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The Governance Project

Briefing No. 3 – November 2008

“A short guide to Judicial Review – and how to avoid it”

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Introduction

All advice agencies will be aware of the basic public law principles of fair and lawful public body decision-making. Many advisers will also be familiar with applying these concepts to public body decisions affecting their clients and the potential availability of judicial review. However, some organisations are now also waking up to the fact that they might need to consider a judicial review of a decision made by their funder – or another public body that they work with – and this article is aimed at providing some background to that process, as well as outlining tactics to help organisations avoid even having to consider it.

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Public law wrongs

It goes without saying that all public bodies should act fairly and lawfully and that a public law wrong can often be challenged using judicial review proceedings. But what actually constitutes a public law wrong and how do you go about identifying one? The following can be used as a handy list to run through and consider when looking at a public body decision-making process that you think has gone wrong:

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- Has the public body failed to take into account relevant information (or taken into account irrelevant information)?
- Do they have the power to do what they are doing?
- Have they considered the issue fairly on its own merits, or is there a blanket policy that fetters their discretion?
- Has there been a “fair hearing” of the issue, including elements such as: disclosing relevant documents, allowing those affected to have their say?
- Has the public body followed agreed procedures?
- Have they given reasons for their decisions?
- Have they asked themselves the right question and undertaken sufficient enquiry when deciding the issue?
- Is the decision rational and reasonable?
- If consultation is necessary or embarked upon, is it lawful? Consultation should be when proposals are at a formative stage, with sufficient information and time for the consultees to respond in a meaningful way; the results of any consultation should be taken into account when the public body makes its decision.

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- Have they breached any statutory duties such as the equalities duties relating to protected groups?

If you think the public body may have erred in any of the ways outlined above, you may be able to bring a judicial review of their decision.

Limitations on judicial review

However, you need to bear in mind some basic issues around judicial review.

Firstly, it is a remedy of last resort, so you need to consider any appropriate alternative remedy, such as complaints procedures or going to the ombudsman.

Secondly, you must act promptly to bring any challenge and it must be started within three months – at the latest - of the date of the decision you want to challenge. Although the court has a discretion to extend this time limit, you have to have a very good reason for having missed it.

Thirdly, all judicial review gets you, generally speaking, is a quashing of the unlawful decision, and the public body has to take the decision again, hopefully on a lawful basis. This means you can win the battle but not the war; sometimes public bodies simply take the decision again lawfully but reach the same conclusion.

Fourthly, in a judicial review, the remedy (e.g. a quashing order) is discretionary. This means that even if you establish that the public body has acted unlawfully, the judge might not give you the remedy you want, for example if it is not in the interests of good administration.

Fifthly, litigation is risky and expensive. Can your organisation afford it – or afford to lose if you then have to pay the public body's costs as well. You may have service-users with sufficient interest to bring the claim who may be able to get legal aid, but you will need to get them on board quickly.

Having said all this, judicial review – or even just the threat – is a very powerful weapon against public bodies, and can set a useful precedent for other groups facing similar difficulties in the future. Moreover, most cases settle, with many public bodies giving in before a claim is even issued.

What do you want to achieve?

You also need to think about the wider ramifications of judicial review; bringing legal action against your funder or the main public body you work with can make a difficult relationship considerably worse. Or it can in fact strengthen your position; you are less likely to get messed around in the future; the public body are likely to improve their decision-making processes as a result, and this can impact on other organisations as well as your own.

In one case, the claimants lost their consultation challenge; the judge held that the first decision without proper consultation was unlawful, but the local authority had rectified this after the issue of proceedings and therefore the second decision was

lawful and the claim failed. However, the groups involved felt this put them in a much better position in terms of having spoken up for their users and that after the case, the local authority and other local public bodies started to consult properly. As they put it at the time:

"In my opinion the Judicial Review was certainly a wake up call to the Statutory bodies particularly in respect of how a consultation process should be conducted and I believe that we have made a difference and gained respect for supporting the views and wishes of older people that we represent."

How to avoid the dispute in the first place

The main strategy for avoiding this type of dispute is to engage in the decision-making process as early as possible. If you have concerns that a decision is going to be taken in the future, but you don't know the details, ask the public body what's going on and when you find out, make appropriate representations as the following group did:

"We were finally given sight of a draft letter that the PCT proposed to send to all voluntary organisations with which it had a funding arrangement. Some of the proposals in that letter caused us very serious concerns about the approach that the PCT at that stage were intending to adopt. It was our view that some of these would have had potentially very damaging consequences for individual voluntary organisations. We made urgent representations to the PCT about some of these including pointing out the possibility that some of their proposals would probably not be allowed under public law. The PCT acknowledged the points raised by our organisation. As a result of our intervention the most worrying proposals have been withdrawn and the letter has not been sent by the PCT."

Ask for all related information including documents such as internal memos, guidance and policy documents, as well as copy letters and minutes of meetings. All these should be in the public domain. If the public body is reluctant to disclose them, ask them why, or simply ask for the documents under the Freedom of Information Act.

When dealing with public bodies, don't let them off the hook if they fail to respond, and don't wait for them to tell you what's going on. If you ask them a question, put it in writing (an email will do) and give them a deadline for responding; keep chasing them even if you're concerned you won't like the response. Keep a note of all conversations you have with them, including phone calls and informal meetings or remarks made at a meeting about something else. Follow up crucial discussions with a short email to confirm your understanding of the position and asking for a response if that's not their understanding of the issue.

Use the public body's website to look up agendas and minutes of meetings if you suspect something is being discussed that you might have an interest in, but aren't being kept in the loop about. Copy in other relevant officers (for example more senior decision-makers or those from related bodies) and even councillors or the political decision-makers as well.

Find out what colleagues think is going on and pool information. If you need to challenge what the public body might be doing – and they're not telling you what's going on – don't make it personal; keep it factual and don't use emotional language. Consider making a formal complaint if you're concerned about lack of information or a failure to respond to your queries; look at the public body's complaints procedure and set out your case clearly, saying what you are concerned about and what the public body needs to do to put it right.

Don't wait until after a decision's been taken to do something about it. Encourage the public body to make a fair, open and lawful decision in the first place. That way, hopefully, you won't even have to consider a judicial review.

The above briefing was kindly written for the Governance Project by:

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Help and advice

PLP is funded by the Big Lottery to provide advice and training on public law disputes for voluntary sector organisations. This includes everything from discussing tactics before a dispute arises through to full judicial review proceedings, such as the case brought on behalf of two Southall Black Sisters service-users. You can call us on 020 7697 2198 or email evs@publiclawproject.org.uk.

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