INTRODUCTION

The Cuts

On 20th October 2010 the government announced the outcome of its comprehensive spending review. This included the following:

- Reductions of 28% in local authority budgets over the next four years. This compares with cuts of 8.3% across all other government departmental budgets. Local authority core funding from central government falls from £28.5 billion in 2010/11 to £22.9 billion in 2014/15 (a reduction of £3.2 billion). The reduction is more than 7% per year in real terms and significantly front loaded.

- Local authority capital funding is cut by the equivalent of 45% over the period, compared with 29% over the whole of the public sector.

- Local authorities can still borrow money from central government through the Public Works Loan Board (PWLB) but interest rates have been increased by 1% with immediate effect.

- £470 million is allocated over four years towards building the voluntary sectors' capacity so that it can delivery the government's big society agenda.

- Of this amount £100 million is set aside as a transition fund to help the voluntary and community sector adjust to new public spending budgets.

- The Core Cabinet Office budget (which includes the Office for Civil Society) will be reduced by £55 million by 2014/15.

In response to the spending review the Local Government Association has estimated (on 25th November 2010) that around 140,000 local government jobs will be shed in

the next year as a result of the spending cuts. Job losses are likely to be 40% higher than was originally thought at the time of the spending review. This is because the cuts are front loaded meaning that councils will have to trim their budgets by an average of 11% in 2011/12. Overall job loses in the public sector are expected to be around 330,000. It is also anticipated that there will be a knock on effect in the private sector as public sector contracts are cut back.

These cuts come on the back of cuts of more than £1 billion which were made in local authority budgets during the course of 2010.

The leading accountancy firm KPMG said of the cuts:

> *"The future for local government is one of dramatic challenge, in order to survive, councils will need to be ruthless in urgently deciding on front line service priorities and ending lower priority services."*

The spending review also announced cuts in welfare spending of £7 billion to be added to the £11 billion reduction announced in the June 2010 budget.

On 13 December 2010 the government announced its financial settlement for local government. The Local Government Association issued the following statement:

> "*This is the toughest local government finance settlement in living memory. A few councils have seen a reduction in the money they receive from the Government of up to 17% in the first year. As a result councils face a total funding shortfall of £6.5 billion over the next year.*
>
> *We have been clear that the level of spending reduction that councils are going to have to make goes way beyond anything that conventional efficiency drives, such as shared services, can achieve. We have to face the fact that this level of grant reduction will inevitably lead to cuts in services."*

It has been estimated that charities could lose £4.5 billion as a result of spending cuts, a continuing decline in giving, and forthcoming increases in VAT. Research suggests that prior to the spending review council grants to local organisations had been cut back extensively[1].

Cuts and the Compact

Evidence suggest that in the face of these cuts local authorities and other parts of government may disproportionately cut funding to third sector organisations before cutting other services. The evidence referred to in a recent publication by the Commission for the Compact states that:

> *"Central government departments appear to treat this kind of funding [to third sector organisations] as a more flexible or discretionary element to be increased or decreased in response to economic exigencies"*

The Commission notes that risk is important as 35% of the third sector's income comes from statutory sources.

The possible consequences identified by the Commission are as follows:

- An increase in third sector organisations (TSOs) folding and leaving unfulfilled contracts with the government

- A risk in the supply chain for smaller TSOs if their suppliers are bankrupt.

- A risk that central government and/or local authorities may not heed compact undertakings around funding as effectively during the recession (for example in December 2009 the Minister for the third sector Angela Smith had to apologise for an admitted breach of compact when she decided to withdraw

[1] Kane D 2010 ("Crowd Sourcing the Cuts – the story so far") (This research published on 15th October 2010, that is, before the spending review reports cuts of about £5million from information gleaned from only 614 organisations. The cuts amounted to about 2% of budget.

£750,000 of funds which had been promised to a small group of charities for the Campaign Research Programme.

- More mergers of TSOs could change established relations between them and their funding organisations.

- Increase competition for government funding may have a negative effect on the independence of TSOs. TSOs may feel less comfortable in challenging the government in a period of austerity.

- Cuts in government services may lead to an increase for demand for services provided by TSOs. This increase may be asymmetrical for example, employment and debt service requirements may increase.

- Reductions in funding to TSOs may mean that there is a higher turn over of volunteers and employees leading to inconsistency of service and difficulty in maintaining quality.

- Funding linked to outcomes in the employment sector may be at risk. Many TSOs are delivering public sector contracts in the employment and skills sector where payments are linked to the achievements of outcome targets. If unemployment increases these targets may not be achievable.

- On the positive side funding cuts may present opportunities for new partnership working may lead government to invest more money in the voluntary sector (see the Big Society Agenda) and may lead to an increase in volunteering.

Local authorities and cuts

Public authorities cannot use the allocation of a fixed level of resources as an excuse for failing to meet a statutory duty owed to an individual such as the provision of community care services where an individual has been assessed as being eligible for such a service.

The question of whether social welfare provision is made pursuant to a duty or the exercise of a power on general target duty, is therefore of critical importance not only at the level of individual decision making but at the strategic and political level of overall budget setting. The importance of the nature of the powers and duties operated by public authorities increases when competition for access to reduced resources is particularly intense as will be the case in coming years.

Local authorities are creatures of statute and may only act in accordance with authority given to them by parliament.[2] Authorities are required to act when under a legal duty to do so however local authorities are also given powers in the form of what appear to be very broad discretions; even when the law imposes individual duties it may require the exercise of some kind of judgement professional or otherwise in triggering or delivering that duty.

Despite the existence of these discretions, authorities cannot exercise their powers in an unrestrained way. They must do so in accordance with public law principles; they must apply the relevant law correctly, make rational decisions and do so having followed a fair process.

This has implications not only for the local authorities themselves who must act lawfully but also those who are receivers of those decisions. Participation in local authority decision making requires recipients of local authority services and funding to be familiar with not only the relevant statutory framework under which local authorities act but the principles which govern their discretionary powers. What is required is a public analysis which informs a sustainable view on the lawfulness of the decision (act or failure to act) in public law terms.

[2] Although it would appear that this fundamental constitutional principle is about to be replaced by the General Power of Competence proposed in the Localism Bill

The need for these skills will become increasingly important in the current economic climate as the most common underlying issue in public law disputes is usually accessed to resources.

This course is intended to look at the limits of local authority decision making in the context of overall cuts in available funding. It focuses not on breaches of statutory duty but rather on those areas where local authorities apparently have discretion. Some of the limits to that discretion are imposed by statutory provisions such as equalities legislation, others however are more nuanced deriving from common law (case law). These include circumstances in which local authorities may be required to consult or where individuals may have a right to a continuation of a service based on a local authority's previous actions or promises.

The relationship between public authority decision making and public law may not, however, be easily compartmentalised and the potential reach of the courts is illustrated in the following example.

The decision on how much money a local authority may choose to allocate to any area of its responsibilities is of course a political decision and not on the face of it one for the courts. This may however be to over simplify the issue. In the recent case of R (Domb and others) v Hammersmith & Fulham LBC.[3] The Court of Appeal considered a challenge to the local authority's decision to introduce charges for its domiciliary care services. The local authority, having already decided to reduce Council Tax by 3% some months before, was faced with a choice between raising eligibility criteria, or introducing charges. As part of its impact assessment required by the statutory equality duties the local authority consulted on the proposal to introduce charges. The claimants complained that the local authority had failed to have due regard to those duties and that the impact assessment - which had concluded that there would be positive benefits to maintaining eligibility criteria - was perverse, as it was based on the false premise that the only two choices were to

[3] [2009] EWCA Civ 941

raise eligibility criteria or introduce charges. The court held that there was no evidence that the local authority had failed to consider its equality duties in relation to the decision it was then making. Sedley LJ articulated the court's unease in reaching that decision:

> "*The object of this exercise was the sacrifice of free home care on the altar of a council tax reduction for which there was no legal requirement. The only real issue was how it was to be accomplished. ….there is at the back of this a major question of public law: can a local authority, by tying its own fiscal hands for electoral ends, rely on the consequent budgetary deficit to modify its performance of its statutory duties? But it is not the issue before this court".* (Para 80)[4]

Issues in this case play out in at least two ways. First can a local authority, by citing budget cuts, constrain in terms of a consultation exercise. To simplify the matter greatly, can a local authority consult on the basis of two unpleasant options or does there have to be an option where consultees can say that they do not want any cuts at all.

Secondly, is it possible for budget cuts to come into conflict with the underlying purpose for which local authority's services are provided. This question arises in, for example, Birmingham City Council's proposals to restrict their eligibility criteria for the provision of community care services to those who only have critical needs for personal care. Despite the seemingly unavoidable reduction in the social services budget it may be the case that to make such reductions undermines the underlying statutory purpose of community care legislation.

The sometimes unclear boundaries between public and private law local authorities may wrongly believe that making of revised budgetary decisions involves only issues of contract and compliance with procurement laws. A number of recent examples in Birmingham demonstrate that this is not the case.

[4] See also R (Hajrula and Hamza) v London Councils [2011] EWHC 151 (QB)

In 2008 the a number of service users in the city with serious mental health disabilities challenged successfully a decision by Birmingham City Council to withdraw funding from a third sector specialist mental health service provider. The service users brought the judicial review.

Similarly, in relation to the City's most recent re-tendering of Supporting People services a number of legal proceedings have emerged which have been brought by service users rather than those who deliver the service and whose funding was cut in the first instance. At least one of these challenges raises a supplementary issue namely the interrelated duties of local authorities. In the case in question a withdrawal of Supported People, a housing service, led to a challenge under community care legislation.

These cases also illustrate the sometimes difficult balance which needs to be struck between procurement law and local authority service commissioning. In two of the challenges to the Supporting People tendering exercise grounds of claim raised issues of lack of consultation with service users and failure to comply with equalities legislation. The origins of these challenges, however, lay in the local authority endeavouring to comply with procurement law by not giving unfair advantage to existing service providers.

This course will cover three things. First, how the relationship between public bodies and the voluntary sector in Birmingham is governed by the statutory framework which applies to local authority governments, and the Compact. Secondly, how public law affects the relationship between these two sectors having regard to general public law principles and statutory obligations. Thirdly, how, in practice, unlawful decisions of public bodies are challenged through the mechanism of judicial review.

I THE FRAMEWORK: THE COMPACT, SUSTAINABLE COMMUNITY STRATEGIES, THE BIG SOCIETY AND LOCALISM

1.1 THE COMPACT

1.1.1 The Compact is an agreement between government and the third sector in England. It sets out commitments on both sides which aims to improve the way in which the government and third sector now called civil society organisations (CSOs) work together. It also provides a framework for negotiating local compacts. The Compact extends to organisations with funding relationships with the government as well as informal organisations who wish to be heard on policy questions. The latest version of the Compact (the 'Revised Compact') was published on 14 December 2010.

1.1.2 The compact was developed from recommendations made in the 1996 Report of the Deakin Commission on the future of the voluntary sector. The Commission concluded that the government should recognise the importance of the third sector's diverse roles and its own responsibility to promote a thriving third sector. The Compact's website states:

> *"Although the Compact is not legally binding and is build on trust and mutual goodwill, its authority is derived from its endorsement by government and by the voluntary and community sector itself through its consultation process."*

1.1.3 In signing up to the Compact the government has made it applicable to all central government bodies in England. This includes:

- Government departments
- Government offices for the regions
- Executive agencies
- Non-departmental public bodies

1.1.4 The majority of relationships between the third sector and public bodies exist at a local level. The national compact is not applied directly to these relationships. Instead there are local compacts which govern the relationship with local government, NHS organisations the police and other local statutory bodies.

1.1.5 Local compacts are designed to be built on the principles of the National Compact.

1.1.6 Until recently Compact principles were also reflected in local performance frameworks for local authorities and their statutory partners (see statutory guidance contained in *Creating Strong Safe and Prosperous Communities: Statutory Guidance, 2008)*. However these frameworks were effectively abolished on 13 October 2010. With the Revised Compact the Government has published a set of measures to ensure greater accountability and transparency around the implementation of the Compact. These include a one off inquiry by the National Audit Office into the operation of the Compact across government, a requirement of government departments to include a statement on how the Compact is being implemented in their business plans and the development of a Compact Advocacy Programme to mediate and support CSOs to adhere better outcomes in their dealings with public bodies.

Compact principles

1.1.7 The renewal Compact begins with a statement of Coalition Government's commitment to the principles of the Big Society which are described as being the desire to give people more power and control over their lives and communities, to reform public services and to champion social action over state control and top-down Government targets. It continues *"The role of Government is to enable this cultural change by shifting power away from the*

centre ... CSOs are central to this vision." Compact principles are stated to be important in ensuring empowerment and sustainable communities.

Compact Commitments

1.1.8 The compact sets out the following commitments on the part of government and CSOs.

1. A strong, diverse and independent civil society
2. Effective and transparent design and development of policies, programmes and public services
3. Responsive and high-quality programmes and services
4. Clear arrangements for managing changes to programmes and services
5. An equal and fair society

1.1.9 These general headings contain specific undertakings on the part of government and the CSOs, for example, the commitment to consult before bringing funding arrangements to an end.

The Birmingham Compact

1.1.10 The Birmingham Voluntary Sector Compact is an agreement between the statutory and voluntary sectors in Birmingham. It arises from work carried out by the Birmingham Voluntary and Community Sector Commission. The original Compact was published in July 2005. A refreshed compact was endorsed in November 2010.

1.1.11 Like the national compact the Birmingham compact sets out a framework of principles and values that, although not legally binding, establish what

voluntary sector organisations can expect when being commissioned to provide services. The values are as follows:

- Involving involuntary and community sector in policy development
- Strengthening relationships based on funding and resources for a better service
- Promoting equality

1.1.12 The new compact includes a set of checklists which provide a step by step tick box list to ascertain whether a decision is in line with the Compact. The checklists cover:

- Procurement and commissioning
- Grants
- Services and programmes
- Policy
- Consultation
- Partnerships and involving communities; and
- Leadership and management

1.1.13 The Compact, therefore, provides detailed best practice guidance for partnership working.

1.2 SUSTAINABLE COMMUNITY STRATEGIES AND LOCAL AREA AGREEMENTS

Sustainable Community Strategies

1.2.1 Part 1 of the Local Government Act 2000 places on local authorities a duty to prepare 'Community Strategies' for promoting or improving the economic, social and environmental wellbeing in the areas.

1.2.2 Section 4 of the Local Government Act 2000 was amended by Section 7 of Sustainable Communities Act 2007 so that Community Strategies are now called Sustainable Community Strategies.

1.2.3 Although the Local Government Act was part of the last government's local authority reform programme, the Coalition Government has made no suggestion that the requirement to prepare a sustainable Community Strategy should be repealed.

1.2.4 Guidance on preparing a SCS was included as part of the 2008 publication 'Strong Safe and Prosperous Communities'. The guidance says:

> *"The purpose of the SCS is to set the overall strategic direction and long-term vision for the economic, social and environmental wellbeing of a local area – typically 10 to 20 years – in a way that contributes to sustainable development in the UK."*

1.2.5 A Strategy should:

- Allow local communities to articulate their aspirations, needs and priorities.
- Coordinate the actions of the council and of the public private, voluntary and community organisations that operate locally.
- Focus and shape existing and future activity of those organisations so that they meet community needs.
- Contribute to the achievement of sustainable development.

1.2.6 The community strategy is required to have four components:

- A long term vision for the area focusing on the outcomes that had to be achieved.
- An action plan identifying shorter term priorities and activities
- A shared commitment to implement the action plan and proposals for doing so
- Arrangements for monitoring the implementation of the action plan, for reviewing strategy and for reporting progress to local communities.

Local Strategic Partnerships

1.2.7 In launching Community Strategies the government stated that the most effective way of ensuring the commitment of other organisations would be for local authorities to work with other bodies through a Local Strategic Partnership (LSP).

1.2.8 Although no definitive approach was specified for the way in which such partnerships should be structured it was stated that, in particular, the voluntary and community sector could contribute knowledge of specific communities and expertise in a range of fields which other partners may lack.

1.2.9 Guidance issued at the time said that a Local Strategic Partnership should provide a voluntary framework for local cooperation.

Local Area Agreements

1.2.10 Local Area Agreements were introduced in 2004 and adopted in 20 pilot areas in March 2005. They were introduced across local authorities in 2007.

1.2.11 A Local Area Agreement is a three year agreement that sets out priorities for a local area agreed between central government (represented by the Government Office) and a local area represented by the local authority and local strategic partnership and other key partners at local level. The

agreement should be refreshed annually to reflect changes in national and local priorities.

1.2.12 The initial guidance indicated that community engagement delivery by the third sector was an important element in LAAs development. It is noted that local strategic partnerships should already have representatives of the voluntary sector on them. The guidance stated that LAAs should include a statement of the involvement of the voluntary sector and local people in the design and delivery of the agreement. It should state how local people and the voluntary sector have been informed, consulted and given the opportunity to participate in the LAA process and the delivery of outcomes.

1.2.13 The Local Government and Public Involvement in Health Act 2007 placed LAAs on a statutory footing. Section 106 of the Act requires local authorities to prepare and submit an LAA to the Secretary of State when he/she directs.

1.2.14 In preparing the draft local area agreement the responsible authority must consult *"such other persons as appear to it to be appropriate"*. Guidance issued by the Secretary of State indicates that consultation should include:

- Local businesses and third sectors
- Local people and their representatives
- Parish and town councils
- Elected members of local authorities
- Authorities which are not established in the area but take decisions that affect people in the area e.g. an NHS trust providing services to local residents from facilities operating beyond the local authority boundary.
- Other bodies
- Neighbouring local authorities

Local Area Agreement for Birmingham

1.2.15 The LAA for Birmingham is published by Be Birmingham (the successor to the Birmingham Local Strategic Partnership) it covers the period 2008 to 2011.

1.2.16 The LAA consists of two parts. Firstly the outcomes framework sets out what the agreement is striving to achieve including key outcomes, milestones and targets against resources available. The second part is the delivery framework which sets out how it is proposed that these outcomes should be achieved. The outcomes listed in the agreement are as follows:

- Succeed economically
- Staying safe in a clean and green city
- Being health
- Enjoying a high quality of life
- Making a contribution

1.2.17 The last of these contains an aim to *"encourage more active participation of Birmingham's citizens in neighbourhood and city wide organisations, events and civic institutions"*. The delivery framework in relation to this states that the indicator will be *"support for a thriving third sector"* and that the lead person in relation to this is Brian Carr, Chief Executive of BVSC.

The end of Local Area Agreements?

1.2.18 On 13 October 2010 Local Government Secretary Eric Pickles revoked all designations of local improvement targets in Local Area Agreements. The effect of this was to remove instantly reporting and compliance obligations on local authorities in respect of the targets contained within LAAs. The move also means that Councils are no longer required to prepare new LAAs from April 2011 but that Performance Reward Grants for meeting 2008-2011 LAA targets will not be paid.

1.2.19 Unfortunately this Government announcement contains mixed messages. Although the Secretary said in his announcement of 14 October 2010 that the 'abolition' he was announcing was the obligation to "*report back to central government*", he also said that he was "*scrapping all existing Local Agreements*" and that if local authorities wished to amend or drop any targets "*you are now free to do so".*

1.2.20 While it is clear that the aim of central government is to sweep away what it sees as an unnecessary layer of bureaucracy it is not clear where this leaves the commitments to local communities which are contained within LAAs. It was a requirement that LAAs should include a statement of the involvement of the voluntary sector and local people in the design and delivery of the agreement. It would seem that the government's intention is that by taking itself out of the enforcement equation, local authorities will be in control of their own delivery targets answerable only to residents. This is the effect of the Localism Bill. However, it is arguable that until the Bill is implemented and existing LAAs expire, the commitments, particularly in relation to the involvement of the third sector, do give rise to a legitimate expectation regarding consultation and delivery.

1.3 THE BIG SOCIETY

1.3.1 The Big Society is a government agenda that seeks to change the relationship between citizens, the voluntary and community sector and the state. It involves the radical transformation of public services – giving local people and not for profit organisations the opportunity to take over the running of public services and giving control to citizens over what happens in their area. The government has said it wants to see more people involved in local community action.

1.3.2 There is no master plan for the Big Society but there are three core components:

- Empowering communities
- Opening up public services
- Promoting social action

1.3.3 The Big Society has received some negative press because of the implications that a lot of activities that will be carried out will rely on volunteers and that more can be done for free or little money. The Coalition government have been anxious to separate the discussion about cuts from that of the Big Society. However some commentators claim that the Big Society goes hand in hand with cuts in that cuts are only feasible along side a strategy for shifting responsibility away from the state to individuals, small groups, charities, local enterprise and businesses.

1.3.4 The cumulative effect of the spending cuts will have a strong influence on the way the Big Society is realised. The extent of the cuts will determine what gaps have to be filled by the voluntary sector.

1.3.5 There are therefore two things in conflict here:

- The increased note for the voluntary sector
- Cuts to organisations which give money to the voluntary sector.

1.3.6 In their 'Supporting a Stronger Civil Society' consultation which came out on 15th October 2010 the Coalition government envisage that public sector delivery will continue to be a growth area for the voluntary sector because of the pledge to open up public sector contracts. [5]

[5] See the "Community right to challenge" and "Community right to bid" in the Localism Bill

1.3.7 So far government backed initiatives to build the Big Society include a Big Society bank, 5000 community organisers, a Big Society network, a national citizens service, and a rebranded Government Office for Civil Society.

1.3.8 In the October spending review £470 million was allocated over the next four years to go towards building the voluntary sector's capacity so that it can deliver the Big Society agenda. It including the proposed 5000 new community organisers. Of this amount £100 million is in the form of a transitional fund to help the voluntary and community sector adjust to new public spending budgets.

1.4 DECENTRALISATION AND THE LOCALISM BILL

1.4.1 The Localism Bill will form one of the main platforms for the Government's programme on devolving power. To accompany the Bill the CLG has published an 'essential guide' to decentralisation. The latter rehearses the broad thinking behind the Government's proposed shift 'from Big State to Big Society'. It sets out six forms of action on decentralisation which all Government Departments are asked to follow:

1) Lift the burden of bureaucracy
2) Empower communities to do things their way
3) Increase local control of public finance
4) Diversify the supply of public services
5) Open up Government to public scrutiny
6) Strengthen accountability to local people

1.4.2 According to the Local Government Improvement and Development website the emphasis is towards shedding of central government responsibilities. There are only a few measures that will contribute to 'integrated localism' or

unified public service delivery, of the kind that LSPs have been working towards.

II. WHAT IS PUBLIC LAW?

2.1. Public law is the framework of legal principles which govern the lawfulness of the actions, decisions and failures to act of public authorities, such as Councils, when they are exercising public functions. Sometimes public bodies, such as Councils, are exercising private as opposed to public functions. If so, then they will not be subject to the constraints imposed by public law. Section III looks at the distinction between 'private' and 'public' for these purposes.

2.2 The UK's constitution is based on the idea that individuals are free to do anything that is not prohibited by law, but that the actions of the State must be authorised in some way e.g. whatever a Council, is doing it must be able to point to the legislation which allows them to do it.

2.3 The authority to act may be a duty or a power (i.e. a discretion to exercise). In general, use of words such as "can" and "may", when used in statute, indicate a permissive power rather than a duty. The words "shall" or "must" create a duty.

Duties and powers

Duties

2.4 Public authorities are required to act when they are under a legal duty to do so. However, statutory duties owed by public bodies can be divided into two categories: general public law duties (known as target duties) and duties owed to an individual.

2.5 For example, compare the following: section 17 of the Children Act 1989, which is the main legislative provision under which services to children in need are

provided, and section 2 Chronically Sick and Disabled Persons Act 1970, which deals with the provision of non-residential care services for adults.

"17(1) It shall be the general duty of every local authority.... –

(a) To safeguard and promote the welfare of children within their area who are in need; and

(b) So far as is consistent with that duty, to promote the upbringing of such children by their families

by providing a range and level of services appropriate to those children's needs."

"2(1) Where a local authority .... are satisfied in the case of any person to whom that section applies .....that it is necessary in order to meet the needs of that person for that authority to make arrangements for all or any of the following matters.....[such as help at home] .....

then... it shall be the duty of that authority to make those arrangements..."

2.6 The main difference between these two types of duty lies in the legal consequences which flow from breach. The failure to perform a duty owed to an individual can be enforced in judicial review proceedings. (Judicial review is the court process in which the lawfulness of the actions of public authorities is determined.)

2.7 Generally speaking, the courts will not order a public authority to perform a general duty owed to the public as a whole for benefit of one particular individual who has brought court proceedings for that purpose.

2.8 This does not mean that it is not possible at all to challenge the lawfulness of the failure to perform a target duty. For example:

- It would be unlawful for a Council to decided not to perform the target duty at all e.g. not to provide any section 17 services to children in need;

- It would be unlawful if, in making the relevant decision the Council had got the law wrong e.g. if a Council decided not to provide any section 17 services for young people over 16 this would be unlawful because section 17 defines a child as being anyone under 18.

Powers

2.9 Where a public authority has discretion to act but is not under a duty to do so, it must exercise that discretion in relation to the relevant individual, having regard to all of the relevant circumstances of that particular case.

Principles of public law

2.10 Public authorities must perform their duties and exercise their powers in accordance with the principles of public law. Even when exercising extremely broad discretions, they are subject to the constraints imposed by these principles which in broad outline require them to:

- apply the law correctly
- act fairly
- act rationally

Applying the law correctly

2.11 This is not always an easy task to 'get the law right'. In the event of a dispute, it is only a court that can give a definitive interpretation of legislation.

2.12 For example, until 1999, many local authorities charged for services provided as after care services under section 117 of the Mental Health Act 1983, and had been doing so since the passing of that legislation. However, in 1999, a number of service users took their case to court. They argued that, on a correct interpretation of legislation, social services authorities had no power to charge for such services. The court agreed. Charging for these services has always been unlawful. (*R v Manchester CC ex p Stennett and two other actions* (HL) (2002) 5 CCLR 500).

2.13 Even when the correct interpretation of a piece of legislation is fairly well established by the courts, the public body may still fail to give effect to the law. For example, once an individual has been assessed as needing a home care service under section 2 of the Chronically Sick and Disabled Persons Act 1970, the social services authority is under a duty to provide that service. Lack of money is not an acceptable excuse in law for failing to provide. *(R v Gloucestershire CC ex p Barry* (1997) 1 CCLR 40, (HL)). Yet some social services authorities continue to seek to excuse their failure to provide by reference to their limited budgets.

2.14 When a Council is making a decision, there will always be a specific legal framework that is relevant to that decision and the Council must apply it correctly. But there are some legislative frameworks that apply whenever a Council exercises any of its powers or performs any of its duties and it must always apply these correctly as well, for example:

- Section 6 of the Human Rights Act 1998 requires that public body must always act in ways that are compatible with Convention rights.

- Public bodies are also subject to the equalities duties imposed by the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995, which apply whenever they are exercising their functions.

Acting fairly

2.15 Public bodies must also act fairly. What this requires depends on the circumstances of the case. It could include one or more of the following:

- The right to know 'the case against you' and to answer it before a decision is made
- In some circumstances, the right to have reasons for a decision
- The right to be consulted.

2.16 Essentially, these are "process rights" and the failure to act in accordance with such procedural requirements is sometimes known, in public law, as a "procedural impropriety".

2.17 Sometimes these process rights are set out in the relevant legislation itself e.g. the housing legislation gives the individual the right to have reasons for a homelessness decision.

2.18 However, even where the legislation itself does not set out any specific process rights, the courts will sometimes find that the public law "duty to act fairly" requires particular processes to be followed.

Acting rationally

2.13 The principle of "rationality" establishes a minimum threshold below which public bodies must not fall, even when they have a broad discretion to exercise. A decision is irrational where it is one that no rational decision maker would have made based on the information that was available to that decision maker.

2.14 This is best illustrated by an example. In the case of *Rodgers (R on the application of) v Swindon NHS Primary Care Trust and the Secretary of State for Health (Interested Party)* [2006] EWHC 171 (Admin), the claimant had been refused the funding for Herceptin (an anti cancer drug). She challenged the rationality of the policy of the PCT. Their policy was to only fund Herceptin in exceptional circumstances even where it was clinically recommended (as in Ms Rogers case).The policy said that when making the decision whether or not to fund, all cost considerations would be disregarded. The court found this to be irrational. Once the PCT had decided that it would not refuse anyone on the ground that it had to ration resources, it no longer had any rational basis on which it could choose to fund one patient over and above another when both were in need of it.

2.15 It is often said that when a public body is exercising a discretion it should take into account all relevant considerations and disregard irrelevant considerations. This can be seen as an aspect to acting rationally, but what is relevant and irrelevant can in effect be set down by the terms of the legislation which confers the power and so it may be a question of applying the law correctly i.e. the legislation which confers the discretion may in effect determine what is relevant and irrelevant.

Judicial review

2.16 It is the breach of these public law principles which gives rise to grounds for judicial review, the type of court proceedings within which the lawfulness of the decisions of public authorities are challenged.

The course

2.17 This course will focus on two particular public law issues:

- The equalities duties (applying the law correctly)
- Consultation duties (acting fairly)

2.18 But first we will look at the distinction between what is 'private' and what is 'public' because this is a relevant issue when considering issues n a contacting context such as contracting for services from the third sector.

III. CONTRACTS AND PROCUREMENT

The private/public law divide

3.1 The starting point is that the law distinguishes between private and public law issues.

3.2 Generally speaking, if the relationship between two parties is governed by a contract, and a dispute arises which is essentially contractual in nature, then the dispute is seen as one of private law, rather than public law, even if one of the parties to a contract is a public body.

3.3 With the increasing use by Councils of contracting out (so that public services are delivered by the private sector) issues have arisen about when, if ever, it is appropriate to use judicial review to resolve disputes. In the case of R(Supportways) v Hampshire County Council [2006] EWCA Civ 1035 the Court of Appeal had to consider this issue:

The case concerned a company (Supportways) which had contracted with the Council to provide Supporting People services. Following a review the Council concluded that they were too expensive and wanted to reduce the payments by about half. The company refused to accept this and the Council terminated their contract. The company argued that the review was flawed and so the council was not entitled to terminate the contract and should carry out a further review

The legislative framework which governs Supporting People funding is section 93 of the Local Government Act 2000. This permits the Secretary of State to give money to local authorities towards expenditure on specified welfare services. The local authorities must comply with directions and guidance from the Secretary of State in the way that it spends this money.

The terms of the contract entitled the Council to carry out a review and, after 12 months from the date of the review, to terminate the contract. The contract also set out that review must be carried out in accordance with the guidance and directives issued by the Secretary of State. However those directions and guidance did not, in fact, set out how a service review should be carried out and so, in effect, permitted local authority could set up its own arrangements for doing so.

The judge found that the Council's contractual right to terminate the contract was triggered as long as a review had been carried out and the contract did not require a review of a particular quality.

So the question was whether the company was entitled to a remedy on public law grounds. The Court of Appeal decided not. This was not simply because there was a contract between the parties. However, Lord Justice Neuberger said where the claim is:

> "*fundamentally contractual in nature, and involves no allegation of fraud or improper motive or the like against the public body, it would, at least in the absence of very unusual circumstances, be right, as a matter of principle, to limit a claimant to private law remedies*" (see para 38 of the judgment).

Lord Justice Mummery put the test in more general terms:

> " ..*in order to attract public law remedies, it would be necessary for the applicant for judicial review to establish, at the very least a relevant and sufficient nexus between the aspect of the contractual situation of which complaint is made and the alleged unlawful exercise of relevant public law powers*"(see para 56)

So, for example, would the result have been different had there been detailed directions or guidance from the Secretary of State on the carrying out of the service review which the council had failed to follow?

Public law issues in contracting contexts

3.4 There have been many situations in which the courts have found public law remedies may have a role to play even though there is a contracting context.

3.5 For example, it has been long accepted that decision-making in relation to the award of contracts can be subjected to judicial review.

3.6 Councils will have procurement policies often in their standing orders and these must of course comply with EU procurement law.

3.7 There have been a number of judicial review cases challenging the lawfulness of procurement processes. One of the most recent has been in the field of legal aid contracts R(The Law Society) v Legal Services Commission [2010] EWHC 2550 (Admin) 30 September 2010.

The Legal Services Commission administers the legal aid scheme under the Access to Justice Act 1999. It does so by contracting with individual service providers, both private practices and not for profit organisations. In the early part of 2010 it undertook a major competitive tendering exercise in order to award new contracts. As a result of this exercise the number of firms providing family law advice fell from 2470 to 1300. Lord Justice Moses commented:

" *Of course any competition will throw up losers, will lead to change and cause concern. If that change is in consequence of a fair competitive procedure designed to lead to improvement in the provision of services by those most qualified to provide them, any complaint about the competition is likely to be unjustified."*

However, the court found this particular process to have been unfair.

The process worked the following way. Each bidder had to meet basic eligibility criteria and bid for a number of case starts. If the total number of cases starts bid for exceeded the case starts available in a particular category of work in a

particular procurement area, then the selection criteria were applied. Each bidder was awarded points for its answers to a series of questions. The bidder(s) with the highest score was awarded case starts first and only if there were any left over would the next highest scorer be awarded any.

Points were awarded if the bidder had a caseworker who was accredited by the Law Society's Children Panel and a caseworker who was accredited by the Law Society's Family Accreditation Scheme. The complaint that was made was this. Many firms had caseworkers who would have qualified for accreditation, but, because the LSC had not informed firms in advance that this selection criterion would be adopted or of its importance, the firms did not have sufficient time to secure that accreditation before the bids had to be made.

The court found this to be unfair. It also meant that the LSC could not properly perform its statutory obligations under section 4 of the Access to Justice Act 1999 to secure access to legal services (within its resources) and to promote improvement in the range and quality of the services it provides.

Are there non-contracting parties affected by the decision?

3.8 There may be others, such as the users of a service, who are not parties to the contract and therefore have no contractual rights, but who are affected by a decision. They may be able to rely on some kind of "public law wrong" to challenge the decision. For example:

- Does fairness demand that they should have been consulted because of the potential impact on them of the decision? (See below).

- Is the Council under a duty to provide a service to them (perhaps irrespective of cost) and there is no other service provider currently available that could meet their needs?

- Are their Convention rights engaged by the decision e.g. will the contracting decision result in the loss of their home?

IV. EQUALITIES DUTIES

4.1. Public authorities are subject to a number of what are called “equalities duties”.

4.2. There are currently three such duties which apply in respect of race, disability and gender and which are found in three separate pieces of legislation. But they all follow the same basic model – when carrying out its functions the public body must have “due regard” to the need to eliminate discrimination and promote equality, although the details of the terms in which this is put vary between the legislative schemes.

Sex Discrimination Act 1975

4.3 ***76A Public authorities: general statutory duty***

(1) A public authority shall in carrying out its functions have due regard to the need–

(a) to eliminate unlawful discrimination and harassment, and

(b) to promote equality of opportunity between men and women.

Race Relations Act 1976

4.4 **71. Specified authorities: general statutory duty.**

(1) Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need—

(a) to eliminate unlawful racial discrimination; and

(b) to promote equality of opportunity and good relations between persons of different racial groups.

Disability Discrimination Act 1995

4.5 Section 49A requires that:

"1) Every public authority shall, in carrying out its functions, have due regard to-

(a) the need to eliminate discrimination that is unlawful under this Act;

(b) the need to eliminate harassment of disabled persons that is related to their disabilities;

(c) the need to promote equality of opportunity between disabled persons and other persons;

(d) the need to take steps to take account of disabled persons' disabilities even where that involves treating disabled persons more favourably than other persons;

(e) the need to promote positive attitudes towards disabled persons;

(f) the need to encourage participation by disabled persons in public life."

What does 'due regard' mean?

4.6 There have been a number of cases where the courts have looked at this question. The leading case currently is probably the Court of Appeal case which examined a challenge to the lawfulness of the decision to close post offices. (*R(Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158) Mrs Brown was disabled and could not walk far. There was a decision to close her local post office and it would have been difficult for her to access a post office further away. She challenged the lawfulness of the decision on the ground that there has been a failure to have 'due regard' to the disability equality duty. It was argued that this was evidenced by the failure to carry out a disability equality impact assessment.

4.7 The Court said although a public body must assess the impact of their proposed policies on equality there is not one way of doing so. It is not an absolute requirement that an equality impact assessment is carried out, but the public body must show that it did have 'due regard' to the issues set out in the legislation. The Court said:

"... we do not accept that either section 49A(1) in general, or section 49A(1)(d) in particular, imposes a statutory duty on public authorities requiring them to carry out a formal Disability Equality Impact Assessment when carrying out their functions. At the most it imposes a duty on a public authority to consider undertaking a DEIA, along with other means of gathering information, and to consider whether it is appropriate to have one in relation to the function or policy at issue, when it will or might have an impact on disabled persons and disability."

4.8 The Court went on to set out some general principles:

"....*First those in the public authority who have to take decisions that do or might affect disabled people must be made aware of their duty to have "due regard" to the identified goals..."* If decision makers don't understand the nature of the duties they owe they will not be able to pay 'due regard' to them.

Secondly, the "due regard" duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind...

Thirdly, the duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of "ticking boxes".....

Fourthly, the duty imposed on public authorities that are subject to the section 49A(1) duty is a non-delegable duty...

Fifthly,... the duty is a continuing one.

Sixthly, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually

considered their disability equality duties and pondered the relevant questions. Proper record-keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court it has fulfilled the duty imposed..."

Equality Schemes

4.12 Each piece of equality legislation also permits the relevant Secretary of State to make orders or regulations which impose - in addition to the general duties - specific obligations. This power has been used and amongst the duties imposed is the requirement to have an equality scheme for each of these areas – a Race Equality Scheme[6], a Disability Equality Scheme[7] and a Gender Equality Scheme[8].

4.13 The orders/ regulations say that the scheme must show how the public body intends to fulfil the general equality duty.

4.14 There are other more specific requirements for example as to the content of the scheme which vary between the three equalities duties. But they all include the requirement that the public body set out the methods it will use for assessing the impact of its policies and practices on the relevant groups.

4.15 So, although there is nor requirement in the legislation of the orders/regulations to carry out equality impact assessments before making decisions on, for example, a change in policy, many public bodies have adopted this methodology (which is recommended by the Equalities and Human Rights Commission) and will have set this out in their equality schemes. (Some public bodies have met their obligations under the three regimes by having a Single Equality Scheme.)

[6] Race Relations Act 1976 (Statutory Duties) Order 2001
[7] Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005, SI 2005/2966 (as amended)
[8] Sex Discrimination Act 1975 (Public Authorities)(Statutory Duties)Order 2006 SI2006/2930

4.16 This is important because having said that a particular process will be followed, it will be more difficult for a public body to depart from that process without risking acting unfairly (in breach of a "legitimate expectation" that it would have followed the published procedure).

4.17 For example, in what is believed to be the Birmingham City Council's still current Disability Equality Scheme ("*Birmingham City Council Corporate Disability Equality Scheme 2007-2010"),* it says:

"*The City Council has developed a thorough Equality Impact Needs Assessments (EINA) methodology to address the need for impact assessments. The EINA examines how policy , procedure or services may have an unequal impact on different groups of people."*

[The Council's website does say its equality schemes produced in 2007 are under review and will be replaced with a "Single Equality Framework" which was due to published in the summer of 2010 but there is no indication on the website that this has yet taken place. This may be because the new requirements under the Equality Act 2010 are yet to be finalised – see below.]

4.18 The details of the current EINA process used in Birmingham are to be found on the website – "*Helping to make an impact Corporate EINA Guidance Manual Main Overview"* and *"Helping to make an impact Corporate EINA Guidance Manual Step by Step Guide (Revised Dec 2009)."*

4.19 The Main Overview document explains:

"*An equality impact assessment (EINA) is a systematic tool for identifying the potential impact of a council's policies, services strategies and functions on its residents and staff. The aim is to identify any effect or likely effect on different groups within the community."*

"The process is done through two stages. The first is that Initial Screening Test. This checks to what extent the service, policy or strategy is relevant to the Council's equality duties and whether there is evidence that suggests that a detrimental impact is likely. Where evidence suggests potential negative impact on any equality group a second stage of a Full EINA is undertaken in more detail."

4.20 The Step by Step guide sets out 9 main steps (see copy for details of each):

- *STEP 1 SCOPING THE EQUALITY IMPACT NEEDS ASSESSMENT*
- *STEP 2 INVOLVEMENT AND CONSULTATION*
- *STEP 3 DATA COLLECTION AND EVIDENCE*
- *STEP 4 ASSESSING IMPACT AND STRENGTHENING THE POLICY*
- *STEP 5 PROCUREMENT AND PARTNERSHIPS*
- *STEP 6 MAKING A DECISION*
- *STEP7 MONITORING EVALUATING AND REVIEWING*
- *STEP 8 ACTION PLANNING*
- *STEP 9 SIGN OFF*

Using the equality duties to make fair financial decisions

4.21 This is the title of a guide published by the Equalities and Human Rights Commission[9]. It says in the introduction:

"The equality duties do not prevent you from making difficult decisions such as reorganisation and relocations, redundancies and service reductions nor do they stop you from making decisions which may affect one group more than another. What the equality duties do is enable you to demonstrate that you are making financial decisions in a fair, transparent and accountable way, considering the needs and the rights of different members of your community. This is achieved by assessing the impact that changes to policies, procedures and practices could have on different equality groups.

9 http://www.equalityhumanrights.com/uploaded_files/PSD/using_the_equality_duty_to_make_fair_financial_decisions_final.pdf

4.22 The guide reminds public bodies that the equalities duties will apply. It says :

"*Financial proposals which are relevant to equality such as those likely to impact on equality for your workforce and/or for your community should always be subject to a thorough assessment. This includes any proposals to outsource or procure any of your organisation's functions. The assessment should form part of the proposal and you should consider it carefully* ***before*** *making a decision."*

4.23 The guide asks "What should I be looking for in an assessment?" and in answer says:

- *Is the purpose of the financial proposal clearly set out?*

"A robust EIA will set out the reasons for the change; how this change can impact on equality groups, as well as who it is intended to benefit and the intended outcome."

(It suggests that consideration should be given to how different proposals relate to each other and gives and example of the need to consider cumulative impact.)

- *Has the EIA considered available evidence?*
- *Have those likely to be affected by the proposal been consulted and involved?*
- *Have potential positive and negative impacts been identified*

The guide points out that equal treatment does not always lead to equal outcomes and consideration may need to be given to take steps to meet differing needs. This is expressly reflected in the DDA duty which reminds public bodies that disabled people may sometimes need to be treated more favourably than others.

- *What course of action does the EIA suggest I take? Is it justifiable?*

    - No major change to the proposal required
    - Adjustments to remove barriers identified or to better promote equality
    - Continue despite having identified potential for adverse impact or missed opportunities to promote equality
    - Stop and rethink NB if will lead to unlawful discrimination

- *Are here any plans to alleviate negative impact ?*

- *Are there plans to monitor actual impact of proposal?*

4.24 The guide reminds public bodies that a failure to properly assess impact can lead to costly legal challenges (which will, of course, undermine the purpose of the proposal if it is to save money).

4.25 It seems that the duties apply even to the most fundamental financial decision of all – budget setting. In its judicial review challenge to the Coalition Government's first budget, the Fawcett Society argued that the government failed to comply with its equality duty under section 76A of the Sex Discrimination Act 1975. The Fawcett Society argued that the government should have assessed whether its budget proposals would increase or reduce inequality between women and men. On their website they said:

"*Independent analysis of the budget has shown that it is women who will bear the brunt of the cuts unveiled so far. Research by the House of Commons Library found that 72 per cent of the savings identified in the budget will come from women's pockets. This is because many of the benefits to be cut or frozen - including the Health in Pregnancy Grant, the Sure Start Maternity Grant and Child Benefit - are benefits that more women than men rely on. Further, this analysis doesn't take into account the impact of the public sector pay*

freeze which will also hit women disproportionately as 65 per cent of public sector workers are women. "[10]

The government admitted in the hearing that they had not assessed the impact of the budget on women. The challenge failed but not, apparently, because the equality duties do not apply to such decision-making, but because the Court found that so much time had passed since the budget was set that there was no reasonable prospect that a court would overturn it. In their press release the Fawcett Society said:

"While we are disappointed not to have been granted a judicial review of the budget, we are pleased the government has today heard that budgetary decisions are not above equality law - and that a court of law agreed with us that the government's economic processes need to be looked at again.

"Outside of the courts, our action has already made an impact. When drawing up the Comprehensive Spending Review, the government produced the first ever equalities statement to accompany such a big piece of financial policy. Though we feel it's inadequate, it's a start." [11]

[Judgment was given on 6 December 2010 and no transcript of the judgement has yet been published on the various websites but will no doubt be available in due course.]

The new Equality Act 2010

4.26 Parts of the Equality Act 2010 came into force on 1 October 2010 but the new public sector equality duty will not come in until 6 April 2011.

4.27 The new equality duty is found in section 149 of the new Act:

[10] http://www.fawcettsociety.org.uk/index.asp?PageID=1171
[11] http://www.fawcettsociety.org.uk//index.asp?PageID=1204

149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this 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.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to—

(a) a breach of an equality clause or rule;

(b) a breach of a non-discrimination rule.

4.28 The first major change is the extension of the equality duty to a range of other groups – which are defined by reference to a shared "protected characteristic" which includes in addition to disability race and sex:

- age
- gender reassignment
- pregnancy and maternity
- religion or belief
- sexual orientation

4.29 The precise terms of the duty have changed, but it is difficult to say at this point, before any experience of implementation, whether this is going to give rise to actual changes of substance in the nature of the obligations.

4.30 The Act again permits regulations to be made to impose more specific duties. The coalition government has consulted on draft regulations and in its consultation document [12] sets out the reasons for its approach.

4.31 The draft regulations impose the following specific duties (plus an additional 'satellite' duty to undertake any publication that is required in a manner that is reasonable accessible to the public.)

4.31.1 Publishing information

By 4.11.2011 and then at least annually to publish information relating to its performance of the section 149 duty . The information published must include:

- If 150 employees or more, information on the protected characteristics of its workforce
- Assessments of the impact of its policies and practices on furthering the aims set out in the section 149(1) duty
- Information that it took into account when assessing that impact
- Details of any 'engagement' undertaken with those it considered to have an interest

4.31.2 Setting equality objectives:

Not later than 2 April 2012 (and then at least 4 yearly) the public authority must set one or more objectives that it should achieve in order to further one of the objectives in s149(1) (a) to (c).

- The objective(s) must be specific and measurable
- Set out how progress is to be measured
- In setting the objectives the information published (see above) must be taken into account.

[12] Equality Act 2010 The public sector Equality Duty Promoting equality through transparency A consultation The Government Equalities Office

4.32 As matters currently stand, there does not appear to be any proposed requirement to publish an equality scheme.

An example

4.33 In R (Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062 (Admin), the claimants applied for judicial review of a decision of the local authority to award funds to a provider who would provide services to all individuals experiencing domestic violence within the borough irrespective of their ethnic origin. They were users of services from an organisation, Southall Black Sisters (SBS) which provided specialist services to Asian and Afro-Caribbean women particularly in relation to issues arising from domestic violence. It was partly funded by the local authority.

The local authority had decided that rather than funding individual organisations under sponsorship agreements it would commission borough-wide services from community and voluntary organisations by open competition according to published criteria. The local authority proposed that the service provider would provide the service to all individuals resident within the borough experiencing domestic violence irrespective of gender, sexual orientation, race, faith, age or disability.

SBS expressed concerns that the criteria would have a disproportionate impact on black and minority ethnic women and that there had been no racial equality impact assessment. The authority agreed to withdraw its decision in order to prepare what it described as a draft equality impact assessment. That assessment concluded that that it would monitor impact following the funding changes.

The court found that the decision to proceed with its proposal to fund one borough-wide provider without first undertaking a full assessment of the impact was unlawful. It was not sufficient simply to monitor the situation. Once it had identified the risk of impact the Council should have considered potential measures to avoid that impact before deciding on a particular solution. Furthermore, the Council's deliberations were based on in an

incorrect analysis of the relevant statistical information. The Council had said that the largest proportion of domestic violence was suffered by white European women. Although 28% of domestic violence was suffered by Indian Pakistani and other Asian women, those groups only made up 8.7% of the population. The Council had not taken account of this.

V. CONSULTATION AND LEGITIMATE EXPECTATIONS

V.1 CONSULTATION

INTRODUCTION

5.1. In 2003 Leicester City Council had a new political administration which decided it wanted to change the way it funded the voluntary sector. Specifically it decided that it only wanted to fund work that was providing "core services". The Council reviewed all groups with funding and wrote to a substantial number of them to say that they were minded to cease funding them. The groups were given 28 days to comment and then the Council considered the comments and made decisions. The decisions were struck down for lack of consultation. [13]

WHEN IS CONSULTATION NECESSARY?

5.2 There are four main circumstances in which a duty to consult may arise

- There is a statutory scheme that imposes a consultation duty
- There may be a procedural legitimate expectation of consultation arising from a promise or past practice
- Consultation may be required as a matter of basic fairness, for example because of the nature of the impact of the proposed decision on persons affected or the importance of the subject matter
- A public authority which chooses to consult even if there is no requirement to do so must do so properly

WHAT DOES THE LAW SAY ABOUT ADEQUATE CONSULTATION?

[13] R (Capenhurst) v Leicester City Council [2004] EWHC 2124 (Admin)

5.3 The test of what constitutes a fair consultation process was explained by Lord Woolf on giving judgment in the case R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213, where he stated that:

"*To be proper, consultation must be undertaken at a time when proposals are still at a formative stage. It must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.*"

5.4 However it must not be forgotten that:

"*That precise demands of consultation...vary according to the circumstances . ... The extent and method of consultation must depend on the circumstances. Underlying what is required must be the concept of fairness"* [R v London Borough of Islington ex parte East [1996] ELR 74]

What is not consultation?

5.5 The Courts have held in various cases that the following are not sufficient to meet the consultation requirement.

- Council's officers are already in regular contact with consultees and had relayed their views.

- The Council were in regular contact with organisations affected and therefore were very familiar with their activities.

- It was obvious to consultees what was going on and they could have commented if they wanted to.

- Discussions were offered.

Consultation must be at a time when proposal was at a formative stage

5.6 This means that a public authority cannot wait until has identified a definite solution. It must embark on the consultation process at a time when it is prepared to change course if persuaded to do so. It cannot make the decision in principle and then consult afterwards nor can it start by excluding an option and so denying any real opportunity to present a case on it. Salami tactics are impermissible for example consulting on what model of decision to adopt and then only later consulting on the impact for those affected as preventing informed and integrated responses.

The proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response

5.7 The reasons given must be the true reasons incorrect or misleading reasons.

5.8 Consultees should be told what selection criteria were adopted and what the important factors were intended to be considered to be.

5.9 Fairness may also require that relevant information should not be withheld from a consultee.

5.10 Generally speaking, it is not necessary to set out the arguments against the proposal.

Adequate time must be given for consideration and response

5.11 Adequate time should be given even in a case of urgency.

5.12 Public authority cannot wait until the matter is so urgent that consultation is said to be impracticable.

5.13 A few weeks may suffice but a few days is unlikely to do so.

The product of the consultation must be conscientiously taken into account in finalising any proposals

5.14 A consultation process is not a binding referendum There does not need to be an independent external evaluation or a particular type of fresh assessment of needs.

5.15 See, for example, the introduction of congestion charging in London

Re-consultation

5.16 There is a duty to reconsult if there is a fundamental difference between the proposals consulted on and those which the consulting parties subsequently wishes to adopt. However there is no duty to consult further on amended proposals emerging in the consultation process itself.

GOVERNMENT CONSULTATIONS

5.17 The government has published a Code of Practice for its consultations Consultation, Better Regulation Executive (2008). This states:

"Ongoing dialogue between government and stakeholders is an important part of policy-making...when developing a new policy or considering a change to existing policies, processes or practices, it will often be desirable to carry out a formal, time bound, public, written consultation exercise. This kind of exercise should be open to anyone to respond but should be designed to

seek views from those who would be affected by, or those who have a particular interest in, a new policy or change in policy..."

5.18 The government recognises that in order to reach certain groups this may mean going beyond traditional, written consultation.

5.19 The status of the Code encapsulated in the following guidance:

- The Code sets out the approach the government will take when it has decided to run a formal consultation exercise.
- The Code does not apply to other public sector organisations unless they explicitly adopt it
    - Consultation may not be effective
    - Consultation may not be proportionate
    - The scope of the exercise is very narrow
    - The level of interest is highly specialised
    - Other methods can be sought to secure input
- If the Code is not to be used an explanation should be provided
- The Code is not intended to create a commitment to consult on anything or to give rise to a duty to consult or to be cited as evidence that individuals have an expectation of consultation
- Deviation from the Code may be unavoidable but reasons should be given

5.20 The Code sets out 7 consultation standards which should be applied in all consultation documents.

- When to consult – Formal consultation should take place at a stage when there is scope to influence the policy outcome.

- Duration of consultation exercises – Consultations should normally last for at least 12 weeks with consideration given to longer timescales were feasible and sensible.

- Clarity of scope and impact - Consultation documents should be clear about the consultation process what is being processed, the scope to influence and the expected costs and benefits of the proposals.

- Accessibility of consultation exercises – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

- The burden of consultation – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees buy-in to the process is to be obtained.

- Responsiveness of the consultation exercises – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

- Capacity to consult – officials running consultations should seek guidance on how to run an effective consultation exercise and share what they have learned from the experience.

5.20 **When to consult** The guidance says that it will often be necessary to engage in informal dialogue with stakeholders prior to formal consultation to obtain initial evidence and to gain an understanding of the issues that will need to raised in the formal consultation.

Over the course of the development of some policies the government may decide that more than one formal consultation exercise is appropriate.

Consultation exercises should not generally be launched during election periods.

5.21 ***Duration of consultation exercises*** If the consultation is to take place over a period when consultees are less able to respond e.g. over the summer or at Christmas, consideration should be given to allowing a longer period.

When timing is tight a shorter period may be necessary.

In planning a consultation it is important to raise awareness of the consultation so that consultees can take full advantage to it.

5.22 ***Clarity of scope and impact*** Estimates of the costs and benefits of the policy options under consideration should normally form an integral part of consultation exercises.

An impact assessment should be carried out for most policy decisions.

Consultations should take place on impact assessments and equality assessments.

Consideration should be given to which groups or sectors may be disproportionately affected by the proposals.

5.23 ***Accessibility of consultation exercises*** A variety and formats and methods of consultation should be used. Email may be appropriate.

5.24 ***The burden of consultation*** Formal consultation should not be entered into lightly.

5.25 ***Responsiveness of consultation exercises*** The focus should be upon the evidence given by consultees to back up their arguments.

It is important to understand who different bodies represent.

A timescale should be given for further developments.

The government should provide a summary of who responded, a summary of the views expressed to each question. This feedback should set out what decisions have been taken in the light of the consultation exercise. This should be published before or alongside any further action.

5.26 ***Capacity to consult*** Organisations adopting the Code should appoint a consultation coordinator to deal with queries or complaints.

Government departments should monitor the effectiveness of their consultation exercises to inform themselves and other departments and agencies.

THE LOCAL GOVERNMENT AND PUBLIC INVOLVEMENT IN HEALTH ACT 2007

5.27 The Local Government and Public Involvement in Health Act received the royal assent on 30th October 2007. It places on local authorities (and other authorities but not the police) a 'duty to involve'.

The duty to involve

5.28 The duty to involve came into force on 1st April 2009. It is set out in Section 138 of the Act.

5.29 The statutory guidance in relation to the duty states as follows:

"There is already a range of existing requirements such as statutory requirements to inform, consult with or promote the participation of users or

citizens, in relation to individual functions (such as spatial planning), and their are also existing non-statutory agreements in certain areas (e.g. local compacts with the third sector). The duty to involve does not replace these existing requirements. Instead, the new duty needs to be considered in addition to them, i.e. authorities need to determine whether the new duty requires any extra actions over and above these more specific requirements". [Creating Strong, Safe and Prosperous Communities, Statutory Guidance paragraph 2.13].

What does the duty to involve require?

5.30 Authorities are required to take steps they consider appropriate to involve *representatives of local persons* in the exercise of any of their functions, where they consider it is appropriate to do so. It specifies three ways of involving that need to be covered in this consideration.

- Providing information
- Consulting
- Involving in another way

What are "representatives of local persons"?

5.31 Local persons are those likely to be affected by, or interested in a particular authority function. It does not mean simply local residents, it also covers those who work or study in the area, visitors, service users, local third sector groups, businesses, parish councils and others. The term covers children and young people as well as adults.

5.32 The phrase *"representatives of local persons"* means a mix of local persons. It does not mean community leaders or elected representatives.

Involvement means more than consultation

5.33 The duty is to involve local persons in the exercise of any of a relevant authority's functions. This goes beyond how services work or consulting individuals about changes of policies. The guidance notes that 'involvement' includes:

- Influence or directly participating in decision making
- Providing feedback on decisions, services, policies and outcomes
- Co-designing policies and services
- Carrying out some services
- Working with the authority in assessing services

5.34 As with the guidance on the code of consultation the guidance on the duty to involve notes that it may not be possible to take a particular course of action favoured by local persons.

Involving the Third Sector

5.35 There are three ways in which third sector organisations may be involved:

1. Local third sector organisations might be affected by a particular authority function

2. Third sector organisations might have a role as advocates for local people.

3. Third sector organisations might be able to provide relevant expertise and specialist knowledge.

Evaluation

5.36 The guidance states that authorities should be able to demonstrate, among other things, that:

"*local people will feel that the authority provides relevant and accessible engagement opportunities and will know how to get involved.*"

THE COMPACT AND CONSULTATION

Central government

5.37 The Revised Compact sets out a series of commitments for government and the third sector. These are grouped under 5 headings. The Government undertakings include the following:

1. A strong, diverse and independent civil society

    - Ensure CSOs are supported and resourced in a reasonable and fair manner where they are helping the Government fulfil its aims (emphasis added)
    - Ensure that the Government recognises the need to resource national and local support and development organisations in order to assist CSOs
    - Help CSOs to challenge existing provision of services, access new markets and hold Government to account.
    - Consider ways to support CSOs such as enabling greater access to state owned premises and resources.

2. Effective and Transparent Design and Development of Policies, Programmes and Public Services

    - Consider the social impact that may result from policy and programme development
    - Work with CSOs from the earliest possible stage to design policies, programmes and services

- Give early notice of forthcoming consultations and, where appropriate, conduct 12 week formal written consultations
- Consider providing feedback to explain how respondents have influenced the design and development of policies
- Assess the implications for the sector of new policies, legislation and guidance

3. Responsive and High-Quality Programmes and Services

- Work to remove barriers that may prevent CSOs accessing government funding
- Ensure transparency by providing a clear rationale for all funding decisions
- Ensure well managed and transparent application and tendering processes
- Agree with CSOs how outcomes, including the social, environmental or economic value will be monitored before a contract or funding agreement is made
- Ensure the widest range of organisations can be involved in the provision of services
- Ensure all bodies distributing funds on the Government's behalf adhere to the commitments in this Compact
- Apply the Compact when distributing European funding

4. Clear Arrangements for Managing Changes to Programmes and Services

- Assess the impact on beneficiaries, service users and volunteers before deciding to reduce or end funding.
- Assess the need to re-allocate funds to another organisation serving the same group
- Where there are restrictions or changes to future resources, discuss with CSOs the potential implications as early as possible, give

organisations the opportunity to respond, and consider the response fully, respecting sector expertise, before making a final decision

- Give a minimum of 3 months notice in writing when changing or ending a funding relationship

5. An Equal and Fair Society

- Work with CSOs that represent, support or provide services to people's specifically protected by a legislation and other under-represented disadvantaged groups
- Take practical action to eliminate discrimination, advance quality and ensure a voice for under-represented and disadvantaged groups.

The Birmingham Compact

5.38 In relation to funding decisions the 2005 Compact stated that:

"*The Compact recognises that traditional funding practices – usually short term and/or competitively based – are instrumental in maintaining this [third] sector in a subordinate relationship vis-a-vis statutory sector funders. There is therefore a commitment in principle to develop a common approach that delivers secure medium term funding and that addresses the requirement for core funding of organisations".*

5.39 Like the national Compact the new 2010 Birmingham Compact lays out a set of values and principles which mirror those in the national Compact.

5.40 Under the heading '*Involvement in Policy Development'* the Compact notes that statutory organisations can be better informed about the effects of their decisions and programmes they involve the voluntary and community sector. They therefore recommend that the statutory sector should "*involve the community and voluntary section in the earlier stages of policy development –*

acknowledge their expertise and follow best practice when consulting them in giving them feedback"

5.41 The Compact then goes on to give some examples of guidance for the statutory sector on good practice. These include the following:

- Early consultation
  - Build consultation into your regular planning cycle and consult early to make a difference.
  - Carry out at least 12 weeks of formal written consultations with an explanation given of the consultation is less that 12 weeks.

- Policy development
  - Encourage responses from the voluntary and community sector organisations that are likely to have a view.
  - Build consultation with a voluntary and community sector into plans and develop courses which recognise old communities
  - Make sure you follow local and national guidance when carrying out consultations.

- Analysis
  - Report back on the views you are given during the consultations and what you have done as a result.
  - Analyse the results of consultations

- Feedback
  - Give feedback to the voluntary and community sector on the results of the consultation.
  - Give feedback to explain why you have not included recommendations that have come up during the consultation.

5.42 In considering '*Strengthening funding and resource relationships'* the Compact recognises that relationships between statutory sector and the voluntary and

community sector should fair open and should use best practice guidance. It continues that these values should also apply to sub-contractors and organisations that distribute public money. Under examples of good practice the Compact recommends that statutory bodies should, when providing and withdrawing services, give at least 12 weeks notice.

5.43 In order to seek to secure the implementation of good practice the Compact includes a series of checklists for both statutory sector and voluntary and community sector organisations. Those applying to the statutory sector are as follows:

- Procurement in commissioning
- Grants
- Services and programmes
- Policy
- Consultation
- Involving the community and partnerships leadership and management

5.44 The checklists codify good practice set out elsewhere in the Compact by allocating a point score in relation to various processes. The format of the checklists is to ask questions to which a varying point score is awarded if the answer is yes. Examples relevant to consultation and legitimate expectation issues are as follows:

- Have you given a suitable length of time to advertise notices and at least 12 weeks notice before the expected date of the new programme, provision being set up or de-commissioning a service?
- Have you given constructive feedback to unsuccessful organisations?
- Have you given at least 12 weeks notice that you are going to end your funding, and have you given reasons for this and encouraged the voluntary and community sector to respond?
- Have you built consultation into your regular planning cycle and consulted early?

- Have you carried out at least 12 weeks of formal written consultations? If you have consulted for less than 12 weeks, have you given an explanation to the voluntary and community sector?

5.45 In addition to these questions there is, as noted above, a checklist which deals specifically with consultation and which mirrors closely guidance issued by central government. Indeed one of the questions asked in the checklist is '*Have you followed local and national guidance in carrying out consultations'*. A copy of the Birmingham Compact consultation checklist is attached as an annexe to these notes.

V.2 LEGITIMATE EXPECTATIONS

INTRODUCTION

5.50 Breach of legitimate expectations is a discrete ground for challenge in public law claims.

5.51 Case law establishes that there are, essentially, two kinds of legitimate expectations:

- Procedural legitimate expectation and
- Substantive legitimate expectation

5.52 There is a degree of blurring between these categories.

5.53 Legitimate expectations of either kind may (but do not always) arise in circumstances where a public decision maker changes or proposes to change an existing policy or practice.

5.54 The public law ground of legitimate expectations, if made out, may allow the Administrative Court to quash a decision where it is held to be unfair or an abuse of power, however this does not automatically follow

PROCEDURAL LEGITIMATE EXPECTATION

5.55 The classic example of a procedural legitimate expectation arises where a public authority has provided an unequivocal assurance whether by means of:

- an express promise; or
- established practice

that it will give notice or embark on consultation before it changes a policy. For example the public body may have an "engagement policy" which may make promises about when it will consult.

5.56 The court will not allow the decision maker to make the change without notice or consultation unless this can be justified by an overriding legal duty or some aspect of public interest such as national security.

5.57 There may be issues about whether a claimant for relief must have known of the promise in order to rely on it. However the courts have rejected this requirement on the basis that the harm which the court is seeking to remedy in legitimate expectations cases is not to do with how harshly the decision bears on any individual but because of the court's obligation to uphold good administration. This means that where a public authority is given a plain assurance it should be held to it. This is an objective test.

The courts have also held there may be cases where procedural legitimate expectation arises where there has been no prior practice or promise. These cases are fact driven but depend upon the general requirement of fairness.

SUBSTANTIVE LEGITIMATE EXPECTATION

5.58 A substantive legitimate expectation arises where the court allows claimant to enforce the continued enjoyment of an existing practice or policy in the face of the decision maker's wish to abolish it.

5.59 A substantive legitimate expectation arises only where:

- there is a clear and unambiguous representation
- upon which an individual seeks to rely; and
- it is reasonable for him so to rely

5.60 In the case of R v North and East Devon HA ex parte Coughlan [2001] QB213 Lord Woolf stated that:

> "*where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new indifferent course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any over riding interest relied upon for the change of policy."*

5.61 In a procedural case the promise is of notice or consultation. In the substantive case the promise is of present and future benefit.

5.62 The problem for public authorities is that once set in place every policy which is not subject to a termination date may give rise to a substantive policy expectation.

5.63 The concept of substantive legitimate expectation therefore poses a question: what are the conditions under which a prior representation promise or practice by a public decision maker will give rise to an enforcible expectation of a substantive benefit.

What are the limits of substantive legitimate expectation?

5.64 The courts have held that a substantive legitimate expectation does not simply arise in circumstances where a public authority adopted a policy with no termination date. Rather it must constitute a specific undertaking, directed at a particular individual or group, that the policy continuance is assured.

5.65 The leading case in this is Coughlan. Mrs Coughlan was a very severely disabled woman. She had been given a very clear promise by a health authority that her care home would be her home for life. The health authority then decided to close the facility because it ceased to be financially viable. The court held, among other things that the promise was:

- An express promise
- Made on a number of occasions in precise terms
- It was unqualified
- It was made to encourage Mrs Coughlan to move to the facility (thus she relied on it)
- If the matter had been one of private law it would have amounted to a breach of contract.

5.66 In later cases these principles have been refined. The court has held that although in theory there may be no limit to the number of beneficiaries of a promise, in reality it is likely to be small. The court has also said that it is difficult to imagine a case in which the government will be held legally bound a promise made to a diverse class because in such circumstances the interests of those to whom the promise is made may differ or be in conflict.

5.67 Further the court has held that the broader the class claiming the benefit of the promise, the more likely that public interest will be held to justify a change in policy.

VI JUDICIAL REVIEW

6.1 What is judicial review?

Judicial review is not an appeal

6.1.1 When the courts deal with a judicial review claim, they do so primarily in order to supervise decision making rather than take on the decision maker's role.

6.1.2 In practical terms this means that the main focus of judicial review will be the decision making process, rather than its ultimate result or the factual merits. Judicial review is not an appeal and although the judge may have decided the matter differently were he or she the official or body being challenged, this will not, of itself, lead to the claim being allowed.

6.1.3 The most common outcome of a successful judicial review will be an order 'quashing' the defective decision, which means it will no longer have any legal force. The public body will then need to reconsider the matter afresh, bearing in mind any pointers given by the court.

Discretion

6.1.4 Judicial review remedies are discretionary, rather than something to which a claimant is entitled if a case is established. The court may refuse to entertain a claim at the preliminary stage (when 'permission' to proceed is sought), or withhold a remedy at the full hearing. The most common reasons for doing so are:

- An alternative, equally effective means of resolving the case was or remains open to the person seeking judicial review, but this has not been used or exhausted.

- The claim has not been brought within what are, in comparison with other proceedings, very tight time limits.

- The claim is premature because the public body has yet to reach a decision on the matter at issue:

- Making an order will not achieve anything practical.

A variable standard of review: deference and anxious scrutiny

6.1.5 The courts may exhibit a degree of deference to decision makers depending on their nature (the decisions of expert fact finding bodies are less likely to be quashed than those merely dealing with legal issues) and what is at stake.

6.1.6 On the other hand, in some contexts – and especially where fundamental rights are engaged - the Court will adopt an 'anxious scrutiny' approach which requires much more by way of justification from the public body.

Judicial review remedies

6.1.7 Seven forms of remedy are available from the court. Those sought will be set out in the claim form. The first three can only be obtained through a judicial review claim: see Supreme Court Act 1981, s 31(1)(a).

- Mandatory order. This compels the public authority to reach a decision or perform a duty when the failure to do so has been found to be unlawful.

- Quashing order. This quashes a decision or measure, setting it aside so that it has no legal force or effect. The authority is then obliged to take the decision again applying the proper legal test or follow fair procedure.

- Prohibiting order. Similar to a quashing order, this remedy takes effect at an earlier stage by prohibiting a public body form acting unlawfully.

- Injunction. This compels the individual or authority to which it is addressed to perform, or refrain from, specified acts.

- Declaration. There are two forms. The first is an authoritative ruling on the rights of the parties or the state of the law which does not compel the public body to adopt a particular course of action but nevertheless must be taken into account. The second form, a 'declaration of incompatibility' was introduced by the Human Rights Act 1998 s 8. Where the higher courts find primary legislation, and in some circumstances secondary legislation, breaches one of the enforceable Convention rights, they have the power to make a declaration of this kind, in turn triggering a fast track procedure which enables, but does not compel, Parliament to make an order in Council rectifying the defect.

- Damages. It is uncommon for damages to be awarded as a consequence of a successful judicial review claim. The fact a public body has acted unlawfully does not, of itself, give any right to damages: The claimant must

establish firstly that the claim would have succeeded had an ordinary claim been commenced at the same time as the judicial review

6.1.8 The Court can exercise its discretion to withhold any remedy, even if a public law wrong has been established.

6.2 Grounds for judicial review

Wrongs not rights (through there are exceptions)

6.2.1 Exercising the supervisory role described above, and using the common law, the courts have developed certain principles, known as 'grounds for judicial review', These grounds are traditionally classed under the headings of 'illegality', 'irrationality' and 'procedural impropriety' See Council of Civil Service Union v Minister for the Civil Service [1985] AC 374, [1984] 3 All ER 935, HL.

6.2.2 There is often considerable overlap between the grounds in individual cases and the concepts of 'proportionality', 'fairness' and 'abuse of power' have become increasingly significant in their own right.

6.2.3 The conventional grounds for judicial review have also been significantly enhanced by the Human Rights Act 1998.

Illegality

6.2.4 Public bodies must understand correctly and apply the law that regulates their functions and decision-making powers:

6.2.5 The courts have conceptualised illegality in a number of ways. The most common are as follows.

- A decision or action will be ‘ultra vires’ (literally, ‘beyond the powers’) if the body or official has no power to take a decision or action of that kind, or exceeds such powers as have been given.

- Linked to that is the principle that if a public body makes an error of law in the course of a decision which affects the result, it is treated as having acted outside its powers.

- Public bodies and officials must exercise their powers for the purposes which Parliament intended and not other, extraneous ones.

- Where a public body makes a fundamental mistake about a fact material to a decision it has taken, this can sometimes amount to a failure to take into account a relevant consideration, i.e. the correct factual background to the decision.

- Public bodies must not found their decisions on conclusions as to matters of fact which are unsustainable or on matters about which there is no evidence at all.

- Public bodies and officials must take into account relevant considerations and disregard those which are irrelevant. When irrelevant considerations have been taken into account and this has altered the outcome of the decision, this will be illegal.

- Where a public body is given a wide discretion, it must not restrict (‘fetter’) it, for example by applying a particular set of criteria which must be satisfied in all cases.

- Where the authority to take a decision or exercise a power is given exclusively to a particular officer or body, it may be illegal to delegate it.

6.2.6 As mentioned above, the grounds for judicial review are not fixed. The last three examples of illegality above, for instance, can also lead a court to conclude that a public body has acted irrationally.

Illegality and the Human Rights Act 1998

6.2.7 Most of the substantive provisions of the European Convention on Human Rights are scheduled to the Human Rights Act 1998.

6.2.8 Section 6 HRA requires public authorities, and bodies which are discharging functions of a public nature to act in a way which is compatible with those Convention rights unless some primary legislation, or secondary legislation designed to give effect to it, positively prevents that public body from doing so. However, section 3 provides that legislation must be interpreted 'so far as possible' in an way which complies with the Convention, so it will be a rare case where a public authority cannot act in conformity with the Convention.

6.2.9 Where a public body fails to comply with its duty under section 6 HRA, or interprets legislation governing its powers in a non-Convention compatible way, in breach of the general duty under section 3 HRA, this can be conceptualised as a form of illegality, and can constitute a discrete head of judicial review.

Identifying illegality

6.2.10 There are four basic questions to be asked:

- What is the source of the authority?
- Is it a power or a duty?
- If a duty, is it an individual or target duty?
- What is the scope of the power/duty?

Irrationality and proportionality

Basis of an irrationality challenge

6.2.11 The courts will also intervene to quash a decision if they consider it to be so demonstrably 'unreasonable' that the official or body responsible has acted 'irrationally'.

The classic 'Wednesbury' formulation

6.2.12 There is a natural tendency on the part of those who are the subject of unwelcome decisions to equate unreasonableness with unacceptability from their point of view. The courts, however, envisage a different, and fairly high, threshold. The benchmark decision on this was made as long ago as 1948, in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, [1947] 2 All ER 680. which concerned the exercise of powers to

licence cinemas. There, Lord Greene commented that even where all relevant factors had been taken into account

> '[i]*t may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could have come to it.'*

Defiance of logic

6.2.13 Irrational decisions have also been described as those which are

- 'outrageous in [their] defiance of logic or of accepted moral standards'

- 'can be seen to have proceeded by flawed logic'.

Rationality and Justification when Fundamental or Human Rights Are Engaged

6.2.14 Where fundamental or human rights will be affected by a decision, the courts will generally expect much more by way of justification from the public body under challenge and will scrutinise the decision more 'anxiously' (this is sometimes called the super-Wednesbury approach).

Unfairness, procedural impropriety and abuse of power

Forms of unfairness and procedural impropriety

6.2.15 There are three main forms of procedural impropriety. These are

- first, failure to follow statutory procedures or rules (which is likely to also amount to illegality);
- second, bias or partiality; and
- third, failure to hear or deal with a matter fairly.

6.2.16 Linked to the last of these are the concepts of 'abuse of power', 'legitimate expectation' and a 'right to reasons' for certain decisions.

Basis for a challenge based on the failure to follow statutory rules or procedures

6.2.17 If a statutory process has been laid down for reaching a certain decision, such as consultation, this should be followed. Failure to do so will give rise to grounds for judicial review.

Basis for a challenge based on bias

6.2.18 The rule against bias requires public bodies to be impartial in its decision making and to be seen to be so. For example, the body should not allow decisions to be made by people who have a financial stake in the decision, or who have a family or business connection with any of the parties, or who have

strongly held views which may cause them to reach a decision based on prejudice. The key test is whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the decision-maker was biased.

Respect for legitimate expectations

6.2.19 See above.

6.3 The claimant and third parties

Standing/sufficient interest to bring a claim

6.3.1 To bring a judicial review claim the claimant must have 'sufficient interest in the matter' to which the claim relates. If a claimant lacks 'standing' (or 'locus standi') in this sense, the court may refuse permission for the claim to proceed or withhold a remedy.

6.3.2 The courts have developed the concept of standing themselves. The key principles are as follows:

- Individuals or organisations that are directly affected by a decision have sufficient interest to bring a claim.

- Similarly, representative groups will sometimes issue a claim based on the way their own interests – such as a right to be consulted - have been compromised by a decision.

- The third type of claimant is an individual public interest group which seeks to bring a claim not on the basis that their own rights will be affected by the decision, action or failure to act in question, but because the actions of the public body are unlawful and this in itself warrants the attention of the courts. Claims of this kind have been permitted by Rosemary Gillick, the Society for the Protection of Unborn Children, the Child Poverty Action Group, the Joint Council for the Welfare of Immigrants and the World Development Movement.

Claimants who must also be also 'victims': judicial review claims based on the Human Rights Act 1998

6.3.3 The test for standing under the Human Rights Act 1998 is deliberately narrower than that for other judicial review proceedings and is likely to bar the third class of applicant described above from bringing proceedings based on section 6.

6.3.4 The restriction comes about because, under section 7(3), only individuals or organisations that are 'victims' can rely on the Human Rights Act 1998 fully to enforce their rights using judicial review. The concept of a victim comes from Article 34 of the Convention.

- It covers those who are *directly affected*, as well as indirectly affected persons such as relatives of a deceased person whose human rights are said to have been breached.

- A person will qualify as a victim if there is a sufficient *risk* his or her Convention rights will be breached by the actions of a state.

- A pressure group will have standing if its *own* rights are compromised.

Litigation friends

6.3.5 Where a claimant lacks sufficient mental capacity to bring a claim themselves a 'litigation friend' may be appointed under CPR Part 21 to act on their behalf.

Interested parties and other intervenors

6.3.6 Other parties may become involved in judicial review proceedings in addition to the claimant and defendant. This can happen in two ways.

6.3.7 First, the claimant is obliged to serve their claim form on 'interested parties' besides the defendant whose actions are being challenged

6.3.8 The courts may also receive evidence and hear from any other person in the course of judicial review proceedings: see CPR Part 54, rule 54.17 Such 'third party interventions' are increasingly common.

6.3.9 In terms of strategy, the claimant's representative may want to consider encouraging the involvement of either interested or other third parties for a number of reasons:

- There may be a question of an interested party being responsible ultimately or potentially for providing the substantive benefit or advantage sought by the claimant despite the initial decision or failure being down to

the defendant. It may make sense to involve the interested party to establish their position at an early stage.

- The interested party may have helpful information or documentation which the defendant does not possess. If they are involved, it will be easier to obtain this.

- Third party intervenors may bring a broader perspective to the case than the claimant can alone. However, this may not necessarily be helpful.

6.4 Alternative Remedies

6.4.1. It has always been the case that judicial review is only available if all equally effective, convenient and expeditious alternative remedies have been exhausted first – the "alternative remedies principle". The court can refuse permission, dismiss the claim or stay proceedings pending use of the alternative if it is of the view that such an alternative exists. This is not common. E.g:

- Statutory appeals/review procedures
- Complaints Procedures
- Statutory Ombudsmen
- The Local Authority Monitoring Officer
- Default powers of the Secretary of State
- Other forms of ADR

6.4.2 There are three main questions to be asked when considering whether to pursue judicial review or one of the alternative remedies.

- What is likely to be the most effective course of action?
- What does the client want to do?
- Are there any constraints on the choice?

6.4.3 What is likely to be the most effective course of action? Generally speaking, the threat of JR is more likely to lead to some kind of action being taken on a client's case than the threat of any of the alternative remedies. It has other advantages:

- The client is in control of the process
- Expedition and interim relief is (in principle) available
- Orders are binding on the public authority
- Consideration of the case by legal experts

6.4.4 What does the client want? A client may be so fearful of litigation that s/he will not contemplate this course of action even when reassured that s/he will not have to give live oral evidence. For some, the fear is of damaging an ongoing relationship with a service provider, on which they are extremely dependent.

6.4.5 Are there any constraints on choice? There are, potentially, a number, for example, costs.

6.5 The Letter Before Claim

6.5.1 If proceedings are started without first notifying the defendant of the intention to start litigation and giving them an opportunity to resolve the matter before doing so, the court may refuse permission and/or make a costs order against the Claimant (or against the representatives).

6.5.2 Various public bodies request that the letter before claim is addressed to a specific department e.g. Local authorities have requested that the letter before claim is sent to the address on the decision letter and copied to the legal department.

6.6 Funding Judicial Review

6.6.1 Very few individuals will contemplate making a judicial review claim without public funding, not only because of the costs of their own solicitors and barristers, but because of the risk of being ordered to pay their opponent's casts.

6.6.2 "Before the event" insurance is rare. Even though many household policies include some legal expenses insurance judicial review is usually excluded. "After the event insurance" can be very expensive.

6.6.3 The court has the power to make a pre-emptive costs order (PCO) preventing the making of a costs order against a particular party irrespective of the outcome of the case. A PCO may be made at any stage of the proceedings on such conditions as the court thinks fit, provided that the court is satisfied that:

- The issues are of general public importance.
- The public interest requires that those issues should be resolved.
- The Claimant has no private interest in the outcome of the case.
- Having regard to the financial resources of the parties and the amount of costs likely to be involved, it is fair and just to make the order.
- If the order is not made, the Claimant will probably discontinue the proceedings, and will be acting reasonably in so doing.
- [See R (Corner House) v Director of the SFO [2008] 3 WLR 568. Although Corner House is still good law the above principles have been refined and in some cases watered down, by subsequent cases.]

Public funding may be available to individual's or groups of individuals but not organisations as such. In circumstances where an individual brings a claim which may bring benefits for a wider group of people, a "community contribution" may be required.

6.6.4 The grant of a Public Funding Certificate also brings with it a form of "costs protection" i.e. protection against being ordered to pay the opponent's costs. The costs protection provided by the scheme is not absolute, however.

6.7 Time limits

6.7.1 The court rules say:

(1) The claim form must be filed:

(a) promptly; and

(b) in any event not later than 3 months after the grounds to make the claim first arose.

(2) The time limit in this rule may not be extended by agreement between the parties

(3) The rule does not apply when any other enactment specifies a shorter time limit for making a claim for judicial review

6.7.2 The test is promptness. Three months is a maximum not an entitlement which means that a case could be dismissed for delay if issued within the 3 months, although this is not common.

6.7.3 The time limit begins to run from the date that the grounds first arose not from the date when the Claimant first learned of the decision.

6.7.4 If the challenge is to a specific decision or order then the relevant date will usually be the date on which the decision or order was made. However, care needs to be taken when that decision is itself dependent on some earlier decision which it could be said is the real basis of complaint. Time may well be found to run from that earlier decision.

6.7.5 The court has the power to grant an extension time. The principles applicable are. The court will consider whether there is good reason for the delay and

whether extending time will not cause substantial hardship or prejudice to any person or be detrimental to good public administration.

6.7.6 Delays in notification of the Clamant of the decision or in the grant of public funding (as long as the Claimant's representative is not at fault) and the degree of public interest will all be relevant factors.

6.7.7 The parties cannot extend the time limit by agreement but it may be possible to "restart time" by seeking a fresh decision.

6.8 Other Matters

- Claim form
- Interim relief
- Acknowledgement of service
- Permission
- Evidence
- Final hearing

