



USING PUBLIC LAW IN DEBT AND MONEY CASES

COURSE NOTES

- 1. WHAT IS PUBLIC LAW?**
- 2. PUBLIC BODIES AND PUBLIC FUNCTIONS**
- 3. DUTIES, POWERS AND SOURCES**
- 4. DECISIONS AND FAILURES TO ACT**
- 5. LEGISLATION, REGULATIONS AND GUIDANCE**
- 6. PUBLIC LAW WRONGS**
- 7. PUBLIC LAW REMEDIES: JUDICIAL REVIEW AND NON-COURT BASED REMEDIES**
- 8. THEORY INTO PRACTICE: SOME BASIC ISSUES**

INTRODUCTION

Our approach on this course is not to give you a lot of case law or make you memorise a lot of jargon. It is to help you understand the basics and spot situations where public law could help your client. These notes break down the fundamental issues into simple building blocks or key issues for you to follow through, so you can use these tools to build up your client's case. Some of it involves lateral or creative thinking. Some of it uses concepts you may not be familiar with. Public law is not hard; it is just different. But if you grasp the basics, it can be the quickest and most effective way to help your client.

Throughout the course we will refer to a case study. This is based on a real case concerning an application for discretionary housing payments. Copies of the documents relating to the case study are included in the course materials and referred to in the notes.

1. WHAT IS PUBLIC LAW?

1.1 Public law is the set of legal rules which ensure bodies carrying out public functions:

- discharge their legal duties
- do not abuse or exceed their powers
- avoid breaching certain articles of the European Convention on Human Rights.

1.2 What's the difference between you and a public body?

- You can do anything you want unless it's illegal
- A public body can only do what it is legally allowed to do

1.3 This is not private law; there are no contractual rights to enforce; it's not like civil litigation between two parties.

1.4 When public law disputes go to court in judicial review:

- the court's role is supervisory only
- judicial review is a remedy of last resort
- remedies are discretionary

1.5 Public law wrongs can also be dealt with through:

- Ombudsman schemes
- Complaints procedures

1.6 Building block

And now you already have your first building block or your foundation or the trench you've dug for your foundations, because now you know what public law is.

2. PUBLIC BODIES AND PUBLIC FUNCTIONS

2.1 Public bodies

The principles of public law only apply to **public bodies**. Many organisations are obviously public bodies, for example, local authorities and government departments. “Organs of the state” are the easiest public bodies to identify. Less obvious public bodies are the Law Society, the General Medical Council and the National Trust.

In our case study, the public body involved is the Local Authority. The City Council deals with applications for discretionary housing payments.

If it is unclear whether a public body is subject to the principles of public law, the courts will use a number of devices to assess this.

The “**source**” test considers the source of the body’s powers. If the **source** of its powers is statutory for example, then the body will probably be considered a public body and public law rules will apply.

The “**function**” test looks at how the public body operates and assesses the nature of the power it exercises based on a number of factors:

- the degree of statutory or governmental underpinning for the function
- whether the relationship is governed solely by contract
- applying the “but for” test: would the power be exercised directly by government or a government agency if the body in question did not do so?
- whether the individual consented to be bound by the public body’s decision or whether they had no choice; (if the latter, it is more likely to involve the exercise of public functions).

The last two points are the easiest to use if you are trying to decide whether you can use public law to challenge a decision by a particular body.

Easy examples to remember are that national sporting bodies (e.g. the FA) are not public bodies, because the government would not necessarily set up and regulate a football league if the FA didn't exist. In contrast, using the same test, the Advertising Standards Authority was found to be a public body.

One example that might arise in this field is whether action by bailiffs could be challenged by way of judicial review. Bailiffs' companies are not public bodies; they are private firms. However, they are instructed by and work on behalf of local authorities. The action by the bailiff could be susceptible to judicial review if you could show that the bailiff was acting at the council's agent (and therefore the council would be the public body whose action you were challenging).

BUILDING BLOCK

IS THE OFFENDING BODY IN QUESTION

A PUBLIC BODY?

2.2. Public functions

Public law principles only apply to the **public functions** exercised by the body in question. It is therefore important to establish whether the body is in fact exercising a public function. There will be many instances in which any public body enters into private agreements, such as employment contracts, which do not constitute exercising a public function.

For example, a police force is a public body. It exercises a public function in terms of policing the streets, investigating crimes and so on. An employment contract with an individual police officer, or disciplining that officer is not exercising a public function.

Obviously, the “**function**” test referred to above at 2.1, in terms of establishing whether an organisation is a public body, will also help you to determine whether it is exercising a **public function**.

In terms of the case study we are using, administering discretionary housing payments is clearly a public function.

There is plenty of case law on this point, particularly in the area of social services and the provision of care with the increase in local authorities relying on private bodies to provide care. In terms of debt and money cases it is unlikely to be an issue, or on a tricky point you can ring the Public Law Project and see what we think.

BUILDING BLOCK

IS THE BODY IN QUESTION EXERCISING

A PUBLIC FUNCTION?

2.3 Public bodies under the Human Rights Act 1998

Section 6 of the **HRA** sets out the statutory definition of a public authority, i.e. those which must act compatibly with the Convention rights introduced by the HRA.

The definition of public bodies includes “**any person certain of whose functions are functions of a public nature**”, but specifically confirms that: “**a person is not a public authority ... if the nature of the act is private**”.

This has meant that a situation has evolved where there are:

- Obvious public authorities
- Hybrid (or “functional”) public authorities
- Private bodies which have no public functions

Because of the problems over defining the middle, “hybrid” category, the courts have used public law cases to help them decide what is a public authority for HRA purposes. These are ostensibly private bodies which exercise public functions (e.g. Securicor guarding prisoners).

Although this course cannot cover these issues in detail, it is worth considering when you have a case which involves a public body which may well have breached your client’s human rights. You may wish to raise this with the public body in any complaint you make and it may be relevant to a judicial review claim. Before doing so, you will need to think through whether the body in question is a public authority which should be complying with the Convention rights introduced by the HRA.

BUILDING BLOCK REVIEW

IS IT A PUBLIC BODY

AND IS IT EXERCISING A PUBLIC FUNCTION?



3. DUTIES, POWERS AND THEIR SOURCES

Actions by public bodies are empowered or authorised by Parliament in some way. The authority to act takes one of two forms: either a **power** or a **duty**.

3.1 Duties

As set out above in chapter 1, public law is the set of legal rules which ensures that bodies carrying out public functions discharge their legal **duties**. The most obvious basis on which a public body may have acted unlawfully, is if they have failed to carry out a duty.

A duty is obviously something that **must** be done. The source of such a duty may be primary legislation (such as an Act of Parliament), or secondary legislation (such as regulations or directions). A failure to comply with a statutory duty is an easily identifiable public law wrong which can be challenged.

Look out for the words “**duty**” or “**shall**” when you want to identify something that a public body **must** do.

An example in secondary legislation concerning housing benefit is set out as follows:

*Where it is impracticable for the relevant authority to make a decision on a claim for a rent allowance within 14 days of the claim for it having been made and that impracticability does not arise out of the failure of the claimant, without good cause, to furnish such information...as the authority reasonably requires and has requested, the authority **shall** make a payment on account of any entitlement to a rent allowance of such amount as it considers reasonable...*

Regulation 91, Housing Benefit (General) Regulations 1987

Another more involved example of what a public body **must** do is in the Council Tax regulations dealing with the single person's discount. The Regulations actually specify that:

A billing authority shall take reasonable steps to ascertain whether that amount is subject to any discount under section 11 of the Local Government Act 1992.

Regulation 14, Council Tax (Administration and Enforcement) Regulations, 1992

The Regulations go on to say that:

*...where, having taken such steps as are referred to in regulation 14, a billing authority has reason to believe that the chargeable amount for the financial year concerned is subject to a discount of a particular amount, it **shall** assume, in making any such calculation...that the chargeable amount is subject to a discount of that amount.*

Regulation 15(2), Council Tax (Administration and Enforcement) Regulations 1992

This shows how there is a specific process that the local authority **must** carry out and follow through when dealing with the issue of single person's discounts.

3.2 Powers

Other than duties, public bodies can exercise public functions by way of **powers** that they have been given. Powers are usually discretionary, i.e. things that **may** be done in certain circumstances.

Again, the source of such **powers** could be primary or secondary legislation.

For example, the Discretionary Financial Assistance Regulations 2001 gives local authorities the **power** to make discretionary housing payments as follows:

*Subject to paragraphs (2) and (3) and the following regulations, a relevant authority **may** make payments by way of financial assistance (“discretionary housing payments”) to persons who...*

Regulation 2, Discretionary Financial Assistance Regulations 2001

There is no **duty** on the local authority to make such payments but they have a **power** to do so.

Another example of a local authority’s **power** is to make grants to voluntary groups, although local authorities are not generally required to do so, (i.e. there is no **duty** on them to make grants, but they have the discretion to do so in certain circumstances).

3.3 Sources

As mentioned above, duties and powers may come from primary or secondary legislation. (There are some more obscure sources such as Magna Carta and the Bill of Rights, implied powers and the Royal prerogative, but luckily we don’t need to worry about these.)

The point about identifying the source of the power or duty is that this is the key to establishing whether the public body has acted unlawfully or not. The best analysis of the problem is to go back to the source and ask yourself some basic questions:

- ***What*** is the public body required to do?
- ***How*** is it required to do it?
- If it has discretion, what must it take into account?

We will look at this again when we consider statutes, regulations and guidance below.

BUILDING BLOCK

WHAT IS THE **POWER** OR **DUTY** THAT THE PUBLIC BODY IS
EXERCISING?

WHAT IS THE **SOURCE** OF THAT POWER OR DUTY?

4. DECISIONS AND FAILURES TO ACT

When you want to challenge the actions of a public body, you need to identify precisely what it is you are challenging. This will also help you assess the strength of your client's case and the best way to present it.

4.1 Decisions and actions

The easiest cases are those where a public body has “*done something*”, i.e. made a decision or acted in a certain way and you have a specific act to complain of. This will often be something like a decision not to do something, such as allocating a national insurance number. Hopefully, the decision will be conveyed in writing, so you have it in print and the letter will include the date of the decision.

Unfortunately, this is not always the case. Even if you don't have the decision or act confirmed in writing to your client, it is still worth sitting down and working out the precise action that you want to complain about. Depending on how you want to challenge the decision, different time limits will apply, so you also need to identify what you want to complain about from that point of view. Identifying the decision or act will also help you identify what remedy is going to help your client most. Do you want the decision taken again? If so, how?

*In our case study, the local authority had made a **decision** about Mrs H's application for a discretionary housing payment: they had refused her application and this was the decision we wished to challenge. This was conveyed in a decision letter and so was easy to identify.*

4.2 Failures to act

The trickier cases are those where a public body *hasn't* done something, i.e. it has failed to carry out a function that it is either obliged to do, or has some discretion over. You are then probably faced with an ongoing failure which might be hard to identify.

*In terms of our case study looking at discretionary housing payment applications, a situation could arise where a client had made an application, but the local authority simply failed to deal with it within a reasonable timescale. This would result in a **failure to act** that could be subject to a challenge on the basis of public law principles.*

The harder cases are those where the public body is ignoring correspondence, indulging in unjustifiable delays and giving no reasons for its failure to act. We will deal with the tactics of how to handle this sort of situation later in the course, but it is important to appreciate that a failure to act can be challenged as readily as a decision or act itself.

4.3 Useful exercise

A useful exercise to adopt in terms of assessing a case and checking you have identified what you specifically want to challenge is to see whether you can explain it in **one sentence**. For example:

- My client wishes to challenge **the decision** of the Local Health Board to withdraw funding from the local advice centre that he uses.
- My client wishes to challenge the local authority's **failure** to assess her needs for help in her home.
- My client wishes to challenge **the decision** to refuse her application for discretionary housing payments.
- My client wishes to challenge the local authority's **failure** to deal with her application for discretionary housing payments.

4.4 Building block review

Now add this block onto your existing ones. If you've got your **public body** exercising a **public function** and you've identified the **duty** or

power it is meant to be exercising, what has it actually **done or failed to do?**

BUILDING BLOCK

WHAT IS THE **DECISION, ACTION OR FAILURE TO ACT**
THAT YOUR CLIENT WISHES TO CHALLENGE?

5. LEGISLATION, REGULATIONS AND GUIDANCE

We have already looked at the relevance of statutes and regulations in terms of the powers and duties they impose on public bodies. However, primary and secondary legislation are also relevant to establish *how* a body should behave. You should always identify the source of the power or duty and see what it says about how the body should be behaving.

5.1 Primary legislation

If the **power** or **duty** comes from an Act of Parliament, **look it up** and identify the specific section. This will not only help you analyse your client's case, but can also help you see what has gone wrong, and help the public body to understand their mistake as well. Although it may seem obvious what the **duty** or **power** is, many public bodies need to have this spelled out to them, and you should quote direct from the statute wherever possible.

Duties under statute will sometimes be classed as "target duties", while others expressly refer to, for example, the needs of a particular person being met and appear therefore to create binding rights enforceable by individuals.

An example in the community care field is the **duty** on health authorities and social services to provide after-care for someone detained under the Mental Health Act. The relevant section reads as follows:

It shall be the duty of the Primary Care Trust or Health Authority and of the local social services authority to provide, in co-operation with relevant voluntary agencies, after-care services for any person to whom this section applies...

s.117(2) Mental Health Act 1983

5.2 Secondary legislation

The source of the **duty** or **power** may be in secondary legislation such as **directions** or **regulations**, and again this may provide further information or leads on how the public body should act when exercising their power or duty.

In the example of Mrs H applying for discretionary housing payments, the relevant legislation was the Discretionary Financial Assistance Regulations 2001. These set out circumstances in which local authorities can make DHPs, the form, manner and procedure for handling claims, how payments could be made, and provided for reviews.

When we looked at secondary legislation in Chapter 4 above, examples included how Housing Benefit and Council Tax are regulated and what the local authority should do and how it should go about it.

For example, in the Housing Benefit situation, Regulation 91 goes on to say what the relevant authority will consider when making a payment on account of rent allowance:

...having regard to –

*such information which may at the time be available to it concerning the claimant's circumstances; and
any relevant determination made by a rent office in exercise of the Housing Act functions.*

Regulation 91(1), Housing Benefit (General) Regulations 1987

5.3 Guidance

Guidance is also useful in finding out how a public body should be acting. It is important to remember that **guidance is not the law**. It cannot confer powers or impose duties. Guidance can even be wrong in some instances.

However, if a public body has failed to follow guidance it should be using, this may be the basis for a successful challenge or complaint.

- 5.3.1 Guidance can take many forms. In some situations, a public body's duties or powers will be covered by **statutory guidance**. This is for example, guidance issued by the Secretary of State for Health, which local authorities are required to follow when providing social services; the requirement to follow the guidance is imposed by s.7 of the Local Authority Social Services Act 1970. Guidance issued under this section will usually make reference to this fact in the introduction.

A public body can only depart from **statutory guidance** for good and clearly articulated reasons. Public bodies should conscientiously take **non-statutory guidance** into account.

- 5.3.2 A failure to follow their own **internal guidance** may amount to **procedural impropriety** which in itself can be a ground for challenging a decision by a public body, which we will deal with below in chapter 6.

A public body should not have **internal guidance** or an internal policy that contradicts legislation (including regulations or directions).

It is also important to be aware that guidance is only guidance. It does not necessarily limit the conditions or circumstances in which a public body can act; it should just **"guide"** them on how to act. If you think that **guidance** used is too narrow, you can always put this to the public body and suggest what else they should consider.

*In Mrs H's case, the DWP issued **guidance** on Discretionary Housing Payments. At the time of her case, old guidance setting a test of "exceptional hardship" had been replaced with a test of "where the local authority considers that additional help with housing costs is needed". Although the latter test was broader and provided the Council with a wider discretion (which might have made their decision harder to challenge), it possibly made the test easier to meet in the first instance, as Mrs H no longer needed to show "exceptional hardship".*

BUILDING BLOCK

WHAT LEGISLATION OR GUIDANCE
UNDERPINS THE PUBLIC BODY'S ACTIONS?

6. PUBLIC LAW WRONGS

What are we actually saying is a public law wrong? What must a public body have done to act unlawfully? There is more to public law than just a breach of duty or failure to use a power.

There are three categories of public law wrongs which we will look at in turn:

- **illegality**
- **fairness**
- **irrationality and proportionality**

There is also a fourth – **maladministration** – which we will deal with separately.

6.1 Illegality

The main examples of **illegality** in public bodies exercising their functions are as follows:

- exceeding their powers
- misapplying the law
- failing to take into account relevant information
- taking into account irrelevant information
- failing to ask the right question
- failing to undertake sufficient enquiry
- delegating a decision for which they are exclusively responsible

6.1.1 Decision-makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be **“illegal”**. An action or decision may be illegal on the basis that the public body has **no power to take that action or decision**, or has acted beyond its powers. This arises, for example when the legislation relating to a public body does not include the necessary power or has precise limits on when the power can be used. Public bodies acting illegally in this way can be described as acting **“ultra vires”** (which means beyond or outside their powers).

6.1.2 When a public body exercises their discretion or makes a decision, they must ensure that they have not **fettered their discretion**. If for example a government department or local authority adopts a very rigid policy about a certain decision-making process, this would be unlawful.

In the case study, where Mrs H has applied for discretionary housing payment, the council would have fettered their discretion unlawfully if they applied a policy whereby only people with more than 4 children were allowed payments.

6.1.3 Another type of illegality is where the public body has made a decision and either failed to consider **relevant information** or has taken into account **irrelevant information**.

In the case study of someone applying for a discretionary housing payment, it would be illegal for the public body to ignore say the expense the applicant incurs because of health problems or the number of children they have. If the decision was based on irrelevant considerations, such as the local authority wanting to save money in that year's budget, this would also be illegal.

6.1.4 Any public body making a decision is also obliged to undertake a **sufficient enquiry** and **ask itself the right question**. To enable it to exercise a discretionary power properly, it must be addressing the right issue, and must also take reasonable steps to obtain the information on which a proper decision can be based.

If an applicant for a discretionary housing payment is not asked about their income and expenditure, the decision is unlikely to be properly made. Similarly, if the local authority asks itself the wrong question (e.g. does this person already get housing benefit and do they have more than 3 children), this would be unlawful. The correct question is whether they are in financial need.

6.1.5 A public body must also ensure that they do not let someone else take the decision on their behalf (unless they are permitted by law to do so). This is known as **unlawful sub-delegation**. An example would be where the public body uses a private company to gather information and assess a claim for a type of benefit. If the public body also lets that private agency make the decision on entitlement, this is likely to be unlawful sub-delegation, unless the relevant legislation empowers it to delegate (e.g. Housing Benefit decisions can now be contracted out).

This issue goes to the heart of the accountability of public bodies. If they can allow another person to take a decision for them, they are giving their power away and fail to be properly accountable.

6.1.6 Lastly, a failure to comply with the **HRA** by acting in a way incompatible to the Convention might also be a form of **illegality**.

6.2 Fairness

Fairness demands that a public body should never:

- act so unfairly that it amounts to an **abuse of power**
- breach the rules of **natural justice**
- make a **biased** decision or one that appears biased
- breach a duty to reach a decision by way of **express procedures**

6.2.1 In terms of natural justice, one of the key issues is the **rule against bias**, which requires the public body to be impartial and to be seen to be so. For example, the public body must not allow decisions to be made by people who have strongly held views which may cause them to reach a decision based on prejudice, nor allow decisions to be made by people who have a financial interest in the decision.

6.2.2 There could also be what is called “procedural impropriety” if a public body **failed to follow the procedures** laid down by legislation.

6.2.3 There must also be a “**fair hearing**” before a decision is reached, although this does not always literally mean an oral hearing. Basically,

a person is entitled to know the case against them, and must have the opportunity to put their case properly. Any other requirements above and beyond this will depend on the seriousness of the issue, for example, if someone's livelihood or liberty is at stake.

6.2.4 Examples of **unfairness in relation to the hearing** of a case before a public body makes a decision would include the following:

- Failing to tell the individual what the **case was against them**, or taking into account evidence or factors which s/he was not aware of
- Failing to allow the individual to **put their case forward**
- Failing to give the individual the **facilities** for putting their case forward properly
- Refusing to hear **evidence** which might have led to a different decision
- Denying access to relevant **documents**
- Holding a hearing in the **absence** of the individual when they had a good reason for not being able to attend
- Failing to notify the individual of the **time and place** of the hearing that would lead to the decision being taken
- **Failing to consult** those who the public body had a duty to consult, or those who had a **legitimate expectation** that they would be consulted before the decision was made.

6.2.5 "**Legitimate expectation**" can come into play in one of two ways when a public body is making a decision that affects an individual. As referred to above a person may have a legitimate expectation that they will be consulted before a decision is taken, this is called "**procedural legitimate expectation**".

An example would be where it is obvious that someone has an interest in a matter and should be consulted, e.g. local people being consulted over planning decisions.

However, a legitimate expectation is called "**substantive**" when someone has been promised a benefit, and the public body is thinking of going back on this promise. In this instance the courts have said that it could amount to an abuse of power to take such a benefit away.

The classic example here is a promise of a “home for life” which was in fact what the key case was all about. A local authority that had promised a resident of a care home a home for life, was found to have acted unlawfully by breaching this promise.

6.2.6 Fairness may also demand that the public body give **reasons** for their decision. Certain statutory procedures will require this, although there is no specific requirement in law generally. However, more recent cases have suggested that in certain circumstances reasons should be given, and this will often depend on the **nature** of the decision and **how important** it is to an individual.

Reasons for a decision may be required when:

- The decision-maker is a professional **judge**
- The decision would otherwise appear **aberrant** (aberrant meaning “to diverge from the normal type”)
- The **subject matter** is particularly highly regarded, such as a person’s liberty.

It is risky for a public body **not to give reasons** because:

- Reasons can be sought in correspondence in any event, including a pre-action letter of claim if proceedings are being considered.
- A public body challenged through judicial review, or dealing with an Ombudsman’s complaint, will be expected to explain themselves.
- If reasons are not offered, the court may conclude there are no good reasons for the decision, and that the body acted irrationally.

6.3 **Irrationality and proportionality**

6.3.1 Irrationality (aka “Wednesbury” unreasonableness)

Decision-makers must not act irrationally. More specifically they must **not act in a way that no reasonable decision-maker would consider**

justifiable. This is quite a high test and can be very difficult to meet even if a decision appears irrational on the face of it.

Although this was established in a case in 1948 and is still sometimes referred to as “Wednesbury unreasonableness” more recent cases have echoed the high test, along the following lines:

“[a decision] which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

In the case of Mrs H applying for a discretionary housing payment, one of the reasons the Council turned her down was because they thought she could cut down on fruit juice and squash, sweets and cakes. One potential way to try to challenge this decision would be to say that this was irrational: that no reasonable decision-maker would think it justifiable to refuse to find someone in need of help with their rent on the basis that they spent too much on juice and squash for their children. However, this illustrates how difficult this ground is to pursue.

6.3.2 Irrationality, proportionality and the Human Rights Act

However, in contrast to this high test of irrationality, there will be a lower threshold if rights under the **HRA 1998** are engaged, and this has led to developments in the law dealing with irrationality generally. The test in HRA cases becomes one of “**proportionality**”.

To justify an interference with a qualified Convention right, the **state** is required to demonstrate that the interference is:

- authorised by domestic law;
- for the purpose of pursuing a legitimate aim;
- proportionate.

This contrasts with the test of **irrationality** which is for the **claimant** to establish. If a Convention right is interfered with, the **public body** must justify its behaviour.

The courts took a variety of approaches when looking at the **proportionality** of the public body's behaviour in HRA cases. A progressive stance developed in some decisions where it was argued that proportionality was a question of law for the court to decide for itself. However, this has been replaced by a more conservative approach showing greater deference to the public bodies in question, and distancing the court from the state body's decision.

More significantly for public law challenges, there appears to be a trend towards **proportionality replacing irrationality** even in non-Convention judicial review cases.

Although your case may not involve a potential breach of a Convention right and you think that there may be an **irrationality** element, you may wish to consider the **proportionality** of what the public body has done.

BUILDING BLOCK

WHAT IS THE **GROUND** FOR
YOUR PUBLIC LAW CHALLENGE?

7. PUBLIC LAW REMEDIES: JUDICIAL REVIEW AND NON-COURT BASED REMEDIES

7.1 Judicial Review

Public law challenges can be brought in a variety of forums. The most obvious is by court proceedings known as judicial review.

The grounds for bringing a judicial review claim are set out above in **chapter 6**: illegality, fairness and irrationality or proportionality.

Your starting point – for several reasons – must always be that judicial review is a **remedy of last resort**. The court (and the LSC if you want funding) will expect you to have tried everything else before you pursue proceedings.

One of the important aspects to remember is that the court's role is **supervisory**. They will only look at how the decision is made; they will not take the decision on behalf of the public body.

In the case study of challenging a decision about whether someone should get DHPs, the court was being asked to quash that decision and order the Council to make a fresh decision in a fair and reasonable way. We were not asking the court to decide whether the Claimant should get DHPs or not; that is not their role in judicial review.

The court's intervention is also **discretionary**. Even if they find that the public body has acted unlawfully, they may decide not to give the individual the remedy they seek if this would not be **good administration**.

DHPs are paid out of a fund provided to the local authority by central government. Although unlikely, if this fund had expired by the time the court decided the Council had acted unlawfully, the Court might have been reluctant to force the Council to undertake an exercise that would have been futile (i.e.

considering a new application for DHPs when they knew the money had run out).

When considering whether judicial review may be an appropriate route to take, you should also bear in mind the following:

- Claims must be brought **promptly** and within **3 months** of the date of the decision at the latest.
- You can get an **injunction** as an interim remedy, which can be essential in maintaining the status quo and protecting your client's position.
- The outcome is likely to be the **decision being quashed** and the public body ordered to take a **fresh decision**.
- The client will need to be represented by a **solicitor** specialising in public law (or the relevant area and with experience of bringing judicial review proceedings).
- If the prospects of success are good, **public funding** is likely to be available.
- If the client is not financially eligible, judicial review is likely to be prohibitively **expensive**.

7.2 Ombudsmen schemes

Various ombudsmen schemes have been set up by statute. These have been developed in parallel with the way judicial review proceedings work in the courts.

7.2.1 An ombudsman will consider a complaint and investigate it on the basis of whether there has been **maladministration causing injustice**. It is important to understand this two-limb test: first has there been **maladministration** by the public body in question, and second, did that maladministration cause **injustice**.

The list of examples of **maladministration** used when the first ombudsman scheme was set up is as follows:

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

In terms of specific examples that might lead an ombudsman to find against a public body would include:

- failure to follow procedures
- poor standards of decision-making
- refusal to inform adequately of a right of appeal
- knowingly giving misleading or inadequate advice.

The basis of the complaint should set out clearly what the client thinks the **maladministration** was and how this has resulted in **injustice**, which remains unremedied.

7.2.2 Complaints to ombudsmen have a number of restrictions to them:

- The complaint must be about **administrative** actions
- The injustice must remain **unremedied**
- Internal **complaints procedures** must be exhausted first
- The particular ombudsman must have **jurisdiction**
- The merits of **discretionary** decisions are not questionable unless there is maladministration
- There is no other (reasonable) **remedy** available
- The complaint must be made within the **time limit** (usually 12 months)

7.2.3 There are pros and cons to using an ombudsman scheme to obtain a remedy for your client. On the upside, it is **simple and cheap**. A report on a complaint can encourage **better practice**. The ombudsman can also recommend that the public body pay **compensation**.

On the downside, the process can be **slow** and you cannot get any interim remedies. There is **no duty** to investigate or complete an investigation. Ombudsmen will not generally deal with **points of law**. The Ombudsmen's recommendations are **not binding** on the public body.

The **legal basis** for a complaint to an ombudsman is different from a judicial review, although there is some overlap between the two. Whilst a judicial review will be based on public law principles, the ombudsman considers **maladministration leading to injustice**. When considering which route to go down (or possibly both), you will need

to consider the best solution for your client as well as the factors outlined above. Look at what remedies each offer, the time limits, the cost, the urgency and so on.

There is currently a debate between the Administrative Court and ombudsmen schemes generally as to where the dividing line is between the two.

- 7.2.4 The Ombudsman scheme that is likely to be most relevant is the **Local Government Ombudsman**, also known as the Commissioner for Local Administration in England and Wales. They have a good website with leaflets and information at www.lgo.org.uk. You can call them on 0845 602 1983 and they also have a good “Guide for advisers” poster you can order. Ombudsman’s **reports** are available which provide a useful guide as to how investigations are conducted and the outcome of similar cases. You can also download the policy on remedies which sets out how the Ombudsman decides what is appropriate.

Central government departments and a number of other agencies are covered by the **Parliamentary Ombudsman**; (also called the Parliamentary Commissioner for Administration). Complaints to the PO must be made via an MP. Again, the best source of current information is on their website at www.ombudsman.org.uk.

In terms of money and debt work, you may also find that your client’s case falls within the jurisdiction of the **Financial Ombudsman**. Although their remit is limited, they do cover complaints about banks, building societies and insurance companies. These are obviously not public bodies, but the FO Service works in a similar way to other Ombudsmen schemes, and was set up by statute. It is free and independent, and has a website at www.financial-ombudsman.org.uk.

- 7.2.5 Remember that the Ombudsmen themselves are public bodies, and they have a complaints procedure. If you are not happy about how the ombudsman has dealt with a complaint, you can complain about them, or you can even bring judicial review proceedings against them.

7.3 Complaints procedures

You should also consider using a public body's complaints procedure to try to resolve a dispute for your client. For various reasons judicial review or an ombudsman complaint may not be appropriate or available. You also need to have exhausted or at least considered using the public body's complaints procedure before you can bring judicial review proceedings or go to the ombudsman.

All public bodies will have a complaints procedure. Some work better than others, and some are much more sophisticated than others. The best starting point is always to obtain the complaints procedure direct from the public body. It should include all the basics you will need to know to help your client make a complaint:

- what the complaints procedure does and does not cover
- who to complain to
- what form the complaint should be made in
- the different stages of the procedure (usually informal, formal and then a final stage)
- how long it will take for the complaint to be dealt with

When formulating the complaint on behalf of your client, or helping them to make it, narrow down the issues as much as possible. Leave out extraneous details if they do not add to the substance of the complaint. Separate out the key issues and if possible present them as numbered points. Avoid using inflammatory or over the top language and take out as many adverbs as possible.

A chronology and copies of the relevant documents are helpful even if the complaints procedure does not specifically require them. Discuss with your client what they want out of the process and whether this is achievable.

Keep copies of everything you send to the public body.

BUILDING BLOCK

HOW ARE YOU GOING TO

BRING YOUR PUBLIC LAW CHALLENGE?

IS IT A PUBLIC BODY?

IS IT EXERCISING A PUBLIC
FUNCTION?

WHAT IS THE POWER OR
DUTY AND WHAT IS ITS
SOURCE?

WHAT IS THE DECISION, ACTION
OR FAILURE TO ACT?

WHAT LEGISLATION
OR
GUIDANCE IS THERE?

WHAT IS THE GROUND FOR
THE CHALLENGE?

HOW ARE YOU GOING TO
BRING YOUR CHALLENGE?

8. THEORY INTO PRACTICE: SOME BASIC ISSUES

8.1 Time limits and letters of claim for judicial review

As outlined above in chapter 7, judicial review claims must be brought **promptly** and **within 3 months** of the date of the decision. This does not mean you have 3 months to work up your claim, it means you must get on with it **immediately**, and if you haven't issued within 3 months you are likely to be out of time (although the court retains a discretion to extend the time limit).

You must also, under the **judicial review pre-action protocol**, send a detailed **letter of claim**. This must set out your client's case and should include the following:

- Your client's name and address
- The details of the matter being challenged
- The issue (include the date and details of the decision/act/omission and a brief summary of the facts)
- The grounds for challenging the decision (i.e. what has the public body got wrong)
- What you want the public body to do to set matters right
- Details of any information you want the public body to give you

You must also give the other side **time to respond**, usually **14 days**. If you think it is appropriate to ask for a speedier reply, say why. Say what action you will take if they do not reply, or do not provide a substantive reply.

Not only does the court require you to send a letter of claim before you start proceedings, but it can also lead to a **quick solution**. Although many public bodies ignore or do not deal with letters of claim properly, some will **roll over immediately** once the public law breaches have been pointed out to them. It can also be useful to copy the letter to the public body's legal department to put them on notice that you are threatening proceedings.

8.2 ADR, funding and representation

8.2.1 You must always consider whether there is any method of alternative dispute resolution or any other alternative remedies that may be appropriate to use to resolve the dispute between your client and the public body. This could include:

- Negotiation
- Mediation
- Complaints procedures
- Ombudsman schemes
- Tribunals
- Statutory appeals.

As set out above, you need to consider what your client wants and how this can best be achieved. The court will expect you to have tried any genuine alternative remedies before you start judicial review proceedings.

8.2.2 In terms of **public funding**, judicial review is a priority under the CLS Funding Code. This means that if the case has reasonable prospects of success, and meets the general costs benefit test (*“the likely benefits of the proceedings justify the likely costs, having regard to the prospects of success and all other circumstances”*), your client should get funding.

Even without good prospects of success there are some bases on which funding can still be granted:

- If the case has a significant, wider public interest
- If it involves a breach of a Convention right
- If it is of overwhelming importance to the client.

All these categories have considerable limitations and conditions, but it does mean that even without a very strong case, public funding might still be available.

Limited funding is available through the Legal Help scheme to help clients with complaints procedures and taking a case to the Ombudsman.

8.2.3 If you think that you have a case which is likely to be worth pursuing, you can call the **Public Law Project** for advice and help under our

Specialist Support contract. If we cannot take the case on, we can help you find someone who can. The two main points to remember are that you want a specialist and you don't want to run out of time. **Do not sit on a decision letter**, even if you are going to do the letter of claim. Call us, or contact a solicitor if you think you will want to refer it on. It is very frustrating to get a case with only a few weeks before the three-month deadline expires!

8.3 A Steps in a Judicial Review case

1. Identify the decision or failure to act
2. Investigate other remedies or methods to resolve the dispute
3. Send a letter of claim to the public body
4. Consider their reply
5. If dispute not resolved, apply for public funding
6. Prepare and issue the claim
7. Consider the Defendant's acknowledgment of service; reply if appropriate
8. Court grants permission
(If not, you can renew your application for permission at an oral hearing.)
9. Prepare for final hearing, including exchange of evidence and skeleton arguments
10. Final hearing and judgment – decision quashed; public body ordered to make fresh decision on lawful basis.
11. New decision from public body

B Steps in a complaint to the Ombudsman

1. Exhaust internal complaints procedure of the public body you wish to complain about.
2. Consider whether appropriate to use Ombudsman, and if so, which one.
3. Set out client's complaint in detail, keeping copies of all documents.
4. Ombudsman decides whether appropriate to investigate.
5. Ombudsman carries out investigation, including interviewing client and relevant people in the public body.
6. Ombudsman provides initial view for comments from client and public body.
7. Ombudsman finalises investigation and recommends action for public body to take if maladministration has been found and has caused injustice.
8. Public body follows Ombudsman's recommendations.