A legitimate expectation to what, exactly?

The Court of Appeal has considered whether the Secretary of State is required to give reasons for deciding not to 'call in' a planning application. Ralph Kellas considers the court's findings and its implications

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'Lewison LJ deemed it an important question whether the SoS is required to give reasons for his decision whether or not to call in planning applications. He therefore granted permission to appeal but limited relief to a declaratory judgment on this question.'

In *R (on the application of Save Britain's Heritage) v Secretary of State for Communities and Local Government* [2018], Save Britain's Heritage (Save) challenged the lawfulness of the Secretary of State's (SoS's) decision under s77 of the Town and Country Planning Act 1990 not to call in an application relating to the 'Paddington Cube' development. Save argued that the SoS should have given reasons for this decision because:

- given policy statements by the SoS, Save had a legitimate expectation that reasons would be given; and
- the SoS had a common law duty to give reasons for decisions not to call in applications.

The Court of Appeal's ruling is helpful in so far as it refines the law on the interaction between the exercise of statutory discretion and the public's legitimate expectation as to how such discretion may be exercised. It provides encouragement for potential legitimate expectations claimants.

The ruling is also disappointing. It confirms that the SoS was required to give reasons and that, correspondingly, Save could legitimately expect reasons. However, it stops short of addressing the *standard* of reasons required, leaving both the SoS and Save somewhat in the dark.

Section 77 discretion

Section 77(1) of the 1990 Act confers on the SoS the power to:

> ... give directions requiring applications for planning permission... to be referred to him instead of being dealt with by local planning authorities.

This discretion is wide: such a direction may be general or specific as to the local planning authorities (LPAs) and the application(s) to which it applies (s77(2)).

The SoS has published policies on how he will exercise this discretion. A written ministerial statement issued in October 2012 (the WMS) provides that the SoS will be 'very selective about calling in planning applications' and will do so 'in general, only… if planning issues of more than local importance are involved'. The WMS sets out a non-exhaustive list of potential 'examples' of such applications, including those which:

> ... in his opinion... may conflict with national policies... could have significant effects beyond their immediate locality... raise significant architectural and urban design issues [etc].

While the SoS has no statutory duty to give reasons for not calling in applications, in December 2001 a green paper announced that:

> ... in the interest of greater transparency, we will now, as from today, give reasons for not calling in individual cases and to put copies of these letters on the Department's website.

At around the same time, this policy was announced in Parliament (together, the 2001 statements).

Subsequently, the SoS's *Review of the call-in Process* (March 2012) affirmed the policy.

In early 2014 the SoS was said to have stopped including reasons in non-intervention letters. Since then, the SoS issued some 1,600 such letters. In practice, however, the language of the non-intervention letters changed little; the content was broadly the same both before and after this 'change' in approach.

The decision

The section 77 decision in question related to an application to Westminster City Council (the LPA) for planning permission and listed building consent for a major redevelopment, known as the Paddington Cube, adjacent to Paddington Station. The proposals included:

- the demolition of a historic Royal Mail Sorting Office, a wall within the curtilage of the listed station and a locally listed building; and
- the construction of a 14-storey glass office building, with restaurants and retail space at the ground floor, and a new public square.

The proposals were controversial. Save objected to the proposals on the basis of their impact on the surrounding heritage assets. The officer report recognised this impact but the committee resolved to grant permission.

Save made a request to the SoS to call in the applications for his own determination. The SoS responded in March 2017 confirming that he would not call in the applications, noting that the SoS had reached this decision 'having regard to [the call-in policy]' (the 2017 decision letter).

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While Save's initial aim was to prevent the development from proceeding, it brought judicial review proceedings impugning the SoS's decision not to call in the application. Save argued that:

- because of the 2001 statements (which had not been withdrawn) Save had a legitimate expectation that reasons would be given (the legitimate expectation ground); and
- there was a common law duty to give reasons applying generally to decisions under s77 or, alternatively, to this particular section 77 decision (the reasons ground).

The High Court dismissed both grounds (*R (on the application of Save Britain's Heritage) v Secretary of State for Communities and Local Government* [2017]). In particular, the court held that there could have been a legitimate expectation arising from the practice of giving reasons established by the policy announcements in 2001. However, the court held, by the time of the 2017 decision letter this practice had been superseded by an established practice of not giving reasons 'and so could not found an expectation that reasons would be given' (para 33).

Save sought permission to appeal on the same grounds. By this time, however, the LPA had granted the consents, rendering the claim academic. Nevertheless, Lewison LJ deemed it an important question whether the SoS is required to give reasons for his decision whether or not to call in planning applications. He therefore granted permission to appeal but limited relief to a declaratory judgment on this question. He refused to allow Save to use the challenge to the call-in decision as a vehicle to challenge the underlying planning permission.

Court of Appeal

The Court of Appeal dismissed the reasons ground but, contrary to the High Court, allowed the legitimate expectation ground. Coulson LJ gave the leading judgment in the Court of Appeal.

The reasons ground

The court dealt first with the reasons ground.

In arguing this ground, Save sought to rely on the Supreme Court's judgment in *Dover District Council v CPRE Kent* [2017] (*CPRE*), which was handed down after the High Court's judgment in *Save*. *CPRE* considered whether an LPA was required to give reasons for its decision to grant (despite an officer recommendation to refuse) planning permission for 'EIA development' partly within an area of outstanding natural beauty.

Save's reliance on *CPRE* was extremely difficult to sustain, particularly for its proposition of a general common law duty to give reasons. First, as Coulson LJ noted, Lord Carnwath's statements in *CPRE* on the common law duty to give reasons were *obiter* because, in that case, statute (the Town and Country Planning (Environmental Impact Assessment) Regulations 2011) imposed the requirement to give reasons (albeit only the 'main' ones).

Second, Lord Carnwath had affirmed the principle that there is no general common law duty and had noted the need for the court to:

> ... respect the exercise of Ministerial discretion, in designating certain categories of decision for a formal statement of reasons.

The common law duty is limited to filling the gaps where there is no statutory duty to give reasons and

where fairness requires or special circumstances apply. As such, Coulson LJ found, it was impossible to reconcile the proposition of a general common law duty with the statements in *CPRE*.

The court also rejected the second element of the reasons ground: that the common law duty to give reasons applied to this particular case. Applying *CPRE*, the court found that, although:

- 'at least some' of the call-in criteria were engaged; and
- the decision on the applications had been taken by the minister himself,

it did not follow that the common law would step in to impose a duty to give reasons.

Rule over pragmatism

Coulson LJ's reasoning on this ground goes further than the Supreme Court in *CPRE* in circumscribing the common law. He noted the practice that has grown up of making call-in requests to the SoS following resolutions. Coulson LJ recognised that s77 might be seen as providing a kind of *de facto* means of appeal against resolutions on planning applications. However, Coulson LJ said, that was not the original intention of s77. Rather:

> ... the section postulates a simple binary choice as to whether it is the SoS or the LPA who 'deals with' an application.

Citing Edwards-Stuart J in *Saunders v Secretary of State for Communities and Local Government* [2011], Coulson LJ observed that a section 77 decision 'is… "the exercise of a procedural discretion", and reasons are not required'. He went on to conclude that:

> There are no good legal policy reasons (let alone strong ones) which require reasons to be given for a decision which is procedural only, and which is not directly determinative of the relevant parties' rights and obligations.

This reasoning sat uneasily with Singh LJ, who stated that he would:

> ... not necessarily accept the apparent breadth of the principle... that the common law would never impose a duty to give reasons for the exercise of a discretion simply because it can be characterised as a 'procedural' discretion.

This caution seems sensible. The theoretical tidiness of Coulson LJ's approach may be attractive, but it is out of kilter with the common law's pragmatic, case-by-case approach. In any event, procedural decisions can affect people's rights and obligations. The distinction between 'procedural' and 'substantive' decisions has the potential to cut across the possibility of 'fairness' or 'special circumstances' justifying the imposition of the common law duty to give reasons. Indeed, the use of s77 itself can lead to people's rights and obligations being different from what they would have been otherwise – ie where an LPA makes a resolution on an application but the SoS calls it in and makes the opposition decision.

The Court of Appeal disagreed with the High Court's conclusion that the promise, and the legitimate expectation which it generated, had been superseded by an 'established practice' that reasons would not *be given.*

Legitimate expectation ground

As to the legitimate expectation ground, Coulson LJ began by distinguishing two categories of cases, either of which can arise in the planning context:

- cases where a public authority's *express promise* gives rise to a legitimate expectation; and
- cases where a *practice* carried on by a public authority generates a legitimate expectation.

Coulson LJ was clear that the present case was a 'promise' case.

Coulson LJ then reviewed the leading 'promise' authorities, arriving at the (para 39):

> ... proposition that, if a public body indicates a clear and unequivocal policy that will be followed and applied in a particular type of case, then an individual is entitled to expect that policy to be operated, unless and until a reasonable decision is taken that the policy be modified or withdrawn ([*United Policyholders Group v AG of Trinidad and Tobago* [2016]]), or implementation interferes with that body's other statutory duties ([*AG of Hong Kong v Ng Yuen Shiu* [1983]]).

In the present case, Coulson LJ found that a legitimate expectation of reasons for non-intervention had 'plainly' arisen. There had been an express, unequivocal promise in the 2001 statements, which had not been withdrawn or modified by any subsequent express statement.

The Court of Appeal disagreed with the High Court's conclusion that the promise, and the legitimate expectation which it generated, had been superseded by an 'established practice' that reasons would *not* be given. Coulson LJ considered that this may have confused a 'promise' case with a 'practice' case. He accepted that where a legitimate expectation had been created by a *practice*, which subsequently changed, the legitimate expectation that the former practice would be followed 'might well disappear with [that change]'. Where, however, a published promise had given rise to a legitimate expectation, and the promise had not been changed or withdrawn, a divergent practice alone could not end that legitimate expectation.

Coulson LJ noted that the circumstances surrounding the decision to change the template non-intervention letter were unclear. It appeared that the change had been effected without awareness of the 2001 promise, and that this promise 'was never consciously withdrawn'. This reinforced the proposition that

the legitimate expectation could not have been superseded. The judge warned of the 'administrative chaos' which could ensue if legitimate expectations generated by unequivocal ministerial promises could be ended by 'unadvertised change[s] of practice'.

law claim based on an unequivocal promise is not to be treated as if it were some species of estoppel' (para 50). He continued: 'A promise made to the world is enough to found a legislative [sic] expectation claim' (para 50). This is consistent with

If a public authority has published a policy (which does not interfere with statutory duties), it must stick to that policy; if the public authority wants to depart from that policy, it must make public the decision to do so.

Accordingly, the court allowed this ground and made the declaration:

> ... that the SoS was required to give reasons for any decision whether or not to call in applications for planning permission and/or listed building consent for his own determination under s77.

Clarification

The Court of Appeal affirmed (contrary to the SoS's submission) that detrimental reliance was not necessary to found a public law legitimate expectation claim. The language of estoppel (for which detrimental reliance is required) featured in some of the early public law legitimate expectation cases (eg *Wells v Minister of Housing and Local Government* [1967] and *Lever (Finance) Ltd v City of Westminster* [1970]). For Coulson LJ, though, 'a public

R v East Sussex County Council, ex parte Reprotech (Pebsham) Ltd [2002] where the House of Lords acknowledged the analogy between public law legitimate expectations and the private law estoppel but confirmed that it is no more than an analogy.

In other words, the bar for public law legitimate expectation claims is low. It will be interesting to see whether more legitimate expectation claims are made. In any event, if the ruling spurs claims which challenge one decision as a proxy attack on another decision, as Save attempted here, that would not be welcome.

Premises

The court's ruling on the legitimate expectation ground can be distilled into the following: if a public authority has published a policy (which does not interfere with statutory duties), it must stick to that policy; if the public authority wants to depart from that policy, it must make public the decision to do so.

This statement of law rests principally on two premises. The first is the need for *good administration* (*AG of Hong Kong*). The second, related, premise is the need for the policy to be *known* or at least *knowable* in order that an individual can make representations in relation to it. In this regard, Coulson LJ quoted Lord Dyson JSC in *Lumba v Secretary of State for the Home Department* [2011], in turn quoting Stanley Burnton J in *Salih v Secretary of State for the Home Department* [2003] at para 52, that:

> ... it is in general inconsistent with the constitutional imperative that statute law be made known for the government to withhold information about its policy relating to the exercise of a power conferred by statute.

This reflects the rule of law maxim that rules should be open, general and clear, in order that people may plan and act accordingly (eg Raz, J 'The Rule of Law and its Virtue' (1977) 93 LQR 195).

A legitimate expectation of what, exactly?

The assertion of these values is all very well. However, the judgment itself stopped short of providing the guidance which is now needed. While the judgment confirms that reasons should be given for any section 77 decision, the SoS is left not knowing what *standard* of reasons

is required. Correspondingly, the public do not know what, exactly, they may legitimately expect in terms of reasons.

Although the issue of the standard of reasons was outside the scope of the appeal, it is of immediate practical importance. How should the SoS now deal with requests for call-ins (and with applications required to be referred to him under the Town and Country Planning (Consultation) (England) Direction 2009)? The SoS could decide to publicly revoke/supersede the 2001 statements, and that would be the end of the matter. Alternatively, the SoS may want to stick to the 2001 statements after all. In any event, until the SoS does revoke or supersede the 2001 statements, reasons will need to be given for any section 77 decision and the SoS will need to decide how detailed those reasons need to be.

In *City of Westminster v Secretary of State for Communities and Local Government* [2014], Collins J held that although reasons did not need to be given for section 77 decisions, if reasons were given, they could be examined for errors of law. The SoS will be wary of falling foul of this while ensuring that the resources dedicated to reason-giving are proportionate.

According to the evidence presented in court, the non-intervention letters changed very little in 2014 when the supposed decision not to give reasons was made. Coulson LJ noted that the pre-2014 letters provided only very brief reasons. One such letter:

> ... identified the relevant policies and simply said that 'the application does not, in the SoS' view, raise issues of such wider significance requiring determination by him'.

'Typical' post-2014 letters likewise identified the relevant policies and 'went on to say that, having regard to those policies, the SoS "has decided… not to call in this application…"'.

The 2017 decision letter was not materially different. It stated that the SoS had 'carefully considered this case against the call-in policy, as set out in the [WMS]'. It identified the elements of the WMS and concluded that 'The [SoS] has decided, having had regard to this policy, not to call in this application'. Earlier in the proceedings it was argued that the 2017 decision letter did, in fact, give sufficient reasons. This argument was not pursued at the Court of Appeal. If it had been pursued, the court may have pronounced on whether or not the 2017 decision letter provided sufficient reasons. In the event, the conclusion which Coulson LJ drew from the similarity between pre-2014 and post-2014 decision letters was that there was no change of *practice* which the SoS could rely on to demonstrate that the legitimate expectation had been overtaken.

Consequently, the questions are:

- whether a non-intervention letter which refers to the elements of the WMS, and states that the decision was made having regard to those elements, constitutes a reason; and
- if it does, whether that is adequate.

It is beyond the scope of this article to consider these questions in detail. However, the following factors would be relevant to such a consideration:

- Section 77 itself imposes no express constraints on the exercise of the call-in power.
- While the call-in policy provides indicators as to how the SoS will make a decision, it preserves the SoS's wide discretion. The WMS is couched in very loose terms: the SoS 'will, *in general*, only *consider* the use of his call-in powers' (emphasis added). Cases in which the SoS may use the call-in power 'may' (and therefore, presumably, may not) 'include' (non-exhaustive) 'those which in his opinion' fall within the listed 'example' scenarios. These examples are themselves couched in uncertain language.
- The *South Bucks* principles (which were upheld in *CPRE*) state that the reasons must:
  - not give rise to a substantial doubt as to whether the decision-maker erred in law;
  - be intelligible; and
  - enable the reader to understand what conclusions were reached on the principle issues (*South Bucks District Council v Porter* (No 2) [2004]).

The Court of Appeal in *Save* was somewhat detached from the practical reality behind the appeal. The ruling confirms an abstract obligation and an abstract legitimate expectation, leaving the parties unclear as to where they stand. As can be seen from *South Bucks*, the question of the adequacy of reasons is highly fact-sensitive. It does not lend itself to general legal statements. The SoS's best course is therefore to decide whether or not to publicly supersede the 2001 statements. Whatever policy prevails the SoS will need to stick to it. ■

AG of Hong Kong v Ng Yuen Shiu [1983] UKPC 7

City of Westminster & anor v Secretary of State for Communities and Local Government [2014] EWHC 708 (Admin)

Dover District Council v CPRE Kent [2017] UKSC 79

Lever (Finance) Ltd v City of Westminster [1970] EWCA Civ 3

Lumba v Secretary of State for the Home Department [2011] UKSC 12

R v East Sussex County Council, ex parte Reprotech (Pebsham) Ltd [2002] UKHL 8

R (on the application of Save Britain's Heritage) v Secretary of State for Communities and Local Government [2017] EWHC 3059 (Admin); [2018] EWCA Civ 2137

Salih & anor v Secretary of State for the Home Department [2003] EWHC 2273 (Admin)

Saunders v Secretary of State for Communities and Local Government [2011] EWHC 3756 (Admin)

South Bucks District Council & anor v Porter (No 2) [2004] UKHL 33

United Policyholders Group & ors v AG of Trinidad and Tobago [2016] UKPC 17

Wells v Minister of Housing and Local Government [1967] 1 WLR 1000