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Remedies where giving effect to a legitimate expectation would be ultra vires: drawing inspiration from a recent renewable energy judicial review

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Energy

The unusually detailed permission decision of Fordham J in R (Woodboilers LLP) v Gas and Electricity Markets Authority [2020] EWHC 1578 (Admin)

A challenge by a renewable energy company to the decision by the Gas and Electricity Markets Authority ("Ofgem") to cease making subsidy payments under a statutory scheme for the provision of environmentally friendly domestic heating systems – provides useful guidance on how to establish a legal error and secure a meaningful remedy in circumstances where the relevant public body would be acting *ultra vires* in giving effect to a legitimate expectation.

The general principle underpinning the doctrine of legitimate expectation is that a public body is not permitted to resile from a legitimate expectation where it is unfair to do so:

'So if […] the [public body] makes an agreement or representation from which it cannot withdraw without substantial unfairness to the [citizen] who has relied on it, that may found a successful application for judicial review […] If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it.' (R v Inland Revenue Comrs, ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545, Bingham LJ (as he then was) at [1568]-[1569]).

The position is rather more complex, however, where the public body has no legal authority to honour the legal expectation which has arisen (in other words, where fulfilment of the legitimate expectation would be *ultra vires*).

The traditional position and development of the law in Rowland

The traditional position is that for a legitimate expectation to be enforceable under the common law, the party seeking to rely on it must show *'that it lay within the powers of the […] authority both to make the representation and to fulfil it'* (R (Bibi) v Newham London Borough Council [2002] 1 WLR 237 at [46]). Sometimes this is expressly or impliedly put as meaning that the promise or practice relied upon must be lawful for any expectation deriving from it to be 'legitimate' (R v Secretary of State for Education and Employment, Ex p Begbie [2000] 1 WLR 1115 at [1125] per Gibson LJ).

However, in Rowland v Environment Agency [2003] EWCA Civ 1885 the Court of Appeal unanimously held that a legitimate expectation (of private ownership) *had arisen* in circumstances where, through its dealings over several years with a non-tidal stretch of the River Thames which adjoined the Claimant's property, the Environment Agency ("the Agency") had represented that the waterway in question was private (before subsequently deciding that in fact it was subject to public rights of navigation) [78]. Importantly for the development of the law on this point, each of the three judges considered that the representations of the

public body, *even though strictly ultra vires* (outside the powers of the Agency), did give rise to a legitimate expectation.

However, the court also decided that the Agency could not be compelled to continue treating the waterway as private because this would be ultra vires. Specifically, upholding the legitimate expectation would run directly contrary to primary legislation, namely s.1 of the Thames Preservation Act 1885 which (with some limited exceptions) extended public rights of navigation over every part of the River Thames. As such, the most that could be done to give effect to the legitimate expectation was a requirement (recorded in a declaration made by the court) that in exercising its statutory functions the Agency must take into account the common assumption previously held by both parties that the stretch was private.

Each of the judges grappled with this conflict in a different manner, with May LJ going so far as to say:

"I reach the conclusion that this appeal should be dismissed, for the reasons given by Peter Gibson and Mance LJJ, with undisguised reluctance. I say this because I regard the outcome as unjust. It is, in my view, the unjust product of a developing, but at times over-complicated, body of related jurisprudence, elements of which need reconsideration. Binding authority prevents constructive reconsideration in this court. The most unusual facts and circumstances of this appeal seem to me to illustrate related problems of real importance." (At [100]; emphasis added).

As a matter of common law ("just satisfaction" under the ECHR not having been claimed), May LJ considered the most that could be offered by way of relief in such a case was a requirement that the public body take into account the legitimate expectation when exercising its relevant statutory functions [97]. Indeed, it is clear from the judgment of May LJ, including his consideration of the proposals for change to the law made by Professor Craig [114]-[120], that he considered further development (at least, on the facts before him of a conflict with primary legislation) would only be open to the House of Lords.

Mance LJ (as he then was) undertook a significantly different analysis, albeit coming to the same result. In his view, due to ECHR case law and specifically that a substantive legitimate expectation may be a protected possession under A1P1 (whether in conflict with national legislation or not):

"Whatever the previous position, I consider, in the light of the European court decisions in thePine Valley 14 EHRR 319 and Stretch 38 EHRR 196 cases, that it can no longer be an automatic answer under English law to a case of legitimate expectation, that the agency had no power to extinguish the PRN over Hedsor Water or to treat it as private." (At [152]; emphasis added).

Mance LJ went on to observe that in circumstances where there was no claim for compensation (as awarded in Pine Valley and Stretch) but only an application for a declaration, the Agency was bound to adjust its approach by reason of s 3(1) of the Human Rights Act 1998 ("HRA") [152]. More specifically, he found that the case ultimately resolved into issues of the nature (and strength) of the legitimate expectation and the extent to which the court both can and should grant relief requiring the Agency to take that expectation into account when exercising its discretionary power [153]. On this basis he concluded:

"For my part, I accept that the agency's conduct conferred on Mrs Rowland a legitimate expectation to the effect, at least, that, should it transpire that Hedsor Water was not private, the agency would, in reacting to any such discovery, take into account the previous common assumption of the Rowlands and of the agency to the contrary…" (At [153]).

Discussion of Rowland and consideration of alternative factual scenarios

De Smith on Judicial Review (8th Ed., 2018) initially states it as 'doubtful' on one 'view' (not necessarily shared by the authors of that publication) that there can be a "legitimate" expectation that a public body will exceed its powers (at [12-065]). They go on, however, to express various caveats at [12-066] and under the heading "A changing approach?" deal at some length [12-075]-[12-183] with the judgment in Rowland, academic commentary and the absence of clarity on the present state of the law [12-081], before suggesting some future incremental developments.

The authors of this article are of the view that the - formerly "orthodox" - position that an expectation cannot

be "legitimate" if it turns on an *ultra vires* promise or course of action did not survive the Rowland judgment. In Rowland in the Court of Appeal all three judges found that a legitimate expectation had arisen despite a lack of *vires* (and on a close reading the authors suggest that the same approach would apply even in circumstances where the HRA is not engaged).

The factual matrix of Rowland was certainly not as favourable as the Claimant may have wished for: she faced a conflict with primary legislation and she also omitted to seek damages under the HRA such that that avenue was not open to consideration by the court. As such, Mrs Rowland's case lacked some key elements for the kind of incremental development of the law espoused by May LJ and/or for the grant of a more effective remedy on the basis of the ECHR.

In the authors' view a future case may be amenable to a more favourable outcome at even first instance if it were to combine some or all of the following elements:

- A clear legitimate expectation in favour of an individual or limited group;
- The legitimate expectation is of a kind that would make it a possession under A1P1 (likely a clear substantive expectation involving some form of economic 'right' under established case law rather than a merely procedural legitimate expectation);
- The legitimate expectation, if given effect to, would not limit the rights of third parties. (Unlike Mrs Rowland, who faced a situation in which the waterway was either public or private, many instances can be envisaged in which action by a public body, say a refusal of a licence or accreditation of some form, does not have an obvious direct impact on third parties);
- The absence of *vires* would (preferably) not be due to primary legislation, but secondary legislation (in which case the HRA *requires* effect be given to the relevant Convention right);
- The claim is amenable to relief by way of just satisfaction and this is sought (this is particularly important if any other remedy will affect third parties' rights adversely in which case the injustice to the Claimant would typically best be remedied by damages rather than other forms of relief).

The Woodboilers case: case study for an alternative factual scenario

In the Woodboilers decision Fordham J granted permission for a renewable energy company to challenge a change of position by Ofgem. Ofgem had previously approved and paid subsidies under the Domestic Renewable Heat Incentive Scheme Regulations 2014 "'the Regulations") in respect of a scheme whereby the company installed and provided renewable energy for homeowners before subsequently refusing do so. Specifically, over the course of approximately four years Ofgem paid the subsidies in relation to the scheme to a "custodian" bank account, under the terms of which the payments were effectively forwarded to the company. Subsequently Ofgem decided that this arrangement, because the subsidies were not paid to a homeowner-controlled bank account (which could then be forwarded to the Claimants), was contrary to Regulation 26 of the Regulations (as in force at the time of accreditation, and even though later changed). Ofgem thus, having paid tens of millions of pounds (over some 4 years of the seven year eligibility period) decided the renewable subsidy was not payable on a forward looking basis for the remaining 3 years.

The first ground of challenge was a failure to fulfil the legitimate expectation as a matter of domestic English public law and the second ground alleged a breach of A1P1, in the form of a possession or right by way of legitimate expectation (as to payment under the scheme).

In granting permission to apply for judicial review, Fordham J observed (first dealing with ground 1 and thus the common law position): *'depending on what altitude this case ultimately arrives at, it may be that the point will be open and could flourish […] That is so, even on the basis of taking Rowland and Albert Court on their face and as the high watermark'* [15]. He also observed that there was potential scope for distinguishing Rowland, which was a case about primary legislation with *'a clear incompatibility with that primary legislation'* and Woodboilers where the incompatibility relied on concerned secondary legislation:

'…in my judgment, there is an arguable point arising in relation to secondary legislation, in circumstances where the premise would be this: that a legitimate expectation arose, from a clear promise or

representation or established practice, which in fairness the public authority would otherwise be required to honour. The fact that, leaving any legitimate expectation to one side, a payment other than strictly to participants would be ultra vires regulation 26, does not in my judgment necessarily support the same conclusion, beyond argument, were the court satisfied that there was a legitimate expectation and therefore a duty in public law in substantive fairness to pay in an alternative way which the public authority had specifically and knowingly approved through agreement.' [16].

As for the second ground of challenge, Fordham J accepted as arguable the proposition put forward by the Claimant that the legitimate expectation that Ofgem would pay subsidies under the Regulations through the approved scheme (including to the "custodian" bank account), frustrated by Regulation 26 which prevented the continuation of such payments, was a "possession" for the purposes of A1P1. This meant it was at least arguable that the Claimant was entitled to a remedy either in the form of a "reading down" of Regulation 26 in accordance with s.3 of the HRA or damages pursuant to the HRA if Regulation 26 could not be read in an A1P1 compliant manner. As Fordham J explained, on the basis that a legitimate expectation had arisen:

"the consequence is that Ofgem as a public authority would, as it seems to me, have a section 6 HRA duty not unjustifiably to disrespect the legitimate expectation it has engendered. Once regulation 26 is put alongside that HRA section 6 duty, it can powerfully be argued that the restriction in regulation 26 cannot 'cut down' the obligation owed under the HRA as primary legislation. Another way of putting the same point is that an HRA-compatible interpretation of the regulations would 'read in' a proviso: 'save as necessary to avoid the violation of a Convention right'. That would not only empower but oblige Ofgem to make the payments to the participants in the way that it agreed and approved back in 2014. Even if all of that is wrong it is, in my judgment, properly arguable that it in no way undermines the analysis of the statutory scheme of a remedy of 'just satisfaction' to be awarded, any more than it did so in Stretch v UK where the statutory scheme precluded the option being recognised and yet 'just satisfaction' was payable" [21].

The Woodboilers matter has subsequently settled, with the result that, unfortunately for the development of the law in this area, there will be no substantive judgment. However, it is considered that the permission judgment is essential reading for those seeking relief in respect of a public body's refusal to give effect to a legitimate expectation on that basis that to do so would be *ultra vires*. In particular, as long as the expectation in question concerns the effective enjoyment of a property right, a claimant should – at the very least – have a respectable claim for damages under s.8 HRA. Further, even if that does not pertain, it may be open to at least the appellate courts to resolve a conflict between a legitimate expectation on the one hand and a secondary legislation *vires* on the other in favour of the Claimant.

Duncan Sinclair and Katherine Barnes acted for the Claimant renewable energy company in the Woodboilers case, instructed by CMS Cameron McKenna Nabarro Olswang LLP.

A similar version of this article (entitled "Routes to relief where a public authority's fulfilment

of legitimate expectation ultra vires") is available to subscribers of Practical Law UK.