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AN ALIEN'S RIGHT TO NATURAL JUSTICE: A CASE FROM HONG KONG

by

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While the expanding frontiers of natural justice in regard to content as well as scope represent a feature of modern administrative law, lingering doubts are still entertained about the applicability of the rules of natural justice in limited areas of executive action. The relevance of procedural safeguards in the context of deportation orders, and the broader question of the entitlement of aliens to natural justice, are unresolved problems in contemporary law. A fresh opportunity to forge a definitive judicial approach, satisfying from the standpoint of policy to these problems, was available to the Privy Council in a recent appeal from the Court of Appeal of Hong Kong[1].

The *mise en scene* was the growing crisis confronting the government of Hong Kong in 1980 with regard to the influx of illegal immigrants from mainland China. For several years until 1980 the government of Hong Kong followed the "reached base" policy under which illegal immigrants from China were not repatriated if they managed to reach the urban areas without being arrested. However, a phenomenal increase in the volume of illicit immigration to Hong Kong compelled the government to repudiate the "reached base" policy and, in October 1980, to promulgate the Immigration (Amendment) (No. 2) Ordinance which amended in material respects the Immigration Ordinance of 1971. The current legislation empowers the Director of Immigration to make a removal order against any person who, having landed in Hong Kong unlawfully, remains in Hong Kong without the Director's authority.[2]

The respondent, whose case was dealt with on the basis that he belonged to this category of persons, saw a television programme giving publicity to an announcement by a senior immigration official that illegal immigrants from Macau would be interviewed in due course and that each case would be considered on its merits. The respondent, who had entered Hong Kong unlawlully from Macau several years before the enactment of the Immigration (Amendment) Ordinance 1980, reported in reliance on this assurance to the Immigration Clearance Office and was detained pending inquiry. Sub-

1. *Attorney-General* v. *Ng Yuen Shiu,* Privy Council Appeal No. 16 of 1982 in which the opinion of the Judicial Committee was delivered on 21st February, 1983.
2. Section 19 (1) read with section 38 (1) of the Immigration Ordinance 1971.

sequently, the Director of Immigration made a removal order against the respondent whose application to the High Court of Hong Kong[3] for certiorari and prohibition against the Director was unsuccessful. But the Court of Appeal,[4] allowing in part the respondent's appeal, granted an order of prohibition against the Director prohibiting him from executing the removal order before an opportunity had been given to the respondent of putting all the circumstances of his case before the Director. The basis of the respondent's partial success was the view expressed by the Court of Appeal that the clear undertaking given on the Director's behalf as to the procedure which would be followed in dealing with the cases of illicit immigrants of the specified category conferred on the respondent at common law , in the absence of applicable provision in the governing legislation, the right to a hearing in the particular circumstances of the case. It was this conclusion of the Court of Appeal that was assailed by the Attorney-General in his appeal to the Judicial Committee.

The submissions on behalf of the appellant before the Privy Council canvassed the general question regarding the asserted right of an illegal immigrant to an adequate hearing prior to the making of a removal order against him, as well as the limited question whether, if no general right could be conceded, the respondent could rely on the explicit assurance held out by the government as the source of his entitlement to a hearing in the circumstances. The Privy Council assumed, without deciding, that the High Court and the Court of Appeal of Hong Kong were correct in denying a general right to natural justice to an alien in the respondent's position and disposed of the appeal on the narrow ground.

The reasoning by the Privy Council involves emphasis on the concept of "legitimate expectation" in the setting of the announcement by the administration with regard to cardinal aspects of its immigration policy. The idea of legitimate[5] or settled expectation has been developed during the last decade by English and Commonwealth courts as a conceptual device significantly broadening the bases of right and interest as the foundation of natural justice.[6] Lord Fraser of Tullybelton, delivering the opinion of the Privy Council, had no hesitation in following a line of English authority assessing the effect of an undertaking given by a public authority on the expectations of an individual adversely affected by a decision of the public body : "so long as the performance of the undertaking is compatible with their public duty, they must

3. Roberts C.J. and Rhind J.
4. McMulin V.P., Li J.A. and Baber J.
5. *Schmidt* v. *Secretary of State for Home Affairs* (1969) 2 Ch. 149 (C.A.); *Breen* v. *Amalgamated Engineering Union* (1971) 2 Q.B. 175 (C.A.).
6. *Jim Harris Ltd.* v. *Minister of Energy* (1980) 2 N.Z.L.R. 294 (H.C.).

honour it"[7]. The Privy Council, declaring that "Their Lordships see no reason why the principle should not be applicable when the person who will be affected by the decision is an alien, just as much as when he is a British subject,"[8] dismissed the appeal on the restricted ground that the respondent, despite his status as an alien, was entitled to rely on the government's promise as the basis of his expectation of a fair hearing.

This conclusion, however, has been resisted vigorously by a distinguished Australian judge in approximately comparable circumstances. In a case[9] where the Australian Minister of Immigration and Ethnic Affairs offered amnesty in general terms to prohibited immigrants of given characteristics, the Chief Justice of Australia was of opinion that an immigrant falling within this category had no judicial remedy against the Minister's refusal without sufficient reason to afford him the benefit of the amnesty envisaged, Barwick C.J. commented : "It is regrettable that because the Minister does not wish to extend the amnesty to the applicant, and indeed has assigned an untenable reason for not doing so, he has given ground for a sense of grievance and disappointment; but that is no basis, in my opinion, for saying that the applicant had in the language of the law a 'legitimate expectation' of the grant of an entry permit."[10] The lack of a remedy, and indeed of the right to a hearing, was postulated notwithstanding the conviction of Barwick C.J. that "The statements were calculated to excite an expectation of their performance."[11]

The rationale of this approach, which conflicts directly with the Privy Council's acceptance in the Hong Kong case of an explicit statement by a public authority as the source of an enforceable right to a hearing, derives from a strikingly narrow perspective with regard to the nature of legitimate expectation. Barwick C.J.'s approach to the construction of this concept is epitomised in the remark : "No matter how far the phrase may have been intended to reach, at its centre is the concept of legality, that is to say, it is a lawful expectation which is in mind. I cannot attribute any other meaning in the language of a lawyer to the word 'legitimate' than the meaning which expresses the concept of entitlement or recognition by law".[12] But this approach, refuted by the dichotomy between legal right and reasonable

7. *R.* v. *Liverpool Corporation, ex p. Liverpool Taxi Fleet Operators' Association* (1972) 2 Q.B. 299 at p. 308, *per* Lord Denning M.R. .
8. See p. 6 of the opinion.
9. *Salemi* v. *Minister for Immigration and Ethnic Affairs* (*No.* 2) (1977) 14 A.L.R. 1. (H.C.A.).
10. At p. 9.
11. *Ibid.*
12. at p. 7.

expectation underlined in a discordant strand of English[13] and Australian[14] judicial opinion, incurred the disapproval of the Privy Council which regarded legitimate expectation as synonymous with reasonable expectation. In keeping with a *cursus curiae* in England[15] Lord Fraser had no doubt that "Legitimate expectations in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis"[16].

Discrepant points of departure typifying Commonwealth law regarding the content of legitimate expectation, coupled with the unsatisfactory restriction in policy terms of an alien's right to a hearing to situations involving explicit representations by a public authority in respect of its course of conduct for the future, probably justified consideration of the broader question raised in argument before the Privy Council.

At common law, where entry of aliens into the realm was regulated by the Prerogative, unequivocal authority exists withholding from aliens the right to a hearing as a precondition of the validity of a deportation order.[17] Contrary to insistence that the right to a hearing is "fundamental and universal,"[18] the balance of judical authority in England and the Commonwealth has favoured insulation of problems concerning aliens from the impact of emergent liberal trends expressed in the doctrine of procedural fairness and in the extended rules of natural justice. The Court of Appeal of England, highlighting the distension of concepts rooted in fair dealing throughout the range of administrative adjudication, has supported the *caveat* that "In the case of aliens it is rather different".[19] In similar vein the assertion has been baldly made that an alien, save in circumstances characterised by pre-existing right, "can be refused (admission or continued residence) without reasons given and without a hearing."[20] A deportation order has been expressly treated as an exception to the right to be heard,[21] attention being called to the unsuitability of an implied condition predicating a hearing in the terms of a statutory instrument applicable to deportation[22]. The Supreme Court of New Zealand has insisted that "The case of aliens is firmly retained under a

13. *R.* v. *Criminal Injuries Compensation Board, ex p. Lain* (1967) 2 *Q.B.* 864; *R.* v. *Board of Visitors of Hull Prison, ex p. St. Germain* (*No.* 2) (1979) 1 W.L.R. 1401.
14. See the case cited at note 9, *supra*, at p. 34, *per* Stephen J.
15. *Supra.*
16. See page 4 of the opinion.
17. *R.* v. *Secretary of State for Home Affairs, ex p. Duke of Chateau Thierry* (1917) 1 K.B. 922.
18. *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180.
19. *Schmidt* v. *Secretary of State for Home Affairs* (1969) 2 Ch. 149 at p. 170, *per* Lord Denning M.R..
20. At p. 171.
21. *R.* v. *Governor of Brixton Prison, ex p. Soblen* (1963) 2 Q.B. 243 (C.A.) at p. 298, *per* Lord Denning M.R.; cf. *R.* v. *Leman Street Police Station Inspector and Secretqry of State for Home Affairs, ex p. Venicoff* (1920) 3 K.B. 72 (C.A.).
22. See *Soblen's* case, note 21 *supra*, at p. 316 *per* Person L.J.

different category".[23] Modification of the rules of natural justice *vis-a-vis* aliens has been advocated emphatically.[24] Moreover, there has been reluctance to recognise a distinction, for purposes of the general rule dispensing with a hearing in these cases, between the contexts of deportation and refusal of extension of a residence visa.[25]

Nevertheless, the transformed outlook of contemporary law, reinforced by a statutory framework of rules supplanting the Prerogative in this area in England[26] and in Commonwealth jurisdictions,[27] has been moulded by realities connected with "modern transportation and the mass population movements of the twentieth century."[28] The Hong Kong case furnished the Privy Council with a valuable opportunity of declaring the law in harmony with current policy requirements enjoined by greater international mobility in a changed environment.

A counterpoise to conservative attitudes, yet embedded in the prevailing law, is provided by the sweeping approach that "The absence of right or legitimate expectation is not a convincing reason for not enforcing the duty to act fairly in the making of a decision drastically affecting individuals."[29] But so radical an assumption is difficult to reconcile with established patterns of development of the law. Thus, in England where relevant legislation at one time conferred on Commonwealth citizens under the age of sixteen the right to be admitted to the country it has been held that a hearing should have been accorded to a boy who claimed that he was under sixteen,[30] but not to a Commonwealth citizen who sought entry into the United Kingdom to contract a marriage,[31] there being no right or reasonable expectation of any kind in the latter situation unlike in the former. In Australia[32] a broadly equivalent distinction has been drawn between a new application for a licence and an application for renewal of an existing licence, and the suggestion has been tentatively made that the application in the second case, but not necessarily

23. *Tobias* v. *May* (1976) 1 N.Z.L.R. 509 (S.C.) at p. 511, *per* Quillan J.
24. *R.* v. *Secretary of State for Home Affairs,* ex p. *Hosenball* (1977) 1 W.L.R. 766 (C.A.) at p. 778 *ad. fin.*, per Lord Denning M.R.
25. *Pagliara* v. *Attorney-General* (1974) 1 N.Z.L.R. 86 (S.C.) at p. 94, *per* Quillan J.
26. Immigration Appeals Act 1969 (U.K.) extended to aliens by S.I. 1970 No. 151; cf. Immigration Act 1971 (U.K.).
27. For Australia see Migration Act 1958 (Cwlth); cf., for New Zealand, Immigration Act 1964 (N.Z.).
28. *Chandra* v. *Minister of Immigration* (1978) 1 N.Z.L.R. 559 (S.L.) at p. 568, *per* Barker J.
29. H. W. R. Wade, *Administrative Law* (5th edition, 1982), p. 509.
30. *In re H.K.* (*An Infant*) (1967) 2 Q.B. 617 at p. 630, *per* Lord Parker C.J..
31. *R.* v. *Secretary of State for the Home Department, ex p. Avtar Singh* (Div. Ct., 25th July 1967).
32. *Salemi* v. *Minister for Immigration and Ethnic Affairs,* note 9 *supra* (H.C.A.) at p. 34 *per* Stephen J; cf. *Ex. p. Fanning, re Commissioner for Motor Transport* (1964) N.S.W.R. 1110 at p. 1112 (S.C.).

in the first, is sustained by a legitimate expectation.[33] Elements of this approach pervade the analysis of the rights of an illegal immigrant by the High Court of Australia.[34] In New Zealand it had been observed that "An overstayer after expiry of a temporary permit has no right to remain and usually no legitimate expectation."[35] The Court of Appeal of England has considered that "In cases where there is no legitimate expectation, there is no call for a hearing."[36]

A survey of judicial trends throughout the Commonwealth leaves no room for doubt that, although the dimensions of natural justice have been expanded crucially by innovative decisions, the limits of the extension are signified by the criterion of legitimate expectation. A pervasive premise of the case law is the resolve of judges to ensure that the developing law continues to be anchored to some vestiges of its traditional moorings. The accompanying restraint makes for balance between the postulates of administrative efficacy and individual freedom.

The flexible lineaments of procedural fairness could well be called in aid as the basis of useful mediating techniques in this branch of the law. While decisions relating to deportation and allied matters, by their very nature, call for the conferment of substantial discretion on the Executive, the width of this discretion is not incompatible with the incidence of rudimentary safeguards against arbitrary or capricious action.[37] An instrument of value in striking the requisite balance in relation to the treatment of aliens emerges from the duty to act fairly, representing as it does an intermediate standard between the plenary protection bestowed by the rules of natural justice and unqualified administrative discretion.

The caution that "Attempts to represent natural justice and 'acting fairly' as two different things are a sure sign of failure to understand that administrative powers are subject to the principles of natural justice"[38] derives support from some judicial pronouncements in England[39] and Canda.[40] It is clear, however, that policy objectives of practical importance are furthered by current judicial usage which recognises a quantitative difference between

33. For New Zealand, cf. *Movick* v. *Attorney-General* (1978) 2 N.Z.L.R. 545 (C.A.) at p. 550, per Woodhouse J.

34. *R.* v. *Forbes, ex p. Kwok Kwan Lee* (1971) 124 C.L.R. 168 (H.C.A.) at p. 173.

35. *Daganayasi* v. *Minister of Immigration* (1980) 2 N.Z.L.R. 130 (C.A.) at p. 143, *per* Cooke J.

36. *Cinnamond* v. *British Airports Authority* (1980) 1 W.L.R. 582 (C.A.) at p. 590, *per* Lord Denning M.R.

37. Cf. *Re Rogers* (1980) 23 B.C.L.R. 67 (S.C. of B.C.) at p. 72, *per* Wallace J.

38. H. W. R. Wade, *op. cit.*, note 29 *supra* p. 467.

39. *O'Reilly* v. *Mackman* (1982) 3 W.L.R. 1096 (H.L.) at p. 1100, *per* Lord Diplock.

40. *Moser* v. *R. in Right of British Columbia* (1981) 128 D.L.R. (3d) 695 (S.C. of B.C.) at p. 703, *per* Hinds J.

these concepts. Fairness has been characterised as "the minimum standard of justice"[41] entailing "something less than the procedural protection of traditional natural justice."[42] The minimal fetter imposed on administrative bodies and officials is underlined by the comment of a Canadian court that, to warrant the exercise of supervisory jurisdiction in these contexts, "(There) must be something more than unfairness, (there) must be manifest unfairness in light of the applicable procedures."[43] The distinct identity of the conceptions of natural justice and procedural fairness has been stressed in New-Zealand,[44] while a separate rationale which purports to link these doctrines with transgression of rights and jeopardy to interests, respectively, has been spelt out in Canada.[45]

The controlled degree of protection offered by procedural fairness has pragmatic utility in the area of treatment of aliens. In contrast with "all the safeguards of natural justice,"[46] the less exacting standard may well be complied with by a meaningful[47] or fair[48] opportunity to explain, notwithstanding that relevant particulars, especially sources of information, are not divulged.[49] In an analogous context it has been suggested in Canada that, where there is a legitimate interest in preserving confidentiality, the obligation of procedural fairness is satisfied by disclosing "the essence of any detrimental information."[50] Indeed, in exceptional situations involving, for instance, the conviction of an alien for grave crime, the duty to act fairly may be discharged in the absence of opportunity for a hearing.[51] Some elements of bias arising from preconceptions formed during properly constituted investigative procedures is not necessarily inconsistent with the obligation of fairness.[52] According to Canadian authority,[53] the decision of an immigration officer not

41. *Re Taylor and Law Society of British Columbia* (1980) 116 D.L.R. (3d) 41 (S.c. of B.C.) at p. 49, *per* Callaghan J.
42. *Re Soloniuk and Meewasin Valley Authority* (1980) 116 D.L.R. (3d) 34 (C.A. of Sask). at p. 41, per Woods J.A..
43. *Re Bazeau and Ontario Institute for Studies in Education* (1982) 134 D.L.R. (3d) 99 (Ont. H.C. of J., Div. Ct.) at p. 103, *per* Reid J.; cf. *Paine* v. *University of Toronto* (1981) 131 D.L.R. (3d) 325 (C.A. of Ont.) at p. 333, *per* Mackinnon A.C.J. where reference was made to "a flagrant case of injustice."
44. *Stininato* v. *Auckland Boxing Association* (Inc.) (1978) 1 N.Z.L.R. 1 (C.A.) at p. 5, *per* Richmond P; cf. *T. Flexman Ltd.* v. *Franklin Council* (1979) 2 N.Z.L.R. 690 (S.C.) at p. 695, *per* Barker J.
45. *Re Acro Pace Projects Ltd. and Birchfield* (1982) 133 D.L.R. (3d) 418 (S.C. of B.C.P. at p. 423, per Taylor J.
46. *R.* v. *Commission for Racial Equality, ex p. Hillingdon London Borough Council* (1982) Q.B. 276 at p. 287, *per* Lord Denning M.R.
47. *Re Canadian Radio-Television Commission and London Cable T.V. Ltd.* (1976) 67 D.L.R. (3d) 267 (F.C. of App.).
48. *Lazarov* v. *Secretary of State for Canada* (1973) F.C. 937 at p. 940 (F.C. of App.).
49. *R.* v. *Secretary of State for Home Affairs, ex p. Hosenball,* note 24 *supra.*
50. *Re Ruiperez and Board of Governors of Lakehead University* (1981) 130 D.L.R. (3d) 437 (Ont. H.C. of J., Div. Ct.) at p. 431, *per* Galligan J.
51. *R.* v. *Secretary of the State for the Home Department, ex p. Santillo* (1982) 2 W.L.R. 362.
52. *R.* v. *Secretary of State for Trade, ex p. Perestrello* (1981) Q.B. 19 at p. 35, *per* Woolf J.
53. *Re Ramnarain and Ellis* (1981) 129 D.L.R. (3d) 162 (Fed. Ct., F.R. Div.) at p. 165, *per* Walsh J.

to reopen an inquiry which had culminated in an exclusion order against an alien entails the duty to act fairly rather than the total gamut of natural justice. The vitality of the former concept is the result of its exceptional resilience,[54] for the substance of fairness depends on the nature of the inquiry and the gravity of the consequences attendant on its findings.[55] Procedural fairness, in its application to aliens, is capable of being curtailed appropriately by exceptions founded on legislative intent,[56] the quality of the subject matter[57] the exigencies of a given case[58] and the binding effect of contractual stipulations.[59]

Dominant trends in the decided cases reveal a tentative movement towards limited judicial control of executive discretion exercised in respect of deportation orders and ancillary matters. Principles relating to ulterior purpose[60] and advertence to the entirety of relevant considerations,[61] as implied restraints on the use of discretionary public power, have been applied in Australia in matters bearing upon immigration. Despite previous doubts,[62] recent Commonwealth authority leans towards the grant of a hearing before the execution, if not the making, of a deportation order.[63] It is unfortunate that the Privy Council[64] let slip an opportunity of making a beneficial extension of the law in accordance with the spirit of these antecedents.

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54. See the case cited at note 51, *supra.*
55. *Selvarajan* v. *Race Relations Board* (1976) 1 All E.R. 13.
56. *Hasma* v. *Canadian Wheet Board* (1981) 122 D.L.R. (3d) 706 (Ct. of A.B., Alberta) at p. 713, *per* MacDonald J.
57. *R.* v. *Minister for Immigration and Ethnic Affairs, ex p. Ratu* (1977) 14 A.L.R. 317 H.S.P. at p. 319, *per* Barwick C.J.
58. *Re Melesness and Minister of Social Services and Community Herlth* (1982) 132 D.L.R. (3d) 715 (Alberta C.A.) at p. 721, *per* Stevenson J.A.
59. *Australian National University* v. *Burns* (1983) 43 A.L.R. 25 (F.C. of App. Gen. Div.) at p. 31, *per* Bowen C.J. and Lockhert J.
60. *Drake* v. *Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577 (F.C.A., Gen. Div.) at p. 589-590, *per* Bowen C.J. and Deane J.
61. *Re Georges and Minister for Immigration and Ethnic Affairs* (1978) 22 A.L.R. 667 (Ada. Appeals Trib.) at p. 670, *per* Fisher J.
62. See *Soble's* case, note 21 *supra*, at p. 298-299, *per* Lord Denning M.R.
63. *R.* v. *Commissioner of Police, ex p. Ivusic* (1973) 20 F.L.R. 412 (S.C. of Austr. Cap. Terr.) at p. 428, *per* Connor J.
64. *Ceskovic* v. *Minister for Immigration and Ethnic Affairs* (1979) 27 A.L.R., 423 (F.C.A., Gen. Div.) at p. 425, *per* Smithers, St. John and Northrop JJ.