The Multiple Doctrines of Legitimate Expectations*

Legitimate expectations arise in a variety of different ways[1] and yet 'the doctrine of legitimate expectations' is still regarded as one amorphous doctrine. Any underlying theory which attempts to unify diverse case law will thus inevitably be fairly general. [2] For example, the case law contains references to 'fairness' and 'abuse of power'[3] as the basis for upholding legitimate expectations, but as Schiemann and Laws[4] L.J.J. have pointed out, such terms cannot provide specific guidance on the facts of a particular case.[5] And in particular, the area has historically been driven principally by the remedy available (procedural or substantive protection) rather than by the cause of action giving rise to the remedy in the first place. My argument is that we should now break free of this focus on the remedy and realise that there may in fact be three different varieties of legitimate expectation which have different conceptual and normative bases, which thus require different 'ingredients' to be made out by the claimant and which can each be protected in a variety of ways.[6] Some expectations are really like contracts,[7] containing an exchange of promises between the public authority and the private party. Others fit more naturally into administrative law's usual territory, as part of the process of monitoring the use and operation of policies by public authorities. Finally, a third category of 'legitimate expectations' do not in fact contain any particular expectation or reliance on the part of the claimant at all. Instead, in this third category, the public authority has been inconsistent, not over time, but across cases, so that the claimant has been treated unequally

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[1] See P. Craig, *Administrative law*, 7th edn (London: Sweet and Maxwell, 2012) and S. Schønberg, *Legitimate Expectations in Administrative Law* (Oxford: Oxford University Press 2000).

[2] See, for example A. Perry and F. Ahmed, "Promises, Practices, and Policies: A Rule-Based Unification of the Doctrine of Legitimate Expectations", (2012) Melbourne Legal Studies Research Paper No 614, <http://ssrn.com/abstract=2163255> accessed 13 February 2016. See also the dictum of Schiemann L.J. in *R (Bibi) v Newham LBC (No. 1)* [2001] EWCA Civ 607; [2002] 1 W.L.R. 237 at [25]: 'Several attempts have been made to find a formulation which will provide a test for all cases. However, history shows that wide-ranging formulations, while capable of producing a just result in the individual case, are seen later to have needlessly constricted the development of the law.'

[3] See, e.g., *R v IRC ex p MFK* [1990] 1 W.L.R. 1545; [1990] 1 All E.R. 91, *R v IRC ex p Preston* [1985] A.C. 835; [1985] 2 W.L.R. 836, and *R v IRC ex p Unilever* [1996] S.T.C. 681. See also *R v North and East Devon Health Authority, ex p Coughlan* [2001] Q.B. 213; [2000] 2 W.L.R. 622.

[4] In *Nadarajah, Abdi v The Secretary of State for the Home Department* [2005] EWCA Civ 1363.

[5] Schiemann L.J. in *Bibi* [2001] EWCA Civ 607 at [19]: "care needs to be taken to distinguish analytical tools from conclusions which encapsulate value judgments but do not give any indication of the route to those conclusions…". See also Laws L.J. in *Nadarajah* [2005] EWCA Civ 1363 at [67], "Abuse of power …goes no distance to tell you, case by case, what is lawful and what is not."

[6] For other proposals of disaggregation see M Elliott, "Legitimate Expectations: Procedure, Substance, Policy and proportionality" [2006] 65 C.L.J 254 and R Clayton, "Legitimate Expectations, Policy and the Principle of Consistency" (2003) 62 C.L.J 93.

[7] Which in themselves can be problematic in the public sphere, see e.g. *R v Inhabitants of Leake* (1833) 5 B. & Ad. 469; 110 E.R. 863; *Birkdale District Electricity Supply v Corporation of Southport* [1926] A.C. 355, and *BTC v Westmorland* [1958] A.C. 126.

in comparison with others in the same situation. Currently these three very different situations are elided under the one very general heading of 'legitimate expectations', but separating out these three different kinds of claim could provide benefits both for courts and for administrative decision-makers by enhancing the clarity and predictability of the area. This thesis will be defended in two stages. Section I will separate out the three different normative bases which can be found to underlie the current unified doctrine of legitimate expectations, and the ways in which these normative differences ought to have an impact on the operation of the law. Section II will then examine potential objections to this disaggregation of the doctrine.

I. Reforming the law of legitimate expectations

If we understand why we are upholding a particular expectation, this has obvious implications for when it should be upheld and how.

1. Legitimate expectations as almost-contracts[8]

The first kind of legitimate expectation arises where an authority makes a promise in order to induce people to do something that they do not want to do, only to renege on that promise once compliance has been achieved. The reason for beginning with this kind of legitimate expectation is, of course, that this was what the Court of Appeal found to have occurred in the leading case of *Coughlan* itself, in which the severely disabled Ms Coughlan was asked to move into a care facility called Mardon House on the basis of a promise that if she did so it would remain her 'home for life'.[9] Another example comes from the immigrant children saga in Hong Kong.[10] The Hong Kong government interpreted very narrowly the criteria for establishing a right of abode in Hong Kong. Alarmed by the huge numbers of people seeking to challenge this interpretation via judicial review, the government made general media announcements and sent pink postcards to those who had applied for judicial review, asking that applicants take no further action and promising that the government would be bound by the results of a test case to be heard by the Court of Final Appeal (CFA). However, when the CFA took a wider interpretation of the right of abode, the government asked the Standing Committee of the National People's Congress for an 'interpretation' of the relevant provisions which, once given, essentially contradicted the findings of the CFA. As a result,

[8] A more literally apt term might of course be 'quasi-contracts', but obviously that term has other technical connotations in the law of unjust enrichment which make it unsuitable here.
[9] *Coughlan* [2001] Q.B. 213 at [86].
[10] See further C Forsyth and R Williams "Closing Chapter in the Immigrant Children Saga: Substantive Legitimate Expectations and Administrative Justice in Hong Kong" (2002) 10 Asia Pacific Law Review 29.

the applicants brought a further case, *Ng Siu Tung*,[11] claiming, in part successfully,[12] that their legitimate expectations had been breached. In these circumstances the expectation has, as Lord Woolf MR put it in Coughlan, 'the character of a contract', indeed as will be discussed in further detail below, it is not wholly clear why the promise in *Coughlan* was not in fact treated as a contract.

The suggestion that promise-based legitimate expectations are different from other forms of such expectation is not, of course, new. Schønberg distinguishes four different kinds of legitimate expectation, the first of which occurs 'where a public authority makes a formal decision about a person, or a limited group, which it subsequently seeks to revoke.'[13] And Clayton has argued that *Coughlan*-style legitimate expectations should only arise in cases of representation, not policies.[14] However, there is no unanimity over what it is that distinguishes this kind of case or why it is normatively different from other varieties of legitimate expectation. This is perhaps hardly surprising when there is a similar lack of agreement over the normative basis for upholding actual contracts. Fried, for example, views the promise as the key essence of contract,[15] so that promises to make a gift are no different from promises in exchange for which the promisor expects to receive a benefit.[16] If applied in the context of legitimate expectations this might bracket together cases such as *Patel*[17] or *Bibi*[18] in which promises are similarly made gratuitously, separating all these cases from those in which there is no promise. But as Fried accepts, 'this…is not exactly a statement of positive law', and even at the theoretical level it has been disputed by Atiyah, who regards it as a 'gross distortion', asking whether it is not 'manifest that a person who has actually worsened his position by reliance on a promise has a more powerful case for redress than one who has not acted in reliance on the proimise at all?'[19] For Atiyah, then, it is this detrimental reliance which is key, so much so that it 'can give rise to obligations even where there was no promise at all', and it can cut

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[11] Court of Final Appeal, 10 January 2002 <www.legco.gov.hk/yr01-02/english/panels/se/papers/se0124-869-01e.pdf> accessed 14 February 2016.

[12] The CFA found in favour of those who had received pink postcards, but against those who had simply believed the media announcements. See further Forsyth and Williams "Closing Chapter in the Immigrant Children Saga: Substantive Legitimate Expectations and Administrative Justice in Hong Kong" (2002) 10 Asia Pacific Law Review 29. The distinction will be discussed below.

[13] Schønberg, *Legitimate Expectations in Administrative Law* (2000), at 8, although when writing with Craig in 2000 he adopted a slightly different taxonomy, P. Craig and S. Schønberg, "Substantive Legitimate Expectations after Coughlan" [2000] PL 684 at 687.

[14] Clayton, "Legitimate Expectations, Policy, and the Principle of Consistency" (2003) 62 C.L.J. 93.

[15] C. Fried, *Contract as Promise, a Theory of Contractual Obligations* (Cambridge, Mass: Harvard University Press, 1981).

[16] Fried, *Contract as Promise, a Theory of Contractual Obligations* (1981), at 37.

[17] *R (Patel) v General Medical Council* [2013] EWCA Civ 327; [2013] 1 W.L.R. 2801. It will be argued below that in fact *Patel* is a classic example of the kind of case in which the law creates court-ordered transitional provisions, see further section 2. (b) Legitimate Expectations as Court-ordered transitional provisions.

[18] *Bibi* [2001] EWCA Civ 607. See discussion at XXXXX.

[19] P. Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986), at 20.

across the traditional categories of contract, tort and unjust enrichment. This too, however, is problematic in terms of the decided law, which does distinguish those categories. Rather, as other authors note, the way in which contract operates in practice is not to choose between reliance and promise, but rather to generate obligations out of a combination of the two. Thus as Burrows states, '[t]he law of contract is concerned with binding promises….It has been a traditionally accepted feature of English law that only bargain promises – that is, promises supported by consideration – are binding.'[20] It is therefore this combination of binding promise and *exchange* of obligation which is at the heart of contracts, and which is echoed by the almost-contractual category of legitimate expectation cases. The question, then, is how this normative basis for upholding the expectation should translate into the 'ingredients' that a claimant must demonstrate in order to make out such an expectation, as outlined in *Bibi*,[21] namely:

1. To what the public authority has, whether by practice or by promise, committed itself.
2. Whether the authority has acted or proposes to act unlawfully in relation to its commitment.
3. What the court should do.

Question 1: The initial ingredients of an almost-contract

The first obvious conclusion is that such expectations can arise only from a clear promise or representation, and it seems appropriate to require the claimant, as in *MFK*, to have 'put all its cards face up on the table',[22] but it seems less likely that the claimant will be required to take precautions[23] rather than trusting the decision-maker. The long temporal duration of the expectation appears unlikely to be an issue; Mardon House was promised to remain Miss Coughlan's home 'for life', regardless of how long this might turn out to be, and the same goes for the Hong Kong right of abode, but as Collins points out in the context of contract, however long it lasts it must be finite in duration.[24]

Reliance or knowledge are not currently required under the current homogeneous rules for legitimate expectations, although their absence is, as Peter Gibson LJ put it in *Begbie*, 'very much the exception rather than the rule'.[25] Now that the normative basis for this category is understood, however, both should be required; it is the very essence of this kind of legitimate expectation that

[20] A. Burrows, *Understanding the Law of Obligations* (Oxford: Hart Publishing, 1998), at 3.
[21] *Bibi* [2001] EWCA Civ 607.
[22] *R v IRC ex p MFK* [1990] 1 W.L.R. 1545.
[23] As in *R v Jockey Club ex p RAM Racecourses Ltd* [1993] 2 All E.R. 225 at 239.
[24] H. Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999), at 16.
[25] Peter Gibson L.J. in *R v Secretary of State for Education and Employment ex p Begbie* [2000] 1 W.L.R 1115 at 1124; [2000] E.L.R. 445 at [48], cited in *Nadarajah* [2005] EWCA Civ 1363 at [55].

there will be almost-consideration on the part of the private entity.[26] This is in keeping with the decision of Sales J in *Oxfam v HMRC*.[27] In that case Oxfam had used a method approved by HMRC to work out the VAT status of its various activities. A subsequent court decision[28] altered one of the assumptions on which this Approved Method was based, such that the application of the Approved Method formula would be much more favourable to Oxfam than had previously been the case. Oxfam therefore submitted that there was an agreement between it and HMRC to the effect that the Approved Method should govern the apportionment of input tax and that accordingly Oxfam was entitled to have the benefit of the new combination of the Approved Method and the change in case law. On the facts the appeal was dismissed for several reasons, including Sales J's reliance on Peter Glbson L.J.'s dictum that '*in a case such as this*, involving an assurance given to only one person and where there is no irrationality in the part of the public authority in adopting a different approach, the absence of detrimental reliance… is fatal' to the claim.[29] The proximity of the case to contract is evident from the fact that contract was pleaded as an alternative ground, and Sales J. left open the possibility in other cases for HMRC to enter into a binding contract if a taxpayer were to refuse to accept a method of apportionment of input tax without such a binding contract.[30]

Nevertheless, from a pragmatic perspective it is particularly likely here that the form of reliance will be, as Schiemann L.J. suggested in *Bibi*,[31] negative, in the sense that the claimant will have *refrained from* taking action in reliance on the promise: not objecting to the move to Mardon House in the case of Miss Coughlan, not pursuing their legal claims in the Hong Kong right of abode cases. [32] Thus, for the reasons given by Schiemann LJ in *Bibi*,[33] proof that the claimant positively did not know of the representation or promise (which seems unlikely in practice), or possibly proof that the claimant would have acted the same way in any event ought to be sufficient to defeat the claim, rather than requiring the claimant to prove knowledge or reliance, which would be very difficult to do in practice. This would still be more favourable to public authorities than the current rule which generally does not regard an absence of reliance or knowledge as fatal to the claim.

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[26] This may explain the result in *R v Secretary of State for the Home Department ex p Hargreaves* [1997] 1 W.L.R. 906; [1997] 1 All E.R. 397. Perhaps the feeling was that in signing the compact prisoners were only agreeing to do what they ought to have done anyway and thus there was 'no consideration' for the promise. Indeed this is a challenge faced by the law of contract itself, see eg *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1; [1990] 2 W.L.R. 1153.

[27] *Oxfam v her Majesty's Revenue and Customs* [2009] EWHC 3078 (Ch); [2010] S.T.C. 686.

[28] *Church of England Children's Society v Commissioners of Revenue and Customs* [2005] EWHC 1692 (Ch); [2005] S.T.C. 1644.

[29] Emphasis added.

[30] Although as a matter of jurisdiction, the ability of the tax tribunal to enforce a legitimate expectation was subsequently doubted in *Noor v Revenue and Customs Commissioners* [2013] UKUT 71 (TCC); [2013] S.T.C. 998.

[31] *Bibi* [2001] EWCA Civ 607 at [53]–[55].

[32] See Schiemann L.J. in *Bibi* [2001] EWCA Civ 607 at [53].

[33] *Bibi* [2001] EWCA Civ 607 at [53]–[55].

As for the numbers of applicants involved, the case of *Carlill v Carbolic Smoke Ball Co*[34] famously held that it is possible to make an offer to the world at large and that in such circumstances there is no requirement on the part of the person accepting the offer to notify that fact to the offeror. The case did, however, require that the language of the offer should not be too vague, which would fit with the requirement of a clear promise identified above, and also with the fact that in the event the legitimate expectations upheld in the right of abode cases were confined to those who had received pink postcards and who thus represented a finite rather than infinite category of promisees.[35] However, it is inevitable that the number of people to whom the promise has been made will play a role in the courts' reasoning (as it did in *Coughlan*[36] and the Hong Kong right of abode context)[37], since the larger the number of people involved, the greater the burden on the public purse. Nevertheless, courts should bear in mind that while failing to uphold the expectation may provide the public authority with short term relief, in the long run that authority's ability to manage and govern will be correspondingly reduced. In the Hong Kong right of abode cases, for example, only those who had been joined to the test cases or sent coloured cards by the legal aid office were found to have a legitimate expectation that the government would keep its promises.[38] As a result of the CFA's intervention, in Hong Kong the coloured card procedure would thus presumably be an effective means of managing the public in future, should a similar problem arise again, but public announcements may not, since although in the past they had supported the grant of a procedural protection in *Attorney General for Hong Kong v Ng Yuen Shiu*,[39] they did not lead to the grant of any protection in *Ng Siu Tung*. There are thus, to use familiar shorthand, both 'red' and 'green' light reasons[40] for the courts to be cautious in rejecting legitimate expectation claims too readily.

As far as any other criteria might be concerned, two were mentioned by the Court of Appeal in *Coughlan*. The first was the importance of what was promised to Miss Coughlan (and its close connection to the Human Rights Act 1998). This may well be relevant as part of the pragmatic balancing process, but it will surely not often be the case that claimants litigate unimportant expectations. The second criterion was that 'the consequences to the health authority of requiring it to honour its promise are likely to be financial only', but many decisions made by local authorities

[34] [1893] 1 Q.B. 256.
[35] *Carlill v Carbolic Smoke Ball Co* [1893] 1 Q.B. 256 at 262–63.
[36] *Coughlan* [2001] Q.B. 213 at [59].
[37] Court of Final Appeal, 10 January 2002 <www.legco.gov.hk/yr01-02/english/panels/se/papers/se0124-869-01e.pdf> accessed 14 February 2016.
[38] Court of Final Appeal, 10 January 2002 <www.legco.gov.hk/yr01-02/english/panels/se/papers/se0124-869-01e.pdf> accessed 14 February 2016.
[39] *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 A.C. 629; [1983] 2 W.L.R. 735.
[40] The terms of course come from the discussion in C. Harlow and R. Rawlings, *Law and Administration*, 3rd edn (Cambridge: Cambridge University Press, 2009).

are likely to be financial, and this does not mean that they are any less 'tragic'[41] or that they will have any less serious implications for the public at large, since whatever money is spent on upholding expectations will presumably have to be recouped from elsewhere.[42] It therefore cannot be assumed that the weight is all on the side of the claimant simply because the consequences for the public authority defendant are 'financial only', or because the expectation itself was 'important' to Ms Coughlan, instead a balance must be struck in each case between the degree of importance of the expectation to the claimant and the resource implications for the public at large in upholding it.

Question 2: What arguments will defeat the claim?

It is clear that if the public authority has considered the position of those to whom it has made promises, for example by qualifying those promises, the court will take account of this.[43] In addition, even in the private context, as Burrows points out, a promise is not binding if it is unfair to the promisor to hold him or her to it,[44] thus even there, let alone in the public context various factors could be relevant. Fettering is the most likely to be raised,[45] but this should be balanced carefully against both the 'red' *and* the 'green light' concerns. As noted above, it may well be the case that even significant short term fettering is preferable to a long term loss of the ability to manage and govern, which might arise from a perception that public authority promises are worthless. It is in the very nature of a contract that it will fetter the contracting parties' activities to some extent.

Question 3: What should the court do?

On the one hand we now have a unifying and coherent basis for the upholding of such expectations, and one which may make it perhaps less surprising or controversial[46] that the form of protection is substantive. But this raises the question why such cases are not then dealt with by the actual law of contract, rather than as almost contractual legitimate expectations. In particular, there are various challenges faced by the law of almost contractual legitimate expectations to which the law of contract has already developed answers.

First, as Burrows notes, in contract law although the courts have become much more willing to grant specific performance, it remains a secondary remedy, while the usual remedy is expectation

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[41] The term of course comes from G. Calabresi and P. Bobbitt's, *Tragic Choices* (New York: WW Norton & Co, 1978).
[42] See further P. Sales and K. Steyn, "Legitimate Expectations in English public law: an analysis" [2004] P.L. 564 at 591.
[43] By analogy with *R (Patel) v GMC* [2013] EWCA Civ 327. This case will be discussed in more detail in section 2(b) below where it will be argued that it in fact belongs in the category of court-ordered transitional provisions, albeit that in *Patel* itself there was a more specific representation made to the claimant.
[44] Burrows, *Understanding the Law of Obligations* (1998), at 4.
[45] And both the Hong Kong cases and *Coughlan* [2001] Q.B. 213 did entail substantial fettering.
[46] See, e.g. Sales and Steyn, "Legitimate Expectations in English public law: an analysis" [2004] P.L. 564 who question the correctness of the decision in *Coughlan*.

damages.[47] At the very least, then, this may be an appropriate avenue for the law of almost contractual legitimate expectations to explore. Of course in some instances this may be tantamount to, or even more expensive than one of the other methods for protecting the expectation, but in other instances it may be more economically efficient.

Second, there is the question of what should happen to promises which do not contain the kind of reciprocal consideration to be found in *Coughlan* and *Ng Siu Tung*. If the promise is the equivalent of a promise to make a gift, as in *Bibi,*[48] then on the one hand, if it would not be enforceable in private law, it seems difficult to justify enforcement of a gratuitous promise to use public resources. Conversely, in *Bibi* Schiemann L.J. took the view that in this respect, public authorities ought to be held to a *higher* standard than a private entity, not a lower one.[49] Ultimately, however, in *Bibi* the court only required the public authority to remake the decision, taking into account the legitimate expectation as a relevant consideration, since it had not already done so.[50] The existence of a legitimate expectation thus did play some role in identifying a specific relevant consideration, but since the public authority was already under a general duty to take into account all relevant considerations, that role was minimal, as was emphasised by Schiemann L.J.[51] In the event of a wholly gratuitous promise of this kind, it does seem that is the most that should happen.

Third, there is the question of what should happen when the public authority has specifically induced reliance by the private authority, but this does not amount to the kind of reciprocal 'consideration' necessary for an almost contractual situation to arise. In *Reprotech*[52] Lord Hoffmann made it clear that estoppel and legitimate expectations were 'analogous', but no more than that, and, famously, he held that the 'time had come' for legitimate expectations to 'stand upon its own two feet'.[53] This is obviously the case, as evidenced by the fact that this investigation itself deals with legitimate expectations which arise in a variety of situations beyond those which can be regarded as akin to estoppel. But with respect, while it may be that, as Lord Hoffmann suggested, 'public law has already absorbed whatever is useful from the moral values which underlie… estoppel',[54] the same

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[47] Burrows, *Understanding the Law of Obligations* (1998) citing in particular *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1; [1997] 2 W.L.R. 898 on the question of specific performance and Parke B in *Robinson v Harman* (1848) 1 Exch 850 at 855, on the question of expectation damages.
[48] *Bibi* [2001] EWCA Civ 607.
[49] 'There is moral detriment, which should not be dismissed lightly… In our view these things matter in public law, even though they might not found an estoppel or actionable misrepresentation in private law, because they go to fairness and through fairness to possible abuse of power'. *Bibi* [2001] EWCA Civ 607 at [55].
[50] *Bibi* [2001] EWCA Civ 607 at [49]. If it had already done so, this suggests that there would be no further remedy granted by the court.
[51] *Bibi* [2001] EWCA Civ 607 at [40].
[52] *Reprotech* [2002] UKHL 8.
[53] *Reprotech* [2002] UKHL 8 at [34]–[35].
[54] *Reprotech* [2002] UKHL 8 at [34]–[35].

may not be said of its absorption of the subtleties of distinction made by the law of contract between bargain promises and promises which induce reliance falling short of such bargains. There is, of course, an obvious difference between promissory estoppel and legitimate expectations in that in England and Wales the latter, but not the former, can constitute a cause of action.[55]. The point is simply that both public and private law distinguish between bargain promises such as those in *Coughlan* and *Ng Siu Tung*, wholly gratuitous promises such as *Bibi*, and promises which may induce reliance but no bargain, as were almost at stake in *MFK*.[56] However, while private law has articulated these differences, rendering the law more certain as a result, public law has not yet done so, and as a result, private law also has a more nuanced set of responses, since it can in principle compensate the reliance interest, the expectation interest, or grant specific performance. Indeed in *Waltons Stores (Interstate) Ltd v Maher*[57] the High Court of Australia also held that promissory estoppel could in certain circumstances be used as a 'sword' as well as a 'shield', but limited recovery to the reliance interest, as opposed to the expectation interest which would have been protected by contract. (Of course, as in *Waltons Stores* itself, the two measures may in practice be identical, and often are).[58]

At present, then, public law appears to be reinventing a wheel which has already been well developed in the context of private law, and the relationship between these public and private spheres has not yet been fully thought through. On the one hand, the tendency of the legitimate expectations case law has generally been to hold public authorities to a higher standard than would be the case in private law, as evidenced by Schiemann L.J. in *Bibi*, the availability of 'specific performance' rather than expectation damages,[59] and the very availability of legitimate expectations as a sword rather than just a shield. However, it is worth noting that conversely, in *Reprotech*, one of Lord Hoffmann's reasons for wishing to sever the connection between legitimate expectations and estoppel was the fact that 'remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote',[60] and that a public authority cannot be estopped from exercising a statutory discretion or performing a public duty, suggesting that in his view estoppel might operate too strongly against the public authority and the public interest. Complete clarification of the relationship between this kind of legitimate expectations and

[55] On the inability of promissory estoppel to act as a 'sword' rather than a 'shield', see *Combe v Combe* [1951] 2 K.B. 215; [1951] 1 All E.R. 767.
[56] *R v IRC ex p MFK* [1990] 1 W.L.R. 1545. In the event the claimant had not 'put all its cards face up on the table.'
[57] (1988) 164 C.L.R. 387.
[58] See E McKendrick, *Contract Law*, 10th edn (Basingstoke: Palgrave Macmillan, 2013), at 101.
[59] Albeit that this is the result of circumstance rather than choice.
[60] *Reprotech* [2002] UKHL 8 at [34].

their private law counterparts would therefore require an answer to the far bigger question of the general relationship between public law and private law, their aims and purposes, and in particular the extent to which it might be necessary and possible to adapt the application of private law to a public law context.[61] Indeed it may be that the absence of such an adapted form of private law may,[62] alongside an element of happenstance, have been what led to the development of this branch of the doctrine of legitimate expectations in the first place.

At the very least, however, it seems sensible to suggest that if it does continue to develop, the law concerning almost contractual expectations should pay attention to the more nuanced causes of actions and remedies developed by private law.

Almost-contract legitimate expectations: providing adequate guidance for decision-makers

If the nature of cases such as *Coughlan* is thus properly understood, the law stands a better chance of providing helpful guidance to decision-makers. Taken alone *Coughlan* does, as noted at the outset, appear to bring the courts very close to 'kicking the football',[63] interfering with the financial policy choices of a public authority. However, it may be less problematic if instead the courts are seen as clarifying a choice open to the public authority: if that authority wishes an entity to behave, or refrain from behaving in a certain way, and makes a promise or representation in order to induce that behaviour, it should be prepared to make good on that promise. However if it does not wish to be bound, it can avoid this by not making the promise, although it must then accept that it may not be able to induce the desired behaviour. The authority can therefore strike a balance in advance (as must any contracting party) between the cost to which it is committing itself and the desirability of what it seeks to get in return.

2. Legitimate expectations and policies

The second category of legitimate expectations is far more typical of the traditional role of administrative law. There is no suggestion here of anything in the way of a specific bargain between the public authority and the private parties it aims to manage. Instead the focus is on the general relationship of trust[64] and reliance between the authority and the public in general, which can operate to the benefit of both parties. Courts have increasingly sought to control public authorities'

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[61] On which see also *Breyer v Department of Energy and Climate Change* [2014] EWHC 2257 (QB); [2015] 2 All E.R. 44. I am very grateful to Angus Johnston for bringing this case to my attention.

[62] For commentary on the inability directly to apply private contract law to public law contexts, see eg Craig, *Administrative law* (2012), at 18-029.

[63] The metaphor is Lord Donaldson's in *R v Secretary of State for the Environment ex p Hammersmith and Fulham LBC* [1991] 1 AC 521 at 561.

[64] See C.F. Forsyth, "The Provenance and Protection of Legitimate Expectations" (1988) 47 C.L.J. 238 and "Legitimate Expectations Revisited" (2011) 16 J.R. 429.

use of policy, outlining when such policies must be adopted,[65] and when they should and should not be followed.[66] There are two sub-categories of legitimate expectation which fall within this broader picture of controlling policy use.

2. (a) Legitimate expectations as a means of enforcing good rule-based management

Davies and Gaines-Cooper v Revenue and Customs Commissioners[67] concerned advice given in HMRC's guidance booklet IR20 and the circumstances in which a person would be considered as having left the UK permanently for tax purposes. The taxpayers in *Davies and Gaines-Cooper* argued that they fulfilled the requirements of paragraphs 2.7-9 of the booklet and thus should be treated as not ordinarily resident in the UK. The revenue, on the other hand, argued that IR20 provided general guidance only and did not preclude the need for evidence that the taxpayer had made, in accordance with the ordinary law of residence (as established by *Reed v Clark*),[68] a distinct break with his previous life in the UK. Lord Mance agreed with the claimants, holding that chapter 2 of IR20 did not imply the case law test of a distinct break, but instead introduced a series of specifically delineated cases in which a taxpayer would be treated without more as not resident or ordinarily resident in the UK,[69] which certainly seems to be how IR20 would be read at face value. Indeed, Lord Mance held that it would be 'remarkable' that if the case law requirement of a distinct break were required 'it was not clearly expressed. The guidance is intended to be useful as well as reliable'.[70] He held further that it was 'wrong to assume a knowledge of the case law as background to the construction of IR20. The purpose of IR20 was to reflect 'the law and practice'. It was addressed to individual taxpayers, and, even if they might often have professional advisers, those advisers would be very likely to be, as [two of the claimants' were,] accountants rather than lawyers'.[71] The majority of the Supreme Court disagreed, however, and found for the revenue on three fronts. Principally, they pointed out that the preface to the IR20 booklet stated that the notes contained in it were not binding in law and that 'whether the guidance is appropriate in a particular case will depend on all the facts of that case' and that taxpayers with any 'difficulty in applying the rules' to their own cases

[65] See, e.g. *R (Purdy) v DPP* [2009] UKHL 45; [2009] 3 W.L.R. 403.
[66] See, e.g. *British Oxygen v Minister of Technology* [1971] A.C. 610; [1969] 2 W.L.R. 892, but contrast *Stringer v Minister of Housing and Local Government* [1970] 1 W.L.R. 1281 at 1297B–1298F and *R (Elias) v SS for Defence* [2006] EWCA Civ 1293; [2006] 1 W.L.R. 3213. See also *Attorney-General ex rel Tilley v Wandsworth* LBC [1981] 1 WLR 854; [1981] 1 All E.R. 1162.
[67] *R (Davies and Gaines-Cooper) v HMRC* [2011] UKSC 47; [2011] 1 W.L.R. 2625.
[68] *Reed v Clark* [1986] Ch 1; [1985] 3 W.L.R. 142.
[69] *Davies and Gaines-Cooper* [2011] UKSC 47 at [100].
[70] *Davies and Gaines-Cooper* [2011] UKSC 47 at [93].
[71] *Davies and Gaines-Cooper* [2011] UKSC 47 at [94].

'should consult an Inland Revenue Tax Office'.[72] Lord Mance also referred to this 'general guidance' issue[73] but held that although the guidance was not 'binding in law and does not affect a taxpayer's right of appeal, it was and is intended to obviate the need for a taxpayer to look further', citing HMRC's own letter on the matter to the claimants as support for this proposition.[74] Second, the Court also concluded that the references to 'visiting' the UK in all three paragraphs suggested that all three in fact underlined the need for a 'distinct break',[75] and finally, the Court held that if this was not the case, then alternatively the booklet was so unclear as to be incapable of having legal effect.

By contrast, *R v Secretary of State for the Home Department, ex p Khan*[76] concerned a Pakistani citizen who was settled in England and who wished to adopt his brother's child from Pakistan, with the agreement of the child's parents. The applicant had contacted an Advice Bureau and had been given a letter issued by the Home Office explaining the system for immigration in such circumstances. The letter explained that

> There is no provision in the immigration rules for a child to be brought to the United Kingdom for adoption. The Home Secretary may, however, exercise his discretion and exceptionally allow a child to be brought here for adoption where he is satisfied that the intention to adopt under United Kingdom law is genuine and not merely a device for gaining entry; that the child's welfare in this country is assured; and that the court here is likely to grant an adoption order. It is also necessary for one of the intending adopters to be domiciled here.

The rest of the letter contained details of the procedure for immigration, but in the case of the applicant this procedure was not initiated. Instead the applicant received a letter stating that the Secretary of State was 'not satisfied that serious and compelling family or other considerations make exclusion [of the child from the UK] undesirable'. This criterion, not mentioned anywhere in the letter seen by the applicant, apparently came instead from Paragraph 46 of Statement of Changes in Immigration Rules (1980) (HC 394). Parker L.J. held that in these circumstances 'the 'guidance' given in the Home Office letter is grossly misleading as was frankly accepted… on behalf of the Secretary of State'.[77] In those circumstances he quashed the refusal of entry clearance, leaving the Secretary of

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[72] Lord Wilson J.S.C., *Davies and Gaines-Cooper* [2011] UKSC 47at [32]; Lord Hope J.S.C. at [64]; Lord Walker J.S.C. at [66]. Lord Clarke agreed with Lord Wilson for the reasons given by Lord Hope at [68].
[73] *Davies and Gaines-Cooper* [2011] UKSC 47 at [85].
[74] *Davies and Gaines-Cooper* [2011] UKSC 47 at [87].
[75] Lord Wilson J.S.C., *Davies and Gaines-Cooper* [2011] UKSC 47 at [42]. Lord Hope J.S.C. at [64] agreed with 'Lord Wilson J.S.C.'s careful analysis' and Lord Walker dismissed the appeals 'for the reasons given by Lord Wilson J.S.C.' (at [67]). Lord Clarke also agreed with Lord Wilson for the reasons given by Lord Hope at [68].
[76] *R v Secretary of State for the Home Dept ex p Asif Mahmood Khan* [1984] 1 W.L.R. 1337; [1985] 1 All E.R. 40.
[77] *ex p Asif Mahmood Khan* [1984] 1 W.L.R. 1337 at 1343.

State free 'either to proceed on the basis of the letter or […] to afford the applicant a full opportunity to make representations why, in his case, it should not be followed'.[78]

It is not wholly clear why there should be such a contrast between the results of these two cases. In *Gaines-Cooper* the additional factor was contained in case law rather than in Home Office rules, but it is hard to see why that should make a difference. It is arguable that those in the position of the applicant in *Khan* might be expected to have less in the way of professional advice than those in *Gaines-Cooper*, and the claimant in *Khan* might have been thought to be more morally meritorious than those in *Gaines-Cooper*, for wishing to adopt a child rather than avoid paying tax. Indeed, it may appear as if positive reliance on the tax rules in some way operates *against* the applicant, as providing evidence of a desire to 'play the system'. But this would be an odd conclusion since at the very least from a rule of law perspective it might be thought that the tax rules should allow for such financial planning, and indeed in some instances taxation is used as an incentive or disincentive for certain behaviour, all of which suggests that positive reliance on the tax rules should not be regarded as being problematic. And in any case, if any of these reasons did play a role in producing the different results, there is no direct indication of this in the judgments, let alone any guidance as to how this might apply in future cases. Nor is there anything to suggest that the Home Office guidance in *Khan* had any greater authority than the guidance in IR20. The only potentially pertinent distinction is thus the fact that there was a health warning in *Gaines-Cooper* but not in *Khan*. It is clear from the wording of the paragraph above that the ability to bring a child into the UK for adoption would only be at the discretion of the Home Secretary in exceptional cases, but there was no specific health warning of the kind in *Gaines-Cooper*. (This basis for the distinction would also be in keeping with the decision in *ex parte Fulford Dobson*.)[79]

The question, then, is how the law of legitimate expectations should operate in order to achieve these benefits.

Question 1: The initial ingredients of 'good rule-based management' legitimate expectations

Plainly, if the idea here is for legitimate expectations to add to court control of decision-makers' use of rules and policies, then for such an expectation to arise there must be some form of reasonably clear, published rules or policy, or a clear practice, although it is evident that for practices the

[78] *ex p Asif Mahmood Khan* [1984] 1 W.L.R. 1337 at 1347.
[79] *R v Inspector of Taxes, Reading, ex parte Fulford-Dobson* [1987] 1 Q.B. 978; [1987] 3 W.L.R. 277. I am grateful to Stephen Daly for bringing this case to my attention.

requirements will be particularly stringent,[80] and in *Gaines-Cooper* the court held that claimants would need 'evidence that the practice was so widespread, so well-established and so well-recognised as to carry within it a commitment to a group of taxpayers including themselves of treatment in accordance with it'.[81] This in fact suggests that, at least in practice cases, there may be a positive requirement of *long* temporal duration of the existing situation. It seems unlikely that temporal effect would otherwise be relevant.

However, the slightly more problematic requirement is that the rules etc should be 'devoid of relevant qualification'.[82] As noted above, in *Gaines-Cooper* the 'health warning' at the beginning of IR20 was regarded as counting against the establishment of a legitimate expectation in that case, as it also was in *R (Thompson) v Fletcher*,[83] *Hanover*,[84] and *Fulford-Dobson*[85] a position which seems likely to encourage the use of such 'health warnings' in future by public authorities. Indeed as early as 1986 Kerry argued that public authorities would respond to the law of legitimate expectations by acting defensively to avoid the creation of those expectations in the first place.[86] The problem with this, as Freedman and Vella note, is that if correct, 'HMRC's Manuals, as a whole, would …be a useless tool or even worse, a trap for the unwary'.[87] Their concern is in part a 'red -light' one that 'it would be unfair to the point of being an abuse of power for HMRC to be entitled to disown their interpretation on the basis of a general, exculpatory caveat',[88] but it would also be unwise from HMRC's point of view. In the Court of Appeal in *Gaines-Cooper*, Moses L.J. stated (in a paragraph endorsed on appeal by Lord Wilson) that 'the revenue itself has long acknowledged that the best way [to facilitate tax collection] is by encouraging co-operation between the revenue and the

[80] In *Unilever* [1996] S.T.C. 681 at 696 there was a 'clear and consistent pattern' of acquiescence, per Simon Brown L.J. It will, however, be argued that *Unilever* itself belongs in category 2 2. (b) Legitimate Expectations as Court-ordered transitional provisions below, as a result of its specific facts, which appeared to involve a change of approach rather than the application of one set of rules rather than another.
[81] Lord Wilson J.S.C., *Davies and Gaines-Cooper* [2011] UKSC 47 at [49]. As noted above, his reasoning was supported by Lord Hope J.S.C., who at [64] agreed with 'Lord Wilson J.S.C.'s careful analysis', Lord Walker at [67], and Lord Clarke at [68].
[82] Bingham LJ in *R v IRC ex p MFK* [1990] 1 W.L.R. 1545 at 1569.
[83] *R (on the application of Thompson*) *v Fletcher* [2002] EWHC 1448 (Ch); [2002] S.T.C. 1149.
[84] *Hanover Company Services Ltd v The Commissioners for her Majesty's Revenue and Customs* [2010] UKFTT 256 (Tax Commissioners); [2010] S.F.T.D. 1047.
[85] *ex parte Fulford-Dobson* [1987] 1 Q.B. 978.
[86] M. Kerry, "Administrative Law and Judicial Review – The Practical Effects of Development Over the Last 25 Years on Administration in Central Government" (1986) 64 *Public Administration* 163 at 170.
[87] J. Freedman and J. Vella, "HMRC's Management of the UK Tax System: The Boundaries of Legitimate Discretion" in J. Freedman, C. Evans and R. Krever (eds.), *The Delicate Balance: Revenue Authority Discretions and the Rule of Law* (Amsterdam: IBFD, 2011), at 106.
[88] J. Freedman and J. Vella, "HMRC's Management of the UK Tax System: The Boundaries of Legitimate Discretion" in J. Freedman, C. Evans and R. Krever (eds.), *The Delicate Balance: Revenue Authority Discretions and the Rule of Law* (Amsterdam: IBFD, 2011), at 106.

public'.[89] And as Lord Mance pointed out in his dissent, tax guidance is 'intended to obviate any need for a taxpayer to look further'.[90] The strategic placing of health warnings and a correspondingly strict application of the 'devoid of relevant qualification' requirement is thus highly likely to empty any such rules or policy of most of their purpose. Courts should therefore be very hesitant before finding that this has happened, since here again what appears to be short-term protection of the relevant public authority may turn out, in the longer term, to be extremely problematic for that authority, unless the authority is content effectively to render its generalised policy non-existent and instead positively *wants* the public to contact its officers (tax offices, immigration offices etc) for individualised advice. The public authority must also, in these circumstances, be prepared to provide the necessary resources for this direct contact to take place. And in other contexts where private parties have more choice over whether or not to engage with an authority's policy and the authority positively wants them to do so (such as increasing the use of public transport, for example) such a health warning may discourage this engagement.

A further problematic requirement in this context, also arising from a tax case, is the one requiring the claimant to 'put its cards face upwards on the table',[91] or, as Moses LJ puts it in *Gaines-Cooper*, the requirement of fair dealing.[92] In almost-contracts, where there is a more individual interchange between the claimant and the authority, it is obviously undesirable that the claimant should extract a promise from the authority by deception, or anything of that kind. But where, as here, the situation concerns general rules issued to the world at large which are then consulted by the applicant, it is very difficult to know what kind of behaviour on the part of the claimant is likely to be considered 'unfair'. Behind the decision of the majority of the Supreme Court in *Gaines-Cooper* may have been the idea that the claimants were in some way abusing the tax system.[93] But if this is the case then it needs to be dealt with specifically by the courts, with clear criteria for identifying such abuse in future, since here again the danger is that by refusing to uphold the expectations in such circumstances the functioning of the system as a whole is jeopardised.

As for reliance and knowledge, it was made clear in *ex p Khan* that there was no need for the claimant to demonstrate that he had expended money on the faith of the policy.[94] On the other hand, if the essence of this kind of legitimate expectations is that the courts are helping in the effective use of the rules or policy as a management tool, then it seems that at least knowledge

[89] *Gaines v Cooper* [2010] EWCA Civ 83; [2010] S.T.C. 860 at [12], endorsed by Lord Wilson J.S.C., *Davies and Gaines-Cooper* [2011] UKSC 47 at [25].
[90] *Davies and Gaines-Cooper* [2011] UKSC 47 at [87].
[91] See *R v IRC ex p MFK* [1990] 1 W.L.R. 1545.
[92] *Gaines v Cooper* [2010] EWCA Civ 83 at [12].
[93] *Davies and Gaines-Cooper* [2011] UKSC 47.
[94] *ex p Asif Mahmood Khan* [1984] 1 W.L.R. 1337 at 1347.

ought to be required. However, for the practical reasons discussed above this would have again have to take the form that proof of absence of knowledge on the part of the claimant would enable the authority to defeat the claim.[95]

The essence of this kind of legitimate expectation also means that neither temporal duration nor the macro as opposed to micro-economic nature of the policy are likely to be relevant concerns. Indeed the greater the number of people affected by the rules or policy, arguably the greater the incentive for the court to ensure that that policy is operated properly and thus effectively.

What of Clayton's challenge that policies should never be capable of generating this kind of expectation at all? The discussion above has, it is hoped, demonstrated that are good reasons, both from the point of view of legal certainty on the part of the individual, and from the point of view of efficiency on the part of the public authority, why policies should in fact generate legitimate expectations. There is no question in this particular context of the law insisting that there *be* a policy, as it does elsewhere;[96] it is simply that *if* the public authority has decided to publish a policy, the courts will control the use of that policy in a manner which may be of benefit both to private parties and to public authorities. Applicants who know the 'rules' are in a better position to play by them, which in turn cannot be wholly against the interests of the public authority, since it will enable the public authority to deal with them more straightforwardly in a routine manner. This brings us immediately to a second challenge, posed particularly sharply by Baldwin, who argues against viewing the world through the 'distorting perspective' of 'legalistic eyes' which encourage 'an understating of the drawbacks of rules and an exaggeration of their virtues'. Administrative lawyers might be tempted to turn published policies into rules binding both the public authority and private parties, but in Baldwin's view this would have various disadvantages.[97] The answer to this is that if the routinization of decisions becomes too rigid it will fall foul of the *British Oxygen* principle,[98] and absent that, it is arguable that, as the discussion above has indicated, a degree of routinization is actually of benefit both to applicants, who will know where the goalposts are, and to public authorities, who can thus make decisions more efficiently.[99]

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[95] Where such reliance is present, however, it should not matter whether its source was the policy itself or advice received from a practitioner on the basis of that policy. The contrary decision in *Hanover Company Services Ltd* [2010] UKFTT 256 (Tax Commissioners) is thus particularly odd.

[96] See further *R (Purdy) v DPP* [2009] UKHL 45.

[97] Thus, he argues, "[a] rule may enhance legitimacy and consistency but it may also serve quite readily as a cover for unflinching policy beliefs or as a device that bureaucrats may use in deflecting individual or collective entreaties", Robert Baldwin, *Rules and Government* (Oxford: Oxford University Press, 1997), at 14.

[98] See *British Oxygen v Minister of Technology* [1971] A.C. 610.

[99] Thus Platt, Sunkin and Calvo cite one of their interviewees who explained the effect of a judgment on the vulnerability of a particular client group for purposes of housing. The decision saved officers from having to

Question 2: What arguments will defeat the claim?

A defendant might wish to depart from its policy for some pressing reason such as national security, but since instances of departure are more likely to fall into the category of court-created transitional provisions or equality (below), as it stands this category is likely to be less susceptible to such arguments. 'Health warnings' may be effective but, as discussed above, are not without costs to the authority.

Question 3: What should the court do?

In *Khan* the claimant's expectation was only protected procedurally. But *Khan* pre-dated *Coughlan*'s confirmation that substantive legitimate expectations (also at issue in *Khan*) could be protected substantively,[100] and in at least some instances such substantive protection may be necessary for the long-term preservation of the effectiveness of the policy. Again, in considering substantive protection a court should not hesitate to balance the long-term benefits for the authority against short-term disadvantages for it, rather than simply assuming that the latter are decisive. In short, there is no inherent reason why any one of the three remedies[101] should automatically be applied to a claim in this category: rather the appropriate remedy should be chosen in each case.

Legitimate Expectations as a means of ensuring good rule-based management: providing adequate guidance for administrators

All government agencies such as HMRC or the immigration authorities face the same problem of managing large numbers of people with generalised rules. The efficient operation of more detailed policies, guidance, rules etc can facilitate this process; applications to the authority come in a standard format and people are able to arrange their affairs to fall within the rules.[102] However, these benefits come with certain implications, which the law of legitimate expectations ought to make clear. Authorities then have a choice; they can publish rules complete with a 'health warning' indicating that those rules should not be relied on without contacting the authority, but should only do this if they do indeed want to be contacted, are prepared to devote the necessary resources to responding to such enquiries, or are not concerned that such warnings may in some instances deter

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ponder each case in order to determine what would be a fair outcome. L. Platt, M. Sunkin and K. Calvo, "Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England & Wales" (2009), Institute for Social & Economic Research Working Paper Series No 2009-05, at 21 < www.iser.essex.ac.uk/files/iser_working_papers/2009-05.pdf> accessed 27 February 2016, citing their interviewee IDNO5. Of course it is also the case law is only one of the influences affecting officials' discharge of their responsibilities, but for reasons of space this interesting issue must remain beyond the scope of the current investigation.

[100] *Coughlan* [2001] Q.B. 213.

[101] Substantive protection, procedural protection or requirement to take into account the legitimate expectation as in *Bibi* [2001] EWCA Civ 607.

[102] For an excellent example of this, see Moses L.J. in *Gaines v Cooper* [2010] EWCA Civ 83 at [12].

people from relying on the policy in question. Conversely, if they do wish the policy to stand alone and obviate the need for contact, this can increase efficiency, but care will then need to be taken in both the initial drafting of the policy and in making any subsequent amendments or changes to it. At present, however, these alternatives are not made clear by the law of legitimate expectations. Recognition of the specific role of legitimate expectations in this context would thus determine not only the necessary ingredients, counterarguments and appropriate protection for such expectations in future cases, but it would also enable the courts to present decision makers with a coherent set of choices for operating policies.

2. (b) Legitimate Expectations as Court-ordered transitional provisions

Here the concern is not with the application of two parallel sets of rules, but rather with those who are caught in the pipeline when a decision maker wishes to change from one policy to another,[103] and the argument is that in this context legitimate expectations operate as a kind of court-ordered transitional provision which balances the need for the change in policy against the impact this will have on those in the pipeline by encouraging some kind of phased change. Again, understanding the essence of such legitimate expectations can enable us to clarify both the criteria necessary for establishing and defeating them.

Question 1: The initial ingredients of court-ordered transitional provisions

First, there is no reason in this context to require a specific representation, although, as in *R (Patel) v GMC*[104] they are clearly very helpful and will greatly increase the claimant's chances of success. In this case Dr Patel needed, for various practical reasons, to obtain an overseas medical qualification which he wished the GMC to recognise. He therefore enquired whether the GMC would do so and in return received a specific email from the GMC stating that the GMC 'accepts' the qualification in question.[105] Dr Patel then enrolled on the course, invested the necessary time and money and undertook the necessary clinical rotations in the UK, obtaining a degree with distinction. As a result of concerns over the ability to regulate the quality of overseas medical qualifications the GMC then decided to change its policy, but in the circumstances the Court of Appeal held that Dr Patel had a legitimate expectation that his qualification would nonetheless be recognised as the GMC had promised. However, although such promises will be helpful, a clearly articulated policy statement of

[103] See further Forsyth and Williams "Closing Chapter in the Immigrant Children Saga: Substantive Legitimate Expectations and Administrative Justice in Hong Kong" (2002) 10 Asia Pacific Law Review 29, and Craig, *Administrative law* (2012).
[104] [2013] EWCA Civ 327.
[105] [2013] EWCA Civ 327 at [60]. The court alluded to this as a 'promise' but the case nevertheless seems to belong in this category, rather than the category of almost contracts, discussed above, because there is no suggestion of a two-way bargain with the GMC seeking to induce Dr Patel to do anything. However, as noted above, it is not intended that the categorisation be rigid.

the kind found in *Khan*[106] should be sufficient. It is not, of course, possible to specify the precise degree of clarity which will be required, but once the purpose of this variety of legitimate expectations is properly understood it at least becomes apparent that the appropriate question is whether the statement was clear enough to generate an expectation that the policy would not be changed without giving the applicant chance to exit the pipeline. And this would be an improvement on the unpredictability of the current law.

Second, evidently the size of the class may be important for pragmatic reasons,[107] but in fact there is a more subtle distinction to be drawn in this context between finite and infinite classes, as it has been, for example, by the EU courts in *Sofrimport*[108] and *Unifruit Hellas*.[109] This is because the finite nature of the class enhances the visibility of the applicants: where it is possible for a decision-maker to ascertain who exactly is in the pipeline at the time when it wishes to change policy, this strengthens the argument that a failure to make provisions for such applicants is 'unfair' or an 'abuse of power'.[110] From the decision in *Luton*[111] it appears that this requirement is objective (ascertain*able*), rather than subjective (actually ascertained).This case concerned the 2003 Building Schools for the Future (BSF) scheme. Participation in the scheme involved significant outlay by participating authorities between the acceptance by the Secretary of State for Education of an 'Outline Business Case' (OBC) and the approval of a Final Business Case. Following the May 2010 change of government the new Secretary of State for Education announced in July that the BSF scheme would be terminated, but allowed projects which had received OBC approval before 1 January 2010 to go ahead, cancelling projects which had received OBC approval after that date. The six applicant authorities in *Luton* had all incurred significant expenditure in connection with BSF projects which had been cancelled as a result of this decision. Of the six applicant authorities in *Luton* only five had received OBC letters from the government, Sandwell had not. However, it had received OBC approval for another set of schools and had been permitted to transfer funding between the two sets of schools. Holman J. thus concluded that these facts supported Sandwell's claim to be consulted too. This suggests that it is the discover*ability* of the claimant that is relevant, rather than whether it was actually brought to the attention of the decision-maker. Here, then, is an

[106] *ex p Asif Mahmood Khan* [1984] 1 W.L.R. 1337.
[107] See *R (Patel) v GMC* [2013] EWCA Civ 327, Lloyd Jones L.J. affirming the views of Laws L.J. in *R (Bhatt Murphy (a firm)) v The Independent Assessor* [2008] EWCA Civ 755; (2008) 152(29) S.J.L.B. 29.
[108] Case C-152/88 *Sofrimport v Commission* [1990] ECR I–2477.
[109] Case T-489/93 *Unifruit Hellas EPE v Commission* [1994] ECR II–1201. The EU Courts have held that policies concerning licensing for or charges imposed on products can be altered, but account must be taken of goods already in transit under the existing system at the time the change is brought about. In both cases, the traders had applied for licences or for import certificates, and thus their existence and identity were ascertainable.
[110] *Coughlan* [2001] Q.B. 213.
[111] *R (Luton, Nottingham, Waltham Forest, Newham, Kent, Sandwell) v Secretary of State for Education* [2011] EWHC 217 (Admin); [2011] Eq. L.R. 481.

example of a requirement for a successful claim whose import varies with the kind of legitimate expectation at issue; the number of applicants was relevant in a purely pragmatic manner in the 'almost contracts' category, but not in the conceptual manner that it is relevant here. This understanding may therefore assist consideration of the issue in future cases, and prevent attempts to use a homogeneous set of rules for what are actually quite different cases.

Another similar distinction arises in relation to the duration of the expectation. As noted above, in 'almost contract' cases the expectation can be 'for life'. By contrast, the idea here is that certain entities will be in the pipeline when the decision-maker wishes to change policy and these entities should be given chance to exit the pipeline with the new policy coming on-stream behind them. This reasoning supposes that those entities can indeed be expected to exit the pipeline within a reasonable amount of time.

As for reliance and knowledge, as above, it would not be desirable for detrimental reliance to be required since it will again usually be negative and thus difficult for the claimant to prove.[112] However, we cannot dispense with even the requirement that the claimant must have *known* of the expectation, since in the absence of such knowledge it is difficult to see why the court should order anything akin to transitional provisions at all. As before, then, if there is positive evidence that the claimant did not know[113] of the current policy, he/she/it cannot be regarded as the kind of 'pipeline' candidate who is to be protected by this kind of legitimate expectation.[114] Not only is this so from the perspective of fairness to the individual applicant, it is also true of the promotion of administrative efficiency. As noted in section 2(a) above, policies may be helpful not only in preventing apparent retroactivity for the individual[115] but also in facilitating public management of the private entities operating in a given area, but this can only be so where entities know of them.[116]

A corollary of this argument is the question whether it would have been reasonable for the private entity to take precautions to protect itself. This enquiry should not make unrealistic assumptions

[112] *Bibi* [2001] EWCA Civ 607 at [53]–[55].
[113] Putting the burden of proof in this form is more lenient to the decision-maker than the law at present may be, but it also avoids the problem that there may simply be no evidence that the claimant could bring to prove that it did know of the current policy, were it required to do that.
[114] For example, in *ex p Begbie* [2000] 1 W.L.R 1115 reliance was held not to be required but knowledge was certainly present.
[115] The term 'apparent retroactivity' was coined by J. Schwarze, *European Administrative Law* (London: Sweet and Maxwell, 2006) ch 6.
[116] See also the dissent of McHugh J. in *Minister of Ethnic Affairs and Immigration v Teoh* (1995) 183 C.L.R. 273; (1995) 128 A.L.R. 353 at [31] and C. Forsyth, "*Wednesbury* Protection of Substantive Legitimate Expectations" [1987] P.L. 375.

about the claimant's capabilities, but if the claimant's argument is that it expected the initial policy to continue until it had left the pipeline, this must not be an unreasonable expectation.

It also appears from *R (Patel) v GMC*[117] that it is necessary in this context for the claimant to have complied with the *MFK* requirement of putting all its cards face up on the table. In keeping with the theory underlying this category, this must be in order to make the position of the claimants sufficiently visible to the decision-maker that a failure to take account of them (as in *Patel*) constitutes the necessary level of unfairness. In other words, in combination with the conclusion drawn from *Luton*,[118] this suggests that while the existence of the claimants need only be ascertain*able* by the public authority, the claimants must not withhold information which would prevent the public authority from ascertaining their circumstances.

Question 2: What arguments will defeat the claim?

Of course, all the general arguments about fettering, national security, safety (as in *Patel v GMC*) and so on will provide good reasons for shifting from one policy to another. However, it is less obvious that any of these (other than perhaps an immediate national security threat which could not otherwise be managed) would provide a reason for shifting policy *without transitional provisions*. Given the limited number of visible applicants and the limited temporal application of expectations in this category, the courts should be slow to accept arguments of this kind too readily. However, conversely, claims may well be less likely to succeed where there are already existing transitional provisions or guarantees in place. In *Hamble Fisheries, Bhatt Murphy* and *Abbassi*[119] there were already transitional provisions in place and the problem for the claimants was that they fell outside them. In *Luton* the long-term interests of the claimants were protected by the existence of Final Business Case approval, and again the problem for the specific applicants was that they had not reached this stage of the proceedings, being in possession only of Outline Business Case approval. *R (Cheshire East Borough Council and others) v Secretary of State for the Environment, Food and Rural Affairs* also related to a situation in which Final Business Case approval was a possibility which had not been reached by the claimants.[120]

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[117] *R (Patel) v GMC* [2013] EWCA Civ 327 at [41]–[49].
[118] *Luton* [2011] EWHC 217 (Admin).
[119] See *R v MAFF ex parte Hamble Fisheries* [1995] 2 All E.R. 714; [1995] 1 C.M.L.R. 533 per Sedley L.J. at [57]–[60]; *R (Bhatt Murphy (a firm)) v The Independent Assessor* [2008] EWCA Civ 755 at [60]–[61]; *R (Abbassi and Munir) v Secretary of State for the Home Department* [2011] EWCA Civ 814; and *Luton* [2011] EWHC 217 (Admin).
[120] [2011] EWHC 1975 (Admin); [2011] N.P.C. 92.

Question 3: What should the court do?

Of course, in *Hamble*, *Bhatt Murphy* and *Abbassi* the courts still examined the transitional provisions in place to ensure that they were sufficient, and in *Luton* the court held that the expectations of authorities with OBC approval[121] should nevertheless be protected procedurally. However, in both *Hamble* and *Bhatt Murphy* the existent provisions were found to be sufficient and in *Luton* the applicants were warned that they should not 'gain false hope' from the grant of a hearing. Courts will therefore probably be slower to find existent provisions inadequate than to find a breach of legitimate expectations where there are no such provisions at all, and if courts do provide protection for those who fall outside the existent provisions, it is, as in *Luton*, more likely to be procedural only (though there is no inherent bar to substantive protection even in this context). Conversely, if there are no transitional provisions then there is nothing to stop a court from protecting the claimants' expectations procedurally,[122] but given that the whole point of such cases is that they are to protect a finite and ascertainable number of people for a relatively limited period of time, substantive protection may not be so problematic. Where it is not too late to do so, taking the *Bibi* option of requiring the decision-maker to take into account the legitimate expectation as a relevant consideration[123] would effectively give the decision-maker chance to create its own transitional provisions. However, it may be too late for that option to be open, or the court may simply regard the claimant's case as warranting stronger protection than this, in which case the court can engage in a balancing exercise to establish whether there is any compelling reason to justify the absence of such provisions (*not* whether the change in policy is itself justified), and if it is not, the court can then require the decision-maker to apply the original policy to the claimants, bringing the new policy on-stream behind them instead. Thus in *Patel v* GMC the Court of Appeal pointed out that 'no consideration' had been given by the GMC 'to whether it was necessary to introduce the new rules with immediate effect or to the consequences of doing so.' This 'in itself' was

> sufficient to lead to the conclusion that the decision to apply these rules to the appellant should be quashed. At the very least, the GMC should have taken account of the impact of its decision to depart from its previous policy with immediate effect on the appellant and anyone else who received a similar specific assurance. It should have done so long before deciding whether to change course.[124]

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[121] *Luton* [2011] EWHC 217 (Admin), in particular to the specific circumstances surrounding the Sandwell claim discussed at XXXXX.

[122] As was arguably the case in *ex p Asif Mahmood Khan* [1984] 1 W.L.R. 1337, though see further at XXXXX about the correct categorisation of this case.

[123] *Bibi* [2001] EWCA Civ 607.

[124] *R (Patel) v GMC* [2013] EWCA Civ 327 at [81].

For the purposes of the argument here, however, the most significant aspect of the case is the fact that the Court of Appeal did not stop there. Recognising that simply quashing the original decision could leave the GMC able to consider Dr Patel's claim and replace the initial decision with another identical one, the Court went on to hold that 'it was not open to the GMC to change its policy… without adopting some transitional provision that would cater for the case of this appellant.'[125] It would be 'neither necessary nor appropriate for this court to identify what transitional provisions should have been adopted' and 'their precise form should be a matter for the GMC'.[126] Nevertheless, the Court of Appeal unanimously held that the appellant should be granted specific relief compelling the GMC to recognise his qualification. A clearer example of court-ordered transitional provisions would be hard to find.

Court-ordered transitional provisions: providing adequate guidance for decision-makers

The aim is therefore again to give better guidance to decision-makers, in this case on the management of policy changes. This in turn would not only enhance the autonomy of such pipeline entities, but could also, as explained above, ensure administrative efficiency through cooperative compliance. Of course such entities may not have any choice but to comply with the policy, and thus the authority need not be concerned with giving incentives for such compliance.[127] However, even then an entity may still try to seek additional assurances from the decision-maker, or other forms of protection for its long-term interests. Even replying negatively to such requests would add to the administrative burden of the decision-maker. And of course in many cases, such as *Luton*[128] the decision-maker will positively need entities to choose to participate in a given area.

The action taken by the decision-maker to protect pipeline people can take one of two forms. It can put in place long term interest protections of the kind discussed above[129] or it can make clear in advance that its current policy is subject to change.[130] However, precisely because this second option will deter people from relying on the policy, it has the same drawbacks as the 'health warnings'

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[125] *R (Patel) v GMC* [2013] EWCA Civ 327 at [85].
[126] *R (Patel) v GMC* [2013] EWCA Civ 327 at [86].
[127] This might, for example, explain the decision in *Re Findlay* (*Findlay v Secretary of State for the Home Department)* [1985] AC 318; [1984] 3 W.L.R. 1159, in which it was held that the Home Secretary could change parole policy without consulting the Parole Board and the pipeline prisoners did not have a legitimate expectation otherwise.
[128] *Luton* [2011] EWHC 217 (Admin).
[129] See *R v MAFF ex parte Hamble Fisheries* [1995] 2 All E.R. 714; [1995] 1 C.M.L.R. 533 per Sedley L.J. at [57]–[60]; *R (Bhatt Murphy (a firm)) v The Independent Assessor* [2008] EWCA Civ 755 at [60]–[61]; *R (Abbassi and Munir) v Secretary of State for the Home Department* [2011] EWCA Civ 814; and *Luton* [2011] EWHC 217 (Admin); and at XXXXX.
[130] At XXXXX. For discussion of such 'health warnings' see also section (a) Legitimate expectations as a means of enforcing good rule-based management above and the discussion of *Davies and Gaines-Cooper* [2011] UKSC 47.

discussed in section 2(a) and may not be an option for a public authority which seeks positive compliance with a policy.[131]

3. Legitimate expectations as a means of upholding equality/consistency

This category is perhaps the most different from the others so far considered. Obviously a key requirement of the rule of law is that of 'consistency', but in fact this word nicely captures the interrelated nature of the two key branches of the rule of law, which requires consistency both across time and across cases. Examining whether or not the public body has been consistent or inconsistent is also in keeping with the fact that across this area the courts have appeared to adopt a defendant-focused 'public wrongs' approach.[132] However, from the claimant's perspective, this category is different because while those discussed above were focused on the requirement of legal certainty, here it is equality.[133] Thus both *Nadarajah*[134] and *Rashid*[135] concerned claims by the appellants that a particular policy should have been applied to them as it was to others, regardless of whether or not they knew of the policy at the time.

Question 1: The initial ingredients of an equality-based legitimate expectation

The requirements for such a claim will thus also be significantly different. Whereas it was argued in the contexts above that knowledge should at least not be proven absent, in this category claimants need not even have knowledge, let alone reliance, and as just noted, one of the cases in which reliance was dispensed with, *Nadarajah,*[136] belongs under this heading. Indeed, while there is no conceptual reason why knowledge and reliance should *prevent* a case from falling into this category, in practical terms if knowledge and reliance are present the case will be more likely to fall into one of the categories discussed above.

As for size of class, whereas being a member of a large class may make a case appear less like an almost-contract and more like a macro-political economic decision, in an inequality case the larger the number of other people being treated in the desired fashion, the *stronger* the applicant's claim will be that (s)he too must be so treated. Similarly, whereas in the cases above being a member of a very small and specific class of people will strengthen the claim, here specificity is a disadvantage,

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[131] This was the case, for example, in relation to the Hong Kong right of abode issue, at XXXXX, although of course this involved the making of promises, rather than a shift in policy.
[132] See, e.g. Laws L.J. in *R (Bhatt Murphy (a firm)) v The Independent Assessor* [2008] EWCA Civ 755 at [30]. Though see also Elliott, "Legitimate Expectations: Procedure, Substance, Policy and proportionality" [2006] 65 C.L.J 254.
[133] See further generally T. Bingham, *The Rule of Law* (London: Penguin, 2010) ch 5.
[134] *Nadarajah* [2005] EWCA Civ 1363.
[135] *R (Rashid) v Secretary of State for the Home Department* [2008] EWHC 232 (Admin).
[136] *Nadarajah* [2005] EWCA Civ 1363 at [55].

since it will suggest that the claimant is distinguishable from the majority and thus justify their different treatment.[137]

Such expectations are more likely to be based on information given to the world at large (such as policies or rules), rather than practices or specific representations which by definition will be more likely to lead to the other forms of expectation. The rules will need to be clear enough to establish whether or not the public authority is indeed behaving inconsistently or treating the relevant claimant unequally.[138] Whether or not the claimant ought to have relied on the source of the expectation is irrelevant if knowledge and reliance are also irrelevant. Conversely, all the claimant's cards will presumably still need to be face upwards on the table, but in order for the decision-maker to identify accurately whether or not the claimant falls into the relevant rules or policy, rather than as part of an interchange between the two parties.

Question 2: What arguments will defeat the claim?

The decision-maker may use any of the factors listed above to argue that there is a pressing reason for failing to treat the claimant equally, but obviously only like cases must be treated alike, so decision-makers will presumably seek primarily to establish that in fact the claimant's case should be distinguished.

Question 3: What should the court do?

As Craig has pointed out, it may well be less drastic for a court to compel an agency to apply an existing policy to a particular applicant than intervention in other categories of expectation may be.[139] Thus substantive protection of the kind given in *Coughlan* may be appropriate, although there is nothing in principle to prevent the court using any of the techniques outlined above.

Protection of Equality/Prevention of Inconsistency: providing adequate guidance for decision-makers

Again, this category differs because court intervention here will not focus on the interchange between public authorities and private parties with a view to promoting cooperation and effectiveness. However, this does not mean that this category is without potential benefits to public authorities. On the contrary, presumably if a policy has been drafted this is because the public authority sees a benefit in treating a group of cases in a particular way. If this is so, then it is arguably

[137] Thus in the *Oxfam* [2009] EWHC 3078 (Ch) at [55], Sales J pointed out that 'in view of the specific nature of the assurance in this case there is no scope for Oxfam to contend that principles of equal treatment require that it be afforded the benefit of some general policy which is applied to others'.
[138] Contrast, for example (coincidentally) *R (Rashid) v Secretary of State for the Home Department* [2008] EWHC 232 (Admin), in which it could not be determined whether or not the claimant's case had been treated differently from other similar cases because virtually nothing was known about the other cases with which the claimant sought to compare himself (at [33]).
[139] Craig, *Administrative law* (2012), at 22-022.

in the authority's own interests for the policy to be applied consistently (absent a sudden, pressing need to override it).[140] And conversely the potential for legitimate expectations to bite in this area could provide a deterrent for public authorities against drafting policies in too broad and general a manner, when in fact more specific and different treatment might be appropriate for some of the cases. Thus again, by requiring consistency and specifically drafted rules the court may be imposing a short term cost on the authority, but at the same time ensuring a long term gain in the achievement of the aims of those policies. It is also worth noting that while in the cases falling within this category there may well be no knowledge or reliance, if the courts in this category nevertheless provide an incentive for public authorities to draft specific and accurate rules then this will be of benefit in the ways discussed above when claimants do know of or rely on those rules as discussed in section 2.

II. Disaggregation and litigation

Are there, then, arguments against the disaggregation proposed here? The danger in any boundary-drawing is of course the potential for greater litigation, and unwanted formalism. But this danger should not arise here. The argument has been that what is currently thought of as a uniform doctrine in fact contains three different normative reasons for upholding legitimate expectations; preventing public authorities from reneging on bargains; managing public authorities' use of policies and protecting the principle of equality. So the first point is that once these quite different normative bases are understood it becomes less likely that one kind of case could be mistaken for another in a manner likely to lead to litigation over the distinction. It will always be necessary for courts to understand the factual basis of the claim, and a proper understanding of that factual basis can reveal quite different reasons why the expectation in question should be upheld. Second, none of the distinctions suggested above are beyond the experience of the courts. Courts are perfectly capable of answering the much more precise question whether there has been an actual contract or not, let alone whether the basis for a claim is that a public authority has reneged on a bargain. Courts are equally capable of distinguishing instances of reliance on policy from those of reliance on promises,[141] and of identifying the existence of a challenge to equality in other contexts.[142] Third, the boundaries are not drawn in order to lead to radically different outcomes; in most cases it has

[140] Which would give rise to concerns dealt with above in section 2. (b) Legitimate Expectations as Court-ordered transitional provisions

[141] Indeed some have suggested this as the key basis for distinction in the area, see Clayton, "Legitimate Expectations, Policy, and the Principle of Consistency" (2003) 62 C.L.J. 93.

[142] Indeed it was suggested in section III (1) above that in the context of perhaps the most difficult distinction, that of almost-contracts versus gratuitous promises, the courts are already drawing the distinction in the context of legitimate expectations, and do so regularly in the context of private law.

been suggested that any of the law's current responses [143] could in principle be appropriate. The point is simply that the normative basis for the claim ought to play a greater role in determining the factors relevant to that claim so that the ultimate reasoning is more coherent and thus more intelligible and useful for public authorities looking to it for guidance.

And on the other hand the approach suggested here would have significant practical benefits. A clearer understanding of the multiple doctrines of legitimate expectations and their purposes may help courts to do three things, First, to ascertain what criteria should be required for a successful claim. Rather than trying to fit all pegs of whatever shape into the same hole, thereby rendering the hole shapeless, the law would be able to tailor its consideration of the ingredients necessary to the particular normative reason for upholding the expectation in the first place, as demonstrated above. Thus, for example, it was suggested that long duration of the expectation into the future would be a disadvantage for a 'court ordered transitional provisions claimant', but far less problematic for an 'almost contract' claimant. Absence of knowledge of the basis for the expectation should pose problems for a claimant in categories 1, 2a or 2b, but would not be problematic for a claimant basing a claim on the principle of equality, and so on. Second, if administrative law can provide any guidance to administrators it must be clear, and if clarified as suggested here the law of legitimate expectations could provide useful guidance to decision-makers about the use of policies and rules and in particular the benefits but also obligations associated with their use. Finally, this approach could help courts to balance the short term expediencies of thwarting expectations in a particular case against the long term implications of doing so, which may not be so advantageous even to the public authority. All these changes would not only improve the coherence of legitimate expectations doctrine, but could also provide practical benefits for both claimants and public authorities.

[143] Outlined in section I question 3 above.