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What is the latest judicial thinking on procedural and substantive fairness following Gallaher and the associated intensity of review?

Helpful Analyses

- June 2022 James Goudie KC [talk](#) on “Fairness - Where or how can the line be drawn between procedural and substantive fairness?”
- June 2021 Sarah Hannett KC [talk](#) on “Substantive unfairness - Drawing on recent and live cases, how is the Court responding to claims of substantive unfairness in judicial review?”
- June 2020 James Maurici KC [talk](#) on “Conspicuous unfairness - How are judges weighing ‘conspicuous unfairness’ as a factor since Gallaher? Important new innovation or damp squib?”
- May 2019 Gerry Facenna KC [talk](#) on “Gallaher - In the spotlight of Gallaher, how are you to steer clients through claims for ‘legitimate expectation’ or ‘conspicuous unfairness’? What leeway do you have?”
- Paul Daly, “The Future of Substantive Review in English Administrative Law: R (Gallaher Group Ltd) v Competition and Markets Authority [2019] AC 96” at <https://www.administrativelawmatters.com>
- Prof Mark Elliott, “Consistency as a free-standing principle of administrative law?” at <https://publiclawforeveryone.com>

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

- Equal treatment is not recognised as a distinct principle of administrative law. A breach of “equal treatment” cannot be a “ground” for judicial review.
- Gallaher contended that it was treated unfairly in an investigation by the Competition and Markets Authority for price-fixing. It, along with other parties, had entered into non-statutory “Early Resolution Agreements” whereby a reduced penalty was awarded in exchange for cooperation. The CMA promised one of the parties that if it entered into the ERA it would receive the benefit of any appeal by any other party against the decision of the Office of Fair Trading.
- The Court of Appeal found that the CMA had made a mistake in giving the assurance to T, and that its decision to honour the assurance while treating the Gallaher differently was both unfair and a breach of the principle of equal treatment. It held that the OFT had acted unlawfully by not offering Gallaher the same assurance and refusing to repay the penalties which they had paid
- The Supreme Court disagreed and said UK law did not recognise equal treatment as a distinct principle of administrative law. Consistency was “generally desirable”, but was not an absolute rule.
- Main passages in Gallaher: see Lord Carnwath at §§24, 26, 40, 41; Lord Sumption at §50; Lord Briggs at §§62-63

What not to do...

- When formulating grounds for judicial review, probably best not to assert a principle of equal treatment (see *Turani* discussed below).
- Treat with caution the old cases addressed in *Gallagher* such as:
 - ***R v. Inland Revenue Commissioners, ex p. Preston*** [1985] AC 835 in which Lord Scarman held at 851 that “unfairness in the purported exercise of a power can be such that it is an abuse or excess of power”. See also Lord Templeman at 864. Lord Carnwath held in *Gallagher* that in hindsight this was a legitimate expectation case §37
 - ***R v. Inland Revenue Commissioners, ex p. Unilever plc*** [1996] STC 681: “illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power” (per Simon Brown LJ at 694). Lord Carnwath thought this would in modern terms be seen as a legitimate expectation case, or one of irrationality §40.

JR Options in relation to unequal treatment

- Common Law Grounds
 - Procedural (rather than substantive) unfairness
 - Legitimate Expectation
 - Rationality

- Statute-based Grounds
 - Article 14 ECHR read with any other applicable article
 - Equality Act sections 29, and 19 (indirect discrimination) or 29 and 13 (direct discrimination)
 - Principle of equal treatment in retained EU law.

Procedural Fairness

- **Pathan v SSHD [2020] 1 WLR 4306**
- A duty to inform the Appellant promptly of the revocation of the sponsor's licence "a self-evident aspect of the duty to act fairly" (§107); "a procedural duty to act fairly" (§108) (per Lord Kerr).
- Lord Briggs at §158 that the principle was that a person be given "a fair opportunity to present their case to the decision maker".
- **R. (Pearce) v Parole Board for England and Wales [2023] 2 W.L.R. 839**
- The duty of procedural fairness is a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.
- Substantive Fairness closely tied to substantive legitimate expectation

Substantive Legitimate Expectation

- *R. (KBL) v Secretary of State for the Home Department* [2023] EWHC 87 (Admin)
- Rejected a claim that Guidance issued in respect of the British government's mission to evacuate certain at-risk persons from Afghanistan in August 2021 created a legitimate expectation that others, who were in a comparable position but who had not been evacuated, would be given equal treatment. There was no clear representation in the guidance that decisions about who would be prioritised for evacuation would be made fairly and consistently.

Rationality and EU principle of Equality overlap

- *R (Rotherham MBC) v. Secretary of State for Business, Innovation and Skills* [2015] PTSR 322
- 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 century” [26].
- *R. (Humane League UK) v Secretary of State for the Environment, Food and Rural Affairs* [2023] EWHC 1243 (Admin)
- Concerned a challenge to the policy on fast breeding of chickens, which the Claimant said amounted to a policy of “non-enforcement” of the law against non-compliant producers and was therefore unfair on compliant producers.
- Sir Ross Cranston seems to tie EU equal treatment principles to rationality at [109].

Rationality Challenges Post-Gallaher

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

- **Steyn J** held it had not been irrational for the secretary of state to maintain, pending the outcome of the Infected Blood Inquiry, a cut-off date of 1 September 1997 for applying to the English Infected Blood Support Scheme for individuals who had contracted hepatitis C through treatment with NHS blood or blood products.
- 73. ... 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. 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.** "Consistency ... is a 'generally desirable' objective, but not an absolute rule": *Gallaher*, Lord Carnwath at [24], citing [R \(O'Brien\) v Independent Assessor \[2007\] 2 AC 312](#), Lord Bingham at [30].
- 74. I agree with the Secretary of State's submission that the distinctions drawn in this case are far removed from those which were found to be irrational in *Gurung*. McCombe J found that the line drawn between persons governed by one military code as opposed to another, originally derived from 19th century United Kingdom and colonial legislation, was "racial in nature ...

Successful Rationality Challenge

[Gurung v Ministry of Defence \[2002\] EWHC 2463](#) (Admin)

- Exclusion from an *ex gratia* scheme of Gurkhas who had been in Japanese prisoner of war camps.
- The basis of the exclusion was *de facto* racial grounds. As such, it was irrational.
- The claim under the Human Rights Act failed.

Some Failed Challenges following *Gallaher*

- In ***Turani v Secretary of State for the Home Department* [2019] EWHC 1586 (Admin)** a concerted effort was made to in effect assert a common law principle of equal treatment in reliance on Lord Hoffman's judgment in *Matadeen v Pointu* [1999] 1 AC 98 notwithstanding *Gallaher*, but failed. Laing J distinguished *Gurung* on the basis that it was a direct discrimination claim.
- In ***R (Page) v Darlington BC* [2018] EWHC 1818 (Admin)** Whipple J rejected a challenge to a library closure in light of *Gallaher* on the basis that there was no challenge on rationality grounds and the legitimate expectation aspect failed too.
- Similarly in ***R. (Farmiloe) v Secretary of State for Business, Energy and Industrial Strategy* [2019] EWHC 2981 (Admin)** Lang J rejected a challenge to discriminatory treatment by Ofgem on grounds of a failure to plead irrationality.
- ***Inclusion Housing Community Interest Co v Regulator of Social Housing* [2020] EWHC 346 (Admin)**. At §98 Chamberlain J noted that where the judgement involved was multi-factorial and fact-specific, a comparison between outcomes will rarely be an auspicious basis for a rationality challenge.

Consistency as a Material Consideration

North Wiltshire District Council v Secretary of State for the Environment [1992] 65 P. & C.R. 34

- Court of Appeal (Mann LJ, Purchase LJ and Sir Michael Kerr agreeing) explained that previous decisions of Inspectors or local authorities in relation to applications for planning permission are capable of being material to a subsequent decision because like cases should be decided in a like manner so that there is consistency in the appellate process.
- It was held that consistency is self-evidently important. However, there is no rule that like cases must be decided alike in planning: An inspector must always exercise his own judgment and is therefore free upon consideration to disagree with the judgment of another. Before doing so, however, he or she ought to have regard to the importance of consistency and give reasons for departing from the previous decision.
- *R (Edward Blacker) v Chelmsford City Council [2023] JPL 942*

Articulating Rationality

- In *R (Patel) v Secretary of State for the Home Department* [2012] EWHC 2100 (Admin), Mr John Howell QC (sitting as a Deputy High Court Judge) found unlawfulness by reason of failing to provide a 'rational reason' for treating the Claimant less favourably than others (at [141]). He said, at [114]:
 "The "principle of equality" thus simply means that distinctions between different groups or individuals must be drawn on a rational basis. It is thus no more than an example of the application of *Wednesbury* rationality"
- Steyn J's focus on whether the distinctions drawn between otherwise equal groups are themselves rational.
- Anxious scrutiny: As Hannek K.C. identifies in her talk (*cited supra*):
 Where "constitutional principles" are at stake, the court has applied "anxious scrutiny", see, for example, *Kennedy v. Charity Commission* [2015] AC 455 at [245]. Similarly, other cases suggest that where equality issues are in play, anxious scrutiny must be applied; *R (Gurung) 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.
- Focus on reasons and irrelevant considerations?

Thank you for listening

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