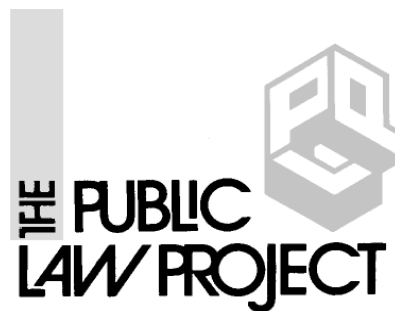


Using Public Law

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Louise Whitfield explains how to use public law to make public bodies behave better.

Advice work often revolves around action – or inaction - by public bodies. Situations often arise where either appeal routes have been exhausted, or the behaviour of the public body cannot be appealed against. This article looks at how public law can be used to help clients get fairer decisions and quicker action from the public bodies they have to deal with. Clients and their advisers should not have to put up with misdemeanours of this sort any longer.

What is public law and how can it help

Public law is the set of principles governing how public bodies should behave. This includes making sure they discharge their legal duties, do not exceed or abuse their powers, and do not breach certain articles of the European Convention on Human Rights. These principles apply to all public bodies when they exercise public functions, for example central government departments such as the DWP and their agencies (Job Centre Plus and the like) dealing with applications for benefits.

Thus many actions and decisions (or failures to act or make a decision) by public bodies that routinely arise in advice work are governed by public law principles. Unfortunately, many public servants are unaware of this and use the perceived power of the public body to act in any way they choose. Public law seeks to redress the balance between the unarmed individual and the might of the public body.

Examples of public body behaviour to which public law principles apply:

- *Decision by a local authority to instruct bailiffs to recover a council tax debt, or to start bankruptcy proceedings*
- *Failure to process a housing benefit application*
- *Refusal to accept certain documents as identification for the purposes of a benefits application*
- *Failure by the Inland Revenue to exercise their discretion not to recover a tax credit overpayment*

What makes an action or decision unlawful

A public law breach can take many forms. The basic categories are as follows:

- Illegality
- Unfairness
- Irrationality
- Maladministration

These definitions are useful tools in analysing where a public body has gone wrong, but they are fairly fluid concepts and there will often be a degree of overlap between the categories when considering the potentially unlawful action that may be subject to challenge.

Illegality

Illegality can take a number of forms. As a basic starting point, a public body can only do what it has the power to do. If it acts beyond its powers, it is acting illegally, and the action is unlawful. The court can quash the decision or action.

Other forms of illegality relate to the way public bodies make decisions and take action that affects individuals. For example, they must ensure that they apply the law properly; if they get the law wrong, the decision is unlawful and can be quashed.

In terms of advice in social welfare law, one common form of illegality by public bodies is how they gather and consider information when making a particular decision. They must only consider relevant information and must not consider irrelevant information. They must ask the right question and must undertake sufficient enquiry (i.e. in relation to the subject matter in question). Any error in these areas may render their decision-making process unlawful.

Public bodies are also often guilty of fettering their discretion. This tends to occur when they adopt a very rigid policy in relation to a certain decision-making process when they should be exercising their discretion. This is common in local DWP offices that adopt a “tick box” approach to an area of decision-making over which they have a discretion, and the effect of the rigid policy is to fetter that discretion.

Lastly, public bodies are not allowed to delegate their decision-making powers, (unless they have a specific right to do so in law). This means for example that the DWP cannot let a private company take over making benefits decisions; they can help with processing claims, but not deciding on entitlement.

Fairness

Public bodies must not act so unfairly that it amounts to an abuse of power; they must not breach the rules of natural justice; they must not make a biased decision (or one that appears biased), and they must not breach their duty to make decisions by way of an express procedure.

Most of these aspects of fairness are self-explanatory. The rules of natural justice are however worth considering in terms of what is a “fair hearing”, regardless of whether a particular situation justifies an oral hearing or not. A hearing in itself can simply be “on the papers”, a consideration of the case without oral submissions or legal representation. (Entitlement to an oral hearing with or without legal representation will depend on the seriousness of the subject matter.)

In any event, however it is dealt with, the matter must be decided by way of *fair* hearing, which includes the individual being entitled to know the case against them, and to have the opportunity to put their own case properly. Individuals must have access to the relevant documents on which the decision will be based, and the decision-maker must not refuse to hear evidence which may have led them to reach a different conclusion.

It may also be particularly unfair in public law terms for a public body to frustrate an individual’s “legitimate expectation”. This may be an expectation that they are consulted over a particular decision, or an expectation of a particular benefit which the public body unfairly withdraws. (The latter in itself may be so unfair as to amount to an abuse of power.)

Lack of reasons for a decision in certain circumstances may sometimes be unfair, although this will usually depend on the nature of the decision and how important it is to the individual.

Irrationality (and proportionality)

Public bodies must not make irrational decisions or act in an irrational manner. However, it can be very difficult to prove that a public body has acted irrationally (no matter how perverse their behaviour appears to be) as the legal test is whether they have acted in a way that “no reasonable decision-maker would consider justifiable”. This is a high hurdle to get over, but the courts have now also started to look at whether a public body’s behaviour is proportionate or not. This has evolved from human rights cases where courts have to look at whether the interference with someone’s rights is proportionate or not. This means that even if it may be impossible to prove that what a public body has done is irrational (in the strict legal sense), if rights under the Human Rights Act are engaged, there may be a basis for arguing it is disproportionate and therefore unlawful.

Maladministration

The actions of public bodies are all about good administration. They will therefore breach public law principles if they are guilty of “maladministration”, and if this causes injustice, the ombudsman can intervene. The term maladministration covers a multitude of sins including delay, arbitrariness, neglect, bias, incompetence, inattention, ineptitude, perversity and turpitude: this list having been devised when ombudsman schemes were originally set up. In real terms this could mean failures such as not following procedures, poor standards of decision-making, or knowingly giving misleading or inadequate advice.

The Local Government Ombudsman covers local authorities and the Parliamentary Ombudsman deals with most central government departments and agencies.

Examples of public law wrongs

*If a local authority operates a scheme for discretionary housing payments, they are a **public body exercising a public function** and must do so in accordance with **public law principles**. They must therefore start by applying the law set out in the **relevant legislation** (Discretionary Financial Assistance Regulations 2001) and must also take into account any relevant **guidance** (the DWP has issued "Guidance for local authorities on the operation of discretionary housing payments"). If the local authority **misapplies the law**, or **departs from the guidance without good reason**, this would be unlawful and their decision could be subject to challenge.*

*The correct test is whether the local authority considers that additional help with housing costs is needed. **Applying a different test** (e.g. the old test of exceptional hardship) would render the decision unlawful. **Applying a rigid policy**, such as only giving DHPs to people with more than four children would **fetter their discretion**. If no account was taken of the applicant's dependants or expenses related to health problems, this would be **a failure to consider relevant information**; taking into account how long the applicant had lived in the borough would be **considering irrelevant information**: both arguably undermine the legality of the decision. Simply asking the applicant how many children s/he has would not be **undertaking a sufficient enquiry or asking the right question** to establish whether s/he needed additional help with housing costs.*

A failure to process the DHP application can in itself be subject to challenge. The local authority has a power to operate the scheme set out in the Regulations. There is also guidance on how they should go about this. Applicants are entitled to have their applications dealt with, and dealt with within a reasonable period of time. Unreasonable delay can amount to an abuse of power by a public body.

What are the options to challenge a public law wrong?

What can advisers do then, if they think a public body has acted unlawfully, but there is no appeal route open to their client, or no solution readily available to get the public body to reconsider? The three main methods for public law wrongs to be righted are taking judicial proceedings, making a complaint to the public body in question and complaining to the relevant ombudsman. The interplay between these three options is not straightforward but some basic rules apply which can be used to narrow down possibilities and help the adviser decide which route to take.

Judicial review

Court proceedings are expensive and can be complex. The client will need public funding (or deep pockets) and a specialist solicitor. The court's role is supervisory only and any remedies are discretionary, which means that even if unlawful behaviour is proved, the client may not get the remedy they seek. Interim remedies (such as an injunction to maintain the status quo) are available. Judicial review

decisions are binding, can resolve legal disputes and help other clients in similar situations. The main grounds for judicial review are the first three outlined above: **illegality, fairness and irrationality or proportionality.**

Damages are not generally available in judicial review proceedings. Cases often settle, but even with a final order the likely outcome is that the public body's decision is quashed and it is ordered to take a fresh decision. (The judge does not take the decision on the public body's behalf.) This can sometimes make the result of the proceedings a hollow victory for the client if the public body simply reaches the same conclusion the second time round but does so in a lawful way.

Most significantly perhaps is the fact that the time limit for bringing judicial review proceedings is very tight. A client must issue their claim promptly and within three months at the latest from the date of the decision (or action) complained of. Judicial review is also a remedy of last resort, so claimants must have exhausted – or at least considered – all realistic alternatives to bringing proceedings, including complaints procedures and alternative dispute resolution.

However, despite these restrictions, a threat of judicial review can be a powerful tool in convincing a public body to reconsider their decision, or to force them to take action they should be taking.

Ombudsman schemes

Ombudsman schemes deal with maladministration (explained above), but not points of law. A client does not need a lawyer to go to the ombudsman and the process is free, although they may need help with the forms and explaining how the maladministration has caused them injustice. Clients must have exhausted the public body's internal complaints procedure before they can lodge a complaint with the relevant ombudsman. The whole process can therefore be very slow.

An ombudsman's recommendations are not binding, but they can recommend that the public body apologises, pays compensation, reviews their policies and procedures and rights the specific wrong complained of. The time limit for taking a complaint to the relevant ombudsman is usually 12 months from the date of the action complained of or the conclusion or any internal complaint or review.

Complaints procedures

Complaints procedures will cover most things but are unlikely to grapple with points of law or to overturn policy. They may lead to a more practical resolution of a problem than court proceedings, or may allow more readily for negotiation or mediation of the dispute which may in fact lead to a better outcome for the client. Complaints procedures usually have an informal stage, but they can be slow and public bodies are not well-known for their effective complaints handling. As with taking a complaint to the ombudsman, using a complaints procedure is free and clients do not need legal advice, but they may need help in formulating their complaint and ensuring it is dealt with properly.

Weighing up the options

In some cases it will be clear that one option is ruled out (e.g. the time limit for judicial review has passed) or the remedy needed is only available through one channel. The focus must of course always be on what the client wants to achieve from the process and the best way to get there, bearing in mind their personal circumstances, the subject matter of their problem and the general strength of the case. Advisers should adopt a pragmatic approach with public law challenges and not assume that litigation will produce the best result. Sometimes the matter will be so urgent and so serious (such as recovery of an overpayment of child tax credits which leaves the client with little or no money to live on) that judicial review will be the only realistic option, (particularly for example in the light of the Inland Revenue's failure to deal with correspondence or complaints).

PUBLIC LAW CASE ANALYSIS CHECKLIST

- **is it a public body?**
- **is it exercising a public function?**
- **what has it done or failed to do?**
- **is there any appeal route available?**
- **what is the law that applies to the duties and powers?**
- **what sort of public law wrong is this?**
- **what is the best way to challenge this failure?**
- **are there any other remedies available to the client?**
- **what's the client's end goal?**

How to frame the client's complaint or letter of claim

Often the basic problem with a public body is making them see how they have gone wrong. If the adviser can do this effectively, s/he can then also point out how the public body can put the matter right. Making submissions based on the following guide (whether as an internal complaint, a letter of claim threatening judicial review, or a complaint to the Ombudsman) will often result in a fresh decision, or lawful action finally being taken by the public body.

The structure set out below is a useful guide to putting together a complaint or letter of claim.

1. Summarise in one sentence what the public body has got wrong (e.g. failure to process a housing benefit application).
2. Set out the salient facts, preferably in chronological order (including reference to copy documents, specific dates etc) focussing on the

substantive failure by the public body and the impact this is having on the client.

3. Set out the law as it applies to the public body (i.e. refer specifically to the regulation that governs a particular duty or power which the public body is failing to meet or exercise).
4. Apply the law to the facts (or vice versa), to show on what basis the public body has erred in relation to the client's case.
5. State what the public body should have done, and how they must now act to put matters right (e.g. process the housing benefit claim within 14 days of the date of this letter).
6. Set a deadline for the reply, and confirm what action the client or adviser will take if the public body does not put matters right.
7. If appropriate, copy the letter to the public body's legal department.

Results and resources

Many poor decisions and failures by a public body can be righted by relying on public law principles. Many public bodies do not even know that public law applies. All too often the staff dealing with a certain process do not know how they should be applying the rules or making a fair decision. Once this has been pointed out to them, the results can be remarkable. It is difficult to judge how much this is down to the threat of proceedings or realisation that they have made an error.

If an adviser sees repeated maladministration causing injustice, they should report this to the relevant ombudsman, as their remit is to look into individual complaints and to promote good administration generally. The Local Government Ombudsman has a helpline for advisers (0845 602 1983) to provide advice on individual cases and also to gather information on recurrent problems.

The Public Law Project runs the Legal Services Commission public law specialist support line for advisers with an LSC contract: 0808 808 4546, Mondays and Wednesday 2.00 to 5.00 pm, Tuesdays and Thursdays 10.00 am to 1.00 pm. PLP also provides in house, tailor made training on any aspect of public law and currently has funding to deliver free training on using public law in money and debt cases to advisers working in this area.