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Fairness

James Goudie QC

- PRESTON (19985) AC 835: unfairness in the purported exercise of a power can be such that it is an abuse or excess of power.
- DOODY (1994) 1 AC 532, at 560.
- COUGHLAN (2001) QV 213 (Court of Appeal): legitimate expectation extended from procedure to substance.
- NADARAJAH (2005) EWCA Civ 1363: the legal requirement of fairness dictates the result; substance and procedure are not separate compartments; public power must not be abused.
- BHATT MURPHY (2008) EWCA Civ 755: two classes of procedural legitimate expectation, the latter being where an action would be “so unfair as to amount to an abuse of power”

- Fairness will every often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification; or both.
- Since the person affected usually cannot make worthwhile representations without knowing what factors may weight against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

“The search for principle surely starts with the theme that is current through the legitimate expectation cases. It may be expressed thus. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so.

What is the principle behind this proposition? It not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. ... Accordingly a public body’s promise or practice as to future conduct may only be denied, and this the standard I have expressed may only be departed from, in circumstances where to do so is the public body’s legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.”

“This approach makes no distinction between procedural and substantive expectations. Nor should it. The dichotomy between procedure and substance has nothing to say about the reach of the duty of good administration. Of course there will be cases where the public body in question justifiably concludes that its statutory duty (it will be statutory in nearly every case) requires it to override an expectation of substantive benefit which it has itself generated. So also there will be cases where a procedural benefit may justifiably be overridden. The difference between the two is not a difference of principle. Statutory duty may perhaps more often dictate the frustration of a substantive expectation. Otherwise the question in either case will be whether denial of the expectation is in the circumstances proportionate to a legitimate aim pursued. Proportionality will be judged, as it is generally to be judged, by the respective force of the competing interests arising in the case. Thus where the representation relied on amounts to an unambiguous promise; where there is detrimental reliance; where the promise is made to an individual or specific group; these are instances where denial of the expectation is likely to be harder to justify as a proportionate measure. ... The balance between an individual’s fair treatment in particular circumstances, and the vindication of other ends having a proper claim on the public interest (which is the essential dilemma posed by the law of legitimate expectation) is not precisely calculable, its measurement not exact ...”

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- TALPALDA 2018) EWCA 842, at para 61: “it should be emphasised that it is only unfairness which amounts to an ABUSE OF POWER that is justiciable” in the context of procedural or substantive unfairness.
 - R. (HELP REFUGEES LTD) v SSHD (2018) EWCA Civ 2098, (2018) 4 WLR 168, at para 90: “the Courts will not lightly find that a consultation process is unfair”.
 - R (KEEP THE HORTAL GENERAL) v OXFORDSHIRE CCG (2019) EWCA Civ 646, (2019 22 CCL Rep 69, at paras 18 and 66 “fairness does not require perfection”.
 - FINUCANE (2019) UKSC 7: legitimate expectation from para 55; COUGHLAN referred to as “the leading case on substantive legitimate expectations”: NADARAJAH cited with apparent approval.
 - GALLAHER v CMA (2018) UKSC 25; from para 31:
 - Fairness can be seen as a fundamental principle of democratic society; BUT NOT necessarily one directly translatable into a justiciable rule of law
 - Addition of the word “conspicuous” does not obviously improve the precision of the concept

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- “Legal rights and remedies are not usually defined by reference to the visibility of the misconduct”: para 31
 - “SIMPLE UNFAIRNESS AS SUCH IS NOT OF ITSELF A GROUND FOR JUDICIAL REVIEW”: para 32.
 - Procedural fairness or propriety is well established: para 33.
 - A broader concept of “unfairness amounting to excess or abuse of power” has emerged: paras 34-41.
 - It is misleading to take out of context a single expression such as “conspicuous unfairness” and attempt to elevate it into a free-standing principle of law: para 40.

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- PROCEDURAL FAIRNESS is “well established” and “well understood”.
 - SUBSTANTIVE UNFAIRNESS on the other hand is NOT A DISTINCT LEGAL CRITERION
 - Nor is 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 irrationality and legitimate expectation.

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- Legitimate expectation: ABUSE OF POWER relevant to frustration of legitimate expectation: R (RD) v Worcestershire County Council (2019) EWHC 449 (Admin)
 - R (MP) v SoS (2020) EWCA Civ 1634, para 36:
 - Reference to FAIRNESS may be “useful” when determining whether proper consultation on a particular set of proposals requires consultees to be told of some different proposal.
 - FAIRNESS CANNOT of itself, however, act as a free-standing touchstone for when consultation on a particular proposal is necessary, referring to Divisional Court and PLANTAGENET ALLIANCE (2014) EWHC 1662 (Admin).

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- BALAJIGARI v SSHD (2019) EWCA Civ 675, from para 46
 - When the question is whether there has been procedural FAIRNESS that “question is NOT whether the decision maker has acted reasonably ...”: para 46.
 - “although sometimes the DUTY TO ACT FAIRLY may not require a FAIR PROCESS to be followed before a decision is reached, FAIRNESS WILL USUALLY REQUIRE that to be done where that is feasible”: para 59.
 - R (AA) v Rotherham MBC (2019) EWHC 3529 (Admin): fairness requires a consultation to set out alternatives where FAIRNESS requires it because it is necessary to allow informal or intelligent responses.

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- R (OH) v SSHD (2020) EWCA 1912 (Admin), at paras 272-277 inc; the test to be applied in assessing whether a policy is SYSTEMICALLY UNFAIR is whether it creates a REAL RISK OF UNFAIRNESS in a significant number of cases; otherwise systemic unfairness should not be found unless there is a sufficient evidential basis for concluding that UNFAIRNESS IS INHERENT IN THE SITUATION.
 - BURN v ALDER HEY NHS TRUST (2021) EWCA Civ 1791:
 - There may be a general duty upon an employer to act procedurally fairly in the context of disciplinary processes; however fairness does not impose a general disclosure obligation.
 - R (GOESA LTD) v EASTLEIGH BOROUGH COUNCIL (2022) EWHC 1221 (Admin)
 - Works at Southampton International Airport
 - Alleged breach of legitimate expectation not to issue planning permission until SoS has time to call in planning application and cause Public Inquiry to be held.
 - The doctrine of fairness is rooted in fairness, BUT fairness is NOT a “one-way street”;
 - It imports the notion of equitableness of fair and open dealing, to which the authority is a much entitled as the citizen;
 - There may be “different types of interest” to consider.

- In considering fairness, there are a range of “competing interests” in play.
- There may have been “a spectrum of representations”, and there is the “unrepresented” general public as a whole.
- Generally, it must be shown that a claim has suffered “substantial unfairness” because of the unfairness.

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