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Keeping One's Word:
The Protection of Legitimate Expectations in Administrative Law

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A review of Maltese Administrative Law cases does not reveal anything like a plethora of cases where the central issue is the failure of the public authorities to 'keep their word'. Such cases are, for some reason which I will not venture to discover in this article, rather hard to come by.

This is not to say that such issues are unknown to our Courts.

Over the years our Courts have in fact been called upon to decide disputes relating to the unilateral changing of street levels,[1] the refusal to respect a contractual right to use a theatre on alleged grounds of public order,[2] the unwelcome amendment or revocation of building permits[3] or driving licenses,[4] and a number of disputes as to the binding implications of particular authorizations especially in the field of import licensing.[5]

On some occasions our Courts have tended to approach these issues from the point of view of the application of 'principles of justice'[6] but they have also favoured an adaptation of the law of contract involving the reading of implied contractual obligations into administrative authorizations or decisions communicated to third parties and holding that the Administration is obliged to respect such implied agreements or pay damages in default.

It is noteworthy that in the *Francesco Camilleri v. Lorenzo Gatt noe*[7] decision, a case about the alteration of street levels, the Court decided the issue on the basis of French and Italian writings and judgements and made reference both to the notion of a tacit 'contract' between the public authorities and the owners of property abutting on a public street and to the legitimate expectation (*legittima speranza*) which the construction of a public street at a certain level gives rise to.

The following extract from that judgement is of particular interest:

> *Atteso che nel silenzio di una legge che impone tale obbligo, questo si potrebbe bene desumere da un' accordo tacito che interviene tra il governo ed i privati, quando ilprimo, aprendo una strada, permette a questi ultimi d' innalzare le loro costruzioni lungo la stessa, aprirvi porte e finestre e scaricarvi le acque piovane; per cui eglino nutrono la legitima speranza di non essere disturbati nel godimento.*

It is also significant that in the same judgement the Court set aside the position expressed in a British judgement to the effect that the change in road levels would only give rise to the payment of compensation if it were undertaken 'wrongfully, arbitrarily, negligently and oppressively'. The reason given in the judgement is that the particular British decision was 'apparently' based on a specific law (*ma tale decisione sembra basata su uno statuto speciale, ivi citato*).

This approach, based on notions of justice and an adaptation of the law of contract, has over the years provided protection against some arbitrary or over zealous decisions by the Administration but one problematic aspect of applying a 'contract' test rather than a 'fairness' test in public law is that the notion of contract becomes one of doubtful assistance where specific rights cannot be read into the position of the plaintiff, such as in the case of exercise of powers of a 'prerogative' nature,[8] or where the effects of a change in the Administration's

1 Vide *Carmelo Micallef v. Direttur tax-Xogħolijiet*, (Court of Appeal 28th February 2001) quoting *Francesco Camilleri v. Lorenzo Gatt noe*, (Vol. XVIII, ii. 171, 17th May 1902), *Carmelo Micallef v. Brigadier John Belle McCance noe*, (Vol. XXXVIII. ii. 637, 7th February 1953) and *P. L. Constantino Fenech v. Camillo Gatt noe et*, (Vol. XVIII. ii. 164), *Mgr. Can. Dr Luca Zammit v. Col. J. W. Sill noe*, (Vol. XXI. i. 247), *Giuseppe Xuereb et v. Perit Carmelo Micallef noe*, (Vol. XXXVII. ii. 753), and *Antonio Camilleri v. Perit Carmelo Micallef*, (Vol. XXXIV. 1. 66).

2 *P. L. Francesco Azzopardi v. Emilia Malfiggiani et*, (First Hall Civil Court 5th June 1902).

3 *John Lowell v. Dr Carmelo Caruana noe*, (Civil Court First Hall, 14th August 1972), and *Mary Grech v. Ministru għall-Iżvilupp ta' l-Infrastruttura et*, (Court of Appeal 29th January 1993 and Civil Court First Hall 4th August 1989).

4 *Pace v. De Gray*, (Court of Appeal, 25th April 1969).

5 *Emmanuel Zahra v. Chief Government Medical Officer*, (Court of Appeal 23rd September 1993).

6 *Vide Mary Grech v. Ministru għall-Iżvilupp ta' l-Infrastruttura et*, (Court of Appeal 29th January 1993 and Civil Court First Hall 4th August 1989).

7 Civil Court First Hall, (Vol. XVIII, ii. 171, 17th May 1902) per Mr Justice G. Pullicino.

8 In English common law the exercise of prerogative powers has been subject to judicial review since *R. v. Criminal Injuries Compensation Board, ex parte Lain*, [1967], 2 QB 864.

policies are unfair without being in breach of such 'rights' of third parties.

The private law notion of contract may indeed match uneasily in a number of public law relationships where there is in fact no real 'contract' to be found or implied and where the private person's right may not extend to the conferment of a benefit but may be limited to a right to a hearing before a change of policy is implemented.

It is also relevant that the classification of acts of the Administration as 'contracts' with those effected by them may tend towards denying the flexibility required for the governance of a State in an increasingly demanding and rapidly changing national and international environment.

Such changes may often lead to situations, which are not uncommon, where public authorities find themselves unable to deliver on the promises which they had made. This is not necessarily the result of any policy intended, as Francis Bacon, rather cynically, remarked many centuries ago, to 'hold men's hearts by hopes when it can not by satisfaction' but, as Lord Justice Schiemann noted in a recent England and Wales Court of Appeal decision,[9] such a breach of promise may be due to circumstances where

> Seen from the point of view of administrators focusing on the problem immediately before their eyes a promise seems reasonable or will at least reduce the need to worry further in the immediate future about the promisee. But when they, or their superiors, focus on a wider background it appears that the making of the promise was unwise or that, in any event, its fulfilment seems too difficult.

This is not to say that lack of proper foresight is acceptable, but one cannot ignore the fact that it is nevertheless a practically unavoidable reality where administrators are called upon to take decisions in an environment where problems are increasingly multifarious and their solutions subject to various legal, political, international and budgetary constraints which are subject to rapid change.

It is also of the essence of the democratic system that the Administration must be able to retain flexibility in decisions about the use and allocation of resources and a legal system based on an implied obligation to perpetuate the 'status quo' is bound to run into conflict with the essentials of democracy, not to mention the economic interests of the country as a whole.

The Administration's flexibility requirements however still have to co-exist with the private person's right to the protection of the certainty of the law and a suitable balance has therefore to be sought between the Administration's need to be able to change and adapt its policies and the private person's right to protection against capricious or conspicuously unfair policy changes often resulting from bad administration.

Ensuring Fairness

The doctrine of 'legitimate expectation' is intended to protect private persons against capricious changes in the Administration's policies which although being 'legal' in that they do not go against any express provision of the law, are nevertheless unfair in that they imply a breach of promise amounting to an abuse of power. The concept of 'legitimate expectation' implies that, subject to statute, if a policy or a decision is made which confers a benefit then that policy will not be changed without granting the person concerned a reasonable opportunity to make representations and, where the expectation relates to a substantive benefit, without giving due consideration to the promise which was made and to the effects of failing to honour it for reasons of public interest.

The rule that a public authority should not frustrate a person's legitimate expectation is, in fact, an aspect of the rule that a public authority must act fairly and reasonably. As stated above, the rule operates both with regard to procedural rights and with regard to substantive rights and it draws upon the principle of good administration which prima facie requires public authorities to adhere to their promises.

As stated in the England and Wales Court of Appeal decision in *R. v. North and East Devon Health Authority ex parte Pamela Coughlan and Secretary of State for Health, Intervenor and Royal College of Nursing, Intervenor*,[10]

> The court's task in all these cases is not to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate interests or expectations of citizens or strangers who have relied, and have been justified in relying, on a current policy or an extant promise.

As a result of the need to protect the individual against unfair treatment the doctrine of legitimate expectation has been developed and expounded upon in various common law jurisdictions in a manner which Mr Justice Kelly sitting in the High Court of Ireland in the case of *Glencar Exploration PLC v. Mayo County Council*[11] even described as not being easily reconcilable with one another.

Protecting 'Legitimate Expectations'

In English Law the doctrine of 'legitimate expectation' was first expounded by Lord Denning in the case of *Schmidt v. Secretary of State for Home Affairs*[12] in 1969.

9 London Borough of Newham and Manik Bibi and Ataya Al-Nashed, *R. v. [2001] EWCA*, Civ 607, (26th April 2001).
10 [1999] EWCA Civ (16 July 1999).
11 [1998] IEHC 137 (20 August 1998).
12 (1969) 2 Ch 149 at 170-71.

That case concerned the decision of the Secretary of State for Home Affairs not to grant a number of foreign students the right to stay in the United Kingdom for the purpose of continuing their studies without granting the students a hearing. In that case although the application was turned down since the students did not have a right to stay one day more than what was originally permitted, Lord Denning stated that if a person had a right, interest or legitimate expectation he could claim a right to be heard whenever a public authority has by promise or by conduct created a 'legitimate expectation' that a hearing will be given.

In practice, the theory extends the protection granted by the rules of natural justice to legitimate expectations (as distinct from rights) of persons affected by the exercise of power by the Administration. As devised by Lord Denning it was

> a device that permitted the Courts to invalidate decisions made without hearing a person who had a reasonable expectation, but no legal right, to the continuation of a benefit, privilege or state of affairs. It therefore helped to protect a person from the disappointment and often the injustice, that arises from the unexpected termination by a government official of a state of affairs that otherwise seemed likely to continue.[13]

The Irish Courts had apparently not applied the doctrine until 1988 when Chief Justice Findlay presiding over the Supreme Court of Ireland in the case of *Webb v. Ireland*[14] stated that

> It would appear that the doctrine of 'legitimate expectation', sometimes described as 'reasonable expectation', has not in those terms been the subject matter of any decisions of our Courts. However, the doctrine connoted by such expressions is but an aspect of the well recognized concept of promissory estoppel (which has been frequently applied in our Courts), whereby a promise or representation as to intention may in certain circumstances be held binding on the representor or promissor. The nature and extent of that doctrine in circumstances such as those of this case has been expressed as follows by Lord Denning MR in *Amalgamated Property Company v. Texas Bank*, [1982], QB84, 122:
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> 'Where the parties to a transaction proceed on the basis of an underlying assumption – either of law or of fact – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the Courts will give the other such remedy as the equity of the case demands'.

In a 1993 case, before the High Court of Ireland,[15] Costello J. after reviewing various authorities in the United Kingdom and in Australia defined the practical effects of the doctrine of legitimate expectation in Ireland as follows:

I can summarize the legal principles which I think are to be derived from the authorities to which I have referred and which are relevant for the purposes of this case as follows:

1. There is a duty on a Minister who is exercising a discretionary power which may affect rights or interests to adopt fair procedures in the exercise of the power. Where a member of the public has a legitimate expectation arising from the Minister's works and/or conduct that
   (a) he will be given a hearing before a decision adverse to his interests will be taken, or
   (b) that he will obtain a benefit from the exercise of the power, then the Minister also has a duty to act fairly towards him and this may involve a duty to give him a fair hearing before a decision adverse to his interests is taken. There would then arise a correlative right to a fair hearing which, if denied, will justify the Court in quashing the decision.
2. The existence of a legitimate expectation that a benefit will be conferred does not in itself give rise to any legal or equitable right to the benefit itself which can be enforced by an Order of Mandamus or otherwise. However, in cases involving public authorities, other than cases involving the exercise of statutory discretionary powers, an equitable right to the benefit may arise from the application of the principles of promissory estoppel to which effect will be given by appropriate Court order.
3. In cases involving the exercise of a discretionary statutory power, the only legitimate expectation relating to the conferring of a benefit that can be inferred from words or conduct is a conditional one, namely, that a benefit will be conferred provided that at the time the Minister considers that it is a proper exercise of the statutory power in the light of current policy to grant it. Such a conditional expectation cannot give rise to an enforceable right to the benefit should it later be refused by the Minister in the public interest.
4. In cases involving the exercise of a discretionary statutory power in which an explicit assurance has been given which gives rise to an expectation that a benefit will be conferred no enforceable equitable or legal right to the benefit can arise. No promissory estoppel can arise because the Minister cannot estop either himself or his successors from exercising a discretionary power in the manner prescribed by Parliament at the time it is being exercised.

The Main Issues in Litigation

How do the Courts go about determining 'legitimate expectation' cases?

In the recent England and Wales Court of Appeal (Civil Division) decision in the case of *London Borough of Newham*

[13] As per McHugh J., High Court of Australia in *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh*, (1995) 128 ALR 353.
[14] [1988] IR 353.
[15] *Tara Prospecting Limited and Another v. Minister for Energy*, Ireland and the Attorney General, [1993], ILRM 771.

And Manik Bibi And Ataya Al-Nashed, R. v.[16] Lord Justice Schiemann, Lord Justice Sedley and Mr Justice Blackburne define the questions to be asked and answered in the determination of such cases as the following:

> In all 'legitimate expectation' cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.

The Court then went on to define the first question ('To what has the public authority committed itself?') as a question of analyzing the evidence in order to determine whether the public authority has said or done anything which can legitimately be considered to have generated an expectation. If it results that no expectation was 'legitimately' generated, as would probably be the case when a promise was made without lawful authority, the case would stop there.

Finding answers to the second and third questions ('Whether the authority has acted or proposes to act unlawfully in relation to its commitment?' and 'What should the Court do?') is a more complicated matter involving the definition of the 'measuring rods' to be used in order to define whether a certain course of action constitutes an abuse of power and the definition of the judicial reaction once such abuse is identified.

As Professor Craig states in his *Administrative Law*[17] there are often tensions between several values in these cases and one often has to decide which good to attain and which good to forego. There are, on one hand, administrative and democratic gains in allowing the Administration the flexibility of coming to different conclusions about the allocation of its resources in the future whilst on the other hand there is value in holding the Administration to the promises which it made, thereby encouraging responsible public administration and allowing people to plan their lives sensibly.

It is therefore very difficult to come to wide-ranging formulations applicable to all cases in determining whether the Administration has acted unlawfully

As stated by the England and Wales Court of Appeal in the quoted Newham[18] decision:

> 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. Thus it was the view of this court in Coughlan[19] that a principle, apparently earlier embraced by this court in *R. v. Secretary of State for the Home Department, ex parte Hargreaves*,[20] to the effect that the court would only enforce expectations as to procedure as opposed to expectations of a substantive benefit, was wrongly framed.

One question which often arises is that as to whether a plaintiff must prove that he or she has relied upon a promise in order to be able to demand judicial review on the grounds of breach of a legitimate expectation.

In the England and Wales Court of Appeal decision of *R. v. Secretary of State for Education and Employment, ex parte Heather Charis Begbie*[21] it was held that reliance, though potentially relevant in most cases, is not essential. However, Mr. Justice Peter Gibson, giving the leading judgement, also stated that:

> it would be wrong to understate the significance of reliance in this area of the law. It is very much the exception, rather than the rule, that detrimental reliance will not be present when the court finds unfairness in the defeating of a legitimate expectation.

This is also broadly in agreement with what Professor Craig has proposed in this regard in his *Administrative Law*[22]

> Detrimental reliance will normally be required in order for the claimant to show that it would be unlawful to go back on a representation. This is in accord with policy, since if the individual has suffered no hardship there is no reason based on legal certainty to hold the agency to its representation. It should not, however, be necessary to show any monetary loss, or anything equivalent thereto.

Professor Craig however also gives the following example of a case where reliance is not essential:

> Where an agency seeks to depart from an established policy in relation to a particular person, detrimental reliance should not be required. Consistency of treatment and equality are at stake in such cases, and these values should be protected irrespective of whether there has been any reliance as such.

The case of *R. (On the application of Zeqiri) v. Secretary of State for the Home Department*[23] is a good illustration of reference to 'detrimental reliance' in 'legitimate expectation' cases. It was an immigration case filed by a Kosovar seeking asylum in the United Kingdom which had been pending

16 [2001] EWCA Civ 607 (26th April, 2001).
17 P. P. Craig, *Administrative Law*, 4e. Ch. 19.
18 At 7 above.
19 *R v. North and East Devon Health Authority, ex parte Pamela Coughlan and Secretary of State for Health, Intervenor and Royal College of Nursing*, Intervenor, [1999], EWCA, Civ (16th July 1999).
20 [1997], 1 W. L. R. 906.
21 2000, 1, W. L. R. 1115.
22 As at 14 above p. 619.
23 [2001], All ER (D) 121 (Mar) (Lord Phillips, MR, Kennedy and Dyson, LJJ).

a final decision in another test case[24] which was destined for the House of Lords. The issue in the test case was identical to that in Zeqiri, namely, whether the applicant's claim for asylum should be decided in the United Kingdom or in Germany. It was assumed all along that if it was held in the test case that the claim should be decided in the United Kingdom then the same result would follow in Zeqiri. Eventually when the decision was given in the test case it was decided that the application for asylum should be decided in the United Kingdom. The Secretary of State submitted, however, that, by reason of a change of circumstances in Germany, it was open to him to proceed on the basis that Zeqiri's claim for asylum should be determined in Germany. The England and Wales Court of Appeal however held that to be unfair in the circumstances of that case. It seems that the court proceeded on the basis that Zeqiri had a 'legitimate expectation' to the effect that, in circumstances similar to those of the test case, his application for asylum would be determined in the United Kingdom and concluded that change of position or reliance on the part of Zeqiri did not need to be shown. The Master of the Rolls delivering the substantive judgement said:

> Mr Gill[25] submitted that the period that the appellant spent 'in limbo', awaiting the progression of [the test case] to the House of Lords has involved further hardship. The prolonged period of uncertainty as to his fate will have caused him mental stress and he will have been forced to subsist without the benefits of those whose claim to asylum has been recognized... I consider that this hardship is material to the question of whether it would now be fair for the Secretary of State to remove the appellant to Germany on the basis that the decision for which he has been waiting is of no relevance to his case. It is unfair for the Secretary of State to change tack at this late stage.[26]

This decision was reversed by virtue of a House of Lords judgement of the 24 January 2002[27] on the basis of a disagreement as to whether a 'legitimate expectation' had in fact been created to the effect that following the decision of the Court of Appeal, Mr Zeqiri's application for asylum would be considered on its merits.

The following passage from the House of Lords judgement illustrates the point made by that Court and throws further light on the application of the 'legitimate expectation' doctrine:

> 44. It is well established that conduct by an officer of state equivalent to a breach of contract or breach of representation may be an abuse of power for which judicial review is the appropriate remedy: see Lord Templeman in *R. v. Inland Revenue Commissioners, Ex p Preston*, [1985] AC 835, 866-867. This particular form of the more general concept of abuse of power has been characterized as the denial of a legitimate expectation. In considering the expectations which may legitimately arise from statements to taxpayers by the Inland Revenue, Bingham LJ said that they must be 'clear, unambiguous and devoid of relevant qualification': see *R. v. Inland Revenue Commissioners, Ex p MFK Underwriting Agents Ltd.*, [1990] 1 WLR 1545, 1569G. Mr Gill said that while it might be appropriate in the case of dealings between the Revenue and sophisticated tax advisers to insist upon a high degree of clarity in the alleged representation, this need not necessarily be required in other cases. Kosovar refugees cannot be expected to check the small print. In principle I agree that an alleged representation must be construed in the context in which it is made. The question is not whether it would have founded an estoppel in private law but the broader question of whether, as Simon Brown LJ said in *R. v. Inland Revenue Commissioners, Ex p Unilever PLC*, [1996] STC 681, 695B, a public authority acting contrary to the representation would be acting 'with conspicuous unfairness' and in that sense abusing its power.
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> 45. In the present case what is relied upon is not a representation directly to the applicants but one which is said to arise out of the conduct of adversarial litigation and was made to the applicant's legal representatives. The question is therefore what would have been understood by a lawyer rather than an unaided Kosovar refugee.'

As has already been stated a central issue to be examined in cases based on the alleged breach of a 'legitimate expectation' is that as to whether in going back on its promise the Administration has acted in a manner 'so unfair as to amount to an abuse of power'.[28] In this regard, although it is not the case that each unfulfilled promise constitutes an abuse of power, when the Administration adopts a course of action in breach of a previous promise without even considering the breach of the promise as being a relevant consideration the decision would amount to such an abuse of power.[29]

Seeking the Appropriate Reaction

The third and last question, regarding the appropriate judicial reaction once the Court finds that a breach of a legitimate expectation amounted to an abuse of power, raises the

[24] *R v. Secretary of State for the Home Department, ex parte Besnik Gashi*, [1999], INLR 276.
[25] Counsel to the applicant.
[26] In paragraph 68 of the judgment.
[27] [2002], UKHL 3.
[28] *Vide R. v. Inland Revenue Commissioners ex parte Unilever*, [1996] S. T. C. 681.
[29] *Vide* also Coughlan decision quoted at 16 above.

problem as to whether the Court can order the fulfilment of the promise (as in the case of a breach of contract) or whether it may simply annul the administrative decision in question and send the matter back to the public authority concerned for reconsideration.

In the United Kingdom it would appear that the general rule in Administrative Law cases is that the Courts will not order specific performance where to do so would be to assume functions constitutionally vested in the Executive. This is also the position which appears to result from the wording of article 469A of the Maltese Code of Organization and Civil Procedure which regulates judicial review.[30]

One particularly strong argument in favour of reference for reconsideration rather than ordering specific performance is that based on the fact that in considering judicial review cases the Court often concentrates on particular aspects relating to the legality of the decision and in so doing it usually has before it only part of the relevant material upon which the decision on the merits is made.

As Lord Bingham said in *R. v. Cambridge Health Authority, ex parte B*:[31]

> ...it would be totally unrealistic to require the authority to come to the court with its accounts and seek to demonstrate that if this treatment were provided for B then there would be a patient, C, who would have to go without treatment. No major authority could run its financial affairs in a way which would permit such a demonstration.

In the Newham[32] decision, which was about entitlement to public housing, it was held by the Court that:

> In an area such as the provision of housing at public expense where decisions are informed by social and political value judgements as to priorities of expenditure the court will start with a recognition that such invidious choices are essentially political rather than judicial. In our judgement the appropriate body to make that choice in the context of the present case is the authority. However, it must do so in the light of the 'legitimate expectations' of the respondents.

The Australian decision of *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh*,[33] also discusses the extent to which one can demand that a legitimate expectation be fulfilled:

> The existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way.
>
> That is the difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount to treating it as a rule of law... But, if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.

These *dicta* demonstrate that although there are cases, mostly in the field of legitimate expectations to substantive benefits, where there can only be one lawful answer to the question whether the Administration should be obliged to honour its promise, it would be very risky to assume that this will always be the case.

International Treaties

The Australian decision in Teoh is particularly important with regard to the question as to whether an international treaty to which the State is a party but which has not yet been incorporated into national law can give rise to a 'legitimate expectation' to the effect that the Executive will take the provisions of the Treaty into consideration in the execution of its functions.

As is the case in Malta[34] the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been incorporated into national law. This principle has its foundation in the proposition that in the Australian constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law falls within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into Australian municipal law cannot operate as a direct source of individual rights and obligations under that law. This is also substantively the position emerging from Malta's Ratification of Treaties Act.[35]

Nevertheless, the High Court of Australia held that:

30 The wording of Article 469A only entitles the Court to 'enquire into the validity of any administrative act or declare such act null, invalid or without effect'.

31 [1995], 2 All E. R. 129.

32 As at 7 above.

33 As at 10 above.

34 Vide Ratification of Treaties Act, 1983 (Cap 304). The cases cited in Teoh in support of this are *Chow Hung Ching v. The King*, (1948), 77 CLR 449 at 478; *Bradley v. The Commonwealth*, (1973), 128 CLR 557 at 582; *Simsek v. Macphee*, (1982), 148 CLR 636 at 641-642; *Koowarta v. Bjelke-Petersen*, (1982), 153 CLR 168 at 211-212, 224-225; *Kioa v. West*, (1985), 159 CLR 550 at 570; *Dietrich v. The Queen*, (1992), 177 CLR 292 at 305; *J. H. Rayner Ltd. v. Dept. of Trade*, (1990), 2 AC 418 at 500. The position also corresponds with that in the Unitd Kingdom at common law *vide Thakrar v. Secretary of State for the Home Department*, (1974), 2 All E. R. 261

35 1983, Cap 304 Laws of Malta.

> by ratifying the Convention[36] Australia has given a solemn undertaking to the world at large that it will: 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies' make 'the best interests of the child a primary consideration

and that it had thus given rise to a legitimate expectation, in the absence of statutory indications to the contrary, to the effect that the said provisions of the Convention on the Rights of the Child would be taken into account when Australian authorities came to consider whether to grant resident status and whether to deport Mr Teoh, a Malaysian citizen previously convicted of drug offences in Australia, from Australia to the detriment of his children.

It is relevant to note in this regard that in its decision in *Kavanagh v. Governor of Mountjoy Prison*[37] the High Court of Ireland affirmed that the decision in Teoh was only concerned with procedural fairness and that it could not be invoked in order to demand the quashing of a conviction by the Irish Courts on the basis of a decision of the Human Rights Committee established under the International Covenant on Civil and Political Rights. In that case the High Court of Ireland also held that:

> Even if the Covenant is part of Irish domestic law, the subject of international law is the State and not the individual: See O'Laighleis (1960) IR at 124. Such matters as are raised by the Applicant are not justifiable at the suit of an individual.

In the United Kingdom the decision in Teoh, founding a 'legitimate expectation on the terms of a treaty was approved obiter in *R. v. Home Secretary ex parte Ahmed*,[38] but H. W. R. Wade & C. F. Forsyth point out in the eight edition of their *Administrative Law* that the principle has not since been adopted.[39]

A Possible Maltese Development?

Can the doctrine of legitimate expectation as outlined above adopted by a Maltese Court as a basis for deciding an Administrative Law case?

As stated above, the Maltese Courts have been rather inclined to apply references to an adaptation of the law of contract where expectations of citizens are frustrated by actions of the Administration but cases may arise where the Courts would be confronted with a situation where the public law test of 'fairness' would be more appropriate than an adaptation of the private law of contract which may be inapplicable *in casu*. Indeed the search for a 'just' solution has also been an underlying factor in Maltese decisions and we have had cases such as the Mary Grech[40] decision where the sole consideration was the application of 'principles of justice' a concept much akin to the notion of 'fairness'.

The affinity between British Common Law and Maltese Administrative Law has clearly survived Malta's independence even though one can argue that Maltese legislative interventions on judicial review in 1981[41] and in 1995[42] and the incorporation of the European Convention on Human Rights into Maltese law long before this was incorporated into British law have marked some significant departures.

In his introduction to *Cases in Administrative Law* Professor Ian Refalo, reviewing the development of Maltese Administrative law states that:

> The most important of these developments has been, perhaps, the rule that British Common Law is a source of Maltese Administrative Law. The principle has been affirmed in a number of cases; what is perhaps even more significant is that there is no case where the principle has been rejected or declared not to apply.

As recently as the 19th November 2001 Mr Justice Filletti in the judgement of the First Hall of the Civil Court *Frank Pace et v. Kummissarju tal-Pulizija et* stated that:

> *fejn l-atti jew azzjonijiet amministrattivi m'humiex regolati bil-liġi Maltija, allura r-regoli tad-dritt amministrattiv applikabbli jsibu fonti fid-dritt amministrattiv Ingliż, ara – John Lowell et noe v. Onor. Clo. Caruana noe, Prim Awla tal-Qorti Ċivili, 14 ta' Awissu 1972, u Onor. Prim Ministru v. Sr. L. Dunkin noe – Qorti Ċivili, 26 ta' Ġunju 1980.*

Article 469A of the Code of Organization and Civil Procedure entitles the Courts to:

> enquire into the validity of any administrative act or declare such act null, invalid or without effect only in the following cases:
> 1(b)
> (ii) when a public authority has failed to observe the principles of natural justice or mandatory procedural re-

36 Art. 3.1 of the United Nations Convention on the Rights of the Child.
37 [2001], IEHC 77 (29th June 2001).
38 [1999], COD 69 (Lord Woolf MR).
39 Footnote 68 at page 498 quoting *R v. DPP ex parte Kebilene*, [1999], 3 WLR 175 (DC) holding that the ratification of the European Convention on Human Rights did not found a legitimate expectation that it would be followed, and *R. v. Home Secretary ex parte Behluli*, [1998], COD 328 holding that there was no legitimate expectation that asylum applicants would be dealt with in accordance with the Dublin Convention. Wade and Forsyth also refer to *R. v. Uxbridge Magistrates' Court ex parte Adimi* which held that asylum seekers had a legitimate expectation that they would not be prosecuted for using false documents contrary to Article 31 of the UN Convention Relating to the Status of Refugees.
40 As at 3 and 6 above.
41 Act VIII of 1981.
42 Act XXIV of 1995.

quirements in performing the administrative act or in its prior deliberations thereon; or

(iii) when the administrative act constitutes an abuse of the public authority's power in that it is done for improper purposes or on the basis of irrelevant considerations; or

(iv) when the administrative act is otherwise contrary to law.

Given that the doctrine of 'legitimate expectation' is about extending the protection of the principles of natural justice, about preventing the abuse of a public authority's power by ensuring that promises are treated as 'relevant considerations' and that any exercise of power that is abusive is generally considered as an illegality, the article provides a sufficient legal basis for the application of the doctrine of legitimate expectation in Maltese law within our system of judicial review.

This basis in law, authorities and jurisprudence provides fertile ground for the development of the doctrine of legitimate expectation, already established in the Courts of other countries with a 'common law' Anglo-American tradition in Administrative law such as the United Kingdom, Australia and Ireland, in Maltese law. In this regard one must not ignore the experience acquired by our Courts in interpreting the Articles on the Fundamental Rights and Freedoms of the Individual in Chapter IV of the Constitution of Malta, and the European Convention on Human Rights. That experience can also enable our Courts to make a substantial contribution towards defining the extent of review of Administrative acts for 'fairness', in line with the case law of the European Court of Human Rights and of the European Court of Justice and with the benefit of the discrete Maltese tendency to look at both British and Continental ways.