THE DEVELOPING DUTY OF FAIRNESS IN THE UK COURTS

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1. In this paper I shall discuss a few important recent UK authorities on the nature of fairness in public law cases. Some elaborate new legal principles or new application of principles whilst others confirm longstanding legal standards.

2. I shall discuss a very different topic from that discussed by Justice Kleith which examined the development of a contractual term of good faith as a result of recent decisions of the Supreme Court of Canada.[1] In England the idea of a contractual term of good faith is a controversial and fledgling topic. It appears to be confined to a relational relationship based on the parties' collaboration and co-operation.[2] However, the precise scope of relational relationship is unclear

3. However, the cases I address concern the public law principle of fairness covering:
   - the purpose of procedural fairness;
   - that the duty of fairness does not include "substantive fairness", but is limited to procedural fairness;
   - that the content of the duty of fairness depends on context and the particular facts of the case; and
   - that bias principles apply to arbitrators.

(1) The purpose of procedural fairness

4. In *R((Osborn) v Parole Board* [2014] A.C. 1115 the UK Supreme Court recasts the rationale requiring decision makers to adhere to the common law duty to act fairly.

5. A number of prisoners (including prisoners serving life sentences) applied for an oral hearing before the Parole Board so he could be released from prison. The context concerned deprivation of liberty which required the duty of fairness to be rigorous in the context of making a decision which could consider a wide range of issues.

6. The Supreme Court held that:
   - although it was impossible to define exhaustively the circumstances in which an oral hearing would be necessary, they would include cases where:
     - important facts were in dispute, or significant explanations or mitigations were advanced, which needed to be heard orally in order fairly to determine their credibility, or
     - the board could not otherwise properly or fairly make an independent assessment of risk, or of the means by which it should be managed, or
     - a face-to-face encounter with the board, or questioning of those who had dealt with the prisoner, was necessary to enable the prisoner's case to be put effectively or tested, or
     - in the light of the prisoner's representations, it would be unfair for a paper decision made by a single member panel to become final without an oral hearing;

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[1] See *Wastech Services v Greater Vancouver Sewerage* [2021] 1 SCR 32 where the Supreme Court commented on and clarified the principle of good faith in contracts recognized by the Court in *Bhasin v. Hrynew* [2014] 3 SCR 494

[2] In *Compound v Photonics Group* [2022] EWCA Civ 1371 the Court of Appeal held that the duty of good faith clause imposed a core requirement that the parties should act honestly towards each other and the company, and not to act in bad faith towards each other.

- the purpose of holding an oral hearing was not only to assist in the board's decision-making but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he had something useful to contribute;
- the question of whether fairness required a prisoner to be given an oral hearing was different from that as to whether his application was likely to succeed and could not be answered by assessing that likelihood
- The Court addressed three general issues:
    - First, the Court's role when considering whether a fair procedure was followed by a decision-making body .... The approach of asking whether procedural fairness requires an oral hearing is a matter of judgment for the board, reviewable by the court only on *Wednesbury* rational ground ... is not correct. The court must determine for itself whether a fair procedure was followed*: Gillies v Secretary of State for Work and Pension*s [2006] 1 WLR 781, para 6, per Lord Hope of Craighead. Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required.
    - Secondly, the purpose of procedural fairness. No doubt that one of the virtues of procedurally fair decision-making is that it is liable to make better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested. But as Lord Hoffmann observed however in *Secretary of State for the Home Department v AF (No 3*) [2010] 2 AC 269, para 72,
        - the purpose of a fair hearing is not merely to improve the chances of the tribunal reaching the right decision. At least two other important values are also engaged.
        - Justice requires a procedure which pays due respect to people whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions**.** Respect entails that such people ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken.

          This point can be illustrated by Byles J's citation in *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180, 195 of a dictum of Fortescue J in *Dr Bentley's Case (R v Chancellor, Master and Scholars of the University of Cambridg*e **(1723)** 2 Ld Raym 1334):

          > "*The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, on such an occasion, that even God himself did not pass sentence on Adam before he was called on to make his defence*."

        - The second value is the rule of law. Procedural requirements that decision-makers should listen to people who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions.
        - The third matter to be clarified concerns the cost of oral hearings. The easy assumption that it is cheaper to decide matters without having to spend time listening to what the persons affected may have to say begs a number of questions. In the context of parole, where the costs of an inaccurate risk assessment may be high (whether the consequence is the continued imprisonment of a prisoner who could safely have been released, or re-offending in the community by a prisoner who could not),

procedures which involve an immediate cost but contribute to better decision-making are in reality less costly than they may appear.

- What fairness requires depends on the circumstances. It is impossible to lay down rules of universal application. Nonethless, the Supreme Court gave general guidance.
    - Generally, the board should hold an oral hearing whenever fairness to the prisoner requires such a hearing in the light of the facts of the case.
    - The board should consider whether its independent assessment of risk, and of the means by which it should be managed and addressed, may benefit from the closer examination which an oral hearing can provide.
    - The board should also bear in mind that the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute. An oral hearing should therefore be allowed where it is maintained on tenable grounds that a face-to-face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him.
    - Issues which are considered by the board are not in practice confined to the question whether the prisoner should or should not be released or transferred. As I have explained, the statutory directions given to the board require it to consider numerous matters. The board's findings in relation to these matters may in practice affect the prisoner's future progress in prison, for example in relation to the courses which he is required to undertake and his future reviews.
    - An oral hearing is required when facts which appear to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally if it is to be accepted.
    - An oral hearing is also necessary when for other reasons the board cannot otherwise properly or fairly make an independent assessment of risk, or of the means by which it should be managed and addressed.
    - Whether a prisoner's right to a fair hearing requires the holding of an oral hearing does not depend on his establishing that his application for release or transfer stands any particular chance of success: that approach would not allow for the possibility that an oral hearing may be necessary in order for the prisoner to have a fair opportunity of establishing his prospects of success, and thus involves circular reasoning.
    - Fundamental to procedural fairness that the board must be, and appear to be, independent and impartial. The board should therefore have no predisposition to favour the official version of events, or the official risk assessment, over the case advanced by the prisoner.

(2) ***The duty of fairness is limited to procedural fairness and does not include "substantive fairness"***

7. In *R((Gallaher Group Ltd) v Competition and Markets Authority* [2019] A.C. 96 the regulator investigated potential breaches of competition law by manufacturers and retailers of tobacco. It concluded that anti-competition law was infringed. The regulatory body then reached early resolution agreement with companies so that any admission of liability and co-operation would receive substantial reductions in the level of financial penalties anticipated. However, anyone who reached an early resolution agreement could appeal against the final decision, but would then become liable to an increased penalty. The regulator told a third party retailer that, if it did not appeal, it would, nevertheless, be given the benefit of any successful appeal against regulator's decision.

8. No other party was told of or given those assurances or and the claimants ultimate sought judicial ground on the ground that that they were entitled to the same benefits of settlement as the third party retailer which had been given an assurance- which the regulator refused to give.

9. The Supreme Court rejected the submission that the regulator had breached any principle of equal treatment[3] and also rejected that claim that the regulator breached its duty of fairness.
    - Simple unfairness as such is not a ground for judicial review. As Lord Diplock stressed in *R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 637:
        > "*judicial review is available only as a remedy for conduct of a public officer or authority which is ultra vires or unlawful, but not for acts done lawfully in the exercise of an administrative discretion which are complained of only as being unfair or unwise …*"
    - Procedural fairness or propriety is of course well-established. For instance, *R v National Lottery Commission, Ex p Camelot Group pl*c [2001] EMLR 3 concerned unequal treatment between two rival bidders for the lottery, one of whom was given an unfair procedural advantage over the other.
    - However, a broader concept of "*unfairness amounting to excess or abuse of power*" emerged in the 1980s, influenced principally of Lord Scarman. In the *National Federation* case [1982] AC 617, 652–653 he had been alone held that "*a legal duty of fairness (was) owed by the revenue to the general body of taxpayer*s". Furthermore, in *R v Inland Revenue Comrs, Ex p Preston* [1985] AC 835, in which Lord Scarman he presided, Lord Templeman (who gave the leading speech), said that Lord Scarman developed the idea that a duty of fairness to an individual taxpayer, arising from a written assurance given by the Revenue as to his tax treatment.
    - Lord Templeman adopted the words of Lord Scarman about the revenue's general duty of fairness **(**without noting that it had been a minority view) to state that there was a duty of fairness owed to each individual taxpayer; but subject to the caveat that the Court could **not "***in the absence of exceptional circumstances*" decide that the tax authorities would be acting unfairly- the tax authorities would be acting unfairly if the Court was satisfied that "'*the unfairness' of which the applicant complains renders the insistence by the commissioners on performing their duties or exercise of powers an abuse of power by the commissioners*": p 864G.
    - Lord Templeman cited various authorities, saying that judicial review granted on the grounds of "'*unfairness' amounting to abuse of power*", either due to "*some proven element of improper motive*"[4], or due to "*an error of law whereby the Price Commission misconstrued the code they were intending to enforc*e":[5] whereby the tax authorities would be guilty of "'*unfairness' amounting to an abuse of power*"- provided that their conduct would in a private context entitle the appellant to "*an injunction or damages based on breach of contract or estoppel by representation*". However, Lord Carnwath pointed out this part of Lord Templeman's speech was *obiter*.
    - Lord Carnwath overruled this approach. With hindsight, *Preston* is best understood by reference to principles of legitimate expectation derived from an express or implied promise: *see De Smith's Judicial Review*, para 12-019; *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, para 61. He pointed out that *Preston* had not been argued on legitimate expectation basis, perhaps because at the time it was

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[3] The Supreme Court decided that English law did not recognise equal treatment as a distinct principle of administrative law and that these questions had to be judged by reference to ordinary principles of judicial review, such as legitimate expectation and irrationality; t

[4] Citing *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997

[5] Citing *HTV Ltd v Price Commission* [1976] ICR 170

uncertain whether legitimate expectation applied to substantive[6] rather than procedural benefits: see the Privy Council decision in *United Policy Holders Group v Attorney General of Trinidad and Tobago* [2016] 1 WLR 3383, para 83.

- Lord Carnwath then discussed the Court of Appeal decision in *Ex p Unilever plc* [1996] STC where the Court of Appeal held that the revenue should not be permitted without warning to apply a strict time limit for submission of claims to loss relief, when to do so departed from a practice accepted by them without objection for some 20 years.
- Despite the *Unilever* decision, Lord Carnwath concluded that, whereas 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 circumstance*s"- this idea of substantive unfairness 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, like irrationality and legitimate expectation and these are the principles that the Courts must apply.

(3) The content of the duty of fairness depends on context and the particular facts of the case

10. The broad principles of fairness are of course well known. However, the Court of Appeal in *R**(Taj)** v Secretary of State for the Home Department* [2021] 1 W.L.R. 1850 underlined the importance of context when considering whether the duty of fairness has been breached.

11. The Claimant applied for leave to remain as a Tier 1 (Entrepreneur) Migrant under the points-based system under the Immigration Rules. The Claimant's application in three stages, comprising
    - consideration of his written application,
    - an interview and
    - a site visit to the claimant's business premises.

12. The Secretary of State refused the claimant's application because of concerns about the viability and genuineness of his business. The claimant claimed that the procedure adopted by the Secretary of State was unfair since the claimant had not been given a fair opportunity to know the case that was being made against him and therefore had not had a fair chance to advance his case

13. The Court of Appeal held:
    - although the common law principles of procedural fairness, including the right of a person affected by a decision to make representations to the decision-maker before the

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[6] In *(Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 A.C. 453 [60] Lord Hoffman stated that *"a claim to a legitimate expectation can be based only upon a promise which is "clear, unambiguous and devoid of relevant qualification": see Bingham LJ in R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545 , 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called "the macro-political field": see R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115 , 1131". There have been a few Privy Council decisions which address substantive legitimate expectation. In *United Policyholders Group v AG of Trinidad* [2016] 1 W.L.R. 3383 the Privy Council decided that hat the principle of legitimate expectation was based on the proposition that, where a public body had stated clearly, unambiguously and without relevant qualification that it would or would not do something, a person who had reasonably relied on that statement would, in the absence of good reasons, be entitled to rely on it and to enforce it through the courts, at least where the statement was as to the procedure to be adopted in a particular context, In *Paponette v AG of Trinidad* [2012] 1 A.C. 1 it held that where a public body created a substantive legitimate expectation, unless it provided evidence to explain why it had acted in breach of a representation or promise made to an applicant, it was unlikely to be able to establish any overriding public interest to defeat the applicant's legitimate expectation.

decision was taken and the right to know the gist of the case that he had to answer, applied to decisions taken under the points-based system, the application of those principles was fact- and context-sensitive;

- in the context of an application for leave to remain under the points-based system, it was not unfair, systemically,
- that the points-based system did not incorporate, as part of its system, a requirement on the decision-maker to put the applicant on notice of concerns entertained as to the genuineness of the application and the business in question, whether or not those concerns related to the truthfulness of the applicant's account;
- that it **was not procedurally unfair on the facts of the case** if the decision-maker failed to put the claimant on notice of his concerns;
- neither the points-based system itself nor the Secretary of State's decision to refuse the claimant's application for leave to remain were procedurally unfair

Bias principles apply to arbitrators

14. The principles of apparent bias are firmly settled in the UK Courts. In *Porter v Magill* [2002] 2 A.C. 357 based on the case law established by the European Convention of Human Rights under the Human Rights Act 1998, the House of Lords rejecting the restrictive approach taken in *R v Gough*[1993] AC 646;[7] and decided that the test for apparent bias was whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased.

15. However, in ***Halliburton*** *Co v Chubb Bermuda Insurance* [2021] A.C. 1083 the Supreme Court decided that this principle of bias to international arbitrators.

16. Unless the parties to an arbitration otherwise agreed, arbitrators had a legal duty to make disclosure of facts and circumstances which would or might reasonably give rise to the appearance of bias. The fact that an arbitrator had accepted appointments in multiple references concerning the same or overlapping subject matter with only one common party was a matter which might have to be disclosed, depending upon the customs and practice in the relevant field. More generally, the Supreme Court decided that the requirements of apparent bias impose a limited duty of disclosure on those who decide bias applications

17. The Supreme Cour held that:
    - an arbitrator's duty of impartiality enshrined in s 33 of the Arbitration Act 1996),[8] applied to all arbitrators, whether appointed by the parties, by party-appointed arbitrators, by an arbitral institution or by the Court;
    - there was no difference between the test in s 24(1)(a) of the 1996 Act, which involved the existence of circumstances that gave rise to justifiable doubts as to an arbitrator's impartiality, and the common law test for apparent bias, which asked whether the fair-minded and informed observer would conclude that there was a real possibility of bias;

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[7] As Lord Goff stated in R v Gough[1993] AC 646, 670 .

"... I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him ..."

[8] Section 33(2) states "The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it".

- therefore, on an application for an order for the removal of an arbitrator under s24(1)(a), the Court would apply the objective test of the fair-minded and informed observer, having regard to the realities of international arbitration and the customs and practices of the relevant field of arbitration; and
- there might be circumstances in which an arbitrator's acceptance of appointments in multiple references concerning the same or overlapping subject matter with only one common party might reasonably cause the objective observer to conclude that there was a real possibility of bias**,**
- whether the objective observer would reach that conclusion would depend on the facts of the particular case and especially on the custom and practice in the relevant field of arbitration

18. As a result, the Supreme Court decided that:
    - an arbitrator's duty under s 33 of the 1996 Act to act impartially gave rise to an implied term in the contract between the arbitrator and the parties that the arbitrator would, on his or her appointment, act fairly and impartially;
    - the implied term would not be complied with if the arbitrator, at and from the date of his or her appointment, had knowledge of undisclosed circumstances as would, unless the parties waived the obligation, render him or her liable to be removed under s 24 of the 1996 Act;[9]
    - therefore, an arbitrator was under a legal duty in English law to disclose facts and circumstances known to him or her which would or might reasonably lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased;
    - in the context of a Bermuda Form arbitration, that duty would require the arbitrator to disclose appointments in multiple references concerning the same or overlapping subject matter with only one common party, unless the parties to the arbitration had agreed otherwise

19. The Supreme Court went on to conclude that:

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9 Section 24 of the 1996 Act states:

A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds—

(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;
that he does not possess the qualifications required by the arbitration agreement;

(b) that he does not possess the qualifications required by the arbitration agreement

(c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;

(d)` that he has refused or failed-

(i) properly to conduct the proceedings, or

(ii) to use all reasonable despatch in conducting the proceedings or making an award,

and that substantial injustice has been or will be caused to the applicant.

(2) If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person.

(3) The arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

(4) Where the court removes an arbitrator, it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.

(5) The arbitrator concerned is entitled to appear and be heard by the court before it makes any order under this section.

(6) The leave of the court is required for any appeal from a decision of the court under this section.

- where the information which ought to be disclosed was subject to an arbitrator's duty of privacy and confidentiality, disclosure could only be made if the parties to whom the obligations were owed had given their consent;
- if such consent were not obtained the arbitrator would have to decline the second appointment;
- consent to the disclosure of private and confidential information could be express or inferred from the arbitration agreement itself in the context of the custom and practice in the relevant field; and
- in a Bermuda Form arbitration the consent of the common party to multiple appointments of the same arbitrator could be inferred from its action in seeking to nominate (or appoint that arbitrator), so that express consent would not be required