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Some Effects of European Law on English Administrative Law

YVONNE CRIPPS*

In this article, Dr. Cripps discusses how European law has affected English law in recent decades, particularly with regard to the constitutional supremacy enjoyed by the English legislative branch. She notes the reception by English judges of concepts of legitimate expectation and proportionality previously recognized in some European Community nations. Dr. Cripps predicts that the English bench will be increasingly willing to take European law into account in their decisionmaking.

I. INTRODUCTION

Current doubts about the European exchange-rate mechanism and ratification of the Treaty of Maastricht will be of concern to those seeking closer European union, but such difficulties do not detract from the impact that European law—both in terms of European Community law and the domestic law of European nations—has already had upon the domestic administrative law of Britain. This article is mainly concerned with what might be called the osmotic effects of European law. These effects are created by principles of European law which, even when not directly applicable through European Community law, are either indirectly derived from Community law or from legal doctrines that feature in the jurisprudence of individual European states and then filter through into English domestic administrative law. This article does not dwell on principles such as equality and legal certainty. These are part of Community jurisprudence but have not been expressly and independently voiced in English common law as a result of European influences outside the sphere of applicable Community law.

* Director of Studies in Law, Emmanuel College, University of Cambridge. I would like to thank Dean Alfred C. Aman for making this lecture possible and to acknowledge my debt to his book, ADMINISTRATIVE LAW IN A GLOBAL ERA (1992).
II. THE BACKGROUND: SOVEREIGNTY AND REMEDIES

Since the passage of the European Communities Act 1972, which incorporated the Treaty of Rome into English domestic law, the fundamental English constitutional doctrine of parliamentary sovereignty has been limited in certain fields. The English constitution does not embody a real or even a putative separation and balancing of powers of the kind that exists in the United States. In England prior to 1972 the legislative branch was unquestionably supreme. Its legislative acts could not be directly challenged in the courts if they were validly passed. In the post-1972 era the legislative branch still occupies a very dominant position in relation to the other branches in the United Kingdom. Even if a sovereign parliament could by entrenchment fetter its power to repeal legislation, there is no purported fetter of this kind in the European Communities Act, and thus parliament could repeal it.

The judicial, legislative, and executive branches in Britain are not only not equal, but also not separate. The British Prime Minister, for example, is a pivotal member of both the legislative and executive branches, while the Lord Chancellor is a member of all three branches. This is the background against which the European Court of Justice (the Court of the European Communities) and the English courts have had to decide issues of sovereignty. There can be little doubt that, in certain areas, the English parliament ceded sovereignty to the Community in the 1972 European Communities legislation. But, at first, some English judges, led in this matter by the redoubtable Lord Denning, were reluctant directly to acknowledge any cession of sovereignty to foreign institutions.

The matter has, however, been addressed by the House of Lords and the European Court of Justice, most notably in the Factortame litigation, which involved an English statute alleged to be in conflict with European Community law. In Factortame, the applicant company, which was largely Spanish-owned, applied to the English High Court for judicial review of administrative action on the grounds that certain provisions in the Merchant Shipping Act 1988 were in conflict with Community law. The provisions,

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1. The Single European Act of 1986 was incorporated into English law by the European Communities (Amendment) Act 1986.
3. Merchant Shipping Act, 1988, ch. 12 (Eng.).
if applied, would have prevented Factortame from registering its fishing vessels in the United Kingdom because the company was not at least seventy-five percent British-owned. The High Court, using the reference procedure provided for in article 177 of the Treaty of Rome,\(^4\) requested that the European Court give a preliminary ruling interpreting Community law on this issue. Factortame also requested interim relief in an attempt to suspend the operation of the relevant part of the Merchant Shipping Act until the European Court had given its decision on the alleged conflict between the Act and Community law. At a later stage the House of Lords (using the article 177 procedure) referred to the European Court the question whether Community law required that interim relief be given by the national court pending a determination by the European Court on the question of compatibility with Community law. The European Court answered that question in the affirmative, and on the reference back from the European Court to the House of Lords, their lordships granted an interim injunction pending the European Court’s decision on incompatibility.\(^5\) In a separate judgment, the European Court eventually declared that nationality requirements of the kind under dispute in \textit{Factortame} did not conform to Community law.\(^6\)

So we see in this litigation a successful attack by the applicants on the validity of English legislation in a country which, outside a Community context, acknowledges no equivalent of \textit{Marbury v. Madison}.\(^7\) Community law was clearly dominant, and the mere possibility of incompatibility between national law and Community law led to the creation of an exception to what had been viewed by English judges as a lack of jurisdiction to grant interim relief against the Crown since the passage of the Crown Proceedings Act 1947.\(^8\) The House of Lords in \textit{Factortame} held that this could not prevent an English judge from granting relief where Community law, as elucidated by the European Court of Justice, required that course of action.

\(^{6.}\) \textit{Id.}
\(^{7.}\) \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137 (1803).
\(^{8.}\) Crown Proceedings Act, 1947, 10 & 11 Geo., ch. 44 (Eng.).
There was no question of damages in *Factortame*. However, a claim for damages was in my view erroneously rejected\(^9\) by the English Court of Appeal in the *Bourgoin S.A. v. Ministry of Agriculture, Fisheries & Food* case\(^10\) in respect of an alleged breach of the Treaty of Rome. The decision of the European Court of Justice in the *Francovich* case\(^11\) establishes that individuals can claim damages against Member States if they suffer harm as a direct result of the State's failure validly to implement a directive that is for the benefit of individuals. This decision may well have far-reaching effects in other situations in which damages are sought for breaches of Community obligations, and it seems very likely that the *Bourgoin* case would have been decided differently had it occurred after *Francovich*. The European Commission is currently considering whether either the European Court or the Commission should be given the power to fine Member States which do not comply with judgments of the Court or which fail to transpose directives. The *Francovich* case offers a more subtle way of dealing with the latter situation.

In terms of national sensitivities it is important to note that the article 177 reference procedure does not give the European Court the power to interpret or strike down domestic law. Article 177 grants the European Court jurisdiction to give preliminary rulings concerning, inter alia, the interpretation of the Treaty to the extent that, where such a question is raised before a court or tribunal of any Member State, the court or tribunal may, if it considers that a decision on the question is necessary in order to give judgment, request the European Court to give a preliminary ruling on the issue. Thus, the discretion concerning whether and when to refer is left to the national court, and the European Court does not in theory interfere with the domestic law.\(^12\) It is ultimately for the domestic court to decide the validity of the domestic law in light of the ruling given by the European Court on the meaning or validity of the Community law. In this way the sensibilities of national courts are preserved in cases of incompatibility, although in practice the domestic court may be left with little choice but to comply with a ruling by the European Court. It must also be remembered

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that, because the Treaty of Rome has been incorporated into English domestic law, national courts may determine questions of incompatibility between Community law and domestic law without referring to the European Court.

Another major European treaty to which Britain has acceded is the European Convention on Human Rights and Fundamental Freedoms 1950, but this treaty has not been incorporated into English domestic law and thus its effects are, at best, indirect. The European Convention on Human Rights and Fundamental Freedoms created the European Court of Human Rights which is based in Strasbourg and must not be confused with the European Court of Justice based in Luxembourg. As its title suggests, the European Convention enumerates certain fundamental rights and freedoms. These resemble quite closely the amendments to the Constitution of the United States. The Treaty of Rome, the primary European Community treaty, does not concern itself in express terms with as wide an array of rights and freedoms. The European Court of Justice has, however, developed some general principles of law through which the interests of persons in Member States of the Community may be safeguarded. These principles include the concept of proportionality.

III. PROPORTIONALITY

Proportionality is an example of a concept that is part of Community law and which is sometimes applied in English courts as a direct result of Community law. At other times it appears in English law as a result of indirect Community influences or influences from the domestic law of other European States or because of the indirect effect of the European Convention on Human Rights and Fundamental Freedoms.

The concept of proportionality appears first to have been recognized as a general principle of law in Germany, but it has also been applied in a wide range of cases in France, the Netherlands, and other Member States of the European Community. Perhaps the best summary of the principle is to be found in a set of guiding principles attached to a Recommendation of the Committee of Ministers of the Council of Europe, in which one of the

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principles recommends that an administrative body "maintain a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues."\textsuperscript{15} This extends far further than the Eighth Amendment prohibition on excessive fines and cruel and unusual punishment.

The application of proportionality in English law as a direct result of European Community law is illustrated by \textit{Regina v. Intervention Board for Agricultural Produce, ex parte E.D. & F. Man (Sugar) Ltd.}\textsuperscript{16} An exporter who wished to export sugar to a country that was not a member of the European Community had to obtain a license from the appropriate national organization. An applicant was required to deposit a sum to guarantee that the export was effected during the five-month period of the license. The deposit was lodged when the exporter submitted a tender to the organization. If the tender was accepted, he was required to apply for a license within a specified period. Article 6(3) of Commission Regulation 1880/83 provided that the security was forfeited if the exporter did not apply for the license within the specified period, except in a case of force majeure. As a result of an oversight, Man (Sugar) Ltd. did not apply for the license until an hour or two after the expiration of the period and therefore forfeited the whole sum deposited. The company sought, in the Queen's Bench Division of the English High Court, the repayment of the security, arguing that the decision concerning forfeiture was invalid. On a reference from the English High Court under article 177 of the Treaty, the European Court ruled that article 6(3) was invalid since it offended the principle of proportionality.\textsuperscript{17} The forfeiture of the whole of the security for an infringement of the obligation to obtain a license, which was less serious than the failure of the primary obligation to export (which the security itself was designed to guarantee), was too drastic a penalty. The Divisional Court of the English High Court was then faced with an application for judicial review brought by the company, which sought a declaration that the decision that the security be forfeited was unlawful and invalid. In the light of the finding by the

\textsuperscript{15} Concerning the Exercise of Discretionary Powers by Administrative Authorities, Recommendation No. R(80) 2 of the 11th of March 1980. The Council of Europe, founded in 1949, is the international organization under the auspices of which the European Convention on Human Rights and Fundamental Freedoms was drafted.


\textsuperscript{17} \textit{Id.}
European Court that article 6(3) of Regulation 1880/83 was invalid because it breached the proportionality principle, the Divisional Court declared that the decision to forfeit the security was invalid.\(^\text{18}\)

In this case, the English courts were giving effect to the principle of proportionality because of relevant Community law. Proportionality may also be regarded as an applicable principle outside the sphere of judicial review applications. There are references to proportionality in cases under the European Convention on Human Rights. For example, in the *Sunday Times v. United Kingdom* case,\(^\text{19}\) the European Court of Human Rights held that the restriction imposed on the plaintiff's freedom of expression "proves not to be proportionate to the legitimate aim pursued."\(^\text{20}\)

The right to freedom of expression described in article 10 of the European Convention on Human Rights\(^\text{21}\) was considered by the English courts in the "Spycatcher" litigation. At first instance in one of the domestic "Spycatcher" proceedings\(^\text{22}\) Scott J. observed that:

> [t]he public interest in freedom of the press to report the court action outweighs, in my view, the damage, if any, to national security interests that the articles might, arguably, cause. I can see no "pressing social need" that is offended by these articles. The claim for an injunction against these two newspapers was not, in my opinion, "proportionate to the legitimate aim pursued."\(^\text{23}\)

Lord Goff also adopted these words in the decision of the House of Lords in the same case.\(^\text{24}\) Yet it might be argued that their lordships were doing no more in this litigation than simply exploring the equitable discretionary features of injunctive relief.\(^\text{25}\)

A less ambiguous example of the circumstances in which proportionality may apply in an English case is found in *Regina v. Barnsley Metropolitan*

\(^{18}\) Id. at 126.


\(^{21}\) European Convention, supra note 13, art. 10.


\(^{23}\) Id. at 164-65.

\(^{24}\) Id. at 290.

Borough Council, ex parte Hook. The Barnsley Borough Council had suspended a market stall-holder’s license to trade after he behaved offensively in the street. The Court of Appeal quashed the Council’s decision on the ground that the stall-holder had not had a fair hearing, which is one of the well recognized elements of English natural justice—the equivalent of due process. But Lord Denning was also prepared to quash the decision on the ground that the punishment was altogether excessive and out of proportion to the occasion. He clearly felt that effectively to deprive the man in question of his livelihood was out of proportion to his misconduct.

Unfortunately, however, the proportionality principle has not received the unqualified support of English judges. In Regina v. Secretary of State for the Home Department, ex parte Brind the House of Lords held that proportionality did not exist as a distinct principle of English law outside the head of review of administrative discretionary power for unreasonableness—the equivalent of review of arbitrary and capricious administrative behavior in the United States. Brind involved an application by various journalists employed by the BBC and the Independent Broadcasting Authority (IBA). These journalists sought a declaration that the Home Secretary acted illegally when he banned representatives of certain Irish organizations from speaking on television or radio (as opposed to through television actors or journalists reading or repeating their statements for them). The journalists also sought certiorari to quash the decisions of the Home Secretary. It is interesting to note that there is an even wider ban in the Republic of Ireland by the Irish authorities themselves, which extends to the reporting or repeating of the words of the banned organizations. The journalists argued that the Home Secretary’s decisions were unlawful on several different grounds. One ground was that the Home Secretary had gone beyond the lawful use of his powers, under section 29(3) of the Broadcasting Act 1981 in relation to the IBA and in relation to the BBC, under certain clauses of the license and agreement contained in a deed made between the Secretary of State and the BBC—the terms of the Act and the agreement were not materially different. It was argued that the Secretary of State had gone beyond the lawful use of those powers because his directions

to the BBC and the IBA were out of proportion to the mischief that he sought to avoid.

Another ground was that the Secretary of State's decisions were unreasonable in the narrow sense of being absurd. Their lordships in the House of Lords concluded that counsels' arguments on lack of proportionality were simply an aspect of their challenge on the grounds of what is known in England as Wednesbury unreasonableness. The Court of Appeal went somewhat further than either the Divisional Court or the House of Lords in Brind in acknowledging the existence of proportionality as a separate ground for review. Lord Donaldson, then Master of the Rolls, referred to Lord Diplock's speech in Council of Civil Service Unions v. Minister for the Civil Service (where Lord Diplock described proportionality as a possible ground for judicial review) and noted the existence of the principle in European Community law. He pointed out that the judicial review jurisdiction had been developed and was still being developed by the judges. But he also warned of the danger of a principle like proportionality leading the courts into an assessment of the substance rather than the legality of administrative decisionmaking. Ultimately, their lordships in the House of Lords decided that the decisions of the Secretary of State that were challenged in Brind were not narrowly unreasonable (or absurd) and thus the journalists failed in their application.

We have by no means heard the last of the principle of proportionality as a separate head of review in England. We have noted that the proportionality principle evolved in certain Member States of the European Community, and it may well prove to be significant that Sir Gordon Slynn, speaking at the Law Society's Annual Conference in October 1991, after the Brind case, suggested that the proportionality principle was likely to become an important feature of English law. Sir Gordon, who was Britain's judge at the European Court of Justice and is fervently pro-European, has now been appointed to the House of Lords, where he is almost certain to emphasize the European dimension of administrative law.

It seems to me that judges should be as specific as possible about their grounds for attacking a decision. They should not, for example, hide behind the broad sweep of unreasonableness if disproportionality is really the problem. References to Wednesbury unreasonableness have been sprinkled

very liberally through English judicial review cases in recent years, and there is a danger that judges’ motives will fall under suspicion if they refuse to divide unreasonableness into separate, more specifically identified grounds for review. It cannot, however, be denied that a separate head of review of disproportionality may facilitate challenges to administrative action when that action might not otherwise be held to be so unreasonable as to be absurd in the narrow Wednesbury sense.

IV. LEGITIMATE EXPECTATIONS

Like proportionality, legitimate expectations are recognized in the domestic law of some European nations, notably Germany. They too apply in Community law and in English domestic law, even when there is no relevant issue of Community law. Legitimate expectations have also been invoked under the European Convention on Human Rights and Fundamental Freedoms.30

In very broad terms, an entity may have a legitimate expectation of fair procedure in decisionmaking or, to use another formulation of the concept, a legitimate expectation may act in law to provide the holder of the expectation with protective safeguards without which he cannot validly be deprived of the thing that he expects. A legitimate expectation may also confer standing on the holder of the expectation.31

Under Community law, nation-states may hold legitimate expectations. For instance, in Case 84/85, United Kingdom v. Commission of the European Communities,32 the European Court of Justice declared void a European Commission decision of December 1984 that reduced the grants to the United Kingdom from the European Social Fund for the 1984 financial year. The decision was held to be void because it ignored the legitimate expectation of the United Kingdom that the methods of calculation would not be different from those previously announced.

The first English judge to employ the term "legitimate expectation" was Lord Denning in *Schmidt v. Secretary of State for Home Affairs*.  

Schmidt, a scientologist, had been unsuccessful in his application to remain in the United Kingdom beyond the period specified in his entry permit. When he appealed, the Court of Appeal held that the Home Secretary had not acted unfairly by failing to give him an opportunity for a hearing, in that Schmidt had no right to continue to stay in the country and no legitimate expectation of so doing. He only had a legitimate expectation of staying (and, it was suggested, the chance of a hearing) with regard to the period up to the expiration of his permit. This therefore seemed to indicate that a promise or undertaking could create a duty to act fairly with regard to the promise or undertaking if it had been relied upon. The particular words used are especially important in terms of the controversy over whether legitimate expectations provide only procedural protection or actually guarantee an expected substantive outcome. Lord Denning observed that the protections of fairness would in part depend on "whether he has some right or interest, or, I would add, some legitimate expectation of which it would not be fair to deprive him without hearing what he has to say." This passage suggests that what is envisaged is an obligation to afford the relevant person an opportunity to present his case before any decision is taken that could thwart his legitimate expectation. Compared with those in most of the later cases, Lord Denning’s formulation here is a slightly unusual one in that it suggests that if a legitimate expectation had existed in *Schmidt*, it would, in terms of Lord Denning’s words in the quoted passage, have been a legitimate expectation of staying in the country, of which Schmidt could not be deprived without a hearing, rather than a legitimate expectation of a hearing. But with either formulation, the protection of the courts would not extend beyond ensuring that lawful procedures were followed before a ministerial decision was taken on the substantive immigration issue.

Lord Denning adopted the same approach a short time later in *Breen v. Amalgamated Engineering Union* where, as the dissenting judge in the

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33. Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch. 149.
35. Schmidt [1969] 2 Ch. at 170.
Court of Appeal, he restated his view that a person should not be deprived of a legitimate expectation without a hearing. He seemed to see this as part of the duty to act fairly—a duty that in England is normally associated with the rules of natural justice. Breen had not been given a hearing or a statement of reasons before a trade union committee had refused to approve his election as a shop steward. All their lordships agreed that the committee was under a duty to act fairly but Lord Denning, alone in referring to Breen’s legitimate expectations, was the only member to decide that the committee had not in fact acted fairly.

Another major case on legitimate expectations is Attorney General of Hong Kong v. Ng Yuen Shiu,37 a decision of the Privy Council on appeal from Hong Kong which might appear in some future lecture in this series as an illustration of the osmotic spread of European principle via the Privy Council to the “Empire.”38 In the Hong Kong case their lordships decided that the respondent illegal immigrant, because of the words “each case will be treated on its merits,” had a legitimate expectation of a hearing. Legitimate expectations were said to include expectations that were not legally enforceable, although the court felt that there must be a reasonable basis for the expectation. Lord Fraser noted that “the principle that a public authority is bound by its undertakings as to the procedures it will follow, provided they do not conflict with its duty, is applicable to the undertaking given by the Government of Hong Kong to the applicant.”39

A general doctrine of estoppel is far from established in English law and decisionmakers must not fetter their discretion in advance; hence their lordships’ emphasis on procedure rather than substance. In addition to the passage cited above, Lord Fraser, referring to Regina v. Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators’ Association,40 interpreted the court order in that case as being “limited to ensuring that the corporation followed a fair procedure by holding an inquiry before reaching a decision: provided such procedure was followed, the decision was left with the corporation to whom it had been entrusted by Parliament.”41 Thus

38. Compare, however, the Ng Yuen Shiu decision with the decision of the Privy Council on appeal from New Zealand in Butcher v. Petrocorp Exploration Ltd. [1991] 1 N.Z.L.R. 641.
it is clear that what their lordships envisaged in the Hong Kong case was "merely"—if one can use that word in such a context—the protection of the legitimate expectation of a hearing, or the equivalent of procedural due process in the United States.

The decision of the House of Lords in the Council of Civil Service Unions case also contains a discussion of legitimate expectations—expectations that were then ignored by their lordships on the basis of a perceived risk to national security. In this case, Lord Diplock attempted to elaborate upon, or at least explain, the nature and effect of a legitimate expectation. He indicated that legitimate expectations may arise either when a person is affected because rights or obligations that are enforceable by or against him in private law are altered, or because an express promise is given on behalf of a public authority, or because a regular practice exists that the claimant can legitimately expect to continue. To that one can also add that legitimate expectations may arise from a newly adopted policy guideline as in Regina v. Secretary of State for the Home Department, ex parte Khan.

The House of Lords confirmed in the Civil Service Unions case that the concept of legitimate expectations is part of English law. Their lordships observed that legitimate expectations are now firmly entrenched in administrative law and are closely connected with the "right to be heard." They also observed that an expectation may take many forms. There may be an expectation of prior consultation or an expectation of being allowed time to make representations, especially where the aggrieved party is seeking, on account of exceptional circumstances, to persuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power. Their lordships also noted that the application of the concept did not depend upon the existence of a private right and even went so far as to suggest that a legitimate expectation could be based on a benefit or privilege that conflicted with the private law rights of the holder of the expectation. The Civil Service Unions case led to a
dramatic growth in applications based on legitimate expectations. Robert Riggs points out that more than three times as many expectation cases were decided between 1985 and 1987 as in all the previous years combined.⁴⁶

None of what has been put forth so far is intended to suggest that legitimate expectations only arise as a result of promises or established practices or, as Lord Diplock remarked in the *Civil Service Unions* case, the withdrawal of benefits.⁴⁷ In *Regina v. Secretary of State for Transport, ex parte Greater London Council*,¹⁰ McNeill J. reviewed the Secretary of State’s direction to the Greater London Council (GLC) to pay 281 million pounds to London Regional Transport. This direction was made without consulting the GLC, not least, one suspects, because the Secretary of State had not had a past practice of consulting with the GLC (this also meant that there could be no suggestion of withdrawal of a benefit previously enjoyed). Nor had the Secretary of State promised or indeed suggested that he would consult the GLC. Despite this, the judge, after reviewing the legitimate expectations cases, simply declared that:

Parliament had legislated for a maximum payment in the initial year. That assumes that less than the maximum could be directed. Whichever phrase be used—duty to act fairly, legitimate expectation, a right to be heard—it seems to me that natural justice entitles the payer at least to make representations to the effect that he should not pay the maximum, but some lesser sum.⁴⁹

With regard to legitimate expectations arising from ministerial policy guidelines, the *Khan* case⁵⁰ arising only a matter of months after the *Hong Kong* case, is sometimes, and in my view erroneously, held out as an example of the courts actually holding a minister substantively to his statement of policy. Mr. Khan wished to adopt the child of a relative not resident in the United Kingdom. After adoption he intended to bring the

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⁴⁹ *Id.* at 556, 587.
child into the country. The Minister responsible for the policy governing foreign adoptions had broad discretion to approve or refuse applications of this nature. The Ministry had a standard form letter that it handed out in response to general inquiries concerning foreign adoptions. The letter set out the procedure for applicants to follow in respect of such adoptions and the criteria on which the applications would be considered. Mr. Khan read the letter and his application met the criteria, but his application was refused.

In quashing the refusal, Parker L.J. held that the information in the letter raised a legitimate expectation, on the part of those who read it, that their applications would receive consideration on the basis of the procedures and the criteria set out. In Khan's case, the Minister, in exercising broad discretion, had refused permission for reasons entirely different from the stated ones. While Parker L.J. was critical of the Minister's approach he did not interfere with the scope of the ministerial discretion. He held that, where legitimate expectations are created by such representations, an application that is to be refused for reasons other than those disclosed in advance as being the normal criteria, cannot be refused without notice and a hearing. His Lordship (echoing similar statements in the Liverpool Corporation case) held that even where such notice of change of policy is given and an opportunity to be heard is provided, the new policy must be of overriding public interest to justify a refusal other than on the basis of the publicly stated criteria. Dunn L.J. concurred with Parker L.J. in holding that the Minister's decision ought to be quashed, but he arrived at that conclusion by going a step beyond fairness and legitimate expectations. For Dunn L.J. a decision so unfair could not be reasonable. Watkins L.J. refused to place any constraints on the Minister's discretion to make and apply policy.

It is, however, important to note that even Parker L.J. was referring to procedural rather than substantive protection. For instance, he stated that:

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51. Id. at 1347.
52. Id. at 1339-43.
53. Id. at 1347-48.
54. Id. at 1347.
55. Id. at 1351-52.
56. Id. at 1351.
[t]he Secretary of State is, of course, at liberty to change the policy but in my view, vis-à-vis the recipient of such a letter, a new policy can only be implemented after such recipient has been given a full and serious consideration whether there is some overriding public interest which justifies a departure from the procedures stated . .

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And again, in the penultimate paragraph of his judgment, he said:

I would allow the appeal and quash the refusal of entry clearance. This will leave the Secretary of State free either to proceed on the basis of the letter or, if he considers it desirable to operate the new policy, to afford the applicant a full opportunity to make representations why, in his case it should not be followed.58

The reference to an overriding public interest may prove to be significant in the future if the courts wish to provide more substantive protection. Their lordships have given an indication that those who issue statements or guidelines might be held to them unless there is an overriding public interest to the contrary. This “subject to a contrary public interest” approach would help to avoid part, though only part, of the fear that administrative lawyers would have about introducing a general doctrine of estoppel into English administrative law.59

The decision that comes closest to suggesting that legitimate expectations may be protected substantively as well as procedurally is Regina v. Home Secretary, ex parte Ruddock.60 The situation in Ruddock arose after a certain Mr. Cox had his telephone tapped by the security services. Cox claimed that the interception of his telephone calls was contrary to criteria that had been repeatedly published and regularly applied by the Home Office over a period of six years. The Home Secretary argued that Cox could have no legitimate expectation that his calls would not be

57. Id. at 1347 (emphasis added).
58. Id. at 1348 (emphasis added).
59. Given the current state of the law, one of the dangers of advocating an approach whereby a legitimate expectation would guarantee a substantive, as opposed to procedural, outcome is that, in their desire to disavow that approach, judges may resort to an inappropriate refusal to recognize a legitimate expectation giving rise to any protection at all, even of a nonsubstantive kind. This danger is evident in the case of Regina v. Secretary of State for Health, ex parte United States Tobacco International, Inc. [1992] 1 Q.B. 353.
intercepted since he could not have expected to be consulted or have a hearing before a decision to intercept his calls was made. While the legitimate expectation argument ultimately foundered on an absence of evidence that the published criteria pertaining to wire taps had not been followed, Taylor J., referring to fairness as the underlying basis for the concept of legitimate expectations, concluded that:

Whilst most of the cases are concerned, as Lord Roskill said, with a right to be heard, I do not think the doctrine is so confined. Indeed, in a case where ex hypothesi there is no right to be heard, it may be thought the more important to fair dealing that a promise or undertaking given by a minister as to how he will proceed should be kept. Of course such promise or undertaking must not conflict with his statutory duty or his duty, as here, in the exercise of a prerogative power.  

Apart from the national security aspect of Ruddock, which negated the possibility of an individualized hearing prior to a decision to tap, the factual situation in this case, with regard to the effect of published policy setting out criteria for the exercise of discretion, is really very like the situation in the Khan case. In Khan, before new criteria could be applied, the applicant was found to have a right to make representations in respect of them. The judge explicitly stated in Ruddock that the Minister was quite entitled to change the criteria, provided he followed the past practice of publishing such changes. The legitimate expectation was that the public should be informed of a change in policy before any application of new criteria, although the judgment was actually obiter on the legitimate expectations point because Cox was unable to demonstrate that the Secretary of State had not adhered to the published criteria.

There is no suggestion within the concept of legitimate expectations that a decision-making body can be required to do anything that is ultra vires or not within its competence; the concept is being exercised with caution though not without flexibility. With regard to providing procedural rather than substantive protection, it must be remembered that, in practice, a

61. Id. at 1497.
64. See id.
variety of non-legal pressures make it unlikely that decisionmakers will pursue their original substantive decision after it is judicially reviewed and quashed on the grounds of having been illegally reached. However, it must be emphasized that they can technically do so once they have followed the decision-making steps required by the reviewing court. Yet, to take just one example, it can also be argued that review for "unreasonableness" is an illustration of a sphere of review of administrative action where there is, in practice, a particularly fine line between deciding on the substance or merits of the case on the one hand, and the legality of the way in which a decision was reached on the other. Nonetheless, the distinctions between appeal and review and substance and procedure are still carefully preserved both by English judges and their continental counterparts, such care being necessary to maintain the respect of the public and ensure the tolerance of the executive and legislative branches.

V. CONCLUSION

In the Factortame litigation and the Man (Sugar) case, we see English courts dealing with issues directly involving Community law. Particularly since the United Kingdom joined the European Community, English courts have been increasingly inclined to look not only at the law of the Community, which, depending on the subject matter of the case, may or may not bind them, but also at the national domestic laws of individual Member States such as France and Germany. This occurs despite the fact that Member States' civilian traditions are different in nature, and frequently in intent, from Britain's common law. Even where Community influences are not direct, the development of English common law has, in my view, been accelerated and shaped by the very existence of a body of Community law, itself influenced by national European laws and an even earlier set of pan-European legal principles.65 The Community ethos has encouraged wider international and comparative inquiry and consequent changes in legal attitude and approach that extend beyond those required by Community frameworks.

The definition of what is "public" for the purposes of English law is very broad, sometimes surprisingly so for those more used to definitions of

“public actor” in the United States. Thus, concepts recognized as being part of English administrative law may have very wide-ranging consequences. There is little doubt that two of the most interesting jurisprudential adventures in modern English administrative law—those involving proportionality and legitimate expectations—are at least in part attributable to the increasing willingness of English judges to engage in comparative analysis. Let us then await with interest developments that flow from the process begun by the North American Free Trade Agreement in a nation that rejoices in diverse local laws beneath a crown of shared legal principle. Consider also whether Britain should incorporate the European Convention on Human Rights and Fundamental Freedoms into domestic law so that it will have a direct effect in English courts, thereby possibly incidentally increasing the influence of British law on European law. If, as is currently under discussion, the European Community accedes to the European Convention on Human Rights, Britain may in any event find that the question of incorporation is rendered partially moot and politically irresistible.