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1.19. Distinguishing questions of fact and law

1.19.1. Questions of fact and law may be distinguished as follows:

- A question of fact usually involves *the assessment of evidence*.
- A question of law concerns *whether the law was applied correctly*, or viewed another way, an argument about legal authority, e.g. was the legal test from the legislation interpreted correctly?

1.19.2. Legal challenges to homelessness decisions are therefore restricted to :

- The manner in which the council exercised their discretion (was it lawful?), and
- The process by which the council reached its decision (was the process lawful?).²³

1.20. Subjective element to qualifying criteria

1.20.1. Decision-makers have a wide degree of discretion when administering homelessness functions. For example they:

- Exercise judgment about whether the statutory conditions are met, and
- Exercise judgment as to what the facts of the individual case actually are.

1.20.2. One implication of this is that two different decisions may often lawfully be made on the same set of facts. It is not unusual or improper for two decision-makers to reach different conclusions on the same issue.

1.20.3. Facts may be:

²³ In relation to procedural impropriety, see the sections of this chapter starting with the section entitled 'Procedural fairness and natural justice – generally'.

- Determinative of an issue – i.e. determine the issue at hand, e.g. once it is concluded that it is probable that an applicant is likely to suffer domestic abuse²⁴ if they continue to occupy accommodation, that accommodation cannot be reasonable to continue to occupy (s.177(1)).
- Indicative – i.e. point towards a particular decision, but not determine the issue, e.g. a person's entitlement to child benefit and child tax credit when deciding whether they are person who is in priority need by virtue of having a dependent child residing with them. This is because there may be cases where the child is not, in reality, dependent on the person, and/or not reside with them, or not be someone who might reasonably be expected to reside with them, notwithstanding receipt of the benefit or tax credit.

1.20.4. Some of the judicial review grounds regulate how public bodies approach the facts in individual cases. For example a decision must be based on information which is relevant in light of the statutory test which must be applied.

1.21. Grounds for judicial review

1.21.1. In *CCSU* the House of Lords categorised the grounds on which judicial review may be sought as falling into three categories:

- Illegality,
- Irrationality, and
- Procedural impropriety (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374).

1.21.2. Lord Diplock stated:

²⁴ Or threats of domestic abuse which are likely to be carried out.

"By "illegality" ... I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it..."

By "irrationality" I mean ... "Wednesbury unreasonableness" ... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

I have described the third head as "procedural impropriety" rather than a failure to observe the basic rules of natural justice or failure to act with procedural fairness... This is because susceptibility to judicial review under this head covers also failure ... to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice." (CCSU v Minister for the Civil Service [1985] AC 374 at [410] to [411]).

- 1.21.3. The various grounds for judicial review (which are dealt with in more detail in the following sections)²⁵ are as follows:

Illegality

Misdirection of law

Decision at variance with the facts

Taking irrelevant matters into account

Failure to take relevant matters into account

Disproportionate weight for relevant considerations

Fettering discretion

Unlawful delegation or dictation

Frustrating the purpose of legislation

²⁵ Note that certain grounds for judicial review are omitted from these training notes because they rarely or never arise in relation to homelessness applications.

Breach of human rights

Irrationality

Perverse decision

Bad faith

Improper purpose or motive

Procedural wrong

Breach of natural justice

Not giving effect to the right to be heard

Failure to give adequate reasons

Secret policy

Breach of legitimate expectation

Bias

Breach of statutory procedure

The limits of categorisation

- 1.21.4. While the categorisation of the various grounds ('errors of law') is 'an indispensable tool in the search for rationality and coherence in the law', the grounds in a specific case will tend to 'run into one another' (per Lord Steyn in *Boddington v British Transport Police* [1999] 2 AC 143, HL at 170F; per Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at [239]).
- 1.21.5. The grounds should therefore not be viewed self-contained or mutually exclusive. A public body's error in a particular case may be characterisable as unlawful under more than one ground. Put simply, in individual cases the grounds tend to overlap.
- 1.21.6. *Elrify* illustrates the point. A home owner contended he was homeless as his three-bedroom home was so overcrowded by him, his wife and seven children aged 5 to 18 that it was not

reasonable to continue to occupy (s.175(3)).²⁶ The council decided that while the overcrowding exceeded the statutory 'room standard' (s.326 Table I), the excess was by only one person and continued occupation was reasonable. The Court of Appeal quashed the decision. The council had erred by

- failing to consider the alternative 'space standard' (HA 1985, s.326 Table II) under which there was an excess of two and half persons (i.e. failure to have regard to relevant matters).

The council's error might also be characterised as:

- misdirecting themselves as to the statutory rules governing overcrowding (i.e. misdirection of law).

1.21.7. The context – the factual matrix of the case – is important when applying the grounds for judicial review. As Arden observes:

"Public law is not about absolutes: many aspects of it engage degrees of right and wrong, which will depend on the facts of the individual challenge, rather than 'rules'" (Homelessness and Allocations (2018) 11th ed, p.534).

1.22. Misdirection of law and incorrect legal test

1.22.1. A decision based on a misunderstanding or misapplication of the law is unlawful (*CCSU* [1985] AC 374).

1.22.2. The council must apply the correct legal test. The decision-maker must therefore:

- Correctly understand the particular legal test the legislation requires them to apply in the particular circumstances, and
- Apply the test correctly.

1.22.3. Where necessary (given the facts of a particular case) decision-makers should acquaint themselves with the principles arising

²⁶ See chapter on 'Homelessness'.

from court judgments which confirm how a particular legal test operates. For example, the guidance in the case of *Hotak* on what 'vulnerable' means and how the vulnerability test should be applied in practice.²⁷

Examples of breach

- 1.22.4. In *Smith* the council decided the applicant had not attained priority need because of vulnerability. The reviewer stated:

"It may very well be the case that you are more vulnerable than ordinarily vulnerable but I am not satisfied that you are significantly more vulnerable or even [more] vulnerable than ordinarily vulnerable".

The court held this demonstrated a quantitative threshold or a 'more harm plus' approach, which was to misunderstand what s.189(1)(c) required. If an applicant is more vulnerable than ordinarily vulnerable, as compared with an ordinary person if made homeless, he has a priority need (*Panayiotou v Waltham Forest LBC; Smith v Haringey LBC* [2017] EWCA Civ 1624, applying *Hotak v Southwark LBC* [2015] UKSC 30).

- 1.22.5. *Tonnicondi* concerned whether a friend and companion who had lived with the applicant should be considered part of his household for the purpose of deciding what accommodation must be secured. The council had misdirected themselves by asking whether the applicant was so disabled that he required a live-in carer. In the circumstances HA 1985 s.75 (now HA 1996, s.176) required the decision-maker to consider whether the applicant's friend was a person who might be reasonably be expected to reside with him, either as a carer or companion (*R v Hackney LBC ex p Tonnicondi* (1998) 30 HLR 916, QBD).

Reversing burden of proof

²⁷ See 'Priority need' chapter.

1.22.6. The burden of making inquiries lies with the authority. In *Woodspring* the council erred when requiring the applicant positively and by evidence to prove her homelessness by providing evidence that armed forces accommodation she had formerly occupied with her ex-partner was no longer available (*R v Woodspring DC* (1984) 16 HLR 73, QBD. See also, for example, *Birmingham CC v Wilson* [2016] EWCA Civ 1137; *Cramp v Hastings BC* [2005] EWCA Civ 1005).

1.23. Decision at variance with the facts

1.23.1. Decisions concerning the facts of a case are for the council, with intervention by the courts restricted to errors of law. As Brooke LJ stated in *Adan*:

"...a court of supervisory jurisdiction does not, without more, have the power to substitute its own view of the primary facts for the view reasonably adopted by the body to whom the fact-finding power has been entrusted." (*Adan v Newham LBC* [2001] EWCA Civ 1916 at [41]).

1.23.2. However, a decision may be challengeable on the grounds that it is at odds with the factual matrix if:

- The council did not direct itself properly as to the facts, or
- There was no evidence to support a finding of fact or inference made from the facts (*Secretary of State of Education and Science v Tameside MBC* [1977] AC 1014, HL).

1.23.3. Errors involving facts are usually characterisable under one of the other conventional categories, e.g: a failure to take relevant matters into account, taking no account of the particular facts because a predetermined policy was rigidly applied (see

'fettering discretion'), a finding of fact which was irrational, or a conclusion that was irrational on the particular facts.

Precedent facts

- 1.23.4. Where a fact affected the jurisdiction of the decision-maker the Administrative Court may decide it has the power to inquire into the factual evidence to establish whether the facts were sufficient to justify the public authority's belief that those facts existed at the time. This power arises where the decision-maker has wrongly decided an issue of fact (or law) to confer upon themselves or deny themselves jurisdiction, e.g. the obligation to perform a duty or right to exercise a power. In such cases the court is not limited to reviewing the process by which the decision-maker determined the fact in question (by asking whether they had reasonable grounds for the decision), but may instead determine the factual issue for itself (e.g. *R v Secretary of State for the Home Department ex p Khawaja* [1984] AC 74).
- 1.23.5. Jurisdictional facts often arise in administrative law where a particular status is in issue, e.g. whether a person is a child for the purpose of establishing a social services duty under section 20 of the Children Act 1989 (*R(A) v Croydon LBC* [2009] UKSC 8)²⁸. However, in homelessness such instances will be exceptional.

Examples

- 1.23.6. It is arguable that whether a s.202 review request was received and made in time is a precedent fact which the Administrative Court may determine for itself (*R (Sederati) v Enfield LBC* [2002] EWHC 2423 (Admin); *R (Casey) v Restormel BC* [2007] EWHC 2554 (Admin)).

²⁸ Whether the person is a 'child' (under 18) may be determined by the court on the evidence as a precedent fact. Whether a child is 'in need' is for the social services authority to decide, subject to the ordinary administrative principles (grounds for judicial review) set out in this chapter.

- 1.23.7. On a s.204 appeal the court does *not* have jurisdiction to determine factual issues (*Bubb v Wandsworth LBC* [2011] EWCA Civ 1285).
- 1.23.8. Whether or not a person is deprived of the ability to make a homeless application because of mental incapacity is *not* a precedent fact which the court may determine for itself (*R v Oldham MBC ex p Garlick; R v Bexley LBC ex p Begum* [1993] AC 509).

1.24. Taking irrelevant matters into account

- 1.24.1. A decision will be unlawful if an irrelevant matter has been taken into account, if the factor is significant or potentially of influence, meaning that if it had not been taken into account the decision may have been different (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223).
- 1.24.2. Whether a matter is relevant depends on the context, including what the legislation requires in light of the particular facts.
- 1.24.3. The council is required to take reasonable steps where necessary to acquaint itself with the relevant information required to determine the issue in question (*Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014).

Examples of irrelevant factors

- 1.24.4. When deciding whether a homeless application has been made the following considerations are irrelevant for deciding whether the threshold for commencing s.184(1) inquiries has been met:
- Whether the applicant is eligible for assistance.
 - Whether the applicant has a priority need for accommodation.
 - Whether the applicant became homeless intentionally.
 - Whether the applicant has a local connection with the council's district.

- Whether the applicant has already applied to another council for assistance on grounds of homelessness (Code 18.9).

Relevance of resources

- 1.24.5. As a general rule the resources available to the council – e.g. availability of accommodation and budgetary considerations – are irrelevant to the issue of whether a Part 7 duty is owed.²⁹
- 1.24.6. The resources available to the council are irrelevant to the question of whether the court should require the council to comply with its duty to secure suitable accommodation (*R (Khan and Hussain) v Newham LBC* [2001] EWHC 5189 (Admin)).
- 1.24.7. The council's resources are irrelevant when deciding, under s.190(2)(a), what period of time would afford a priority need but intentionally homeless applicant a reasonable opportunity of securing alternative accommodation when the s.189B relief duty and s.188 interim accommodation duty end (*R (Conville) v Richmond upon Thames LBC* [2006] EWCA 718).³⁰

1.25. Failure to take relevant matters into account

- 1.25.1. A decision will be unlawful if the decision-maker failed to take into account relevant matters (*Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223; *CCSU v Minister for State for the Civil Service* [1985] AC 374, HL).
- 1.25.2. Whether a matter is relevant depends on the context, including what the legislation requires on the particular facts.

²⁹ But see *Holmes-Moorhouse v Richmond upon Thames LBC* [2009] UKHL 7, where it was held that a scarcity of housing is not irrelevant to the question of whether a child should be able to reside with a parent when they already have a home with the other parent, for the purpose of deciding priority need on the basis of whether a child might reasonably be expected to reside with the applicant. See the chapter 'Priority need'.

³⁰ See the chapter 'Section 190 accommodation duty'.

1.25.3. The question of whether a matter is relevant is *prima facie* for the council not the courts to decide (not the courts).

Relevance of resources

1.25.4. As a general rule the resources available to the council may be relevant when determining how a duty should be performed, and whether a particular unit of accommodation is suitable for the applicant's needs (e.g. *Nzolameso v Westminster CC* [2015] UKSC 22; *R v Newham LBC ex p Sacupima* (2001) 33 HLR 2, CA).

Considerations mandated by legislation

1.25.5. The Act or regulations may provide that certain issues must be considered. Accordingly, a failure to consider such matters will render a decision unlawful. Examples include:

- The decision-maker must take into account the types of income and expenditure listed at Reg.2 of the Homelessness (Suitability of Accommodation) Order 1996 No 3204, when deciding whether accommodation is reasonable to continue to occupy or suitable on grounds of affordability.
- The decision-maker must consider the significance of any disruption which would be caused by the location of accommodation when deciding whether accommodation is suitable (Homelessness (Suitability of Accommodation) (England) Order 2012 No 2601, Reg. 2(a)).

1.25.6. In *Khan* a council erred when it upheld a decision that the applicant did not have a local connection. The decision was exclusively based on the applicant's residence in the borough. As a result the council failed to deal with the applicant's assertion

that they had relatives living in the district (*R v Slough BC ex p Khan* (1995) 27 HLR 492, QBD).³¹

Public sector equality duty ('PSED')

1.25.7. When exercising their housing functions councils must have 'due regard' to, *inter alia*, the need to eliminate discrimination, harassment, victimisation, and the need to advance equality of opportunity and foster good relations between persons sharing a protected characteristic and persons who do not share it (Equality Act 2010, s.149).

1.25.8. Where the PSED is engaged an adverse decision must, in substance, comply with the PSED. Merely asserting compliance is not sufficient. Conversely the council may have 'unwittingly' complied with the duty notwithstanding, for example, no explicit finding as to whether there is a disability or protected (*Hotak v Southwark LBC* [2015] UKSC 30. See also, for example, *Hackney LBC v Haque* [2017] EWCA Civ 4, *Lomax v Gosport BC* [2018] EWCA Civ 1846 and *McMahon v Watford BC* [2020] EWCA Civ 497).

1.25.9. See further the chapter 'Equality duties'.

Safeguarding children's welfare

1.25.10. Councils are under a duty to have regard to the need to safeguard and promote the welfare of children (Children Act 2004, s.11).

1.25.11. Section 11(2) provides that councils must:

"...must make arrangements for ensuring that –
(a) their functions are discharged having regard to the
need to safeguard and promote the welfare of
children; and

³¹ There are several methods by which a local connection may be obtained, including normal residence of choice and family associations. See the chapter 'Local connection referrals'.

(b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need.”

- 1.25.12. Determining what sum is required for ‘reasonable living expenses’ when deciding whether accommodation is affordable requires having regard to the needs of children in the household, including what sums may be necessary to promote their welfare (*Samuels v Birmingham CC* [2019] UKSC 28).
- 1.25.13. When deciding whether to secure out of borough accommodation the council must have due regard to the need to promote and safeguard the needs of the applicant’s children (*Nzolameso v Westminster CC* [2015] UKSC 22).
- 1.25.14. When deciding an issue that may adversely affect a child’s welfare councils should:
- Identify the principal needs of the child(ren) both individually and collectively, and
 - Explain the choices made, preferably by reference to published policies (*Nzolameso v Westminster CC* [2015] UKSC 22).
- 1.25.15. In *Safi* the council was not required to expressly refer to the s.11 duty, which was in any event encompassed in its Part 7 duties (*Safi v Sandwell MBC* [2018] EWCA Civ 2876).
- 1.25.16. In *R(E) v Islington LBC* [2017] EWHC 1440 (Admin) Judge Ben Emmerson QC held:

“...any local authority contemplating the transfer of a school-age homeless child into temporary accommodation out of borough is under a Nzolameso duty to make contemporaneous records of its decision-making and its reasons, capable of explaining clearly how it evaluated the likely impact of the transfer on the educational welfare of the

*child, in accordance with its primary obligation under section 11(2)(a). In addition, however, by virtue of section 11(2)(b), it must be able to demonstrate, by reference to written contemporaneous records, the specific process of reasoning by which it reached the decision (if it did) that the authority to which it was delegating its housing obligations would secure the child's educational welfare either through making appropriate arrangements for school admission, or by making available alternative educational provision under section 19 of the Education Act 1996.*³²

1.25.17. The Code stresses the importance of:

*"...minimising the disruption to the education of children and young people, particularly (but not solely) at critical points in time such as leading up to taking GCSE (or their equivalent) examinations"*³³

1.25.18. Para 2.75 of the Code states:

"The provision of support to households placed in temporary accommodation is essential to ensure that they are able to continue to enjoy a reasonable quality of life and access the range of services they need. In formulating their homelessness strategies, housing authorities should consider what arrangements need to be in place to ensure that households placed in temporary accommodation, within their district or outside, are able to access relevant support services. In particular households will need to be able to access:

[...]

*b. appropriate education services; [...]"*³⁴

³² At [120]. See also below under 'Breach of human rights' / 'Protocol 1, Article 2'

³³ Para 17.52.

³⁴ Para 2.75.

- 1.25.19. In *E*, Judge Ben Emmerson QC stated the above guidance³⁵:
“...amounts to an unambiguous and strongly worded recommendation to the housing department of the sending authority which is contemplating the temporary out-of-borough transfer of a school-age homeless child, to liaise directly with the education department of the receiving borough, in order to ensure that appropriate educational arrangements are put in place and monitored.”
 (*R(E) v Islington LBC* [2017] EWHC 1440 (Admin) at para 108).
- 1.25.20. Parliament must have intended that, where an out-of-borough placement is made, the sending council owes a duty to ensure the continued provision of educational services by the receiving council (*R(E) v Islington LBC* [2017] EWHC 1440 (Admin) at para 135).
- 1.25.21. In *A* there was a failure to properly consider the interests of a pre-school child required to undertake four 80-minute journeys on school days, when the council decided out of borough main duty accommodation was suitable (*A v Lewisham LBC* (2018) December Legal Action 46, CC).
- 1.25.22. Unsuccessful challenges include:
- *Hines*: A decision that a Jamaican national was ineligible for assistance³⁶ and not a ‘*Zambrano* carer’³⁷ because the applicant’s British-born son, of whom she was the primary carer, could remain in the UK with his father who had a permanent right to reside. The son’s interests had been taken into account and were not a paramount

³⁵ At para 4.16 of the 2006 version of the Code, which is replicated in the current version.

³⁶ s.185(2).

³⁷ Regulation 15A(4A) of the Immigration (European Economic Area) Regulations 2006, SI No 1003, which provides an applicant obtains a derivative right of residence where (a) P is the primary carer of a British citizen (b) that British citizen is residing in the UK, and (c) the British citizen would be unable to reside in the UK or in another EEA State if P were required to leave the UK.

consideration that could override the clear statutory test³⁸ of whether the child was able to remain in the UK (*Hines v Lambeth LBC* [2014] EWCA Civ 660).

- *Safi*: It was clear from all the decisions a council made in respect of a pregnant woman and family's continued occupation of overcrowded accommodation that they had had due regard to the interests of the children, notwithstanding an absence of express consideration of the s.11 duty in the decision notification letter (*Safi v Sandwell MBC* [2018] EWCA Civ 2876).³⁹

Guidance

1.25.23. Councils must have regard to guidance issued by the Secretary of State when exercising their homelessness functions (s.182(1)).

1.25.24.

1.25.25. The guidance contains recommendations that must, in appropriate circumstances, be considered by the decision-maker. For example:

- The recommendation that accommodation should not be considered reasonable to continue to occupy if the applicant is an assured shorthold tenant who has received a valid s.21 notice, there would be no defence to possession proceedings, and the council are not taking steps to persuade the landlord to allow the tenant to remain for a reasonable period (Para 6.35).

³⁸ See previous footnote.

³⁹ The appeal succeeded on the alternative basis of a breach of the review procedure regulations and a failure to determine whether continued occupation was reasonable looking to the future. See respectively, the section 'Breach of statutory procedure' later in this chapter, and the 'Homelessness' chapter.

- The recommendation that accommodation secured to perform an accommodation duty is free from Category 1 hazards (Para 17.25).
- 1.25.26. Accordingly decision-makers should be alert to specific recommendations in the statutory guidance that are relevant in the particular circumstances.
- 1.25.27. In *Ugbo* the council erred when deciding an applicant was intentionally homeless. There was no indication they had had regard to a recommendation that councils should not require tenants to fight a possession action where the landlord's prospect of success were certain⁴⁰ (*R v Newham LBC ex p Ugbo* (1994) 26 HLR 263, QBD).
- 1.25.28. A failure to *explicitly refer* to a relevant recommendation from the guidance will not vitiate a decision, if it is apparent from the stated reasoning that the decision-maker did in fact have had regard to it (*Birmingham CC v Balog* [2013] EWCA Civ 1582).
- 1.25.29. A decision-maker may be required to give reasons for departing from a recommendation that applies on the particular facts (e.g. *Mondeh v Southwark LBC* (2010) November *Legal Action* 19, CC).
- 1.25.30. In *Mondeh* the applicant was found to have become homeless intentionally because he left privately rented accommodation a few weeks after a section 21 notice requiring possession had expired. The decision letter failed to mention the Code. The county court held the council had erred by failing to have regard to the guidance. It was held the reviewing officer should have at least addressed the guidance and given reasons for departing from the recommendation⁴¹ that it would be unlikely to be reasonable to continue to occupy once a proper notice had

⁴⁰ Para 10.12 of the third (1991) edition of the Code of Guidance.

⁴¹ At para 8.32 of the 2006 version of the Code, which applied at the time of the decision.

expired, unless certain steps were being taken (*Mondeh v Southwark LBC* (2010) November *Legal Action* 19, CC).

- 1.25.31. If a council has had regard to the guidance, the applicant is likely to have to have to establish that it acted unreasonably in light of the relevant provision (*R v Brent LBC ex p Macwan* (1994) 26 HLR 528, CA).

Policies

- 1.25.32. Council policies may contain relevant provisions that require consideration.

- 1.25.33. For example, in *Walsh* an allocation policy stated that an applicant would be entitled to an additional bedroom if they required a 'live in' (non-cohabiting) carer. When deciding that a final offer of one bedroom accommodation to end the main housing duty was suitable the council erred by failing to properly engage with the policy and give reasons for the departure (*Walsh v Haringey LBC* (2014) July *Legal Action* 56, CC).

1.26. Disproportionate weight for relevant considerations

- 1.26.1. It is for the decision-maker to decide how much weight to give to relevant matters.

- 1.26.2. However, on occasion the courts have quashed decisions because the decision-maker has given too much weight to a relevant consideration. For example, in *Ashton*, it was stated:

"Parliament could never had intended [the general circumstances prevailing in relation to housing in the council's area] to be more than something to which a local authority may have regard and I do not think [the council's barrister] Mr. Stephenson would submit that it is or should be the overall determining factor. It is something that must be weighed carefully in the balance with the other factors upon

which the decision under section 60(1) [now s.191(1)] is reached". (R v Winchester CC ex p Ashton (1992) 24 HLR 520, CA at [527], per Purchas LJ).

1.26.3. In *Lomax* (another s.177(2) 'comparison' case) the council erred when deciding they should give considerable weight to the housing situation in its area when determining whether it was reasonable for a severely disabled wheelchair bound person to continue to occupy accommodation where her 24-hour care needs would not be met and where there was evidence that remaining in occupation would be detrimental to her mental ill-health.

1.26.4. The courts have sometimes expressed errors of this kind in terms of the decision-maker misdirecting themselves or acting perversely in concluding that a factor was, in the particular context, significant or decisive (e.g. *South Oxfordshire DC v Secretary of State for the Environment* [1981] WLR 1092, QBD; *R (Gallagher) v Basildon DC* [2010] EWHC 2824).

1.27. Fettering discretion

1.27.1. A pre-determined and rigid policy or practice which prevents a true exercise of discretion renders a decision unlawful (*British Oxygen v Minister of Technology* [1971] AC 610; *Re Betts* [1983] 2 AC 613).

1.27.2. The decision-maker must:

- Reach their own decision, based on the particular facts of the case.
- Consider each case on its own merits, and
- Keep an open mind, and not 'shut their ears' to the merits of the case.

- 1.27.3. Fettering discretion may be viewed as a process by which the council prevents itself from properly exercising its decision-making discretion by improperly binding itself in some way.
- 1.27.4. Two common ways in which public authorities fetter their discretion are:
- Adopting a rigid policy, that predetermines how cases falling within a particular class must be treated, thereby precluding proper consideration of the individual case.
 - Introducing an additional non-statutory 'hurdle', that deviates from the legal test which must be applied.
- 1.27.5. There is nothing wrong *per se* in councils adopting policies and procedures to aid the administration of homeless applications, including policies that provide for a 'norm that is intended to be followed' in the generality of cases. However, policies must allow decision-makers to properly exercise their discretion and allow for exceptions to be made (*R v Eastleigh BC ex p Betts* [1983] 2 AC 610).
- 1.27.6. A general practice which is generally applied will not necessarily amount to a blanket or inflexible policy precluding exceptions (see, for example, *R (Rehoun) v Islington LBC* [2019] EWHC 371 (Admin)).⁴²
- 1.27.7. Errors in several individual cases will not necessarily establish an unlawful blanket approach (see, for example, *R (Edwards) v Birmingham CC* [2016] EWHC 173 (Admin)).⁴³

⁴² *Rehoun* was an unsuccessful challenge to Islington's policy of generally requiring applicants for discretionary housing payments to pay the first £15 towards any shortfall between their contractual rent and benefit entitlements. An appeal on the basis that the policy was unpublished was rendered academic ([2019] EWCA Civ 2142). In relation to the latter point see the 'Secret policy' section below.

⁴³ In *Edwards*, four claimants in judicial review proceedings alleged systemic 'gatekeeping' of homeless applications. While there were individual errors by staff working under intense pressure, the claimants were unable to establish an unlawful policy. The council had genuinely attempted to comply with their Part 7 obligations.

Examples of breach

- 1.27.8. A policy of booking all applicants owed the interim s.188 accommodation duty into bed and breakfasts was held to be unlawful (*R v Newham LBC ex p Ojuri (No 3)* (1999) 31 HLR 452).
- 1.27.9. A decision that a victim of domestic violence had to serve notice to quit to terminate her joint tenancy before she could be secured main duty accommodation was unlawful. Once the s.193(1) conditions were met, the duty to accommodation was owed; it was unlawful to impose 'any further hurdle or proviso before accepting that the duty arises' (*R (Hammi) v Wandsworth LBC* [2005] EWHC 1127 (Admin)).
- 1.27.10. A blanket 'same-day' policy requiring decisions on the duty owed and thereby interim accommodation on the day of application would be unlawful (*R (Khazai) v Birmingham CC* [2010] EWHC 2576 (Admin)).⁴⁴

1.28. Unlawful delegation or dictation

- 1.28.1. Decision-making powers given by Parliament to councils cannot generally be delegated to another body (*Vine v National Dock Labour Board* [1957] AC 488).
- 1.28.2. Decision-makers to whom a decision has been entrusted cannot lawfully discharge their responsibilities by allowing themselves to be dictated to by another body, or by simply accepting the decision of a third party.
- 1.28.3. A decision purportedly made by a body which does not have lawful authority to make that decision is treated by the courts as not having been made. It is void and the true decision-maker has made no decision.

⁴⁴ The claimants in *Khazai* did not establish that the council had required all applications to be dealt with in this way.

- 1.28.4. Unlawful delegation in a homelessness context could arise, for example, where:
- An independent medical advisor decides whether the applicant has a priority need.
 - Another council's decision on intentional homelessness is simply adopted, rather than the council forming its own view on the basis of its own inquiries.
- 1.28.5. There is a distinction between simply adopting a third party's decision and the proper use of others to assist. For example, while a council's medical advisor is not permitted to make the decision, the decision-maker may legitimately take their advice and opinion into account.
- 1.28.6. Local authority functions may legitimately be discharged by committees, sub-committees or officers (Local Government Act 1972, ss. 101 and 112).
- 1.28.7. Most homelessness functions, including inquiries and decision-making, can be contracted out (Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 No 3205).
- 1.28.8. A decision by a contractor may be a nullity if the council has not lawfully contracted out, nor complied with The Deregulation and Contracting Out Act 1994 (see, for example, *Shacklady v Flintshire CC* (2010) November Legal Action, 20, CC).
- 1.28.9. The council remains responsible for errors of law where it's Part 7 functions have been contracted out to a private company.⁴⁵

1.29. Frustrating the purpose of legislation

⁴⁵ Similarly, a complaint may be still be made to the council in respect of actions by a private company contracted to deliver its statutory functions. See the section entitled 'Ombudsman' later in this chapter.

1.29.1. Acting to defeat the purpose of legislation which is the source of the decision-maker's discretion renders a decision unlawful (*Padfield v Ministry of Agriculture, Fisheries and Food* [1968] AC 997).

Example of breach

1.29.2. In *Robinson* a decision to defer notification of a decision that a 17-year-old was not in priority need until the applicant's 18th birthday so as to avoid acceptance of the main duty was unlawful (*Robinson v Hammersmith and Fulham LBC* [2006] EWCA Civ 1122).

1.30. Breach of human rights

1.30.1. It is unlawful for a public authority to act in a way which is incompatible with a Convention right (Human Rights Act 1996, s.6).

1.30.2. The Convention rights potentially relevant in relation to homeless applications are:

- Article 3 – the prohibition on inhuman or degrading treatment (absolute right).
- Article 6 – the right to a fair hearing by an independent tribunal in the determination of one's civil rights (absolute right).
- Article 8 – the right to respect for one's private and family life, home and correspondence (qualified right).
- Article 14 – the enjoyment of rights and freedoms without discrimination on any ground such as sex, race, colour, language, religion or other opinion, national or social origin, association with a national minority, property, birth or other status (qualified right).
- Protocol 1, Article 2 – the right to education (qualified right) (Human Rights Act 1998, Schedule 1).

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treatment of those applicants relying on persons unlawfully in the UK or subject to a 'no recourse to public funds' condition when determining priority need, when compared with those relying on persons not subject to the same immigration restrictions. The different treatment was reasonably and objectively justified by the need to allocate the scarce resource of housing (*Bah v UK* (2011) ECtHR, App No 56328/07).

- 1.30.20. See also the chapter 'Equality duties' for discrimination, contrary to the Equality Act 2010.

Protocol, Art. 2

- 1.30.21. In *E* the council placed a single parent owed the main duty outside of the borough and then back in-borough at short notice.

- 1.30.22. Inadequate arrangements were made for the child's education which was severely disrupted. The court held there had been a breach of Art.2. Complying with the s.208 duty to serve notice on the other authority was not sufficient to discharge its duties in this respect (*R (E) v Islington LBC* [2017] EWHC 1440 (Admin)).⁵²

1.31. Wednesbury unreasonableness

- 1.31.1. A decision is unlawful if it is so unreasonable that no reasonable authority could have made it (*Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223).

- 1.31.2. This ground is also referred to as 'irrationality' or 'perversity'.

- 1.31.3. In *CCSU* Lord Greene explained irrationality as:

"A decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had

⁵¹ But by analogy the current version also, given Ms Bah's immigration status as a Sierra Leonean with indefinite leave to remain and that of her son, a Sierra Leonean national who was subject to immigration control.

⁵² See also above under 'Safeguarding children's welfare'.

applied his mind to the question to be decided could have arrived at it."⁵³

- 1.31.4. Establishing irrationality requires 'something overwhelming' (*Wednesbury* at [230]). It is a high hurdle for the applicant in the absence of another ground. A perverse decision will commonly also be characterisable as demonstrating one of the other errors of law.
- 1.31.5. The decision-maker often has a range of findings potentially available on the particular facts, with which the court cannot interfere. To establish irrationality the decision or policy must be beyond the range of reasonable responses open to the decision-maker (*R v Ministry of Defence ex p Smith* [1996] 1 All ER 257).
- 1.31.6. Certain homelessness decisions are for councils to make, and absent another type of legal error, the applicant is required to demonstrate *Wednesbury* unreasonableness, for example:
- A decision not to make further inquiries before making a decision (*R v Gravesham BC ex p Winchester* (1986) 18 HLR 207).
 - A decision as to what period of time will provide an intentionally homeless applicant who has a priority need a reasonable opportunity of securing alternative accommodation (s.190).
 - A decision there is no irregularity or deficiency in an original decision, or in the process by which it was made⁵⁴ does not constitute an irregularity or deficiency for the purposes of Reg.7(2) of the Review Regulations (*Hall v Wandsworth LBC* [2004] EWCA Civ 1740).

⁵³ *CCSU v Minister of State for the Civil Service* [1985] AC 374 at [410].

⁵⁴ Nor by virtue of subsequent events or information received. See the section 'Reg.7(2) procedure' later in this chapter, and the 'Section 202 reviews' chapter.

- A decision not to exercise the power to secure accommodation pending review (
- A decision that accommodation is suitable (*Cordona v Mid-Bedfordshire DC* [2004] EWCA Civ 925).

1.31.7. While irrationality is a high threshold applicants are more likely to be able to successfully argue pervisity where the relevant threshold test only requires a low degree of certainty. See, for example, *IA* and *Hoyte* below.

Examples of breach

1.31.8. In *Khan and Hussain* two sisters had lived together for many years with their husbands, children and disabled mother in their mother's home. The council erred when refusing the applicants' wish to live together and purporting to discharge the main housing duty by providing two separate properties. No reasonable authority could have concluded that the sisters did not satisfy the first definition in s.176⁵⁵ (*R v Newham LBC ex p Khan and Hussain* [2001] 33 HLR 29).

1.31.9. In *Karaman* the applicant and her daughter suffered from serious mental ill-health and medical problems because of torture and human rights abuses in Turkey. The applicant was particularly afraid of coming into contact with her husband, from whom she had separated on arrival in the UK, and others in the Turkish and Kurdish community. Despite the 'extremely high hurdle' in suitability case, the council's decision that accommodation in the heart of the Turkish and Kurdish communities on the main bus route from the area in which the husband was known to be living was perverse (*R v Haringey LBC ex p Karaman* (1997) 29 HLR 366, QBD).

⁵⁵ Section 176 provides that accommodation may only be regarded as available for a person's occupation if, *inter alia*, it is available by them together with any other person who normally resides with them as a member of their family. See 'Homelessness' chapter.

- 1.31.10. In *IA* the applicant was a refugee who had been subjected to mental and physical torture who presented with medical evidence detailing depression, panic attacks, insomnia, back and leg pains affecting mobility, difficulty in coping, and a list of medication. Following a one-hour interview the council decided the applicant did not have a priority need. The council's decision that it had no reason to believe that the applicant may have a priority need and its failure to make s.184(1) inquiries was arguably perverse (*R (IA) v Westminster CC* [2013] EWHC 1273 (QB)).⁵⁶
- 1.31.11. In *Hoyte* a woman had made two previous unsuccessful applications where she was found to have no priority need despite depression. After receiving the second decision she made plans to commit suicide and was assessed as being at risk of suicide. The council's decision to reject a third application on the grounds there were no new facts was quashed as irrational. The GP's opinion had changed (*R (Hoyte v Southwark LBC* [2016] EWHC 1665 (Admin)).⁵⁷

1.32. Bad faith / improper purpose or motive

- 1.32.1. A public authority acts unlawfully if it uses a power entrusted to them for a purpose that is outside of the scope for which Parliament intended (*Congreve v Home Office* [1976] 1 QB 629).
- 1.32.2. A decision is unlawful if the decision-maker acted in bad faith or was motivated by an illegitimate motive.
- 1.32.3. Bad faith has been held to include:
- Fraud and corruption (*Smith v East Elloe RDC* [1956] AC 736, HL), and

⁵⁶ Permission was granted to apply for judicial review.

⁵⁷ See the section 'Repeat application' in the chapter Applications' for further examples of unreasonable decisions that there are no new facts.

- Dishonest misuse or abuse of power (*Cannock Chase DC v Kelly* [1978] 1 WLR 1, CA).

1.32.4. Bad faith or improper purposes or motives will not be assumed but must be proven. Claims must be particularised (*Cannock Chase DC v Kelly* [1978] 1 WLR 1).

1.33. Procedural fairness and natural justice – generally

1.33.1. Decision-makers must act fairly and in accordance with the rules of natural justice.

1.33.2. In *Fairmount* Lord Russell stated:

"It is to be implied, unless the contrary appears, that Parliament does not authorise by the statute the exercise of powers in breach of the rules of natural justice and that Parliament does ... require compliance with those principles."
(*Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 1 WLR 1255).

1.33.3. Natural justice requires decision-makers to act in good faith and listen fairly to both sides (*Board of Education v Rice* [1911] AC 179).

1.33.4. The rules of natural justice include:

- The rule against bias, and
- The right to a fair hearing.

1.33.5. The following sections set out those grounds for judicial review that concern procedural fairness.

1.34. Not giving effect to the right to be heard

1.34.1. If fairness requires it, the applicant must be informed of a matter that is adverse to their interests and be given the opportunity to comment, before a decision is reached on the issue (*Board of Education v Rice* [1911] AC 179).

- 1.34.2. The 'right to be heard' has two elements. If fairness requires it the applicant must:
- Be informed of what is being said, and
 - Be given an opportunity to answer what is being said.
- 1.34.3. This contrasts with the following, where no right to be heard arises:
- Information the applicant is not aware of, but which is *favourable* to their interests/housing application.
 - Information that is unfavourable but which *does not adversely affect* the issue being determined.
 - Information that is adverse to the applicant, but which is *not contested* by the applicant.
- 1.34.4. The right to heard does not extend to:
- An obligation to put matters to the applicant in writing (although in the context of s.202 review, note the Reg.7(2) requirements – see 'Failure to follow statutory procedure' section below).⁵⁸
 - A right to an oral hearing (again, compare with the Reg.7(2) requirements on review).
 - An obligation to give the applicant 'the last word' (*Bellouti v Wandsworth LBC* [2005] EWCA Civ 602).
- 1.34.5. Where the applicant is given an opportunity to comment but fails to take up that opportunity, the council may proceed to make a decision. They may also, where appropriate, draw adverse inferences.
- Timescale for comment
- 1.34.6. Where there is a right to be heard the council must not set a timeframe for the applicant's response that is so short as to be

⁵⁸ And the 'Section 202 reviews' chapter.

Wednesbury unreasonable (e.g. *Harman v Greenwich LBC* (2010) January Legal Action 36, CC and *Connors v Birmingham CC* (2010) May Legal Action 25, CC).⁵⁹

Dishonesty and bad faith

- 1.34.7. If the council is minded to completely disbelieve the applicant's account on an issue which is critical to the issue to be determined, they must put the matter to the applicant and provide them an opportunity to deal with it (*R v Hackney LBC ex p Decordova* (1994) 27 HLR 108).
- 1.34.8. A finding that the applicant is not telling the truth should be 'spelt out' and reasons confirmed (*R v Wandsworth ex p Dodia* (1998) 30 HLR 562 at 565).
- 1.34.9. However, a finding of bad faith on the applicant's part is most often not required, since there are commonly other explanations available, e.g. the applicant is merely mistaken as to the facts, or alternative inferences may be drawn from the same facts.

1.35. Failure to give adequate reasons

- 1.35.1. At common law the decision-maker may be required to give adequate reasons for adverse decisions.
- 1.35.2. The duty to give reasons is given statutory effect by s.184(3), in relation to certain Part 7 decisions. The council must notify the applicant of the decision, and so far as any issue is decided against the applicant's interests, notify them of the reasons for the decision.⁶⁰
- 1.35.3. Decisions made under Part 7 other than under s.184 – e.g. decisions to end a duty – are nevertheless subject to the public law duty to provide reasons where fairness requires it.

⁵⁹ See also *Harman* and *Connors* below in 'Failure to follow statutory procedure' section.

⁶⁰ Decision notifications under s.184 must also inform the applicant of their right to request a review, and the time within which such a review must be requested (s.184(5)).

- 1.35.4. The circumstances may call for an explanation so the applicant can understand why the decision was made. For example, prior to discharge of duty, the applicant may have cited facts pertaining to the suitability of accommodation offered to end the duty, which requires reasons to be given in the 'discharge of duty' letter.
- 1.35.5. Fairness and natural justice does not require reasons to be given where the council:
- Makes a positive decision (*Akhtar v Birmingham CC* [2011] EWCA Civ 383).
 - Decides that accommodation is suitable when making an offer of accommodation (*Solihull MBC v Khan* [2014] EWCA Civ 41).
- 1.35.6. Reasons must be adequate, intelligible and deal with the substantive points raised (*R v Westminster ex p Ermakov* (1995) 28 HLR 819, CA).
- 1.35.7. The applicant needs to be able to establish from the reasons why they have lost, and whether they have grounds for appeal (*South Bucks DC v Porter (No 2)* [2004] UKHL 33; *R v Brent LBC ex p Baruwa* (1997) 29 HLR 915, CA).
- 1.35.8. Where no reasons are provided the courts may infer the council did not have reasons. See 'examples of breach' section below.
- 1.35.9. The factual context is crucial when determining whether reasons are adequate. In *Porter (No 2)* Lord Carswell stated:
- "...the degree of particularity required [depends] entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on*

relevant grounds." (*South Bucks DC v Porter (No 2)* [2004] UKHL 33 at [36]).

- 1.35.10. When reviewing decision letters the courts must recognise they are addressed to parties who are aware of the issues involved and the arguments advanced (*South Bucks DC v Porter (No 2)* [2004] UKHL 33).
- 1.35.11. Not every factor which weighed with the decision-maker when appraising the evidence need necessarily be identified and explained, providing the issues which were vital to the conclusion are identified, and the manner in which they were resolved explained (*English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605).
- 1.35.12. The court will establish the adequacy of reasons by considering the decision letter as a whole (*Osmani v Camden LBC* [2004] EWCA Civ 1706).
- 1.35.13. A benevolent approach should be adopted by the court when reviewing the adequacy of reasons. Reasons need not be stated with 'judicial exactitude' or elaborate (*Eagil Trust Co Ltd v Pigott Brown* [1985] 3 All ER 119, CA; *R v Brent LBC ex p Baruwa* (1997) 29 HLR 915, CA).
- 1.35.14. A decision can survive appeal despite the existence of an error in the reasoning advanced to support it, if the error is trivial and did not affect the outcome, or if it is clear from the rest of the reasoning, read as a whole, that the decision would have been the same notwithstanding the error, or the decision was the only one which could rationally be reached (*Holmes-Moorhouse v Richmond upon Thames LBC* [2009] UKHL 7).
- 1.35.15. The court must be cautious about allowing councils to admit post-decision evidence as to its reasons for making a decision. There is a distinction between elucidation, e.g. where the

language used lacked clarity and fundamental alteration (*R v Westminster ex p Ermakov* (1995) 28 HLR 819, CA).

‘Sparing the applicant’s blushes’

- 1.35.16. A wish to be kind and not hurtful may lead a decision-maker into error if it results in them failing to give adequate reasons, for example where it is considered the applicant is being untruthful (*R v Wandsworth ex p Dodia* (1998) 30 HLR 562 at 565).

Reliance on policy

- 1.35.17. Applying the provisions of a lawful *Nzolameso*-policy⁶¹ and referring to the policy in a decision may suffice for discharging the duty to provide reasons when deciding that out-of-borough accommodation is suitable and that it was not reasonably practicable to secure in-borough accommodation⁶² (*Brent LBC ex p Alibkhiat; Adam v Westminster CC* [2018] EWCA Civ 2742).

Examples of breach

- 1.35.18. In *Farah* the applicant was evicted from a private rental because of failure to pay rent arrears and found to have become homeless intentionally. There was a shortfall between her rent and housing benefit. Prior to a s.202 review the applicant’s representatives forwarded a statement showing her expenditure exceeded her income. The review decision was quashed as no reasons were given as to why certain items of expenditure were not essential or could be reduced (*Farah v Hillingdon LBC* [2014] EWCA Civ 359).

⁶¹ A policy adopted in line with the guidance in *Nzolameso v Westminster CC* [2015] UKSC 22. In *Nzolameso* the Supreme Court recommended that councils placing significant numbers of applicants outside their own district adopt a policy for determining, *inter alia*, which applicants are prioritised for over-subscribed in-borough accommodation.

⁶² HA 1996, s.208.

- 1.35.19. In *Dodia* the applicant gave several contradictory accounts of the circumstances in which she had left accommodation. The council based an intentionality decision on the most recent version. It erred by not explaining why it preferred this version over an earlier version, which may have included material which was favourable to the applicant's case. Reasons should also have been given as to why medical evidence was rejected (*R v Wandsworth ex p Dodia* (1998) 30 HLR 562).⁶³

1.36. Transparency and disclosure

- 1.36.1. A variety of statutory obligations relating to disclosure of information may be relevant in relation to housing and homelessness applications.

- 1.36.2. Rights to disclosure principally arise under:⁶⁴

- Data Protection Act 2018 ("DPA") and the General Data Protection Regulations 2016 ("GDPR").⁶⁵
- Freedom of Information Act 2000.

Data Protection Act 2018 & GDPR

- 1.36.3. An applicant has a statutory right upon request to confirmation of:
- Whether or not 'personal data' concerning them is being processed (DPA, s.45; GDPR, Art. 15).
 - The categories of personal data involved (DPA, s.45; GDPR, Art. 15).
 - From where the data has been collected, if not from the individual themselves (GDPR, Art. 15).

⁶³ The appeal succeeded on an additional ground. See the section 'Dishonesty and bad faith' above.

⁶⁴ Additional rights arise in relation to housing register applications for an allocation of social housing. Those rights are beyond the scope of these notes.

⁶⁵ Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

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