

**Conspicuous unfairness:
How are judges weighing "*conspicuous
unfairness*" as a factor since *Gallaher*?
Important new innovation or damp squib?**

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Introduction

- The 2 questions I have been asked to answer:
 - (1) How are judges weighing "*conspicuous unfairness*" as a factor since ***Gallaher***?
 - (2) Important new innovation or damp squib?
- I have broken this down:
 1. What was the position pre-***Gallaher***?
 2. What was ***Gallaher*** about? What did it decide?
 3. What has been the reaction?
 4. How have the Courts approached matters since ***Gallaher***?
 5. How significant is the decision in ***Gallaher***?

The position pre-*Gallaher*

- (1) General acceptance in case-law that there was a principle of **fair and equal treatment** in common law, that gave rise to a free-standing ground of judicial review: see the case-law cited in the SC's decision in ***Gallaher*** at [20].
- (2) There was also an overlapping principle of "***substantive unfairness***" that itself also gave rise to a free-standing ground of judicial review and which was said to arise where there was "***conspicuous***" unfairness or unfairness "***amounting to an abuse of process***".
- *NB* focus in ***Gallaher*** was on domestic law not EU law where there is a principle of equal treatment, as a general principle of EU law (see ***Gallaher*** at [21] and [24]).
- Also *not* considering:
 - (i) Duties on public authorities under the Equality Act 2010; or
 - (ii) Article 14 of the European Convention on Human Rights.

Gallaher: facts

- OfT investigation concluded competition law breaches by a C manufacturer (“Gallaher”), a C retailer (“Somerfield”) and other retailers/manufacturers.
- Several retailers/manufacturers entered into early resolution agreements (“ERAs”) in which they admitted liability, agreed to co-operate with the OfT and thus received reduced penalties.
- The ERAs allowed for appeals (within time) vs final decision but at risk of increased penalty.
- Cs entered ERAs on those terms.
- Another retailer (“TMR”) raised an issue re appeals and was given an (erroneous) assurance by OfT that if it did not appeal and another party did it would nonetheless get the benefit of any successful appeal. No one else given that same assurance.
- Cs and TMR did not appeal, some others did.
- The Competition Appeal Tribunal allowed those appeals.
- OfT then honoured its assurance to TMR and reimbursed it the sums it had paid in penalties.
- The Cs asked for same treatment. The OfT refused.
- CA allowed the JR holding the Cs were in a comparable position to TMR and their different treatment required objective justification. The CA said there was a breach of the principle of fair and equal treatment at common law as no such justification.

Gallaher: SC decision (1)

- Leading judgment by Lord Carnwath (other Judges all agreed: Lord Mance, Lord Sumption, Lord Hodge and Lord Briggs).
- Key points from discussion of the Legal Principles:
- **Equal Treatment:**
- (1) Domestic law does **not** recognise equal treatment as a distinct principle of administrative law: [24];
- (2) Consistency is a “*generally desirable*” objective, and “*one of the building blocks of democracy*” but **not** an absolute rule: [24] and [25];
- (3) Issues of consistency may arise in judicial review but **only as aspects of rationality** [25];
- (4) The SC accepted that the Cs in **Gallaher** did have though a LE of equal treatment [30], but this did not win the day for the Cs – see below;

Gallaher: SC decision (2)

- **Substantive Fairness:**

- (1) Fairness, like equal treatment, is a fundamental principle of democratic society, but not necessarily translatable into a justiciable rule of law: [31];
- (2) The addition of words like “*conspicuous*” does not improve precision of the concept: (*ibid.*);
- (3) Unfairness *per se* (as opposed to procedural unfairness) is not a ground of JR: citing ***R v IRC, ex p National Federation of Self-Employed and Small Businesses Ltd*** [1982] AC 617, 637 per Lord Diplock: [32] – [33];
- (4) The broader concept of “*unfairness amounting to excess or abuse of power*” as a ground of judicial review had emerged in cases in the 1980s (see e.g. ***R v IRC, ex p Preston*** [1985] AC 835): [34] – [36]);

Gallaher: SC decision (3)

- (5) This concept was “*not without difficulty*” and the cases relying on this on analysis all also gave rise to a conventional ground of review e.g. improper motive, illegality or breach of legitimate expectation;
- (6) The ***Preston*** case is (with hindsight) best understood by reference to principles of LE derived from an express or implied promise: at the time it was not so analysed as not established then that a LE could be of a substantive benefit rather than a procedural one: [37];
- (7) Similarly, ***Ex p Unilever*** [1996] STC 681 is best understood not as a case of “*conspicuous unfairness*” as a free-standing legal principle but as LE case based on a representation that could be *implied* from the Revenue's consistent practice - the legality of departing from which is to be judged on ***Wednesbury*** grounds: [40].

Gallaher: SC decision (4)

Per Lord Carnwath at [40] :

*“In summary, procedural unfairness is well-established and well understood. **Substantive unfairness** on the other hand - or, in Lord Dyson MR’s words [2016] Bus LR 1200, 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.”*

Gallaher: SC decision (5)

Per Lord Sumption [50]:

*“I agree with Lord Carnwath JSC’s analysis of the relevant legal principles. In public law, as in most other 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. 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 Matadeen v Pointu [1999] 1 AC 98, 109 “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”.*

Gallaher: SC decision (6)

- So the outcome:
- (1) CA decision overturned;
- (2) As Cs knew nothing of the assurance given to TMR, there was no LE in that sense;
- (3) Even assuming that there was a breach of the Cs LE of equal treatment in that the OfT did not replicate the assurance this got Cs precisely nowhere in terms of overturning their financial penalties;
- (4) WHY? Because there was a rational basis for treating the Cs differently – namely that they were not given the relevant assurance. TMR were. OfT reasonably took view that despite being erroneous if it was not honoured TMR would have had a strong case for pta out of time: *per* Lord Carnwath [44] and *per* Lord Sumption [56]. Cs did not have such a case.

The reaction (1)

- Look at 3 articles:
- (1) *A “principle” of consistency? The doctrinal configuration of the law of judicial review*, Mark Elliott, C.L.J. 2018, 77(3), 444-448:
 - **Substantive unfairness**: Applauds *“the bucket of cold water that Lord Carnwath poured over notions such as “abuse of power” and “conspicuous unfairness” (in the substantive ... sense of unfairness), the sloppy deployment of which has muddied the doctrinal waters of administrative law”*.
 - **Equal treatment**: Asks *“does it really matter whether, like legitimate expectation, consistent/equal treatment is regarded as an administrative law “principle” in its own right (in the sense of being a separate ground of review)?”*
 - Says “yes” because: (i) *“recognising consistent/equal treatment as a free-standing principle would be fitting recognition of its normative importance”*; (ii) *“it would facilitate the development of a suitable doctrinal superstructure, as occurred with legitimate expectation”* and (iii) *“carving out a principle of consistent/equal treatment from the generality of rationality review would place less weight on the latter and, as a result, would aid legal transparency”*.

The reaction (2)

- (2) *From early resolution to conceptual confusion: R. (on the application of Gallaher Group Ltd) v The Competition and Markets Authority*, Hayley J. Hooper, P.L. 2019, Jul, 460-469:
 - argues that **Gallaher** was rightly decided.
 - “The ruling confirms that *as a matter of English administrative law, substantive unfairness (also described by the court as “simple unfairness” or the legal requirement of equal treatment) is not a discrete head (or ground) of judicial review. Procedural fairness remains the only legal category of fairness which is a distinct head of review. Instead, substantive fairness remains a background principle of democratic and administrative behaviour which may influence the existing grounds of review to a greater or lesser degree. The Supreme Court’s discussion of both legitimate expectations and consistent treatment speak only to this non-legal dimension of fairness. There are sensible reasons, such as respect for the principle of the separation of powers, and the autonomy of administration which underpin this balance*”.

The reaction (3)

- (3) *Equal Treatment and Consistency Before and After **Gallaher***, Jasveer Randhawa & Mark Smyth, JR 2018 23(3) pp 159 – 175:
 - Open the article by saying: “*The Supreme Court decision... has been received with some consternation amongst many public law practitioners. There have been mutterings that this may be “the beginning of the end” of the expansion of public law. At a time when our common law is going to be all the more important in the post-Brexit world, many are surprised to see from the Supreme Court what could be perceived as a narrowing of the parameters of judicial review*”
 - Agree that the actual decision of the SC – the outcome - in the case is not surprising;
 - “*The surprise of **Gallaher** arises not from the outcome but from the breadth and stridency of the Supreme Court’s observations on the role of unequal treatment that will be of wider application, which on one view of the ratio may strictly have been obiter. The benefit of the freestanding principle approach evident in some earlier cases was to impose a higher burden on public bodies to demonstrate an objective justification once differential treatment of like cases had been established by the claimant. The Supreme Court’s emphasis on irrationality appears to leave little room for lower courts to shift the onus onto public bodies to justify discriminatory treatment of like cases*”.

The response of the Courts (1)

- (1) **McCord's application for JR: Re, Border Poll [2020] NICA 23:**
 - JR of refusal of S/S to publish a policy setting out the circumstances in which he would hold a border poll under the NI Act 1998, s. 1 and Sch 1. M argued, *inter alia*, that an obligation to publish a policy flowed from a general principle of acting consistently.
 - NICA apply **Gallaher** in NI “*consistency is a component of equal treatment which in turn is not a separate principle, but part of **Wednesbury** rationality*” [86] “*we reject the proposition that “inconsistency is a ground of judicial review” except in that it is evidence of **Wednesbury** irrationality*” (*ibid.*).
- (2) **R (Turani) v SSHD [2019] EWHC 1586 (Admin) per Laing J.:**
 - Challenge the Vulnerable Persons Resettlement Scheme;
 - C argued there was a common law principle of equality which aligned with the claim being pursued by the C under the Equality 2010 Act, and that Scheme unlawful as breached both;
 - Judge says [133] that in light of **Gallaher** “ *... I doubt whether there is a free-standing common law principle of equality*” [133] and “*I do not understand, in any event, how a principle which is said to align with a statutory scheme can add anything to an analysis of whether the Scheme is lawful*” (*ibid.*).

The response of the Courts (2)

- (3) ***Pathan v Secretary of State for the Home Department* [2018] EWCA Civ 2103:**
 - Cs applied for further leave to remain sponsored by a employer. At the time when applications made employer had valid certificate of sponsorship, but before applications processed sponsors certificates revoked. S/S was aware of revocations, C not informed. Refused leave. Cs argue, *inter alia*, substantive unfairness.
 - CA, per Singh LJ:
 - What said by CA in ***R (Talpada) v SSHD*** [2018] EWCA Civ 841, at [56]–[65] on substantive fairness now to be read in light of ***Gallaher***: [68];
 - “*it is (to say the least) very doubtful that any freestanding doctrine of substantive fairness has survived the decision of the Supreme Court in that case*” (*ibid.*);
 - “*in **Gallaher**, the Supreme Court held that, while the principle of equal treatment could be regarded as an aspect of rational behaviour, it does not in itself constitute a freestanding ground for judicial review: see paras 24–30 (Lord Carnwath) and para 50 (Lord Sumption)*”: [69];
 - Unable to accept there was such unfairness as to amount to irrationality: [70], for reasons given in D’s witness statements.
 - Appealed to SC, heard December 2019 – judgment awaited.

The response of the Courts (3)

- (4) *R. (Page) v Darlington BC* [2018] EWHC 1818 (Admin) per Whipple J.
 - Library closure case;
 - Useful in making clear where matters stand after **Gallaher**:
 - (i) For a LE need to meet the **MFK** test – an assurance that is “*clear, unambiguous and devoid of relevant qualification*”: [37] - NB but can be express or implied – see below;
 - (ii) If fail that test, Cs **cannot** now argue in the alternative (other than via irrationality) that D “*abused its powers by acting in a manner which was conspicuously unfair*”: [38] – [40];
 - “*The position thus reached ... was this: for the Claimant to succeed in this part of her case, she had to show as a starting point, either that she ...received a promise from the Defendant which met the standard in MFK, i.e., it was “clear, unambiguous and devoid of relevant qualification”; or that the Defendant had acted in a manner which was so unfair as to be irrational in light of Gallaher*”: [41]
 - “*there is no middle ground where general allegations of unfairness, falling short of breach of legitimate expectation or irrationality, could found a claim in public law*”: [42];
 - This aspect failed as “*nowhere did the Claimant plead that the Defendant had acted irrationally*” (ibid.)

The response of the Courts (4)

- (5) ***R. (Reid) v Revenue and Customs Commissioners*** [2020] UKUT 61 (TCC):
- JR of accelerated payment notices (“APN”) issued by HMRC, an earlier one having been withdrawn:
 - C accepted no LE further APN would not be served;
 - Argued instead that “*the decision to reissue his APN was “so unfair as to amount to an abuse of power”*: [104] – so substantive unfairness;
 - Judge noted that the SC in ***Gallaher had*** decided “*a complaint of “conspicuous unfairness” (not involving unfairness of a procedural nature) could amount to a free-standing ground of challenge*”: [105];
 - Thus the only issue was irrationality;
 - HMRC decision was made on basis that it reviewed the position and considered that the notices originally issued were in fact valid because all of the statutory requirements were met, and therefore they should not have been withdrawn.
 - That could not be said to be irrational: [107].

The response of the Courts (5)

- (6) ***R. (Heathrow Hub Ltd) v Secretary of State for Transport*** [2020] EWCA Civ 213:

 - Challenge to Heathrow preference in Airports National Policy Statement;
 - CA cites Lord Carnwath in ***Gallaher*** at [37] and [40] “*It is clear therefore, in our view, that, although an express promise is not required to found a legitimate expectation, there must be a consistent practice which is sufficient to generate an implied representation to the same effect*”: [74] – [75].

- (7) ***Inclusion Housing Community Interest v Regulator of Social Housing*** [2020] EWHC 346 per Chamberlain J.:

 - JR of regulator’s decision that C was non-compliant in respect of financial viability and governance;
 - C argued, *inter alia*, unequal treatments vs others adjudged compliant;
 - Judge cites ***Gallaher*** and says “*“unequal treatment’ is a ground for review if and only if it involves drawing irrational distinctions. In a context such as this, where each judgment is multifactorial and fact-specific, a comparison between outcomes in different cases will rarely be an auspicious basis for a rationality challenge ..”* [98]; allegation fails as situations materially dissimilar.

The response of the Courts (6)

- (8) *R. (Farmiloe) v Secretary of State for Business, Energy and Industrial Strategy* [2019] EWHC 2981 (Admin) per Lang J.:
 - Application to Ofgem for accreditation under the Domestic Renewable Heat Incentive Scheme.
 - Ofgem sought a new Energy Performance Certificate (“EPC”) in support of application. That decision JRd.
 - Argued by C, inter alia, that other applicants had not been required to commission new EPCs and that Ofgem was discriminating against C because of high value application, and treating C differently to other applicants: [105].
 - Post *Gallaher* only issue is irrationality and that not pleaded: [106] – [107]; difference in treatment clearly rational.

The response of the Courts (7)

- (9) [R. \(Aozora GMAC Investment Ltd\) v Revenue and Customs Commissioners \[2019\] EWCA Civ 1643](#):
 - JR of HMRC decision to issue closure notices following inquiries into Aozora UK's tax returns;
 - It was held that this was a breach of a LE;
 - The issue was whether HMRC could lawfully resile from it;
 - CA:
 - (i) rejected argument that once representation capable of giving rise to a LE has been identified, the burden then shifts to HMRC to adduce evidence to the court showing some public interest in it being able to resile from the representation: [46];
 - (ii) holds that Lord Carnwath in **Gallaher** was not dispensing with the need for a high degree of unfairness to be established before the court would prevent HMRC resiling from a LE *“I consider that wherever an express representation is established it is still essential for the court to consider all the factors relevant to whether it would be unfair to allow HMRC to frustrate an expectation arising from that promise, assurance or representation and further that a high level of unfairness is necessary to override the public interest in the collection of taxes to which I have referred”*: [48] – [51].

The response of the Courts (8)

- (10) *R. (Phoenix Life Holdings Ltd) v Revenue and Customs Commissioners* [2019] EWHC 2043 (Admin) per Philips J.
 - HMRC reject a repayment claim
 - C’s primary public law challenge was on the ground that it was so “*conspicuously unfair*” as to be irrational: [67];
 - C’s accepted HMRC made no express representation, but nevertheless assert that what was an effective “*volte face*” on the issue of entitlement, after the expiry of the time limit for a claim, was capricious and therefore unlawful: (*ibid.*);
 - Considers ***Gallaher***: [74];
 - “*the Decision was irrational and, if a separate concept, conspicuously unfair*”!?: [79].

Conclusions (1)

- (1) Clear after **Gallaher** that equal treatment and/or substantive fairness (“*conspicuous unfairness*”) are no longer free-standing grounds of JR but rather aspects of irrationality;
- (2) This is a radical change in terms of Legal Principles – many earlier cases (e.g. **Unilver**, **Preston** et al) still relevant but need to be read now carefully in the light of **Gallaher**;
- (3) C can argue:
 - (i) LE which met the standard in **MFK**, i.e., it was “*clear, unambiguous and devoid of relevant qualification*” based on an *express or implied* assurance from D; or
 - (ii) Absent that can argue D has acted in a manner which was so unfair as to be irrational.
- (4) In relation to any established LE, in determining whether the D may resile from this the degree of unfairness this would cause remains relevant – so may still ask: is it *conspicuously* unfair to resile? Or perhaps more properly: is it irrational to resile?
- (5) In relation to irrationality the issue would be: (i) is any alleged unequal treatment irrational; or (ii) is any conduct so otherwise unfair that it is irrational;
- (6) In subsuming equal treatment/substantive unfairness into irrationality, SC may have made winning on such grounds, if anything, more difficult;

Conclusions (2)

- (7) See e.g. *Randhawa/Smyth* “[t]he benefit of the freestanding principle approach evident in some earlier cases was to impose a higher burden on public bodies to demonstrate an objective justification once differential treatment of like cases had been established by the claimant. The Supreme Court’s emphasis on irrationality appears to leave little room for lower courts to shift the onus onto public bodies to justify discriminatory treatment of like cases.”
- (8) But, see what said by Lord Hoffmann in *Matadeen* (above) and cited by Lord Carnwath and Lord Sumption: “*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 . . .*”

Conclusions (3)

- (9) **Gallaher** brings into focus the importance of the **Wednesbury** test, and its limits – and the issue which the SC has so far chosen to avoid of whether this is the test that should be applied generally in administrative law, or whether it should be proportionality: see e.g. **R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs** [2016] A.C. 1355 and **R. (Youssef) v Secretary of State for Foreign and Commonwealth Affairs** [2016] A.C. 1457;
- (10) **Gallaher** by no means a damp squib, it is a major departure in terms of the way public law analyses and views claims based on unequal treatment/substantive unfairness;
- (11) It may have an indirect impact on the likelihood of claims succeeding (see above);
- (12) The full implications of the case yet to be worked out ...

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Thank you for listening

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