

FAIRNESS

What is the latest judicial thinking on procedural and substantive fairness in the post-Gallaher decisions, and what are the implications for the associated intensity of review?

James McClelland KC

Brick Court Chambers

Labyrinth (1986)

(Jim Henson & Terry Jones)



“That is not fair”

Jennifer Connelly (Sarah)



“You say that so often; I wonder what your basis for comparison is.”

David Bowie (The Goblin King)

STRUCTURE OF THIS PRESENTATION

Take it in four stages

1. Gallaher – re-cap and key reasoning
2. Substantive unfairness post-*Gallaher*
3. Distinguishing substance from procedure.
4. “Conspicuous unfairness” and duty to consult.

(1) GALLAHER – RECAP

R (Gallaher Group Ltd) v Competition and Markets Authority [2018] UKSC 25, [2019] AC 96

GALLAHER (1)

Background

- Office of Fair Trading (OFT) investigated price-fixing by tobacco companies.
- Some tobacco companies entered into early resolution agreements (ERAs).
- Those agreements offered a 20% reduction in penalties but required admissions and a commitment to cooperate.
- When OFT made its final decision, the parties to the ERA could still appeal (despite admissions), but risked having their penalty increased.

GALLAHER (2)

- One company (TMR) obtained an assurance from the OFT that if it did not appeal, but another company did, then it would get the benefit of any other party's successful appeal.
- That assurance:
 - (i) was not given to Cs or any other tobacco companies; and
 - (ii) was given by mistake (*viz.* it was intended as a statement of the default position in law – in ignorance of finality principle).
- 6 companies appealed to the CAT, and won.
- TMR asked the OFT to honour its assurance, which it did.
- Cs made the same request and were refused. Cs brought a JR.

GALLAHER (3)

- **Collins J:** OFT was “subject to public law requirements of fairness and equal treatment”, but
 - the assurance was given in error;
 - “as a general rule a mistake should not be replicated where public funds are concerned”; and
 - This provided “an objective justification” for the refusal.
- **CA:** reversed Collins J.

GALLAHER (4)

Lord Dyson MR:

- “the OFT must comply with the principle of equal treatment” [34].
- “The fact that there has been a mistake may be an important circumstance. It may be decisive. It all depends”. [54]
- The real focus had to be whether the difference in treatment was “objectively justified” [60].
- It was not:
 - “The only difference between the positions of TMR on the one hand and that of the claimants on the other hand was that the OFT had given the assurances to TMR in 2008, but not the claimants” [60].
- The refusal involved “unequal treatment” which was “stark and manifest” [59].

GALLAHER (5)

Supreme Court:

- Domestic UK law did not recognise EQUAL TREATMENT as distinct principle of administrative law [24] (Carnwath)
- Drew on Lord Hoffmann's reasoning in the earlier case of *Madadeen v Pointu* [1999] 1 AC 98, to the effect that:

“[...] treating like cases alike and unlike cases differently is a general axiom of rational behaviour. [...] Of course persons should be uniformly treated unless there is some valid reason to treat them differently. But what counts as a valid reason for treating them differently? And perhaps more important, who is to decide whether the reason is valid or not? Must it always be the courts? The reasons for not treating people uniformly often involve, as they do in this case, questions of social policy on which views may differ. These are questions which the elected representatives of the people have some claim to decide for themselves.”

GALLAHER (6)

- **Lord Carnwath JSC:** “in domestic administrative law issues of consistency may arise, but generally as aspects of rationality, under Lord Diplock’s familiar tripartite categorisation.” [26]
- **Lord Sumption JSC:** “The common law principle of equality is usually no more than a particular application of the ordinary requirement of rationality imposed on public authorities.” [50]
- Turning to “**FAIRNESS**”, “procedural fairness” was well-established, but, as to substantive fairness:
 - “Fairness, like equal treatment, can readily be seen as a fundamental principle of democratic society; but not necessarily one directly translatable into a justiciable rule of law”. [31]
 - “Simple unfairness as such is not a ground for judicial review” [32]

GALLAHER (7)

- What of “conspicuous unfairness”, or similar?
 - Past cases had referred to “conspicuous unfairness” or “unfairness amounting to a excess or abuse of power” [34].
 - Many could be explained as cases on legitimate expectations. (NB *Ex parte Coughlan* was only decided in 1999.)
 - Bottom line:

“Substantive unfairness [...] is not a distinct legal criterion. Nor is it made so by the addition of terms such as conspicuous or abuse of power. Such language adds nothing to the ordinary principles of judicial review, notably in the present context irrationality and legitimate expectation. It is by reference to those principles that cases such as the present must be judged.” [41]

GALLAHER (8)

- On the facts – the principle of equality was engaged, either through rationality or LE:

“It is not difficult to hold that the OFT owed a general duty during the negotiations in 2008 to offer equal treatment to those subject to the Tobacco investigation. There was no logical reason to do otherwise, since it was applying a single set of legal and policy criteria to a limited group of parties within a single area of business activity. In addition, its commitment to equal treatment had been expressed in terms to those parties [...] To that extent, it may be said, they had in public law terms a legitimate expectation that they would be treated equally.” [29]

GALLAHER (9)

- But, the difference in treatment was both rational and objectively justified:

“Lord Dyson MR noted, at para 60, that the only difference between the respective positions of TMR and of the claimants was that the OFT had given the assurances to TMR in 2008, but not to the claimants. But that was a potentially crucial difference.

All those who entered ER agreements were aware of the possibility that other parties would appeal and might be successful. That was a risk the claimants took. [...] TMR did not. They sought and obtained an assurance on which they claimed to have relied.” [44]

- Reversal of CA turned less on doctrinal differences, and more on the significance attached to common facts. Intensity of review.

**(2) SUBSTANTIVE FAIRNESS
POST-GALLAHER**

R (Challis) v Secretary of State for Health and Social Care [2022] EWHC 2269 (Admin)

- Case arising out of infected blood scandal.
- Compensation schemes had been put in place for those affected. There was also an ongoing public inquiry (recently published).
- For Hepatitis C, applicants had to (a) have been infected with NHS blood/blood products prior to September 1991, or (b) been infected by someone who had been.
- C received transfusions in 1992-1993, and contracted Hep C.
- She challenged the cut-off date on the grounds of irrationally, relying, amongst other things, on inequality of treatment, since no cut-off date was applied to the eligibility criteria for HIV-infected applicants.

Challis (2)

- Mrs Justice Steyn rejected the claim.
- Post-Gallaher, claims of unequal treatment were confined to a reasonableness / rationality:
 - “The Supreme Court made clear in Gallaher that unequal treatment is not a distinct ground of review. In assessing the claimant's allegation of unequal treatment, the question is whether irrational distinctions have been drawn between different groups.” [73]
- With its customary implications for the intensity of review:
 - “It is well established that it is for the court to determine whether, viewed objectively, the decision is outside the range of reasonable decisions open to the decision-maker.” [73]

Challis (3)

- The inequality of treatment was not irrational:
 - (1) A cut-off date was not intrinsically unreasonable, nor was the 1991 date wholly unsupported by evidence.
 - (2) The different schemes were introduced at different times in different circumstances (1987 and 1993 in the case of HIV; and 2004 in the case of Hep C). When the HIV scheme was introduced prognoses were different and, in the case of HIV, was for swift and certain death.
 - (3) Other features of the HIV scheme meant that the differences in practice were less than first appeared (including a presumption that blood was screened post-1985).
 - (4) A re-consideration of the criteria would be complex and multi-factorial: it was rational for the SStE to await the Inquiry report.
- Unlikely to have been decided differently pre-Gallaher.

R (Pearce) v Parole Board [2023] UKSC 13

- Concerned the “fairness” (procedural or substantive) of Parole Board’s determination not to direct a prisoner’s release.
- C had committed sexual offences. After the expiry of his minimum term, the Parole Board considered whether to direct his release (section 28 of the Crime (Sentences) Act 1997).
- In relation to unproven allegations, the Board's guidance stated that, where it could not make a finding of fact, it should nevertheless assess the “level of concern” attaching to it and reach a judgment about the impact of that concern on the parole review.
- Board considered 6 allegations which it found to be relevant and declined to direct C’s release.

Pearce (2)

- C sought JR, alleging that:
 - both the guidance and the decision were unlawful; and
 - a risk assessment had to be based on facts established following due inquiry, not unproven allegations, which were “non-facts”
- SC rejected the claim, and its treatment of “fairness” is interesting.
- As to, **procedural fairness**, this offered C no recourse: it was satisfied by providing C with a proper opportunity to be heard [66], [68], [75].

Pearce (3)

- As to **substantive fairness**, the SC (unexpectedly) appeared to acknowledge the existence of such a doctrine:

“The rules of substantive fairness in public law are, as Singh LJ explained in *Talpada*, at paras 59-61, closely related to the doctrine of substantive legitimate expectation and substantive unfairness entails behaviour on the part of a public authority that amounts to a abuse of power (see also *R (Gallaher Group Ltd) v Competition and Markets Authority* [2019] AC 96, paras 40—41 per Lord Carnwath JSC, para 50 per Lord Sumption JSC).” [68]

- Striking that cited *both Gallaher*, which repudiated “substantive fairness”, and pre-*Gallaher* authority, which had endorsed it.

Pearce (4)

- On the facts, substantive fairness did not provide an answer:
“we do not see any basis for an assertion that substantive fairness requires a judicial body to treat as if they were “facts in issue” information which, on a proper analysis, is not of that nature.” [68]
- And, in delineating the outer margins of Parole Board’s powers, seems to have treated rationality as the operative principle:
“a failure to make findings of fact where it was reasonably practicable to do so or an irrational reliance on insubstantial allegations could be a ground of a successful public law challenge.”[87]

Pearce (5)

- Takeaways from *Pearce*
- The case *might* indicate a greater willingness to entertain the language of “substantive fairness”.
- This was a (largely) different panel of the SC from *Gallaher*:
 - Judgment in *Pearce* was delivered by Lord [Hodge](#) DPSC (who had sat on *Gallaher* and concurred with Lord Carnwath) and Lord Hughes; Lord Kitchen, Lord Hamblen and Lord Richards JJSC agreed.
 - Cf Panel in *Gallaher*: Lord Carnwath JSC, Lord Mance DPSC, Lord Sumption, Lord [Hodge](#) and Lord Briggs JJSC.
- However, the indication has not been taken up at first instance, and, in any event, it still appears bounded by rationality.

R (Howard Gardens Manco Ltd) v Cardiff City Council [2024] EWHC 1112 (Admin)

- A challenge to the council tax assessment of student accommodation.
- D had exercised its discretion *not* to “aggregate” the bedrooms in each flat. Council tax was, therefore, charged for each bedroom, rather than each flat.
- C challenged on five grounds including “*inconsistency of treatment*”: it asserted that the Defendant:

“irrationally failed to treat the Property in a manner consistent with the treatment of ... “comparable” properties and has failed to give adequate reasons for this inconsistent treatment” [51].
- So, C acknowledged *Gallaher* and sought to bring inequality argument within the envelope of an irrationality challenge.

Howard Gardens (2)

- His Honour Judge Keyser KC found [54]:

“The analysis in the Gallagher Group case offers a helpful way of approaching this ground. The question then becomes whether rationality required the defendant to treat the Property in the same manner as the “comparable” properties had been treated (that is, to aggregate the rooms within each flat); or, to put it another way, whether there was an objective justification for reaching a different decision in respect of the Property from that which had been reached in respect of the “comparable” properties”.

Howard Gardens (3)

J. found that the decision was not unlawful. The intensity of review appears to have been relatively “light touch”. In summary:

- (1) Decisions on comparable properties had been made in previous years (2016, 2017 and 2019), under an earlier version of the guidance [61].
- (2) There was “limited information as to why the flats in the “comparable” properties had been aggregated” [62]. If that was a fault, it was a fault attaching to the comparators, not the decision now in issue.
- (3) The decision to aggregate “*was one of fact and degree in every case [...] decisions might turn on specific facts*” [60]
- (4) “[...] in these circumstances it was perfectly rational to decline to make a decision on the basis of consistency ...” [63]

Other cases

- ***R (Realreed Ltd) v HMRC [2023] EWHC 1572 (Admin)***. Concerned a challenge to HMRC's decision as to whether the supply of accommodation was taxable or exempt. One ground of challenge was "conspicuous unfairness". Dismissed out of hand by Lavender J: "*I am bound by the decision in Gallaher to hold that substantive unfairness is not a ground for judicial review. That is sufficient to dispose of the Claimant's primary case on ground 1.*"
- See also ***R (Knot Builders Ltd) v Construction Industry Training Board [2024] EWHC 115 (Admin)***: a challenge to decisions about eligibility for grant funding. One ground of challenge concerned unequal treatment between levy payers: *per* Ellenbogen J. at [36]: "*this ground [...] in order to succeed would need to establish irrationality on the part of the Defendant: R (Gallagher Group) v Competition and Markets Authority [2019] AC 96" [36]*

(3) DISTINGUISHING SUBSTANCE FROM PROCEDURE

WHY IT MATTERS

- ***What it is.*** Roots of procedural fairness lie in “natural justice” – traceable to *magna carta*, if not beyond. For a classic and enduring formulation, see Lord Mustill in *Ex p. Doody* [1994] 1 AC 531, 560.
- Its separate existence was hardwired into Lord Diplock’s tripartite division of grounds in *CCSU* case: [1985] AC 374, 410ff (“illegality”, “irrationality”, and “procedural impropriety”).
- ***Why it matters.*** The independent life of “procedural fairness” was re-affirmed by SC in *Gallaher* and the boundary between procedural and substantive fairness is now crucial post-Gallaher, since:
 - (1) there is no free-standing ground of “substantive unfairness”, and its merger into rationality brings with it a low intensity of review;
 - (2) By contrast procedural fairness is a free-standing ground of challenge and the fairness of procedures is (generally) a matter for the Court.

Pathan v SSHD [2020] UKSC 41

- C applied to remain as a Tier 2 Migrant in the UK.
- He held a valid certificate of sponsorship from his employer.
- SSHD later revoked his employer's sponsor's licence.
- This invalidated C's certificate and was fatal to his application.
- C was not informed of the revocation at the time; he only learnt of it 3 months later when the Home Office rejected his application.
- The Tier 2 rules did not provide an applicant with time to seek another sponsor.

Pathan (2)

- C applied for JR, claiming that, as a matter of procedural fairness: SSHD had been required:
 - 1) to inform him promptly when the sponsor's licence was revoked ("Ground 1"); and
 - 2) to grant him a reasonable period in which to respond to that revocation ("Ground 2").
- In practice responding to the revocation meant taking steps to overcome its effects, e.g. by finding an alternative sponsor.

Pathan (3)

- SC judgment is a kaleidoscope:
- (1) Whole Court agreed that it had been procedurally unfair not to have informed C promptly of the revocation (Ground 1).
- (2) A majority of the Court (Kerr, Black and Briggs) found that C did not have a right to a reasonable period in which to respond to the revocation (Ground 2). (Arden and Wilson dissented.)
- (3) A majority agreed that since Ground 1 had been upheld the SSHD's decision had to be overturned.
(Briggs dissented: the unfairness had not been causative, the revocation of the sponsor's licence had been fatal to C's application and C had no right to a delay in which to take steps to address it.)

Minority reasoning

Lord Wilson

- Concomitant with the duty of prompt notification was a duty to grant C a reasonable period to respond [201].
- Without this the right to be notified would be nugatory: “*The law should not impose a duty nor confer a right if they are of no value*” [217].

Minority reasoning (contd)

Lady Arden

- There was no free-standing ground of substantive unfairness, but “[the] line between procedural and substantive unfairness need not be rigid” [40].
- This was a “subset of procedural fairness” in which the challenge “will inevitably engage the substantive rule as well as procedural fairness” [45].
- The issue was “what does fairness require in this case?” [55]

Pathan (6)

Majority reasoning

Lord Briggs:

- Procedural unfairness was a distinct ground: “*its boundaries need to be carefully defined if it is not to operate as a gateway through which the courts can pass judgment on the substantive merits [...]*” [153]
- On the facts there was a clear distinction:
 - “[T]ime for the applicant to put his best case forward on the facts already available may be procedural, but time to change or improve the underlying facts to make them more favourable is substantive.” [177].
- This has the benefit of being both principled and clear.

Pathan (7)

- But this reasoning was rejected by Lord Kerr and Lady Black:

“If there is a duty to allow representations to be made for the purpose of bringing about a result favourable to the representor, why should it not also be fair to allow the affected person to have the chance by a different means to secure that outcome?”
[139]
- They drew the procedure-substance distinction differently.
 - Duty to act fairly was “a duty not to deprive, not an obligation to create” [108].
 - Informing C was sufficient. “By contrast, an obligation positively to confer a particular period of grace during which to take action would [...] amount to the imposition of a substantive rather than a procedural duty”. [141]

Pathan (8)

- Where does *Pathan* leave us?
- Difficult to elicit a clear ratio given multiplicity of judgments.
- There remains scope for argument as to boundary of procedure and substance.
 - For Claimants: use procedural unfairness as a bridgehead, and then characterise secondary, more “substantive” duties as emanations of “fairness”.
 - For Defendants: scrutinise claims for “procedural fairness” and see if duties can be characterised as “positive”, or “substantive”, and contested on that basis.

**(4) “CONSPICUOUS UNFAIRNESS” &
THE DUTY TO CONSULT**

R (Plantagenet Alliance Ltd) v Secretary of State for Justice & Others [2014] EWHC 1662 (Admin)

- A pre-*Gallagher* case. At [97]-[98] Hallet LJ provided an influential formulation of when a duty to consult will arise:

“There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional circumstances, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult...”
- The Courts are still negotiating the status of the last criterion post-*Gallagher*.

R (Cruelty Free International) v SSHD [2023] EWHC 1064

- In *R (Cruelty Free International) v SSHD* [2023] EWHC 1064, Linden J. reasoned at [187] that:

“[...] the reference to conspicuous unfairness in the [sic] Hallett LJ’s fourth category was not intended to create a free standing public law principle. Rather, it was intended to emphasise the extreme nature of the conduct required to amount to a breach of duty i.e. irrationality or breach of a legitimate expectation established in accordance with recognised principles: see *R (Gallagher) v Competition and Markets Authority* [2018] UKSC 25, [2019] AC 96 at [40]-[41]”
- This is aligning the test with grounds of *substantive* review, rather than procedural fairness.

R (Medical Justice) v SSte for Home Dept [2024] EWHC 38 (Admin)

- Linden J. found that there had been a legitimate expectation of consultation, but commented *obiter* that, but for this, he was “doubtful” that he would have found a duty to consult and:

“There is some uncertainty as to the precise role of “*conspicuous unfairness*” in this area of the law: as to whether Hallett LJ's fourth category was intended to create a free standing public law principle over and above existing principles of fairness, legitimate expectation and rationality and, if so, as to the scope of that principle (in addition to the *TN* case relied on by Ms Anderson, see *R (Gallagher) v Competition and Markets Authority* [2018] UKSC 25, [2019] AC 96 at [40]-[41] on which I was not addressed).” [165]

R (Ariyo) v Richmond upon Thams LBC [2023] EWHC 2278 (Admin)

- Concerned a challenge to a planning decision. C alleged unfairness in a failure to re-consult once the planning application had been modified.
- Mr Ockelton, VP of the Upper Tribunal framed the issue as going to *procedural* fairness:

“There is perhaps room for doubt whether the unfairness would have to be so conspicuous as to amount to an abuse of power in a matter such as this where procedural rather than substantive unfairness is in issue (see the discussion in *Broad v Rochford DC* at [29]-[37] of *R (Holborn Studios Ltd) v Hackney LBC* [2017] EWHC 2823 and *R (Gallagher Group) v CMA* [2018] UKSC 25). What is not in doubt is that when there is a challenge of this sort it is for the Court to assess whether the failure to re-consult was unfair, taking into account the position as it appeared to the decision-maker at the time.”

My own view

- (1) I agree that the “conspicuous unfairness” to which Hallett LJ referred should be seen as procedural, rather than substantive. It is, ultimately, about a duty to seek representations.
- (2) The distinction is material, since whether procedures are fair is ultimately for the Courts (contrast the low intensity of review in rationality).
- (3) The term “conspicuous” does not identify particular additional criteria and, post-Gallaher, it is apt to confuse.
- (4) However, what underlies it, is a recognition that, to require consultation, one must identify by a close analysis of all the circumstances, some clear and specific unfairness suffered by a particular claimant (or group), whose particular interests will usually need to have been directly and consequentially engaged.