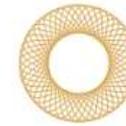


**Outer Temple**

**How do you successfully frame a claim for  
inconsistency of treatment by regulators and turn  
the scale in your client's favour?**

**John McKendrick KC**



## Inconsistency's historical role in JR

- Substantial case law in which reliance placed on 'inconsistency' as a basis for finding illegality in public law decision making:
  - R (O'Brien) v Independent Assessor [2007] UKHL 10  
"It is generally desirable that decision makers, whether administrative or judicial, should act in a broadly consistent manner"
  - R (Hussain) v SSHD [2012] EWHC 1952 (Admin)  
"There is an established principle of public law that 'all persons in a similar position should be treated similarly' ....any discretionary public law power 'must not be exercised arbitrarily or with partiality between individuals or classes potentially affected by it'"

## EU Law

Kone OYJ and others v European Commission (Elevators and Escalators Cartel Appeal) [2014] 4 CMLR 10,

“The principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified.”

## Consistency and “Fairness”

Is the right to consistent decision making a sub-set of the rules of fairness? Namely does an inconsistent decision amount to a breach of the common law rules of fairness?

“unfairness amounting to excess or abuse of power” – is that a grounds for review?

Maybe not, but to be considered under ‘rationality’ or ‘unreasonableness’ but not likely a free standing basis for a finding of illegality.

But procedural matters may cause inconsistency and be unfair/unlawful.

## Gallaher v CMA - Facts

R (Gallaher Group) v Competition and Markets Authority [2018] UKSC 25 – Lord Carnwarth

OFT investigation into tobacco pricing.

The Competition and Markets Authority (which succeeded OFT) appealed against a decision that its predecessor, the Office of Fair Trading, had breached its public law duty to treat parties under investigation equally by refusing to reimburse penalties which the respondents had paid.

## Gallaher v CMA

Lord Carnwarth:

### No English law right in law to equal treatment

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 the passage relied on by the appellant (para 19 above), is a "generally desirable" objective, but not an absolute rule."

## Gallaher v CMA

Lord Carnwarth:

Fairness, procedural, yes, but substantive, no.

” 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.”

## Gallaher v CMA

### Lord Sumption:

“To say that a decision-maker must treat persons equally unless there is a reason for treating them differently begs the question what counts as a valid reason for treating them differently. Consistency of treatment is, as Lord Hoffmann observed in *Matedeen v Pointu* [\[1999\] 1 AC 98](#), at para 9 “a general axiom of rational behaviour”. The common law principle of equality is usually no more than a particular application of the ordinary requirement of rationality imposed on public authorities. Likewise, 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.”

## Rationality not inconsistency

### Core Conclusion:

An administrative law challenge to inconsistency, absent procedural unfairness or breach of legitimate expectation, must focus on the irrationality of the distinctions which determine the consistency or inconsistency of decision making.

Chamberlain J:

**Inclusion Housing Community Interest Company v Regulator of Social Housing [2020] EWHC 346 (Admin)**

“In a context such as this, where each judgment is multi-factorial and fact-specific, a comparison between outcomes in different cases will rarely be an auspicious basis for a rationality challenge. In this case, the regulator has attached the RJs for the comparator cases and has briefly explained the key differences. It is plain that the circumstances of the purported comparators are materially dissimilar. There is no basis for the suggestion that the distinctions drawn were irrational.”

## Policies

Regulators may, indeed, should be encouraged to use published policies to guide their regulatory discretion.

Courts will look to policies to consider issues of rationality in the context of inconsistency.

Classic decision of R (Alconbury Developments) v SSFETR [2001] UKHL 23:

“The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of administrative discretion”

# Strategies

## Challenging regulatory decisions:

- Procedural fairness - what are the rules of the game?
- Can you obtain previous regulatory decisions?
- Disclosure?
- Does a policy guide the outcome?
- Focus on irrationality of distinctions.

QUESTIONS?

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