FAIRNESS AND EQUALITY IN ADMINISTRATIVE LAW: THE SUPREME COURT IN *GALLAHER*

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I. INTRODUCTION

In a relatively concise judgment, the Supreme Court rejected the principles of equal treatment and fairness as free-standing grounds of judicial review in *R (on the application of Gallaher Group Ltd) v Competition and Markets Authority*.[1] While rightly expressing concerns about the extrapolation of general principles from cherry-picked *dicta*, and about the coherence of administrative law, the Supreme Court was perhaps unduly conservative in its interpretation of existing case law, and in the stance it chose to adopt in selecting between earlier lines of authority. This note will analyse the court's discussion of the principles of equal treatment and of fairness, before also briefly considering the issues of legal coherence and the role that remains for equality and fairness in administrative law.

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1 [2018] UKSC 25, [2018] 2 WLR 1583.

II. SUMMARY OF FACTS AND JUDGMENT

In March 2003, the Office of Fair Trading (OFT) (predecessor of the defendant, the Competition and Markets Authority (CMA)) opened an investigation against thirteen manufacturers and retailers for alleged price-fixing. In 2008, several parties, including the claimants, Gallaher and Somerfield, entered Early Resolution Agreements (ERAs) with the OFT, under which they admitted liability in exchange for reduced penalties. In an internal document, the OFT listed "fairness, transparency and consistency" as principles integral to the early resolution process. One of the parties, TMR, further obtained from the OFT an assurance that, should the other parties successfully appeal an OFT ruling, the OFT would withdraw its decision or reduce the penalties, as appropriate. In April 2010, the OFT issued findings of infringement against twelve of the parties involved, including Gallaher, Somerfield and TMR. In 2012, six parties which had not entered into ERAs successfully appealed these findings before the Competition Appeal Tribunal. The tribunal's reasoning was such that, had the other parties appealed, they would certainly have been successful as well.

Given the successful appeals, TMR invited the OFT to withdraw the findings of infringement against it, citing the assurances in 2008, and the OFT did. Gallaher and Somerfield then sought a withdrawal of the findings of infringement against them too, but the OFT refused. The claimants thereafter sought judicial review of the OFT's refusal to grant them the same benefits of settlement as were afforded TMR in 2012. The judge at first instance rejected their claims. The Court of Appeal allowed the claimants' appeal, holding that that the equal treatment principle applied, since the parties were in a comparable position, and there was no objective justification for treating them differently.

The Supreme Court unanimously reversed the Court of Appeal's decision. Delivering the lead judgment, Lord Carnwath held that neither the principle of equal treatment nor the principle of fairness are distinct grounds of review, and the

claimants had no case on established principles of administrative law. Concurring, Lords Sumption and Briggs held that the OFT's decision, while discriminatory, was objectively justified and rational. It is important, Lord Sumption explained, "not unnecessarily to multiply categories".[2] The OFT's refusal stood or fell according to the "ordinary requirement[s] of rationality".[3]

III. ANALYSIS

A. THE EQUALITY PRINCIPLE

In considering the equal treatment principle, Lord Carnwath was unequivocal: it is not a distinct ground of review, or, to use his Lordship's phrase, "a distinct principle of administrative law".[4] In support of this, his Lordship relied on a passage by Lord Hoffman in *Matadeen v Pointu*:[5]

> 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 fact that equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a justiciable principle.

To be sure, his Lordship did not entirely dismiss the relevance of considerations of fairness and equality. Rather, these are to be treated merely as aspects of established principles of substantive review: rationality and proportionality. For

2 ibid [50].
3 ibid.
4 *Gallaher* (n 1) [27].
5 [1999] 1 AC 98 (HL) 109E–F.

instance, in *A v Secretary of State for the Home Department*,[6] the detention of non-national suspects but not of British nationals was irrational and constituted a disproportionate infringement of the rights of the non-nationals.[7] In *Middlebrook Mushrooms*,[8] the exclusion of mushroom pickers from the wage rate for manual harvest workers was Wednesbury unreasonable and hence, irrational.[9]

Yet it is unclear that the prior case law compelled the court to completely dismiss equality as an independent principle. While powerful, Lord Hoffman's remarks were made in a Privy Council case ruling on the Constitution of Mauritius, which merely provided persuasive authority to their Lordships in the Supreme Court, ruling on domestic principles of administrative law. Nor was it the only line of authority their Lordships could have availed themselves of. In the Court of Appeal, Lord Dyson had referred to *Crest Nicholson v OFT*,[10] a case also concerning the OFT's regulatory activities, and held that the OFT was bound by the equal treatment principle.[11] Perhaps it was not raised in argument before the judges of the Supreme Court; but its lack of any mention or consideration is regrettable.

Regrettable also was the court's failure or refusal to engage in a more probing examination of cases such as *A v Secretary of State*. While that case, unlike *Gallaher*, involved a discussion of human rights and European jurisprudence, the analysis contained therein provided a useful guide on how to approach the question of discriminatory treatment. There, Lord Bingham explained that:

6 [2004] UKHL 56, [2005] 2 AC 68.

7 Although concerned with proportionality under the European Convention of Human Rights, the reasoning "could be applied equally to common law rationality". *Gallaher* (n 1) [27].

8 *R (Middlebrook Mushrooms Ltd) v Agricultural Wages Board of England and Wales* [2004] EWHC 1447 (Admin), The Times, 15 July 2004.

9 *Gallaher* (n 1) [28].

10 *Crest Nicholson plc v Office of Fair Trading* [2009] EWHC 1875 (Admin), [2009] UKCLR 895.

11 At least in all steps leading up to the imposition of a penalty. *R (on the application of Gallaher Group Ltd) v Competition and Markets Authority* [2016] EWCA Civ 719, [2016] Bus LR 1200 [34].

> The question is whether persons in an analogous or relevantly similar situation enjoy preferential treatment, without reasonable or objective justification for the distinction, and whether and to what extent differences in otherwise similar situations justify a different treatment in law.[12]

The Court of Appeal adopted a similar approach in *Gallaher*, finding the claimants to be in an analogous situation to TMR, without any objective justification for differential treatment.[13] Rather than dismiss the principle of equal treatment outright, the Supreme Court could have chosen to engage in a more nuanced analysis of how it applied to the present case. Lord Briggs saw a "powerful objective justification for unequal treatment" in the fact that the OFT's original assurance was a mistake, that rescinding its promise would result in TMR being better off, and in the claimants' lack of reliance.[14] The court could have considered these factors as circumstances relevant to the legality of unequal treatment, instead of throwing the baby out with the bathwater. Unfortunately, it did not.

B. THE FAIRNESS PRINCIPLE

Lord Carnwath took a similarly firm stand against the principle of fairness: "Simple unfairness as such is not a ground for judicial review".[15] As with the principle of equal treatment, his Lordship held that fairness did not add anything beyond conventional grounds of review such as improper motives or illegality.[16] This was to be seen in Lord Templeman's discussion of earlier authorities in *Preston*,[17] where

[12] *A v Secretary of State* (n 6) [50].
[13] *Gallaher* (CA) (n 12) [38]–[45], [48]–[61].
[14] *Gallaher* (n 1) [63].
[15] *Gallaher* (n 1) [31].
[16] *Gallaher* (n 1) [37].
[17] *Re Preston* [1985] AC 835 (HL) 864H–866F.

there was "unfairness" only because of the use of power for improper objectives (as in *Padfield*),[18] or because of an error of law (as in *HTV Ltd v Price Commission*).[19]

In the course of his judgment, his Lordship cautioned against seizing on individual phrases such as "conspicuous unfairness" out of context to derive some principle of law.[20] The decision in *Unilever*[21] (where the phrase was taken from) was "unremarkable on its unusual facts", and such phrases were "simply expressions used to emphasise the extreme nature of the Revenue's conduct".[22] This warning is to be welcomed, if past cases are not to be taken as authority for more than they really are.

Yet, the court's focus on whether "conspicuous unfairness" was a free-standing test led it to overlook the broader principle of unfairness developed in *Unilever*. Lord Carnwath quoted at length from Simon Brown LJ's judgment:

> '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 either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power.[23]

His Lordship certainly took a reasonable view in rejecting an extensive extrapolation of the law based on the final words of that paragraph. Yet, his Lordship neglected to quote in full Simon Brown LJ's immediately following statement of principle: "In short, I regard the MFK category of legitimate expectation as

[18] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL).
[19] *HTV Ltd v Price Commission* [1976] ICR 170 (CA).
[20] *Gallaher* (n 1) [40].
[21] *R v Inland Revenue Commissioners, ex p Unilever plc* [1996] STC 681 (CA).
[22] *Gallaher* (n 1) [40].
[23] *Unilever* (n 21) 695.

essentially but a head of Wednesbury unreasonableness, *not necessarily exhaustive of the grounds upon which a successful substantive unfairness challenge may be based*."[24]

And again, no reference was made to the concluding paragraph of the same section (headed "Legitimate expectation or nothing?"):

> Any unfairness challenge must inevitably turn on its own individual facts. True, as Lord Templeman made clear in Preston, it can only ever succeed in 'exceptional circumstances'… I am very ready to accept that rare indeed will be the case when a fairness challenge will succeed outside the MFK parameters. It is certainly difficult to envisage many situations when, absent breach of a clear representation, a highly reputable and responsible body such as the Revenue will properly be stigmatised as having acted so unfairly as to have abused their power to accept late claims. But I am satisfied that *there exists no legal inhibition to such a conclusion*.[25]

In seeking to confine *Unilever* to its facts, it would seem the court had ignored the broader thrust of that case: that it would require unusual facts to ground an unfairness challenge, and any such challenge would turn on those facts, but nonetheless that such facts might arise (as in *Unilever* itself), and there was no reason to confine a case involving unfairness to the straightjacket of existing private or public law principles. Such an interpretation would have more accurately reflected the state of the law, while preserving the caution, certainty, and yet also flexibility of the law. A blanket dismissal of the principle of unfairness did not. It is ironic that Lord Carnwath should have cautioned against tunnel vision; yet ignored the more extensive discussion of the principle at hand.

[24] ibid (emphasis added).
[25] ibid (emphasis added).

The court also referred to, but chose not to follow, Lord Scarman's *dicta* in *National Federation*[26] and *Preston*.[27] In those cases, Lord Scarman expressed his view that an unfair use of power could be challenged in court.[28] His Lordship provided a clear and powerful, if *obiter*, defence of the duty of fairness. It is not a "mere matter of desirable policy or moral obligation"; an unfair decision gives rise to a "genuine grievance" which the courts can provide an "effective remedy" for in the form of "prerogative relief"; the courts should not shrink from this role "merely because the duties imposed… are complex and call for management decisions in which discretion must play a significant role".[29] It was open to the Supreme Court to at least engage with, even if not adopt, persuasive analysis in a line of Supreme Court cases. A well-considered restriction of the principle of fairness would still have been preferable to a thinly-supported rejection.

A similar issue has arisen in relation to the doctrine of legitimate expectations. There, commentators have regarded the principle of fairness as too uncertain,[30] abstract[31] and open-ended[32] to serve as a justification for the doctrine. In *Gallaher*, the court could have articulated similar problems with treating unfairness as an independent head of review. The court could have considered that such problems militated against a distinct principle of fairness, given its vague nature, but perhaps less so for the principle of consistency, which is less general and abstract. Such an

[26] *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL).

[27] *Gallaher* (n 1) [34]–[35].

[28] *National Federation* (n 26) 651E–653A; *Preston* (n 17) 851H–852C, 852F–G.

[29] ibid.

[30] Jack Watson, 'Clarity and Ambiguity: A New Approach to the Test of Legitimacy in the Law of Legitimate Expectations' (2010) 30 Legal Studies 633, 633–35.

[31] Paul Reynolds, 'Legitimate Expectations and the Protection of Trust in Public Officials' [2011] PL 330, 330–36.

[32] Mark Elliot, 'Legitimate Expectations and the Search for Principle: Reflections on *Abdi & Nadarajah*' [2006] JR 281, 282–84.

approach, too, would have been more balanced than the blanket rejection of both principles.

C. COHERENCE IN THE LAW

In his concurring judgment, Lord Sumption elaborated on the rationale for being circumspect in developing new grounds of review:

> 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.[33]

This indicates the court will likely be reticent if asked to uphold a challenge not based on a clearly established ground of review. This will guide future litigants in framing their claims. This statement also supplies an independent reason for rejecting distinct principles of equality and fairness, thus providing some explanation as to why the court chose to adopt a conservative view of the existing lines of authority discussed above.

It is worth considering whether having additional principles truly hurts legal coherence, and if so, whether there are not more useful purposes to be served by these principles. As Mark Elliot points out, the doctrine of substantive legitimate expectations does not sit in isolation from the principles of rationality and proportionality, yet none would dispute its status as a free-standing principle of administrative law.[34] Similarly, principles of equality and fairness, developed within

[33] *Gallaher* (n 1) [50].

[34] Mark Elliot, 'Consistency as a free-standing principle of administrative law?' (*Public Law for Everyone*, 15 June 2018) <https://publiclawforeveryone.com/2018/06/15/the-supreme-courts-

appropriate constraints such as the need for objective justification or exceptional circumstances, can provide a useful basis for challenging unlawful administrative action. To subsume such principles within the doctrines of proportionality and rationality is possible, but at the cost of accuracy, precision, and indeed certainty in how exactly fairness and equality factor into substantive review.

D. WHAT ROLE DO EQUALITY AND FAIRNESS PLAY?

It is worth noting that claimants can still challenge discriminatory or unfair treatment. But they must satisfy the requirements of established administrative law doctrines, as in *Middlebrooks* (irrationality),[35] *Padfield* (improper objectives) or *HTV Ltd* (error of law).[36] So it would seem, based on the foregoing analysis of *Gallaher*. Yet there is more than meets the eye. For in *Gallaher*, Lord Carnwath acknowledged that the claimants had a *legitimate expectation* of equal treatment, given the OFT's expressed commitment to that principle.[37] Yet his Lordship proceeded to dismiss that as possible grounds for granting a legal remedy.[38] Going further, Joanna Bell suggests that the claimant's case could have been made out on the ground of irrationality itself.[39] For it hardly seems that an official's blunder should be a legally acceptable reason for treating TMR differently to the claimants. Nor does the original blunder in 2008 seem to justify differential treatment in 2012. Why did the claimants lose then? It appears the court might have been influenced by "institutional features" of the case

judgment-in-gallaher-consistency-as-a-free-standing-principle-of-administrative-law/> accessed 24 Dec 2018. See section headed 'Rationality, proportionality and underlying normative values'.

35 As discussed above at II.A.

36 As discussed above at II.B.

37 *Gallaher* (n 1) [29].

38 *Gallaher* (n 1) [30], [42].

39 Joanna Bell, 'Administrative Blunders & Judicial Review: Analysing the UKSC Decision in *Gallaher v Competition & Markets Authority*' (2018) (forthcoming).

such as the huge cost to OFT of repaying the claimant's penalties, and shied away from imposing such a cost on them.[40]

If correct, this suggests that even if claimants show discriminatory or unfair treatment, they may not be able to obtain the desired result or remedy. Indeed, Bell argues that in *Gallaher*, the court should have found the discriminatory treatment in 2008 (and possibly in 2012) unlawful, while restricting the remedy to, at most, declaratory relief.[41] Once again, the Supreme Court's focus on dismissing equality and fairness as free-standing principles may have proven unhelpful. A more nuanced remedial response was available. More importantly, the court missed an opportunity to provide productive guidance as to when unequal or unfair treatment will lead to findings of unlawfulness, and what the appropriate forms of relief would be in different circumstances.

IV. CONCLUSION

The decision as it stands prevents litigants from basing their claims on independent principles of fairness and equality. It should also make them wary of straying beyond pre-existing grounds of review and raising principles not clearly established in law. Unfortunately, the court failed to provide further guidance as to how and when unfair or discriminatory treatment would be irrational, disproportionate, or violate other principles of substantive review, or what the appropriate remedies would be. But given the likelihood of further cases engaging the issues of fair and equal treatment, it is to be hoped that it will soon have occasion to do so.

[40] ibid.
[41] ibid.