

## **A basic guide to public law principles by reference to asylum and immigration cases**

### What is public law?

Public law is a set of legal principles which govern the manner in which public authorities exercise their power. Government departments (e.g. the UK Border Agency, local authorities, police and prisons) are all public bodies. Some organisations, whilst not government departments can still be public bodies if their function is to provide or discharge a public function (e.g. a private company running an Immigration Detention Centre).

Public law is different from private law which governs relationships between an individual and a private company e.g. in consumer matters, contracts of employment etc.

Where a public body such as the UK Border Agency makes a decision that affects an individual, if that decision is made on a wrong understanding of the law or facts or is made through a process that is unfair or biased; then the person affected by that decision can take action to challenge that decision in a variety of ways. Examples of how s/he can do so are:

- 1 By appealing against that decision (if there is a right of appeal); or
- 2 By pursuing a complaint; or
- 3 By making a claim for judicial review.

Public law also regulates the conduct of Tribunals and lower Courts (ie Courts below the High Court) such as the First Tier Tribunal (Immigration and Asylum Chamber), (Social Entitlement Chamber) – Asylum Support; and the Upper Tribunal (Immigration and Asylum).

### What is the source of public bodies' authority to make decisions?

The main sources of the power to make decisions are:

- 1 Acts of Parliament (primary legislation)
- 2 Delegated (or secondary) legislation i.e. legislation that Ministers have the power to make because an Act of Parliament gives that authority. Such legislation can be in the form of directions, orders or regulations (e.g. the Asylum Support Regulations or the Tribunal Procedure Rules);
- 3 European Union Law – this can be in the form of directives or regulations made by legislative bodies of the European Union.

The basis on which a public body can act will be either because:

- 1 it has the power to act – that something may be done in certain circumstances (e.g. detain a person); or
- 2 it is under a duty to either do something (e.g. provide support for someone who has claimed asylum and is destitute) or to not do something.

Most, if not all, public bodies will also have **policies** to regulate how they exercise their powers and duties. The purpose of policies is to help to make sure that a public body acts consistently as between one person and another and that it exercises its discretion in a principled and reasonable way rather than in an arbitrary manner. Generally, a public body must act in accordance with its policies or have good reasons for departing from its policies. However, it must not operate an inflexible policy.

The Enforcement Instructions Guidance, the Immigration Directorate's Instructions are all examples of policies. The UK Border Agency website has a whole section on its website on 'Policy and Law' (<http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/>)

The **Immigration Rules** are a unique hybrid of policy and law. They are not strictly speaking legislation, and the Secretary of State can change them at will (although they must be laid before Parliament which can disapprove them). However, the UKBA is bound to comply with the Immigration Rules in so far as they apply to a case before it, and the Tribunal will allow an appeal against a decision that is not in accordance with the Immigration Rules.

#### Making a lawful decision

In order to make a lawful decision, a public authority has to act within its powers, be reasonable, fair and make decision within a reasonable period of time.

#### Acting within its powers

A public body must have the power to make the decision that it makes otherwise it will be acting unlawfully. For example, everyone has a right to access the court. Last year a High Court judge said that the UK Border Agency's policy to give little or no notice of removal to some classes of people was unlawful because it did not give those people a reasonable chance to challenge that decision in Court. Therefore the Home Secretary was acting outside her powers in having such a policy.

#### Acting in a reasonable manner

A public body must properly understand the law and apply it correctly in a particular case. It should consider each case on its own merit and must not adopt inflexible blanket policies – see for example the decision of the Supreme Court in *Lumba and Mighty* that the blanket policy of detention of foreign nationals liable to deportation adopted in the wake of the 'foreign national prisoners crisis' was unlawful because it admitted of no exceptions.

A public body also has to take into account all the relevant information and ignore irrelevant information.

#### Acting fairly

A public body must allow the person to put his or her case fully – e.g. by allowing them a reasonable time to produce documents. If the public body has information that is relevant to its decision, it should disclose it to the person concerned and give him/her the opportunity to explain or deal with it before a decision is made especially if the material could lead to an unfavourable decision for the person.

A public body must give full and proper reasons for its decision so that the person affected can know the basis on which the decision has been taken.

Where a decision is going to impact on an organisation then as part of the process of taking a fair decision, the public body may well have a duty to consult with the organisation concerned. If so, it has to provide a reasonable period of time for consultation and take into account the result of that consultation when making its decision.

The extent of these duties to act fairly may depend on the importance of the issue. The Courts have consistently held that asylum applications involve decisions of the highest importance and that only the highest standards of fairness will suffice.

### The Human Rights Act

The Human Rights Act 1998 which came into effect on 2 October 2000, requires public authorities to act in a way that is compatible with the European Convention on Human Rights (ECHR) as far as is possible for them to do so.

A failure to act in this way creates an independent possibility of challenge with the possibility to argue that the decision of the public body is unlawful because it is in breach of one of the rights guaranteed in the ECHR – e.g. the right to family life or the right not to be tortured or subjected to treatment that is inhuman and degrading or a right to liberty.

It is also possible to challenge secondary or even primary legislation on the basis that it is not compatible with one of the ECHR rights. However, a court cannot 'strike down' primary legislation – it can only make a declaration that it is incompatible with the ECHR rights, leaving it to Parliament to decide how to remedy the incompatibility. An example of this is the *Baiai* case which decided that the certificate of approval for marriage scheme was incompatible with the ECHR right to marry read together with the prohibition of discrimination.

### European law

There are two branches of European law that are relevant to the decisions of public bodies:

- 1 European Union law: This is enforceable directly in the domestic courts, which can make a 'reference' to the Court of Justice of the European Union<sup>1</sup> in Luxembourg if the law is unclear.  
This law in the area of immigration and asylum cases takes precedence over English law. Examples are the rights of European workers and now it also has impact on refugee law related issues; and
- 2 The European Convention on Human Rights which is enforceable in the European Court of Human Rights in Strasbourg.

### Maladministration

Maladministration occurs when a public body acts in a way that it ought not to have done and it has occurred as a result of: bias, neglect, delay, incompetence, ineptitude, turpitude, arbitrariness.

Delay in taking action (e.g. issuing status documents or making a decision), losing documents, making misleading and inaccurate statements are all examples of maladministration.

Many of the principles set out in respect of public law overlap or are closely related to maladministration.

Parliament has given a number of Ombudsmen the power to investigate complaints about maladministration. The two Ombudsmen relevant in the field of asylum and immigration law are: the Parliamentary and Health Service Ombudsman and the Prisons and Probation Ombudsman.

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<sup>1</sup> This used to be known as the European Court of Justice (ECJ) and is still commonly referred to as the ECJ.

What action can you take under public law?

If a public authority acts in breach of public law principles in making a decision then the decision is unlawful.

The unlawful decision can be challenged in a number of ways:

- 1 Through an appeal if there is a right of appeal; or
- 2 Making a complaint using an internal complaints procedure and if that doesn't resolve the issue then by considering a complaint to the appropriate Ombudsman; or
- 3 Through court action by using the mechanism of judicial review.

The nature of the unlawful act and its consequences will determine which avenue of challenge is the most appropriate.

So, a delay in issuing status papers could be challenged through a complaint or if the delay is having serious consequences (e.g. the person is a refugee but his/her family cannot apply for family re-union until the refugee has status papers) then it may be that a challenge through a claim for judicial review is more appropriate.

These issues are dealt with separately in this seminar.