

RANASINGHE BANDARA

Vs.

DIRECTOR, DISTRICT LAND REFORM COMMISSION AND OTHERS

COURT OF APPEAL
J. DE SILVA, J.
CA/WRIT/233/2017
FEBRUARY 20, 2019

Land Reform Commission—Substantive legitimate expectation—Ultra vires representations and legitimate expectation—Ostensible authority of a public officer

The petitioner, on the belief that his lessor had a valid lease from the Land Reform Commission, was in possession of a particular land. It transpired later that the lessor in fact had no such lease. Subsequently the petitioner wrote letters to the Land Reform Commission, all of which were responded to by the Director of the Land Reform Commission and upon which the petitioner based a claim for legitimate expectation to remain on the property under the Land Reform Commission. Upon the Land Reform Commission issuing the petitioner a notice to quit, the petitioner instituted these proceedings seeking to quash the notice to quit by a writ of certiorari and a writ of prohibition.

Held:

1. Substantive legitimate expectation is permitted based on the principle of legal certainty. It is in the interests of good administration that a public body, which makes a promise, should act fairly and implement its promise.
2. The starting point for legitimate expectation is to ask what the individual's legitimate expectation was. Where there is a dispute on this, the court may decide the same by considering the following three outcomes, taking a different role in respect of each category.

a) The court may decide the public body only needs to bear in mind its previous policy assurances, giving it the weight it thought fit but no more, before deciding to change course. The Court will then only review the decision on conventional Wednesbury unreasonableness.

b) The court may decide that the representation gives rise to a legitimate expectation or procedural benefit and, if so, the court will require that an opportunity for consultation is given unless there is an overriding reason to withdraw from it.

c) The court will, in a proper case, decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Once the legitimacy of the expectation is established, it is for the court to determine whether there is sufficient overriding interest relied upon for the change of policy or to justify the public interest from the individual's interest. The court is undertaking a balancing exercise between the public interest and the individual's interest.

3. An ultra vires representation should not be binding on the body which made it as it would entirely destroy the whole of the doctrines of ultra vires and separation of powers. None of the communications relied upon by the petitioner bind the Land Reform Commission as it is the Commission and not a Director that has the power to lease land owned by the Commission.

4. Alf ostensible authority involves a representation by the principal as to the extent of the agent's authority. No representation by the agent as to the extent of his authority can amount to a 'holding out' of the principal. The Land Reform Commission had not held out the Director as having any ostensible authority to lease out the land on behalf of the Land Reform Commission.

Cases referred to:

1. Chandrasena v. Dahanayake and others (1985) 1 Sri LR 151

2. Council of Civil Service Unions v. Minister for the Civil Service (1985) AC 374, 408- 9

3. Sudhakaran v. Bharathi and others (1987) 2 Sri LR 243

4. Desmond Perera v. Karunaratne, Commissioner of National Housing [1994] 3 Sri LR 316(CA); [1997] 1 Sri LR 148 (5)

5. Laub v. Attorney General [1995] 2 Sri LR 88
6. Multinational Property Development Ltd v. Urban Development Authority [1996] 2 Sri LR 51
7. R v. Secretary of State for the Home Department, Exp. Hargreaves (1997) 1 WLR 906
8. R v. Secretary of State for the Home Department, Ex p. Ruddock [1987] 1 WLR 1482
9. R v. Ministry for Agriculture, Fisheries and Floods, Ex p. Hamble (Offshore) [1995] 2All ER 714
10. R v. Secretary of State for the Home Department, Ex p. Khan [1984] 1 WLR 1337
11. R v. North and East Devon Health Authority, Exp. Coughlan (2000) 2WLR622
12. Dayarathna and others v. Minister of Health and Indigenous Medicine and others [1999] 1 Sri LR 393
13. Mowjood v. Pussadeniya [1987] 2 Sri LR 287
14. Robertson v. Minister of Pensions (1949) 1 KB 227
15. Howell v. Falmouth Boat Construction Co (1951) AC 837
16. Regina v. Inland Revenue Commissioners, Ex p. M. F. K. Underwriting Agents Ltd and others (1990) 1 WLR 1545 at 1573
17. Attorney General of Hongkong v. Ng Yuen Shiu [1983] 2 AC 629 at 638
18. R. v. North and East Devon Health Authority, Ex p. Coughlan (2000) 2 WLR 622 at 647, 651, 656
19. R v. Secretary of State for Education and Employment, Exp. Begbie (2000) 1 WLR 1115 at 1125, 1132
20. Tokyo Cement Company (Lanka) Ltd v. Director General of Customs (2005) BLR 24
21. Vasudeva Nanayakkara v. K. N. Choksy and others [2008] 1 Sri LR 134
22. Attorney General v. A. O. Silva 54 NLR 529
23. Rowlands v. Attorney General 74 NLR 385

APPLICATION for Writs of Certiorari and Prohibition.

Rohan Sahabandu, P. C., with Chathurika Elvitigala for the Petitioner.

Vijaya Gamage with Upul Wickremanayake for the Land Reform Commission.

cur. adv. vult.

June 17, 2019

J. DE SILVA, J.

The Petitioner is in possession of a portion of Ambalamanawatta which is admittedly owned by the Land Reform Commission. The Petitioner claims that he was initially a sub-lessee of the said land having leased it out from one M. D. Husain Sriyad who had leased it from the Land Reform Commission.

It later transpired that the M. D. Husain Sriyad did not have a valid lease from the Land Reform Commission. Hence over a period of time the Petitioner had several communications with the Land Reform Commission with a view to obtaining a lease. The Petitioner states the said communications created a legitimate expectation in the Petitioner that he will be granted a lease to the said land.

The Petitioner states that contrary to the legitimate expectation held by him the 1st Respondent had by letter dated 05. 06. 2017 [P15(a)] directed him to vacate from the said land within 14 days from the said date. He seeks a writ of certiorari quashing the decision in P15(a) and a writ of prohibition against the 1st Respondent preventing him from occupying the said land (sic) without recourse to the due process of the law.

The Petitioner relies on documents marked P3, P4, PS, P6, P7, P8, P9(b), P10(a), P10(d), P11 and P12 to establish that a legitimate expectation was created in him that the said land will be leased to him by the Land Reform Commission. All these letters have been written by the 1st Respondent and there is indication at least in P7 that steps are being taken to lease the said land to the Petitioner.

The Land Reform Commission has raised several preliminary objections to the maintainability of this application including that the Petitioner is a trespasser and hence cannot maintain this application [*Chandrasena v. Dahanayake and Others*1]. Additionally, it is contended that 1st Respondent did not have any authority to give such an undertaking to the Petitioner and as such it cannot create any legitimate expectation in the Petitioner.

Legitimate Expectation

In *Council of Civil Service Unions v. Minister for the Civil Service*2 Lord Diplock stated that for a legitimate expectation to arise, the decision:

*must affect [the] other person . . . by depriving him of some benefit or advantage which either (i) he had in the past been **permitted by the decision maker to enjoy** and which he can legitimately expect to be permitted continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has **received assurance** from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (emphasis added)*

Such legitimate expectations may arise where a public authority has made a clear, unqualified and unambiguous representation to a particular individual that it will act in a particular way. The burden is on the individual to demonstrate that an unqualified, unambiguous and unqualified representation was made [*Clive Lewis, Judicial Remedies in Public Law, 5th Ed., 248 (South Asian Edition)*].

The terms of the representation by the decision-maker must entitle the party to whom it is addressed to expect, legitimately, one of two things:

(a) That a hearing or other appropriate procedure will be afforded before the decision is made. (procedural legitimate expectation);

or

(b) That a benefit of a substantive nature will be granted or, if the person is already in receipt of the benefit, that it will be continued and not be substantially varied. (substantive legitimate expectation)

Our courts have consistently recognized the concept of procedural legitimate expectation. [*Sudhakaran v. Bharathi and Others*,³*Desmond Perera v. Karunaratne, Commissioner of National Housing*,⁴*Laub v. Attorney-General*,⁵*Multinational Property Development Limited v. Urban Development Authority*⁶].

The courts have accepted that procedural protection should be given where an individual has a legitimate expectation of procedural protection such as a hearing or a consultation before a decision is made.

The controversy is whether in such situations the individual has a legitimate expectation that the benefit will be granted or continued. This is the question of substantive legitimate expectation. The traditional objection to the doctrine of substantive legitimate expectation is twofold:

(a) Ultra vires by fettering the discretion

(b) The principle of legality

The arguments in favour of permitting substantive legitimate expectation are based on the principle of legal certainty. It is said that where a public body makes a promise it is in the interests of good administration that it should act fairly and should implement its promise.

Prior to the Court of Appeal decision in *R. v. Secretary of State for the Home Department, exp. Hargreaves*⁷ the weight of authority was in favour of the developing doctrine of substantive legitimate expectations. There was direct support in *R. v. Secretary of State for the Home Department, exp. Ruddock*⁸ and *R. v. Ministry for Agriculture, Fisheries and Floods, exp. Hamble (Offshore)*⁹ while indirect support could be found in *R. v. Secretary of State for the Home Department, ex p. Khan*.¹⁰

However, in *R. v. Secretary of State for the Home Department, ex p. Hargreaves (supra)* the court cast a shadow over the doctrine of substantive legitimate expectation by suggesting that it was not for the court to determine the fairness of a minister's decision not to accommodate a reasonable expectation which a policy would thwart, as this amounted to an intrusion into the merits of the decision. It was suggested that on matters of substance *Wednesbury* is the correct test, and that the doctrine of legitimate expectation, based on fairness, cannot be extended from procedural to substantive matters. It was for the decision-maker to undertake the balancing act: to decide whether the expectation should be protected or whether the public interest is strong enough to override the expectation. The court would only quash the decision to apply the new policy instead of the old, if it could be shown that the decision maker's judgement to do was irrational, *Wednesbury* unreasonable; it could not be quashed on the basis of fairness.

The court in *R. v. Secretary of State for the Home Department, ex p. Hargreaves (supra)* overrode *R. v. Ministry for Agriculture, Fisheries and Floods, exp. Hamble (Offshore) (supra)* in so far as court said that a balancing exercise should be undertaken by the court.

In *R. v. North and East Devon Health Authority, exp. Coughlan*¹¹ the question was considered in detail by the Court of Appeal and it was stated that the starting point is to ask what the individual's legitimate expectation was, and suggested that where there is a dispute as to this

it is to be determined by the court, with there being at least three possible outcomes with the court taking a different role in respect of each category.

(a) The court may decide the public body only needs to bear in mind its previous policy or assurances, giving it the weight, it thought fit, but no more, before deciding to change course. The court will then only review the decision on conventional Wednesbury grounds.

(b) The court may decide that the representation gives rise to a legitimate expectation of procedural benefit and if so, the court will require the opportunity for consultation to be given unless there is an overriding reason to withdraw from it.

(c) The court will in a proper case, decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Once the legitimacy of the expectation is established, it is for the court to determine whether there is sufficient overriding interest relied upon for the change of policy or to justify departing from the promise. The court is undertaking a balancing exercise between the public interest and the individual's interest. This category is a clear acceptance of the doctrine of substantive legitimate expectation. The court defined the type of case of an enforceable expectation of a substantive benefit as being where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract. Promises rather than policies are more likely to fall within this category.

In Sri Lanka substantive legitimate expectation has been recognized in some cases. [*Dayarathna and Others v. Minister of Health and Indigenous Medicine and Others*,¹²*Mowjood v. Pussadeniya*¹³].

Ultra Vires Representation

An ultra vires representation should not be binding on the body which made it as it would entirely destroy the whole doctrines of ultra vires and separation of powers which are related. In *Robertson v. Minister of Pensions*¹⁴ Lord Denning used the doctrine of estoppel to give relief to an individual who had relied on an unlawful representation. However, the House of Lords in *Howell v. Falmouth Boat Construction Co.*¹⁵ disapproved of Lord Denning's remarks relating to an ultra vires assurance and its legal consequences.

In *Regina v. Inland Revenue Commissioners Ex Porte M. FK Underwriting Agents Ltd. and Others*¹⁶ Judge J. states that “No legitimate expectation could arise from an ultra vires relaxation of the relevant statute by the body responsible for enforcing it.”

The principle that the court will not give effect to a legitimate expectation where to do so would involve the decision-maker acting contrary to law is fundamental [*Attorney-General of Hongkong v. Ng Yuen Shiu*; ¹⁷*R. v. North and East Devon Health Authority Ex parte Coughlan*; ¹⁸*R. v. Secretary of State for Education and Employment Ex parte Begbie*¹⁹].

In *Tokyo Cement Company (Lanka) Ltd. v. Director General of Customs*²⁰ the Supreme Court held that the representation must be intra vires for there to be a legitimate expectation. Hence the alleged representation on behalf of the Land Reform Commission should have been made by a person or body empowered by law to do so.

Land Reform Commission Act

In terms of section 44 of the Land Reform Commission Act it is the Commission that has the power to take or give on lease agricultural land owned by the Commission. None of the communication relied on by the Petitioner contains any decision or representation by the Commission that it will lease out the land in dispute to the Petitioner.

All the documents relied on by the Petitioner have been signed by the 1st Respondent. However, in terms of the Land Reform Commission Act he does not have any power to lease out land and hence he has no actual authority.

All ostensible authority involves a representation by the principal as to the extent of that agent’s authority. No representation by the agent as to the extent of his authority can amount to a “holding out” of the principal [*Vasudeva Nanayakkara v. K. N. Choksy and Others*²¹]. There is no representation by the Land Reform Commission that the 1st Respondent had any ostensible authority to lease out the land in dispute on behalf of the Land Reform Commission. Hence there is no question of any ostensible authority.

In any event, the ostensible authority of an employee of a public corporation just as much of a public officer is limited to his actual authority [*Attorney General v. A. O. Silva*,²²*Rowlands v. The Attorney General*,²³*Vasudeva Nanayakkara v. K. N. Choksy and Others (supra)*].

To summarize, the representations relied on by the Petitioner are ultra vires the provisions of the Land Reform Commission Act. The 1st Respondent did not have the power or authority to make such representations and hence they are ultra vires. There cannot be any legitimate expectation created by an ultra vires representation.

The application is dismissed. The parties shall bear their costs.

Application dismissed.

Judgment by: Janak De Silva, J.

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