977) 137 C.L.R. 487, 491.

licence terminable at will.⁹⁶ In the result, the issuing of the warning-off notice could not be said to have affected any legal right of Heatley. On the strict approach of the Chief Justice, a member of the public seeking entry to a racecourse has neither a right nor a legitimate expectation but a mere 'human' expectation or hope of being admitted which, in terms of legal principle, will not suffice to attract the rules of natural justice.⁹⁷

It is likely that judges will continue to exhibit (despite Barwick C.J.'s views) an increasing tendency to utilise the legitimate expectation doctrine in extending the operation of the rules of natural justice to the licence revocation cases if for no other reason than to avoid the somewhat artificial quest for a particular right, privilege, liberty or proprietary interest. Henceforth, they will be engaged instead in a process of identifying some 'benefit' which a person affected legitimately expected to retain.

V. THE IMMIGRATION CASES

The second major field in which the legitimate expectation doctrine has been applied is that of the immigration cases. Although these cases, involving applications for the extension of entry permits and decisions to revoke them, bear strong similarities to the licensing cases, the judicial tendency has been to treat the immigration cases in a discrete and special category and it is proposed, therefore, to do likewise here.

The most recent decision of high authority to consider the application of the legitimate expectation doctrine in this context is that of the Privy Council in *Attorney General of Hong Kong v. Ng Yuen Shiu*.⁹⁸ The respondent had entered Hong Kong illegally in 1976 and had become part owner of a small factory. In October 1980, the Government of Hong Kong announced a change in immigration policy whereby illegal immigrants from China were liable to repatriation. In order to allay fears caused by the announcement amongst illegal immigrants from Macau who were of Chinese origin (of which the respondent was included) that they would be deported to China, a senior immigration official announced publicly that illegal immigrants from Macau would be interviewed and that each case would be 'treated on its merits'. Soon afterwards, the respondent reported to the Immigration Department where he was interviewed, detained and ultimately made the subject of a removal order by the Director of Immigration. The respondent sought relief by way of judicial review which the Hong Kong Court of Appeal granted in the form of prohibition against the execution of the removal order until an

⁹⁶ *Ibid.* 492.

⁹⁷ *Cf. Forbes v. New South Wales Trotting Club Ltd* (1979) 143 C.L.R. 242, wherein Gibbs J. applied *Heatley's* case to a similar fact situation to uphold the appellant's submission that he could not validly be warned off racecourses under the respondent's control without first being afforded an opportunity to be heard on the basis of his legitimate expectation of admission as a member of the public. *Forbes* is distinguishable from *Heatley* in so far as the warning-off notice was not issued in pursuance of the exercise of a statutory power (but rather under private club rules) nor was it issued by a governmental authority but rather by the racecourse proprietor itself. Barwick C.J. dissented once again.

⁹⁸ [1983] 2 All E.R. 346.

opportunity had been given to the respondent to fully explain to the Director the humanitarian grounds upon which he should be allowed to remain.

Since no statutory provision required a hearing to be held prior to the making of a removal order, the question raised for the consideration of the Privy Council was whether the respondent was so entitled at common law. Their Lordships were of the opinion that the respondent had a right to such a hearing on the basis of the immigration official's public promise that each case would be treated on its merits. Delivering the opinion of the Board, Lord Fraser of Tullybelton considered that the term 'legitimate' fell to be read as meaning 'reasonable' and that '[a]ccordingly 'legitimate expectations' in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis'.⁹⁹ His Lordship continued:

The expectations may be based on some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for [a person affected] to be denied such an inquiry.¹

The justification for this principle was that 'when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty'.² In their Lordships' opinion, this principle that a public authority is bound by those of its procedural undertakings that do not conflict with its duty, applied to the promise that each case would be considered on its merits. As this promise had not been faithfully implemented by the Government of Hong Kong, the appeal by its Attorney General was dismissed accordingly. In upholding the respondent's 'narrower proposition' that a person is entitled to a fair hearing before a decision adversely affecting his interests is made by a public authority if he has a legitimate expectation of being accorded such a hearing based on some procedural undertaking made by it, the Privy Council's decision served a dual purpose. First, it confirmed the High Court of Australia in its rejection in *Heatley's* case of the narrow approach taken by Barwick C.J. to the meaning and scope of the phrase 'legitimate expectation'. Secondly, it reaffirmed the Court of Appeal in *R. v. Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association*³ in so far as a public assurance can give rise to a legitimate (or 'settled') expectation.⁴

⁹⁹ *Ibid.* 350. His Lordship expressly referred to and disagreed with Barwick C.J.'s construction of the word 'legitimate' as embodying the notion of 'entitlement or recognition by law' (*ibid.*).

¹ *Ibid.* Lord Fraser cited *R. v. Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299, as an example of the application of this principle.

² *Ibid.* 351.

³ [1972] 2 Q.B. 299.

⁴ There, prohibition issued against the respondent corporation prohibiting it from implementing a resolution calling for an increase in the number of hackney carriage licences, when to do so would have directly contravened its prior public undertaking that the number of licences would not be increased until proposed legislation controlling private hire vehicles had come into force. In the opinion of Sir Gordon Willmer (*ibid.* 312), the applicants were entitled to expect on the basis of the undertaking that they would be afforded an opportunity to make appropriate representations in the event that the respondent later decided to increase the number of licences in contravention of the undertaking. Accordingly, prohibition issued to prevent the grant of further licences until after the applicants had been heard. Although the phrase 'legitimate expectation' did not appear in the judgments themselves, the public undertaking can fairly be said to have aroused an expectation in the applicants that the

The first Australian High Court decision to consider the application of the legitimate expectation doctrine in the context of an immigration matter and, indeed, generally was that of *Salemi v. Minister for Immigration and Ethnic Affairs (No. 2)*.⁵ The plaintiff, an Italian citizen, entered Australia in 1974 on the basis of a temporary entry permit of three months' duration. Upon the expiry of a further such permit granted to the plaintiff, he became a 'prohibited immigrant' in terms of s. 7(3)⁶ of the Migration Act 1958 (Cth) and liable to deportation under s. 18⁷ thereof. In early 1976, a series of news releases from the Minister for Immigration and Ethnic Affairs pertaining to an 'amnesty for prohibited immigrants' was issued to the effect that an offer of resident status would remain open until 30 April 1976 for all visitors who were over-stayed at 31 December 1975 and who met the normal standards of health and good character. On 1 April 1976, the plaintiff applied to the Department of Immigration and Ethnic Affairs for the grant of resident status which was later refused by the Minister on the ground of the plaintiff's alleged ineligibility for the amnesty. Although the plaintiff appeared to meet all of the amnesty requirements (indeed the demurrer before the High Court was argued on the basis that he did), he was faced with the prospect of a deportation order under s. 18 which he sought to restrain in actions for injunctions and declarations from the High Court.

The main issue presented on these facts was whether the Minister had power to issue a deportation order against the plaintiff without first observing the rules of natural justice. The plaintiff argued for their application on the basis that the terms of the amnesty offer coupled with his capacity to fulfil its requirements conferred upon him a legitimate expectation of being permitted to remain lawfully in Australia. The resolution of this issue turned to a large extent on the effect in law of the ministerial amnesty offer and, by a statutory majority,⁸ the High Court held that the Minister was not bound to comply with the rules of natural justice prior to exercising his power to deport under s. 18.

In the strongest of the three dissenting opinions, Stephen J. upheld the plaintiff's right to be notified of the grounds upon which he was excluded from the terms of the amnesty and to make representations in reply on the basis of the legitimate expectation doctrine. After having referred at length to and distinguished *Schmidt's* case on the basis that Salemi's expectation was not founded upon a revocation or non-renewal of a licence or permit, his Honour invoked the principle

number of licences would not be increased until the relevant legislation had entered into force, which could not be defeated without hearing the applicants. In the broader context, the *Liverpool Corporation* principle affirmed by the Privy Council might be put on the basis that persons who have been assured that they will be consulted before a decision affecting them is taken have a legitimate expectation that they will be so consulted and are entitled to rely on the procedural protection that such possession entails.

⁵ (1977) 137 C.L.R. 396.

⁶ Sub-section 7(3) provides as follows: 'Upon the expiration or cancellation of a temporary entry permit, the person who was the holder of the permit becomes a prohibited immigrant unless a further entry permit applicable to him comes into force upon that expiration or cancellation.'

⁷ Section 18 provides as follows: 'The Minister may order the deportation of a person who is a prohibited immigrant under any provision of this Act.'

⁸ *Per* Barwick C.J., Gibbs and Aickin JJ. (Stephen, Jacobs and Murphy JJ., dissenting) whose decision became that of the Court pursuant to para. 23(2)(b) of the Judiciary Act 1903 (Cth).

laid down by the Court of Appeal in the *Liverpool Corporation* case. He regarded the basis for Salemi's expectation as stronger than in the licensing cases in that it arose from an express assurance given by the Minister as to the particular manner in which he would exercise his statutory discretionary powers.⁹ In light of the duty to act fairly¹⁰, Stephen J. was of the view that:

the present case appears to me to be pre-eminently one in which a court should not be slow to recognize the plaintiff's right to be accorded natural justice in support of the expectation, engendered in him by the Minister, that he would not be deported but would be granted resident status if he responded to the Minister's amnesty offer.¹¹

As in the case of the council in the *Liverpool Corporation* case, the Minister could depart from his assurance but only after he had considered the plaintiff's representations.¹² Stephen J. then proceeded to apply the three matters laid down by Lord Upjohn in *Durayappah v. Fernando*¹³, which must be considered in determining whether the exercise of a statutory power is qualified by an implied duty to observe the rules of natural justice. In relation to the first matter, the nature of the status enjoyed by the plaintiff, his Honour regarded the effect of the amnesty as having transformed the plaintiff's status from that of a prohibited immigrant under threat of deportation to that of 'one who has every reason to believe that he will be immune from deportation and will on the contrary be granted lawful resident status'.¹⁴ As to the second matter involving the circumstances in which the Minister's discretion to order deportation is exercisable, although the discretion conferred by s. 18 was in terms unqualified, nevertheless the amnesty superimposed the criteria of good health and character in order to guide the exercise of such discretion.¹⁵ The third matter, the nature of the sanction, also favoured the implication of an obligation to observe the rules of natural justice prior to exercising the power to deport under s. 18 in view of the severe consequences of a deportation order for the deportee. In the result, Stephen J. had no doubt but that the plaintiff was entitled to the protection of the rules.

Gibbs J.¹⁶ agreed with Stephen J. to the extent that he conceded that the nature of the sanction — deportation — was sufficiently grave to warrant the implication of natural justice. The agreement ended there, however, as Gibbs J. regarded the

⁹ *Salemi v. Minister for Immigration and Ethnic Affairs* (No. 2) (1977) 137 C.L.R. 396, 439.

¹⁰ See the remarks of Lord Parker C.J. in *In re H.K. (An Infant)* [1967] 2 Q.B. 617, 630.

¹¹ *Salemi v. Minister for Immigration and Ethnic Affairs* (No. 2) (1977) 137 C.L.R. 396, 440.

¹² *Ibid.*

¹³ [1967] 2 A.C. 337. In delivering the judgment of the Board, Lord Upjohn stated that (*ibid.* 349): 'there are three matters which must always be borne in mind when considering whether the [*audi alteram partem*] principle should be applied or not . . . first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other.'

¹⁴ *Salemi v. Minister for Immigration and Ethnic Affairs* (No. 2) (1977) 137 C.L.R. 396, 441.

¹⁵ Generally, the wider the discretion, the less likely it will be that the rules of natural justice will apply. Here, however, Stephen J. is suggesting that the amnesty has, in effect, amended s. 18 by supplying the criteria of good health and good character and, in so doing, has narrowed the discretion so as to facilitate the operation of the rules.

¹⁶ Aickin J. expressed his agreement with the analysis and conclusion of Gibbs J. with respect to the natural justice issue (*Salemi v. Minister for Immigration and Ethnic Affairs* (No. 2) (1977) 137 C.L.R. 396, 460).

effect of the amnesty as neither transforming the plaintiff's status as a prohibited immigrant having no legal right to remain in Australia, nor fettering the otherwise absolute discretion conferred on the Minister by s. 18.¹⁷ On balance, then, the three matters propounded by Lord Upjohn when considered together supported the conclusion that the Minister's power to deport under s. 18 was unqualified by any duty to observe the rules of natural justice. However, there is one aspect of the reasoning of Gibbs J. leading to this conclusion that appears troublesome. Unlike Stephen J., his Honour treated the legitimate expectation aspect of the case as a collateral issue in relation to the application of the first of the three matters to the facts. His reasoning is illustrated in the following passage:

Once it is concluded that the Act [construed in accordance with the three matters] does not impose a duty to act in accordance with the principles of natural justice, it is not relevant that statements made by the Minister may have led the plaintiff to expect that he would not be deported; . . . In other words, if the Act confers a power which may be exercised without regard to the principles of natural justice, the Minister is entitled to exercise that power even if the exercise of it appears to be unfair, and to defeat expectations which his statements have raised. On the other hand, if the conclusion had been reached that the Act did require the Minister to act in accordance with the principles of natural justice, it might be relevant, in deciding whether or not he had discharged his duty, to consider the statements he had made and the manner in which the plaintiff had acted in reliance on them.¹⁸

In other words, statements and assurances made by a public authority which rouse expectations in the addressee are irrelevant in considering the question of the applicability of the rules of natural justice; their relevance being confined to the content¹⁹ of those rules when they are found to be applicable through a consideration of matters which exclude legitimate expectations. With respect to Gibbs J., his Honour's views on this point are another example of the proverbial 'tail wagging the dog'. If the legitimate expectation doctrine is to have any bite at all in the jurisprudence, then it is submitted that the views of Stephen J., to the effect that the application of the first Lord Upjohn matter to the facts is inextricably linked with the doctrine, are to be preferred.

Barwick C.J. concluded that the plaintiff had neither a legal right to remain in Australia nor a legitimate expectation of such. His Honour stressed that at the centre of the phrase 'legitimate expectation' is the concept of legality:

I cannot attribute any other meaning in the language of a lawyer to the word 'legitimate' than a meaning which expresses the concept of entitlement or recognition by law. So understood, the expression probably adds little, if anything, to the concept of a right.²⁰

As Barwick C.J. considered the ministerial amnesty to be nothing more than a statement of policy falling short of a legal obligation, it could at most be said to excite 'human expectations' as opposed to expectations 'founded in or at least attendant upon legal right'.²¹

In the end, a statutory majority consisting of Barwick C.J. and Gibbs and Aickin JJ. held that the Minister's public statement concerning the amnesty offer did not

¹⁷ *Ibid.* 420.

¹⁸ *Ibid.* 422.

¹⁹ See *supra* n. 74.

²⁰ *Salemi v. Minister for Immigration and Ethnic Affairs (No. 2)* (1977) 137 C.L.R. 396, 404. This passage was expressly criticized by the Privy Council in *Attorney General of Hong Kong v. Ng Yuen Shiu* [1983] 2 All E.R. 346, 350. See *supra* n. 99.

²¹ *Ibid.* 406-7.

give rise to a legitimate expectation. However, Barwick C.J.'s narrow interpretation and application of the concept has been rejected in Australia in *Heatley's* case and also in the United Kingdom by the Privy Council in the recent *Ng Yuen Shiu* decision. The approach taken by Gibbs J. (with whom Aickin J. agreed) that expectations founded upon assurances made by public authorities are irrelevant in determining whether the rules of natural justice apply, has been authoritatively rejected as well in *Ng Yuen Shiu*. Of the dissenting justices,²² only Stephen J. concluded that natural justice applied on the basis of the plaintiff's legitimate expectation. As we have already seen, however, a majority of the High Court accepted several months later in *Heatley's* case that a legitimate expectation of an entitlement to a benefit was sufficient to attract the operation of the rules of natural justice.

Apart from the amnesty type of situation presented in *Salemi's* case, litigants have sought to have the legitimate expectation doctrine applied in immigration cases relating to the revocation of temporary entry permits and their non-renewal leading ultimately to deportation. In the former category, the courts appear reluctant to imply a duty to accord natural justice despite certain comments²³ of Lord Denning M.R. in *Schmidt's* case. In the New Zealand case of *Tobias v. May*²⁴, for example, Quilliam J. held that the Minister of Immigration was not bound by the *audi alteram partem* rule in revoking an alien's temporary entry permit. His Honour considered the statement of Lord Denning in *Schmidt's* case, to the effect that an alien whose permit is revoked would have a legitimate expectation of being allowed to stay for its stated duration, as *obiter* and as having been made in a different factual context (*i.e.*, a refusal to grant an extension of a temporary entry permit).²⁵ The decision in *Tobias* seems to have turned on the treatment of aliens in a special category and on a rather wide statutory power of revocation,²⁶ evidencing, in the opinion of Quilliam J., a legislative intention to confer upon the Minister 'freedom of action' with regard to aliens.²⁷

The Full Court of the Federal Court of Australia recently had occasion to consider the same question in *Minister for Immigration and Ethnic Affairs v. Gaillard*.²⁸ The applicant, an alien, was granted initially a temporary entry permit to allow her to enter Australia to take up a position as a domestic servant following her entry into an undertaking that she would leave upon cessation of such employment. She was granted further permits, during the currency of the last of which she married an Australian citizen and left her employment. On the basis of an allegation that this marriage was contrived solely to enable the applicant to remain

²² Although Jacobs J. briefly discussed the legitimate expectation concept, he based his conclusion on the view that no legislative intention to wholly exclude the application of the rules of natural justice could be discerned (*ibid.* 452) while Murphy J. did not discuss the concept in taking a broad view that the rules applied.

²³ See *supra* n.36.

²⁴ [1976] 1 N.Z.L.R. 509.

²⁵ *Ibid.* 511.

²⁶ Sub-section 14(6) of the *Immigration Act* 1964 provided as follows: 'A temporary permit granted under this section may be at any time revoked by the Minister.'

²⁷ Cf. *Pagliara v. Attorney-General* [1974] 1 N.Z.L.R. 86.

²⁸ *Minister for Immigration and Ethnic Affairs v. Gaillard* (1984) 49 A.L.R. 277.

in Australia, the Minister for Immigration and Ethnic Affairs cancelled her latest temporary entry permit pursuant to s. 7(1)²⁹ of the Migration Act 1958 (Cth) and ordered her deportation as a prohibited immigrant pursuant to s. 7(3)³⁰ and s. 18³¹ thereof. The applicant applied for an order of review of these decisions under s. 5 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) on the ground, *inter alia*, that in failing to give her adequate notice of his intention to consider the cancellation of her permit and her deportation and a sufficient opportunity to be heard on these matters, the Minister breached the rules of natural justice.

In upholding the Minister's decisions, the Federal Court unanimously held that the applicant could not have had in law any reasonable or legitimate expectation of being permitted to remain in Australia. As in *Tobias v. May*,³² Sweeney J. distinguished *Schmidt's* case on the facts and dismissed the remarks³³ of Lord Denning therein as *obiter*. His Honour said:

In my opinion, the applicant, having been given a temporary entry permit which was subject to cancellation by the Minister in his absolute discretion at any time, having obtained entry into Australia on the faith of the acknowledgment which she signed, and having herself brought to an end her employment which was a 'strict condition' of the approval of her entry into and stay in Australia, does not have a legitimate expectation, of being allowed to remain in Australia, of which it would not be fair to deprive her without hearing what she has to say. The Minister was not bound to comply with the rules of natural justice in making his decision to cancel the applicant's temporary entry permit.³⁴

Like Sweeney J., Neaves J. sought to distinguish *Schmidt's* case on somewhat narrow grounds and concluded that the applicant '[could not] have had any legitimate expectation that she would be permitted to remain in Australia even for the remainder of the period specified in her temporary entry permit'³⁵ in view of her previous undertakings and her employment having been terminated by her own act.³⁶ In the result, the Federal Court held that the Minister was not bound to comply with the rules of natural justice in revoking the applicant's temporary entry permit.

The courts have also been reluctant to find applicants in possession of a legitimate expectation in cases involving the failure to renew or grant further temporary entry permits. There have been exceptions, however. The general approach taken by Australian courts is illustrated by the High Court's decision in *R. v. Minister for Immigration and Ethnic Affairs; ex parte Ratu*.³⁷ The applicants, Fijian nationals, entered Australia pursuant to a one-month temporary entry permit after having signed undertakings that they would not engage in employment in Australia. In contravention of their undertakings, they obtained employment and,

²⁹ Sub-section 7(1) provides as follows: 'The Minister may, in his absolute discretion, cancel a temporary entry permit at any time by writing under his hand.'

³⁰ See *supra*, n. 6, p. 703.

³¹ See *supra*, n. 7, p. 703.

³² [1976] 1 N.Z.L.R. 509.

³³ See *supra* n. 36.

³⁴ *Minister for Immigration and Ethnic Affairs v. Gaillard* (1984) 49 A.L.R. 277, 282-3.

³⁵ *Ibid.* 290-1.

³⁶ The notion that the person asserting a legitimate expectation may be prevented from relying on it by his own conduct (or misconduct) was developed by the Court of Appeal in *Cinnamon v. British Airports Authority* [1980] 1 W.L.R. 582.

³⁷ (1977) 137 C.L.R. 461.

upon the expiry of extensions to their permits, became prohibited immigrants under s. 7(3)³⁸ of the Migration Act 1958 (Cth). In order to prevent the execution of deportation orders made against them pursuant to s. 18³⁹ of the Act, the applicants commenced proceedings in the original jurisdiction of the High Court to have the orders quashed on the ground that the Minister for Immigration and Ethnic Affairs had denied them natural justice by failing to reveal the contents of certain departmental reports allegedly containing reasons for the deportations. The High Court dismissed the applications on the holding in *Salemi's* case that the power to order deportation conferred on the Minister by s. 18 is not qualified by an obligation to observe the rules of natural justice and that, in any event, there was no denial of natural justice on the facts. After having carefully examined the Migration Act 1958 (Cth), Mason J. concluded that 'the making of the deportation orders did not deprive the applicants of any right or interest or of the legitimate expectation of a benefit in such circumstances as to impose upon the Minister an obligation to give advance notice of his reasons for making the orders'.⁴⁰ Apart from statutory considerations, Mason J. was of the view that '[t]he considerations affecting the . . . extension of entry permits are very different from those relating to the renewal of licences'.⁴¹

By contrast, the New Zealand Court of Appeal recently considered and applied the legitimate expectation doctrine in the case of an 'overstayed' alien in *Daganayasi v. Minister of Immigration*.⁴² The appellant had been convicted of a charge of remaining in New Zealand after her temporary entry permit had expired, the automatic consequence of such conviction being a court deportation order. The appellant appealed to the Minister of Immigration against her deportation under s. 20A of the Immigration Act 1964 which conferred on the Minister a discretion to order that an offender not be deported if he was satisfied that it would be unduly harsh or unjust to deport the offender because of 'exceptional circumstances of a humanitarian nature'. The thrust of the appeal to the Minister was that one of her New Zealand-born children had a rare metabolic disease and had to remain in New Zealand to receive proper medical treatment. Following the Minister's refusal to order that she not be deported, the appellant sought judicial review on the ground that the substance of a prejudicial report of the medical referee appointed by the Immigration Division had not been disclosed to her before the Minister made his decision. In upholding the appellant's contention that the Minister's decision was vitiated by procedural unfairness, Cooke J., with whom Richmond P. and Richardson J. agreed on the natural justice issue, said:

An overstayer after expiry of a temporary permit has no right to remain in New Zealand and usually no 'legitimate expectation' . . . of being allowed to do so. But when she has a New Zealand-born child suffering from a rare disease of a type in which a New Zealand clinic specialises it may be said that she has something akin to a legitimate expectation under s. 20A. A decision under that section may have a profound effect on the whole future lives of mother and child.⁴³

³⁸ See *supra*, n.6, p.703.

³⁹ See *supra* n.7, p.703. The applicants' continued residence in Australia could have been regularised by the issue of further temporary entry permits under sub-s. 7(3) of the Migration Act 1958 (Cth).

⁴⁰ *R. v. Minister for Immigration and Ethnic Affairs; ex parte Ratu* (1977) 137 C.L.R. 461, 476-7.

⁴¹ *Ibid.* 480-1.

⁴² [1980] 2 N.Z.L.R. 130.

⁴³ *Ibid.* 143-4.

Cooke J. then proceeded to articulate the source or basis of the appellant's legitimate expectation of a favourable decision which he found to be her 'bona fide and substantial' grounds for claiming that the statutory test contained in s. 20A was satisfied.⁴⁴ His Honour stressed the importance of a favourable ministerial decision to both the appellant and her child which would have the effect of conferring on the appellant a statutory right to a permit under s. 20A to remain in New Zealand. On the basis of the appellant's legitimate expectation, the Court of Appeal held that the substance of the contents of the referee's report should have been disclosed to the appellant to enable her to make appropriate representations before the Minister made his decision. Clearly, this decision is distinguishable from *Schmidt's* case and *Ratu's* case on the grounds of substantial personal hardship and the appellant's statutory right to remain in New Zealand if she satisfied (as she claimed to) the relevant statutory requirements.⁴⁵

The Federal Court of Australia has also recently considered the application of the legitimate expectation doctrine in the context of the expiration of temporary entry permits and resultant deportation orders in *Haj-Ismael (H. and M.) v. Minister for Immigration and Ethnic Affairs*.⁴⁶ The first applicant entered Australia in 1972 pursuant to a temporary entry permit and continued to reside in Australia on the authority of further entry permits which were granted to him periodically. He was approved subsequently as a private overseas student and began research for a Doctorate of Philosophy in 1975. In 1980, the first applicant and his spouse, the second applicant, made application for resident status which was supported by a letter from their Member of Parliament requesting on their behalf that special consideration be given to granting their application. In a letter of reply, the Minister for Immigration and Ethnic Affairs indicated that their applications would be granted 'provided they are able to meet normal immigration health and character requirements'. Shortly thereafter, the Minister was advised that his department held security files on the first applicant, and a report prepared subsequently by the Australian Federal Police contained a series of highly damaging allegations against him. On the basis of these revelations, the Minister approved a recommendation that their application for resident status be refused and signed deportation orders against both applicants pursuant to s. 18⁴⁷ of the Migration Act 1958 (C'th) on the ground that they had become overstayed prohibited immigrants by virtue of s. 7(3)⁴⁸ thereof. The applicants applied under the Administrative Decisions (Judicial Review) Act 1977 (C'th) for an order of review in respect of the Minister's decisions to refuse their applications for resident status and to deport them. The applicants contended, *inter alia*, that by virtue of the contents of the Minister's letter, they acquired a legitimate expectation that they would be granted resident status, which entitled them to an opportunity to be heard in the event that the Minister proposed to disappoint such expectation. Alternatively, the first

⁴⁴ *Ibid.* 145.

⁴⁵ See the discussion of *In re H.K. (An Infant)* *supra* at p.689.

⁴⁶ (1981) 36 A.L.R. 516.

⁴⁷ See *supra* n.7, p.703

⁴⁸ See *supra* n.6, p.703

applicant argued that he possessed a legitimate expectation of being allowed to remain in Australia until the completion of his studies. As no opportunity had been afforded to the applicants to reply to the serious allegations (of which they remained ignorant), they submitted that the Minister's decisions were void.

At first instance, Ellicott J. dismissed the first submission since the letter merely referred to what would happen if the applicants were able to meet 'normal immigration health and character requirements'. The mere fact that the letter may have provided the basis for optimism that resident status would be granted was insufficient to attract the rules of natural justice.⁴⁹ In relation to the second submission, Ellicott J. conceded that in the normal course of events, an alien would not be entitled to an opportunity to be heard before a further temporary entry permit is refused or a deportation order made, but that in the 'very special circumstances of this case' a right to be heard arose from the first applicant's legitimate expectation of being able to complete his studies in Australia.⁵⁰ Such expectation stemmed from his lengthy period of residence and study in Australia and the notion that 'where a person has been allowed to stay for a long term purpose (such as study) under a series of temporary entry permits and consideration is being given to his deportation before the purpose is fulfilled . . . a benefit is being taken away which he could legitimately have expected to retain.'⁵¹ In substance, Ellicott J. viewed the first applicant's case as 'no different to a case where a permit to stay for a period is revoked before expiration or a licence is not renewed where an expectation of renewal might be inferred'.⁵² Accordingly, his Honour held that the first applicant was entitled to a right to be heard prior to the Minister exercising his discretion to deport him under s. 18.

On appeal⁵³ by the Minister to the Full Federal Court, the Court unanimously agreed with the trial Judge in his holding that the Minister's letter did not contain such statements as would give rise to a legitimate expectation, still less to any right in the applicants at first instance.⁵⁴ Davies J. agreed in principle with Ellicott J.'s view that a private overseas student should not ordinarily be refused a renewal of his entry permit during his course of studies without compliance with the rules of natural justice since '[s]uch a person has a legitimate expectation that his permit will be renewed so as to enable him to complete his course of study'.⁵⁵ On the facts, however, it could not be said that the first applicant had acquired a legitimate expectation that he would be permitted further time to complete his studies since five years of research towards a Doctorate of Philosophy had failed to produce any positive results.⁵⁶ Accordingly, Davis J. concurred with Bowen C.J. and Franki J.

⁴⁹ *Haj-Ismael (H. and M.) v. Minister for Immigration and Ethnic Affairs* (1981) 36 A.L.R. 516, 533.

⁵⁰ *Ibid.* 536.

⁵¹ *Ibid.* 537.

⁵² *Ibid.* 536. But see the text *supra* relating to n.41, p.708.

⁵³ *Minister for Immigration and Ethnic Affairs v. Haj-Ismael (H. and M.)* (1981-82) 40 A.L.R. 341.

⁵⁴ *Ibid.* 348, 363.

⁵⁵ *Ibid.* 360. In support of this proposition, Davies J. cited the passage of Barwick C.J. in *Salemi's case* at (1977) 137 C.L.R. 396, 405. See *supra* n.60.

⁵⁶ *Ibid.* 361.

that there was no obligation on the Minister to observe the rules of natural justice before refusing resident status or ordering deportation.

Haj-Ismail's case demonstrates the versatility of the legitimate expectation doctrine in respect of its application and the propensity of judges to arrive at opposite conclusions on its applicability in the same fact situation. It further illustrates the apparent reluctance of Australian courts to find a legitimate expectation in an alien whose temporary entry permit has expired.⁵⁷ Although legitimate expectations have been raised with some success in other contexts,⁵⁸ they have not enjoyed the same degree of success in immigration matters as they have in the licensing cases. Particularly in Australia, litigants have pleaded the doctrine in cases involving the revocation or non-renewal of temporary entry permits, but courts have reserved its application only for the most exceptional of circumstances. Underlying this tendency is a judicial conviction based on public policy grounds that the treatment of aliens falls into a special category notwithstanding the obvious parallels that exist between the revocation and non-renewal of temporary entry permits and licences.

VI. THE EMPLOYMENT CASES

The third major field in which the legitimate expectation doctrine has been invoked frequently is that of what for want of a more suitable epithet may be described as the 'employment' cases. Again, the seminal case emanated from the Court of Appeal and a judgment of Lord Denning M.R.. In *Breen v. Amalgamated Engineering Union*⁵⁹, the appellant had been elected by his fellow workers as their shop steward in accordance with the union rules⁶⁰ which provided that the election of shop stewards was subject to the approval of the district committee of the union. Although the appellant's election had been approved in previous years, the district committee decided not to approve his election. The appellant sought declarations that this decision had been made in breach of the rules of natural justice. The trial judge held that such rules did not apply to the committee's decision and on appeal

⁵⁷ For a recent decision of the Federal Court of Australia (Beaumont J.) in which the legitimate expectation doctrine was successfully invoked in a case involving a refusal to grant a further temporary entry permit and deportation, see *Arslan v. Durrell* (1982-83) 48 A.L.R. 577. The basis of the legitimate expectation was questionable or, at the least, insufficiently articulated and an appeal to the Full Federal Court had been lodged against the decision at first instance at the time of writing.

⁵⁸ In *Barbaro v. Minister for Immigration and Ethnic Affairs* (1982-83) 46 A.L.R. 123, Smithers J. held that the rules of natural justice were applicable to the reconsideration by the respondent Minister of his decision to order the deportation of the applicant pursuant to s. 12 of the Migration Act 1958 (Cth), when such reconsideration had been preceded by a recommendation of the Administrative Appeals Tribunal that the deportation order be revoked. In such circumstances, the deportee would have a legitimate expectation that the Minister would act in accordance with such recommendation or, at least, would provide the deportee with an opportunity to make representations before the discretion was exercised against him a second time contrary to the recommendation (*ibid.* 130). However, in *Simsek v. Minister for Immigration and Ethnic Affairs* (1982) 148 C.L.R. 636, 644, Stephen J. (In Chambers) held that the applicant did not possess a legitimate expectation that his application for refugee status under the 1951 Geneva Convention relating to the Status of Refugees would be granted, but merely that his application would be treated by the Minister in a manner consistent with the Convention and the procedures established thereunder.

⁵⁹ [1971] 2 Q.B. 175.

⁶⁰ Rule 13 (21) provided as follows: 'Shop stewards elected by members are subject to approval by the district committee and shall not function until such approval is given.'

this conclusion was upheld by the majority of the Court of Appeal (Edmund Davies and Megaw L.J.J.). In a dissenting judgment in which he was prepared to grant to the appellant a declaration that the committee wrongly refused to approve his election, the Master of the Rolls stated:

If a man seeks a privilege to which he has no particular claim — such as an appointment to some post or other — then he can be turned away without a word. He need not be heard. No explanation need be given: . . . But if he is a man whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard. I go further. If he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him, according as the case may demand.⁶¹

Applying these general principles to the facts, his Lordship continued:

Seeing that he [the appellant] had been elected to this office by a democratic process, he had, I think, a legitimate expectation that he would be approved by the district committee, unless there were good reasons against him. If they had something against him, they ought to tell him and to give him a chance of answering it before turning him down.⁶²

Although Lord Denning's dictum appeared in a dissenting judgment, it was the second occasion that he had made use of the phrase 'legitimate expectation'⁶³ and his remarks in *Breen's* case have been referred to with approval in a number of Australian cases relating to employment and appointment to positions.

In the recent New Zealand case of *Paterson v. Dunedin City Council*,⁶⁴ which presented a similar though less compelling fact situation from the standpoint of the applicant for relief, Hardie Boys J. criticized the legitimate expectation concept and, curiously, did not refer to *Breen's* case. A vacancy in respect of an elected position had occurred on a hospital board which was filled by the respondent Council pursuant to s.36⁶⁵ of the Hospitals Act 1957. The Chairperson of the Dunedin Labour Local Body Committee applied for judicial review of this decision, contending that he had a legitimate expectation on the basis of precedent elsewhere that the highest polling unsuccessful candidate at the last election, one Muir, a Labour candidate, would have been appointed by the respondent Council to fill the vacancy. Hardie Boys J. rejected the submission that the Council was required to observe the rules of natural justice in filling a vacancy pursuant to s.36 on the basis of a legitimate expectation or any other basis. Even assuming for the sake of argument that the applicant did have a legitimate expectation, his Honour was not prepared to depart from the decided cases by extending relief to a person

⁶¹ *Breen v. Amalgamated Engineering Union* [1971] 2 Q.B. 175, 191. Lord Denning considered (*ibid.*) that the appellants in *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997, would have had a legitimate expectation that their complaint would be referred to a committee of investigation.

⁶² *Ibid.* Edmund Davies L.J. considered this view as 'too wide' (at 195), while Megaw L.J. did not directly address himself to this particular aspect of Lord Denning M.R.'s judgment. For what may perhaps be regarded as an endorsement of Lord Denning's general views in this regard by the Court of Appeal, see *Stevenson v. United Road Transport Union* [1977] 2 All E.R. 941, 949, *per* Buckley L.J. (delivering the judgment of the Court).

⁶³ The first occasion was, of course, two years earlier in the context of an immigration matter in *Schmidt's* case.

⁶⁴ [1981] 2 N.Z.L.R. 619.

⁶⁵ Sub-section 36(1) provided as follows: 'In the event of an extraordinary vacancy in the office of a representative of any constituent district on the Board, the local authority of that district shall forthwith appoint some qualified person in his place as a representative of that district.'

not 'directly and personally affected' by the decision.⁶⁶ In the result, the Council's decision to appoint someone other than the highest polling unsuccessful candidate was not reviewable. Although the decision was influenced to a considerable degree by the virtually unfettered discretion conferred upon the Council by s.36(1), it was in relation to a similar wide discretion in respect of the exercise of which Lord Denning M.R. implied a duty to act fairly in *Breen's* case.

This circumspect approach of the New Zealand High Court may be contrasted with the apparent willingness of Australian courts to apply natural justice in promotion and appointment cases on the basis of a legitimate expectation. In *Hamblin v. Duffy (No. 2)*⁶⁷, the applicant had appealed to the Promotions Appeal Board⁶⁸ of the Australian Broadcasting Commission against the provisional promotion of another officer to a more senior position on the statutory ground of 'equal efficiency and seniority'. The Appeal Board conducted interviews with a number of staff members to ascertain their opinion of the applicant's efficiency as a Commission officer relative to that of the provisionally promoted officer. After refusing a request by the applicant that the Board interview officers nominated by her in relation to her professional activities, the Board dismissed the appeal. The applicant sought judicial review of this decision by the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 (Cth). In rejecting the Commission's submission that the Appeal Board were not bound by the rules of natural justice inasmuch as their decision could not adversely affect the rights, property or legitimate expectations of the applicant,⁶⁹ Lockhart J. stated:

Plainly a decision of the [Promotions Appeal] Board to uphold or disallow an appeal is a decision which may adversely affect the rights, person and legitimate expectations of the appellant [applicant] or the officer provisionally promoted. It affects their salary, position in the A.B.C. and prospects of promotion. The rules of natural justice therefore apply to the proceedings and the decision of the Board.⁷⁰

It may be true that the officer provisionally promoted *ipso facto* has a legitimate expectation of having such promotion finally confirmed, but upon what basis can it be said that the applicant, *qua* appellant, had a right or legitimate expectation adversely affected by a decision of the Appeal Board to disallow her appeal against the provisional promotion? It may be conceded that the appellant's salary and position would have been affected in the limited sense that they were not enhanced, but is this sufficient to warrant reliance upon the legitimate expectation doctrine to imply natural justice? The views expressed by Lord Denning M.R. in *Breen's* case to the effect that a person who seeks a privilege to which he has no

⁶⁶ *Paterson v. Dunedin City Council* [1981] 2 N.Z.L.R. 619, 624. Hardie Boys J. pointed out (*ibid.*) the 'great danger of elevating felicitous descriptions [legitimate expectations] into definitions of principle'.

⁶⁷ (1981) 37 A.L.R. 297.

⁶⁸ Appointed pursuant to the Broadcasting and Television Act 1942 (Cth).

⁶⁹ Counsel for the Australian Broadcasting Commission had relied on Lord Denning M.R.'s dictum in *Breen's* case (see above, n.61, p.712) and on a passage in de Smith, *op. cit.* 177: 'Some forms of interest have not yet been afforded any procedural protection at all in the courts — e.g. . . . a civil servant's . . . interest in not being . . . passed over for promotion'.

⁷⁰ *Hamblin v. Duffy (No. 2)* (1981) 37 A.L.R. 297, 304.

particular claim — such as an appointment to some post — need not be heard,⁷¹ are to be preferred to the broad statements of Lockhart J.⁷²

A case in which the legitimate expectation doctrine was called in aid in arguably more compelling circumstances involving reappointment to the Public Service was that of *Cunningham v. Cole*.⁷³ The applicant had been appointed to the Public Service in 1974 and was employed in the Department of Immigration and Ethnic Affairs. In 1979, the applicant resigned from the Service over an allegation that he was harbouring a prohibited immigrant with whom he had developed a close personal relationship. In fact, the applicant had been induced by his Department to resign by threat of criminal prosecution and by the promise that he would leave with a 'clean record' notwithstanding his denial of any impropriety. In 1981, the applicant sought reappointment to the Service but was turned down on the basis of an adverse character report which had been received from his former Department relating to the circumstances surrounding his resignation. Although the applicant had requested access to this report, he was refused a copy and was not told even the gist or substance of the damaging allegations contained therein. The applicant sought judicial review of the Public Service Board's decision not to reappoint him on the ground of denial of natural justice in that he had not been given sufficient notice of the allegations made against him.

At first instance, Ellicott J. held on these facts that the Public Service Board were bound to comply with the rules of natural justice when considering the application for reappointment to the Public Service. Although as a general rule, a person applying to the Service for the first time or an applicant for reappointment would not be entitled to an opportunity to be heard for neither would possess a relevant right or legitimate expectation,⁷⁴ nevertheless, in the very special circumstances of the applicant's case, the applicant had a legitimate expectation that the

⁷¹ *Breen v. Amalgamated Engineering Union* [1971] 2 Q.B. 175, 191.

⁷² Different considerations may apply, however, where a person's employment is sought to be terminated and serious allegations are involved. In *Ioannou v. Fowell* (1982) 43 A.L.R. 415, where the applicant was advised at the time of his appointment to a position of temporary employment under the Public Service Act 1922 (Cth) that such employment might be extended, and where it was in fact renewed for a one-year period but later sought to be terminated at the expiration of the renewal period on the grounds of the applicant's misconduct and incompetence in the performance of his work, it was held that 'the circumstances of the case [were] such as to have required the first respondent [employer] to hear what the applicant had to say about the serious allegations made concerning him before proceeding to a decision.' (*Ibid.* 433). Accordingly, the applicant had been deprived in Sheppard J.'s view of a legitimate expectation that he would be heard before the making of a decision that he would not be re-employed (see *supra* n.10, p.687). The legitimate expectation here appears to have been based on the allegations of misconduct, the serious consequences for the applicant of an adverse decision and the obvious analogies with the licence renewal cases. On appeal, the Full Federal Court set aside Sheppard J.'s order granting relief to the applicant. Bowen C.J. and Northrop J. did not enter upon a discussion of the legitimate expectation doctrine in upholding a preliminary objection to the competency of the application for an order of review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) on the ground that there was no decision to which the Act applied. Although Woodward J. reached the opposite conclusion in relation to such objection, he nevertheless agreed in the result on the ground that it was not possible to imply, in light of the particular statutory scheme, an obligation to accord natural justice to applicants for temporary employment. Upon further appeal, the High Court unanimously set aside the orders of the Full Federal Court and substantially reinstated those of Sheppard J. on grounds which excluded the natural justice and legitimate expectation issues ((1983-4) 52 A.L.R. 460).

⁷³ (1982-83) 44 A.L.R. 334.

⁷⁴ As Lord Denning M.R. remarked in *Breen v. Amalgamated Engineering Union* [1971] 2 Q.B. 175, 191: 'If a man seeks a privilege to which he has no particular claim — such as an appointment to some post or other — then he can be turned away without a word. He need not be heard.'

question of his future employment in the Service would not be decided on the ground of his alleged prior misconduct whilst a Departmental officer without first being given sufficient particulars of the misconduct alleged in the character report from his former Department and an opportunity to be heard in relation thereto.⁷⁵

Ellicott J.'s approach to the natural justice issue at first instance may be contrasted with that taken on appeal by the Federal Court.⁷⁶ In dismissing the appeal from the trial judge's decision setting aside the Public Service Board's decision to refuse reappointment, the Court agreed with the judgment below that the rules of natural justice would not ordinarily apply in the case of an application for appointment or reappointment to the Public Service in view of the absence of any right or legitimate expectation that could be affected or disappointed by an adverse decision.⁷⁷ However, in finding a basis for the legitimate expectation in the instant case, the Court relied instead on a principle contained in the opinion of the Privy Council in *Attorney General of Hong Kong v. Ng Yuen Shiu*⁷⁸ that 'expectations may be based upon some statement . . . by, or on behalf of, the public authority . . . if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him [the person affected] to be denied such an inquiry'.⁷⁹ In view of the circumstance that the respondent (applicant at first instance) had been induced to resign by threat of prosecution and the assurance of an unblemished record he 'was entitled to hold the reasonable expectation that he would be afforded a reasonable opportunity of answering the allegations should the Department change its attitude towards him and assert (contrary to the representation it had made to him) that he had left the Department with a blemished record'.⁸⁰ If, contrary to the respondent's legitimate expectation that his reappointment application would not be decided on the basis that his past service record with the Department was tarnished, such record was to be treated as blemished by the Public Service Board, the common law required that the respondent be heard.⁸¹

Apart from employment cases relating to appointments to various positions, the legitimate expectation doctrine has been considered in the related context of disciplinary proceedings. In *Gordon v. Commissioner of Police*⁸², a former police constable sought judicial review of the decisions of the Commissioner of Police to

⁷⁵ *Cunningham v. Cole* (1982-83) 44 A.L.R. 334, 345.

⁷⁶ *Cole v. Cunningham* (1983) 49 A.L.R. 123. It is significant to note that the Privy Council decision in *Attorney General of Hong Kong v. Ng Yuen Shiu* [1983] 2 All E.R. 346, intervened between Ellicott J.'s decision and that of the Full Federal Court.

⁷⁷ *Ibid.* 128.

⁷⁸ [1983] 2 All E.R. 346.

⁷⁹ *Ibid.* 350.

⁸⁰ *Cole v. Cunningham* (1983) 49 A.L.R. 123, 133.

⁸¹ In the recent case of *Douglas v. Allen* (Federal Court, 3 April 1984, No. ACT G94 of 1983, unreported at writing), Marling J. distinguished *Cole v. Cunningham* on its very special facts in rejecting the applicant's contention that she had a legitimate expectation that she would be classified as a Master Teacher. His Honour could not identify any statutory provision, condition of employment or assurance that might provide the basis for such expectation, although he did concede, in acknowledging 'the trend to expand the class of case in which the requisite "legitimate expectation" will be found to exist,' that the applicant was entitled to hold the more limited expectation that her application for such classification would be dealt with substantially in accordance with the Handbook procedures.

⁸² Supreme Court of New South Wales, 27 June 1980, unreported.

suspend him without pay and ultimately to dismiss him from the New South Wales Police Force after he had been charged with and pleaded guilty to having a pistol in his possession without being the holder of a licence. The constable contended that the Commissioner had denied him natural justice by failing to provide him with proper notice and a hearing prior to his suspension and dismissal. In quashing the dismissal and earlier suspension, Rogers J. held that the existence of disciplinary procedures in the relevant statutory Police Rules (N.S.W.) had conferred on the applicant a legitimate expectation that he would not be suspended or dismissed except in compliance with such procedures⁸³ which did not exclude natural justice and its requirement that he first be heard on mitigation of penalty.⁸⁴

Soon afterwards in *Dixon v. Commonwealth*,⁸⁵ the Full Federal Court applied the legitimate expectation doctrine in a rather relaxed manner in founding a right to a hearing in the context of the purported suspension and dismissal of a permanent officer of the Australian Public Service. Both before and after pleading guilty to charges of stealing and fraudulent misappropriation of government property from the office in which he had been engaged, the appellant had been suspended without salary in the absence of a prior hearing. Acting pursuant to a recommendation, the Public Service Board subsequently purported to dismiss the appellant from the Service, whereupon the latter applied for prerogative and declaratory relief in respect of these decisions on the ground that in law he should have been accorded a prior formal hearing. Having reaffirmed that the common law requires that a statutory power of decision affecting the rights, property or legitimate expectations of a person be exercised in accordance with the rules of natural justice, the Court held that the appellant was entitled to a prior opportunity to be heard in relation to the decision to suspend him since it 'adversely affected [his] rights and legitimate expectations'.⁸⁶ Unfortunately, the joint judgment of the Court did not attempt to distinguish between the appellant's 'rights and legitimate expectations' or to identify a foundation for the latter, apart from stating that the suspension decision deprived him of his entitlement to perform his duties as a Public Service officer and of his right to be paid salary and that 'it was likely to have profound emotional, social and financial effects upon him'.⁸⁷ If it is accepted that a 'right' of the appellant had been adversely affected by the exercise of the statutory power of suspension, then it would seem that any discussion by the Court of the possible possession of a legitimate expectation in order to found a right to natural justice is superfluous.

The most recent Australian decision at the time of writing relating to the application of the legitimate expectation doctrine in the context of disciplinary

⁸³ The expectation here is similar to that which Stephen J. considered the applicant to possess in *Simsek v. Minister for Immigration and Ethnic Affairs* (1982) 148 C.L.R. 636. See *supra* n.58, p.711.

⁸⁴ On appeal by the Commissioner of Police from the judgment of Rogers J., Moffitt P. (with whom Reynolds and Glass JJ.A. agreed) did not find it necessary to rule upon his Honour's decision in relation to the application of the legitimate expectation doctrine, as he was of the view that the appeal ought to be decided on a different basis. Moffitt P. did, however, express the view that the constable had a 'right . . . to continue in office until that office is properly determined' (emphasis supplied): *Commissioner of Police v. Gordon* [1981] 1 N.S.W.L.R. 675, 679.

⁸⁵ (1981) 3 A.L.J. 289.

⁸⁶ *Ibid.* 297.

⁸⁷ *Ibid.*

proceedings is that of the Full Supreme Court of Victoria in *O'Rourke v. Miller*.⁸⁸ The respondent had successfully completed initial training for admission to the Victorian Police Force and been appointed a constable subject to a two-year probation period. He received numerous departmental assessments in which his service, conduct and efficiency had been reported on as exemplary and had passed a retention examination which the Police Regulations 1979 required probationary constables to pass. As a result of a complaint made against the respondent alleging drunkenness, intimidation and the use of obscene language, the Chief Commissioner of Police purported to terminate the respondent's appointment as a probationary constable pursuant to s. 8(2)⁸⁹ of the Police Regulation Act 1958 (Vic.) and regulation 212⁹⁰ of the Police Regulations 1979. The respondent sought judicial review of this decision under the Administrative Law Act 1978 (Vic.) on the ground that in arriving at his decision, the Commissioner had breached the rules of natural justice in failing to afford him a reasonable opportunity to be heard. In relation to the respondent's submission that in such circumstances he possessed a legitimate expectation that the Commissioner would confirm his appointment, Murphy J. (with whom Starke J. agreed) assumed without deciding that the respondent did have such a legitimate expectation in law.⁹¹ His Honour examined the case law on legitimate expectations which, in his view, supported the proposition that 'if something akin to past misconduct lies at the root of a proposed decision not to renew or to terminate a licence previously granted, . . . or an appointment made, . . . it is as a general rule the legitimate (reasonable) expectation of the person who is to be affected by the decision that the licence, . . . appointment . . . shall not be taken away without giving him a reasonable opportunity to be heard . . .'.⁹² It is also noteworthy that he criticized the current tendency whereby 'the term "legitimate expectation" is in shorthand fashion transferred from the benefit which the applicant reasonably expects . . . to a legitimate expectation of being accorded a hearing before it is taken away'.⁹³ In the opinion of Murphy J., the legitimate expectation must be an expectation of some benefit reasonably entertained by the person concerned.⁹⁴ Nevertheless, the possession of a legitimate expectation of some particular benefit can benefit its holder only in relation to the manner in which the impugned decision was reached (*i.e.*, procedural protection). In other words, the right arising from the possession of a legitimate expectation is the right to natural justice rather than the right to the

⁸⁸ [1984] V.R. 277.

⁸⁹ Sub-section 8(2) provides as follows: 'An appointment of a person to be a constable shall be subject to a period of probation of two years.'

⁹⁰ Regulation 212 provides in part as follows: 'Upon the receipt of a report . . . on the service conduct and efficiency of a constable and after conducting a retention examination and such other examinations (if any) as he thinks fit, the Chief Commissioner may — a) confirm the [probationary] appointment of such constable; or b) terminate [such appointment].'

⁹¹ *O'Rourke v. Miller* [1984] V.R. 277, 292. O'Bryan J. (*ibid.* 305) concluded that the Commissioner was bound to observe the rules of natural justice on the basis of authorities such as *Schmidt's* case.

⁹² *Ibid.* 291-2.

⁹³ *Ibid.* 292.

⁹⁴ See *supra* nn. 10 and 11, p.687.

benefit itself such that '[a] "legitimate expectation" of confirmation cannot, by any decision of this Court, be changed into a legal right to confirmation'.⁹⁵

In contrast, then, to the cautious approach adopted by the courts in extending the legitimate expectation doctrine's application to immigration cases, the Federal Court of Australia, in particular, has exhibited in a number of the appointment and disciplinary cases what might be described as an unguarded zeal in this respect. Provided the courts take pains to identify an adequate foundation for its application in each case, however, it is likely that the doctrine will continue to flourish in this particular area.

VII. PRESENT STATUS AND CONCLUSION

The legitimate expectation doctrine must now be regarded as firmly entrenched in the realm of natural justice in view of its recent adoption not only by the High Court of Australia in *Heatley* and the New Zealand Court of Appeal in *Daganayasi*, but also by the Privy Council in *Ng Yuen Shiu* and the House of Lords in *O'Reilly v. Mackman*⁹⁶. However, the gate remains ajar in relation to the circumstances in which a legitimate expectation can be said to arise. Apart from the licensing, immigration and employment cases, legitimate expectations have also been pleaded with varying success in a variety of cases ranging from those involving remission of sentence and parole applications⁹⁷ and the prosecution of offences⁹⁸ to taxation assessment⁹⁹ and tariff duties.¹

The problems associated with the legitimate expectation doctrine lie not in its existence but rather in its manner of application. Clearly, the development of the 'legitimate expectation' since it was first introduced in 1969 has facilitated the expansion of the area within which the rules of natural justice operate, which had hitherto been hedged about by the traditional insistence on the existence of a legal right. Lord Denning M.R.'s dictum² stemming from Lord Parker C.J.'s duty to act fairly³ mitigated the rigours of such an approach and exposed to judicial scrutiny

⁹⁵ *O'Rourke v. Miller* [1984] V.R. 277, 293 (per Murphy J.). This view must be regarded as sound for the Court would otherwise be exceeding its jurisdiction in judicial review proceedings by attempting to substitute its opinion as to how the discretion committed to another decision-maker (here, the Chief Commissioner) ought to have been exercised. See in this connection n.5, p.686, *supra*.

⁹⁶ [1982] 3 All E.R. 1124.
⁹⁷ *Ibid.* Lord Diplock (with whom the other Law Lords agreed) stated that each appellant prisoner had 'a legitimate expectation, based on his knowledge of what is the general practice, that he would be granted the maximum remission, permitted by . . . the Prison Rules, . . . if . . . no disciplinary award of forfeiture of remission had been made against him.' (*ibid.* 1126-7). *Contra. R. v. Angel; ex parte Van Beelen* (1983) 108 L.S.J.S. 200, where the Full Supreme Court of South Australia refused to hold that release on parole is either the right or the legitimate expectation of a prisoner.

⁹⁸ *Nicol v. Attorney-General for the State of Victoria* [1982] V.R. 353.

⁹⁹ *Ahern v. Deputy Commissioner of Taxation* (1983) 50 A.L.R. 177.

¹ *Nashua Australia Pty Ltd v. Channon* (1981) 36 A.L.R. 215. In rejecting the legitimate expectation contended for, Lee J. noted that the exercise of the statutory power in question 'will usually be unrelated to factors personal to the applicant and will depend upon matters appertaining to the goods themselves in relation to tariff policies (*ibid.* 227).

² See *supra* nn.33 and 36, p.690.

³ *In re H. K. (An Infant)* [1967] 2 Q.B. 617, 630.

decisions relating to matters in respect of which persons affected had been denied relief even in cases of substantial hardship. The legitimate expectation doctrine has been perceived from the outset as a vehicle to attain fairness and justice.⁴

If there is an outstanding common criticism linking a number of the preceding cases together, that criticism must be the fervour of judges in applying the doctrine without thoughtful consideration and articulation as to the foundation or basis upon which the legitimate expectation is said to arise.⁵ Inasmuch as the possession of a legitimate expectation confers upon its holder the substantial right to be accorded natural justice, the courts must ensure that the expectation contended for is well founded. In this respect, numerous alternative bases can be discerned from the foregoing cases.⁶

As we have seen, the possession of a particular benefit such as a licence may provide the basis for an expectation in its holder that such benefit will not be arbitrarily revoked if such action would cause substantial inconvenience and economic loss.⁷ Similar considerations apply to the renewal⁸ of a benefit that has expired where the former holder had not been told not to expect a renewal and had faithfully complied with all of the relevant obligations during the term. An expectation may possibly arise from an assurance given by a public authority as to the manner in which a statutory discretionary power vested in it would be exercised,⁹ or where an authority voluntarily undertakes to give a hearing and subsequently fails to comply with the procedural standards that it has set for itself.¹⁰ A person's knowledge of a precedent or a general practice followed by an authority may be sufficient to rouse in him an expectation that that practice will again be followed in his particular case.¹¹ Alternatively, a person's expectation may arise from his status as a member of the public or from expectations held by the community at large.¹² Judges may be willing to apply the doctrine when they

⁴ See the text relating to n.63, p.695 *supra*.

⁵ As Holland J. aptly remarked in *M.G. v. Minister of Immigration* (N.Z. High Court, 13 August 1982, No. A220/80, unreported): 'The right to apply to the Court to review a statutory power of decision is a precious one in a democratic country but is also one which must not be abused. Those responsible for making the decision must not be placed in an impracticable position when faced with an application for review. They must be allowed to know precisely on what grounds it is alleged that there has been a breach of natural justice or lack of fairness, and if an applicant claims a legitimate expectation he or she must specify the basis on which the claim is based and the precise nature of to what the expectation may relate. The mere allegation of a breach of natural justice, unfairness or legitimate expectation is quite inadequate.'

⁶ This enumeration is not intended to be exhaustive but merely illustrative. The restrictive approach taken by Barwick C.J. in founding a legitimate expectation on a legal right to the benefit in question is to be eschewed in principle since it effectively denies the existence and utility of the doctrine. Barwick C.J.'s views in this regard have failed to command either judicial or academic support. For a possible exception, see the remarks of Lee J. in *Nashua Australia Pty Ltd v. Channon* (1981) 36 A.L.R. 215, 229.

⁷ *R. v. Barnsley Metropolitan Borough Council; ex parte Hook* [1976] 1 W.L.R. 1052, 1058, *per Scarman L.J.* See also *Salemi v. Minister for Immigration and Ethnic Affairs* (No. 2) (1977) 137 C.L.R. 396, 439 *per* Stephen J.

⁸ *F.A.I. Insurances Ltd v. Winneke* (1982) 56 A.L.J.R. 388.

⁹ *Salemi v. Minister for Immigration and Ethnic Affairs* (No. 2) (1977) 137 C.L.R. 396, 439 *per* Stephen J.

¹⁰ *R. v. Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299; *Attorney General of Hong Kong v. Ng Yuen Shiu* [1983] 2 All E.R. 346.

¹¹ *O'Reilly v. Mackman* [1982] 3 All E.R. 1124; *contra Paterson v. Dunedin City Council* [1981] 2 N.Z.L.R. 619.

¹² *Heatley v. Tasmanian Racing and Gaming Commission* (1977) 137 C.L.R. 487; *Forbes v. New South Wales Trotting Club Ltd* (1979) 143 C.L.R. 242.

perceive unfair treatment or injustice¹³ or where the unrestrained exercise of the statutory power would involve considerable hardship.¹⁴ A person who has been provisionally appointed or elected to some position may be said *ipso facto* to possess a legitimate expectation of final confirmation.¹⁵ A legitimate expectation may have as its source a person's ostensible ability to fulfil statutory requirements, the satisfaction of which automatically entails the conferral of a statutory right.¹⁶ It has also been held that a tribunal recommendation may found a legitimate expectation in the subject person.¹⁷ It may be that a person will be entitled to hold the expectation that decision-makers will exercise their powers in accordance with prescribed procedures.¹⁸ Nevertheless, it would seem that a person's misconduct may disqualify him from relying on a legitimate expectation, however derived, that such person might have had otherwise.¹⁹

Apart from the imperative need to find a sufficient foundation for the legitimate expectation in question, it may be said that the number and types of bases have not been finally settled. This potential for a wide and flexible application of the legitimate expectation doctrine perhaps explains why judges have been reluctant to lay down precisely its content and perimeter of application, preferring instead to apply it on a case-by-case basis. In time, however, some of the uncertainty presently surrounding the nature of the legitimate expectation will likely be dissipated through judicial refinement of the concept. It will indeed be interesting to see whether future courts will be prepared to expand the operation of the legitimate expectation doctrine into areas other than natural justice.²⁰ Whatever may be the future course of its development and despite its perceived shortcomings, the doctrine has continued, in its application, to serve the 'legitimate' ends of justice and fairness to which it owes its origin.

¹³ *Breen v. Amalgamated Engineering Union* [1971] 2 Q.B. 175; *Cole v. Cunningham* (1983) 49 A.L.R. 123; *Attorney General of Hong Kong v. Ng Yuen Shiu* [1983] 2 All E.R. 346.

¹⁴ *Daganayasi v. Minister of Immigration* [1980] 2 N.Z.L.R. 130.

¹⁵ *Breen v. Amalgamated Engineering Union* [1971] 2 Q.B. 175; *Hamblin v. Duffy (No. 2)* (1981) 37 A.L.R. 297; *McInnes v. Onslow-Fane* [1978] 1 W.L.R. 1520, 1529, *per* Megarry V.-C.; *O'Rourke v. Miller* [1984] V.R. 277.

¹⁶ *In re H.K. (An Infant)* [1967] 2 Q.B. 617; *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149, 170, *per* Lord Denning M.R.; *Daganayasi v. Minister of Immigration* [1980] 2 N.Z.L.R. 130.

¹⁷ *Barbaro v. Minister for Immigration and Ethnic Affairs* (1982-83) 46 A.L.R. 123.

¹⁸ *Simsek v. Minister for Immigration and Ethnic Affairs* (1982) 148 C.L.R. 636; *Commissioner of Police v. Gordon*, [1981] 1 N.S.W.L.R. 675.

¹⁹ *Minister for Immigration and Ethnic Affairs v. Gaillard* (1984) 49 A.L.R. 277; *Cinnamonod v. British Airports Authority* [1979] R.T.R. 331, where the defendant banned the plaintiffs from entering Heathrow Airport while engaged in their work as minicab drivers. In dismissing their claim for declarations that the banning notices were invalid for want of prior notice and an opportunity to be heard, Forbes J. considered that their 'persistent and deliberate commission of offence after offence against the [airport 'touting'] by-laws (*ibid.* 342) carried them beyond what would otherwise have been one of the expectation cases. On appeal ([1980] 1 W.L.R. 582), the Court of Appeal unanimously affirmed the holding of Forbes J. that the plaintiffs (appellants) could not be said to have had the legitimate expectation contended for in view of their lengthy record of convictions, unpaid fines and flouting of the regulations.

²⁰ In *O'Reilly v. Mackman* [1982] 3 All E.R. 1124, Lord Diplock appeared to regard a legitimate expectation as a sufficient basis for judicial review on grounds that included but went beyond natural justice when he stated (*ibid.* 1126-7) that: 'In public law . . . such legitimate expectation gave to each appellant a sufficient interest to challenge the legality of the adverse disciplinary award made against him by the board on the ground that in one way or another the board in reaching its decision had acted outwith the powers conferred on it by the legislation under which it was acting; and such grounds would include the board's failure to observe the rules of natural justice . . .'