

Fairness – Procedural and Substantive

25 June 2025

Eleanor Grey KC
39 Essex Chambers

Overview

- Exam question: *How do you advise on evolving case law over procedural and substantive fairness and the associated intensity of review, and gain an edge for your clients?*
- *Recap:*
- Procedural Fairness/Impropriety: a classic ground of review
- Also classically, a ‘hard-edged’ question determined by the Courts – no *Wednesbury* standard
- Wide contexts: public bodies’ ‘primary’ decision-making (including consultation exercises) and tribunals’ ‘secondary’ decisions, on appeal / review / trial.
- But: respect for the approach of a tribunal etc to its procedures / specialist knowledge will import a measure of latitude

When does the duty to act fairly arise?

- **Wide categories include:**
- Where the terms of a statute / regulations etc set out a procedural code, and the inference is that it must be a fair one
- (Gives rise to the question of whether a statutory code may be supplemented)
- Where there is a need to safeguard a right or interest – property rights, status or freedoms (eg prisoner seeking parole)
- Safeguarding a legitimate expectation conferred by the decision maker – due process before a promised benefit can be removed
- Under the ECHR – Articles 2, 3, 6 and 8, for example, confer procedural rights

Content of Procedural Fairness

- The ‘duty to act fairly’ comprises two essential limbs
- First, the right to an independent adjudicator or decision-maker – the ‘free from bias’ limb
- Second, the right to be heard: ‘audi alterem partem’
- The second limb gives rise to a plethora of procedural claims; entitlement to specific protections will vary according to context but may include rights to:-
 - Notice of an intended decision before it is made
 - Sufficient information about the proposed decision to enable an informed response
 - Consultation and/or the right to make representations
 - Quasi-trial procedural rights, including oral hearings, legal assistance, cross-examination
 - Reasons for a decision

Substantive Fairness

- What do we mean by substantive or “conspicuous” unfairness?
- A separate and less well-established category than procedural unfairness
- See Lord Sumption: “Absent a legitimate expectation of a different result A decision which is rationally based on relevant considerations is most unlikely to be unfair in any legally cognisable sense”: *R (Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25
- Overlaps with unreasonableness / irrationality – but terminology is vague
- Still evolving – raises judicial concerns about lack of certainty: *R(Talpada v SSHD* [2018] EWCA Civ 841 at 59 – 66
- Categories not definitively closed but most clearly established in the form of ‘substantive’ legitimate expectations

Scope for Confusion ?

- “Substantive unfairness” can be used in different contexts
- An example is *West Dulwich Service Station v LB Lambeth* [2025] EWHC 111 (Admin) – low traffic neighbourhood scheme challenge.
- Here, the ‘procedural fairness’ challenges related to the process adopted
- But ‘substantive unfairness’ was said to relate to how the Council grappled with the representations it had received
- A *Wednesbury* test applied to this
- Decision quashed on the basis that a relevant 53 page presentation from the protestors had not been shared with the DM and considered
- Is that not a failure to take relevant matters into consideration?

Fairness Continues to be a fertile JR Ground

- There are recent examples of cases where fair procedures lie at the heart of a successful challenge
- See for example *R (TJ Trading Express Ltd) v SSHD* [2025] EWHC 1274 (Admin)
- JR of a decision to revoke a license as the sponsor of skilled immigrants, held by the Claimant business – no opportunity to make representations before revocation
- SSHD Guidance included category of immediate, mandatory revocation of license w/o representations
- Held – even in such ‘mandatory’ cases there should be an opportunity for representations: fairness cannot be determined by the wording of D’s Guidance

... or in the consultation context ...

- See *West Dulwich Service Station v LB Lambeth* [2025] EWHC 111 (Admin) – low traffic neighbourhood
- Consultation case – challenge to the process adopted, not sufficiently inclusive
- Fairness judged by the Court – but burden on Claimant, and there must be something ‘clearly and radically wrong’, not merely that the process could have been improved.
- Intense scrutiny of the details of the complaints, measures taken to hear from objectors
- Process judged as a whole and found to be procedurally adequate

Areas of Debate and Challenge

- Court-determined standards vs deference to specialist knowledge or decision-making discretion
- See:
 - *R. (on the application of Conde) v Kensington and Chelsea RLBC*
 - *U3 v SSHD*
- Does the duty to ‘hear the other party’ / allow consultations or representations arise at all?
- See:
 - *R. (on the application of Transactual CIC) v Secretary of State for Health and Social Care* [2024] EWHC 1936 (Admin)
 - *R (DWP) v Eveleigh and R(National Council for Civil Liberties) v SSHD*

When does the Court defer to the primary decision maker on procedural issues?

- **Classic approach:** see *R(Murcott) v SoS Justice* [2025] EWHC 1328 – upheld decision not to afford an oral hearing before refusal to downgrade prisoner from Cat A to Cat B; also *R (Newton) v Parole Board* [2025] EWHC 631 (Admin)– fairness required oral hearing re recall decision (factual disputes)
- **Contrast** LA review of a decision that a person is intentionally homeless:
 - Detailed procedural code governing decision-making
 - Right to a review has time limits
 - Issue of whether the LA has wrongfully refused to extend time is subject to an irrationality review only – LA has a wide discretion
 - See most recently *R. (on the application of Conde) v Kensington and Chelsea RLBC* [2025] EWHC 715 (Admin), 26 March 2025).
- Could be regarded as akin to a case management decision – a familiar judicial discretion

U3 v SSHD [2025] UKSC 19 – SIAC Decision Making

- National Security decisions are a familiar challenge when looking at fair procedures – both in terms of participation, and deference to conclusions reached by SSHD
- SC reconsidered the role of SIAC in hearing appeals – confirmed that SIAC heard appeals, with fresh evidence and the power to make findings of fact
- But matters of future risk are not determined on the balance of probabilities – an evaluative exercise, taking into account risks / possibilities
- An exercise of *judgement* for SIAC – in carrying out its task it should defer to the expertise of the security services and also Govt (democratic accountability)
- Procedural fairness is secured by the SIAC process, after the decision has been made
- “Full jurisdiction” of the appeal tribunal confirmed, for ECHR compliance purposes (given that Art 8 was in play)

When does the duty to consult or involve arise?

- Claims to be consulted or involved may be framed under ECHR e.g. Art 2 and Art 8
- For Article 8, see *R. (on the application of Transactual CIC) v Secretary of State for Health and Social Care* [2024] EWHC 1936 (Admin)
 - Challenge to the Regulations limiting the prescription and supply of ‘puberty blockers’ to those under 18 (restricting private prescriptions including banning those from overseas)
 - Claim that the ‘emergency’ statutory procedure under the Medicines Act was not lawfully in play (rejected – area of discretionary judgment)
 - Claim that under Art 8 the Cs were entitled to be consulted prior to the making of the Regs. Procedural rights invoked, as issues of gender identity engage Art 8 – may require consultation before decisions affecting those rights are made
 - Rejected: contention of Cs would require public consultation whenever legislation affected Art 8 rights – unworkable and contrary to Medicines Act scheme

Fairness in Practice – Consultation (1)

- Duty to consult will arise in four circumstances: (i) where there is a statutory duty to consult; (ii) where a promise to consult has been made; (iii) where there is an established practice to consult; and (iv) exceptionally, where “conspicuous unfairness” would arise from not consulting
- ‘Gunning criteria’ apply to the content of a consultation exercise – if a consultation is embarked upon, these are the key requirements of procedural fairness
- This is subject to some uncertainty if a consultation is held on a voluntary basis with recent doubts expressed about what has been generally accepted (*Coughlan*)

Fairness in Practice – Consultation (2)

- *When does the duty to consult arise?*
- *R (DWP) v Eveleigh* [2023] EWCA Civ 810: online public survey was not a part of a ‘consultation’, given that only an ‘inchoate strategy’ not a proposal existed;
- But see now *R(National Council for Civil Liberties) v SSHD* – CA 5 May 2025 – [2025] EWCA Civ 571: endorsement of the constitutional space for ‘engagement’ with selected bodies by the executive
- *If consulting, must those included in the process be fairly determined?*
- Distinction between ‘fairness’ and ‘rationality’ can be overblown
- “In either case, it needs to be borne in mind that, save where a statute contains a specific prescription, the decision-maker is likely to have a broad discretion as to whom to consult.”

In Conclusion

- Remains a 'hard-edged' form of review - with teeth
- But need for caution re context and detail, including
 - Discretionary areas of judgment – akin to case management powers?
 - Judicial recognition of specialist knowledge including in areas of national security
 - Procedural codes / requirements which reflect strict statutory criteria / public policy
- Most fertile area of recent discussion has related to when or whether the duty to engage, involve or consult arises at all
- Courts concerned to reflect constitutional checks and balances (e.g. Parliamentary action in lieu of consultation exercises) and/or executive freedom to 'engage' with defined stakeholder groups

Questions and Observations ?

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number OC360005) with its registered office at 81 Chancery Lane, London WC2A 1DD. 39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39essex.com

BARRISTERS • ARBITRATORS • MEDIATORS

LONDON • MANCHESTER • SINGAPORE • KUALA LUMPUR

