

How public bodies should make fair decisions during Brexit and beyond

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As we continue through some turbulent political waters, many public bodies seek advice and support on ensuring the decisions they make comply with the expectations of the law. Certainly, we have seen an increase in the lawfulness of decisions being challenged and that 'prorogation case' recently before the Supreme Court is a perfect example of such challenges. The general public is not only better informed on how to challenge, but also more prepared to challenge decisions which they simply think are wrong.

Recently, the Court of Appeal has provided some clarity on how it expects public bodies to make fair decisions. This is not really a new legal proposition and the basic common law approach to fairness, which has been established by the courts through the centuries, is well established. In essence, it is a flexible doctrine that requires decision makers, when exercising a statutory power in the public sphere, to act fairly when making decisions that impact on the rights of an individual. The doctrine is not tightly proscribed and its content may vary according to the nature of the power and circumstances of the case.

It is, however, worth reflecting on the explanation which the Court of Appeal in *R (on the application of ASK) v SSHD* [2019] provided. In that case Lord Justice Hickinbottom put further flesh on the bones of the common law duty of fairness by articulating its content in the context of decision making in a healthcare and justice setting.

Briefly, the case concerned the alleged unlawful detention of the Claimant in an immigration removal centre and alleged inadequate treatment for a mental health condition. The factual background was complex and the issues numerous. However, at its heart was the question of whether the Secretary of State for the Home Department and the relevant health authorities had acted properly when making decisions regarding the Claimant's continued detention and access to appropriate healthcare.

When considering the legal framework behind the case, LJ Hickbottom articulated the common law duty of fairness as follows:

"63. ...where a power is delegated to a public body, there is a presumption that Parliament intended it to be exercised fairly. The scope of that duty is context specific. In this appeal, two strands are particularly relevant.

64. First, a public body has a common law duty to take reasonable steps to acquaint itself with material relevant to any decision it makes – and then properly to consider that information, with the other relevant information available to it – to enable it to make a properly informed decision. The sufficiency of the inquiry is essentially a matter for the decision-maker; but the context may require particular steps to be taken.

*65. Second, procedural fairness usually requires that a person adversely affected by a decision by a public body will have an opportunity to make representations on his own behalf either before the decision is taken or, in some circumstances, after it has been taken with a view to producing its withdrawal or modification (*R v Secretary of State for the Home Department ex parte Doody* [1984] 1 AC 531 at page 560D per Lord Mustill)."*

Whilst the above should be no surprise, it does provide decision makers, especially in the health context, with clear guidance on how to approach decisions which will impact on service provision. Specifically, during the uncertainty over what treatments may or may not be

available and the wider changes to health provision which need to be made, it is important to understand all relevant material when making a decision. This may well mean that the plans and consequences of Brexit should be taken into account and the NHS will need to understand them. Equally, it is apparent that public involvement strategies need to be understood and actioned, when appropriate.

This is not new law, but a timely reminder of how to make fair decisions when you are a public body.

Browne Jacobson acted for one of the Interested Parties in the above matter and have a very experienced [health public law](#) and [governance](#) team.

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