CASE NOTE

HEATLEY v. TASMANIAN RACING AND GAMING COMMISSION[1]

Administrative Law — Natural justice — "Legitimate expectation" — Implication of natural justice — "Fairness"

The applicant was served by the Racing and Gaming Commission with a notice under section 39(3) of the Racing and Gaming Act 1952 (Tas.)[2] requiring him to refrain from entering any racecourse in Tasmania during the currency of the notice, which was stated to be until its rescission by the Commission. He was given no notice of the Commission's intention to issue the notice, nor of its grounds for doing so. He was not given the opportunity to put his case to the Commission. The Supreme Court of Tasmania refused an application for a writ of certiorari to quash the notice on the grounds that the respondent Commission had failed to comply with the requirements of natural justice. An appeal to the Full Court of the Supreme Court was dismissed, and the applicant sought special leave to appeal to the High Court. The High Court granted leave and by a majority (Stephen, Mason, Murphy and Aickin JJ.; Barwick C.J. dissenting) allowed the appeal.

The most significant feature of this case—the "novel point" to which Aickin J. refers in granting leave to appeal[3]—is that for the first time a majority of the High Court accepted that it was enough for an applicant to have only a "legitimate expectation" of an entitlement, as opposed to a right or interest, to attract the protection of the rules of natural justice from the statutory tribunal with the power to affect him.

The concept of a "legitimate expectation" was introduced by Lord Denning M.R. in *Schmidt* v. *Secretary of State for Home Affairs.*[4] It has since been approved by the Court of Appeal in *Breen* v. *Amalgamated Engineering Union,*[5] *R.* v. *Liverpool Corporation; ex parte Liverpool Taxi Fleet Operators' Association*[6] and *R.* v. *Barnsley Metropolitan Borough Council; ex parte Hook.*[7] Stephen and Jacobs JJ. applied it in *Salemi* v. *Minister for Immigration and Ethnic Affairs (No. 2)*[8] although they were in the minority on a different point. In the same case, Gibbs J., one of the majority, agreed that a legitimate

[1] (1977) 14 A.L.R. 519; 51 A.L.J.R. 703. High Court of Australia; Barwick C.J., Stephen, Mason, Murphy and Aickin JJ.

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

[3] (1977) 14 A.L.R. 519, 542.

[4] [1969] 2 Ch. 149.

[5] [1971] 2 Q.B. 175, 191 *per* Lord Denning M.R., 195 *per* Edmund Davies L.J.

[6] [1972] 2 Q.B. 299.

[7] [1976] 1 W.L.R. 1052, 1058.

[8] (1977) 14 A.L.R. 1, 33, 44.

expectation might be enough to attract the operation of the natural justice rules, if these were not excluded from the operation of the statutory provision.[9]

What in fact is a legitimate expectation? Lord Denning also described it as a "settled expectation",[10] Stephen J. as a "well-founded expectation"[11] and a "reasonable expectation",[12] a term also employed by Aickin J. in *Heatley's* case.[13] Barwick C.J. expressed the view in *Salemi's* case,[14] which he reiterates in *Heatley's* case,[15] that it means an expectation which is founded on a legal right or interest. Mere human expectation, however reasonable or well-founded, is not enough. This view does not coincide with the application of the concept in the English cases, and in view of the decision of the majority in *Heatley's* case, it can now be said that this view is incorrect. But apart from the knowledge that the legitimate expectation is something quite distinct from a legal right or interest, we have few guidelines as to what it actually is. Lord Denning's definition is "some legitimate expectation, of which it would not be fair to deprive him without a hearing, or reason given",[16] which is of little assistance in deciding what gives it legitimacy.

The cases which have referred to the point are quite clear in themselves. It is obviously true to say that a person who has a visa for a certain period of time has a legitimate expectation of being allowed to stay for that period, although he has no right;[17] that a man democratically elected to a certain position has a legitimate expectation that his appointment will be approved;[18] that a group who have been assured that they will be consulted before a decision affecting them is taken have a legitimate expectation that they will be so consulted,[19] and that a man who has a licence on which his livelihood depends has a legitimate expectation that it will not be arbitrarily removed.[20] Equally, it would appear that if the controlling statute did not exclude the operation of the natural justice rules, a person who acts on the assurance of a Minister of the Crown that he will be allowed to remain in the country has a legitimate expectation that he will be allowed to do so.[21] Because these expectations are legitimate, they form the basis of a right to the protection of the natural justice rules.

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[9] *Id.* 19.

[10] *R.* v. *Liverpool Corporation* [1972] 2 Q.B. 299, 304.

[11] *Salemi* v. *Minister for Immigration and Ethnic Affairs (No. 2)* (1977) 14 A.L.R. 1, 34.

[12] *Ibid.*

[13] (1977) 14 A.L.R. 519, 535.

[14] (1977) 14 A.L.R. 1, 7.

[15] (1977) 14 A.L.R. 519, 521.

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

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

[18] *Breen* v. *Amalgamated Engineering Union, supra.*

[19] *R.* v. *Liverpool Corporation* [1972] 2 Q.B. 299.

[20] *R.* v. *Barnsley Metropolitan Borough Council; ex parte Hook* [1976] 1 W.L.R. 1052.

[21] *Salemi* v. *Minister for Immigration and Ethnic Affairs (No. 2)* (1977) 14 A.L.R. 1.

Aickin J., giving the main judgment for the majority of the High Court,[22] describes the concept of a legitimate expectation as

> an expectation that some form of right or liberty will be available, or will not be taken away without an opportunity for the subject to put his case to the relevant governmental authority armed with the compulsory power in question. . . .[23]

Aickin J. had no difficulty in finding that the particular statutory provisions did not exclude the operation of the natural justice rules. The problem was whether Heatley was entitled to their protection. Aickin J. solves this in the following way: although *vis-à-vis* the owner of a racecourse a member of the public has no more than a revocable licence to enter and to remain on such a course, once he has entered the racecourse with the owner's permission, he has a right to remain there that is good as against the rest of the world. As regards entry to the racecourse, since it is the habit of owners of racecourses, football-grounds and so on, to invite and in fact to encourage members of the public to come onto their property, members of the public have a legitimate expectation that on the payment of their entrance fee, they will be admitted. Aickin J. says that he is satisfied that the members of the public do in fact have such an expectation, based upon their knowledge that it is in the interest of the owners to admit them. The fact that the owners have the right to refuse to do so, or to eject them once they have entered, does not affect that expectation. Thus, although they have no enforceable right, they are entitled to the protection of the natural justice rules as against a statutory body with powers to override this legitimate expectation.

Aickin J. recognises that the extent and nature of the legitimate expectation principle has not been laid down precisely,[24] and he does not attempt to lay it down himself. But although he is confident that it is applicable in this case, there are some obvious differences between *Heatley's* case and the line of authority which he uses as the basis of his judgment, which make the ascertainment of the appropriate principle even more difficult.

First, there is the aspect of the consequences to the complainant arising from the action complained of. Until the introduction of the legitimate expectation principle, courts took the view that an entitlement to natural justice rested on the establishment of a right or interest. What this failed to include were those cases where a complainant could establish substantial harm, but had no right or interest recognised in law. The English courts in particular had made their position difficult by seeing a licence as a privilege revocable virtually at pleasure.[25] No distinction was made between granting, renewing or revoking a licence, since if it was nothing but permission, it could be withdrawn at will.

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[22] Stephen and Mason JJ. concurred with Aickin J. Murphy J. did not deal with the legitimate expectation point.

[23] (1977) 14 A.L.R. 519, 535.

[24] *Id.* 536.

[25] *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66; *R.* v. *Metropolitan Police Commissioner; ex parte Parker* [1953] 2 All E.R. 717.

Similarly, no distinction was made between a residence visa and a licence which bestows on the licensee the ability to pursue a certain livelihood, though it was argued that there was a substantial difference between the two. In Australia, this problem was to a certain extent avoided by the decision in *Banks* v. *Transport Regulation Board*,[26] where the High Court held that a taxi-driver's licence can be seen as property,[27] and that the basis on which *Nakkuda Ali* v. *Jayaratne* was decided was erroneous.[28]

The English Court of Appeal, however, found itself faced with a number of cases where arbitrary action by certain tribunals had caused considerable hardship to individuals, who had apparently no means of redress. Lord Denning, in particular, had committed himself to the concept of a licence as a revocable privilege, and his comments and decision in *Schmidt* and *Hook* can be seen as an attempt to minimise the effects of this view of a licence without actually changing it. The "legitimate expectation" approach also has the advantage that it can be applied to almost any situation. The three cases in which Lord Denning has applied it, however, have the common factor that they all obviously involved substantial injustice—which should not matter if the right to natural justice cannot be made out, but has a clear persuasive effect on Lord Denning—and the complainants would suffer considerable hardship if they were not held to be entitled to relief. On this view, their expectation that they would receive a fair hearing was legitimate because the consequences were so severe. If this is so, it is the effects of the action of the relevant tribunal which are really being considered.

Clearly, it is not this factor which influences Aickin J. in *Heatley's* case. Possible consequences to the applicant are loss of reputation and the loss of the pleasure and possible financial gain derived from betting on the racecourse. Although Aickin J. mentions these as an argument raised by the applicant,[29] he does not feel it necessary to comment on them himself. Murphy J. uses these arguments[30] to support his conclusion that the applicant is entitled to the protection of the natural justice rules, but without any reference to legitimate expectation.

Secondly, the English cases deal with people whose expectation arises from a position peculiar to themselves. Breen's expectation was legitimate because he had been democratically elected to a post, the Liverpool Taxi-drivers' Association's expectation was legitimate because they had been promised that they would be consulted before any decision was taken, Hook's expectation was legitimate because he was a stall-holder in good standing who had not breached the conditions of the licence. The legitimacy of their expectations can therefore be seen as deriving from their own position and from their conduct. Heatley's expectation, on the other hand, derives from his status as a member of the public. The public have a legitimate expectation that they will be

[26] (1968) 119 C.L.R. 222.
[27] *Id.* 233 *per* Barwick C.J.
[28] *Id.* 234 *per* Barwick C.J.
[29] (1977) 14 A.L.R. 519, 538.
[30] *Id.* 525.

admitted to a racecourse on paying the prescribed fee, therefore each member of the public has that expectation, even if he or she has never entered a racecourse before. The possible ambit of such public expectations is obviously very broad.

Thirdly, the English cases deal with situations where the party affected has some actual relationship with the deciding body. The alien knows that he must have written permission to stay in England and that without it, he will be deported, the trade union official knows that his appointment is subject to confirmation, the stall-holder knows that he must hold a current licence to continue his operations. Their right to the protection of the natural justice rules is based upon their legitimate expectation that the relevant tribunal will act in a certain way:

Heatley's case deals with a completely different situation. Most members of the Tasmanian public would probably not even be aware of the powers given to the Commission or possibly even of its existence. The power given to the Commission is purely prohibitive—the right to intervene in the relationship between the racecourse owner and members of the public. It cannot be compared to the powers of such bodies as those in charge of public health, subject to whose conditions the public use public swimming pools or toilets. Members of the public cannot be said to enter racecourses and other private property covered by the Commission's powers subject to the Commission's permission. The Commission has the power only to prohibit. Nor does it lay down conditions by which certain groups of the public or the public at large may be prohibited from entering. Its power is against specified individuals. The public are relatively accustomed to infringements being made on what they have traditionally regarded as their "rights". The power of the Commission does not affect these, but operates only "in personam", to prevent one person enjoying the normal pursuits of the rest of the public.

In this situation, it is not surprising that the High Court was not prepared to tolerate the arbitrary exercise of what appears to be a most unusual power. Perhaps the real reason for the decision is the reluctance of the courts to allow a public body to take discriminatory action against a particular individual without notice or a hearing. Even if the Commission cannot be said to be taking away a right, it is in that sense imposing a penalty.

Although it seems only proper that such a penalty should not be imposed without at least the basic requirements of natural justice being observed, *Heatley's* case raises a number of problems. While it demonstrates a welcome ability on the part of the High Court to add to the rights of the citizen as opposed to the powers of statutory bodies, it demonstrates just as clearly the need for a clarification of the "legitimate expectation" concept. We know that the Australian application of the concept is wider than the English, but what are the answers to a number of vital questions? What is a legitimate expectation? In what circumstances will it arise? Is it in any situation in which a reasonable and well-founded expectation is entertained, or are there limits to the legitimacy of an expectation? If so, what are they? Most importantly,

does the concept really have some value, or will it merely create another complicated and artificial area of the law?

While courts continue to require that an applicant prove a valid claim to natural justice before assessing whether he or she has received it, the legitimate expectation principle will continue to be relevant. Thus, *Heatley's* case can be interpreted as a decision relevant only to its rather peculiar facts, and the ambit of the legitimate expectation principle can be confined to cases where the consequences are particularly severe. Alternatively, some effort can be made to make sense out of the combination of the English cases, *Salemi* and *Heatley*, so that some objective standard can be laid down as to the manner of assessing the legitimacy of an expectation. It is suggested that, as in most areas of natural justice, the legitimacy of an expectation is basically a matter of subjective opinion, and that such judges as Stephen and Aickin JJ. will apply the principle when they think that an applicant has not been fairly treated. Potentially, the principle is of very wide application, if all that is required is an actual, reasonable and well-founded expectation. The difficulties which defining this new area present, lead inevitably to the question of its desirability. Rather then creating a new area of the law entitling citizens to the protection of the rules of natural justice as against the power of organisations, it is perhaps preferable to assume that everyone has the right to natural justice, but that the standard provided should, as it already does, vary with the circumstances. There is much to be said for the view of Murphy J. when he refers to

> the standards of official behaviour towards individuals which are basic to every civilised society. These standards referred to as natural justice, due process, or the rule of law, require that when such public power is exercised, the person affected should be given an opportunity to be heard before the order is made to show why it should not be made.[31]

It can be said that the emphasis which the courts have placed on the need for an applicant to show a right or interest justifying the application of natural justice has really obscured the whole issue. Surely the reason for the development of the principle of natural justice was that no person should suffer without a chance to put his case—the dominating feature of "justice" should surely be that it is the right of all, not a privilege handed out at the discretion of the courts.

Other points worth noting in this case are as follows:

Both Barwick C.J. and Aickin J. felt it necessary to reaffirm that the question as to whether the requirement of observing the rules of natural justice is implied in a statute is a matter of construction of the statute in question. The categorisation of the power exercised as "judicial", "quasi-judicial" or as purely "administrative" makes no difference. Aickin J. in particular criticises the decisions of the Supreme Court of Tasmania for deciding the case on the basis of an administrative/judicial

[31] *Ibid.*

difference. He cites *Cooper* v. *Wandsworth Board of Works*,[32] *Municipal Council of Sydney* v. *Harris*,[33] *Ridge* v. *Baldwin*[34] and *Twist* v. *Randwick Municipal Council*[35] to prove his point. Certainly, the law on this point is very clear and has been reiterated many times by the superior courts. It is evident that old habits die hard, and that the lower courts, including a number of the State Supreme Courts, find it very hard to abandon such a convenient method of determining whether the rules of natural justice apply.

It is also interesting to note that the problem of construing statutes to see whether the rules of natural justice are intended to apply or not is still not completely resolved. The law as stated in *Commissioner of Police* v. *Tanos*,[36] is that even though the statute is silent as to the applicability of the natural justice rules, the common law will assume that they are implied. If a contrary intention is to be manifested in the legislature, it "must satisfactorily appear from express words of plain intendment".[37] Similarly, in *Twist* v. *Randwick Municipal Council*,[38] Barwick C.J. commented that if the legislature's intention is to displace the operation of the rules of natural justice, this must be made unambiguously clear. While this remains the view of the majority of the High Court, Barwick C.J. appears to be attempting to shift his ground. In *Salemi's* case,[39] he added a qualification to his comments in *Twist's* case to the effect that courts must be careful not to cross the line dividing the judicial function from the legislative, and that mere silence on the part of Parliament does not leave the courts free to import the obligation to observe the rules of natural justice. It is, he says, a matter of construction. In *Heatley's* case,[40] he reiterates the view that a court must be of opinion, on the proper construction of the particular statute, that the observance of natural justice is required. With respect, this represents an alteration of His Honour's own views in *Twist's* case, and marks an attempt to introduce a further restriction in the requirements of natural justice. By seeing natural justice as a qualification of the grant of power in the statute, he obscures the traditional view that Parliament is presumed to wish to preserve the rights of the citizen unless there can be no doubt that it intends to remove them. If the requirement of natural justice has to be inferred, it will be much more difficult for people to rely on it. It is to be hoped that Barwick C.J.'s formulaton will not be followed.

It is also worthwhile to note briefly Aickin J.'s use of the word "fairness". Whitmore and Aronson[41] devote a lengthy section to

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[32] (1863) 14 C.B. (N.S.) 180; 143 E.R. 414.
[33] (1912) 14 C.L.R. 1, 15.
[34] [1964] A.C. 40.
[35] (1976) 12 A.L.R. 379.
[36] (1958) 98 C.L.R. 383, 395-396 *per* Dixon C.J. and Webb J.
[37] *Heatley's* case (1977) 14 A.L.R. 519, 529 *per* Aickin J.
[38] (1977) 12 A.L.R. 379, 382-383, quoted by Aickin J. in *Heatley's* case (1977) 14 A.L.R. 519, 527-528.
[39] (1977) 14 A.L.R. 1, 5.
[40] (1977) 14 A.L.R. 519, 521.
[41] *Review of Administrative Action* (1978) 63-70.

"fairness" as a legal duty distinct from that of observing the standards required by natural justice, and with a somewhat different standard. This formulation appeared to have been disapproved by Gibbs J. in *Salemi's* case, when he commented[42] that the duty to act fairly does not arise from principles distinct from those of natural justice, but from natural justice itself, and it is this view which Aickin J. appears to be following. He treats "fairness" as the basic requirement of natural justice,[43] and proceeds to discuss what fairness and natural justice require in the particular context. Since the distinction between fairness and natural justice seemed to have been based mainly on the presumption that natural justice had to be applied by bodies exercising a judicial or quasi-judicial function while fairness was to be applied by those exercising an administrative function,[44] and the High Court has gone out of its way to state emphatically that bodies of all categories attract the operation of the natural justice rules, it is probably accurate to say that this distinction is not sustainable in Australia. Aickin J. affirms towards the end of his judgment[45] the view of Kitto J. in *Mobil Oil Pty Ltd* v. *Federal Commissioner of Taxation*[46] that the requirements of compliance with the rules of natural justice will depend on the particular circumstances of each case, which means that an administrative tribunal will not necessarily be bound to observe the judicial standards of a fair hearing, as long as in that particular case, the standards demanded by natural justice can be said to have been met.

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[42] (1977) 14 A.L.R. 1, 18.
[43] *Heatley's* case (1977) 14 A.L.R. 519, 540.
[44] Whitmore and Aronson *op. cit.* 66-67.
[45] (1977) 14 A.L.R. 519, 540.
[46] (1963) 113 C.L.R. 475, 503-504.
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