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HOW ARE THE COURTS RESPONDING TO CLAIMS OF SUBSTANTIVE UNFAIRNESS IN JUDICIAL REVIEW?

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I. INTRODUCTION

1. Historically, the public law duty of fairness has recognised two separate doctrines, namely "*procedural fairness*" and "*substantive fairness*". As noted by Singh LJ in *R (Talpada) v. Secretary of State for the Home Department* [2018] EWCA Civ 841 at [56], "*it is important to keep in mind the distinction… not least because the doctrinal requirements of each concept are different*".

2. Procedural fairness requires the process by which a decision is taken to be fair. The question of whether there has been procedural fairness or not is an objective question for the court to decide for itself.[1]

3. Substantive fairness, however, concerns the merits of the decision. This paper addresses the test applied by the court to such claims.

4. This paper traces the evolution of the doctrine of substantive unfairness. It examines the recent decision of the Supreme Court in *R (Gallaher Group Ltd) v. Competition and Markets Authority* [2018] UKSC 25; [2019] AC 96 (**"*Gallaher*"**). It then identifies some of the possible consequences of, and the unanswered questions raised by, the judgment.

[1] See, by way of example, *R (Balajigari) v. Secretary of State for the Home Department* [2019] EWCA Civ 673; [2019] 1 WLR 4647 per Underhill LJ at [46].

II. THE DEVELOPMENT OF SUBSTANTIVE FAIRNESS

5. Substantive unfairness has historically been thought to comprise two broad principles: (i) "*conspicuous unfairness*" amounting to an abuse of process; and (ii) "*equal treatment*", or consistency of treatment. The historical judicial approach to each is explained below.

(a) Conspicuous unfairness

6. In *R v. Inland Revenue Commissioners, ex p. Preston* [1985] AC 835 Lord Scarman stated that "*unfairness in the purported exercise of a power can be such that it is an abuse or excess of power*" (at page 851). Lord Templeman stated that "*the court cannot in the absence of exceptional circumstances decide to be unfair that which the commissioners by taking action against the taxpayer have decided to be fair*" (at page 864). He added:

> "*The court can only intervene by judicial review to direct the commissioners to abstain from performing their statutory duties or from exercising their statutory powers if the court is satisfied that "the unfairness" of which the applicant complains renders the insistence by the commissioners on performing their duties or exercising their powers an abuse of power by the commissioners.*"

7. In *R v. Inland Revenue Commissioners, ex p. Unilever plc* [1996] STC 681 the Court of Appeal held that the Inland Revenue should not be permitted without prior warning to apply a strict time limit for submission of a particular type of claim, when to do so departed from a practice they had applied for a number of years. Sir Thomas Bingham MR stated that on the "*unique facts*" of the case "*to reject Unilever's claims in reliance on the time-limit, without clear and general advance notice, is so unfair as to amount to an abuse of power*" (at page 691) and to be irrational (at page 692). Simon Brown LJ stated (at page 694):

> "'*Unfairness amounting to an abuse of power' as envisaged in Preston and the other Revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power*".

8. Subsequent cases emphasised the high threshold applicable. For example, in *Talpada* Singh LJ noted that public law is not normally concerned with the substance of decision making, and that the doctrine of substantive fairness "*does not and should not give the*

court a wide-ranging discretion to overturn the decision of a public authority where it considers it to be unfair" [65]. This was important for two reasons: (i) the principle of the separation of powers, and (ii) the need for legal certainty.

9. Further, there was judicial criticism of claims alleging that a decision of a public body is unlawful because it is "*unfair*", as being insufficiently precise: see, for example, R (Nesiama) v. Secretary of State for the Home Department [2018] EWCA Civ 1369 per Hickinbottom LJ at [47]

(b) Equal treatment

10. Domestic courts have, on occasion, applied equal treatment as a freestanding ground of review (i.e. that differences in treatment between analogously situated individuals should be objectively justified).

11. Thus in R (O'Brien) v. Independent Assessor [2007] 2 AC 312 Lord Bingham stated [30]: "*It is generally desirable that decision-makers, whether administrative or judicial, should act in a broadly consistent manner*".

12. In R (Middlebrook Mushrooms Ltd) v. Agricultural Wages Board of England and Wales [2004] EWHC 1447 (Admin) the claimant mushroom grower challenged a statutory order under the Agricultural Wages Act 1948 which established a new category of worker, the Manual Harvest Worker, whose minimum wage was lower than a standard worker. The order uniquely excluded mushrooms from the definition of produce for which harvesters may be paid at the lower rate. The mushroom growers were successful in their challenge to the order. Stanley Burnton J found that there was no lawful justification for excluding mushroom growers from the lower rate [74], citing Lord Donaldson MR's comments in R (Cheung) v. Hertfordshire County Council, The Times, 4 April 1998, that "*It is a cardinal principle of public administration that all persons in a similar position should be treated similarly*". He added that the exclusion was "*Wednesbury unreasonable and unlawful*".

III. THE DECISION OF THE SUPREME COURT IN *GALLAHER*

13. The Supreme Court considered the proper approach to conspicuous unfairness and equal treatment in *Gallaher*.

14. The case concerned an investigation by the Competition and Markets Authority (**"CMA"**)[2] into alleged price-fixing in the tobacco market. The CMA operated an "*early resolution process*" under which an agreement (**"an ERA"**) could be reached requiring the party to admit involvement in the infringements, setting out a series of terms for further cooperation, and imposing a penalty subject to a reduction of up to 20% to reflect cooperation. A party could terminate an ERA at any point prior to its publication by the CMA, but the party would forgo the discounted penalty and the CMA would continue its case against the party. A party to an ERA could also, upon receiving the final decision, appeal against it notwithstanding the admissions. In such cases the CMA was able to apply to the tribunal to increase the penalty and to require the party to pay the CMA's full costs of the appeal regardless of the outcome.

15. Gallaher and other parties (including TMR) entered into ERAs, made admissions and received discounted penalties. Six other parties, in contrast, appealed the CMA's determination to the Tribunal.

16. In the course of negotiating its ERA, TMR obtained a sweetheart deal under which the CMA told TMR that it would benefit from a successful third party appeal notwithstanding its settlement with the CMA. This representation was not made to the other parties who entered into an ERA (including Gallaher).

17. The appeals were successful. TMR was repaid. The CMA refused to repay Gallaher. An application to appeal out of time succeeded before the tribunal, but the Court of Appeal reversed the tribunal's decision; *Office of Fair Trading v. Somerfield Stories Limited* [2014] EWCA Civ 400. Gallaher applied for judicial review arguing that the CMA's decision was conspicuously unfair and/or amounted to a breach of the principle of equal treatment. The claim failed at first instance before Collins J, [2015] EWHC 84, but succeeded before the Court of Appeal, [2016] EWCA Civ 719. The Supreme Court

[2] The investigation was in fact conducted by the Office of Fair Trading which by the time of the proceedings had been replaced by the CMA.

overturned the decision of the Court of Appeal, Lord Carnwath giving the lead judgment with which all other Justices agreed.

18. On **fairness**, the Supreme Court held that procedural fairness as a head of judicial review was "*well-established*" [33]. Substantive fairness was, in contrast, not a ground of judicial review [32], [34]. Lord Carnwath reviewed the decisions in *Preston* and in *Unilever*. He held that terms such as "*conspicuous unfairness*" and "*abuse of power*" added nothing to ordinary principles of judicial review such as irrationality and legitimate expectation. He stated:

> "40. *I have quoted at some length from these judgments to show how misleading it can be to take out of context a single expression, such as "conspicuous unfairness", and attempt to elevate it into a free-standing principle of law. The decision in Unilever was unremarkable on its unusual facts, but the reasoning reflects the case law as it then stood. Surprisingly, it does not seem to have been strongly argued (as it surely would be today) that a sufficient representation could be implied from the Revenue's consistent practice over 20 years… It seems clear in any event from the context that Simon Brown LJ was not proposing "conspicuous unfairness" as a definitive test of illegality, any more than his contrast with conduct characterised as "a bit rich". They were simply expressions used to emphasise the extreme nature of the Revenue's conduct, as related to Lord Diplock's test. In modern terms, and with respect to Lord Diplock, "irrationality" as a ground of review can surely hold its own without the underpinning of such elusive and subjective concepts as judicial "outrage" (whether by reference to logical or moral standards).*
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> 41. *In summary, procedural unfairness is well-established and well-understood. Substantive unfairness on the other hand - or, in Lord Dyson's words at para 53, "whether there has been unfairness on the part of the authority having regard to all the circumstances" - 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.*"

19. Similarly, Lord Sumption stated "*to say that the result of the decision must be substantively fair, or at least not "conspicuously" unfair, begs the question by what legal standard the fairness of the decision is to be assessed. Absent a legitimate expectation of a different result arising from*

the decision-maker's statements or conduct, a decision which is rationally based on relevant considerations is most unlikely to be unfair in any legally cognisable sense" (at [50]).

20. On **equal treatment**, Lord Carnwath stated [24]:

> "*Whatever the position in European law or under other constitutions or jurisdictions, the domestic law of this country does not recognise equal treatment as a distinct principle of administrative law. Consistency, as Lord Bingham said [in O'Brien]… is a "generally desirable" objective, but not an absolute rule*".

21. Lord Carnwath added: "*in domestic administrative law issues of consistency may arise, but generally as aspects of rationality*" [26]. To justify this conclusion, he relied on statements made by Lord Hoffmann in the Privy Council decision of *Matadeen v. Pointu* [1999] 1 AC 98 emphasising the need to distinguish between equal treatment as a democratic principle and as a justiciable rule of law [9]:

> "*… Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational… 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. The fact that equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a justiciable principle - that it should always be the judges who have the last word on whether the principle has been observed. In this, as in other areas of constitutional law, sonorous judicial statements of uncontroversial principle often conceal the real problem, which is to mark out the boundary between the powers of the judiciary, the legislature and the executive in deciding how that principle is to be applied…*"

22. Lord Sumption, in contrast, accepted that there was a common law principle of equality. But, he noted, "*[i]n public law, as in most areas of law, it is important not unnecessarily to multiply categories. It tends to undermine the coherence of the law by generating a mass of disparate special rules distinct from those applying in public law generally or those which apply to neighbouring categories*" [50]. He concluded: "*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]. This may be contrasted with his judgment in *R (Rotherham MBC) v. Secretary of State for Business, Innovation and Skills* [2015] UKSC 6; [2015] PTSR 322, in which Lord Sumption noted that the EU principle of equality, that comparable situations are not to be treated differently without objective justification, was "*fundamental to any rational system of law, and has been part of English public law since at least the end of the 19th cen*tury" [26] (a passage in which he did not suggest that consistency of treatment formed part of a general principle of rationality).

23. The Supreme Court allowed the CMA's appeal. Lord Carnwath noted that the TMR sought and obtained an assurance on which they claimed to have relied, and as such, the CMA could reasonably have taken the view that if the assurance were not honoured, TMR would have a strong case for permission to appeal out of time (whereas Gallaher did not) [44]. If objective justification were needed for the different approaches taken to Gallaher and TMR, this was sufficient; nor was it irrational for them to do so [44]. The judgments of Lords Sumption and Briggs explained that CMA's mistake was to give the assurance to TMR; not that they failed to give it to others [54], [59].

IV. AFTER *GALLAHER*: WHAT NEXT?

(a) Overview

24. I set out below four questions or consequences that stem from the treatment of conspicuous unfairness and consistency of treatment in *Gallaher*, namely:
    (i) Where or how can the line be drawn between procedural and substantive fairness?
    (ii) What effect does the decision in *Gallaher* have on the doctrine of substantive legitimate expectation?
    (iii) What implications does Gallaher have for the law of consultation?
    (iv) How will inconsistency of treatment as irrationality work in practice?

(b) Where, or how, to draw the line between procedure and substance?

25. The decision in *Gallaher* amplifies the importance of identifying whether the complaint is truly one of procedural fairness or one of substantive unfairness. Yet the decisions of the Court of Appeal and Supreme Court in *Pathan v. Home Secretary* illustrate that this delineation may not always be straightforward.

26. The claimant applied for further leave to remain as Tier 2 general migrant sponsored by an employer. At the time of his application, the claimant's employer had a valid certificate of sponsorship. Prior to the application being processed, however, the sponsor's certificate was revoked. Although the Home Secretary was aware of the revocation, the claimant was not informed. Leave to remain was refused. He sought administrative review of the decision and asked for a 60-day period to enable him to provide a fresh certificate of sponsorship. This was refused.

27. The claimant sought judicial review in the Upper Tribunal on the basis that procedural fairness required the Home Secretary to notify him of the revocation of his sponsor's certificate and a reasonable period of time to put his affairs in order. The Upper Tribunal dismissed the claims.

28. The claimants' appeals to the Court of Appeal failed, [2018] EWCA Civ 2103; [2018] 4 WLR 161. Singh LJ (with whom Coulson LJ and Sir Andrew McFarlane P agreed) held that the complaint was properly to be analysed as one of substantive and not procedural unfairness [63]. The Court of Appeal considered that in truth the claimant was seeking a variation to the Immigration Rules to allow him a further 60 days to provide a valid certificate of sponsorship. On this analysis, Singh LJ noted that following the decision in *Gallaher* "*it is (to say the least) very doubtful that any freestanding doctrine of substantive fairness has survived*" [67]. As such the question was whether "*there was in the present context such unfairness as to amount to irrationality*", to which the answer was that there was not [70].

29. In the Supreme Court [2020] UKSC 41; [2020] 1 WLR 4506, however, a majority (Lady Arden, Lord Kerr, Lady Black and Lord Wilson; Lord Briggs dissenting) held that the complaint could be properly characterised as one of procedural unfairness.

30. The reasons given were as follows:

(i) Lady Arden: noted that the same substantive decision may give rise to both a claim for procedural fairness and a claim that the substantive decision is unfair [37]. She stated that the Court of Appeal had fallen into error by drawing too rigid a line between the two [40]. She added that whilst the categorisation of grounds for judicial review was important, the "*real issue is the level of intensity, or sensitivity, to judicial review given the roles and responsibilities of the judiciary under the British constitution*" [41]. The Court of Appeal had characterised the dispute as being about whether the mandatory requirement for a certificate was lawful. As put, that issue was one of substance, but that was not the issue raised by Mr Pathan. Rather, his case was that the Secretary of State should have given him notice that the sponsor's licence had been revoked and time to deal with it [73].

(ii) Lord Kerr and Lady Black: in their joint judgment they addressed the argument made by Lord Briggs [177], that "*time 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*". Lord Kerr and Lady Black stated that a "*distinction must be drawn between the duty to act in a procedurally fair way and the use which the beneficiary of the discharge of the duty will avail of it*" [137].

(iii) Lord Briggs: concluded that whether being given extra time to respond to the revocation of a sponsor's licence does not give rise to procedural fairness at all; rather it is a question of substantive fairness (largely for the reasons given by Singh LJ in the Court of Appeal) [153] (and see the analysis at [154]-[193]).

(iv) Lord Wilson (with whom Lady Arden agreed): asked "*how, without departure from ordinary meaning, could Mr Pathan's complaint be described as not being procedural?*" [208]. Further, he described finding the distinctions drawn by Lord Briggs between procedure and substance to be "*challenging*" [209].

31. The Court went on to hold unanimously that the Home Secretary breached her procedural duty to act fairly by failing to promptly notify the Appellant of the revocation of his sponsor's licence. The majority of the Justices (Lord Kerr, Lady Black, and Lord Briggs) held that the Home Secretary was not under a further duty to provide a period of time following notification to enable the Appellant to react to the revocation of his sponsor's licence. Lord Wilson and Lady Arden concluded that the law did impose this further duty on the Home Secretary.

32. *Pathan* illustrates starkly that it will not always be easy (or indeed uncontroversial) to identity whether an argument is in truth one of procedural or substantive unfairness. Given the heightened importance of the distinction post-*Gallaher*, it seems likely that this issue will lead to further litigation.

(c) Substantive Legitimate Expectation

33. The relationship between the test for substantive legitimate expectation and the demise of substantive unfairness in *Gallaher* is uncertain.

34. Substantive fairness is related to, albeit distinguishable from, the doctrine of substantive legitimate expectation. The connection between the two doctrines was acknowledged by Singh LJ in the pre-*Gallaher* case of *Talpada*. Singh LJ noted that substantive fairness is "*closely related*" to substantive legitimate expectation [59], but that decisions such as *Unilever* made it clear that the concept of substantive fairness may be wider than the concept of legitimate expectation [60].

35. In *Gallaher* itself, reference was made to the doctrine of substantive legitimate expectation, broadly to say that substantive unfairness did not arise absent a substantive legitimate expectation (or irrationality): see Lord Carnwath at [29] and Lord Sumption at [50].

36. A few months after the decision in *Gallaher*, the Supreme Court had cause to revisit the issue of substantive legitimate expectation in *Re Finucane's Application for Judicial Review* [2019] UKSC 7; [2019] 3 All ER 191. This concerned the murder of Patrick Finucane, a Belfast solicitor, in his home, in front of his wife and children, in February 1989. The appellant contended that she had a legitimate expectation that a public inquiry into her husband's death would be held. That, she contended, was based on the unequivocal assurance given to her by the then Secretary of State for Northern Ireland in a statement to the House of Commons on 23 September 2004.

37. Lord Kerr reviewed the previous authorities on legitimate expectation, concluding that "*where a clear and unambiguous undertaking has been made, the authority giving the*

undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context" [62] (emphasis added).

38. There are a number of cases in which the issue of whether or not it is lawful to depart from an undertaking has been resolved by reference to a proportionality test: see, for example, *R v. North and East Devon Health Authority, ex p. Coughlan* [2001] QB 213 at [57] per Lord Woolf MR. The Court in *Finucane*, however, applied a test of "*fairness*". The apparent inconsistency with the approach taken in *Gallaher* has been the subject of criticism by Professor Mark Elliott:[3]

> "*Thus, according to Lord Kerr, 'where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so'. But this gets us only so far, and there is clearly work to be done as regards determining what 'fairness' means in this context… this simply kicks the can down the road, because it tells us nothing about what it actually means for something to be substantively fair. Indeed, in Gallaher, Lord Carnwath's leading judgment appears to pour cold water over the very idea of substantive fairness: while 'procedural fairness' is 'well-established and well-understood', '[s]ubstantive unfairness … is not a distinct legal criterion'.*
>
> *Given these very recent remarks in Gallaher, it is surprising that Finucane appears to rehabilitate the notion of substantive fairness by using it as the touchstone for determining whether the frustration of a legitimate expectation is lawful. It is particularly surprising that Lord Carnwath in Finucane endorsed Lord Kerr's judgment in that case, given Lord Carnwath's remarks about substantive fairness in Gallaher. And it is disappointing that, having so recently expressed scepticism about the meaning and usefulness of the notion of substantive fairness, the Supreme Court in Finucane so blithely invokes that concept. In doing so, it creates uncertainty about the nature of the test being applied, about the operative standard of review, and about how a test of substantive fairness thus conceived relates to and/or differs from other (better understood) potential tests such as rationality and proportionality.*"

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[3] "*The Supreme Court's judgment in Finucane – II: Three unanswered questions concerning the doctrine of legitimate expectation*", Public Law for Everyone (8 March 2019) https://publiclawforeveryone.com/2019/03/08/the-supreme-courts-judgment-in-finucane-ii-three-unanswered-questions-concerning-the-doctrine-of-legitimate-expectation/
See also "*Legitimate expectation: reliance, process and substance*" (2019) 78(2) Cambridge Law Journal 260-264

39. Again, this issue seems very likely to engender further litigation.

(d) Gallaher and Consultation

40. The Divisional Court in *R (Plantagenet Alliance Ltd) v. Secretary of State for Justice* [2014] EWHC 1662 (Admin); [2015] LGR 172 summarised the circumstances in which a decision maker has a duty to consult [98(2)]. The fourth of those circumstances is as follows: "*where, in exceptional cases, a failure to consult would lead to conspicuous unfairness*". The "*fourth limb duty*" can be traced back to the decision of the Court of Appeal in *R (Bhatt Murphy) v. Independent Assessor* [2008] EWCA Civ 755, in which Laws LJ cited *Preston* and *Unilever* [28], [42].

41. What impact, if any, does *Gallaher* have on the content of the fourth limb duty to consult? The answer (thus far) is that it depends on whether the failure to consult is said to give rise to procedural or substantive unfairness.

42. In *R (Broad) v. Rochford District Council* [2019] EWHC 628 (Admin) David Elvin QC, sitting as a Deputy Judge of the High Court, rejected the argument that *Gallaher* had altered the test where the failure to consult was said to give rise to procedural unfairness. He noted that the decision in *Gallaher* did not purport to alter the law relating to procedural unfairness [31]-[37].

43. In *R (Shaw) v. Secretary of State for Education* [2020] EWHC 2216 (Admin); [2020] ELR 677, by contrast, the unfairness alleged by the lack of consultation was substantive: the easing of duties under the special educational needs legislation that had "*been in place undisturbed for decades*" made it "*unfair to remove the relevant rights abruptly, without first consulting formally*" [97]. Without argument on the point (as the parties agreed that this was the correct approach), Kerr J asked whether it was *Wednesbury* reasonable for the decision maker not to consult [106].

44. It may be, therefore, that the fourth limb duty will be tweaked in subsequent cases so as to apply where either: (i) a failure to consult would lead to conspicuous procedural unfairness, or (ii) a reasonable decision maker would have consulted.

(e) Consistency of Treatment

45. By holding that there is no discrete ground of review of consistency of treatment, but this is merely a species of irrationality, *Gallaher* begs a number of further questions.

46. **First**, what is the standard of review to be applied? Where "*constitutional principles*" are at stake, the court has applied "*anxious security*", see, for example, *Kennedy v. Charity Commission* [2014] UKSC 20; [2015] AC 455 at [245]. Similarly, other cases suggest that where equality issues are in play, anxious scrutiny must be applied; *R (Gurang) v. Secretary of State for Defence* [2008] EWHC 1496 (Admin) per Ouseley J at [54] and [60]. *Gallaher* does not resolve whether, and if so in what circumstances, "*anxious scrutiny*" would apply in consistency of treatment cases.

47. **Second**, and related, the decision does nothing to resolve the uncomfortable fit between rationality on the one hand and equality on the other. In this respect Professor Colm O'Cinneide notes that rationality "*was conceptualised as setting a forbiddingly high threshold for judicial intervention, only to be crossed in situations where public authorities had behaved in a manifestly irrational manner. However, these expectations sit uneasily with the value now assigned to the equality principle, and the widespread view that courts should play an active role in reviewing conformity to normative demands*".[4]

48. **Third**, and also related, in emphasising the desirability of not having a multiplicity of judicial review grounds, does the Supreme Court risk having what Professor Mark Elliott has described as "*too little doctrine*", namely that in requiring rationality to do all of public law's heavy lifting, "*the law of substantive judicial review becomes little more than a device for conferring a thin veneer of respectability upon a form of gut-instinct adjudication*".[5] Might it be better, posits Professor Elliott, to have a freestanding principle of consistency?

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[4] "*Equality – A core common law principle, or 'mere' rationality?*" in *Common Law Constitutional Rights*, Mark Elliott and Kirsty Hughes (eds) (Hart Publishing, 2020); https://discovery.ucl.ac.uk/id/eprint/10102595/3/O%27Cinneide_O%27Cinneide%20final%20draft%20cl%20equality%20chapter%2014%20July%202019.pdf

[5] "*Consistency as a free-standing principle of administrative law*?", Public Law for Everyone (28 February 2019) https://publiclawforeveryone.com/2018/06/15/the-supreme-courts-judgment-in-gallaher-consistency-as-a-free-standing-principle-of-administrative-law/#:~:text=First%2C%20recognising%20consistency%20as%20a,recognition%20of%20its%20normative%20importance.&text=Second%2C%20acknowledging%20consistency%20as%20a,as%20occurred%20with%20legitimate%20expectation.

V. CONCLUSION

49. The decision of the Supreme Court in Gallaher has fundamentally changed the law on substantive fairness. The full implications of the decision have, however, yet to be fully worked out.

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