

# LOCAL GOVERNMENT LAW

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## Chapter 1: Local Authorities – Relationships and Responsibilities

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The decision of the CA in *R (Breckland DC) v Boundary Committee*, in relation to consultation in formulating proposals for unitary local government, is reported at (2009) LGR 589.

In September 2009 the Government published its Response (Cm 7712) to CLG's Report into the balance of power between central and local government. It refers, at paragraph 26, to the Government's proposal to enact new powers around mutual insurance at the first legislative opportunity, and continues:

'26. ... Government is consulting on a specific power as changing the well-being power or introducing another form of general power such as a power of general competence would not be certain to ensure that local authorities could engage in mutual insurance arrangements. The consultation is also asking whether there are other similar arrangements which councils believe could be beneficial that are potentially currently out of scope of existing powers.

27. The Government is interested in understanding the substance of what activities local authorities believe they do not have powers to undertake. ... Where specific evidence is provided to us, we will consider this on its merits.'

## Chapter 5: Judicial Control of Local Authorities

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In *Birmingham City Council v Qasim* [2009] EWCA Civ 1080 the CA considered *Smith v East Elloe RDC* [1956] AC 736, *Credit Suisse v Allerdale BC* [1997] QB 306 and *Boddington v British Transport Police* [1999] 2 AC 143 and held that the fact that an anterior public law procedural requirement (compliance with an authority's housing allocation scheme) is not complied with does not necessarily mean that an official act based on it (the grant of a secure tenancy to an ineligible person by a duly authorised officer of the authority) is outwith the capacity of the authority and ultra vires and so ineffective.

In *National Transport Co-operative Society Ltd v A-G of Jamaica* [2009] UKPC 48 the PC held that although (applying *Credit Suisse v Allerdale BC* [1997] QB 306 (CA)) unauthorised franchise agreements entered into by the Government of Jamaica with a company for the provision of public transport services were ineffective and unenforceable, as they had been granted unlawfully, there was no good reason why the agreements should not have taken effect and been operated as road licences granted by the Transport Authority.

As to when a question is one of precedent or jurisdictional fact, to be determined as such by the courts, rather than by what appeared to a local authority to be the case, see *R (A) v Croydon LBC* [2009] UKSC 8 (on age assessment under CA 1989).

## Chapter 6: The Taking of Decisions

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Note the Impact Assessment, published by CLG on 21 September 2009, on the costs and benefits of a potential development of local authority scrutiny powers, pursuant to the *Strengthening Local Government* Consultation Paper.

Note the Local Authorities (Executive Arrangements) (Functions and Responsibilities) (Wales) (Amendment) Regulations 2009, SI 2009/2983 (W.260); and the Local Authorities (Alternative Arrangements) (Wales) (Amendment) Regulations 2009, SI 2009/2993 (W.262).

On delegation and majority voting, note *R (Friends of Hethel Ltd) v South Norfolk District Council*, [2009] EWHC 2856 (Admin), at paragraphs 43–55.

## Chapter 8: Local Authority Employment Law

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In *Tower Hamlets LBC v Wooster*, 10 September 2009, the EAT (Underhill J, President) held that an employee who was dismissed by a local authority 6½ months before he would have been eligible for early retirement had been

discriminated against on the grounds of his age, as the authority had been motivated to dismiss him to avoid the cost of his early pension entitlement.

The employee had worked for the authority for over 30 years and had been seconded to a registered social landlord. The secondment was due to end. The RSL offered to retain him, using its own funds, until he reached the age of 50. The authority refused. He was dismissed, on the grounds of redundancy, 6½ months before he reached the age of 50. He brought claims of unfair dismissal and age discrimination, on the grounds that the local authority had failed to redeploy him, or allow the secondment to continue, because it wished to terminate his employment before he became entitled to an early pension at age 50 from the LGPS.

The EAT held that the nature of the RSL's proposal was that the employee should be retained in employment in order to enable him to reach 50 and then take early retirement. A decision to extend employment for such a purpose would be ultra vires, and a refusal to accept such a proposal would plainly be justified (*Hinckley and Bosworth BC v Shaw* (1999) LGR 385). It followed that if the ET had decided the age discrimination case solely on the rejection of the RSL's offer, it would have erred in law. However, it had not decided the claim on that basis. The authority could have extended the employment for the distinct purpose of facilitating the employee's redeployment, even if that had the effect of taking him over age 50. Such a course was expressly contemplated in the authority's redundancy and redeployment policy and was plainly lawful. The comparison the employee sought to rely upon was with a person in the same circumstances as him in every respect except that he was not aged 49, and therefore not liable imminently to take early retirement at the conclusion of the secondment. If, as the ET had found, the authority was motivated in its desire to dismiss the employee by a wish to prevent him qualifying to take early retirement at age 50, it necessarily followed that it would have treated someone to whom that risk did not apply differently. Pension entitlements were inherently dependent on age. In those circumstances the distinction propounded by the authority was invalid. It did not mean that less favourable treatment of an employee on account of his attaining pensionable age necessarily constituted discrimination, because it might be capable of justification, but that was a different question.

For an important EAT judgment on the justification defence in the Age Discrimination Regulations, see *Pulham v Barking & Dagenham LBC*, 9 November 2009, in the context of pay protection arrangements and a long-service benefits scheme.

## **Chapter 10A: The New Ethical Framework**

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Note the Local Authorities (Case and Interim Case Tribunals and Standards Committees) (Amendment) (Wales) Regulations 2009, SI 2009/2578 (W.209), which, inter alia, contain new provisions as to the roles of the Ombudsman and

the Monitoring Officers at hearings of Standards Committees and the role of the Ombudsman at hearings of Case Tribunals and Interim Case Tribunals.

## Chapter 11: EC Public Procurement Rules

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On the principles of equality of treatment and transparency, and the importance of honouring deadlines, see the judgment of Morgan LCJ in *Watters' Application* [2009] NIQB 71, distinguishing *Leadbitter v Devon County Council* (2009) EWHC 930 (Ch), as to which see (2009) PPLR, NA 192.

In *R (Chandler) v SoS* [2009] EWCA Civ 1011, on City Academies, the CA held, dismissing the appeal, that, for the purposes of the definition of 'service provider' in Directive 2004/18 art 1, referring to any person or public entity or bodies offering on the market the execution of work and/or a work, products or services, the words 'on the market' required the participants in the market to be intending to make a profit from contracting to provide services offered by them.

On 10 September 2009 the ECJ gave judgment in *Sea Srl v Comune di Ponte Nossa*, Case C-573/07 ('*Sea*'). *Sea* was concerned with a contract for the service of collecting, transporting and disposing of urban waste. The ECJ said that the control exercised over a company by shareholder authorities may be regarded as similar to that which they exercise over their own departments when the company's activity is limited to the territory of those authorities and is carried on essentially for their benefit and the authorities exercise conclusive influence on both the strategic objectives of the company and its significant decisions through the bodies established under the company's articles made up of representatives of those authorities.

The ECJ reiterated that it is to be borne in mind that the fact of the contracting authority's holding, together with other public authorities, all the share capital in a contractor company, tends to indicate, but not conclusively, that that contracting authority exercises over that company control similar to that which it exercises over its own departments; but that, in contrast, the holding, even a minority holding, of a private undertaking in the capital of a company in which the contracting authority in question also has a holding means that, on any view, it is impossible for that contracting authority to exercise over that company control similar to that which it exercises over its own departments.

The ECJ also addressed the situation of the prospect of a future private holding in the capital of the company. They said that, as a general rule, the question whether there is a private holding in the company must be determined at the time of the contract award, but that, exceptionally, special circumstances may require events occurring after the date on which the contract in question was awarded to be taken into consideration, in particular, when shares in the contracting company, previously wholly owned by the contracting authority,

are transferred to a private undertaking shortly after the contract at issue has been awarded to that company by means of an artificial device designed to circumvent the relevant Community rules. It is not, however, said the ECJ, inconceivable that shares in a company should be sold at any time to third parties. To allow that mere possibility to keep in indefinite suspense the determination whether or not the capital of a company awarded a public procurement contract is public would not be consistent with the principle of legal certainty. If a company's capital is wholly owned by the contracting authority, alone or together with other public authorities, when the contract in question is awarded to that company, opening of the company's capital to private investors may not be taken into consideration unless there exists, at that time, a real prospect in the short term of such an opening. It follows that, in a situation in which the capital of the contracting company is wholly public and in which there is no actual sign of any impending opening of that company's capital to private shareholders, the mere fact that private persons may hold capital in that company is not enough to support the conclusion that the condition relating to control by the public authority has not been satisfied.

However, if a contract were to be attributed, without being put out to competitive tender, to a public capital company, the fact that subsequently, but still during the period for which that contract was valid, private shareholders were permitted to hold capital in that company would constitute the alteration of a fundamental condition of the contract, which would require the contract to be put out for competitive tender.

Next, the ECJ addressed the question whether, when a public authority becomes a minority shareholder in a company limited by shares with wholly public capital for the purpose of awarding the management of a public service to that company, the control that public authorities which are members of that company exercise over it must, if it is to be classified as similar to the control they exercise over their own departments, be exercised by every one of those authorities individually or whether it may be exercised by them jointly. The ECJ reaffirmed that their case-law does not require the control exercised over the contracting company in such a case to be individual. In a situation in which several public authorities choose to carry out certain of their public-service tasks by having recourse to a company that they own in common, it is usually not possible for one of those authorities, having only a minority holding in that company, to exercise decisive control over the latter's decisions. In such a case, to require the control exercised by a public authority to be individual would have the effect of requiring a competitive tendering procedure in most cases in which such an authority seeks to become a member of a company owned by other public authorities for the purpose of awarding to that company the management of a public service. Such a result would not be in keeping with the system of Community rules on public procurement and concession contracts. It is open to a public authority to perform the public-interest tasks entrusted to it by relying on its own administrative, technical and other resources, without being obliged to call on outside entities not belonging to its own departments. Public authorities may act in co-operation with other public

authorities in making use of that opportunity to rely on their own resources in order to perform their public-service tasks. It must, therefore, be recognised that when several public authorities own a company to which they entrust the performance of one of their public-service tasks, the control which those public authorities exercise over that entity may be exercised by them jointly. With regard to a body that takes its decisions collectively, the procedure used for the taking of those decisions, in particular recourse to a majority decision, is immaterial. In certain circumstances the condition relating to the control exercised by the public contracting authority could be satisfied where such an authority held only 0.25% of the capital in a public undertaking. If a public authority becomes a minority shareholder in a company limited by shares with wholly public capital for the purpose of awarding the management of a public service to that company, the control that the public authorities which are members of that company exercise over it may be classified as similar to the control they exercise over their own departments when it is exercised by those authorities jointly.

On 8 October 2009 the Commission announced the first stage of infringement procedures in five cases and the closing of infringement procedures in two others. The five cases of alleged infringement are:

- (1) IP/09/1458, in relation to contracts for the provision of housing services awarded by Glasgow Housing Association;
- (2) IP/09/1466, in relation to a mandatory waiting period between the award of the contract and its conclusion;
- (3) IP/09/1469, in relation to the award of contracts to joint ventures in the field of urban planning set up by a publicly owned company with private shareholders;
- (4) IP/09/1470, as to whether there was sufficient urgency to justify use of the negotiated procedure without advertisement; and
- (5) IP/09/1478, whether a transaction was a public works concession contract or land transaction.

On the other hand, the Commission closed an infringement case, IP/09/1462, concerning co-operation between public authorities, in the light of the ECJ judgments in *Coditel Brabant*, C-324/07, *Commission v Germany*, C-480/06, and *Sea* (page 4 above). As the Commission put it, the ECJ had developed its concept of 'in-house' contract awards and confirmed that public-public co-operation via jointly controlled public entities with limited market orientation carrying out the essential part of their activities with their public owners does not require the application of public procurement procedures; and has specified that public-public co-operation does not require the creation of jointly controlled entities, but can be based on a not-for-profit co-operation aimed at jointly ensuring the execution of the public tasks of the co-operation partners which is solely governed by considerations and requirements relating to the pursuit of objectives in the public interest.

The Commission also closed another infringement case against Germany, IP/09/1465, concerning the award of public waste-treatment service contracts and public special-purpose associations to other public entities in Rhineland-Palatinate.

On 29 October 2009 Advocate-General Kokott gave her Opinion in *Commission v Ireland*, Case C-456/08, concerned with the Dundalk Western Bypass, and *Uniplex v UK*, Case C-406/08, a challenge against the NHS by a supplier of surgical tools. The Advocate-General criticised the approach of the UK courts that time starts to run from the breach of the procurement rules, rather than from when there is actual or constructive knowledge of the breach. This approach may be acceptable if the relief sought is to set aside the contract, but *not* if what is sought is compensation. In that case there must be sufficient knowledge, and that will not be the case until reasons why the tender was unsuccessful have been given (knowledge that is of the breach; there does not have to be knowledge of the damage caused by the breach).

Secondly, said the Advocate-General, a provision that proceedings be brought promptly or within three months is not a permissible provision if proceedings may not be allowed within three months because they are not prompt. ‘Promptly’ is not sufficiently certain. There must be sufficient certainty both as to the kinds of decision to which the limitation period applies (for example whether or not it applies to interim decisions) and as to the length of the limitation period. So, said the Advocate-General, national courts may not declare inadmissible on the ground of lack of promptness an application for review brought within the three-month period in the Public Contracts Regulations.

Thirdly, said the Advocate-General, the Irish and UK provisions are not saved by the discretion of the courts to extend time.

## **Chapter 14A: Local Government and Information**

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The decision in *Veolia v Nottinghamshire County Council* [2009] EWHC 2382 (Admin) is a very significant case concerning electors’ rights of access to information relating to local authorities’ accounts, also affecting the interpretation of many key provisions of the Audit Commission Act 1998 relating to accounts. The Council had agreed to the elector’s request, under s 15 of the 1998 Act, for information relating to a waste contract, but the contractor, Veolia, brought a judicial review claim against the Council, attempting to prevent the elector having access to material which it said was commercially confidential. The Audit Commission was joined as an interested party, as the contractor’s submissions, if accepted, would have had a far-reaching effect on s 15 rights and also the interpretation of many key provisions of the 1998 Act and regulations thereunder. Accepting the Commission’s interpretation of the statute, with which the Council and the elector agreed, and dismissing the claim for judicial review, Cranston J held

that the Council had correctly decided to provide the information sought, and that, in line with prior authority, commercial confidentiality was no bar to a right of access under s 15 of the 1998 Act.

## **Chapter 19: Sources of Funds – Non-Domestic Rating**

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Note the Business Rate Supplements (Rateable Value Condition) (England) Regulations 2009, SI 2009/2542, and the Business Rate Supplements (Transfer to Revenue Accounts) (England) Regulations 2009, SI 2009/2543.

## **Chapter 20: Capital Finance**

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Note the Consultation Paper on Changes to the Prudential Capital Finance System introduced by LGA 2003, issued by CLG on 16 November 2009, for response by 4 January 2010, which is accompanied by draft Amendment Regulations, and to which are annexed an Informal Commentary on the draft, a Review of the Local Government Investments Guidance, draft Guidance on Local Government Investments, and Guidance on Minimum Revenue Provision. The proposals are to revise the Investments Guidance, amend the Capital Finance Regulations to mitigate the impact of new accounting standards, and revise the Minimum Revenue Provision Guidance, to reflect new accounting standards.

## **Chapter 24: Local Authority Education Law**

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In *Slough BC v SENDIST* [2009] EWHC 1091 (QB) Plender J held that the Tribunal had not erred in deciding to amend a child's Statement of Special Educational Needs so that she continued to be educated at her parents' preferred specialist school as opposed to a school proposed by the LEA, because the Tribunal was entitled to conclude that the difference in cost to the LEA was not overly significant.

See *R (M) v Haringey IAP* [2009] EWHC 2427 (Admin) on school admissions.

*R (LG) v IAP for Tom Hood School* on permanent exclusion from school is reported at (2009) LGR 691: the statutory requirement for an IAP to decide all factual issues on the balance of probabilities, even when the issue in question involves what amounts to an allegation of criminal conduct, is not contrary to ECHR art 6.

The decision of the CA in *R (N) v IAP for Barking and Dagenham LBC* on disability discrimination and exclusions is reported at (2009) LGR 711: for the purpose of deciding whether a pupil has been less favourably treated for a

reason relating to her disability the proper comparator is not a pupil who has not misbehaved but a pupil without a disability who has misbehaved in a similar way; and the IAP had not erred in law by not taking into account a decision of the SENDIST in relation to earlier temporary exclusions.

The decision in *R (G) v Governors of X School* [2009] EWHC 504 (Admin), concerned with when an employee in the public sector may be entitled to legal representation for the purposes of internal disciplinary proceedings, is reported at (2009) LGR 799.

Note the Education (Miscellaneous Amendments relating to Safeguarding Children) (Wales) Regulations 2009, SI 2009/2544 (W.206).

Note the School Staffing (England) Regulations 2009, SI 2009/2680. They consolidate earlier School Staffing Regulations for England, and also incorporate several new provisions. They place a new duty on the Governing Body to ensure that the Head Teacher complies with the duties imposed and benefits from entitlements conferred on the Head Teacher by any Order made under s 122 of EA 2002 (teachers' pay and conditions). They place a duty on the Governing Body to have regard to the desirability of the Head Teacher achieving a satisfactory balance between time spent discharging his or her professional duties and pursuing personal interests outside work. They also make it mandatory for at least one person involved in the interviewing of job applicants at a school to be trained in safer recruitment techniques.

Note the School Organisation (Establishment and Discontinuance of Schools) (England) (Amendment) Regulations 2009, SI 2009/2984, which relate to the performance ratings to be used to determine which local authorities are able to submit a bid for a community school or a community special school into a new school competition.

## Chapter 25: Social Services

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In *R (F) v Wirral BC* [2009] LGR 905 McCombe J held that complaints about assessment and care plans were not the proper subject of judicial review. The nature of the complaints made was too general to be suitable for judicial determination. Moreover, if any of the assessments or care plans was truly inadequate, and gave rise to a true failure to meet an eligible need, then the claimant would have a proper remedy through the statutory complaints procedure.

On social services and equality duties, see the decision of the CA in *R (Domb) v Hammersmith & Fulham LBC* [2009] LGR 843, in which the claim concerned the Council's decision to introduce charges for adult community care services. The claimants alleged that in reaching its decision the Council had failed to have due regard to its equality duties. In rejecting the claimants' challenge, the court adopted the limited interpretation of the scope of the

equality duties which it had previously formulated in *R (Baker) v Secretary of State for Communities and Local Government* [2008] LGR 239, as developed by the High Court in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin).

The court also confirmed that the equality duties were non-delegable. However, it went on to find that it had been acceptable for no specific consideration of the race and sex equality duties to have been undertaken by the councillor decision-makers themselves. The court so found even though the Council had followed a process whereby officers had carried out an equalities impact assessment, but had not put that assessment before the members, instead attempting to summarise the salient points in the report to Cabinet. Thus, because officers undertaking the equalities impact assessment had considered the race and sex equality duties and had concluded that the introduction of charging would not have a disproportionate adverse impact on a particular sex or racial group, the court did not consider it to have been wrong for the sex and race equality duties not to have been mentioned in the report.

The claimants also complained that the Council had acted unlawfully by taking as a given its decision earlier in the year to reduce council tax by 3%. They contended that by so doing the Council had failed to assess the absolute impact of charging, because it had started from the assumption that it has to balance its budget and that therefore the choice open to it was either to introduce charging or to raise the eligibility threshold for access to care services. It was argued that this was unlawful in circumstances where there had been no equalities impact assessment of the earlier decision to reduce council tax. In fact, the decision was not merely a function of the decision on the headline council tax reduction, but rather was prompted by a need to bring the social services budget under control in the long term. Moreover, the evidence on this aspect of the case was incomplete. The court accordingly concluded that the Council had acted lawfully in taking the budgetary decisions taken earlier in the year as its starting point.

## **Chapter 26: Environmental Law**

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In *Boggis v Natural England and Waveney District Council* [2009] EWCA Civ 1061 it was held that the notification and confirmation of a Site of Special Scientific Interest under the Wildlife and Countryside Act 1981 s 28 did not constitute a project or plan for the purposes of Directive 92/43 art 6(3).

In *R (Ethos Recycling Ltd) v Barking & Dagenham Magistrates' Court* [2009] EWHC 2885 (Admin) a Divisional Court held that an abatement notice served on a recycling company by a local authority without the prior consent of the SoS was not a nullity under EPA 1990 s 79, as consent was only required for instituting 'summary proceedings', which did not include the service of an

abatement notice: the SoS's consent was only required prior to the commencement of proceedings for failure to comply with the notice.

## **Chapter 29: The Provision of Leisure Services by Local Authorities**

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The decision of the CA in *R (Lewis) v Redcar and Cleveland BC*, in relation to the registration of Town Greens under the Commons Act 2006, is reported at (2009) LGR 649; and see Case Note thereon at (2009) CLJ 281, entitled 'A Set-Back for the "Village Green Industry"?'.

## **Chapter 31: Crime and Disorder**

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In *Swindon BC v Redpath* [2009] EWCA Civ 943 the CA held that there was a sufficient nexus between a local authority and its former tenant in respect of his antisocial behaviour against victims in the neighbourhood where he used to live to give the court jurisdiction to make an antisocial behaviour injunction. The CA regarded the history of the antisocial behaviour injunction legislation as indicating that the jurisdiction was to be regarded as a broad rather than a narrow one, and a local authority's housing management functions as themselves being broadly expressed. Moreover, s 153A of HA 1996 indicated that, subject to its terms, it was clearly part of a relevant landlord's housing functions to preserve the peace in the neighbourhood of its residential property by seeking injunctions to restrain antisocial behaviour. In the context of promoting well-being and keeping the peace between neighbours, the powers and functions of a local authority should not be artificially narrowed where the broad range of victims within the meaning of s 153A(3) was imposed upon. On certain facts it might be that a local authority had a choice between an injunction and an antisocial behaviour order, and if that was a genuine choice, it could choose which it preferred, at any rate so far as jurisdiction was concerned. As for matters of discretion, however, the difference between the regimes might well enter into the argument. However, there had been no attempt in the instant case to show that it was more properly relevant to the behaviour order regime.

*Birmingham City Council v Shafi* (2009) LGR 367 considered R's conduct, taken as a whole, was 'housing related', viz directly or indirectly relating to or affecting the local authority's housing management functions. Those functions embraced concern for its tenants and property. There was no requirement in the statute that a respondent was a tenant of the local authority. R's conduct was not to be viewed piecemeal, but as a whole. Viewed as a whole, the local authority's housing management functions embraced its responsibility to its continuing tenants and also to owner-occupiers for the conduct of its former tenant.

In *Heron v Plymouth City Council*, 12 November 2009, a Divisional Court held that it was inappropriate to include in an ASBO a condition preventing an individual from causing harm, alarm or distress to any person, as such a condition was no more than a repetition of offences contrary to POA 1986, and was too imprecise to be of any real efficacy.

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