

Chapter 13: Judicial review: procedural impropriety

Problem scenario

Under section 3 of the (fictitious) Food Distribution Act 2024, should anyone wish to open a restaurant, they must apply to the local authority. Under section 3, the local authority must deal with the application according to a special procedure.

Under section 3(1), on receiving an application, the local authority must send a notice to all properties within 250 metres of the proposed restaurant and to place a notice outside the property where the restaurant is proposed. The notice must state that any comments about the application for the proposed restaurant must be made within twenty-eight days.

Under section 3(2) any decision made by the local authority, must be communicated to the applicant in writing. Finally, under section 3(3), the local authority must hear any appeal against the decision, which should be considered by a specially convened independent committee.

Louise owns a property which is currently empty in the town centre of Nanchester and has decided that she should open a seafood restaurant on the ground floor. She applies to the Council, but after six weeks, she received a letter informing her that her application has been rejected.

It is also the case that Louise has since learned that Ryan, the chairman of the committee of the Council making the decision, owns two restaurants in Nanchester City Centre with one restaurant, called Fish Face specialising in fish.

In order to prepare her appeal, Louise has requested from the Council the reasons for their decision. In their response, the Council has rejected Louise's request.

Finally, it also appears that the Council sent letters informing those within 250 metres of Louise's building about her application to open a restaurant, however no public notice was placed on the outside of the building.

Louise is disappointed about the decision and feels that she has not been treated fairly. She has come to you for advice as she prepares her appeal.

Imagine that you have been presented with this scenario and asked to advise Louise.

The scenario raises the following issues. First, whether the procedural requirements as laid down in the 2024 Act have been complied with, whether there is an issue with bias, and what type of hearing Louise may be entitled to expect. In relation to the hearing there are other issues including whether Louise would be entitled to an oral hearing and whether she could be legally represented. The final issue is whether Louise is entitled to reasons as to why her application was rejected.

Each of these issues will be discussed in turn.

(1) The procedural requirements

It is clear that the Council have complied with the requirement in section 3(1) of sending a notice to all properties within 250 metres of Louise's property; however, they have failed to comply with the requirement that a public notice is placed outside the building. This raises the distinction between *Bradbury v Enfield Borough Council*¹ and *Coney v Choyce*² discussed at 13.2.1. On the facts, this appears to be closer to *Coney v Choyce*, as it appears that the purpose of section 3(1) is that those close to the property are informed about the proposal for a restaurant and that they are given the opportunity to do so. They will have been given this opportunity through the notices they each received. In this way, it appears that there has been substantial compliance with the section as required by the *R v Secretary of State for the Home Department, ex p Jeyeanthan*³ case.

(2) Ryan

The issue with Ryan is that as the chairman of the committee that decided Louise's application he owns two restaurants, one of which is a seafood restaurant—which is the same type of food that Louise is intending to sell in her restaurant. This clearly raises questions as to why Louise's application has been rejected. The concern is that Ryan has his own interests in ensuring that Louise's restaurant does not open, as it could compete with his own, especially his Fish Face restaurant.

¹ [1967] 1 WLR 1311.

² [1975] 1 WLR 422.

³ [2000] 1 WLR 354.

The question is whether there is actual bias or the automatic disqualification rule applies. It is very difficult to prove actual bias, as Louise has no evidence that the decision to reject her application has been motivated by bias against her. It is far easier to apply the automatic disqualification rule. Here, Ryan has a financial interest in the decision. This means that Ryan is automatically disqualified from being part of the committee that determined Louise's application. It is also likely that Ryan's interest is more than merely *de minimis*.

(3) What type of hearing

This is an issue which relates to Louise's business interests, so is a relatively serious matter and it would seem that the principles from *R (Osborn) v Parole Board*⁴ as discussed in 13.5 would apply. There is a need for the Council to explain why her application for a licence has been rejected and Louise has a legitimate interest in participating in the decision. An oral hearing would also allow her to put her case before an independent panel and test the reasoning of the Council most effectively.

(4) Legal representation

It may also be that she would be entitled to be legally represented at the hearing, should she so choose. It appears that the test in *R v Secretary of State for the Home Department, ex p Tarrant*⁵ applies, particularly given the facts raise a legal question, as Ryan being the chair of the committee who decided her application may fall under one of the categories of bias.

(5) Reasons

It remains the case that there is no duty at common law to give reasons and there is no statutory requirement to give reasons. However, under section 3(3) of the 2024 Act, Louise is given the right to appeal against the decision. This right can only be exercised fairly if Louise is aware of the factors that meant her application was rejected. This is a strong indication that in this case reasons should be given to Louise. Both the *R v Civil Service Appeal Board, ex p Cunningham*⁶ and *R v Higher Education Funding Council, ex p Institute of Dental Surgery*⁷ cases, as discussed above,

⁴ [2013] UKSC 61.

⁵ [1985] QB 251.

⁶ [1992] ICR 816.

⁷ [1994] 1 WLR 242.

support the conclusion that reasons should be given, there being no way to determine whether the decision has been reached fairly without any details of the reason given.