



How can public law help me?

1. What is public law?

Public law is the set of legal principles governing the exercise of power by public authorities. It can be distinguished from private law which governs relationships between individuals and private companies, e.g. in contracts of employment, divorce proceedings or consumer matters.

If the decision made by a public body (such as a council or government department) is based on an incorrect interpretation of the law, or if the decision-making process is unfair or biased, someone who has been affected by the decision can challenge it, for example using a complaints procedure or by applying for judicial review.

2. Whose actions are controlled by public law?

Public law controls public bodies. Sometimes it is obvious when a body is a public one – for example, a local authority or government department. Because many functions are now carried out by other agencies you sometimes have to consider carefully if a body is ‘public’ or not. In general it will be controlled by public law principles if it is authorised by an Act of Parliament or carrying out a ‘public function’.

The following are all public bodies: government ministers, departments and agencies, local authorities (including social services, housing departments and local education authorities), health authorities (including PCTs and hospital Trusts), the police, prisons, schools, courts, statutory tribunals, coroners’ courts, and regulatory and supervisory bodies.

3. Where do public bodies get their legal authority from?

Usually public bodies and officials get their authority to make decisions, and to take action, from Parliament in the form of legislation. These are often called statutory powers and duties, and may be contained in:

- Primary Legislation (Acts of Parliament);
- Secondary Legislation (also known as delegated legislation); this is legislation that Ministers are empowered to make under the authority of an Act of Parliament. Such legislation may be in the form of regulations, orders or directions;
- European Community Law (EC Law); in the form of directives or regulations made by the legislative bodies of the European Union;

A power can also derive from the common law or the royal prerogative (for instance, the power of the government to sign treaties or issue passports).

4. How can public law decisions affect me?

Most people are affected by public law decisions. For example, benefit claimants, health service users, the homeless, asylum seekers, people with disabilities, people with mental health problems, prisoners, those affected by planning decisions, and school children and their parents.

If you have ever been to hospital, a Council Housing Office, Social Services, a Police Station or claimed benefits you are likely to have been affected by public law decisions.

5. What are public law wrongs?

Public bodies have to act in accordance with public law principles. Briefly, this means that they have to observe the following rules:

- They must not do things without legal authority, act outside their powers, or use their powers for an improper purpose.
- They must not take decisions 'irrationally'.
- They must observe the 'rules of natural justice' i.e. fairness
- They must not breach the Humans Rights Act
- They must not breach European Community Law.

There is more detail in the third leaflet in this series: A brief guide to the grounds for judicial review, and a simple summary below.

6. Duties and powers

Unless the public body has the legal authority to make the decision in question, or to act in the way it did, it will be acting outside its powers. That is unlawful. The legal authority may either be a power that it *can* exercise in certain circumstances, or impose a duty that it *must* fulfil. Therefore, whenever a public body takes any action it must either:

- Exercise a power given to it which is laid down in legislation, (an example would be where a local authority has a power to give grants to voluntary organisations in certain circumstances, but is not required to do so), or
- carry out a duty which is laid down in legislation, (an example would be a local authority's duty to house certain categories of homeless people i.e. something that must be done in certain circumstances).

If a body makes a decision or takes an action which is not authorised by an Act of Parliament or delegated legislation it will be acting outside its powers. For instance if a local council refuses to make a payment of Housing Benefit when the person claiming has proved they are entitled to it.

7. Lawful decision-making

If a decision or an action is apparently authorised by legislation, it will also be unlawful if it breaches certain other public law principles relating broadly to the way in which decisions should be made.

One such public law principle concerns the situation where the relevant legislation allows the use of discretion by the public body but the action or decision it then takes violates the principles which govern the proper exercise of discretionary powers. Examples might include:

- ‘fettering of discretion’, either by applying a rigid set of rules or criteria (rather than considering each case individually), or by the decision-maker allowing himself to be dictated to by another authority;

For example, a health authority that has a policy of treating a certain type of surgery as non-urgent might not be able to justify withholding such an operation in a genuinely urgent case.

- exercise of a power or discretion for a purpose other than that for which it was intended;

For example, the Home Secretary could not use his powers to revoke television licences where people had bought new licences early in order to avoid a price increase.

- taking irrelevant factors into account or failing to take account of all relevant factors;

For example, a local authority fails to take into account an individual’s psychological needs when undertaking a community care assessment.

Another public law principle governs the situation where a decision has been taken irrationally. A court can strike down a decision if it is found to be so unreasonable as to be “perverse” or “irrational”.

The benchmark decision on this principle of judicial review was made in 1948, in a case known as the *Wednesbury* case in which Lord Greene held that

"If a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere... but to prove a case of that kind would require something overwhelming..."

This shows that arguing that a decision is so unreasonable as to be irrational is extremely difficult, and lawyers usually link such a claim to a challenge based on the other grounds if this is possible.

8. Is the decision fair?

The 'rules of natural justice' require public bodies to act fairly when they take decisions. A breach of these rules is sometimes referred to as 'unfairness' or 'procedural impropriety'. The precise requirements will depend on the circumstances of the particular case.

An important aspect of this is the right to a fair hearing (which includes the rule against bias). This means that people affected by a decision from a public body should normally be told what the case is against them, and must have the opportunity to argue their own case properly.

The public body must also be impartial and be seen to be so. For example, the body should not allow decisions to be made by people who have a financial interest in the decision, or a family or business connection with any of the parties, or who have strongly held views which may cause them to reach a decision based on prejudice. Note that actual injustice need not be shown, only that it could appear to have occurred.

Other factors that could lead to a finding that there has been a breach of the duty to act fairly may include situations where the decision-maker:

- failed to allow someone to put his or her case at all or failed to give him/her adequate facilities for making the case;
- did not show someone evidence it had about them, and made a decision based on that evidence;
- refused to hear some of the evidence available and that evidence might have led to a different decision;
- failed to notify the individual or his or her representative of the time and place of any hearing that would lead to the taking of a decision, or denied the individual access to relevant documents;
- failed to give adequate reasons for a decision (the more important the decision for the individual, the fuller the reasons required are likely to be). There is not a general duty to give reasons for decisions in English law, but a number of recent decisions of the courts have held that fairness will demand in many cases that reasons for a decision are given, and that these should be clear and intelligible.

9. In what other ways can a public body act unfairly?

Another aspect of the duty to act fairly is used to prevent abuses of power where public bodies have sought to go back on promises made, without sufficient justification. This is referred to as a breach of a 'legitimate expectation'.

This involves situations where the public body has made a decision and:

- failed to consult those whom it was under a duty to consult, or those who had a legitimate expectation of being consulted before the decision was made
- withdrew a benefit which the individual enjoyed. This is where a public body has described how it intends to act in the future in the form of a promise or policy, which it then abandons to the detriment of the individual.

10. How does the Human Rights Act affect public bodies?

The Human Rights Act 1998 requires public bodies to act in a way that it is compatible with the European Convention on Human Rights insofar as it is possible for them to do so.

Any failure to do so creates a free-standing statutory ground of challenge, and makes it possible to argue that an act or decision of a public body is unlawful where it can be shown that there has been a breach of a Convention right. It normally only applies where the act or decision was made on or after 2 October 2000.

The Act also requires all domestic legislation to be interpreted in a way which is compatible with Convention rights, (so far as it is possible to do so), and so it potentially affects all the legal bases underpinning the public body's powers and duties. This rule applies to conduct based upon past legislation just as much as it does on current legislation and may also require that previous case law be re-examined.

However, public bodies (which includes the courts) cannot change primary legislation (Acts of Parliament). Therefore, if the legislation cannot be interpreted in a way which is compatible, the legislation remains in force and the public authority must follow it. In these circumstances, the public body would not be acting unlawfully. The court may instead make a Declaration that the relevant legislation is incompatible, and Parliament then has the option to amend it. The victim of the breach remains free to consider taking their case to the European Court of Human Rights in Strasbourg, (see below).

Some Convention rights are known as 'absolute' rights, (such as article 3, the prohibition of torture). These provide the highest standard of protection. Public bodies cannot argue that interfering with these rights is justified in the interests of the community.

However, other rights are 'limited' or 'qualified'. 'Qualified rights' are subject to certain qualifications, and establishing a breach of that right will involve a balancing exercise between the interests of the state, the individual claimant and the community at large, and it will fall to the public body to justify any potential breach.

11. What is the relevance of European law?

Decisions which breach European law will also be open to challenge. There are two sorts of European law that are relevant to decisions or actions of public bodies:

1. European Community (EC) law, made under the Treaty of Rome, is enforceable ultimately in the European Court of Justice in Luxembourg.

In some circumstances this takes precedence over UK law. There are many examples of this particularly in the fields of social security, the environment, free movement for workers and sex discrimination. The law is applied in the first instance by our courts, and where there is doubt about the meaning of a provision of EC law, our domestic courts can refer questions to the European Court of Justice.

2. The European Convention on Human Rights, which is ultimately enforceable at the European Court of Human Rights in Strasbourg, remains relevant despite incorporation into UK law of the Human Rights Act 1998.

The right to enforce the provisions of the European Convention on Human Rights in Strasbourg remains an option if the domestic court finds that no breach of an Article has occurred, or where parliament does not take steps to amend the law, following a Declaration of Incompatibility by that court.

12. What is 'maladministration'?

Many of the public law principles mentioned above are closely related to the concept of maladministration. Parliament has given a number of Ombudsmen the power to investigate complaints about maladministration by particular public bodies.

Maladministration occurs when a public body does something it ought not to have done for any one of the following reasons:

bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness.

This is known as the *Crossman List*. Some examples of the common causes of maladministration are:

- delay in taking action;
- taking incorrect action;
- failure to provide information;
- failure to compile and maintain adequate records;
- failure to take action;
- failure to take relevant considerations into account in making a decision;
- failure to investigate;
- failure to deal with letters or other enquiries;
- failure to comply with legal requirements; and
- making misleading or inaccurate statements.

13. How can public law help me?

The public law principles listed above apply to all public body decision-making. If those principles are breached the decision is not lawful. You should challenge the unlawful decision using the most appropriate procedure. This will be different for different types of decision.

There is sometimes a formal appeal procedure, for example you can appeal to the Social Security Appeal Tribunal about many benefits decisions. Always check with the decision-maker whether or not there is an appeal mechanism available.

If you cannot appeal, the decision can sometimes be challenged in court using a procedure called 'judicial review'. In order to consider whether or not you have grounds for bringing judicial review you will need advice from a lawyer who specialises in that area of law. Judicial review cases have to be started promptly and in most cases within 3 months of the decision you wish to challenge (at the latest). It is not normally advisable to consider judicial review proceedings unless you are eligible for CLS funding (legal aid), as the costs risk can be very high.

There may be things you can do yourself which can sometimes be equally effective in obtaining the result you want.

The first thing you can do is make an official complaint. Different public bodies have different Complaints Procedures but most produce leaflets which explain how to go about making a complaint. Some of the most commonly used Complaints Procedures are: the NHS Complaints Procedure, the Police Complaints Procedure and the Social Services Complaints Procedure. In most cases they offer a two or three stage process and often involve an independent review at the end if you are not satisfied with the initial outcome of your complaint.

Many public bodies are also covered by an Ombudsman scheme. The Ombudsman can rule on complaints made on the ground of injustice due to maladministration (see above). If you think there has been maladministration in the handling of your case, or in the handling of a Complaints Procedure, which has led to injustice, you may be able to complain to an Ombudsman. You normally have to follow through the public body's own Complaints Procedure first.

If your complaint concerns a local authority, you can complain to the Local Government Ombudsman. If it concerns the NHS, you can complain to the Health Service Ombudsman. Most government departments are within the remit of the Parliamentary Ombudsman. See Leaflet 8 in this series for more on the Ombudsmen.

Going to the Ombudsman can be slow but it is free. The Ombudsman can publish a report of the investigation, can direct a local authority to improve its practice in future and can recommend compensation to the victims of maladministration.

Even though complaints procedures and the Ombudsmen can often provide a solution to problems with public bodies, they are not appropriate in every case. It is important to be aware that the time limit for bringing a judicial review case starts on the day when the public body took a decision or acted in a way that breached public law principles. If you think you may have the basis of a judicial review case you should take specialist legal advice about this as soon as possible.

There is more information about all these public law remedies in the other leaflets in this series.

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