



Llywodraeth Cymru
Welsh Government

Making Good Decisions

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Introduction

“Making good decisions is a crucial skill at every level.”

– Peter Drucker

Public authorities in Wales make decisions on a daily basis. Each of those decisions has the potential to have a significant effect on people’s lives. It is therefore imperative that public authorities respect standards of good governance and the principles of the Rule of Law. In other words, all central and devolved government departments, local authorities, courts and tribunals, and all other bodies exercising functions of a public nature, should act within the law, fairly, and respect the principles of accountability, accessibility and transparency. This will help to ensure that the public authorities do not act arbitrarily, that all are treated equal in the eyes of the law and that fundamental rights are protected. Ultimately, this will lead to the making of good decisions that are capable of withstanding scrutiny and any legal challenge.

This guidance assists public authorities in Wales to make good decisions that are lawful and comply with the Rule of Law. It does so by describing in clear and accessible terms the main grounds on which a public authority’s actions may be challenged through the judicial review procedure. It also includes a number of case studies and practical tips that give public authorities in Wales insight into good decision-making.

An application for judicial review is an application to the High Court for it to review the lawfulness of an enactment or a decision, action or failure to act in relation to a ‘public function’. For the application to proceed to the hearing stage, the person

making the application (the “claimant”), must have sufficient interest in the matter, and the application must be made promptly and in any event within three months.

The application is made on one or more grounds of review. These grounds have either been developed by the courts (‘the common law’ grounds of review) or are set out in legislation. The main common law grounds of review are set out in the table below. For ease of use, the grounds have been categorised. However, the boundaries between the categories, and the grounds themselves, are quite fluid. In many cases, a claimant will seek to rely on a combination of overlapping grounds. A reference in the table below to ‘CPR’ is to the Civil Procedure Rules 1998 (SI 1998/3132).

The guidance is not intended to be regarded as definitive advice on defending judicial review actions, for which specialist legal advice should be sought.

Claimants for judicial review apply to the High Court to review the lawfulness of:

- (i) an enactment;
- (ii) a decision, action or failure to act in relation to the exercise of a public function
(rule 54.1 CPR)

Claimants must have 'sufficient interest' in the enactment/decision etc. (section 31(3), Senior Courts Act 1981) and must make application promptly and within 3 months (rule 54.5 CPR)

Judicial review application must be made on one or more recognised grounds of judicial review. The main common law grounds are:

| Illegality | Procedural impropriety | Irrationality/unreasonableness | Proportionality |
|--|---|--------------------------------|------------------------------|
| Enactment/decision must be within scope of power (Chapter 3) | Mandatory procedural requirements (Chapter 7) | Unreasonableness (Chapter 12) | Proportionality (Chapter 13) |
| Relevant/irrelevant considerations (Chapter 4) | Invalid consultation (Chapter 8) | | |
| Fettering discretion (Chapter 5) | Legitimate expectation (Chapter 9) | | |
| Unlawful delegation (Chapter 6) | Bias (Chapter 10) | | |
| | Duty to give reasons (Chapter 11) | | |

If the Court considers that the enactment/decision etc. is unlawful it may award one or more of the following remedies, at its own discretion:

- mandatory, prohibiting or quashing order;
- a declaration or injunction;
- damages.

Other considerations

Public authorities in Wales must also comply with a number of statutory duties. They include duties imposed by:

- **the Human Rights Act 1998**
- **the Equality Act 2010**
- **the Well-being of Future Generations (Wales) Act 2015**
- **the Data Protection Act 1998**
- **the Freedom of Information Act 2000**
- **the Welsh Language (Wales) Measure 2011**

This document provides guidance to public authorities in Wales on compliance with these duties. However, public authorities in Wales may also have to comply with further, subject specific, duties and considerations, depending on the context of the decision or action that they are proposing to take. One example is that the Welsh Ministers, and any person exercising functions under the Social Services and Well-being (Wales) Act 2014, must have due regard to the United Nations Convention on the Rights of the Child. Another example is that a public authority must, under the Environment (Wales) Act 2016, seek to maintain and enhance biodiversity in the exercise of its functions in relation to Wales.

A public authority's failure to comply with some of these duties may lead to judicial review proceedings. The guidance includes details of the possible consequences of failures to comply with the **Data Protection Act 1998, Freedom of Information Act 2000 and the Welsh Language (Wales) Measure 2011**, although these are less likely to lead to judicial review challenges. Instead, those Acts provide for specific remedies (e.g. for decision reports to be issued by the Information Commissioner/Welsh Language Commissioner and for particular monetary penalties).

Public authorities in Wales must also comply with European Union ("EU") law, and a failure to do so may lead to a decision being challenged on the grounds that it is unlawful. The detail of public authorities' duties and obligations under EU law is beyond the scope of this guidance. However, it is noted for completeness that despite the result of the referendum held in the UK on 23 June 2016 on the UK's membership of the EU, public authorities remain under a duty to comply with EU law and any failure to do so will remain challengeable in the domestic courts until such time as EU law does not apply in the UK.

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Whose decisions and actions may be challenged through judicial review?

Judicial review is a procedure that allows persons affected by a public authority's decision or act to apply to the High Court for relief from that decision or act. Relief can only be granted if one or more grounds of review apply (as discussed at chapters 3 to 13). These grounds of review, known as 'common law' grounds of review, have been developed over time by the courts, and are not set out in legislation.

A public authority's decisions or acts may only be challenged by judicial review if they are made in relation to the exercise of a 'public function'. The Court will consider various factors in determining whether the decision or act relates to a public function, including the source of the power being exercised and the nature of the public authority's activities, including its funding and whether its decisions are binding.

The Court has a broad discretion in deciding what constitutes a reviewable decision. Generally, it takes a broad interpretation.

In addition to judicial review on common law grounds, legislation may provide for particular grounds of judicial review. For example, the Human Rights Act 1998 sets out that 'public authorities' must not act incompatibly with the European Convention on Human Rights, and that the victim of a public authority's unlawful act may apply to the courts for a review of the legality of the public authority's actions.

What is judicial review?

Judicial review is a procedure which allows a person affected by a public authority's decision, action or omission to apply to the High Court (referred to as "the Court" in this guidance) for relief (known as a remedy) from the effects of that decision, action or omission. It is a mechanism that allows the Court to hold decision-makers to account by ensuring that they act reasonably, follow proper procedure, and otherwise act within the law. The Court will only agree to award relief where it considers that one or more recognised grounds for judicial review are made out. The majority of these grounds have been developed over time by the courts (rather than being set out in legislation) and are known as the 'common law' grounds of judicial review. Chapters 3 to 13 of this document provide guidance on these common law grounds of judicial review and the criteria that must be satisfied before the grounds apply.

The judicial review procedure does **not** allow the Court to award relief from a particular decision or act just because it disagrees with the merits of the original decision, and it cannot substitute its own decision for the original (which a court has the power to do in appeal cases). Instead, in judicial review proceedings, the Court can only award relief where the decision-maker is acting outside of its powers or is abusing its powers. It is however recognised that the Court has broad discretion when considering judicial review applications which on occasion may lead to a blurring of the lines between reviewing a decision's legality and its merits.

The Court's power to hear judicial review applications is set out in section 31 of the Senior Courts Act 1981. The section provides that applications may be made to the Court for one or more forms of relief, including the quashing of the original decision (i.e. the Court making the original decision void), the granting of an injunction to prevent a decision-maker from making a particular decision, or the awarding of damages. All remedies are at the Court's discretion – the Court alone decides which remedies, if any, to grant.

Whose decisions and actions may be challenged?

Judicial review is defined by Part 54 of the Civil Procedure Rules 1998¹ as an application or claim to the Court to review the lawfulness of an enactment (i.e. legislation) or a 'decision, action or failure to act in relation to the exercise of a public function'.

This means that judicial review is only available to challenge decisions, acts or omissions made in the exercise of a 'public function'. In determining whether a decision or act is the exercise of a public function, the Court will consider:

¹The Civil Procedure Rules (SI 1998/3132) are contained in a Statutory Instrument, made under the Civil Procedure Act 1997, setting out the details of the procedures that must be followed in civil court proceedings (i.e. non-criminal court proceedings), including in judicial review hearings.

- ***the source of the power that is being exercised***. If the power being exercised derives from legislation or the royal prerogative (Crown powers that are not set out in legislation and which may be exercised by government), it would usually be considered a public function. On the other hand, where the power being exercised derives from a private agreement (e.g. a contract between the decision-maker and another person) this would tend to be considered a private function and would therefore not be challengeable through judicial review.
- ***the nature of the work or activity carried out by the public authority in question***. The source of the power being exercised is not in itself determinative of whether a function is a public one; the Court will also consider whether the activities that the public authority is carrying out have a public character. The Court will consider factors such as whether the public authority is financed from the public purse and whether other persons are required to comply with the public authority's decisions (and the sanctions for failing to do so). The Court will find that local authorities and government departments will often be carrying out functions of a public character. In some cases, the functions carried out by a seemingly 'private' body will be considered to be public functions that are judicially reviewable. By way of example, the Court has found that a private school, which would ordinarily be considered a private body, was exercising a public function where it received money from the Secretary of State to provide education for particular students. In respect of those particular functions, the private school was considered to be in the same position as a state school; the functions were public functions, and were challengeable by judicial review.

The Court has consistently found the functions of certain types of body to be private functions (and are therefore not judicially reviewable). Examples include sporting bodies such as the Football Association and the Jockey Club, and religious bodies such as a chief rabbi or a mosque.

What constitutes an action, decision or omission that may be challenged by judicial review?

The Court will consider whether an action, decision or omission is amenable to review on the facts of each individual case. However, as a general rule, the Court takes a broad view as to what constitutes a challengeable action, decision or omission by a body exercising a public function. By way of example, the Court has held that press releases and policy guidance (national and local) may be amenable to review in particular circumstances.

In some circumstances, a public authority will make a series of decisions on a particular matter. For example, a local authority committee may develop a policy and decide to submit it for the approval of the full council at a later date. In such cases, it is likely that only the authority's final decision – where it decides whether to approve the policy – would be amenable to judicial review (i.e. it is unlikely that the initial decision – to submit the policy for the full council's consideration – would be reviewable). Nevertheless, the Court will decide on the facts of each case whether a particular decision is reviewable.

Are there any statutory grounds of judicial review?

As set out above, the Court has the power to grant relief from a public authority's action, decision or omission if one or more of the common law grounds of review are made out.

However, in addition to the common law grounds of review, specific legislation sets out additional grounds on which a public authority's decisions or actions may be challenged; these are known as 'statutory' grounds of review. By way of example, section 112 of the Government of Wales Act 2006 allows the Supreme Court to consider whether a Bill passed by the National Assembly for Wales is within the Assembly's power (i.e. to consider the Bill's legality on particular grounds), and Schedule 9 to the same Act allows the courts to consider, among other things, whether the Welsh Ministers' decisions or actions are within their powers (i.e. to consider an action or decision's legality).

Another example of a statutory ground of review, and the most relevant for the purposes of this guidance, is that set out in the Human Rights Act 1998 (see chapter 14). Section 6 of that Act provides that it is unlawful for a 'public authority' to act in a way which is incompatible with a Convention right, and section 7 sets out that the victim of an unlawful decision or act may bring a judicial review challenge in the courts.

3

Is the decision within the scope of the decision-maker's power?

Public authorities must act within their powers or they will be acting *ultra vires*, meaning that they would be acting without legal authority. The powers are usually set out in primary or subordinate legislation.

Limitations on those powers may be set out in legislation, or may be implied by the Court.

Public authorities must also be aware of the further limitations on their powers. These may be under the general public law principles discussed in this guidance, European law, the Human Rights Act 1998, the Equality Act 2010, the Well-being of Future Generations (Wales) Act 2015, the Welsh Language (Wales) Measure 2011, and data protection and freedom of information legislation.

Public authorities have a duty to understand the nature of their powers and their limits, which can be understood by reading the relevant legislation and any accompanying documents.

What is the source of the decision-maker's power?

Public authorities must identify their relevant powers and must act within the limits of these powers or they will be acting *ultra vires*, meaning that they would be acting without legal authority. A legal power to do something will usually be found in legislation – either in primary legislation (an Act of Parliament (e.g. the Serious Crime Act 2015) or an Act of the National Assembly for Wales (e.g. the Historic Environment (Wales) Act 2016) or in subordinate legislation (e.g. statutory instruments such as orders or regulations (for instance the Council Tax Reduction Schemes and Prescribed Requirements (Wales) Regulations 2013).

Decision-makers should consider the wording of the relevant legislation to understand the limits and purposes of the power. In some cases, the clearest indication of the legislation's purpose may be found in accompanying documents such as a report that gave rise to the legislation, the report of a committee of the National Assembly or Parliament, the explanatory notes that accompany the relevant legislation or the record of proceedings in Parliament or the National Assembly.

Is the decision-maker acting consistently with the purpose of the legislation?

Decision-makers will be acting outside of their powers if they act in a way that is inconsistent with the purpose of the legislation that gives them their power. By way of example, the House of Lords held in the *Stewart v Perth and Kinross Council*² case that the purpose of Part II of the Civic Government (Scotland) Act 1982 was not to allow local authorities in Scotland to require second hand car dealers to give specific information to car buyers about the condition of the cars. However commendable the local authority's intention was in trying to protect consumers by requiring dealers to provide this information, that was not Parliament's intention when it passed the 1982 Act and the requirement was unlawful.

In some circumstances, the courts will require a public authority to exercise its discretion in a particular way if failing to do so would be inconsistent with the purpose of the legislation.³

How should decision-makers interpret their powers?

Usually, words in legislation are given their plain English or Welsh meaning.⁴ Where the words might give rise to two or more different interpretations,

² [2004] UKHL 16.

³ An example is the case of *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, where the court required the public authority (a government Minister in that case) to exercise his discretion in a particular way since failing to do so would be contrary to the purpose of the Act that gave the Minister his power.

⁴ Acts of the National Assembly for Wales are always enacted bilingually. Subordinate legislation made by the Welsh Ministers is also usually made bilingually. Section 156 of the Government of Wales Act 2006 provides that the English and Welsh texts of any Assembly Act or subordinate legislation which is in English and Welsh when it is enacted are to be treated for all purposes as being of equal standing.

the Court will try to determine the intention of the legislative body that made the legislation (e.g. the National Assembly for Wales). In all cases, decision-makers will need to understand the general purpose of the legislation and the purpose of the particular provision being relied upon.

In some cases the legislation may appear to give a decision-maker unlimited discretion and powers, without qualification (e.g. “the Welsh Ministers may grant the application”). However, consideration must also be given to the nature and purpose of the power and whether there are any express or implied limitations on the exercise of that power. Consideration should also be given to whether legal advice is necessary.

An **express limitation** is a specific provision in legislation which limits the decision-maker’s power. For example, section 2(2) of the Local Government Byelaws (Wales) Act 2012 specifically limits the scope of local authorities’ power to make byelaws under section 2(1) (see the hypothetical example below). An express limitation may also be in the form of a list of particular purposes for which a power may be used, or a list of the criteria to be applied in using the power. These express limitations may be in the same section or part of the legislation as the power being relied upon, or in a different part of the same legislation, or in different legislation altogether.

An **implied limitation** arises where there is no specific limitation on the power being relied upon, but where the Court may imply or infer a particular limitation. For example, if a provision in legislation provides that “upon receipt of an application, a local authority may grant a licence”, despite the seemingly broad discretion given to the local authority by the use of the word ‘may’ (rather than ‘must’), the Court may still require the local authority to grant the licence in particular circumstances (e.g. where the applicant fulfils all the prescribed application requirements).

In some cases, decision-makers will be given powers under Measures or Acts of the National Assembly for Wales. In these cases, a decision-maker must comply with any express limitations set out in the legislation. It must also comply with the implied restriction that it must exercise its power in accordance with the legislative competence of the National Assembly at the time the legislation was made. Effectively, the decision-maker is prevented from taking any action that would have fallen outside the legislative powers of the National Assembly when the Measure or Act was passed.

Are there any other limitations on decision-makers’ powers?

Decision-makers are also required to comply with limits and requirements in other legislation (primary and subordinate) and the general public law principles discussed in this guidance. This, for example, prevents a public authority from making a decision that is contrary to EU law or rights protected by the Human Rights Act 1998 (Convention rights are discussed at chapter 14). Public authorities are also required to comply with the other considerations discussed at chapters 15 to 18.



An actual example of a decision-maker acting outside the scope of its powers

R v Croydon Youth Court ex p DPP [1997] Cr App R 411.

Section 142(2) of the Magistrates' Courts Act 1980 confers power on a court to allow a case to be reheard where it is 'in the interests of justice'. Despite the seemingly broad discretion afforded to the magistrates' court, it was held that it was not permitted to rehear a defendant's case where the defendant had entered an unequivocal

guilty plea. The court decided that the *implied* purpose of the power was to allow magistrates to correct mistakes, so the courts' discretion was limited to only rehearing cases where mistakes had potentially been made, and did not permit a case to be reheard where a defendant had pleaded guilty without mistake.

A hypothetical example of a decision-maker acting outside the scope of its powers

Power and limitations

Section 2(1) of the Local Government Byelaws (Wales) Act 2012 gives local authorities power to make byelaws for the prevention and suppression of nuisances in its area.

Section 2(2) of the same Act limits the power. It provides that local authorities may not make a byelaw if, among other things, provision has already been made for that purpose in an Act of Parliament or an Act of the National Assembly for Wales.

Scenario

A local authority in Wales decides in August 2020 to exercise the section 2(1) power to make a byelaw to prohibit the feeding of birds in a particular town centre (and the byelaw attaches a map to show where the ban applies). The penalty for being found guilty of the offence is a fine not exceeding £1,000. The byelaw is made in September 2020 and comes into force in January 2021.

However, unbeknown to the local authority, the National Assembly for Wales had already passed an Act in May 2020 to prohibit the feeding of birds in any place open to the public in Wales. A person found guilty of the offence may be fined no more than £500.

Aled is caught feeding birds in the town centre to which the local authority byelaw applies. He is prosecuted for the byelaw offence.

Result

Aled challenges the legality of the byelaw on the grounds that the local authority has acted outside its powers. He argues that the section 2(1) power is limited by section 2(2); since the National Assembly has already legislated for the same purpose, the local authority does not have the power to make the byelaw.

If his challenge is successful, the byelaw may be quashed and Aled would have to be found not guilty of the byelaw offence.



Practical tips

- Decision-makers must identify the specific legislative power they are seeking to exercise.
- Decision-makers should study the wording of the legislation and accompanying documents to understand the limits of their power (e.g. whether the power confers a broad or narrow discretion).
- Consideration should also be given to European law, Convention rights, the public sector equality duty under the Equality Act 2010, the requirements of the Well-being of Future Generations (Wales) Act 2015, Welsh language standards, and data protection and freedom of information legislation.
- Legal advice should be sought where necessary.

4

Has the decision-maker failed to take relevant considerations into account or been influenced materially by irrelevant considerations?

*“It has long been established that if the Secretary of State misinterprets the legislation under which he purports to act, **or if he takes into account matters irrelevant to his decision or refuses or fails to take account of matters relevant to his decision**, or reaches a perverse decision, the court may set his decision aside”⁵*

A public authority must take relevant considerations into account when making decisions. The relevant considerations may be listed in legislation, or may be implied by the Court from the wording of the legislation and the context of the decision.

A public authority must not be influenced materially by irrelevant considerations. A decision that is influenced materially by an irrelevant consideration may be challenged on the grounds that it is unreasonable or that the decision-maker acted outside its powers.

Examples of relevant considerations that ought to be considered include the decision’s effect on a person’s rights, government guidance, policy statements and consultation responses.

⁵ *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295.

When exercising a power given to it by legislation, a decision-maker must have regard to relevant considerations and must not be influenced materially or substantially by irrelevant matters. Failure to comply with these requirements may lead to a decision being quashed by the Court.

How does the decision-maker decide what considerations are relevant/irrelevant?

The issue of what considerations are relevant/irrelevant must be determined in the light of the legislation that is being applied and the facts of the case.

Relevant legislation may list matters which the decision-maker must take into account in making decisions. If so, all those matters are relevant considerations. A failure to take those matters into account may lead to a decision being quashed.

In other cases, relevant legislation may provide a non-exhaustive list of some of the matters that the decision-maker ought to consider. While all the matters contained in the non-exhaustive list are relevant considerations, other relevant considerations may also arise from the facts of the case. Examples are provided in the table below.

Finally, in some cases, relevant legislation will not list any factors which should be taken into account. In such cases, a decision-maker should consider the purpose of the power being exercised to determine what factors are relevant to its consideration. In these circumstances, where legislation does not set out explicitly what factors a decision-maker should consider, the Court may give the decision-maker leeway by not imposing a strict list of the issues which it considers the decision-maker should have taken into account.

Does the decision-maker have to consider all material that is relevant?

The decision-maker is not required to consider *all* material, but should have as much information as possible about the decision to ensure that no relevant considerations are ignored. There is a distinction in this respect between matters which are so relevant that they must be taken into account, and matters which are not irrelevant but which the decision-maker is not required to consider. The relevance of a particular matter will depend on the wording of the legislation and on the facts and context of each case. Generally, the weight to be attached to a particular consideration is a matter for the decision-maker.⁶ The Court will only intervene where the weight attached to that consideration is unreasonable (see chapter 12 for details of the threshold for unreasonableness).

⁶ See *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at 780.

Examples of relevant considerations

In all cases, it is prudent for the decision-maker to consider:

- any potential interference with a person’s human rights
- any relevant statutory or non-statutory guidance
- government policy statements (e.g. a statutory code of practice or government circular)
- the decision-maker’s policies (see chapter 5)
- advice from the decision-maker’s officers
- the response to any consultation on the decision (see chapter 8)
- any representations made by the decision-maker about the decision (see chapter 9)

Public authorities may also have regard to their limited resources in some circumstances (see further below).

Examples of irrelevant considerations

The question of whether a particular matter is irrelevant is to be determined by considering the context of the case and the purpose of the legislation that is being relied upon.

Examples of factors that the Court may consider to be irrelevant include:

- the decision-maker’s need to get something done quickly
- expected media reaction to the decision
- personal opinions and assumptions not based on evidence.

See the below case study for an example of a decision being quashed for having been influenced materially by an irrelevant consideration.

Is the amount of resources that a public authority has at its disposal a relevant factor that may be considered?

In some circumstances, public authorities will be under a statutory duty to provide particular services. Where that duty is specific and precise, it is unlikely that a public authority will be able to take the cost of the service and the resources available to it into account as a relevant consideration. In the *R (on the application of G) v Barnet London Borough Council and Others*⁷ case, the House of Lords found that where a public authority is under a specific and precise duty to provide a particular service, the duty is likely to be interpreted as an unconditional requirement, where the question of cost and resource is irrelevant.

⁷ [2003] UKHL 57.

In other circumstances, public authorities will choose to provide services in the exercise of a statutory discretion. These are commonly known, in non-legal contexts, as non-statutory services. In such cases, the limited or finite nature of a public authority's resources is a relevant consideration; it is something that public authorities can, or must, consider when deciding whether to provide a particular service. For example, in the *R (Health and Safety Executive) v Wolverhampton City Council*⁸ case, the Supreme Court found that the local authority had acted lawfully in considering the financial implications of a particular decision in a planning meeting. In his judgment, Lord Carnwarth said:

"As custodian of public funds, the authority not only may, but generally must, have regard to the cost to the public of its actions, at least to the extent of considering in any case whether the cost is proportionate to the aim to be achieved, and taking account of any more economic ways of achieving the same objective."

What are the consequences of failing to consider relevant considerations or of being influenced materially by irrelevant considerations?

Where the decision-maker has failed to consider relevant considerations or has been influenced materially by irrelevant considerations, the Court may quash the decision. However, as with all other grounds of review, the Court must⁹ refuse to quash the decision (or award any other remedy) if it appears to it to be highly likely that the outcome for the person affected by the decision would not have been substantially different if the decision-maker had not failed to consider relevant considerations or had not been influenced materially by irrelevant considerations, unless the Court considers that it is appropriate to quash the decision for reasons of exceptional public interest.

⁸ [2012] UKSC 34.

⁹ Under section 31(2A) of the Senior Courts Act 1981.



Case Study

An example of a decision being influenced materially by an irrelevant consideration

R v Port Talbot Borough Council, ex parte Jones [1988] 2 All ER 207.

A local councillor had applied for housing accommodation and was given priority status. She was eventually housed in a three-bedroomed council house, despite living alone. The local authority tried to justify the decision to provide her with such accommodation on the basis:

(i) that in order to carry out her council commitments, the councillor required a home which was large enough to accommodate visits from members of the public,

(ii) that no two-bedroomed house was available, and

(iii) that she was required to live in the ward she represented.

The Court found that the decision to provide housing on the basis that the individual would then have a better chance of fighting an election, without having regard to the needs of others on the waiting list, and contrary to the advice of council officers, was a clear case of a decision based on irrelevant considerations.



Practical tips

- Decision-makers must consider the wording of legislation and the context of the decision to determine what factors are relevant and irrelevant. Matters that are specifically listed on the face of legislation should always be considered, as should any effect that the decision may have on a person's human rights.
- The decision-maker should gather as much information as possible to be able to determine what factors are relevant and irrelevant and should read all papers and information given to it about a decision.
- Procedures should be adopted to maintain records or minutes of the decisions and the reasons for the decisions, including the factors that were considered in making the decision.

5

Has the decision-maker fettered its discretion by applying a rigid policy?

“A policy must not be so inflexible that it cannot accommodate the range of situations to which it has to apply, nor must it be so rigid that it does not allow for exceptional cases; otherwise it will result in an unlawful fetter on discretion.”¹⁰

In some circumstances, a decision-maker may improve certainty and administrative efficiency by adopting a policy setting out how it deals with a particular type of decision (e.g. how it determines licence applications).

The policy itself must be lawful; it must comply with all relevant requirements set out in legislation and with the public law principles set out in this guidance (e.g. must be reasonable).

The decision-maker may not ‘fetter’ its discretion by applying a policy too rigidly – without allowing for exceptions or allowing an applicant to argue that the policy should be departed from in a particular case.

¹⁰ *R v Secretary of State for the Home Department ex p Venables and Thompson* [1997] 3 All ER 97.

What does 'fettering' discretion mean?

Where legislation gives a public authority discretion to make decisions, e.g, to award a licence or to grant permission to carry out a development, the public authority must allow itself to consider each decision on its own merits; the public authority must not 'fetter' its discretion by applying a rigid or one-size-fits-all policy to all applications without considering the specific facts of each case. A decision that is made by a public authority that has fettered its discretion in this way may be challenged on the grounds that the decision is unlawful. It may also be challenged on the grounds that the procedure by which it was made was unfair, or on the grounds that it is unreasonable.

Are decision-makers permitted to have policies as to how to make decisions or deal with applications?

Where legislation gives public authorities a power to make decisions such as determining requests for licences, it is likely to receive very many applications. In order to ensure consistency, certainty and efficiency of administration, public authorities are permitted (or required, in some circumstances) to develop policies which set out how applications are dealt with. The policies may, for example, set out what factors ought to be considered in determining applications or the procedural requirements that must be satisfied prior to the applications being considered. This allows applications to be dealt with in a standard way, applying the same criteria and attaching the same weight to the same factors in each case. The policies themselves must be lawful (e.g. must be reasonable, and must comply with the European Convention on Human Rights).

The rule against fettering discretion does not prevent the adoption of such policies. Instead, it is concerned with ensuring that public authorities allow, in appropriate cases, exceptions to the general rules set out in the policies. This is especially relevant in cases involving human rights and equality. In other words, a public authority should not apply its policy rigidly and must allow the applicant the opportunity to make representations as to why the policy should be departed from in that specific case. The public authority must keep an open mind and should consider each case on its own merits.



Examples of public authorities fettering their discretion

- The Secretary of State is not entitled to adopt a rigid rule that a serving officer of a police force may never be appointed Chief Constable of that force.
- Chief Constables are not permitted to adopt a rigid rule that prosecutions will never be brought for particular types of offence.
- Local housing authorities should not adopt rigid policies on, among other things, when to institute eviction proceedings when tenants are in rent arrears, suspending persons who have unreasonably refused accommodation from the housing register for two years, or refusing housing applications from the children of those that are intentionally homeless.
- Local authorities are not permitted to adopt rigid policies on when to close secondary schools that admit children on the basis of ability or when to refuse applications for requests for assessments of a child's special educational needs.



An example of a decision-maker fettering its discretion

R (on the application of P) v Secretary of State for the Home Department, (on the application of Q) v Secretary of State for the Home Department [2001] EWCA Civ 1151.

The Court of Appeal held that the prison service's policy of permitting the babies of female prisoners to stay in prison with their mothers until the babies were 18 months old was lawful. However, the prison service had applied the policy too rigidly and failed to take account of individual circumstances.

A decision to remove a baby from its mother when it was 18 months old without having taken into account the fact that there was no suitable placement for the child outside of prison was quashed on the grounds that the prison service had applied its policy too rigidly.



Practical tips

- Decision-makers should consider whether adopting a policy on how to exercise a particular power (e.g. determining licence applications) would improve consistency, certainty and efficiency of administration.
- Where such a policy is adopted, decision-makers should not apply it rigidly. They must allow for exceptions to the policy in appropriate cases, and must give applicants the opportunity to make representations as to why the policy should be departed from.
- Decision-makers should bear in mind that where they have adopted a policy, it is a relevant consideration (see chapter 5).
- Where a decision-maker adopts a policy and gives reasons for a particular decision (see chapter 11), those reasons should make clear that the policy was considered but that the decision-maker kept an open mind.
- Where a decision-maker departs from a policy, it should give reasons for doing so.

6

Is the right person making the decision?

There is a general rule that where legislation gives a specified individual or body a power to do a particular thing, that power may not be assigned or delegated to another individual or body.

This rule may be rebutted. Legislation may set out in express terms that a power may be delegated, or the Court may infer a power to delegate from the wording and purpose of the legislation.

The Court is more likely to infer a power to delegate administrative functions than judicial or legislative ones, but will consider the circumstances and facts of each case.

What is the rule against delegation? Are there any exceptions?

There is a general rule in administrative law that where legislation confers power on a specified individual or authority, it is that individual or authority that must exercise the power, and the power must not be given away to another person or authority (so-called **unlawful sub-delegation**). This general rule applies to the delegation of all types of power – judicial, legislative and administrative.

However, there are necessarily many exceptions to this rule, which are often set out expressly on the face of the legislation which confers power on the public authority. In other circumstances, the Court will be ready to infer from the wording and purpose of legislation that a particular power conferred on a public authority may be delegated to another person, provided that the authority maintains overall control. The Court will often infer such a power to delegate where not allowing the power to be delegated would lead to disproportionate administrative inconvenience.

How does the Court decide whether a decision-maker can delegate its decision-making power?

The starting point to any consideration of whether a decision-making power can be delegated is the wording and purpose of relevant legislation. It may be evident from the wording or purpose that the legislature's intention was that a particular power conferred on a public authority may be delegated to another. An example from a local authority context is section 101 of the Local Government Act 1972, which provides that generally, and subject to any provision to the contrary in the 1972 Act or any later Act, a local authority may arrange for its functions to be undertaken by a committee, sub-committee or officer of the authority.¹¹

In considering the purpose of the legislation, the Court will give particular attention to the nature of the power conferred on the decision-maker:

Judicial powers – Where the power is a judicial-type power, which involves the decision-maker determining a person's rights (e.g. to suspend a person from a particular profession), in the absence of express wording to the contrary, it is unlikely that the Court will consider the power to be delegable.

Legislative powers – There is a strong presumption that a power conferred on a person to make legislation (e.g. byelaws, regulations) cannot be delegated.

Administrative powers – It is more likely that the Court will consider an administrative power to be delegable than a judicial or legislative power, but the Court's view will depend on factors such as whether the delegating public authority has retained overall or supervisory control over the decision, the degree of any such control, and the importance of the decision for the individual concerned.

¹¹ A more specific local authority-related example is the Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996, which provides that local authorities in England may delegate their duty of holding reviews under section 202 of the Housing Act 1996 – *Heald v Brent LBC* [2009] EWCA Civ 930.

The Court will also consider the width and breadth of the powers that have been purportedly delegated. Generally, the broader the powers that the public authority is seeking to delegate the less likely that the delegation will be held to be valid. If, on the other hand, the delegation involves a relatively narrow and self-contained power, it is more likely to be held to be a valid one.

A decision-maker lawfully delegates its power to another person. Can that person then delegate the power on to a second person?

Legislation may set out that the recipient of delegated powers may then further sub-delegate the powers. An example is section 101(3) of the Local Government Act 1972, which provides that if a local authority arranges for its functions to be carried out by a committee, that committee may then further delegate its powers to a sub-committee or an officer of the authority.

Generally, however, in the absence of such express provision in legislation, the Court is reluctant to infer a power for the recipient of delegated powers to sub-delegate further; there is an assumption that where the legislature has authorised delegation once, no further sub-delegation will be permitted.

Can Government Ministers/Welsh Ministers delegate their power to officials?

The Court of Appeal accepted in the *Carltona*¹² case in 1943 that the administration of government had become so complex and the functions of government ministers so numerous that it would not be possible for a minister to direct his or her mind to each decision personally. It found that, in practice, duties of ministers were usually carried out by officials, but subject to some exceptions where the decision was so important that the Minister had to make the decision personally.

The Court of Appeal confirmed the legality of this system in the *Carltona* case, provided that where officials made a decision on the Minister's behalf, the decision remained the Minister's decision and his or her responsibility. This allows sufficiently experienced officials to take decisions on the Minister's behalf, remains in place today; ministers may generally delegate their power to suitably qualified officials, but remain responsible for the decisions that are made in exercise of that power.

In relation to the Welsh Ministers' powers specifically, section 52(9) of the Government of Wales Act 2006 provides that even without the authority of the Court of Appeal's judgment in *Carltona*, the Welsh Ministers, First Minister or Counsel General may authorise Welsh Government staff to carry out any function on their behalf. This is another example of legislation providing expressly for the delegation of powers.

¹² *Carltona v Commissioners of Works* [1943] 2 All ER 560.



An example of unlawful sub-delegation

R v DPP (Ex p. Association of First Division Civil Servants) Times, 24 May 1988.

The Director of Public Prosecutions had attempted to delegate to non-lawyers the function of deciding whether there was sufficient evidence to proceed with a prosecution.

The Court held that the delegation was unlawful. It considered the wording

and purpose of the relevant legislation and, given the nature of the function, held that Parliament's intention would only ever have been for the power to be exercised by the DPP in person, or to be delegated to a lawyer. The DPP had acted unlawfully in delegating the power to non-lawyers.

An example of lawful delegation

DPP v Haw [2007] EWHC 1931.

Under the Serious Organised Crime and Police Act 2005, demonstrations in Parliament Square, Westminster, require the authorisation of the Commissioner of the Metropolitan Police. The Court held in this case that the Commissioner's power to grant authorisation, and to set conditions, could be delegated lawfully to other officers.

The Court found that where legislation gives a particular police officer a power, the question of whether that officer could delegate the power depended on the interpretation of the legislation

that confers the power. Where the responsibilities of the police were such that it was inevitable that the power would be exercised by another officer, in the absence of express wording or implication to the contrary in the legislation, a particular power could be delegated lawfully. It was held that having regard to the role of the Commissioner, Parliament would have intended for the Commissioner's power to authorise demonstrations in Parliament Square to be delegable to other officers.



Practical tips

- Decision-makers should consider whether legislation gives them a power to delegate their powers and duties. If not, the powers cannot be delegated.
- Where legislation does not expressly set out that a decision-maker has a power to delegate its functions, it will have to consider whether such a power may be implied from the wording and purpose of relevant legislation. Consideration needs to be given to the degree of supervision that it should keep over the decision-making process.
- Where power is lawfully delegated, the decision-maker should ensure that the person to whom the power is delegated is sufficiently experienced.

7 Does the decision-maker have to comply with a particular procedural requirement?

Procedural requirements are usually found in legislation (or guidance documents, Codes of Practice etc. made under legislation) and set out the processes that must be followed when a public authority makes a decision.

Common procedural requirements include those on the form of consultation, the publication of notices, requirements to notify particular parties, and publication requirements.

The consequences of failing to comply with a procedural requirement will depend on the nature of the breach and on the facts of each case. The Court will consider factors such as whether there has been substantial compliance, whether the breach was technical, and whether the legislation's purpose has been achieved.

In some limited circumstances, the Court will impose additional procedural requirements to ensure that fairness is achieved.

What is a 'procedural requirement'?

A decision-maker will regularly be required to comply with particular procedural steps when it makes its decisions. The requirements are usually set out expressly in legislation. They may also be set out in a Code, in a Code of Practice, or in guidance. Occasionally, the requirements may also be in the public authority's own policies. An example of a requirement contained in legislation would be an Act requiring a local authority to undertake consultation with specified persons before making a particular decision, or a requirement to notify a person affected by a decision that he or she has a right to appeal against the decision.

Such express procedural requirements may be set out in primary or subordinate legislation. By way of example, school reorganisation in Wales is regulated by the School Standards and Organisation (Wales) Act 2013 and the School Organisation Code published under section 38 of that Act. Section 48 of the Act requires a Local Authority to consult and publish school organisation proposals in accordance with the Code. Between them, the Act and Code impose procedural requirements that must be followed, including requirements about:

- consultation
- publication of proposals in a particular form
- sending the proposals to the Welsh Ministers
- consideration of objections to proposals
- making a decision on proposals
- publishing the decision
- notifying particular bodies of the decision.

Failure to comply with any of these requirements may leave a decision vulnerable to challenge on the grounds of failure to comply with procedural requirements.

What are the consequences of failing to comply with a procedural requirement?

Essentially, a decision-maker that has failed to follow procedural requirements leaves itself more vulnerable to judicial review challenge than a decision-maker that complies with all relevant requirements. Nevertheless, the prospects of a claimant succeeding with a challenge on the grounds that the decision-maker failed to follow proper procedure depends on the facts of each case, particularly the nature of the requirement that has not been complied with and the consequences of that failure.

In considering whether a decision ought to be quashed for failing to comply with a particular procedure, the key question that the Court will consider is whether the purpose (or intention) of the legislation that sets that requirement is that any decision that is made in contravention of that procedural requirement is invalid.¹³

¹³ *R v Clarke* [2008] 1 WLR 338.

For the more technical procedural requirements (e.g. a requirement to take a particular step within specified timescales, or to use a particular form), the Court will also consider matters such as:

- (i) whether there has been substantial compliance with the procedural requirement, and whether substantial (not strict) compliance would fulfil the procedural requirement set out in legislation
- (ii) whether the non-compliance may be waived (i.e. put to one side by the person that is affected by the non-compliance)
- (iii) if the non-compliance may not be waived, what is the consequence of non-compliance.¹⁴

If the Court is of the opinion that a breach of a procedural requirement would defeat the purpose of the legislation that sets the requirement, it is likely that the decision will be quashed.

However, where the procedural requirement is a technical one, and the non-compliance is relatively minor (e.g. if a requirement to publish a notice is complied with, but is complied with one day late), or where there has been substantial compliance, or where the Court is of the view that the non-compliance does not defeat the purpose of the legislation, a decision may not necessarily be quashed.

Where the procedural requirement is more substantive (e.g. a requirement to consult with interested parties, or to notify affected parties of a decision), it is more likely that the Court will consider that any non-compliance will defeat the purpose of the legislation and is more likely that the decision will be quashed.

Nevertheless, as with all other grounds for judicial review, section 31(2A) of the Senior Courts Act 1981 sets out that the Court must refuse to quash the decision (or award any other relief) if it appears to it to be highly likely that the outcome for the person affected by the decision would not have been substantially different if the decision-maker had not failed to comply with the procedural requirement in question, unless it considers there to be exceptional public interests reasons for awarding the remedy.

Can the Court infer additional procedural requirements?

The most obvious procedural requirements are those set out on the face of legislation (or in Codes, Codes of Practice, or guidance). However, the Court may, in limited circumstances, infer procedural requirements above and beyond those that appear in legislation. It will only do so where there is no implication from the wording of the legislation that the requirements set out there are exhaustive and where additional requirements must be inferred to achieve fairness (see, for example, chapter 8 on the Court inferring particular consultation requirements).

¹⁴ *R v Immigration Appeal Tribunal ex p Jeyeanthan* [2000] 1 WLR 354.



An example of decision being quashed on the grounds of a failure to comply with a procedural requirement

Bradbury v Enfield London Borough Council [1967] 1 WLR 1311.

The local authority sought to reorganise the schools in its area by changing them from grammar and secondary modern schools to comprehensive schools. The legislation required the local authority to give notice to the affected schools of their intention to consult on such a change. In the event, the authority failed to notify eight of the relevant schools.

The Court of Appeal held that the authority's reorganisation decision was invalid on the grounds that failing to give the required notice of intention had prevented parents and the schools from objecting to the authority's proposal.



Practical tips

- Decision-makers should consider relevant legislation (and any guidance, Codes of Practice etc. made under that legislation) to ascertain what their duties are in making particular decisions.
- In all cases, systems should be put in place to ensure that, as far as possible, maladministration does not cause a procedural requirement to be breached.
- While the majority of procedural requirements are set in legislation, in limited circumstances the Court may infer additional requirements where it is necessary to do so to achieve fairness.

8

Has any consultation been carried out fairly and properly?

Public authorities may be under a duty to consult on their proposals. Such a duty may be set in legislation, or may be inferred by the Court.

Where public authorities undertake consultation, it must be fair and:

- i. take place when the proposal is at a formative stage – public authorities must have an open mind;
 - ii. sufficient reasons must be given for the proposal to allow for intelligent consultation and response;
 - iii. adequate time must be given for consideration and response;
 - iv. the product of the consultation must be taken into account.
-

A decision may be quashed where the public authority fails to comply with a legal duty to consult or undertakes defective consultation.

In what circumstances must a public authority consult on its proposals?

Legislation may set out express consultation requirements as part of the decision-making procedure. As discussed in chapter 7, failure to comply with such an express procedural requirement may leave a decision vulnerable to challenge.

In other cases the Court will **infer** a duty to consult, despite there being no express requirement in legislation. Such an implied duty to consult may arise:

- from an express promise made by the public authority to consult or from the public authority's established practice (so-called procedural legitimate expectation. See chapter 9), or
- in exceptional circumstances, where the public authority has not promised expressly or through established practice to consult, but where the impact of the authority's previous conduct (e.g. in providing a particular service) on an individual or group is sufficient to give that individual or group reason to expect the policy to continue for their particular benefit for a reasonable period. In such a case a decision cannot lawfully be made in relation to that service unless the authority notifies the persons affected and consults (this is so-called secondary legitimate expectation).¹⁵

What are the requirements for any consultation that is carried out?

Whether or not there is a legal duty to consult, where consultation is carried out it must be done fairly. What is fair will depend on the circumstances of the case and the nature of the proposals under consideration.¹⁶

Subject to the overall requirements of fairness, the decision-maker will have a broad discretion as to how consultation should be carried out¹⁷ and what should be consulted upon.¹⁸ The consultation must also comply with the following principles (termed the Gunning principles after the case in which they were set out, or the Sedley requirements after the barrister that suggested them in that case).¹⁹

- i. Consultation must take place when the proposal is at a formative stage. Public authorities must have an open mind during consultation and must not have already made the decision, but may have some ideas about the proposal.
- ii. Sufficient reasons must be put forward for the proposal so as to allow for intelligent consideration and response. Consultees must have enough information to be able to make an informed input to the process.

¹⁵ *R (on the application of Bhatt Murphy) v The Independent Assessor* [2008] EWCA Civ 755.

¹⁶ *R (Edwards) v Environment Agency* [2006] EWCA Civ 877.

¹⁷ *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311.

¹⁸ *R (The Vale of Glamorgan) v The Lord Chancellor and Secretary of State for Justice* [2011] EWHC 1532.

¹⁹ Initially set out in *R v Brent London Borough Council, ex parte Gunning* (1985) 84 LGR 168.

- iii. Adequate time must be given for consideration and response. The timing and environment of the consultation must be appropriate, sufficient time must be given for people to develop an informed opinion and then provide feedback, and sufficient time must be given for the results to be analysed.
- iv. The product of the consultation must be conscientiously taken into account.

It is prudent for a decision-maker to show in its decision that it has undertaken consultation and has given proper weight to the representations received. This may involve the decision-maker showing that it has understood the points being made by the responses and has considered them.

What are the consequences of failing to comply with a requirement to consult, or of consulting defectively?

A failure to comply with an express requirement to consult may make a decision vulnerable to challenge if the Court is of the view that a breach of that requirement defeats the purpose of the relevant legislation (see chapter 3).

Where the decision-maker fails to undertake consultation that is required because of a promise it has made or its prior practice (procedural legitimate expectation), the Court may quash the decision where it is of the opinion that fairness requires it to do so and there are no overriding public interest reasons to justify defeating the legitimate expectation (see chapter 9).

Where consultation is undertaken, but does not comply with the Gunning principles, a subsequent decision may be quashed by the Court, depending on the nature of the non-compliance and its effect. However, as is the case with all other grounds for judicial review, the Court must refuse to quash the decision (or award any other relief) if it appears to it to be highly likely that the outcome for the person affected by the decision would not have been substantially different if the decision-maker had not failed to comply with the procedural requirement in question (e.g. to consult fairly and properly). However, the safest course of action in all cases is to put systems in place to avoid any inadvertence or maladministration which could lead to mandatory consultation not being carried out, or being carried out unfairly or improperly.



An example of decision being quashed on the grounds of defective consultation

The Queen (on the Application of Mr Lionel Morris) v Newport City Council [2009] EWHC 3051.

In March 2009, Newport City Council (“the Council”) decided to introduce a rule that only vehicles that were newer than 3 years old could be licensed as private hire vehicles for the first time, and that no vehicles older than 10 years old could have their licences renewed.

The Council had consulted on its proposed policy prior to making its final decision in March 2009. As part of that consultation process, the Council had received evidence from the local hackney carriage drivers’ association that private hire vehicles were already subject to sufficient safety testing by means of an annual MOT, six-monthly tests that the vehicles had to pass, and a stringent enforcement regime.

The Council’s decision was challenged on the grounds that, among other things, the Council had failed to comply with the fourth Gunning principle – that the product of the consultation had not been taken into account in the final decision. The claimant’s ground of challenge was that the drivers’ association’s argument that private hire vehicles were already subject to stringent safety testing had not been considered when the Council came to make its final decision and the Council had failed to refer to these arguments in the documentation accompanying the final decision.

The Court held that the Council’s failure to address the drivers’ association’s consultation response was an important deficiency in the consultation process. The decision was quashed.



Practical tips

Decision-makers should ensure that their consultations conform to the Gunning requirements in all respects. Compliance with the following principles will help ensure that those requirements are satisfied:

- Consultations should be clear and precise, ensuring that the questions are clear and easy to answer;
- Consultations should have a purpose – they should be undertaken when the policy is being developed, and not when the decision-maker has already come to a decision;
- Consultation responses should be taken into account;
- Consultations should give those consulted enough information for them to be able to give informed responses;
- Decision-makers should consider the most effective consultation methods in the circumstances and the specific needs of the stakeholders concerned should be considered (e.g. by considering the timing of consultation, by preparing youth friendly versions, different language versions etc.);
- Consultations should last for a sufficient amount of time to allow for meaningful consultation;
- Decision-makers should publish their response to the consultation undertaken, and should do so in a timely fashion.

9

Is there a legitimate expectation as to how the power is to be exercised?

In some circumstances, the Court will find that a claimant has a 'legitimate expectation' that a decision-maker will keep a promise that it has made or will continue its past practices. In these cases, the Court may quash a public authority's decision where it would be unfair to allow the public authority to break its promise or to change its practice.

There are two broad types of legitimate expectation – procedural legitimate expectation and substantive legitimate expectation. Procedural legitimate expectation arises where a decision-maker makes a promise to do particular things during the decision-making process, or has consistently done particular things in the past.

Substantive legitimate expectation arises less often. It arises where a decision-maker has made a promise to an individual or specific group of people that they will be granted a particular benefit (or that it will continue to be enjoyed).

A legitimate expectation may be defeated by an overriding public interest reason (e.g. the need for a government department to keep within its spending limits).

What is the doctrine of 'legitimate expectation'?

The doctrine of legitimate expectation is one of the Court's controls over the exercise of a decision-maker's powers. The general principle is that the Court will intervene to prevent a decision-maker from making a particular decision (or will quash a decision that is already made) where the decision-maker's prior actions or inactions would make it unfair for that decision to stand.²⁰

There are two broad categories of legitimate expectation:

- **procedural legitimate expectation.** As discussed in chapter 8, it arises where the decision-maker makes an express promise to do particular things during the decision-making process (e.g. a promise to consult) or where the decision-maker has consistently done those things in the past.²¹ The Court will find a procedural legitimate expectation where the practice is so well established that it would be unfair or inconsistent with good administration to allow the public authority to depart from that practice.
- **substantive legitimate expectation.** It arises where the decision-maker has promised to keep an existing policy in force, or to do a particular thing, for a specific party or group, and that particular party or group would be substantially affected by a decision to go back on that promise (e.g. a decision to go back on a promise made to a care home resident that he or she can stay there for the rest of their life).

A substantive legitimate expectation will only be found in exceptional circumstances²² – where allowing the public authority to go back on its word would be so unfair so as to amount to an abuse of power. This is a high threshold for claimants to satisfy²³ and a substantive legitimate expectation will only be found where the promise is “pressing and focussed”, directed at a particular individual or group, and is clear, unambiguous and without relevant qualification. Ordinarily, the person to whom the promise was made must also have taken action in reliance on that promise which has placed them in a worse situation than they would have been had they not taken that action.²⁴

²⁰ *R (on the application of Bhatt Murphy) v The Independent Assessor* [2008] EWCA Civ 755 at para 50

²¹ See, in the context of procedural legitimate expectations *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 HL 401 and *R v Inland Revenue Commissioners, ex p Unilever Plc* [1996] STC 681 CA for substantive legitimate expectation.

²² *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755, para 41.

²³ *R (Godfrey) v Southwark LBC* [2012] EWCA Civ 500, para 51.

²⁴ *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 paras 29 and 30.

Can legitimate expectations be defeated?

The question of whether a legitimate expectation has arisen will depend on a number of factors. This is particularly true of substantive legitimate expectation, where the threshold that the claimant must satisfy is especially high. The factors that the Court will consider include:

- whether the promise was clear and unequivocal
- whether the decision-maker had the power to make the promise.²⁵ If not, it is unlikely that a claim for legitimate expectation will succeed, although there are exceptions where human rights are engaged
- whether the promise was made by a person with sufficient authority to commit the decision-maker to the proposed course of action²⁶
- whether the person to whom the promise was made acted upon that promise and is in a worse position as a result of those actions.²⁷

Where the Court is satisfied that a legitimate expectation has arisen, it may still allow the decision-maker to go back on its word (i.e. to defeat the legitimate expectation) where there is an *overriding public interest* in allowing the public authority to do so.

²⁵ See *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 123 .

²⁶ *R (Bloggs 61) v Secretary of State for the Home Department* [2003] EWCA Civ 686.

²⁷ *R v Secretary of State for Education and Employment Ex p. Begbie* [2000] 1 WLR 1115.



An example of circumstances where a legitimate expectation will be defeated by an overriding public interest reason

***Solar Century Holding Ltd and Others v Secretary of State for Energy and Climate Change* [2014] EWHC 3677.**

Solar Century applied for judicial review of the Secretary of State's decision to close a levy-supported scheme for the installation of solar panels in 2015. The challenge was made on the grounds that a legitimate expectation had arisen through the UK government making statements between 2010 and 2014 that the scheme would not be closed before 2017. The Secretary of State was seeking to close the scheme on the grounds that it had become too expensive as a result of growth in the sector and that the scheme was failing to comply with limits imposed by the government's control framework for levy-funded spending.

The Court found that the challenge failed because no procedural legitimate expectation had ever arisen; UK government documents made clear that where a levy-funded scheme exceeded the limits imposed by the control framework, the position would be reviewed and decisions could be taken to close schemes.

However, the Court went further by saying that even if a legitimate expectation had arisen, it would have been defeated on the grounds of

overriding public interest because, among other things:

- there is a public interest in the macro-economic need for government to impose budgetary discipline across all departments
- the right of the Treasury to impose limits on the costs of levy-supported schemes constituted a public interest consideration of the highest order, and the fact that the scheme had become too expensive was a material change of circumstance and a powerful reason why the government was entitled to change its policy
- adherence to the limits imposed by the control framework was important within a single government department, not just across the government as a whole. Each government department is responsible for balancing its own budget
- the Secretary of State had conducted a fair balancing exercise between the conflicting interests and considered the concerns of those likely to be adversely affected.



Case Study

An example of circumstances where a legitimate expectation is not defeated by an overriding public interest reason

R v North and East Devon Health Authority, ex parte Caughlan [2001] QB 213

The claimant in this case, who was tetraplegic, incontinent and partially paralysed in the respiratory tract, was moved with her agreement in 1993 from a hospital to Mardon House, a NHS facility for the care of long term disabled persons. The Health Authority had told the claimant that Mardon House would then be her home for life.

In 1998, the Health Authority decided to close Mardon House on financial grounds and to transfer the claimant's long-term nursing care to the local authority. The claimant challenged the decision on the grounds that, among other things, the Health Authority's promise that Mardon House would

be her home for life had created a legitimate expectation that she would not be moved against her wishes. The Health Authority had argued in response that any legitimate expectation was frustrated by overriding financial public interest reasons.

The Court of Appeal held that the Health Authority's promise as to how it would behave in future had established a substantive legitimate expectation. In light of how important the promise was for the claimant and that the promise was limited to the claimant and a few other individuals, the Health Authority had failed to justify the decision on public interest grounds.



Practical tips

- Decision-makers should consider carefully before making any concessions which could become an established practice.
- Where a decision-maker is engaging with a particular person on a policy, it is important to consult with that person before changing the policy.
- Public authorities should ensure that the relevant factors that they took into account in making a decision are clearly audited. Decision-makers should also keep full records of any countervailing reasons for not upholding a legitimate expectation.
- Where a decision-maker is seeking to departing from a promise that it has made or a course of past conduct, it should consider whether there are any overriding public interest reasons for departing from any legitimate expectation that has been created.

10

Is the decision-maker biased or does it have the appearance of being biased?

"It is not merely of some importance, but of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

In essence, the rule against bias means that the decision-maker should not have an interest in the outcome of the decision.²⁸

A decision-maker will have a bias if its attitude in making a decision prevents it from having an open mind and from making an objective decision.

The Court will quash a public authority's decision if the decision-maker has a direct bias (i.e. where it has an interest in the decision being made).

The Court may also quash the decision where the public authority has the appearance of bias. The court will find the appearance of bias where a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the decision-maker was biased.

²⁸. *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256.15.

What is the rule against bias?

The Court may find that a decision is procedurally unfair and should be quashed if the decision-maker has a direct bias in making a particular decision, or even if it appears to have a bias. A decision-maker will have a 'bias' where it has an attitude which prevents it from making a decision objectively. The rule allows the Court to ensure that the decision-making process is fair and that decision-makers have an open mind.

A decision-maker will have **direct bias** where it has an interest in the decision being made. This could arise if the public authority has a financial interest in a particular decision (e.g. a local authority councillor would have an interest in a decision to award a grant to a company in which the councillor owns shares). Where the decision-maker's interest is more than minor or remote, the decision-maker will be disqualified from making the decision and any decision that it has made will be quashed.

A decision-maker will have the **appearance of bias** where a fair minded and informed person, having considered the facts, would conclude that there was a real possibility that the decision-maker was biased.

Decision-makers are therefore required to ensure that they do not have a direct interest in the decision being made, and should also consider not acting as decision-maker if there is a real possibility that their impartiality in a particular case may be challenged.

Can a decision-maker's bias be waived?

In some circumstances, a person that will be affected by a decision may know that the decision-maker has an interest in the decision (e.g. if the officer that makes the decision on the public authority's behalf has dealt with the decision at an earlier stage and knows the parties involved), but will still choose to allow the decision-maker to continue to act (i.e. they will agree to waive any objection that they have to the decision-maker's involvement). Where the person affected by a decision waives their objection in this way, it is very unlikely that they will be permitted to raise an objection on these grounds at a later stage.

What are the consequences of a decision-maker being biased?

As set out above, where the decision-maker has an interest in the decision, the decision-maker is disqualified and any decision that it makes will be quashed.

Where a decision-maker only has the appearance of bias, the Court may still decide to quash the decision. However, as is the case with all other grounds of judicial review, in the absence of exceptional public interest reasons, the Court must **refuse** to quash a decision (or award any other relief) if it appears to it to be highly likely that the outcome for the person affected by the decision would not have been substantially different if the decision-maker had not had the appearance of bias.



An example of a decision being quashed because the decision-maker had the appearance of bias

Kelton v Wiltshire Council [2015] EWHC 2853.

A committee of the local authority's councillors had voted, by a majority of one vote, in favour of granting planning permission for a residential development which included affordable housing. One of the councillors that had voted in favour of granting planning permission was a director of a housing association likely to be awarded the contract to provide the affordable housing element of the development. The councillor had declared his role with the housing association, but went on to vote anyway. He did so on the basis that the housing association was not the applicant for planning permission, it was only a body to which a contract could be awarded in future for one element of the development.

The authority's decision was judicially reviewed on the basis that, among other things, its decision was tainted by the appearance of bias. The Court

agreed and quashed the decision. It found that it was clearly in the housing association's interest for planning permission to be granted and the association had worked with the developers on their planning permission application. The Court decided that while the councillor did not have a direct interest in the decision and so was not automatically disqualified from participating in the meeting, the councillor's participation did give rise to an appearance of potential bias – the fair-minded and informed observer, having regard to all material facts, would conclude that there was a real possibility of bias. The Court also concluded that such was the possibility of the appearance of bias, it would have wrong for the councillor to have participated in the planning meeting at all, even if he had not voted.



Practical tips

- Decision-makers should have procedures or policies in place to avoid bias and the appearance of bias. The policies could provide, for example, that where the officer that makes the decision on the public authority's behalf knows the applicant, either personally or through previous dealings, the matter should be passed to a different officer.
- Where particular types of decisions require a decision-maker to provide advice/technical input/investigations in the lead-up to the final decision, and to make the final decision itself, the decision-maker should consider whether it should put structures in place to ensure that there is a separation between the persons providing the advice/technical input/investigations and those making the final decision. This could reduce the risk of the decision-maker having the appearance of bias.
- If the decision-maker is aware of any reasons why it may appear to be biased, it is prudent to declare those reasons at the outset. This will also give any applicants the opportunity to waive their objections at an early stage, should they wish to do so.
- In limited circumstances, even if a person (e.g. councillor or official) who would usually make the decision on the public authority's behalf has an interest in the decision, that person may not be disqualified if the decision needs to be made and cannot be made without that person's involvement. However, decision-makers should not permit that person to act unless all alternatives are exhausted and legal advice is sought.

11

Is the decision-maker required to give reasons for its decision?

Public authorities may be required to give reasons for their decisions. The requirements may be set by legislation, or may be inferred by the Court where reasons are required in the interests of fairness.

There is no uniform rule as to how detailed the reasons must be. However, the reasons given must be intelligible and adequate in all cases, and must be sufficient to allow the parties to understand in broad terms why the decision was made.

The Court may quash a decision that it considers to be unfair as a result of a failure to give reasons.

When is a decision-maker required to give reasons for its decision?

A decision-maker should always let interested parties know what its decision is. This is essential to ensure legal certainty; a person must always have the opportunity to know what is required of them, particularly where sanctions may be imposed for failing to comply with those requirements.

There may also be a legal requirement to provide **reasons** for the decision. The duty to give reasons may be set out expressly in legislation. Alternatively, a duty to give reasons may be inferred by the Court (e.g. where the public authority in question has a policy to always give reasons for its decisions, therefore giving interested parties a 'legitimate expectation' that reasons will be given (see chapter 9)).

The Court is most likely to infer a duty on the public authority to give reasons where it would be unfair for the public authority to not do so, for example if:

- reasons are required to enable an interested party to appeal the decision;
- the decision affects a person's liberty or human rights;
- the decision is unusual in some way (e.g. contrary to established practice);
- the decision appears to be contrary to the evidence.

The Court is less likely to infer a duty to give reasons where it would be very difficult for the decision-maker to do so (e.g. where the decision is a pure exercise of judgment, for example where the decision-maker has to apply its judgment to choose which applicant should be awarded grant funding).²⁹

How detailed should the reasons be?

The level of detail required of decision-makers will depend on the circumstances of each case. Generally, the Court will require more detailed reasons to be given for important decisions than for purely administrative ones. However, there is no uniform standard that will be applied in all cases, other than that the reasons must always be intelligible and adequate. The reasons given need not be lengthy and will be sufficient if they show that the decision-maker directed its mind to the parties' submissions and tell the parties in broad terms why the decision was made.

²⁹ see *R (on the application of the Asha Foundation) v The Millennium Commission* [2003] EWCA Civ 88.

Should the decision-maker give reasons even where there is no legal duty to do so?

Even where it appears unlikely that there is a duty to give reasons for a decision, it may still be prudent for a decision-maker to consider providing reasons. Doing so will enable affected parties to understand the basis for the decision and may go towards demonstrating compliance with key administrative law principles, e.g. that relevant considerations were taken into account and that the decision is reasonable.

Where the decision-maker gives its reasons voluntarily (i.e. where it is not required to do so by law), those reasons must be as detailed as if they were required to be given; i.e. they must, as a minimum, be adequate and intelligible.

What are the consequences of a decision-maker failing to give reasons for its decision?

The Court may choose to quash a decision where it is of the opinion that the decision is unfair because of a failure to give reasons. However, as is the case with all other grounds for judicial review, in the absence of any exceptional public interest reasons, the court must **refuse** to quash a decision (or award any other remedy) if it appears to it to be highly likely that the outcome for the person affected by the decision would not have been substantially different if the decision-maker had not failed to give reasons.

At first glance it may appear unlikely that giving reasons (or failing to do so) could ever have an influence on the decision itself; reasons are given *after* a decision is made, so how could the giving of reasons ever influence the substance of the decision made? The answer is that in some circumstances the process of formulating reasons for its decision would cause the decision-maker to properly focus its mind on the task before it and to consider relevant considerations. In these circumstances, the process of formulating the reasons to be given could have an effect on the substance of the decision itself. If so, it would be open to the Court to quash the decision on the grounds that the decision-maker failed to give reasons for its decision.



An example of a decision being quashed for failure to give reasons

R (on the application of Cash) v HM Coroner for Northamptonshire [2007] EWHC 1354.

The case related to an inquest held into the death of a man who had died following a drug overdose and who had been restrained by police officers immediately before his death. At the conclusion of the inquest, the Coroner had directed the jury that they could not find a verdict of unlawful killing, only those of accidental death or an open verdict. The Coroner had not given reasons for deciding that the unlawful killing verdict was unavailable to the jury. The inquest finding was judicially reviewed by the deceased's sister on the basis that, among other things, the Coroner's failure to give reasons made the decision unfair.

The Court agreed that the Coroner should have given reasons for preventing the jury from finding an unlawful killing verdict and quashed the inquest decision. The Court also said that the process of formulating the reasons to be given for the decision would have concentrated the Coroner's mind on the issues in a focussed way, and that the claimant was entitled to enough reasons to allow her to make an informed decision as to whether she would judicially review the inquest ruling.



Practical tips

- Decision-makers should consider the wording of the relevant legislation to ascertain whether there is an explicit duty to provide reasons for a decision, and should be aware that the Court may infer such a duty where it considers it necessary in the interests of fairness, even where there is no express duty in legislation to do so.
- In all cases, particularly where reasons must be given (or a possibility that they must be given), decision-makers should adopt good record-keeping procedures (and see chapter 17 for details on the implications of the Data Protection Act 1998 and the Freedom of Information Act 2000). Good record-keeping procedures will assist decision-makers to comply with the principles of good administration.

12

Is the decision reasonable?

Decisions made by public authorities may be challenged on the grounds that they are unreasonable.

The test that the Court applies to decide whether a decision is reasonable, and how intensely or closely it reviews a decision, will vary according to the circumstances and context of each case. However, the test that is applied most often is whether the public authority's decision is within the "range of reasonable" decisions that a public authority could have made in the circumstances.

In some cases, particularly those involving political judgment, there will be a high threshold and it will be difficult for the claimant to show that the decision is unreasonable.

In other cases, particularly those involving a person's rights or constitutional principles, the threshold will be lower and the Court will give more careful scrutiny to the decision.

Where a court finds that a decision is unreasonable, it may be quashed.

What is the test for unreasonableness?

A public authority's decision may be challenged on the grounds of unreasonableness (sometimes described as 'irrationality'). The test that the Court will apply most often today to determine whether a decision is reasonable is whether the decision is "within the range of reasonable responses" that a decision-maker could have had in the circumstances.³⁰ However, there is no one standard test that will be applied in all cases to determine a decision's reasonableness. Instead, the test to be applied and the intensity or closeness of the Court's review of a decision's reasonableness will vary according to the subject-matter and the nature and gravity of what is at stake.

Cases that may be subject to low intensity review include those involving political judgment, e.g. matters of national economic policy. This means that the threshold for showing unreasonableness may be very high (e.g. where a decision must be shown to be arbitrary or perverse, manifestly without reasonable justification, devoid of any plausible justification, or one where there is an error of reasoning which robs the decision of logic).

However, decisions involving a person's rights or constitutional principles (e.g. rights that are protected by the rule of law – liberty, accessibility of the law, certainty of the law, accountability, access to justice) are usually scrutinised more intensely or closely. In these cases, a lower threshold of unreasonableness is applied, and the Court may require substantial evidence that the decision goes no further than necessary to achieve the decision's objective, and that objective must be sufficiently important. This is very similar to the considerations the Court apply under the proportionality test (see chapter 13).

What the Court can and cannot do

The Court will give decision-makers a degree of leeway and will not consider whether a decision is absolutely correct or one that the Court itself would have necessarily made. It will bear in mind that where a democratically-elected legislature has given discretion to a particular decision-maker (i.e. a public authority), the discretion remains the decision-maker's. It is not for the Court to exercise the discretion instead. The Court will not retake the public authority's decision on the facts, but in appropriate cases (e.g. those involving a person's rights or the rule of law) it will look very closely at the way the facts have been established and the logic of the conclusions drawn from them.

³⁰ The test for unreasonableness (termed 'Wednesbury' unreasonableness after the leading case) was initially framed in terms of an unreasonable decision being a 'decision that no reasonable body could have come to'. The test was subsequently recast in 'irrationality' terms in the CCSU case, under which there was a very high threshold for showing a decision to be irrational or unreasonable; '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 giving decision-makers this leeway – the extent of which will vary from case to case – the Court have recognised that when different reasonable people are given the same set of facts, it is perfectly possible for them to come to different conclusions without being unreasonable. This means that not every mistaken exercise of judgment is unreasonable. As such, a range of lawful decisions may be within the discretion of the decision-maker (i.e. “within the range of reasonable responses”), but the width of that range will depend on the context of the decision.

Where the Court finds that the decision was unreasonable it may choose to quash the decision, leaving none in its place. The decision-maker may (or often, must) then reconsider the decision, taking into account any guidance given by the Court and applying more reasonable principles. It may be expected that the decision-maker will not remake the original unreasonable decision.

What factors will the Court consider in determining reasonableness?

“The flexibility necessarily inherent [in the unreasonableness test] should not be sacrificed on the altar of legal certainty”.³¹

As set out above, the Court has broad discretion when considering a decision’s reasonableness. The factors it will choose to consider (and the intensity of the scrutiny) will vary from case to case and will depend on the context. It is therefore not possible to provide an exhaustive list of the factors that the Court will consider in all cases. Indeed, the Court themselves have said that the list of grounds that may be considered in determining whether a decision is unreasonable is “probably limitless”.

As a general guide, some of the Court’s considerations in decided cases are set out under the following broad headings.

³¹ Simon Brown LJ in *R v IRC, ex p Unilever plc* [1996] STC 681 at paragraphs 694-695.

Unreasonable process

- arbitrariness or deficiencies of logic in the decision-making process may, if sufficiently serious, make the decision unreasonable.
- a decision may be judged to be unreasonable if it is based on a conclusion that is not supported at all by evidence or good reasons, or where no reasonable person would consider the evidence to be sufficient to support the conclusion drawn. In order to be found to be unreasonable, the conclusion drawn must have been material or integral to the decision-maker's reasoning for the decision (e.g. a planning development decision based on a conclusion that the development would only partially affect the view from the claimant's window was unreasonable since, in fact, the development would obstruct the view completely).³²
- depending on the context, a decision may also be unreasonable if the Court finds that the weight of evidence pointing to one course of action is overwhelming but that the decision-maker has opted to decide the matter in a different and opposing way.³³ Similarly, a decision may be unreasonable if "manifestly excessive" or if "manifestly inadequate" weight has been given to a particular relevant consideration.³⁴
- a decision which is made without alternatives being considered may be unreasonable. Unreasonableness may also be inferred from a decision-maker's failure to give reasons for the decision made where they are required³⁵ (see chapter 11).

Interference with a person's rights or constitutional principles (including the rule of law)

- a decision that interferes with a person's rights or violates the rule of law (i.e. principles including the accessibility of law, accountability, certainty, consistency, equality before the law and a right to a fair trial) may be considered unreasonable.³⁶ See chapter 13 for the circumstances in which decisions that interfere with a person's rights may be challenged on proportionality grounds. For example, a failure to notify an applicant of a decision may render that decision unreasonable. This is because the failure to notify would contravene the need for legal certainty (i.e. the applicant would not be aware of the legal requirements with which they have to comply) and the right to a fair trial (i.e. the decision could not be challenged if the applicant was unaware of it).³⁷

³² *Jagendorf v Secretary of State* [1987] JPL 771.

³³ *Emma Hotels Ltd v Secretary of State for the Environment* (1980) 41 P&CR 255.

³⁴ *Secretary of State for Trade and Industry ex p BT3G Ltd* [2001] Eu LR 325.

³⁵ *Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997.

³⁶ *R (Yumsak) v Enfield London Borough Council* [2002] EWHC 280.

³⁷ *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36.

Oppressive decisions

- a decision may be unreasonable if it is unduly oppressive or unfair. This may be because a decision places an unnecessarily onerous requirement on the affected person or subjects that person to an excessive hardship. In this type of challenge, the Court will assess the outcome of the decision-making process, rather than the process by which the decision is made, and will consider each case in its context. Examples of decisions that have been found to be unreasonable due to their unduly oppressive nature include:
 - a decision requiring a person to do something that he or she cannot legally do (e.g. a requirement for landlords to clean their lettings in April, May or June was unreasonable since landlords could have to trespass to enter their properties during those months);³⁸
 - a decision to use a compulsory purchase power by a local authority even though they already possessed, or were able to acquire by other means, equally suitable land;³⁹
 - a decision which imposes excessive penalties.⁴⁰
- finally, it is noted in this context that decisions as to funding allocations are subject to unreasonableness review, even where financial resources are limited. However, it will be very difficult for a claimant to show that a decision to allocate resources to a particular person is unreasonable.⁴¹

³⁸ *Arlidge v Islington Corporation* [1909] 2KB 127.

³⁹ *Brown v Secretary of State for the Environment* (1978) 40 P&CR 285.

⁴⁰ *Wheeler v Leicester City Council* [1985] 1 AC 1054.

⁴¹ *R (Bibi) v Newham LBC* [2002] 1 WLR 237.



An example of a decision being found to be unreasonable

R (Yumsak) v Enfield London Borough Council [2002] EWHC Civ 280.

The local authority had decided to house the claimant, who was based in Enfield, London, in a bed and breakfast in Birmingham, despite the claimant's objections to moving there. All the parties in the case accepted that the bed and breakfast was in an appalling state of repair.

The housing authority's decision was found to be unreasonable and that there was no evidence that there was no suitable and cost-effective alternative temporary accommodation in or closer to Enfield.



Practical tips

- Decision-makers should consider whether a decision is one that could be said to interfere with a person's rights. If so, the Court may subject the decision to more careful scrutiny in deciding whether it is reasonable (but see also chapter 13 for the circumstances in which a decision that interferes with human rights may be challenged under proportionality grounds instead).
- The unreasonableness test that the Court may apply will vary from case to case, depending on the context. Decision-makers should adhere to principles of good decision-making at all times, and, among other things, should ensure that decisions:
 - are evidence-based,
 - are based on logical and reasoned conclusions, and
 - are made having considered and documented possible alternative options.

13

Is the decision proportionate?

The doctrine of proportionality is concerned with questions of balance and whether the means justifies the objective achieved.

Decisions made by public authorities may be challenged on proportionality grounds where they involve significant interferences with a person's important or fundamental rights, or if the decision involves European law or the European Convention on Human Rights.

'Proportionality' requires that the interference with a person's rights is no greater than what is necessary to achieve the legitimate aim of the interference.

In applying the proportionality test, the Court will consider the context and circumstances of each decision. How intensely or closely the Court reviews a decision will depend on the context and circumstances of each case.

When can the Court assess a decision's proportionality?

In particular circumstances, a public authority decision may be challenged on the grounds of proportionality. This essentially means that where a decision involves a significant interference with a person's important legal rights (e.g. a person's right to citizenship of the UK), or otherwise engages EU law or the European Convention on Human Rights ("ECHR"), the Court will require that any interference with a person's rights is no greater than that which is necessary to achieve the aim of the interference.

Initially, it was considered that the principle of proportionality would only be available as a distinct ground for judicial review where a public authority's decision involved EU law or ECHR issues. However, following a series of cases, and the case of *Pham v Secretary of State for the Home Department* [2015] UKSC 19 in particular, it appears likely that any decision involving significant interference with fundamental rights will be challengeable on proportionality grounds, regardless of whether EU law or the ECHR is also engaged.

A court's assessment of proportionality will involve the following considerations:

- (1) whether the decision's objective is sufficiently important to justify limiting a person's right;
- (2) whether there is a rational connection between the decision and the objective (i.e. whether the decision is suitable);
- (3) whether the objective could have been achieved in a less intrusive way (i.e. whether the decision was necessary);
- (4) whether the decision's negative effect on a person's rights outweighs the importance of the objective. If so, the decision will be disproportionate (i.e. whether the decision strikes a fair balance).

When will a decision constitute significant interference with a person's important or fundamental right?

As is noted above, it appears likely that a decision may be challenged on proportionality grounds if it constitutes a significant interference with an important or fundamental right. The Court have not defined an 'important' right. In the *Pham* case, it was considered that a decision to withdraw a suspected terrorist's British nationality interfered with a sufficiently important right to allow the Supreme Court to consider the decision's proportionality.

Gage v Scottish Ministers [2015] CSOH 174 was one of the first cases to consider proportionality post-*Pham*. In this case, a decision to detain a prisoner in a prison where he was subjected to second-hand smoke was considered not to interfere with a sufficiently important right so as to enable the decision to be challenged on proportionality grounds. As a result, the challenge was considered under reasonableness/rationality grounds instead (see chapter 12)

Is a court's scrutiny of a decision more intense under the proportionality test than under the reasonableness/rationality test?

The difference between the proportionality and reasonableness grounds of review has been the subject of much debate. In many respects, the Court's considerations will be very similar under either test. It will, for example, in all cases consider whether there is a rational connection between the decision and the objective sought. There are also examples of the Court considering under both tests whether the decision's objective could have been achieved by less intrusive means.

The principal difference between the proportionality and rationality tests is that the proportionality test is more structured – the Court will always apply the four part test set out above, whereas they will have more discretion in considering whether a decision is unreasonable. However, the Supreme Court emphasised in *Pham* that the fact that the proportionality test is more structured does not necessarily mean that the scrutiny will be more intense. Both the proportionality and rationality tests are applied flexibly. This means that the intensity of scrutiny and the weight to be given to the decision-maker's view varies depending on the context and circumstances of each case. Therefore, the Court's scrutiny will not automatically be stricter when it applies the proportionality test; the intensity of review will always depend on the context and circumstances of a case.



An example of a decision being found to be disproportionate on the grounds that the aim could be achieved in a less intrusive way and that it failed to strike a fair balance between interests

R (Aguilar Quila and another) v Secretary of State for the Home Department [2011] UKSC 45.

The Secretary of State had set a rule (Rule 277 of the Immigration Rules) to prevent visas being given to foreign spouses of British citizens until they reached the age of 21. This had the effect of preventing some married couples from living together until the foreign spouse turned 21. The rule was challenged on the grounds that the interference with the couples' Article 8 ECHR right (right to a private and family life) was disproportionate.

The Supreme Court accepted the Secretary of State's argument that the rule's aim was legitimate – to protect vulnerable young adults from the risk of being subjected to arranged or forced marriages. However, the Supreme Court also found that the Secretary of State had failed to show that the rule did no more than necessary to accomplish that aim, and that the rule failed to strike a fair balance between the interests of the married couples and the public interest of preventing forced marriages. The rule was therefore disproportionate and was quashed.



Practical tips

- Decision-makers should consider whether a decision interferes with a person's important or fundamental rights, engages the ECHR, or involves EU law. If it does, then the courts can review the decision's proportionality.
- The courts will always apply the four-part test set out above when considering a decision's proportionality.
- Decision-makers should consider and document possible alternative decisions fully. The courts are more likely to find that the objective could have been achieved in a less intrusive way if the public authority has failed to even consider the alternatives.
- When applying the proportionality test, the courts will consider the context and circumstances of the decision; the intensity of the review will therefore vary from case to case.

14

Is the decision-maker complying with the Human Rights Act 1998?

“Freedom means the supremacy of human rights everywhere. Our support goes to those who struggle to gain those rights and keep them. Our strength is our unity of purpose. To that high concept there can be no end save victory.”

– Franklin D. Roosevelt

The Human Rights Act 1998 sets out the 16 fundamental rights and freedoms that everyone in the UK is entitled to, such as the right to life, the right to a fair trial and the right to respect for private and family life.

It is unlawful for a public authority to take a decision or act in a way that is incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (“the ECHR”). A public authority is any person whose functions are of a public nature, such as the Welsh Government, local authorities, the police or the courts.

If a public authority takes a decision that is incompatible with the ECHR, a person affected by that decision can take legal action under the Human Rights Act 1998. This is a statutory ground of judicial review, which sits alongside the common law grounds for judicial review.

There are three categories of human rights: absolute, derogable and qualified.

- absolute rights cannot be limited or interfered with;
- derogable rights cannot normally be interfered with unless it is a time of war or other public emergency; and
- qualified rights are rights that can be limited or interfered with where it is necessary to do so to achieve an important objective such as the protection of public health.

If someone's rights are to be limited or interfered with, any such limitation or interference must be no greater than what is needed to achieve the desired aim – in other words it must be proportionate.

What are Human Rights?

Human Rights are generally thought of as being the minimum legal protections and freedoms to which people are entitled as humans. These freedoms and protections apply regardless of nationality, sexuality and religion.

The Human Rights Act 1998 sets out the fundamental rights and freedoms to which everyone in the UK is entitled. The Act has been in force since October 2000.

There are 16 basic rights in the Human Rights Act 1998, which are taken from the ECHR. They do not only affect matters of life and death like freedom from torture and killing; they also affect people's rights in their everyday life: what they can say and do, their beliefs, their right to a fair trial and many other similar basic entitlements.

Who is bound by the Human Rights Act 1998?

Section 6 of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way that is incompatible with the ECHR and allows a case to be brought in a UK Court of Tribunal if a public authority has acted unlawfully. This is a statutory ground of judicial review, which sits alongside the common law grounds (set out at chapters 3 to 13).

A public authority will not have acted unlawfully under the Human Rights Act 1998 if as a result of a provision of primary legislation (such as another Act of Parliament) it could not have acted differently.

Who is a public authority?

A public authority is any person whose functions are of a public nature. This can be a public sector organisation, such as the Welsh Government, Local Authorities, the Police or the Courts. Private organisations or charities which carry out public functions may also be public authorities - for example, private prisons.

Public authorities are under an obligation to act in accordance with the ECHR and therefore public officials should understand human rights and take them into account in their day-to-day work.

When it comes to decision-making, the rights of one person will often have to be balanced against the rights of others or against the needs of the broader community.

If someone's rights are to be interfered with, any such interference must be no greater than what is needed to achieve the desired aim – in other words it must be proportionate.

There are generally three categories of human right: absolute, derogable and qualified.

- **Absolute rights** are those that cannot be limited or interfered with, for example there are no circumstances under which the UK government could reintroduce slavery;
- **Derogable rights** are those which in time of war or other public emergency may be restricted, but only to the extent that is strictly necessary in the situation; and
- **Qualified rights** are rights that can be limited or interfered with in certain circumstances, such as the right to private and family life.

| Absolute Rights | Derogable Rights | Qualified Rights |
|--|---|---|
| <p>Article 2 – Right to life (except in very specific circumstances such as in the defence of a person from unlawful violence when the use of force was no more than absolutely necessary)</p> <p>Article 3 – Prohibition of torture or inhuman or degrading treatment or punishment</p> <p>Article 4 – Prohibition of slavery, servitude and forced labour</p> <p>Article 7 – No punishment without law (for example, no one shall be found guilty of a criminal offence which was not a criminal offence at the time it was committed)</p> | <p>Article 4 – Freedom from compulsory labour</p> <p>Article 5 – Right to liberty and security</p> <p>Article 6 – Right to a fair trial</p> | <p>Article 8 – Right to respect for private and family life, home and correspondence</p> <p>Article 9 – Freedom of thought, conscience, and religion</p> <p>Article 10 – Freedom of expression</p> <p>Article 11 – Freedom of assembly and association</p> <p>Article 12 – Right to marry</p> |

Qualified rights; those that can be restricted or interfered with but only in specific circumstances.

The rights set out in Articles 8-12 may be restricted or interfered with where it is **necessary to do so** to achieve an important objective.

The objectives for which such limitations are allowed are set out in each Article and include the protection of public health or safety, the prevention of crime and the protection of the rights of others.

Further information and examples of how qualified rights work are set out below.

Article 8

What does this right mean?

Article 8 protects the right to respect for private life, family life, home and correspondence (letters, telephone calls and emails, etc.).

What is meant by private life?

A person in the UK has the right to live their life without government interference.

The courts have interpreted the concept of 'private life' very broadly. It covers the right to decide sexual orientation, lifestyle, personal style and dress. It also includes the right to control who sees and touches your body.

The idea of private life also covers the right to develop a personal identity and to develop and maintain relationships. This includes a right to participate in economic, social, cultural and leisure activities.

Article 8 also means that the media and others can be prevented from interfering in a person's life. Personal information about a person (such as photographs, letters, and medical records) should be kept securely and not shared without that person's permission, except in certain circumstances.

Justifying Interference with Article 8

There are circumstances when public authorities can make decisions that limit or interfere with Article 8 rights. Such a restriction or interference is allowed where the public authority can demonstrate that its decision or action is lawful, necessary and proportionate in the interests of:

- national security
- public safety
- the economic well-being of the country
- the protection of health or morals
- the prevention of disorder or crime, or
- the protection of the rights and freedoms of other people.

An action or decision is 'proportionate' when it is appropriate and no more than necessary to address the problem concerned (see chapter 13).

Article 14

What does this right mean?

In applying the other Convention rights, people have the right not to be treated differently because of their race, sex, political views or other status unless there is an objective justification for the difference in treatment.

Article 14 gives people the right to protection against direct and indirect discrimination in relation to all other rights set out in the Convention.

Everyone is entitled to equal access to these rights.

Article 14 does not give people a general right to protection from different treatments – it only works to protect people from different treatment in exercising their Convention rights.

On what grounds is discrimination prohibited?

Article 14 provides that if one of the other rights protected by the ECHR is engaged, discrimination on the following grounds is prohibited:

- sex
- race
- colour
- language
- religion
- political or other opinion
- national or social origin
- association with a national minority
- property
- birth.

The list of grounds in Article 14 is not exhaustive and discrimination on the basis of other grounds may also be prohibited, for example, sexual orientation and age.

Justifying differential treatment

Differential treatment is not always discriminatory; there may be an objective and reasonable justification for it in some cases. It may be perfectly legitimate to treat people differently based on their personal status. A public authority will however have to demonstrate that it is pursuing a legitimate aim and that the discriminatory treatment is necessary and proportionate to that aim.

What happens if a public authority acts incompatibly with the European Convention on Human Rights?

If a public authority makes a decision that is incompatible with the ECHR then a person can judicially review that decision under the Human Rights Act 1998.

If a public authority is found to have breached a person's Human Rights, a court has the discretion, among other things, to:

- declare that the public authority acted unlawfully;
- make the decision void;
- prevent a public authority from acting in a certain way; and/or
- award compensation.

In most situations if the decision is found to be unlawful the court will make the original decision void and will remit the issue back to the public authority to make the decision again.



Article 8

Re C (Children) (Care: Change of forename) [2016] EWCA Civ 374.

A mother, with a longstanding diagnosis of a psychotic disorder, gave birth to twins in May 2015. The midwife at the hospital contacted the local authority to tell them of her concern that the mother was proposing to name the children, "Preacher" and "Cyanide". The local authority were concerned about this proposal and brought it to the Court's attention at an interim care order

hearing. The mother argued that the right to name her children was protected by Article 8. The mother's appeal was dismissed but the Court of Appeal stated that the seriousness of the interference with the Article 8 rights of the mother demanded that the course of action proposed by the local authority be brought before, and approved by the Court.



Article 9: Freedom of thought, conscience and religion

'Shambo' - R (Surayanda) v Welsh Ministers [2007] EWCA Civ 893.

The decision to slaughter a sacred bullock (belonging to a Hindu temple) that suffered from bovine tuberculosis (bTB), at a time when measures were being taken to control the spread of this disease in the locality, was held to be justifiable under Article 9 by the Court of Appeal. The interference with the particular community's Article 9 right to manifest their belief in the need to protect life was outweighed by other relevant

competing considerations. In particular, the legitimate aims of reducing the economic impact of bTB, maintaining public health protection and protecting animal health welfare, outweighed the community's Article 9 rights. That, together with the fact the action was prescribed by law, meant the decision to slaughter the bullock was justified under Article 9.



Article 10: Freedom of expression

Sunday Times v the United Kingdom (1979-1980) 2 EHRR 245.

The Sunday Times intended to publish an article examining the background to the introduction of the drug thalidomide into the British market and the proposed settlement of the claims against its manufacturers taken by children damaged by the drug.

The UK government succeeded in obtaining an injunction preventing its publication on the ground that it would be in contempt of court. The Sunday Times complained that the injunction violated Article 10.

The European Court of Human Rights held that Article 10 guarantees not only the freedom of the press to inform but also the right of the public to be informed. It was held that the injunction breached Article 10 as, on the particular facts, the public interest in freedom of expression was more important than maintaining the authority of the judiciary.



Article 12: Right to marry and found a family

O'Donoghue and Others v the United Kingdom (2011) 53 EHRR 1.

A government scheme which charged some immigrants a fee to marry, but only if they were not planning to marry in the Church of England, was held to be discriminatory. The scheme was originally set up to help address the issue of sham marriages.

A Nigerian national living in Northern Ireland, wished to marry his partner. Both were practising Roman Catholics. In order to marry in a Roman Catholic Church, the Nigerian national was required to obtain permission from

the Secretary of State and pay £295 because he was subject to immigration control.

The European Court of Human Rights found that this scheme violated the right to marry under Article 12. It was also discriminatory on the grounds of religion and the Northern Ireland Government could not provide any objective and reasonable justification for the difference in treatment between religions.



Article 14

Ghaidan v Godin-Mendoza [2004] UKHL 30.

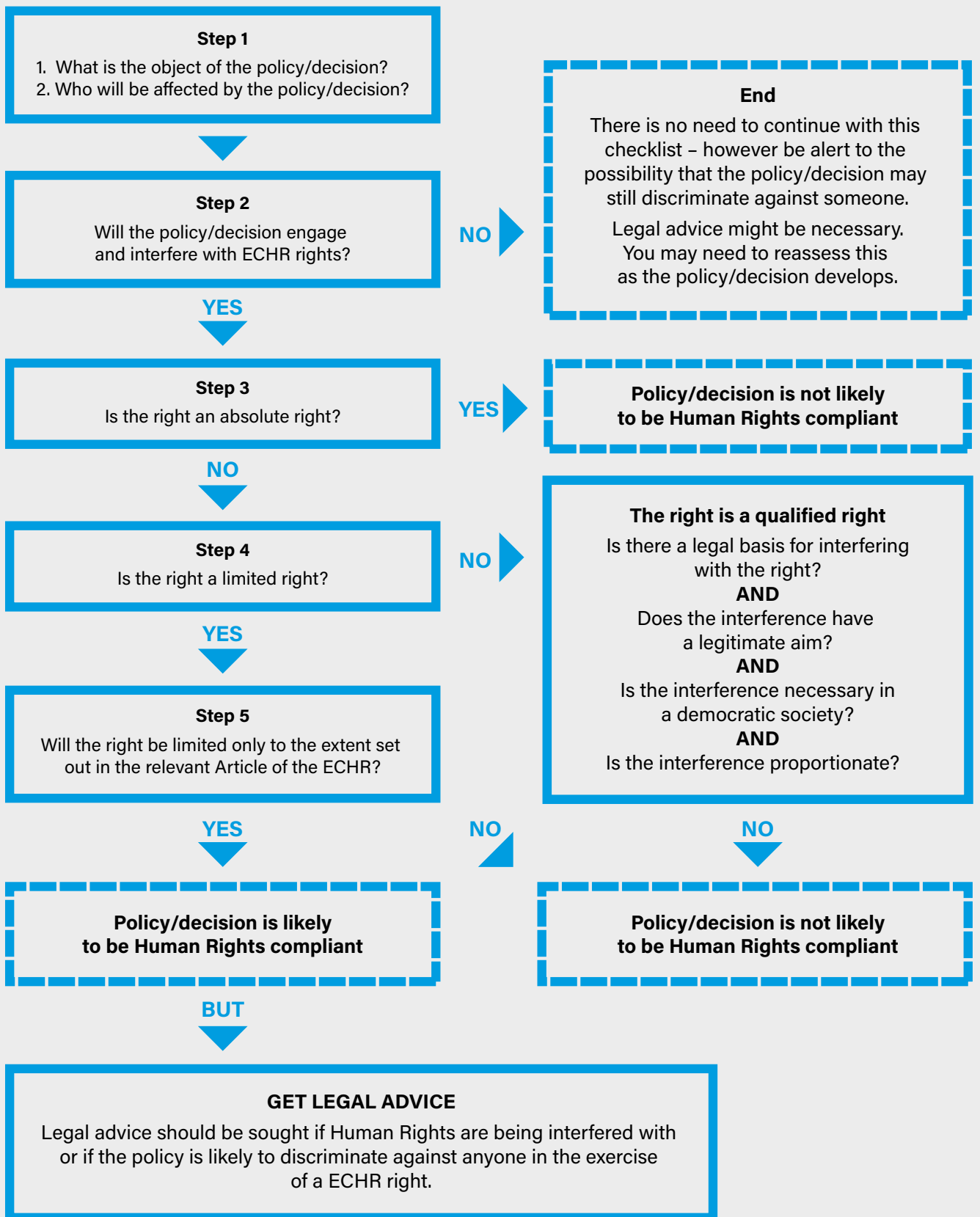
Mr Godin-Mendoza shared a flat with his same-sex partner, who was the tenant. When the tenant died the landlord claimed possession. The county court judge ruled that Mr Godin-Mendoza could not succeed to the tenancy of the flat as a surviving spouse under the Rent Act 1977. The House of Lords, sitting in a judicial capacity, held that the interpretation of the Rent Act concerned the right to

respect for a person's home guaranteed by Article 8 and must not be discriminatory; it must not distinguish on the grounds of sexual orientation unless this could be justified. In this case, the distinction had no legitimate aim and was made without good reason. The difference in treatment infringed Article 14 (read in conjunction with Article 8).



Practical tips

- Remember more than one right may be relevant to any given situation.
- When considering the proportionality of a proposal, it is useful to ask the following questions:
 - What is the problem that is being addressed by the proposed restriction?
 - Will the restriction lead to a reduction in that problem?
 - Does a less restrictive alternative exist, and has it been tried or considered?
- If the decision-maker is unsure or a matter is complicated, legal advice should be sought. It is always prudent to take legal advice if it is proposed to interfere with ECHR rights.
- The following chart may be useful to decision-makers when considering ECHR issues:



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Is the decision-maker complying with the Public Sector Equality Duty?

The Public Sector Equality Duty in section 149 of the Equality Act 2010 is distinct from other duties in that Act and applies to the exercise of functions of a public nature.

The duty is to have regard to the criteria set out in the Act, not a duty to achieve a particular result.

In order to demonstrate that the duty has been fulfilled, evidence of the regard that was had, including what information was available when making the decision, is essential.

What is the Public Sector Equality Duty?

The Public Sector Equality Duty ("PSED") is set out in section 149 of the Equality Act 2010 (the "2010 Act"). The duty is for public authorities to have due regard, in the exercise of their functions to the need to; -

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The 2010 Act specifies what the protected characteristics are and which bodies are public authorities to which the PSED applies. In relation to Wales, the listed bodies include, amongst others, the Welsh Ministers and local authorities.

The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 impose more specific duties, requiring public authorities to set and publish equality objectives to better achieve the general PSED. There is also a duty to assess the impact of proposed policies and practices, known as the Equality Impact Assessment. Case law demonstrates that this document will be important in evidencing that the PSED has been met in relation to a particular policy or decision.

If a public authority is unable to demonstrate, when challenged, that it complied with the PSED when reaching a decision, the courts are likely to find that the decision is unlawful.

It is important to note that the PSED is not about achieving a particular result but instead it is about ensuring that the above factors always form part of the consideration and development of policy before reaching a decision. The courts have been clear that where a judicial review is based on failure to have due regard to the PSED, it is not reviewing the decision itself, as it would in the case of a challenge on the grounds of reasonableness, but rather it is looking at whether there has been a "*proper and conscientious focus on the statutory criteria*".⁴² Whilst there is no specific duty when reaching a decision to reference the regard that was had to the PSED, hard evidence of how the criteria were applied will naturally assist in the case of any challenge. Even aside from the risk of challenge, recording how the criteria of the PSED were applied to a particular decision will help to ensure that proper regard is had to the PSED.

Whilst the PSED must form part of the consideration in all decision making, there is an intrinsic link between complying with the PSED and the adequacy of consultation. It is not sufficient to have regard to the duty only in a general sense, instead it is necessary to ensure that the decision-maker has all the relevant information available to allow the statutory criteria to be properly applied to those facts and a proper assessment of the impact made. Where insufficient information about the likely impact is available, efforts should be made to obtain such information, usually by way of consultation.

⁴² *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin).

How do public authorities comply with the PSED?

There are many cases where the courts have considered whether a public authority has complied with the PSED in its decision-making process. In their judgments, particularly in the *Brown*⁴³ and *Bracking* cases⁴⁴, the courts have established the key principles set out in the table below:

| |
|---|
| <ul style="list-style-type: none">– the decision-maker must be aware of the duty to have regard to the need to achieve the objectives set out in section 149 of the 2010 Act; |
| <ul style="list-style-type: none">– the duty is fulfilled before and at the time when a policy is being considered (i.e. having regard to the PSED <i>after</i> the decision has been taken is not sufficient to comply with the duty); |
| <ul style="list-style-type: none">– the duty must be ‘exercised in substance, with rigour and with an open mind’, i.e. it is not to be a box-ticking exercise only. While public authorities are not under a duty to make explicit reference to the PSED or section 149 of the 2010 Act in their decision-making process, it is usually good practice for reference to be made to section 149, including the actual wording of the section or an accurate paraphrase, in the decision-making documentation; |
| <ul style="list-style-type: none">– the duty is non-delegable, i.e. the duty is on the decision-maker personally; the key consideration is whether the decision-maker itself had regard to the need to achieve the objectives listed in section 149, not whether the decision-makers’ <i>officials</i> have had regard to the section 149 factors; |
| <ul style="list-style-type: none">– the duty is a continuing one; |
| <ul style="list-style-type: none">– it is good practice for the decision-maker to keep records showing how they have complied with the PSED. This will ensure transparency and will assist public authorities to have proper regard to the factors listed in section 149 of the 2010 Act; |
| <ul style="list-style-type: none">– having general regard to issues of equality is not the same as having specific regard to the need to achieve the factors listed in section 149; |
| <ul style="list-style-type: none">– the decision-maker’s officials must be “rigorous in both enquiring and reporting” to the decision-maker on the issues material to compliance with the PSED; |
| <ul style="list-style-type: none">– provided that the courts are satisfied that the decision-maker has given rigorous consideration to the need to achieve the factors listed in section 149, it is for the decision-maker to decide how much weight to give to the various issues relevant to the decision. |

⁴³ *Arlidge v Islington Corporation* [1909] 2KB 127.

⁴⁴ *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158.



An example of a decision being quashed for the decision-maker's failure to have due regard to the equality needs listed in the PSED

R (on the application of T) v West Berkshire Council [2016] EWHC 1876

The claimant in this case challenged, through judicial review, a decision by West Berkshire Council ("the Council") to cut funding to voluntary sector organisations who provide short breaks for disabled children ("short breaks"). The challenge was made partly on the grounds that the Council had failed to have due regard to the factors listed in section 149 of the 2010 Act.

In light of a 44% cut to its funding from the UK government, the full Council decided in its meeting on 1 March 2016 to, among other things, make financial cuts to 47 different public services, including the funding to voluntary organisations for short breaks. The Council had previously consulted widely about its proposed funding cuts, including with those that provided the short breaks.

Council officials had prepared a report for the members' consideration at the 1 March meeting. It summarised the consultation responses received on the short breaks funding cut. It also drew members' attention to the PSED by including the following sentence – *"Members are fully aware of the PSED which requires "decision makers" to keep the welfare of service users and their families at the forefront of their mind, particularly those that are most disadvantaged"*. The actual wording of section 149 of the 2010 Act was not included in the main body of the report.

In its judgment, the Court held that the PSED imposed a duty to have due regard (i.e. regard that is appropriate in all the circumstances) to the factors listed in section 149 of the 2010 Act and that the fundamental requirement in this case was for the decision-maker, having taken reasonable steps to inquire into the issues, to understand the impact of the decision on the disabled children that were potentially affected by the decision.

On the facts, the Court held that the Council's consultation on the proposed funding cuts had complied with the duty to make reasonable inquiry into the issues involved. However, it also held that the Council had failed to have due regard to the factors listed in section 149 of the 2010 Act. The Court held that the summary of the PSED included in the 1 March report (included in italics above) was not specifically tailored to the decision to cut funding for short breaks, and, importantly, asked members to focus on an irrelevant question. The Court held that by not including the actual wording of section 149 of the 2010 Act, and by including the repeated use of the summary of the PSED, the 1 March report suggested that the summary was equivalent to, or a substitute for, the statutory considerations of section 149, which it was not.

The Court was therefore not satisfied that the Council members had asked themselves the right question and quashed the decision in relation to funding cuts for short breaks.



Practical tips

- The decision-maker should record the steps taken to meet the statutory requirements – this will provide evidence that it was more than a “tick box” exercise.
- Any guidance to the decision-maker should either include the wording of the PSED itself, or ensure that any summary accurately paraphrases section 149 and is tailored to the actual decision being taken.
- The time for assessing the impact and having regard to the PSED is before and at the time when the decision is being considered – it should not be applied to the decision after it has been made.
- Those involved in providing information to the decision-maker should resist the temptation to downplay the adverse effects of the decision and exaggerate the benefits – the decision-maker needs a true picture of the impact of the proposed policy in order to apply the statutory criteria properly.

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Is the decision-maker complying with the Well-being of Future Generations (Wales) Act 2015

The Well-being of Future Generations (Wales) Act 2015 sets seven goals for achieving the well-being of Wales.

The Act does not displace or override existing powers or duties of relevant public authorities (known in the Act as 'public bodies') but puts a framework around their decision-making processes.

Relevant public bodies must set objectives and take steps to do things in pursuit of those goals.

In pursuing those goals they must consider the importance of five ways of working set out in the Act.

The Act establishes Public Services Boards for certain relevant public authorities to collaborate on plans to improve well-being at a local level.

What is the Well-being of Future Generations (Wales) Act 2015?

The Well-being of Future Generations (Wales) Act 2015 (“the WFG Act”) gives a legally-binding common purpose – the seven well-being goals – for national government, local authorities, local health boards and other specified public authorities in Wales⁴⁵. It requires those public authorities (known in the WFG Act as “public bodies”) to deliver a public service that meets the needs of the present without compromising the ability of future generations to meet their own needs. The WFG Act sets out the ways in which those public bodies must work, and work together, to improve the well-being of Wales.

The WFG Act requires the public bodies to which it applies to carry out **sustainable development**, which is the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with **the sustainable development principle**, aimed at achieving the **well-being goals**.

What are the well-being goals?

The well-being goals⁴⁶ are:

- a more prosperous Wales
- a resilient Wales
- a healthier Wales
- a more equal Wales
- a Wales of cohesive communities
- a Wales of vibrant culture and thriving Welsh language
- a globally responsible Wales.

Public bodies must consider those goals as an integrated set to ensure the fundamental links between improving the economic, social, environmental and cultural well-being of Wales are recognised. Where it appears that a course of action is consistent with one goal but may not be consistent with other goals, applying **the sustainable development principle** will help to find a solution which strikes an appropriate balance between the goals and other relevant factors.

⁴⁵ The Welsh Ministers, county councils and county borough councils, Local Health Boards, the Public Health Wales NHS Trust, the Velindre NHS Trust, National Park Authorities, Fire and Rescue Authorities, Natural Resources Wales, the Higher Education Funding Council for Wales, the Arts Council of Wales, the Sports Council of Wales, the National Library of Wales, and the National Museum of Wales.

⁴⁶ The Act gives fuller descriptions of each goal.

What are the five ways of working?

In following the sustainable development principle, public bodies must follow the five ways of working by **taking account** of the factors described below. A duty to take account of matters is a duty to consider them alongside other matters before taking a decision.

The five factors to be taken account of are the importance of:

- looking to the **long term** so that public bodies do not compromise the ability of future generations to meet their own needs;
- taking an **integrated** approach so that public bodies look at all the well-being goals in deciding on their well-being objectives;
- **involving** others with an interest in achieving the goals, ensuring those others reflect the diversity of the population;
- working with others in a **collaborative** way to find shared sustainable solutions;
- understanding the root causes of issues to **prevent** them from occurring.

A public body's duty to take account of the importance of those ways of working does not **dictate** the decision they must reach in any given situation: it sets out factors they must conscientiously consider before making a decision to which the well-being duty applies. Public bodies taking such decisions need to ensure they have a clear documentary record of their considerations, setting out a narrative of how the factors were considered and the conclusions the bodies reached, having weighed up the factors against each other and any other factors relevant to the decision. Failure to take account of these factors may lead to a judicial review challenge on the grounds that the public body failed to take relevant considerations into account (see chapter 4).

The **well-being duty** means that, in carrying out sustainable development, the steps a public body must take include:

- setting and publishing well-being objectives that are designed to maximise its contribution to achieving each of the well-being goals, and
- taking all reasonable steps in using its existing powers and duties to meet those objectives.

Public bodies must set and publish such objectives for themselves and also publish statements setting out, among other things, the steps they propose to take to meet those objectives in accordance with the five ways of working. What steps are "reasonable" for public bodies to take in meeting their objectives is a question for them to decide on the basis of their own assessment of the facts of their own particular situations.

The steps for meeting the objectives would include how the body proposes to govern itself, how it will keep the steps under review and how it proposes to ensure that resources are allocated annually for the purpose of taking such steps. These requirements require public bodies to set out particular steps they propose to take to meet the objectives and the things they will do to put themselves in a position to take those steps. This means the steps cannot be simply aspirational.

The WFG Act also ensures public bodies can be held to account for the delivery of the steps they decide to take in order to comply with the well-being duty. The Future Generations Commissioner for Wales and the Auditor General for Wales have significant statutory roles in holding public bodies to account for complying with the WFG Act.

The well-being duty and the sustainable development principle do not displace or override public bodies' duties and powers under other legislation, such as local authorities' duties relating to development control planning, education or social services or local health boards' powers and duties over delivery of healthcare. Instead, the provisions rely on and assume the existence of public bodies' existing powers and duties and put a structure around how public bodies use those powers and duties to seek to meet their objectives.

What are Public Services Boards?

The WFG Act requires a Public Services Board ("PSB") to be established for each local authority area in Wales. The members of those boards are the local authority, the Local Health Board and fire and rescue authority for the local authority area and Natural Resources Wales. Each of the members of a PSB is a public body subject to the well-being duty.

PSBs are required to assess the economic, social, environment and cultural well-being of their areas and then publish that assessment, which is to be an evidence base informing a local well-being plan which sets out local objectives and steps the members of the PSB propose to take to meet those objectives. The contents of the local well-being plan must be unanimously agreed by the PSB members. A PSB member can include in its PSB's local well-being plan objectives that the member has set for itself as a public body, provided the other PSB members agree to the inclusion of the objective. PSBs are required to seek the involvement of certain other types of public body in assessing well-being and in making and delivering on local well-being plans to improve the well-being of their areas.

Practical Example

A local authority decides it should promote the well-being of its area by supporting the regeneration of historic town centres in its area by giving grants to local businesses to improve their premises and by upgrading the road network and pedestrian and cycleways to reduce congestion and provide realistic alternatives to car use. It also decides to publicise and promote buildings of historic and cultural importance (e.g. heritage sites like castles and museums) as hubs for cultural and education activities to address socio-economic disadvantages.

The local authority considers the long-term benefits deriving from the initiative, looks at ways that actions can positively impact on the set of well-being goals, engages with local people and businesses by explaining what it proposes and seeks their views (including how they can contribute to the outcomes), considers how it can work with other public bodies to help achieve the goals and looks to understand the root causes of declines in levels of economic activity and public health in the town.

The proposed actions would help to contribute to:

- a more prosperous Wales, by boosting economic activity
- a resilient Wales, by promoting environmental and ecological benefits flowing from reduced car use
- a healthier Wales, by promoting active travel and alternatives to use of the car
- a more equal Wales, by affording greater opportunities for those subject to disadvantage to benefit from new job opportunities flowing from increased economic activity
- a Wales of cohesive communities, by creating attractive and well-connected communities
- a Wales of vibrant culture and thriving Welsh language, by promoting cultural participation, including in the medium of Welsh
- a globally responsible Wales, by making it easier for local people and businesses to reduce their carbon footprints.

The local authority could include objectives and steps in the local well-being plan adopted by the Public Services Board for its area, if the other members of that Board agree. For instance, the local authority and the Local Health Board for the area could agree steps to collaborate on steps aimed at improving public health.



Case Study

An example of the effects of a failure to comply with a statutory duty to take account of matters before reaching a decision

R (on the application of Winder) v Sandwell Metropolitan Borough Council [2014] EWHC 2617

There is not yet any case law on the well-being duty under the WFG Act but case law on the public sector equality duty in section 149 of the Equality Act 2010 (the “Public Sector Equality Duty”) provides an analogy for what can happen where a public authority fails in a statutory duty to take account of factors before reaching a decision. The Public Sector Equality Duty obliges public authorities to have “due regard” to the need to pursue particular aims relating to equality in using its powers and duties. A duty to have due regard to particular factors is very similar to the duty under the WFG Act to take account of the importance of working in particular ways.

In this case the local authority was obliged to put in place a Council Tax reduction scheme to reduce the Council Tax liability for people in financial need in its area. The decision to adopt the scheme was subject to the Public Sector Equality Duty. At a late stage, the authority decided to limit eligibility to benefit from its scheme to those who had been resident in the borough for at least two years. It did not carry out any assessment of the impact of imposing that limitation on those with protected characteristics. The authority therefore failed to have regard (or take account) of the factors in the Public Sector Equality Duty. Partly as a result of its failure to have due regard to those factors, its decision to adopt the Council Tax reduction scheme was unlawful.



Practical tips

- Treat the goals as an integrated set, ensuring the package of objectives chosen contributes to all of the goals
- When choosing objectives and steps for achieving them, consider whether they are actually achievable and focus on how they will contribute to achieving the goals
- Keep a clear record of how the decision-makers have considered the importance of the five ways of working in setting objectives and steps and in taking action to seek to meet them

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Is the decision-maker complying with data protection and freedom of information requirements?

Public authorities must comply with the Data Protection Act 1998 and the Freedom of Information Act 2000 in the exercise of all their functions. Failure to do so may lead to a complaint being made to the Information Commissioner's Office and, ultimately, in the case of the Data Protection Act, to criminal convictions and/or civil penalties. Decision-makers should keep these requirements in mind at all stages in the decision-making process.

It is unlikely that any breaches of the Data Protection Act 1998 or the Freedom of Information Act 2000 will be grounds for judicial review in their own right, although in some cases a failure to comply with the Data Protection Act in particular may have human rights implications.

The Data Protection Act 1998 establishes a framework to ensure that individuals and organisations handle personal data appropriately and creates rights for individuals to access data held about them.

The Freedom of Information Act 2000 allows members of the public to request information from public authorities and requires public authorities to publish certain information about their activities.

What are the requirements of the Data Protection Act 1998?⁴⁷

The Data Protection Act 1998 (“DPA”) regulates the handling of personal information about individuals (referred to as personal ‘data’ in the DPA). It also confers rights on individuals to access personal data held about them. The DPA applies to all individuals and organisations, including public authorities that process personal data.

In circumstances where a person or organisation is the ‘data controller’ for the personal data, section 4(1) of the DPA provides that the data controller must comply with the eight data protection principles, including, under the first data protection principle, the requirement to process personal data “fairly and lawfully.” This requires a data controller to be satisfied that the processing:

- Is lawful – this means that in addition to complying with data protection law, the processing must not be unlawful for any other reason, such as breaching other legislation, a court order, copyright law or a duty of confidence. In situations where the data controller is a public authority which derives its powers from legislation such as the Welsh Government, there would also be a need to ensure that there is a power in law that permits the data processing
- Is fair – this requires a data controller to be open with individuals about what they are going to do with their personal data. Generally speaking data will be processed fairly if the method by which it was obtained was fair e.g. the person providing the data was not deceived or misled as to the purpose for which the data is being obtained. In practice this is often satisfied by issuing a fair processing notice/privacy notice which explains how an individual’s personal data is to be processed
- Satisfies one or more of the conditions in Schedule 2 to the DPA
- In the case of sensitive personal data, satisfies one or more of the conditions in Schedule 3 to the DPA.

When is the Data Protection Act 1998 engaged?

Public authorities and all other persons that process information must first consider whether the action or decision to be taken is likely to engage the DPA. Consideration will therefore have to be given to whether:

(i) the information to be processed is ‘personal data’

In order to understand what personal data means, it is first of all necessary to consider what ‘data’ means. ‘Data’ is defined in section 1(1) of the DPA. In practice if an organisation is a public authority for the purposes of the Freedom of Information Act 2000, then any information it holds is likely to satisfy the definition of ‘data’ in the DPA.

⁴⁷ It is also noted for completeness that the European Union’s new data protection Regulation (EU Regulation 2016/679) will have effect from 25 May 2018. It is anticipated that this will have a significant impact on the existing DPA framework.

The term 'personal data' is defined in section 1 of the DPA. It captures information that would allow a living individual to be identified either from that data or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller. In some cases, an individual's name together with other identifying information such as an address could be enough to identify an individual. However, it is important to note that an individual is still capable of being identified in circumstances where their name is not known. Each case would need to be considered on its own facts.

In addition there is a sub-category of information, 'sensitive personal data', where the data relates to any of the matters listed in section 2 of the Act (e.g. racial or ethnic origin, political opinions, religious beliefs, sexual life). There are additional requirements for processing sensitive personal data.

(ii) the proposed use of the personal data constitutes 'processing'

The term 'processing' is defined in section 1 of the DPA. This is a very wide definition which essentially captures anything that can be done with personal data. For instance, obtaining it, creating it, recording it, disclosing it and destroying it. It would also extend to reading it or simply holding the personal data, even if nothing is actually being done with it.

If the answers to these questions are 'yes' – that the information is 'personal data' and 'processing' is taking place – a public authority (and any other body that processes personal data) must consider whether it is the 'data controller' as defined in section 1 of the DPA.

The data controller is the person who decides the purpose for which data is processed and the manner in which it will be processed. The data controller may be acting as a lone data controller or could be acting jointly or in common with another data controller. In deciding whether a public authority is a data controller in respect of the personal data that is being processed, one of the key questions to ask is whether it is being dealt with for the purposes of that authority. For example, personal data likely to fall in this category would include the holding of personal data of individuals who have applied for grant funding from that authority.

The data controller must comply with each of the Data Protection Principles set out in Part 1 of Schedule 1 to the DPA.

What are the consequences of failing to comply with the Data Protection Act 1998?

Failure to comply with DPA requirements is not a ground for judicial review in its own right and compliance with the DPA is not usually a 'relevant consideration' for judicial review purposes (see chapter 4 on relevant and irrelevant considerations). However, processing personal data potentially engages Article 8 of the European Convention on Human Rights (right to private and family life) and therefore any decision to process data will need to be justified in that context.

Failure to comply with DPA requirements can lead to enforcement by the Information Commissioner. Enforcement options include financial penalties (by means of fines of up to £500,000) and criminal sanctions. In addition, an individual who has suffered distress as a result of a breach of the Act may pursue a claim for compensation in the civil courts.

What is the Freedom of Information Act 2000?

The Freedom of Information Act 2000 ("FOIA") has two main purposes:

- (i) It gives everyone a right to access recorded information held by public authorities in England, Wales and Northern Ireland. Public authorities can only refuse to release such information where there is a good reason for doing so and it is permitted by FOIA.
- (ii) It requires public authorities to adopt a publication scheme and to proactively publish certain information covered by the scheme (e.g. policies and procedures, minutes, annual reports, financial information). The Information Commissioner's Office has developed a model publication scheme to assist local authorities to comply with this requirement.

The guidance contained in the remainder of this chapter relates to the first of these purposes; a person's right to access recorded information held by public authorities.

Public authorities are defined in Schedule 1 to FOIA and include UK government departments and devolved administrations, local authorities, the NHS and police forces. The Secretary of State has a power to add further bodies to the list of public authorities.

FOIA does not allow people to access personal information that is held about them (for which see above about the Data Protection Act 1998). Generally, the Data Protection Act is intended to regulate how the personal data of individuals must be handled by placing obligations on individuals/organisations that are responsible for the processing of that data.

The main principle behind FOIA is that individuals have a right to know about the activities of public authorities unless there is a good reason not to. This is often referred to as a presumption in favour of disclosure.

Section 1 of FOIA essentially creates two rights;

- The right to know – the right to be told if the public authority holds the information requested: and,
- The right of access – to be provided with a copy of the information, if the public authority holds it.

Information may be withheld if it can be justified with reference to one or more exemptions. In some cases those exemptions can be applied to either one or both of these rights.

What information may be requested under the Freedom of Information Act 2000?

FOIA provides that a person may request the release of any recorded information held by a public authority and includes, for example, advice to the decision-making body (including drafts), emails, notes and CCTV recordings. It includes information that is received by public authorities (e.g. letters received from members of the public, consultation responses). Such information must be released unless there is a good reason for withholding its release under FOIA

FOIA also covers information held on a public authority's behalf, even if it is not held in the authority's premises (e.g. if it is kept in storage on the authority's behalf or in circumstances where official information is contained in private email accounts). However, FOIA does not require any *new* information to be created for the purpose of responding to the FOIA request; FOIA only applies to recorded information already in existence at the date of the request.

What must public authorities do when they receive a request for information?

FOIA gives everyone a right to request information from a public authority. Requests can therefore be made by persons that are not UK citizens or residents, and can also be made by organisations (e.g. newspapers, interest groups, companies). All requests should usually be treated in the same way, regardless of the nature or status of the requester, although there are some instances where the identity of the requester would be relevant (e.g. in circumstances where the information includes the requester's own personal data which would need to be handled as a subject access request under section 7 of the Data Protection Act 1998 or when refusing a request on the grounds that it is a repeated or vexatious request under section 14 of FOIA).

Any request made in writing for particular information is a valid request for FOIA purposes, whether or not FOIA itself is mentioned, provided that the applicant gives his or her real name and an address for correspondence. Such requests may be made by letter, email, or on social media (e.g. Facebook, Twitter). Once the request is received, public authorities must tell the requester whether it holds any information falling within the scope of the request, and must provide that information (even if the public authority is aware that the information is inaccurate or wrong). The public authority must comply promptly, and usually within 20 working days. In some circumstances, FOIA allows public authorities to recover the communication costs (e.g. photocopying costs) incurred in providing the information.

If the request is unclear, the public authority must contact the requester for clarification as soon as possible. The time limit for compliance starts when the public authority has sufficient clarification/information to be able to understand the request properly.

Can public authorities decide to refuse requests for information?

Public authorities are not always obliged to provide the information that they hold. A request may be refused in its entirety if it falls within one of the following provisions provided for under Part I of FOIA:

- Section 12 - It would exceed the 'appropriate limit'. Namely, it would cost too much or take too much staff time to deal with the request. The 'appropriate limit' is currently set at £600 (in the case of UK government departments, Parliament, the National Assembly for Wales, the Welsh Government, the Northern Ireland Assembly, the armed forces) or £450 (for all other public authorities);
- Section 14(1) - the request is vexatious;
- Section 14(2) - the request repeats a previous request made by the same person.

In addition to the above, Part II of FOIA provides for a number of exemptions that allow public authorities to withhold information. The most relevant exemptions for the purpose of this guidance include:

- information that is already reasonably accessible (section 21);
- information received by security bodies or that is required for national security (sections 23 and 24);
- information that would prejudice relations between the UK Government and the devolved administrations (section 28);
- information that would prejudice particular law enforcement purposes, including preventing crime (section 31);
- information that relates to the formulation or development of government policy (section 35);
- information that would prejudice the effective conduct of public affairs (section 36);
- personal information about the applicant (section 40(1)) or personal information about someone other than the applicant (section 40(2));
- information that would reveal information that is subject to legal professional privilege (section 42).

Some FOIA exemptions are absolute, while others are qualified exemptions.

If an absolute exemption applies there is no duty to release the information. The absolute exemptions are listed in section 2(3) of FOIA. These include an exemption under section 40(2) for the personal data of third parties in circumstances where disclosure would breach the DPA and section 41 – where disclosure would breach the law of confidence.

Where a qualified exemption applies, public authorities are required to assess the balance of the public interest for and against disclosure. The public interest test requires a public authority to determine whether the public interest in withholding the information is sufficient to outweigh the public interest in disclosing it by considering the content of the information in the light of the potential exemption that might be claimed. The presumption lies in favour of disclosure since the public interest in favour of withholding must be sufficient to outweigh the public interest in favour of disclosing.

Public authorities may need to seek further specialist advice if they are considering relying on an exemption to refuse to release information.

What are the consequences of failing to comply with the Freedom of Information Act 2000?

As is the case in relation to breaches of the DPA, failure to comply with FOIA is not a stand-alone ground for judicial review. However, public authorities should bear in mind at all stages in their decision-making processes that members of the public may request the release of information that is related to that action or decision, that there is a presumption in favour of disclosure, and that appropriate filing and recording procedures should be adopted.

A public authority may be breaching FOIA if it:

- fails to respond adequately to a request for information;
- fails to publish the correct information;
- deliberately destroys, hides or alters information to prevent it being released.

The Information Commissioner's Office ("ICO") has a duty to investigate complaints from members of the public. If the ICO agrees that there has been a breach of FOIA, and if the breach is not resolved informally, the ICO may issue a decision notice setting out the steps that the public authority are required to take to remedy the breach. Failure to comply with the decision notice may lead to the ICO writing to the High Court with notice of the failure, which may be dealt with as contempt of court.



Data Protection Act 1998

Monetary penalty of £150,000 imposed on Dyfed-Powys Police by the ICO for failing to comply with data protection principles.

In 2015, a Dyfed-Powys police officer sent an email that was intended for internal colleagues, and which contained details of eight sex offenders, including their names, addresses and telephone numbers to an external party by mistake.

The Information Commissioner found that Dyfed-Powys police had failed to comply with the seventh data protection principle – that it had failed to take appropriate technical and organisational measures against the unauthorised processing of personal data. It also found that the conditions

for imposing a monetary penalty – including that the breach was serious, was of a kind likely to cause substantial damage or substantial distress, and was reasonably foreseeable – were satisfied.

The Information Commissioner issued its decision notice on 2 June 2016. It imposed a fine of £150,000, payable by 5 July 2016. The Commissioner's rationale for imposing the fine was to promote compliance with the DPA and to reinforce the need for data controllers to ensure that appropriate and effective security measures are applied to personal data.



Freedom of Information Act 2000

Decision notice issued against the Home Office, dated 7 July 2016.

The complainant wrote to the Home Office on 7 December 2015, requesting information relating to Immigration Removal Centres. The Home Office responded on 5 February 2016, but did not include the requested information. The complainant replied on the same date, requesting that the Home Office undertake an internal review of the request. The only response that the complainant received to that reply was an email on 9 March 2016, when the 5 February 2016 response was re-sent.

The complainant contacted the Information Commissioner on 28 March 2016 to complain. The Commissioner contacted the Home Office, requesting that it provide a response to the complainant's request, or to explain why action was not necessary. The Home Office responded on 15 June 2016, accepting

that its earlier response had not been compliant with FOIA and confirming that a response would be sent to the complainant by 30 June 2016. That response had not been sent by the date the decision notice was issued on 7 July 2016.

The Information Commissioner's decision was that the Home Office had breached sections 1(1) and 10(1) of FOIA by failing to notify the complainant whether it held the requested information and by failing to respond in line with FOIA within 20 working days. The decision required the Home Office to respond to the complainant's request in accordance with FOIA, and noted that failure to comply could lead to the Commissioner writing to the High Court with notice of non-compliance, which could lead to proceedings for contempt of court.



Practical tips

Data Protection Act 1998

- Decision-makers should consider whether the action or decision being taken requires personal data and/or sensitive personal data to be processed.
- Where personal data will be processed, decision-makers (and all others that process personal data) should consider whether they are the 'data controller' for the data.
- Consideration should be given to what steps can be taken in order to comply with the DPA, including the eight Data Protection Principles listed in Part 1 of Schedule 1.

Freedom of Information Act 2000

- Public authorities should bear in mind that each written request that they receive for information, however framed, is a request under FOIA (provided that it contains the applicant's name and address). Officials, particularly those that deal with communications from members of the public, should receive appropriate training in order to assist them to identify FOIA requests.
- Requests for information may often be vague. Public authorities are required to be proactive in ascertaining the scope of the request by means of early and meaningful engagement with the requester.
- Appropriate systems should be put in place to ensure that requests are dealt with promptly and within 20 working days.
- Officials who are responsible for handling FOIA requests should receive suitable information and training on FOIA exemptions, and may need to seek further specialist advice before deciding whether the requested information falls within the scope of one or more FOIA exemptions.

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Is the decision-maker complying with its Welsh language standards?

The Welsh Language (Wales) Measure 2011 makes provision for the development of standards of conduct relating to the Welsh language.

The Welsh Ministers prepare the standards and draft the Regulations which contain them.

The Welsh Language Commissioner chooses which standards to impose on individual organisations through compliance notices.

Before an organisation has to comply with a standard a number of conditions have to be met.

An organisation can challenge the requirements to comply with a particular standard on the grounds of whether it is reasonable and proportionate to require them to do so.

The Welsh Language Commissioner will have the responsibility for enforcing compliance with standards and can impose sanctions for failure of compliance by an organisation.

What are the Welsh language standards?

The Welsh Language (Wales) Measure 2011 (“the Measure”) makes provision for the development of standards of conduct relating to the Welsh language. The standards will gradually replace the existing system of Welsh language schemes provided for by the Welsh Language Act 1993, effectively modernising the existing legal framework regarding the use of the Welsh language in the delivery of public services.

The standards are made by being specified in Regulations made by the Welsh Ministers. Once those Regulations are approved by the National Assembly for Wales, it will be for the Welsh Language Commissioner, whose office is established by the Measure, to choose which standards to impose on individual organisations, including public authorities. The Commissioner does this by issuing a compliance notice to the organisation setting out which standards the organisation has to comply with.

Before an organisation is required to comply with a standard a number of conditions have to be met. These include that the organisation falls within (or within a category in) Schedule 5 and 6 or Schedule 7 and 8 to the Measure and that a compliance notice has been given to the organisation by the Commissioner requiring it to comply with the standard. Once an organisation is under a duty to comply with a standard, it applies to a broad spectrum of the organisation’s activities, and some standards may apply specifically to the organisation’s policy-making or decision-making functions.

What different types of standards can be made?

The Welsh Ministers can specify 5 types of standards in regulations:

- Service delivery standards – these relate to the delivery of services in order to promote or facilitate the use of the Welsh language, or to ensure that it is treated no less favourably than English.
- Policy making standards – these require organisations to consider what effect their policy decisions will have on the ability of persons to use the language and on the principle of treating Welsh no less favourably than English.
- Operational standards – these relate to the internal use of Welsh by organisations. If operational standards are imposed on an organisation, that organisation will be expected to increase the opportunities to use Welsh in their internal arrangements.
- Promotion standards – these relate to promoting or facilitating the use of the Welsh language more widely.
- Record keeping standards – these make it necessary to keep records about some of the other standards, and about any complaints received by an organisation. These records will assist the Commissioner in regulating the organisation’s compliance with standards.

What Welsh language standards have been made?

So far, the National Assembly for Wales have approved four sets of Regulations which specify standards. These standards may then be imposed on the organisations listed in the Regulations (by a compliance notice issued by the Commissioner) if all the relevant conditions are satisfied.

The Regulations have been developed on a sectorial basis:

- the Welsh Language Standards (No. 1) Regulations 2015 specify standards in relation to the conduct of the Welsh Ministers, Local Authorities and National Park Authorities;
- the Welsh Language Standards (No. 2) Regulations 2016 specify standards in relation to the conduct of 32 public authorities, including the Arts Council of Wales, the BBC, S4C, the National Library of Wales, the National Museums of Wales;
- the Welsh Language Standards (No. 4) Regulations 2016 specify standards in relation to the conduct of tribunals;
- the Welsh Language Standards (No. 5) Regulations 2016 specify standards in relation to the conduct of the police and other bodies.

How does an organisation know which standards it needs to comply with? - Compliance Notices

The above Regulations set out the range of standards which could be imposed on the organisations named in those Regulations. However, there is no requirement on the Commissioner to require each organisation listed in the Regulations to comply with every standard. The Commissioner has discretion to choose what standard(s) to impose on which organisations, the extent to which the organisation has to comply with the standard, as well as setting the date by which the organisation is required to comply with a standard. The Commissioner does so by means of a compliance notice.

The Commissioner will therefore have several options when it comes to which standards to impose on an organisation. The organisation may have to comply with a standard only in some circumstances and not in others, depending on what is appropriate for them.

The Commissioner is required to consult with an organisation before issuing it with a compliance notice.

Can an organisation appeal the imposition of a standard?

An organisation can challenge the requirement to comply with a particular standard on the grounds of reasonableness and proportionality. In the first place, an organisation will be able to present a challenge to the Commissioner. If the organisation then wishes to appeal the Commissioner's decision, they may appeal to the Welsh Language Tribunal, and thereafter to the High Court.

What are the sanctions for failing to comply with a standard?

The Commissioner will have the responsibility for enforcing compliance with standards and may take the following enforcement action:

- deciding whether to investigate statutory complaints under section 93 of the Measure on the conduct of an organisation in relation to a standard it is required to comply with;
- investigate under section 71 of the Measure where it is alleged that an organisation has failed to comply with a standard. If, as a result of such an investigation, the Commissioner determines that an organisation has failed to comply with a standard, then the Commissioner can:
 - require the organisation to prepare an action plan or to take steps which will prevent the continuation or repetition of the organisation's failure to comply with the standard;
 - publicise the organisation's failure to comply;
 - require the organisation to publicise the failure to comply;
 - impose a civil penalty on the organisation (up to a maximum value of £5,000).



Practical tips

- Public authorities should familiarise themselves with the standards that they are required to comply with by consulting the relevant regulations made by the Welsh Ministers and the compliance notice issued by the Commissioner.
- The standards will apply across a broad range of a public authority's functions, and some standards may apply specifically to the public authority's policy-making or decision-making processes. Specialist advice should be taken where there is any doubt as to the standards' requirements.

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