to notional expenditures being *treated* as those incurred by the candidate, whereas section 90ZA generally refers to expenses incurred, implying that section 90C is not meant to satisfy section 90ZA requirements unless explicitly provided (as in section 90ZA(2) with regard to the need for an expense to be specified in Part 2 of Schedule 4A).

Yet the more pressing issue is whether requiring authorisation for notional expenditures serves the purpose of the regulatory regime. The regime should facilitate clear identification of relationships between political stakeholders and use expenditure reporting and limits to guarantee fair elections. Such considerations suggest that authorisation should not be required to treat notional expenditures as candidate election expenses. Allowing informal support to be classified under other headings would create a financing grey zone that could undermine statutory oversight of elections, especially where the status of the expenditure might be manipulated through discretionary authorisation. Ironically, the court's interpretation of specific terms in *Mackinlay* – particularly the word "behalf" – might inadvertently curb the regulatory regime, by implying that only a narrow range of notional expenditures (those affirmatively accepted by a candidate) could qualify as candidate election expenses.

The judicial impulse to avoid substantive assessment of electoral politics and confine itself to minimalist statutory interpretation may have legitimate political foundations. It is representatives and their constituents alone who have ultimate policy-making authority in the UK; election law does not merely set first-order policy, but establishes the higher-order terms by which policy is created. Thus election law is, arguably, a domain in which scrupulous judicial deference to parliamentary will is especially important. Yet the centrality of fair electoral procedure to legitimate future selection of representatives means that it is likewise important that the court prioritises integrity and coherence in interpreting the election law statutory regime. *Mackinlay* showed a disinclination to substantively acknowledge these issues, a disinclination that could undermine democracy in the future.

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LEGITIMATE EXPECTATION: RELIANCE, PROCESS, SUBSTANCE

AS he sat at home in Belfast eating a meal with his wife and three children in 1989, human rights lawyer Pat Finucane was brutally murdered by terrorists. Three decades later, his widow, Geraldine, brought judicial review proceedings claiming that the UK Government had failed to discharge its legal obligations to inquire into his death. In *In the matter of an application*

by Geraldine Finucane for Judicial Review (Northern Ireland) [2019] UKSC 7, the Supreme Court upheld Mrs. Finucane's claim that, in the circumstances, such an obligation arose under Article 2 of the European Convention on Human Rights and had not been discharged by means of an independent inquiry established in 2011. However, her further claim, that by failing to establish a public inquiry the UK Government had unlawfully breached a legitimate expectation, was rejected. It is that aspect of the case that forms the focus of this note. It will be argued that while *Finucane* provides welcome clarification in one respect, it also serves to highlight the still-inchoate nature of certain aspects of the legitimate expectation doctrine.

The key questions that arise whenever a claim is made on the basis of the doctrine of legitimate expectation are whether an expectation has arisen and, if so, how (if at all) it should be protected. It was in the course of answering the first of those questions that the Supreme Court had occasion to supply elucidation. In his leading judgment, Lord Kerr held (at [68]) that it was "quite clear" that assurances given to the claimant by the UK Government amounted to "an unequivocal undertaking to hold a public inquiry", and went on to dismiss the suggestion that a legitimate expectation could arise only in the event of detrimental reliance. In doing so, Lord Kerr said (at [72]) that the doctrine of legitimate expectation is "underpinned by the requirements of good administration", and that it would be incompatible with this view "to permit public authorities to resile at whim from undertakings which they give simply because the person or group to whom such promises were made are unable to demonstrate a tangible disadvantage". This is a welcome corrective to *United Policyholders Group v Attorney General of Trinidad and Tobago* [2016] UKPC 17, [2016] 1 W.L.R. 3383, in which Lord Carnwath said that detrimental reliance is, in effect, essential. Happily, Lord Carnwath recanted in *Finucane*.

So far, so good. In another respect, however, *Finucane* serves to muddy the waters rather than to clarify. Having (rightly) concluded that detrimental reliance is irrelevant to the question of whether a legitimate expectation arises, Lord Kerr (also rightly) stated that reliance can be relevant when it comes to determining whether frustration of a legitimate expectation is lawful. This point is self-evidently germane when a court is called upon to determine whether a public body has acted lawfully by dashing a *substantive* legitimate expectation. In applying a balancing test (*R. v North and East Devon Health Authority, ex parte Coughlan* [2001] Q.B. 213) or, as it is now more commonly characterised in this context, the proportionality test (*Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32, [2012] 1 A.C. 1), it stands to reason that the interests of a claimant who has relied to her detriment may prove to be particularly (whether or not sufficiently) compelling when weighed against any public interest in frustrating her expectation. It equally stands to reason that when a

court is engaged in this sort of weighing exercise, there may be constitutional or pragmatic reasons for it to treat the views of the public authority with respect, thus implicating the now well-established doctrine of deference. Such thinking clearly influenced Lord Kerr in *Finucane*. He noted (at [42]) that following a general election, a new Government had adopted a general policy of not holding "long-running, open-ended and costly inquiries into the past in Northern Ireland", and concluded (at [81]) that the decision not to hold a public inquiry into Mr. Finucane's death engaged considerations of "political importance" and "political judgement". On this basis, the court held that it was lawfully open to the Government to resile from the undertakings that had previously been given.

This conclusion is certainly a defensible one. However, the way in which it was arrived at points towards certain respects in which the doctrine of legitimate expectations remains underdeveloped. The first matter concerns the relationship between procedural and substantive legitimate expectations. While the court relied upon doctrinal apparatus (most obviously deference) that is familiar in the context of substantive judicial review, *Finucane* is not – or, at least, is not straightforwardly – a case that concerns a substantive legitimate expectation. Rather, the undertaking to hold a public inquiry appears, at least at first glance, to concern not to the conferral of a substantive benefit but the provision of a particular form of procedure. Yet the court in *Finucane* did not clearly indicate whether it considered itself to be dealing with a legitimate expectation that was procedural or substantive in nature. That is perhaps understandable in the circumstances; indeed, it might amount to a form of constructive ambiguity. After all, even if a public inquiry does constitute a "procedure", it is very different from the sort of thing – such the opportunity to be heard or otherwise to make representations – that is paradigmatically in play in procedural legitimate expectation cases. Indeed, given its resource and other likely implications, a decision about the holding of a public inquiry may be thought to defy binary classification by reference to the process/substance distinction.

On one analysis, leaving that dilemma unresolved does not matter: in *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363, at [69], Laws L.J. said that the difference between procedural and substantive expectations "is not a difference of principle". Viewed against this background, the failure of the Supreme Court to pay attention to the distinction between procedural and substantive legitimate expectations in *Finucane* is unproblematic. Indeed, it might be welcomed as portending the marginalisation of a distinction onto which reality does not always neatly map. However, beguiling though this prospect may be, its unduly hasty embrace should be resisted, not least because the implication that procedural and substantive legitimate expectation forms an undifferentiated body of doctrine that grows from a single normative root is highly questionable. That much is plain from the way in which Lord Kerr falls

back on "good administration" as the normative foundation of legitimate expectation – a concept whose apparent capacity to support what is, in reality, a catholic body of doctrine is attributable to nothing more than its vacuity. The courts' failure adequately to engage with the normative basis of legitimate expectations is arguably one of the reasons for ongoing uncertainty in this area at the doctrinal level; unfortunately, *Finucane* does not resolve that uncertainty.

A further problem with the Supreme Court's judgment in *Finucane* becomes apparent when we consider the test used by the court to determine whether it was lawful to frustrate the expectation. As noted above, the prevailing view today is that the proportionality test ought to be utilised for this purpose. The court in *Finucane*, however, invoked the language not of proportionality but of "fairness". According to Lord Kerr (at [62]), "where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so". On initial examination, this appears – at least in cases like *Finucane*, in which the relevant expectation is of procedurally fair treatment – to require the court to perform mental gymnastics by determining whether it would be fair if the public body were to be permitted to act unfairly. The difficulty eases somewhat once we appreciate that two different senses of fairness must be in play, such that the question is whether it is *substantively* fair to deny someone the *procedurally* fair form of treatment that they were led to expect. But this leaves unanswered the question of what it means, in the first place, for something to be substantively fair or unfair. Moreover, it is noteworthy that, to begin with, *Finucane* appears to require the confrontation of that question, given that less than a year earlier, in his leading judgment in *R. (Gallaher Group Ltd.) v Competition and Markets Authority* [2018] UKSC 25, [2019] A.C. 96, at [41] (noted [2018] C.L.J. 444), Lord Carnwath appeared to dismiss the very idea of substantive fairness: unlike its procedural counterpart, which is "well-established and well-understood", substantive unfairness, said Lord Carnwath, "is not a distinct legal criterion". Against this background, the court's attempt in *Finucane* to rehabilitate the notion of substantive unfairness – without even acknowledging the points made in *Gallaher* – is, to say the least, surprising.

The criticisms advanced in the foregoing paragraphs do not turn on mere matters of semantic or taxonomical pedantry. Rather, they each concern facets of an overarching problem that besets this area of administrative law – namely, an unfortunate judicial tendency to seek to avoid difficult doctrinal and normative questions by sheltering behind superficially attractive but ultimately rather empty notions such as "good administration" and "fairness". Such language may be intuitively appealing, but it is incapable of doing the sort of analytical heavy-lifting that is required if the law in this

area is to be placed on an intellectually cogent footing that lends itself to coherent doctrinal development.

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DECEPTION AND CONSENT TO SEX

IF the categories of deceptions which can vitiate consent to sexual activity are limited, as a matter of law, how should we draw the line between consent-vitiation and consent-validity? *R. (Monica) v DPP, ex parte Boyling* [2018] EWHC 3508 (Admin), [2019] 2 W.L.R. 722 is the latest in a line of cases which attempt to answer this question.

In 1997, Andrew Boyling, a former undercover police officer, had a sexual relationship with "Monica", an activist in the protest movement he had infiltrated, using a fake identity. Monica told the police that she would not have consented to sex had she known the truth. In 2017, the CPS decided not to prosecute Boyling for rape, indecent assault, procurement of a woman by false pretences, and misconduct in public office. Review was sought on the grounds that, for the purposes of the potential rape charge, the DPP had erred as a matter of law in determining that Boyling's deception was not capable of vitiating Monica's consent.

The High Court dismissed the application for review. The CPS, on the assumption that the Sexual Offences Act 2003 (hereafter, the 2003 Act) had simply clarified and restated the existing law, looked to the post-2003 Act authorities as a source of indirect guidance on the law on consent and deception as it applied in 1997. Whilst the court rightfully doubted the veracity of this assumption, it provided a welcome opportunity to review the relationship between deception and valid consent under section 74 of the 2003 Act ("a person consents if he agrees by choice and has the freedom and capacity to make that choice").

Prior to *Boyling*, the leading case in this area was *McNally* [2013] EWCA Crim 1051, [2014] Q.B. 593, in which Leveson L.J. held that "active" deception could vitiate consent under section 74, but not mere non-disclosure, and that "[i]n reality, some deceptions (such as, for example, in relation to wealth) will obviously not be sufficient to vitiate consent" (at [25]). Approaching "the evidence relating to 'choice' and the 'freedom' to make any particular choice … in a broad commonsense way" will identify the "route through the [line-drawing] dilemma" (at [25]). Controversially, the deception in *McNally* was held to relate to the defendant's gender and vitiated consent because, applying the court's common sense approach, the act of digital penetration differs depending on whether

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