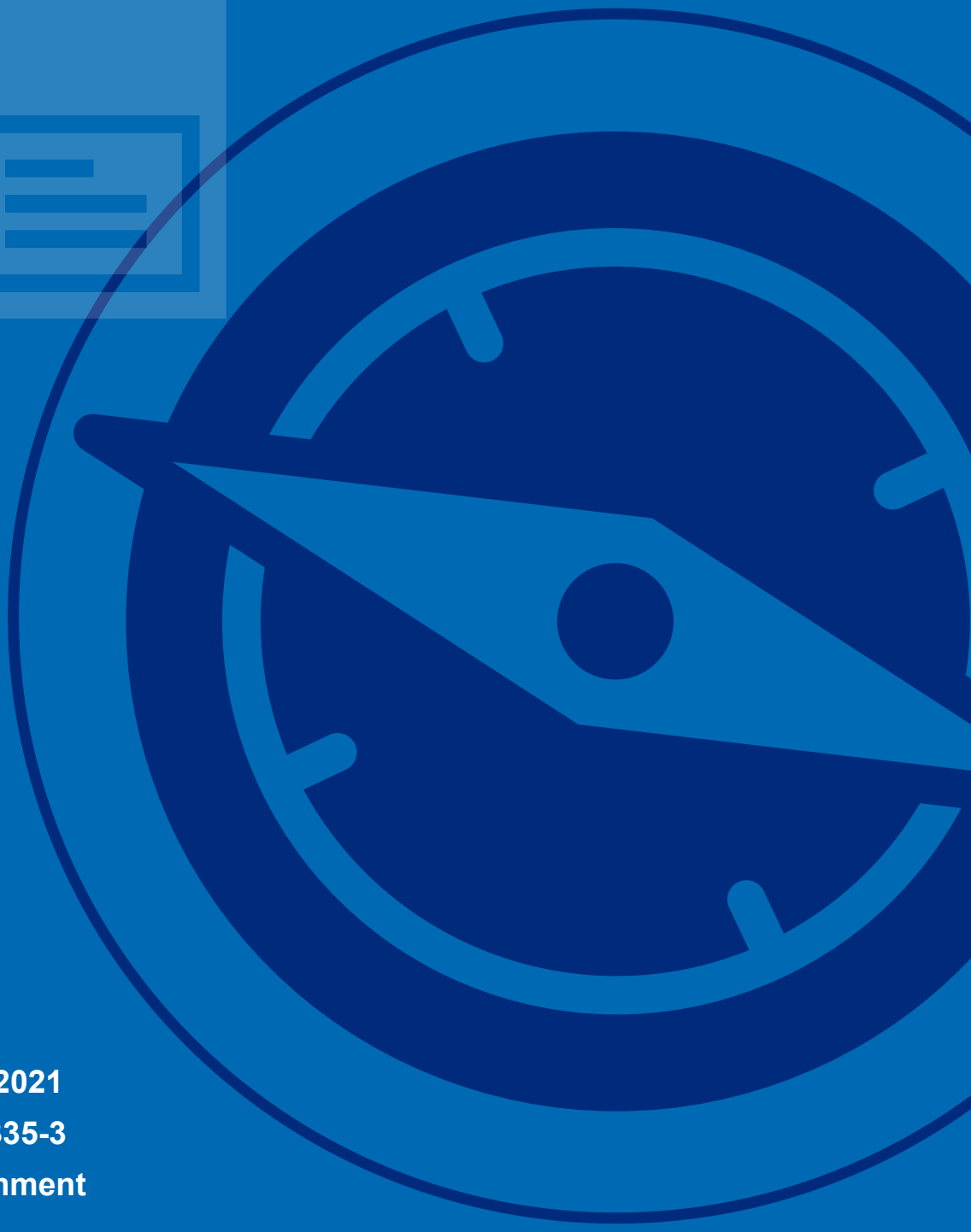
Right First Time

A practical guide
for public authorities
in Scotland
to decision-making
and the law

Third edition

Scottish Government
Riaghaltas na h-Alba



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Contents

Introduction

Welcome to the third edition of Right First Time. Its purpose continues to be to assist decision-makers making relevant decisions to do so in a fair, efficient, accessible and non-arbitrary way.

Since its introduction in 2010, Right First Time has become an important part of the public administrators' toolkit, helping them make sound decisions, and we are delighted to bring this updated edition to you.

Good public administration is key to ensuring that the rule of law is upheld and puts law at the heart of government. The Coronavirus pandemic has highlighted that compliance with the rule of law is just as important, if not more so, in times of crisis. Good public administration, in all instances, starts with high quality decision-making.

We live in dynamic and fast-changing times. This is particularly apparent if you consider recent developments in public law and the wider public discourse around the actions of public bodies.

Indeed, since the first edition was published, much has changed in Scotland – not only in the legal landscape but also in the work of public administration and the way individuals interact with government. What remains constant, however, is the requirement for robust public decision-making that is of the highest standard and, crucially, is in accordance with the law. This edition contains commentary on new and developing areas of law and provides updates relating to legal parameters and obligations of longer standing. Legal principles are illustrated throughout by case examples highlighting where issues have arisen in the courts in the past. It also features, for the first time, horizon scanning on changes to areas of law that are likely to occur and have an impact on decision-making in the future.

The guide is designed to help users on the decision-making journey, from the early preparatory stages through to notification of the decision. Remember though, the checklist and guide are not intended to be a substitute for taking specific legal advice from your lawyer.

This edition has a number of parallels with the Treasury Solicitor's publication, 'The Judge Over Your Shoulder', which is now in its fifth edition, and which remains an important accompanying resource.

Ruaraidh Macniven

Solicitor to the Scottish Government

What is Right First Time?

Right First Time is a user guide intended to help people responsible for making, or advising on, decisions of public authorities. It helps them consider the legal questions that may arise during any such decision-making process.

It is a guide for officials to help identify the relevant principles of administrative law and apply those to any decision. The guide should help you to assess what can and cannot be done in the decision-making process and how to go about making the decision.

This guide, and the checklist on page 7, are here to help navigate the legal landscape that applies to the work of decision-making in public authorities. The checklist sets out key questions to ask yourself at each step. The rest of the guide helps you answer them.

What is meant by a decision?

There are many different types of administrative decisions that this guide could apply to, ranging from the awarding of a high-value contract, to dealing with correspondence; and everything in between.

Other examples could be a decision to make regulations, to grant or refuse a licence or permission to do something, to hold an inquiry or investigation, to provide or stop providing some public facility or to decide to operate it in a particular way, to award or refuse some benefit, to require somebody to do something or to prohibit them from doing something, or to award or refuse a grant.

Decision-making, or considering the scope of recommendations that can be made to decision-makers (such as Ministers, boards or senior officials), will be constrained by administrative law.

How to use this guide

The steps in this guide will help you consider all the relevant administrative law principles to help you arrive at a lawful decision or outcome.

The checklist sets out key questions to ask yourself at each step of the decision-making process.

The checklist does not, of course, represent a linear process. Decision-making will feel and be messier than the checklist suggests. The questions overlap and it has been flagged in each chapter where other considerations may be relevant. Regardless of where in the process you may start, do bear in mind that all questions may have to be considered.

The checklist and guide also have limitations. They are intended to help with any administrative decision, but they are not specific to a particular kind of decision under a particular power, nor a substitute for the specific, detailed or nuanced guidance that will sometimes be needed.

The checklist and guide are not intended to be a substitute for asking your lawyer.

The decision-making process

The process will begin with you getting ready to make a decision (or a recommendation to Ministers, a board or senior official) by sizing up and scoping out the task in front of you. You will move to gathering and analysing facts, evidence, views and opinions to inform the decision. Having done that you will evaluate the options and take the decision (or make a recommendation). Finally, you will notify others of the decision that has been taken.

The story does not always end there, however, and the last step in this guide considers in detail how to respond to challenge, should your decision be contested through the courts.

Here is how the decision-making steps may unfold in a little more detail:

Step 1 | Preparing to decide

These questions are designed to make sure that you understand the law regulating your decision-making power. They are important – you will have to return again and again to these questions and the law at each step.

Step 2 | Process

This is the investigation and evidence gathering process which asks important questions about the way in which the decision is made. This step focusses on the procedure leading to the decision, not on the substance or merits of the decision itself.

Step 3 | Taking the decision

These questions are to make sure the substance of the decision will be respected by the courts.

Step 4 | Notifying others of the decision

Do you have to give reasons?

Step 5 | Responding to challenge

And what if the decision is ultimately challenged through the courts or in a tribunal? These questions will help you to understand the litigation process and some of the risks that this can present.

What does the legal jargon mean?

A glossary is provided to assist you as you navigate through the guide.

Checklist

Step 1 | Prepare: Getting ready to decide

1. Where does the power to make this decision come from and what are its legal limits?
2. For what purposes can the power be exercised?
3. What factors should I consider when making the decision?
4. Is there a policy on the exercise of the power?
5. Does anyone have a legitimate expectation as to how the power will be exercised?
6. Can I make this decision or does someone else need to make it?
7. Have devolution and the Scotland Act affected the power?
8. Will I be complying with human rights law?
9. Will I be complying with retained EU law?
10. Will I be complying with equality legislation?
11. What are my environmental duties?
12. What are the financial implications of the decision?

Step 2 | Process: Investigate and gather evidence

13. Does the power have to be exercised in a particular way, e.g. does legislation impose procedural conditions or requirements on its use?
14. Have I consulted properly?
15. Will I be acting with procedural fairness towards the persons who will be affected?
16. Could I be, or appear to be, biased?
17. Am I handling data in line with data protection and freedom of information obligations?

Step 3 | Decide: Taking the decision

18. Have I taken necessary considerations into account, and is my decision reasonable?
19. Does the decision need to be, and is it, proportionate?
20. Are there decisions where the courts are less likely to intervene?

Step 4 | Notify: Notifying others of the decision

21. To what extent should I give reasons for the decision?

Step 5 | Respond: Responding to challenge

22. What type of legal challenge can a decision-maker face?
23. What are the parties' duties to the court?
24. What is a Specification of Documents and what do I need to do?

Glossary

Legal terms used in this guide

administrative law
Laws that apply to how public bodies carry out their functions. It is a type of public law that sets the parameters and the scope of the powers (which are explained further in question one) that officials can use when carrying out official duties.

convention rights
See 'human rights' below.

human rights
Rights protected by the European Convention on Human Rights (also known as "the Convention" or "the ECHR"), and given effect in Scotland by the Human Rights Act 1998 and the Scotland Act 1998. The European Convention on Human Rights is not part of EU law and it, and the legislation which gives effect to it, is not affected by the UK's withdrawal from the EU. These human rights are also referred to in law and in this document as "the Convention rights". See question eight: Will I be complying with human rights law?

judicial review
The procedure the Court of Session in Edinburgh uses to supervise decisions of public (and some other) authorities in Scotland.

the Scotland Act

The Scotland Act 1998 is the piece of legislation that established the Scottish Parliament and the Scottish Government and gives them their powers. It has been amended by the Scotland Act 2012 and the Scotland Act 2016.

legislation
Acts of the Westminster or Scottish Parliaments, or regulations, orders or rules made under powers given to Ministers and others by Acts, often published as "Statutory Instruments" ("SIs"), or devolved Scottish Statutory Instruments ("SSIs").

retained EU law
Laws which originally applied as a result of the UK's membership of the European Union (EU). This law continues to apply in Scotland to the extent that it is part of domestic law. See question nine: Will I be complying with retained EU law?

ultra vires
Latin for "outwith the powers" of an authority. See question one: Where does the power to make this decision come from and what are its legal limits?

Prepare

Step 1 | Prepare:
Getting ready to decide

1. **Where does the power to make this decision come from and what are its legal limits?**
2. **For what purposes can the power be exercised?**
3. **What factors should I consider when making the decision?**
4. **Is there a policy on the exercise of the power?**
5. **Does anyone have a legitimate expectation as to how the power will be exercised?**
6. **Can I make this decision or does someone else need to make it?**
7. **Have devolution and the Scotland Act affected the power?**
8. **Will I be complying with human rights law?**
9. **Will I be complying with retained EU law?**
10. **Will I be complying with equality legislation?**
11. **What are my environmental duties?**
12. **What are the financial implications of the decision?**

Question one

01 Where does the power to make this decision come from and what are its legal limits?

Power to act

Public authorities only have the functions that the law gives to them, and must exercise those functions within the limits that the law provides. Officials making decisions for public authorities must only make decisions that the law gives the public authority the power to take. If not, that person will be acting *ultra vires* – or outside the decision-maker's powers.

A decision-maker should therefore be clear about where the power to decide the matter before them comes from. Where the power does exist, it will usually be found in legislation.

Legislation may set out the functions that are given to public authorities in different ways. It may confer a function in general terms as an area for which the public authority may take or has responsibility, and where it may take decisions about how it does that. It may set out specifically matters which the public authority is to decide.

If the power to take a decision comes from legislation, you will need to look at its words to work out what the public authority, and so the decision-maker, can and cannot do.

Usually, words in legislation are given their ordinary meaning. Where the words might give rise to a different interpretation, the courts will try to determine the intention of the legislator that made the legislation. Either way, you will need to understand the general purpose of the legislation, as well as the particular provision. It can sometimes be helpful to consider material other than the legislation itself, that indicates the purpose of the legislation.

The courts will also read legislation with certain presumptions in mind about the legislator's intention, and so as to comply with human rights, or (in the case of legislation made by the Scottish Government or the Scottish Parliament), the Scotland Act; or with retained or "assimilated" EU law in some cases, including the case law of the Court of Justice of the EU, the EU Withdrawal Agreement or the Trade and Cooperation Agreement with the EU.

Where you are in doubt whether the public authority has powers to make the decision, you should consult your lawyer.

In the case of the Scottish Ministers, their powers to make decisions may also come from executive functions they have at "common law" or from prerogative powers of His Majesty, which are not set out in legislation.

Limits on the power to act

Once the law giving the public authority the power to make a decision has been identified, the limits on the power to take the decision should also be understood.

Sometimes limits may be expressly set out in the legislation which gives the public authority the power to take a decision. The purposes for which a particular power was given, or the criteria to be applied in exercising it, may actually be set out in the legislation.

One example of an express limit, is where the law places a duty on a public authority to take a decision or act in a particular way. Sometimes even though the words in the legislation indicate that there is discretion as to whether or not to act – e.g. that the public authority

"may" decide to do or not do something – there are cases where that must be interpreted as imposing a duty to act.

For example, a public authority with the power to grant licences may be obliged to do so where an applicant fulfils all the prescribed requirements. In order to determine what a law means when it says "may" (or for that matter "shall") you have to look at the law in question and its purposes as a whole. If in doubt, contact your lawyer.

Sometimes, a decision-maker may appear to have more unlimited powers. A statutory provision conferring a power may say "the Scottish Ministers shall grant or refuse the application" without qualification. But however unlimited the power appears to be, there will be legal limits.

A patient challenged the Scottish Ministers' failure to make regulations under the Mental Health (Care and Treatment) Scotland Act 2003 introducing a formal mechanism to allow patients detained in medium and low-security hospitals to challenge their conditions of security by a certain date. The Act could not effectively operate without the Scottish Ministers enacting regulations that would define key terms within the Act. The Court found that Parliament had intended to bring about an effective result that would have practical consequences. Even though the Ministers' power to define the key terms was discretionary, failure to exercise that power would be unlawful if it frustrated the intention of Parliament.

RM v Scottish Ministers [2012] UKSC 58

Limits may, for example, be implied by the statutory scheme that gives the powers.

Other limits on the powers of public authorities on

- making decisions;
- how they should be taken;
- the decisions that can be made; and
- the reasons that should be given,

come from administrative law applicable to decision-making by public authorities generally, and are dealt with in the subsequent sections of this Guide.

See also in particular

question two
For what purposes can the power be exercised?

question seven
Have devolution and the Scotland Act affected the power?

question eight
Will I be complying with human rights law?

question nine
Will I be complying with retained EU law?

Question two

02 For what purposes can the power be exercised?

As well as having the power to act, a public authority must use its power for a lawful purpose. Its action will be *ultra vires* and an abuse of power if it uses the power to achieve a purpose for which the power was not intended.

Legislation may expressly set out the purposes for which a power may be exercised, or they may be implied from its objectives. The fact that the power to take a decision on a particular matter is not expressly spelled out in legislation does not necessarily mean that a public authority cannot do so, if it is ancillary to a function that the law has given to the authority.

The courts have accepted that a public authority may undertake tasks "conducive to" or "reasonably incidental to" a defined purpose. If, for example, a decision-maker has the power to hold a public hearing to assist in making a decision, related powers to hire accommodation, pay for IT etc. will be treated as being "reasonably incidental" to that purpose.

A circus company applied to a local authority for a temporary public entertainment licence. The licence was refused. The local authority stated that although they had not applied a blanket ban, they had a policy which did not permit circuses featuring performing animals, based on the fact that the whole concept of animals performing in circuses was wrong. The Court found that the powers the local authority had been given by Parliament related to the registration of those wishing to provide public entertainment. This did not permit the local authority to prohibit types of performance of which it simply disapproved.

Gerry Cottle's Circus Ltd v City of Edinburgh District Council 1990 SLT 235

See also in particular

question one
Where does the power to make this decision come from and what are its legal limits?

question three
What factors should I consider when making the decision?

Question three

03 What factors should I consider when making the decision?

To make a decision which is lawful, two main principles should be followed:

1. you should not base your decision on irrelevant factors or considerations; and
2. if there are factors or considerations which you have a duty to base your decision on, then you must do so.

There are certain rules which will help you to decide what factors you have a duty to consider, what factors are relevant, and those which are irrelevant.

If you are using powers given to the public authority by legislation, it might set out the factors on which you should base your decision. Some legislation sets out factors which you have to pay "particular" attention to. So, whilst the legislation doesn't set out every factor which you can consider, it does mean that you have to follow the factors that are listed.

An application for an extension to permitted hours was made to a licensing board. In considering whether or not to grant the application the licensing board was, in terms of the statutory provisions, to have regard to the social circumstances of the locality or to the activities taking place in the locality. The licensing board took into consideration that the local environmental health department had reported one week earlier that the premises were in an unsatisfactory condition. The Court decided that, in terms of the statutory scheme, this was not a relevant factor on which to base the decision.

Bantop Ltd v Glasgow District Licensing Board 1990 SLT 366

If legislation doesn't set out factors to be considered then it helps to look at what the legislation is trying to achieve (its purpose) and from that decide what factors are relevant to the decision you are to make. If your decision is challenged the courts will want to know the factors that you considered; for example, the media's reaction to a decision is unlikely to be relevant to the purpose of the legislation and the courts would be likely to decide that this was an irrelevant factor on which to base a decision.

To take into account all relevant considerations required to come to a decision:

- you need to make sure that you have accurate and up-to-date information;
- where you don't have the information that you need to make the decision you have to make sure that you can get it from those who have it;
- you should consult (see question fourteen) and follow any guidance or points of reference in place within your public authority which relate to the way the decision has to be made; and
- where representations have been made regarding the decision you should take account of them where appropriate.

In a planning appeal against the refusal of outline planning permission for a residential development on agricultural land, the Court found that the Reporter, in considering the application, had failed to address the evidence on housing land supply and had also misconstrued the significance of supplementary planning guidance. He had not undertaken sufficient analysis of the evidence and did not take account of material elements. Rather he applied his own personal view of the application and failed to identify any material consideration which would properly allow for departure from the development plan. He had also failed to properly specify what was meant when he gave as one of the reasons for refusal that the developers' proposal did not satisfy the definition of "affordable housing". The decision was struck down.

Aberdeenshire Council v Scottish Ministers [2008] CSIH 28

It is important to remember that it is the factors which are used in making the decision that are important here and that you must be able to demonstrate that you have properly considered them.

In addition to looking to your powers you should also consider whether your decision could affect an individual's human rights. If so then evidence that you have taken such considerations into account could assist you in responding to any challenge to your decision. You should also consider the requirements of equality legislation, and be sure that you can evidence having met them.

Whatever factors you decide are relevant, you need to be sure that the facts on which you base your decision are accurate and up-to-date. You should also consider whether the factors that influenced your decision, and the decision-making process itself, need to be recorded. In determining what should be recorded, it is worth bearing in mind the rights to access information created by the data protection legislation and the Freedom of Information (Scotland) Act 2002.

See also in particular

question one
Where does the power to make this decision come from and what are its legal limits?

question eight
Will I be complying with human rights law?

question ten
Will I be complying with equality legislation?

question seventeen
Am I handling data in line with data protection or freedom of information obligations?

question twenty-one
To what extent should I give reasons for the decision?

Relevant considerations might also be

- policies (see question four);
- legitimate expectations (see question five); and
- representations received (see questions thirteen to fifteen).

Question four

04 Is there a policy on the exercise of the power?

Where legislation has conferred a discretionary power on Ministers or another public authority to issue something such as a licence, they will potentially have to deal with hundreds or thousands of cases. The legislation may spell out the criteria for the grant of the licence in general terms, but the decision-maker may still be left with a wide discretion. To ensure consistency and promote administrative efficiency, the decision-making authority will probably develop a standard way of dealing with such cases; they will try to apply the same criteria, attaching the same weight in each case. They will develop a "policy" for dealing with cases.

However, where legislation confers a discretion on a decision-maker, the decision-maker must not surrender that discretion – to another person, to a set of rules, or to a "policy". The decision-maker must keep an open mind and consider each case on its own merits; otherwise there is a failure to exercise discretion properly. The authority must not "close its ears" to particular arguments.

The courts have held that it is lawful for decision-makers to have a policy as to the way in which discretion should be exercised – indeed, to achieve consistency in decision-making

The Secretary of State was found liable for the false imprisonment of two foreign nationals who were due to be deported. The policy had been that there was a rebuttable presumption that the prisoner would be released pending deportation. The policy was changed so that the presumption was that the prisoner would not be released, but that change in policy had not been published and so was insufficiently open and accessible.

R. (on the application of Lumba) v Secretary of State for the Home Department [2011] UKSC 12

it may be essential that there is a policy. But the courts have also held that the decision-maker must nevertheless direct their mind to the facts of the particular case and be prepared to make exceptions. This is particularly important in cases involving human rights and considerations of equality. Equally, where a decision-maker does have a policy, the decision-maker should not depart from it without giving an explanation or should ensure that a change in policy is compliant with the law.

The decision-maker must keep an open mind and consider the facts of every case – and make it clear that this has been done in the terms of the decision. This approach is also more likely to be proportionate in human rights terms because it allows a proper assessment of whether any interference with human rights is necessary on the facts of the particular case.

Where there is a policy for dealing with cases, it should be published so that persons affected by the policy can make informed and meaningful representations before a decision is made.

See also in particular

question five
Does anyone have a legitimate expectation as to how the power will be exercised?

question eight
Will I be complying with human rights law?

question ten
Will I be complying with equality legislation?

question fifteen
Will I be acting with procedural fairness towards the persons who will be affected?

Question five

05 Does anyone have a legitimate expectation as to how the power will be exercised?

An authority must act within its powers. It should exercise its discretion in accordance with a "policy", provided it is operated consistently but not too rigidly. The authority must not close off (or "fetter") the exercise of its discretion.

Sometimes a tension arises between these principles in practice. Suppose an authority operates a policy or procedure consistently, but a change of circumstances, or a review of where the "public interest" lies, means that there is a need to modify the policy or procedure. Or suppose the decision-maker misunderstands the extent of their legal powers and offers to an applicant a benefit (for example, planning permission) for which the applicant does not qualify under the legislation.

In this kind of situation, someone affected by the decision may have a legitimate expectation that because the policy or procedure has been operated in such a way in the past, that this will continue in the future. Equally, if the authority has promised someone a particular benefit, it may (depending on the circumstances) be unfair to break that promise, even if there are public interest grounds for breaking it.

A widow challenged the decision not to hold a public inquiry into the murder of her husband by paramilitaries in Northern Ireland. There had been a paper-based review, but not a full public inquiry. The then Home Secretary had given an unequivocal assurance, and had made a statement to the House of Commons, saying that there would be an inquiry. Following a change of government, the new Prime Minister decided not to hold an inquiry. The Court found that where a clear and unambiguous undertaking has been made, the authority giving the undertaking would not be allowed to depart from it unless it was fair to do so. It found that here political issues had overtaken the promise given by government, and contemporary considerations impelled a different course, with a decision made in good faith on genuine policy grounds to depart from the original undertaking.

(Re Finucane's Application for Judicial Review [2019] UKSC 7)

The key to resolving these tensions is to strike a balance between the public interest, for example in changing the policy, and the private interest, in maintaining it. Where a legitimate expectation has arisen, a public authority can still frustrate that expectation if any overriding public interest requires it. Whether a legitimate expectation has arisen, and whether it can be overridden, will depend upon a number of factors, such as:

- were the words or conduct (i.e. the "promise" or "representation") which gave rise to the expectation clear and unequivocal?
- did the person promising the benefit have the legal power to grant it, or was it *ultra vires*?
- who made the promise and how many people stood to benefit by it?
- did the person(s) to whom the promise was made take action in reliance upon it which has placed them in a worse position than they would have been in if they had not taken that action?

These are some of the factors which the courts will take into account in deciding whether a legitimate expectation has arisen and whether it is fair, or would be an abuse of power, to allow the public interest to override it. If the decision-maker had no legal power to make the promise/representation, then a claim of legitimate expectation is unlikely to succeed, though there could be exceptions to this where human rights are in play.

A procedural legitimate expectation might arise where an individual has an expectation of a particular process. A substantive legitimate expectation may exist where an individual has been given an expectation of a particular outcome.

Where an authority intends to change a policy or a procedure (for example, to change a practice of accepting late applications), practical steps should be taken to address any potential claims of there being a legitimate expectation that the policy or procedure would continue. This could be done by means of clear publicity – e.g. by providing a careful explanation as to why the change is necessary, and possibly by consultation with regard to the timing of, or change to, any new procedure to be adopted.

See also in particular

question four
Is there a policy on the exercise of the power?

question fifteen
Will I be acting with procedural fairness towards the persons who will be affected?

Question six

06 Can I make this decision or does someone else need to make it?

The general rule is that where legislation confers a power on a specified individual or body, the power must be exercised by that individual or body and must not be given away to another person or body. However, there are many exceptions to this rule. In particular, the courts accept that Government Ministers cannot possibly make personally every decision which is made in their name, and that officials may act on their behalf. This is known as "the Carltona principle" after the leading case[1].

The theory is that, legally and constitutionally, the acts of officials are the acts of their Ministers provided the official is acting with the express or implied authority of the Minister. The principle does not however apply in local government.

Where the Carltona principle applies, a decision may still only be taken on a Minister's behalf by an official of appropriate seniority and experience. And there will always be some cases where the special importance of the decision, or its consequences, mean that the Minister must make the decision personally.

Under the Prison Rules 1999, a prison governor had power to segregate prisoners for up to 72 hours, after which authority would have to be given by the Secretary of State. In a challenge to a decision to segregate a prisoner for seven months, it was found that the decision to segregate had not been authorised by the Secretary of State. Prison governors had an independent statutory office, and hence were constitutionally responsible for carrying out their duties. The Carltona principle therefore did not apply, and so the governor's actions could not be treated as actions by the Secretary of State.

R (on the application of King) v Secretary of State for Justice [2015] UKSC 54

Sometimes specific statutory provisions require that the Minister make the decision personally. If the power can be delegated, you need to check whether there are limitations on the seniority of officials who can exercise it on the Minister's behalf.

Sometimes, before you can make your decision, you will need information or policy input from another public authority. If so, it is important to remember that the decision is one for you as the decision-maker, having regard to all the circumstances, including the advice or recommendation of that other authority.

You should not merely "rubber-stamp" the advice or recommendation which you receive from elsewhere.

See also in particular

question sixteen
Could I be, or appear to be, biased?

Question seven

07 Have devolution and the Scotland Act affected the power?

The Scotland Act 1998 created a Scottish Parliament with the power to make laws in or as regards Scotland, except for certain matters which only the UK Parliament in Westminster can legislate for. There has been further devolution of powers to the Scottish Parliament by the Scotland Act 2012 and the Scotland Act 2016.

The functions of many public authorities in Scotland, and their powers to make decisions, were relatively unaffected by devolution, though they may be affected by subsequent Acts of the Scottish Parliament. The functions of the Scottish Ministers, and their powers to make decisions, on the other hand, are closely aligned to the laws that the Scottish Parliament can make. Many functions of UK Government Ministers that could be exercised in Scotland before devolution, transferred to the Scottish Ministers.

The Scottish Parliament cannot make laws that relate to reserved matters. Whether a function of the UK Government, and the power to make a decision, has transferred to the Scottish Ministers, or has stayed with the UK Government, depends on whether the function, or exercising it in a particular way, relates to a reserved matter.

The UK and Scottish Governments have powers only over the matters that the law gives to them. Ministers and civil servants in the Scottish Government, and in the UK Government, therefore need to ensure that any decisions that they make have a lawful basis, given the terms of the Scotland Act.

Although much legislation – especially older legislation – gives functions to UK Ministers (often referencing e.g. “the Secretary of State”), those functions may have transferred to the Scottish Ministers as a result of the Scotland Act. There are also a range of mechanisms in the Scotland Act that allow the boundaries of devolution to be altered, so that powers of UK Government Ministers are to be exercised by the Scottish Ministers, powers of the Scottish Ministers are to be exercised by UK Government Ministers, or that both UK Government and Scottish Ministers have to exercise the power together, or that either the UK Government or Scottish Ministers can. Since devolution, a range of alterations have been made.

Where the power to make a decision is contained in an Act of the Scottish Parliament, or in subordinate legislation that has been made by a member of the Scottish Government, the Scotland Act may also affect how that power is to be read and understood. Such powers cannot be read in a way that would not have been within the competence of the Scottish Parliament or Ministers to legislate for. Instead they must be read as narrowly as is required to be within competence, if that reading is possible.

See also in particular

question one
Where does the power to make this decision come from and what are its legal limits?

question eight
Will I be complying with human rights law?

Question eight

08 Will I be complying with human rights law?

The United Kingdom is party to a number of international human rights treaties which public authorities in Scotland are to protect and realise as a matter of international law. One of these is the European Convention on Human Rights (also known as "the ECHR" or "the Convention").

The Human Rights Act 1998 gives effect to rights and freedoms set out in the European Convention on Human Rights in Scots law, and allows claims of breaches of the Convention to be brought before Scottish courts. The Human Rights Act 1998 requires public authorities to act compatibly with rights set out in the Convention. The Scotland Act also obliges members of the Scottish Government to act compatibly with rights set out in the Convention, and provides that provisions in an Act of the Scottish Parliament which are incompatible with rights set out in the Convention are not law.

A woman's husband died after receiving contaminated blood. She asked the Lord Advocate to hold a Fatal Accident Inquiry (FAI) into the death in terms of the Fatal Accidents and Sudden Deaths Act 1976. The holding of an FAI is at the discretion of the Lord Advocate. The Lord Advocate declined to hold such an inquiry. The widow complained that this refusal was a breach of the investigative obligation present in Article 2 of the Convention (the right to life). The Court agreed and held that the decision not to hold an FAI should be reduced. The investigations that had been carried out were insufficiently wide in scope and there had been no practical or effective investigations into the death.

Black v Lord Advocate [2008] CSOH 21

The human rights protected by the Convention ("Convention rights") which public authorities must act compatibly with are:

- The right to life (Article 2);
- The prohibition of torture (Article 3);
- The prohibition of slavery and forced labour (Article 4);
- The right to liberty and security (Article 5);
- The right to a fair trial (Article 6);
- No punishment without law (Article 7);
- The right to respect for private and family life (Article 8);
- Freedom of thought, conscience and religion (Article 9);
- Freedom of expression (Article 10);
- Freedom of assembly and association (Article 11)
- The right to marry (Article 12);
- The prohibition of discrimination (Article 14)
- The protection of property (Article 1 of the First Protocol);
- The right to education (Article 2 of the First Protocol);
- The right to free elections (Article 3 of the First Protocol);
- The abolition of the death penalty (Article 1 of the Thirteenth Protocol).

A decision will be unlawful if the effect of the decision is incompatible with a person's Convention rights. For public authorities other than the Scottish Government the only exception to this is where a duty under primary legislation made at Westminster means that you cannot do otherwise.

In the case example on p20, the decision made

by the Lord Advocate was within the terms of the legislation, but the particular exercise of the power was incompatible with a Convention right and was therefore annulled.

The Human Rights Act also adds an important dimension to interpreting legislation: so far as it is possible to do so, legislation must be read and given effect in a way which is compatible with human rights[2].

A father was not allowed to become involved in children's hearings concerning his child, as he had never been married to the child's mother, and so did not fit the definition of a "relevant person" in section 93(2)(c) of the Children (Scotland) Act 1995. He sought to challenge this decision, relying on his rights under Article 8 of the Convention (right to respect for private and family life). The Court read the section in such a way that "relevant person" could include anyone who appeared to have established family life with the child with which the decision of a children's hearing may interfere, and so ensured that the provision was compatible with human rights law. As his family life with his child was at risk, the father had the right to be afforded a proper opportunity to take part in the decision-making process.

Principal Reporter v K [2010] UKSC 56

Horizon scanning

It is important to note that there are two significant legislative proposals which, if they become law, would substantially alter the legislative human rights landscape in Scotland.

The proposals are as follows:

Firstly, the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill would make it unlawful for public authorities in Scotland to act incompatibly with the "UNCRC requirements" as defined by the Bill.

Secondly, the Scottish Government is committed to introducing a new Human Rights Bill which would incorporate four United Nations Human Rights treaties into Scots law, covering economic, social and cultural rights and protections for women, disabled people and minority ethnic communities. The new Bill is planned to be introduced during the 2021-26 parliamentary session and will include specific rights, subject to devolved competence.

See also in particular

question seven
Have devolution and the Scotland Act affected the power?

question nineteen
Does the decision need to be, and is it, proportionate?

Question nine

09 Will I be complying with retained EU law?

On 31 January 2020 the United Kingdom left the European Union (EU) under the terms of the Withdrawal Agreement Treaty between the EU and the UK and entered a transition or implementation period during which the vast majority of EU law continued to apply until 31 December 2020.

At the end of the transition period much EU law as it stood in Scotland on that date became part of Scots law as "retained EU law" under the European Union (Withdrawal) Act 2018. Retained EU law includes domestic legislation which implemented EU obligations or enabled rights from membership of the EU to be enjoyed, as well as Regulations, and Decisions adopted by institutions of the EU. Retained EU law will continue to apply in Scotland until such time as new domestic legislation is made to change it. In some cases retained EU law has already been modified by domestic legislation so that it operates effectively outside of the EU, for example by providing for functions of EU entities to be exercisable by a public authority in the United Kingdom. Retained EU law will continue to be important in many areas including, for example, the law on environmental duties, procurement and data protection.

In the first instance, the text of EU Regulations and domestic legislation made to implement EU obligations or to enable rights from membership of the EU to be enjoyed will be the source for understanding the requirements of retained EU law. It will be for the courts in the UK to interpret the meaning of retained EU law. Where retained EU law has not been changed by new domestic law, its meaning and effect, and any question about whether it is valid or not, is to be decided by considering:

- relevant cases decided by the Court of Justice of the European Union or domestic courts before the transition or implementation period ended, and certain general principles of EU law;
- limits on what the EU could competently legislate for before the transition or implementation period ended.

The Withdrawal Agreement is implemented by the EU (Withdrawal Agreement) Act 2020.

The EU (Withdrawal Agreement) Act 2020 contains detailed provisions on some specific rights and obligations which apply from the end of the transition or implementation period, for example on the rights of EU Citizens.

Legal advice should be taken if it is unclear whether, or how, a particular piece of retained EU law continues to apply, or where there is any question on the effect of modifications to retained EU law.

Agreements between the UK and the EU (the Trade and Cooperation Agreement, and the Withdrawal Agreement which includes the Northern Ireland Protocol and Windsor Framework) require a degree of alignment between legal rules in the UK with the EU.

Horizon scanning

The Retained EU Law (Revocation and Reform) Act 2020 will reform this body of law at the end of 2023. At that date, retained EU law will become known as "assimilated law". Assimilated law will differ from retained EU law in a number of ways but it will continue to have legal force in Scotland.

See also in particular

question eleven
What are my environmental duties?

question twelve
What are the financial implications of the decision?

question seventeen
Am I handling data in line with data protection and freedom of information obligations?

Question ten

10 Will I be complying with equality legislation?

The Equality Act 2010 ("the 2010 Act") consolidated and replaced the previous equality and discrimination legislation for Scotland, England and Wales. It makes it unlawful to act in a particular way or reach a particular decision where it would be discriminatory on any of the specific grounds and circumstances covered by the 2010 Act.

The 2010 Act covers discrimination because of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. These categories are known as protected characteristics.

In providing a service or exercising a public function, a public authority must act and make decisions in a way that avoids unlawful discrimination, harassment and victimisation.

In addition, section 149 of the 2010 Act sets out the public sector equality duty ("PSED"). This duty requires a public authority in the exercise of its functions to have due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct prohibited under the 2010 Act;
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

A 56-year-old woman wished to take a catering course. The Education (Student Loans) (Scotland) Regulations 2007 made provision for student loans for the course, but only students under the age of 55 were eligible. She was refused a student loan and petitioned for judicial review.

Age is a protected characteristic under the 2010 Act. The Court found that the PSED applied to the implementation of policies as well as their formulation. Even though the policy dated from before the PSED came into force, the duty was ongoing. Where there are grounds to believe that the manner in which a public function is being exercised is not fulfilling the requirements of the PSED, then due regard must be had to exercising it in a manner that does. The Court held that these grounds were established when the Scottish Ministers made amendments to the 2007 Regulations. These amendments disapplied the age limit for certain vocational courses but failed to do so for the course the woman had applied for. At that point the Scottish Ministers failed to meet the requirements of the PSED.

Hunter v SAAS [2016] CSOH 71

Those exercising public functions in or on behalf of public authorities should keep an accurate record showing that they have considered the PSED and relevant questions. Certain public authorities, when applying a new or revised policy or practice have additional specific duties in relation to the PSED and must assess the impact of the policy against the requirements of the PSED[3]. This can be achieved by completing an equality impact assessment. Failure to keep an accurate record of steps taken or failure to carry out an equality impact assessment may lead to a decision being challenged and ultimately struck down.

A man who suffered from physical and mental health problems and had been made homeless made an application for rehousing to a local authority. The Court found that the local authority was required to closely consider the public sector equality duty at every stage in the decision-making process as to whether the man was in priority need of accommodation as a vulnerable person. This duty applied over and above duties towards people with disabilities under the relevant housing legislation.

Hotak v Southwark LBC [2015] UKSC 30

As can be seen from the case examples, the PSED is ongoing and can apply to a policy or practice that pre-dates the introduction of the PSED. Cases have been brought in which it was argued that the duty was not carried out properly, in relation to matters such as decisions on planning control, housing, an *ex gratia* compensation scheme, and the funding of voluntary organisations.

What does a duty to have "due regard" to the needs of the PSED require you to do when making a decision? The UK Supreme Court has held that "due regard" means the regard that "is appropriate in all the circumstances"[4]. In the case of Hotak, Lord Neuberger explained that: *"*in light of the word 'due' in section 149(1), I do not think that it is possible to be more precise or prescriptive, given that the weight and extent of the duty are highly fact-sensitive and dependent on individual judgment*"*.

The case law gives some further guidance [5]. The duty must be exercised in substance, with rigour, and with an open mind, and it is for the decision-maker to determine how much weight to give the duty.

*"*The court cannot interfere...simply because it would have given greater weight to the equality implications of the decision"[6]. The duty is "not a duty to achieve a particular result"[7]*.* It is a duty to have regard to the need to achieve the goals set out in the PSED.

Some other key principles from the case law are that the duty cannot be delegated, must be fulfilled before and while a policy is being considered, and requires the decision-maker to be properly informed.

In addition to the PSED, the 2010 Act imposes a duty on certain public authorities, when making decisions of a strategic nature about how to exercise their functions, to have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage. This is known as the Fairer Scotland Duty, which came into force in April 2018.

There are relevant materials that will assist you in complying with the PSED and Fairer Scotland Duty. The Equality and Human Rights Commission has published Technical Guidance on the PSED in Scotland[8]. The Scottish Government has published 'The Fairer Scotland Duty: Guidance for Public Bodies'[9] and the 'Equalities Outcomes and Mainstreaming Report 2021'[10] in relation to meeting the requirements of the Specific Duties Regulations[11]. These Regulations place specific duties on certain public authorities, including reporting and publishing duties, with the aim of enabling better performance of the PSED by those authorities.

Comprehensive Equality Impact Assessment guidance is available through the Scottish Government intranet to all Scottish Government staff to help ensure these duties are met. Other public authorities will have their own schemes and guidance.

A father, whose son suffered from severe learning and mobility issues, challenged the closure of an adult day care centre. One of the grounds of challenge was that the council had failed to comply with its duties under section 149 of the 2010 Act. The Court found that the effective decision to close the day care centre had been taken without an Equality Impact Assessment. It accepted that a failure to carry out an assessment may be excusable where it can be shown that the duty under section 149 has been observed, but that was not the case here. A scoping exercise that had been carried out had the hallmarks of a tick-box exercise completed after the effective decision had been taken. The Court reduced the decision, which meant that the council was required to keep the day care centre open beyond the date that it was due to close.

McHattie v South Ayrshire Council [2020] CSOH 4

South Wales Police trialled the use of automated facial recognition technology to capture digital images of members of the public which were then compared with images on a police "watch list". A man who was caught on camera twice challenged the use of this technology against him on a number of grounds, one of which was breach of the public sector equality duty. Although South Wales Police had carried out an equality impact assessment, the Court found it had not taken reasonable steps to investigate whether the technology had an unacceptable bias on grounds of race or sex, and therefore had not fulfilled the public sector equality duty.

Regina (Bridges) v Chief Constable of South Wales Police v Information Commissioner and others [2020] EWCA Civ 1058

See also in particular

question three
What factors should I consider when making the decision?

question eight
Will I be complying with human rights law?

Question eleven

11 What are my environmental duties?

There are a number of pieces of legislation which place duties on decision-makers to take steps to consider the environment, climate change and biodiversity before making a decision. Not all of these duties will be relevant to every decision, but you must consider whether they apply and meet them if they do.

This section sets out some environmental duties that could apply to your decisions. Failure to meet these duties could mean that a decision is unlawful and could be struck down.

Environmental assessments

If you are making a decision about a plan, programme or project that is likely to have a significant effect on the environment then you might have to undertake an environmental assessment before you make your decision.

The process of environmental assessment ensures the environmental implications of decisions are taken into account before those decisions are made. It is designed to ensure the environment is considered early and openly in your decision, that there is appropriate consultation and that you have compared different options. The process applies in a wide range of situations.

There are three types of environmental assessment. The first are **Environmental Impact Assessments** (EIA), which evaluate the environmental effects of individual proposed development projects (e.g. a new factory, road or windfarm).The requirements for EIAs are set out separately in respect of different statutory regimes under which consent is given for a project to proceed.

The second are **Strategic Environmental Assessments** (SEA)[12], which evaluate the environmental effects of qualifying public plans, programmes and strategies (e.g. infrastructure plans).

The third are **Habitats Regulation Appraisals**[13], which evaluate the impact a plan or project may have on the habitat of a specially protected site. These are also referred to as “appropriate assessments”.

It is important to determine from the outset whether you need to conduct an environmental assessment. If you think one might be required, you may wish to contact your lawyers or other specialist teams for advice.

Further information on environmental assessments, including relevant guidance, can be found on the Scottish Government website.

A decision could be open to challenge if you don’t undertake an environmental assessment when one is required, or if the process is flawed in some way.

Public bodies' climate change duties

Part 4 of the Climate Change (Scotland) Act 2009 places duties on most public bodies in Scotland to contribute to climate change mitigation, climate change adaptation, and to act sustainably when exercising their functions.

The duties apply whenever decisions are made in the exercise of a body's functions – this covers a very wide variety of decisions, such as decisions about services, plans, funding, licences etc. In practice the level of consideration that needs to be given to the duties will vary depending on the type and level of decision being made.

Public bodies should be embedding these principles into decision-making processes and you may want to check whether local arrangements are in place to demonstrate that your decisions comply with them.

There is guidance on the climate change duties and it is a legal requirement that public bodies have regard to the guidance.

Biodiversity

Section 1 of the Nature Conservation (Scotland) Act 2004 is another example of an environmental duty relevant to decision-makers. It places a duty on public bodies and office-holders, when exercising any functions, to further the conservation of biodiversity. You don't, however, need to take action which would be inconsistent with the proper exercise of your functions.

In meeting this duty you must have regard to the Scottish Diversity Strategy and the United Nations Environmental Programme Convention on Biological Diversity.

The original diversity strategy was published in 2004 but has since been supplemented by the '2020 Challenge for Scotland's Biodiversity' published in 2014. The two documents together now constitute the Scottish Biodiversity Strategy and can be found on the Scottish Government website:

- Scotland's Biodiversity: it's in your hands
- 2020 Challenge for Scotland's Biodiversity

Question twelve

12 What are the financial implications of the decision?

Financial propriety and accountability

Many, if not most, decisions by public authorities will have public resource implications: from straightforward disbursement of funds, to taking a decision on whether or not to enforce a debt (for example a tax liability or an unpaid penalty). In all cases public authorities are responsible for the efficient and effective use of public funds and will be subject to internal protocols relating to the level of authority required and the basis on which financial decisions can be made.

Propriety of expenditure is not in itself a legal test but involves political and ethical judgement against the accepted norms of the day expected of public servants. A key principle here is whether an accountable officer or other public official with financial responsibility would be prepared to defend the expenditure/commitment publicly.

Any decision must be looked at carefully to ensure it complies with the relevant requirements. While such financial obligations may not be legal in the strict sense of being enforceable in court, most, if not all, public authorities will be subject to internal and external audit, their duties to their sponsor bodies and, to a lesser or greater extent, to Scottish Ministers and the Parliament depending on the type of public authority or, in the case of local authorities, their Council Members.

In taking a decision therefore you need to be very clear on what the financial implications of that decision are and ensure that other alternatives have been considered to establish the decision represents good value for money within a framework of Best Value, calling on specialist financial advice (which may, depending on the organisation, be internal or external) where required. Value for money does not always mean choosing the cheapest option, there is in fact an overriding obligation on officials to ensure that public funds are disbursed with due consideration to the suitability, effectiveness, prudence, quality and value of a decision, and should be **judged for the public sector as a whole**, alongside ensuring the avoidance of error and other waste.

Your organisation may be bound by the terms of the Scottish Public Finance Manual (SPFM).

The bodies to which the guidance in the SPFM is directly applicable includes:

- the constituent parts of the Scottish Administration (i.e. the Scottish Government, the Crown Office and Procurator Fiscal Service, Scottish Government Executive Agencies and non-ministerial departments);
- bodies sponsored by the Scottish Government;
- the Scottish Parliament Corporate Body; and
- bodies sponsored/supported by the Scottish Parliament Corporate Body.

Bodies sponsored by the Scottish Government essentially means those commonly referred to as non-departmental public bodies (NDPBs). NDPBs include Executive NDPBs, Public Corporations and NHS Bodies.

The SPFM sets out the rules for spending money, accounting requirements, accountability of officials and auditing arrangements.

The Local Government (Scotland) Act 1973 requires every local authority to make arrangements for the proper administration of their financial affairs and to secure that the proper officer of the authority has responsibility for the administration of those affairs. The 1973 Act sets out the requirement for local authority annual accounts and for the audit of those accounts. Regulations made under the 1973 Act set out additional requirements in relation to financial management and annual accounts[14]. The Local Government in Scotland Act 2003 places a local authority under a duty to secure best value.

Does the decision involve the award of money (or other commercial advantage) to a third party?

There are a number of contexts in which public authorities enter into contracts or award grants to private businesses or third parties to fund certain activities. In taking decisions which involve the expenditure of public funds, an authority must ensure that it complies with applicable law as well as any internal guidance or process which applies, for example, the Scottish Public Finance Manual.

Where an authority makes an arrangement with a third party which involves an economic advantage (which can be by way of a contract or grant, but also more broadly, other advantages, e.g. the ability to use the authority's intellectual property), the authority should consider whether procurement or competition and trade considerations are relevant to the proposal. Procurement refers to the process by which public authorities purchase work, goods or services from others.

Procurement law applies to the provision of most works, goods and services to public authorities and in many cases mandates the use of a competitive procurement process, in which all suitably qualified entities can participate on a fair, open and transparent basis. This is a complex area on which specialist advice will be required, but a general overview is provided here.

Any decision which involves the granting of a commercial advantage to a third party will need to be considered in the context of competition and trade law, in particular constraints on the granting of distortive subsidies (also referred to in the context of EU law as "state aid"). At the time of publication, this area of law was in a period of significant change arising from the UK's exit from the European Union and specialist advice will be required to ensure relevant obligations are respected.

When do I need to think about procurement?

The procurement rules are engaged when a public authority enters into a contract for works, goods, services or the operation of a concession (i.e. granting the right to revenue arising from the operation or exploitation of a particular asset or right, e.g. the operation of a car park where the revenues are dependent on the use of that asset and are not guaranteed by the public authority). These derive originally from EU law as set out in a suite of procurement Directives[15] which have been implemented in Scotland through domestic legislation[16], much of which has become retained EU law following the UK's exit from the European Union and the expiry of the transition or implementation period on 31 December 2020. In addition, the Procurement Reform (Scotland) Act 2014 and supporting Regulations[17] places further obligations on public authorities in relation to procurement.

Contracts above applicable threshold values need to be awarded following a fair, open and transparent competition in accordance with the relevant rules, other than for a few exceptions where the rules may not apply or where direct awards are expressly permitted. There are a number of different procedures available depending on the nature of the contract to be awarded. Specialist support will be required in the design and execution of the procurement.

Failure to comply with the applicable rules may have significant consequences, including financial consequences.

Particular care must be taken when awarding grants to ensure that the arrangement is not in fact a contract for the provision of goods or services. If it is a contract the procurement rules must be followed. Failure to do so may result in the illegal direct award of a contract with potential severe consequences, including financial penalties. Whether or not the arrangement is truly a grant will depend upon its nature and purpose and not the form of agreement used.

See also in particular

question nine
Will I be complying with retained EU law?

Process

Step 2 | Process:
Investigating and evidence gathering process

13. **Does the power have to be exercised in a particular way, e.g. does legislation impose procedural conditions or requirements on its use?**
14. **Have I consulted properly?**
15. **Will I be acting with procedural fairness towards the persons who will be affected?**
16. **Could I be, or appear to be, biased?**
17. **Am I handling data in line with data protection and freedom of information obligations?**

Question thirteen

13 Does the power to make the decision have to be exercised in a particular way, e.g. does legislation impose procedural conditions or requirements on its use?

Correct procedure (or "due process") is vitally important, because there are some tried and tested procedural mechanisms which are likely to secure a just outcome and demonstrate the rule of law. The so-called "rules of natural justice" are rules of procedure. What amounts to a fair process may vary depending on the circumstances. As a general rule, however, a person likely to be affected by a decision should be given adequate notice to allow them to make representations. This may mean that they have a right to an oral hearing or it may just allow them an opportunity to make written submissions. If there is available evidence then there must be an opportunity for all parties to consider and make representations. In determining whether there has been a fair hearing, the courts will consider whether there has been equality of treatment.

In a case involving an application for the renewal of a licence to operate a taxi booking office, the police lodged, in response to the application, a letter of objections based on the taxi operator's conduct in another council area. The licensing authority then refused to renew the licence. The Court held, on appeal, that the licensing authority was entitled to expect an applicant to provide information or evidence in response to the alleged misconduct. The applicant had failed to provide any evidence and therefore the taxi licensing authority was entitled to come to the decision it did.

Glasgow City Council v Bimendi [2016] CSIH 41

Legislation can also impose specific procedural conditions or requirements which must be satisfied before a power can be exercised.

For example, legislation might stipulate that the Scottish Ministers or another public authority must:

- consult with particular persons;
- publish a decision in draft;
- make due inquiry;
- consider any objections before making a decision.

These procedural requirements are important, and failure to comply with them may make a decision invalid. The decision-maker will need to fulfil them (and be able to show that they have been fulfilled) in spirit, as well as literally.

Occasionally, if the requirement is technical, or breach of the required procedure does not defeat the purpose of the legislation or damage the public, a failure to satisfy it will not necessarily be fatal to the decision. It might be for example that the legislation required a public authority to carry out a function within a certain time limit. If the public authority performed the function, but was a bit late, the courts might hold that there had been substantial compliance so that the breach could be overlooked.

Nevertheless, it goes without saying that it is best practice to err on the side of caution and comply with procedural requirements.

A decision by a local authority to close a day care service for adults was reduced where it had failed in its public sector equality duty under the Equality Act 2010 s.149 in the absence of carrying out either an equality impact assessment or consultation with users' families, frustrating their legitimate expectation.

B v Scottish Borders Council [2022] CSOH 68

See also in particular

question ten
Will I be complying with equality legislation?

question fourteen
Have I consulted properly?

question fifteen
Will I be acting with procedural fairness towards the persons who will be affected?

question sixteen
Could I be, or appear to be, biased?

Question fourteen

14 Have I consulted properly?

Consultation with the persons likely to be affected by the decision is very often part of the decision-making process. It helps to make the process a transparent and fair one and helps to ensure that the decision-maker is in possession of all the relevant information, so that the decision is a "rational" one as well.

The Court held that the Scottish Ministers' replacement scheme on the reimbursement of nursery or other childcare settings of the costs of providing milk to children was unlawful. The reason for this decision was that the Scottish Ministers did not undertake proper consultation on a key aspect of the policy, namely the local serving rate. That rate was the basis upon which the periodical payments, made in advance by local authorities to nursery or other childcare settings in relation to the cost of milk, were calculated. It was also held that the fixing of the rate was irrational.

School and Nursery Milk Alliance Ltd v Scottish Ministers [2022] CSOH 11

Consultation is generally desirable whether it is required by legislation or not. Where consultation is undertaken it has to be conducted properly if it is to satisfy the requirement for procedural fairness. Four conditions have to be satisfied:

- consultation must be undertaken when proposals are still at a formative stage;
- sufficient explanation for each proposal must be given, so that those consulted can consider them intelligently and respond;
- adequate time needs to be given for the consultation process; and
- consultees' responses must be conscientiously taken into account when the ultimate decision is taken.

Failures of consultation (and indeed other lapses in due process) usually occur through inadvertence on the part of the decision-maker and the pressures of work. When such a lapse forms the basis of a challenge to the decision, the decision-maker may be tempted to say, "but it was an open and shut case. Consultation would have made no difference. The decision would inevitably have been the same." That may well be true, but the courts are unlikely to be sympathetic to such a response. And for good reason: the principle is that only a fair procedure will enable the merits to be determined with confidence, and must therefore come first.

The Court held that the consultation process undertaken by the Scottish Ministers prior to making amendments to Scottish Planning Policy in relation to housing developments in December 2020 had been so unfair as to be unlawful. The consultees had not been put into a position to properly consider and respond to the consultation request, and they were not told enough, and in sufficiently clear terms, to enable them to make an intelligent response.

Graham's The Family Dairy (Property) Ltd v Scottish Ministers [2021] CSOH 74

See also in particular

question thirteen
Does the power have to be exercised in a particular way, e.g. does legislation impose procedural conditions or requirements on its use?

question fifteen
Will I be acting with procedural fairness towards the persons who will be affected?

question eighteen
Have I taken necessary considerations into account, and is my decision reasonable?

Question fifteen

15 Will I be acting with procedural fairness towards the persons who will be affected?

As well as acting within the limits of its powers, the decision-maker will also need to come to a decision in a procedurally fair way. Without such procedural fairness, even if the decision-maker is not acting *ultra vires*, the decision may still be unlawful.

The common law recognises procedural fairness, or the existence of "due process", as a key principle of just decision-making. Fairness is a concept drawn from the constitutional principle of the rule of law, which requires regularity, predictability and certainty in public authorities' dealings with the public.

Where legislation confers an administrative power there is a presumption that it will be exercised fairly. What is "fair" will depend on the particular circumstances in which the decision is to be taken and may change with the passage of time. Such principles cannot be applied by rote and what is fair depends on the context of the decision. It will be important to look at the terms of the legislation and the parameters in which the discretion is to be exercised. It will often be necessary to allow a person or persons who may be adversely affected by the decision to have an opportunity to make representations and to have notice of the information on which the decision is to be based.

In a case involving appeals by two councils against decisions of the Scottish Information Commissioner one of the grounds of appeal was that the Commissioner's decisions were unlawful as there had been procedural unfairness. The councils had argued that the information sought could be obtained by paying for Property Enquiry Certificates. Providing the information free of charge would, as well as involving the councils in a great deal of additional work and expense, prejudice their commercial interests. Without the knowledge of the two councils, the Commissioner's staff conducted a survey of other relevant authorities to assess whether any of them had experienced damage to their commercial interests as a result of responding to similar requests. The evidence pointed to little, if any, damage to their commercial interests. Neither of the councils had been provided with any information about the Commissioner's investigations or their results and they had not had the opportunity to respond to the Commissioner's findings. They had not been given the opportunity to explain why, in their situation, the result would be different. The Court held that the procedure had been unfair and that the Commissioner should have given the councils notice of any relevant material adverse to their position, and invited their comments.

Glasgow City Council and Dundee City Council v Scottish Information Commissioner [2009] CSIH 73

It is a feature of a fair procedure or decision-making process that the person affected by it will know in advance how it will operate, and so how to prepare for it and participate in it. That is the importance of due process.

Human rights, equality legislation and certain aspects of retained EU law may also require that a fair procedure is followed.

At each stage of a process, a decision-maker should ensure that such issues have been properly considered and that rights or duties have been respected or followed, as appropriate.

A local authority appealed against a decision to quash its refusal of an application by a company for a licence for a sex shop in Belfast. The decision had been quashed on the grounds that it was incompatible with the owner's human rights under Article 10 (freedom of expression), of, and Article 1 of the First Protocol (protection of property) to, the European Convention on Human Rights because the local authority had not taken those rights sufficiently into account when making its decision. The Court held that it was concerned with whether the sex shop owner's human rights had been infringed, not with whether the local authority had properly taken them into account when making the decision. The Court held that it was acceptable for the local authority to interfere with the shop owner's human rights, although the local authority had not taken these matters into account. But where a public authority has carefully weighed the various competing considerations and concluded that interference with a human right is justified, a court would give due weight to that conclusion in deciding whether the action in question is lawful.

Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19

The courts may find that in the interests of fairness additional conditions should be placed on the exercise of statutory or other executive powers. For example, the courts may insist that, before a decision is made, any of the following is required:

- disclosure of the reasons the decision-maker intends to rely on;
- an opportunity for consultation or making representations;
- an oral hearing where appropriate.

And after the decision:

- disclosure of material facts, or the reasons for the decision.

See also in particular

question four
Is there a policy on the exercise of this power?

question five
Does anyone have a legitimate expectation as to how the power will be exercised?

question eight
Will I be complying with human rights law?

question nine
Will I be complying with retained EU law?

question ten
Will I be complying with equality legislation?

Relevant considerations might also be:

- the right to be heard and procedural conditions in legislation (see question thirteen);
- have I consulted properly? (see question fourteen);
- do I need to give reasons? (see question twenty-one).

Question sixteen

16 Could I be, or appear to be, biased?

One of the rules of natural justice is that "no one shall be the judge in their own case". If a decision-maker has a financial or other interest in the outcome of the case, the decision-maker cannot be, or be seen to be, impartial. The rule helps to ensure that the decision-making process is not a sham because the decision-maker's mind was always closed to the opposing case. It deals not only with actual bias, but with the appearance of bias: hence the saying "justice must not only be done, but be seen to be done". Nobody should be able to allege that the decision was a fix because the decision-maker was biased, whether or not there was any truth in that allegation. The rule must be observed strictly to maintain public confidence in the decision-making process.

Impartiality is the opposite of bias. Its importance is enshrined in human rights: Article 6 of the European Convention on Human Rights (right to fair trial) requires that a tribunal must be, and have the appearance of being, impartial and independent. The rule against bias also applies to administrative decision-making (where there may be no "tribunal" as such) just as it does to the courts. It is prudent to have procedures available so as to avoid bias, or any appearance of bias. If, for example, the applicant for a grant is known personally to the decision-maker, or the decision-maker has dealt with the applicant before and decided against the applicant or expressed a view adverse to the applicant, it may be appropriate to refer the application to a different, or more senior, official.

The principle can have practical implications for the process by which a decision is made. Very often, when legislation requires that a public authority make a decision on an application, it (or the officials acting in its name) will require some sort of technical input, or it may be necessary to ask inspectors to carry out an investigation. In order to ensure as much impartiality as possible, it may be necessary to have structures in place so that there is a separation between the people providing the technical input/carrying out the investigation, and the officials taking the decision or submitting the matter to Ministers (when their personal decision is required). This will reduce the risk of an unsuccessful applicant claiming that the decision-maker was not impartial due to being too involved in the case, or had pre-determined the application.

The "independence" of a decision-maker is different from, though closely linked to, impartiality. It refers to independence from external pressure or influence. It has much more direct relevance to judges (by reason for example of the way they were appointed) or the courts themselves than it has to administrative decision-makers, who will often be civil servants appointed to carry out government policy or otherwise work towards securing the objectives of their employer. But even when a decision-maker is obliged to carry out a policy, the decision-maker must keep an open mind, and any lack of independence should be curable by the availability of judicial review by a fully independent court.

Actual bias is rare: most cases are concerned with the appearance of bias. The test is whether, in all the circumstances, the fair-minded and informed observer, having considered the facts, would conclude that there is a "real possibility of bias": that is, not a remote or insignificant risk. If there is, the decision will be set aside. Not only do you need to be sure that you are free of actual bias before making a decision, you also need to consider not acting as decision-maker if there is a real danger that your impartiality might be open to question.

If parties know of a decision-maker's interest or previous participation (because, for example, the decision-maker tells them), they can agree to waive the objection. If you are aware of any reason why you might be thought to be biased, it is wise to declare it at the outset. If the objection is waived, then it is very unlikely that there could be any objection taken later.

In some rare circumstances, a decision-maker who might otherwise be disqualified can still act, if the decision needs to be made, and cannot be made without that person. You should not decide to act in these circumstances without seeking advice on whether there is some way around the difficulty.

See also in particular

question eight
Will I be complying with human rights law?

question fifteen
Will I be acting with procedural fairness towards persons who will be affected?

The deputy governor of a prison heard disciplinary proceedings against a group of prisoners for disobeying an order to be strip searched. The prisoners argued that the order to strip search them was not lawful. The deputy governor of the prison had been present when the order was given. The deputy governor decided that the order had been lawful and found the prisoners guilty of an offence against discipline. The prisoners challenged that decision on the grounds of the deputy governor's apparent bias.

The Court found that this was apparent bias. The deputy governor had given tacit endorsement to the governor's order by being present. When ruling on the lawfulness of the order, a fair-minded observer could all too easily think him predisposed to find it lawful. If the deputy governor had found the order unlawful, he would be acknowledging that he had been wrong to acquiesce in it. To have avoided the appearance of bias, he should either have made it plain that he had been present, and sought the consent of the prisoners to him hearing the disciplinary proceedings, or else stood down. The findings of guilt were quashed.

R (on the application of Carroll) v Secretary of State for the Home Department [2005] UKHL 13

Question seventeen

17 Am I handling data in line with data protection or freedom of information obligations?

Data protection

"Personal data" is defined as any information which relates to an identifiable individual and when held by public authorities (and private companies, organisations and some individuals when held for commercial or professional activities) is governed in the UK by the UK General Data Protection Regulation (UK GDPR), and the Data Protection Act 2018 (DPA 2018). The UK GDPR is retained EU law, and the DPA 2018 supplements the UK GDPR, including providing for restrictions on some of the rights the UK GDPR gives to individuals in particular circumstances, and covering some areas that the UK GDPR does not apply to, such as processing for law enforcement purposes and processing by intelligence services. "Processing" covers any use of personal data, from creation and collection to storage, editing and deleting – so simply having personal data sitting unused in a file means your organisation is processing personal data.

Where it applies, this legislation restricts the use you can make of personal data, and creates a number of individual rights related to that information. There are a wide range of exemptions which may apply, e.g. national security, and where disclosure is required by law. However, you should proceed on the basis that any information that you receive or generate about an individual could end up being seen by that individual. You should ensure that all personal information is, amongst other things, accurate, up-to-date, gathered and held for a clear purpose, stored securely, and that your organisation is accountable for its use of personal data. More guidance is available from the Information Commissioner's Office on the general requirements.

Issues often arise around sharing personal data obtained for one public purpose for another (usually known as "data sharing") either between public authorities or within a single public authority. Information should only be accessed and used in decision-making when there is a proper lawful basis for you to share the information.

There is detailed guidance available.

Freedom of information

Under the Freedom of Information (Scotland) Act 2002, anyone has the right to be given information held by Scottish public authorities. The requester does not have to give reasons for their request.

You should bear in mind when making a decision, that the information you hold (unless held on behalf of another person, or held in confidence, having been supplied by the UK Government), including the material that you generate in the course of the decision-making process may subsequently require to be released. Information about the decision may also be published proactively.

There are a wide range of exemptions, though most are subject to the public interest test. Where that test applies, it has to be considered in relation to each piece of information.

Information should be released unless the public interest in favour of withholding it outweighs the public interest in releasing it.

A requester who is unhappy with your response to a freedom of information request can ask your organisation to carry out an internal review and, if still dissatisfied, apply to the Scottish Information Commissioner for a decision.

Decide

Step 3 | Decide: Taking the decision

18. **Have I taken necessary considerations into account, and is my decision reasonable?**

19. **Does the decision need to be, and is it, proportionate?**

20. **Are there decisions where the courts are less likely to intervene?**

Question eighteen

18 Have I taken necessary considerations into account, and is my decision reasonable?

We have seen in the discussion of question three that when making decisions you must take into account all relevant considerations and not take into account irrelevant considerations. Crucially, when it actually comes to making the decision, you must not make a decision that is so unreasonable that no reasonable person acting properly could have taken it. These are often called the "Wednesbury principles" after the name of the court case which first established them[18].

The test of unreasonableness concerns the decision as well as the way in which it was reached. Even if the decision-maker has taken into account the correct considerations, the decision-maker may still come to a decision so wildly unreasonable or perverse that it can be judged to have been outwith the decision-maker's discretion to make it. If this happens then the decision will be unlawful.

A council wished to encourage the development of a key city centre site. It did this by identifying a developer, entering into an agreement to buy the land under a compulsory purchase order, and then transferring it to the developer. This was done in exchange for an undertaking from the developer that it would carry out the development and indemnify the authority from all future costs. Competing developers argued that the council had acted in a Wednesbury-unreasonable way when it chose its preferred developer. They argued that an indemnity for their costs did not represent the best price or the best terms that could reasonably be obtained for the development of the site. The Court found that the arrangement that had been entered into was reasonably necessary for planning purposes, given the difficulty of developing a site that was in multiple ownership. It could not therefore be said that the council reached a decision that no other reasonable council would have reached.

Standard Commercial Property Securities Ltd v Glasgow City Council [2006] UKHL 50

The decision-maker may even have considered all the relevant information and not considered information that was irrelevant, however the decision-maker may have attached a disproportionate weight to a particular factor or made some other mistake with regard to the logic of the decision, which has distorted the decision-making process.

The courts have recognised that when different reasonable people are given the same set of facts, it is perfectly possible for them to come to different conclusions. This means a range of lawful decisions may be within the discretion of the decision-maker. However, at the same time, the courts have defined a category of decisions which lie outside that range of discretion.

These have been described as:

- *"a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it"*[19]*;* and
- *"beyond the range of responses open to a reasonable decision-maker"*[20]*.*

These definitions of unreasonableness (or "irrationality") seem quite extreme, particularly the first – it might seem then that the courts would hardly ever find a decision-maker to have acted "unreasonably". However, the courts interpret this category of decisions quite widely and will adjust the threshold of unreasonableness according to the circumstances and context of the case.

If a decision is challenged, the courts will examine it to see whether it was made according to logical principles, and will often expressly state that it is not its intention to substitute its own decision for that of the decision-maker. The courts will not make their own decision in place of that of the decision-maker because judges bear in mind that the legislation has given the discretion to make the decision to a particular decision-maker, and it is not for the courts to make that decision instead.

The practical effect of this approach is that, where the courts find that the decision was "unreasonable" and that it has to be remade, the courts will not put in place a more reasonable decision, but will simply cancel the unreasonable one, leaving none in its place.

The decision-maker will then be required to make a fresh decision, taking into account any guidance given by the courts, and this time applying logical principles.

There are good practical, as well as legal reasons for the courts adopting this "hands-off" approach: the decision-maker may be aware of policy implications or other aspects of public interest which are not obvious to the courts, or the decision-maker may have access to technical information which is not available to the courts and which must inform the decision.

In some cases the effect of the decision is such that it cannot be "undone". If this is the case then the court can declare it to be unlawful which can lead to political embarrassment and possible damages being awarded.

See also in particular

question three
What factors should I consider when making the decision?

question nineteen
Does the decision need to be, and is it, proportionate?

Question nineteen

19 Does the decision need to be, and is it, proportionate?

It is important to consider whether your decision is one that involves the area of human rights (or, in some cases, involves interpreting retained EU law). If so, the proportionality of your decision can be reviewed by the courts if your decision is later challenged.

Where a court is applying the principle of proportionality it will generally look more closely at the correctness of the decision given the information available than it would by just applying the Wednesbury unreasonableness test (see question eighteen).

In human rights cases, where an interference with a Convention right may be justified, the courts will consider whether or not the decision was proportionate. In human rights cases proportionality means considering:

- whether what you are trying to achieve is important enough to justify interfering with a Convention right;
- whether what you are deciding to do makes sense to what you are trying to achieve;
- whether you could decide to do something else that would have interfered less with a person's Convention right, and still achieve what you are trying to do; and
- whether you are striking a fair balance between the effects of your decision on a person's Convention rights and what you are trying to achieve.

The intensity with which the proportionality test will be applied by the courts – in other words, the degree of weight or respect that will be given to the assessment of the decision-maker as to what is proportionate – will depend upon the context. For example, to justify "difference in treatment" a more intense review would apply.[21]

Proportionality has also been argued as a ground of review for all decisions. At present, however, proportionality is not currently an independent ground of judicial review at common law in its own right[22].

See also in particular

question eight
Will I be complying with human rights law?

question nine
Will I be complying with retained EU law?

question eighteen
Have I taken necessary considerations into account, and is my decision reasonable?

Question twenty

20 Are there decisions where the courts are less likely to intervene?

In principle, the courts are entitled to review the vast majority of decisions taken by public authorities. “In principle”, because there are still a handful of types of decision with which the courts are reluctant to concern themselves – the award of honours is one example. Even these categories are increasingly restricted, and it can be imagined that if, say, the honours system were placed upon a statutory footing, with procedures, consultation and the like, then the courts would no doubt be entitled to supervise at least procedural aspects.

There remains a class of decision where the courts accept that, because of the subject matter of the decision, the decision-maker is better qualified than the courts to make a judgement. So for example the courts are likely to “defer” to, or recognise a “demarcation of functions” with, the decision-maker in:

- ordering financial priorities, in deciding to spend public money in one way rather than another;
- assessing the needs of national security and public order;
- setting policy on maximum sentences for particular criminal offences.

A woman had been living with a man for 10 years when he died unexpectedly. Her partner was a member of local government pension scheme, and she applied for a pension as his survivor. A Department in Northern Ireland had made regulations requiring that for a cohabitee to get paid out of a pension, the deceased would have to nominate her. The woman had not been nominated by her partner, and was refused a pension. She challenged the refusal on the basis that the requirement to be nominated was incompatible with Article 14 of the European Convention on Human Rights (the prohibition of discrimination). The Court accepted that in the socio-economic field, such as pension provision, a broad area of discretionary judgment should be allowed to state authorities. But in this case, socio-economic factors were not at the forefront of the decision to impose a requirement for an unmarried partner to be nominated. The Department was not able to produce any evidence of consideration as to whether there would be administrative problems if they were to not have a nomination requirement. The Court was therefore willing to critically examine the justifications for the requirement. The Court considered it highly questionable that there was a justification for having the nomination requirement as a difference in treatment between married and cohabiting couples, and in any event there was no rational connection between the nomination requirement and the objective it was considered to pursue.

Brewster v Northern Ireland Local Government Officers’ Superannuation Committee [2017] UKSC 8

The list could go on (and could be broadened to include any topic requiring specialist knowledge or experience), but what the above topics have in common is that they all concern policy, and require a "political" judgement to be made. In the demarcation of functions, that political judgement should be left to the decision-maker, who understands the policy and has experience of its operation to inform the decision. In this kind of area, the courts may exercise restraint in reviewing the decision-maker, or recognise the demarcation of functions between the executive branch of government and the judiciary; the courts are likely to allow a "margin of discretion" or "discretionary area of judgement" depending on the nature of the decision.

It is possible that your decision too will have an element of this kind of political judgement in it; you should identify that element and be prepared to protect it. The decision-maker will usually be allowed a discretionary area of judgement, but this cannot be taken for granted. And, where human rights are involved, the courts are likely to be very careful to ensure that what the decision-maker is seeking to protect is genuinely an area of policy, and that the decision is "proportionate".

Notify

Step 4 | Notify:
Notifying others of the decision

21. To what extent should I give reasons for the decision?

Question twenty-one

21 To what extent should I give reasons for the decision?

When you have made your decision – in accordance with the above principles – you will need to notify it to the person affected by it. In notifying that person, do you have to support your decision with your reasoning? And, if so, how comprehensive does your account of that reasoning have to be? You may also be under an obligation in certain circumstances to publish your decision more widely to ensure that anyone who will be affected by it has had adequate notice.

Why should you give any reasons unless legislation requires it? There may exist an established practice of giving reasons in this type of case, and failure to give reasons may breach a "legitimate expectation". Your decision itself may appear to be inconsistent with previous policy, or with other decisions in similar cases, so that a decision unsupported by reasons may appear irrational, and it may be necessary to explain why there has been a departure from previous policy, or the courts may assume the decision is unlawful. The subject matter of the decision may be of such importance – it may affect human rights – that fairness requires that a decision be supported by reasons.

> "In order to comply with the statutory duty imposed upon him the Secretary of State must give proper and adequate reasons for his decision which deal with the substantial questions in issue in an intelligible way. The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it."
>
> **Lord President Emslie's words in Wordie Property Co Ltd v Secretary of State for Scotland 1984 SLT 345 at 347**

Although it may still be true that there is no general rule requiring that reasons be given for administrative decisions, the circumstances where reasons are not required are becoming rare. Indeed the general availability of judicial review as a remedy makes it inevitable that in most cases fairness now requires that reasons should be given. The law was developing in this direction even before the Human Rights Act 1998 incorporated the European Convention on Human Rights, but that (in particular Article 6 – right to a fair trial) has accelerated the process, because decisions involving human rights are likely to be scrutinised more intensely, and that means that they will have to be more fully reasoned.

In an action to evict a tenant from a council house, the tenant argued that the absence of any obligation in the Housing (Scotland) Act 2001 on the council to give reasons for seeking repossession made the legislation incompatible with the requirements of Article 8 (the right to respect for private and family life) of the Convention. The Court held that an obligation on the authority to give notice of reasons for seeking repossession, could, and should, be read into the legislation.

South Lanarkshire Council v McKenna [2012] CSIH 78

Data protection and freedom of information considerations also support the giving of detailed reasons with the decision. Rights for the individual who is the subject of a decision about their case to access information about that decision – including the reasons for it – may arise under data protection legislation. Additionally, as anyone may make a freedom of information request about how a decision was taken, it is important to keep an appropriate record of how that decision was reached and the reasoning for the decision. More detail on freedom of information considerations is given in question seventeen: Am I handling data in accordance with data protection or freedom of information obligations?

This does not mean that every decision must be accompanied by copious reasoning; it will depend upon the subject matter and the importance of the interests at stake. Moreover there will be some cases where the issue to be decided does not lend itself to logical analysis, but is more a matter of subjective judgement.

A council refused planning permission for a railway development. The developer appealed to the Scottish Ministers, who appointed a reporter to make recommendations. The reporter provided a detailed report recommending that planning permission should be refused for a number of reasons, including that the development would not be in accordance with the development plans. The Scottish Ministers disagreed with the reporter's recommendation and granted planning permission. Scottish Ministers' decision letter gave reasons for this decision, but did not explain why Ministers disagreed with the reporter on a number of critical issues, or why the development plan should not be followed. The council appealed the Ministers' decision on the grounds that the decision letter did not give proper, adequate and intelligible reasons. The Court agreed that the decision letter did not contain proper and adequate reasons for reaching a conclusion contrary to the reporter's recommendations and the development plans. The Court quashed Scottish Ministers' decision.

North Lanarkshire Council v Scottish Ministers [2016] CSIH 69

The need to record reasons when the decision is made with a view to their disclosure may be onerous, but it encourages careful decision-making. The record should show that the decision-maker addressed their mind to the relevant issues and followed the principles of good administration. There is no uniform standard for the quality or layout of recorded reasons, but they must at least be intelligible and address the substance of the issues.

The following provides a useful outline:

- the record should be clear about what the applicant is applying for and that you understand the application;
- it should set out material findings of fact;
- it should show that all relevant matters have been considered and that no irrelevant ones have been taken into account;
- it should cite and apply any relevant policy statements or guidance;
- it should note any representations or consultation responses as having been considered and taken into account;
- it should show that equality legislation has been complied with; and
- it should show by what process of reasoning issues were resolved, and how the various factors were weighted against each other.

If all this (or as much as suits the case) is recorded, then it will provide a framework for your decision letter. The reasons given in the decision letter will of course correspond with those recorded: although there is some scope for elaborating or explaining your reasons in the decision letter (or subsequently), it is bad practice – and unlawful – to make your decision first and construct your reasons only when challenged.

See also in particular

question five
Does anyone have a legitimate expectation as to how the power will be exercised?

question eight
Will I be complying with human rights law?

question nine
Will I be complying with retained EU law?

question ten
Will I be complying with equality legislation?

question fifteen
Will I be acting with procedural fairness towards the persons who will be affected?

question seventeen
Am I handling data in accordance with data protection or freedom of information obligations?

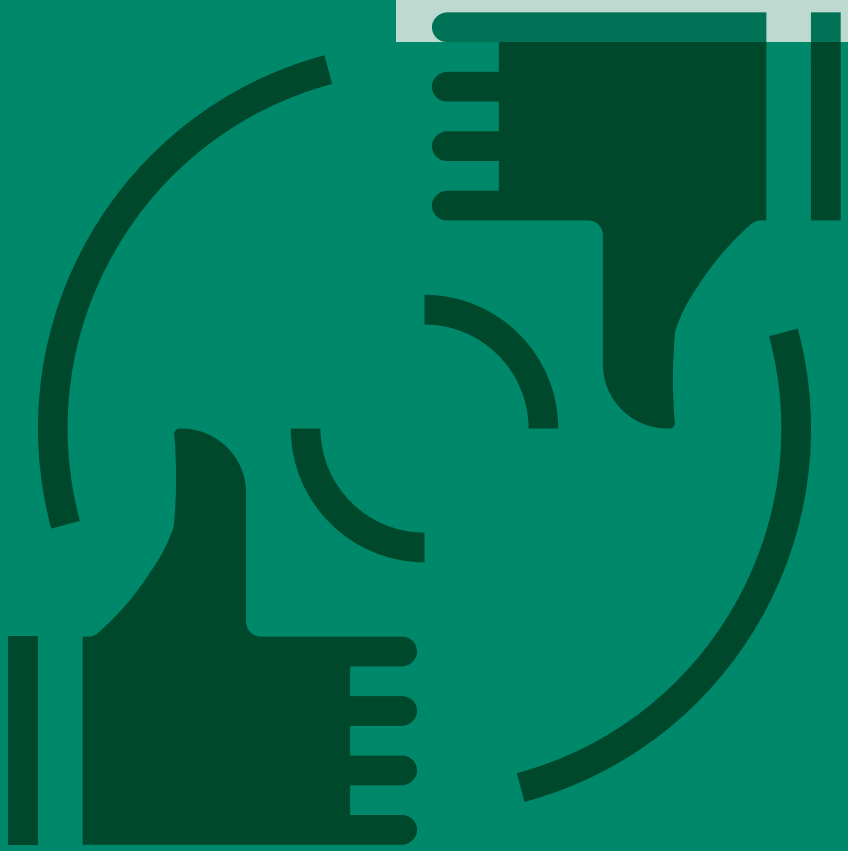
Responding to challenge

Step 5 | Respond: Responding to challenge

22. What type of legal challenge can a decision-maker face?

23. What are the parties' duties to the court?

24. What is a Specification of Documents and what do I need to do?



Question twenty-two

22 What type of legal challenge can a decision-maker face?

A decision-maker may make a decision based upon a power set out in legislation, a common law power, or as part of the royal prerogative (see question one).

The type of legal challenges a decision-maker might face depends upon the nature of the decision. There may be provision for an appeal of the decision in question, the decision may be subject to a petition for judicial review, or a regulatory body may be able to investigate.

What is an appeal?

If the decision-maker makes a decision using a power provided for in legislation, that legislation may also allow for an appeal in relation to that decision. If this is the case, the legislation will provide details as to the nature of an appeal, the time limits for appealing and which court or tribunal can hear the appeal.

Scotland has a variety of courts and tribunals, including the sheriff courts, Court of Session, First-Tier Tribunal, and Upper Tribunal. There are also tribunals which have jurisdiction on specific matters, such as the UK-wide Employment Tribunal which governs employment disputes which can be relevant to public authorities.

What is a judicial review?

Judicial review is a "remedy of last resort" where there isn't a suitable statutory right of appeal and allows for review by the court of an administrative decision. Proceedings for judicial review in Scotland are brought in the Outer House of the Court of Session. In a judicial review, the court may consider whether the administrative law obligations set out in the earlier sections of this guide have been properly applied. In human rights cases the court can also look at the proportionality of the decision.

Judicial review is not an appeal on the merits of a case, but rather a review of the lawfulness of a particular decision (or failure to make a decision). This means the court will review the legality of the decision and the process by which it was reached. It will not substitute its own decision, but will send the case back to the decision-maker to consider again if it finds the original decision to have been defective. This is known as "quashing" the decision. The court may also award damages, make a declaration or make interim orders while the case is being considered where this is appropriate in the circumstances of the particular case, so for example, suspending what would otherwise be the effect of the decision meantime.

What is the procedure for a judicial review?

Judicial review proceedings in Scotland are made by way of a petition to the Outer House of the Court of Session in Edinburgh and must generally be raised within three months of the date of the relevant decision being complained about. The court has a discretion to extend the time period, which it will do in particular circumstances, for example, in a recent decision where the decision was not received until a later date[23].

First Orders

Once a petition for judicial review has been lodged in court, it will go to a judge for First Orders to be granted. These allow the petitioner (the person challenging the decision) to serve the petition on the respondent (the decision-maker) – this effectively starts the proceedings.

At this stage, however, the petitioner can also seek interim orders to apply until the court has an opportunity to consider what should happen at a full hearing of the case (usually to suspend the effect of the decision meantime, for example, to prevent the demolition of a building). Such orders can be granted before the respondent has had the proceedings served and so to avoid that position and to make sure that they are alerted where a petitioner is seeking interim orders against them, respondents lodge what is known as a caveat with the court. This means that if interim orders are sought, the caveat will be triggered and the respondent can then arrange to make representations to the judge and challenge the request for interim orders.

Permission stage

Once any first orders have been considered and the petition has been served on the respondent, the case will proceed to the permission stage where a judge will determine whether the case may proceed. For permission to be granted, the petitioner must have standing and the claim must have realistic prospects of success. A petitioner will have standing if they have a “sufficient interest” in the subject matter or effect of the decision. A petition will have realistic prospects of success if there are some prospects and the case is not fanciful. Generally speaking, the threshold for obtaining permission is a low one.

Permission can be refused or granted on the papers, i.e. without a hearing. The court may, however, order an oral permission hearing where parties are required to address the court on the permission test. It is for the judge to decide whether to grant/refuse permission on the papers or appoint an oral hearing. If permission is refused on the papers, a petitioner can request an oral hearing. If the court refuses the request for an oral hearing then that is the end of the process. If permission is refused following an oral permission hearing, then the petitioner can reclaim (appeal) the refusal to the Inner House.

If permission is granted, then the court will set down a date for a substantive hearing where the full merits of the case will be considered. Judicial reviews are generally about the law and about how a decision has been taken. It is very rare for witnesses to be called and oral evidence taken from them, although this can happen, or alternatively, sworn statements or affidavits may be required.

Third party interventions

It is possible for third parties who have an interest in a judicial review action to seek to intervene in proceedings. This is done by way of application to the court and parties may intervene in two ways.

One such way is where a party considers that they are "directly affected" by the issues raised in the case and in those circumstances may apply to enter the process and become a party to the case with the same rights of participation as the first petitioner and first respondent. It may be that the petitioner is aware that a person or body who is not the decision maker nonetheless has an interest in the subject matter of the challenge and will serve the proceedings on them for that interest. That then allows them to consider whether or not to become involved in the process.

Alternatively a party may apply to participate in a case by way of "public interest intervention". This allows a person to make an application to the court to intervene in a judicial review action where they believe that an issue in the case raises a matter of public interest. Public interest interventions are treated differently to those permitted to intervene on the basis that they are "directly affected" by a case in that they are generally only allowed to participate by way of written submissions on specific issues and oral submissions are only granted in exceptional circumstances.

Legal remedies in judicial review actions

If a judicial review action is successful, the court has the discretion to decide what legal remedy it should grant, and a variety of remedies are possible. Some remedies require a decision-maker to take a decision again. However, as noted above, the court hearing the judicial review will not stipulate what the substance of that new decision should be.

Instructing advocates

Where an appeal or judicial review is raised in the Court of Session, both the petitioner and respondent in the action will instruct an advocate or solicitor-advocate (as they have "rights of audience" or the right to appear before the court) to represent their interests in the case. Where the respondent is the Scottish Ministers, the advocate is generally selected from a pre-approved list known as the standing juniors list. Standing juniors generally have either an interest or specialisation in administrative law. Those who were involved in making the decision which is being challenged will ordinarily be involved in the judicial review proceedings by way of giving instructions, attending meetings with litigation colleagues and the advocate appointed to represent the case in court, providing information to the litigation team regarding the decision being challenged and potentially attending court hearings where appropriate.

What other challenges are possible?

There are also a number of administrative bodies which may investigate complaints about the actions and decisions of public authorities. For instance, the Scottish Public Services Ombudsman (SPSO), and the Scottish Information Commissioner (see question 17) are regulators who can investigate decisions made by public authorities. In respect of the SPSO, it will not usually investigate a matter where there is a right of appeal or redress in court, but may do so where it is not reasonable to expect a person to resort to that remedy. It is a good idea to seek legal advice as soon as possible when you become aware of a challenge to a decision or threat of a challenge to understand next steps and particularly as there may be strict time limits which apply.

Onwards appeals

There are often further appeal rights from the court or tribunal which hears the initial appeal/review. For instance, the decision of the Outer House in a judicial review can be appealed to the Inner House of the Court of Session, and thereafter to the Supreme Court. Advice should be sought in relation to onward appeals for individual cases as availability may differ depending on the nature and basis of the original appeal.

Question twenty-three

23 What are parties' duties to the court?

In any court case, the decision-maker will have duties to the court or tribunal. The nature and extent of these duties will vary depending upon the type of decision and type of proceedings.

The overarching duties of parties to a court case is not to mislead the court or make irrelevant claims.

Public authorities have duties of openness and transparency as a general principle[24].

Disclosing documents relied upon

What this means is that parties must be upfront with the courts in their written case (pleadings) before the Court. If a document is referred to in those pleadings, then it should be produced to the court. Also, parties must have an evidential basis for anything written in their pleadings: that is to say that parties must be able to support claims that they make to the court.

The decision-maker should be upfront when defending the decision and not make a case for which there is no evidential basis.

As part of these duties, decision-makers can be bound in the following ways:

- **undertakings:** a decision-maker may make an undertaking to the court. The undertaking will require the decision-maker to act or not act in a certain way. These are often used as an alternative to the court having to grant an order. Parties must stand by statements or agreements made with the court either in pleadings, correspondence or by their lawyer in open court. The failure to comply with an undertaking given to the court is a very serious matter and may amount to a contempt of court for which the decision maker may be summoned to attend the court.
- **written pleadings:** it is clear that the decision-maker is bound by any position they adopt in written pleadings and must not act contrary to this. Where a party sets out a position in detailed and specific averments in written pleadings put before a court on the professional responsibility of those acting on behalf of the decision-maker then that is also an undertaking to the court[25].
- **orders for production of documents:** if an order for production of documents is made by the Court the decision maker must search diligently for and produce all documents which they hold which fall within the category of documents of which the court has ordered production.

It is noted that in England, Wales and Northern Ireland that there is a specific "duty of candour" resting upon parties to proactively disclose all documents relevant to their case without being ordered to do so by the court. This concept is more specific than has hitherto been recognised by the courts as being the position in Scots law.

Question twenty-four

24 What is a Specification of Documents and what do I need to do?

What is a Specification of Documents?

In a court case in Scotland, a party can seek a Commission and Diligence for recovery of documents. This is an application to the court for an order compelling a person or body to produce documentation, in hard copy or electronic form, to the person making the application. This involves a party making a motion to the court for Commission and Diligence which is accompanied by a Specification of Documents.

It is important to note recovery of documents can be sought from someone who is not a party to the case. For example, in a personal injury case, a former employer may be asked to produce wage slips, and if this cannot be done informally then recovery through this formal process may be required.

The Specification of Documents is the list and nature of documents that are sought by the party. A court will not grant Commission and Diligence if the party is engaging in a "fishing expedition"; that is to say, the party is seeking documentation to create a case or a new ground of challenge.

A court will grant Commission and Diligence where the documents sought are relevant to the written case (called "the pleadings") already before the court, in which the documents sought and who holds them are sufficiently specified.

If the Commission and Diligence is granted, ordinarily the party who made the application will then adopt what is known as the Optional Procedure. This is where the person who has the documents (the "haver") is ordered by the court to produce these within seven days for inspection by the person who applied to the court for Commission and Diligence.

Following the expiry of seven days, if the party seeking the documents has not received disclosure or is unhappy with the extent of disclosure, they may ask the court to appoint a Commissioner. They can then cite relevant havers to attend at a hearing (the "Commission") at which the Commissioner acts in place of the judge or sheriff.

At the Commission, a Commissioner (most often an Advocate or Solicitor) has the power to call parties to swear an oath or affirmation and ask them limited questions regarding the documentation sought (e.g. whether a document exists, where it might be, what searches have been carried out, who else might have the document(s), etc). Havers should not be asked about the contents or substance of the documents sought.

Thereafter, the Commissioner will lodge a report with the court regarding compliance with the Specification of Documents including what further steps may be necessary to recover the documentation.

What is not covered by a Specification?

The following can be relevant grounds for resisting a specification:

- **fishing expedition:** if the specification is too broad and is seeking information not linked to the written pleadings, objections can be taken on this basis.
- **public interest:** in certain circumstances, disclosure of certain information can be resisted on the basis of public interest (e.g. legal advice need not be disclosed).
- **confidentiality:** in certain circumstances, documents can be produced to the court in a sealed envelope for the court or the Commissioner to inspect and determine whether, in the interests of justice, disclosure of the documents, despite their confidential nature, should still be made.

What should I do if I receive a Specification of Documents?

It is extremely important that a Specification of Documents is not ignored and that the time limits are complied with. This is not an optional matter and there can be severe consequences for non-compliance with the court's order.

For example, if a Commissioner is not satisfied that a haver has displayed candour under oath, or deliberately delayed in producing material which they have in their possession, there may be an issue of whether that amounts to Contempt of Court for failure to comply with a court order.

The scope of a Specification of Documents can also be very wide. The breadth of material caught by the specification may be wider than for comparable disclosures under freedom of information or data protection legislation. The same exemptions and exclusions in that legislation will not necessarily apply to a Specification of Documents. Once an order is granted, it is more difficult than in a freedom of information request, to make an argument that the volume of material caught allows production to be resisted.

A thorough search for material, both in hard copy and electronic formats, should be carried out immediately. If the person receiving the specification considers that others in the organisation may hold relevant material they should contact them to ask them to search as soon as possible.

If there is difficulty with complying with the deadline (e.g. historical documents will take longer to retrieve from storage) then action must be taken to inform the party seeking the documents.

In any event, if there is any difficulty or delay in obtaining documents, advice should be taken as soon as possible and the party seeking the documentation should be informed.

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Footnotes

1 *Carltona Ltd –v- Commissioner of Works* [1943] 2 All ER 560.

2 Section 3 of the Human Rights Act 1998.

3 Regulation 5, The Equality Act 2010 (Specific Duties)(Scotland) Regulations 2012 as amended.

4 *Hotak v Southwark London Borough Council* [2015] UKSC 30.

5. *R. (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), paragraphs 90 - 96; *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, paragraph 25.

6 *Hotak v Southwark London Borough Council* [2015] UKSC 30, para 75.

7 As above, para 74.

8 Technical Guidance on the Public Sector Equality Duty: Scotland

9 Fairer Scotland Duty: guidance for public bodies - gov.scot (www.gov.scot)

10 Equality outcomes and mainstreaming: report 2021 - gov.scot (www.gov.scot)

11 The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, as amended.

12 See the Environmental Assessment (Scotland) Act 2005.

13 See the Conservation (Natural Habitats, &c.) Regulations 1994. Where reserved matters (within the meaning of schedule 5 of the Scotland Act 1998) are concerned, certain provisions of the Conservation of Habitats and Species Regulations 2017 (the "2017 Regulations") apply instead.

14 Local Authority Accounts (Scotland) Regulations SSI 2014/200.

15 Directive 2014/24/EU on public procurement; Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sector; and Directive 2014/23/EU on the award of concession contracts.

16 The Public Contracts (Scotland) Regulations 2015, the Concession Contracts (Scotland) Regulations 2016 and the Utilities Contracts (Scotland) Regulations 2016.

17 The Procurement (Scotland) Regulations 2016.

18 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 K.B. 223.

19 *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374 at 410.

20 See, for example, *R v Secretary of State for the Home Department* [2000] 2 A.C. 115 at 144.

21 *R (on the application of SC, CB and 8 children) (Appellants) v Secretary of State for Work and Pensions and others (Respondents)* [2021] UKSC 26

22 *Keyu and others v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69 at 131-134.

23 *Odubajo v Secretary of State for the Home Department* [2020] CSOH 2

24 See *Cherry v Advocate General* [2019] CSIH 49.

25 *Vince v Prime Minister* [2019] CSOH 77.

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