

DUTY TO GIVE REASONS



Duty to give reasons

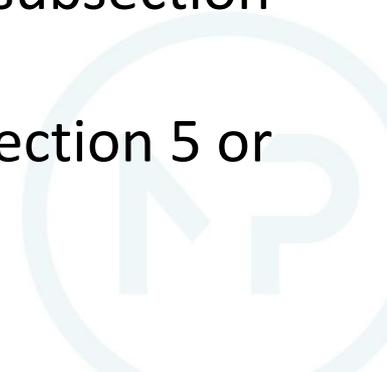
Key principle

- A decision-maker must always give reasons for adverse decisions.



Duty to give reasons

- Section 184(3):
 - “On completing their inquiries the authority shall notify the applicant of their decision and, so far as any issue is decided against his interests, inform him of the reasons for their decision.”
- Section 189A(6):
 - “the authority must record in writing...why they could not agree [the steps which the applicant and LA are to take].”
- Some decisions do not carry a *statutory* duty to give reasons but common/public law duty applies, eg:
 - End of s.195 prevention duty (by notice under subsection 5).
 - End of s.189B relief duty (by notice under subsection 5 or s.193A).



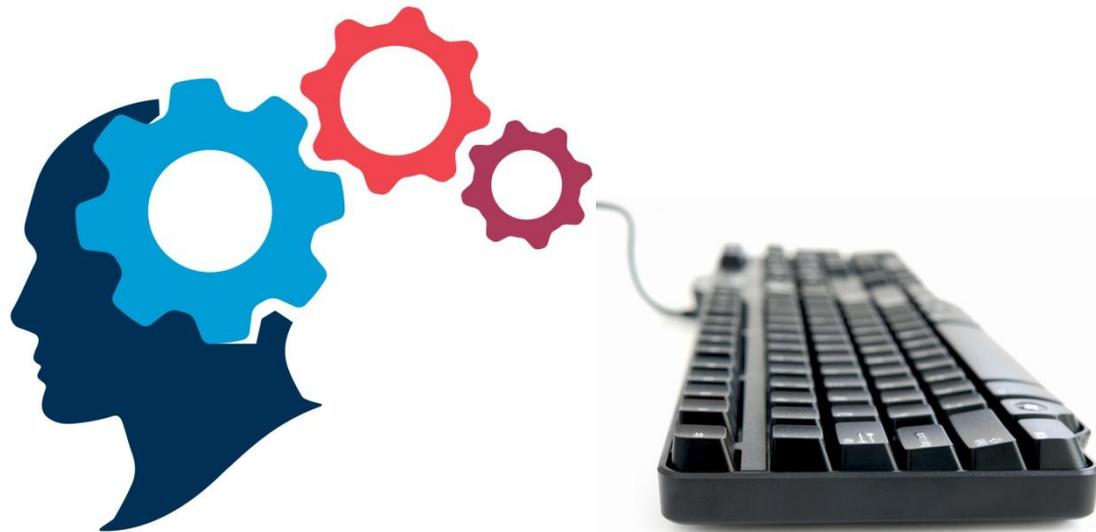
No duty to give reasons

- No duty to give reasons where:
 - Positive decision as to what duty is owed (s.184(3)).
 - Decision that accommodation suitable when offering accommodation (*Solihull MBC v Khan* [2014] EWCA Civ 41).
 - Where review successful (*Akhtar v Birmingham CC* [2011] EWCA Civ 383).



Reasons must be adequate

- Reasons must be proper, adequate, and intelligible and deal with substantive points that have been raised (*R v Westminster CC ex p Ermakov* [1996] 2 All ER 302).



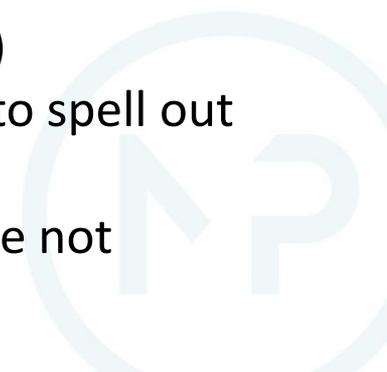
What is 'adequate'?

- Need for applicant to be made aware of whether there are grounds for appeal – “to know why they have or lost” (*R v Brent LBC ex p Baruwa* (1997) 29 HLR 915, CA).
- Is the explanation and reasoning sufficient to enable applicant to:
 - Understand why decision made?
 - Understand decision-maker's thought processes in making material findings?
 - Decide whether reasons challengeable in law?
- Address substantive issues raised by the applicant / his advisor / his circumstances.



Example - reasonable to continue to reside

- In *Safi*:
 - Ms Safi had secure tenancy of 1-bed flat.
 - Husband moved in and child born; Ms Safi applied as homeless.
 - Also pregnant; EDC October 2016.
 - In June 2016 council decided not homeless.
 - Relied on possibility would be re-housed via register with priority.
- LA should have asked:
 - Whether, taking account of family's circumstances impending birth of second child, it was reasonable (looking to the foreseeable future as well as the present) for them to continue to live in the flat, and if no
 - How long it was reasonable to expect the family to stay there in the short term, and whether they would be able to obtain suitable accommodation within that time through the operation of the housing list (*Safi v Sandwell MBC* [2018] EWCA Civ 2876)
- Not possible, even on benevolent reading of decision letter, to spell out how LA had addressed these questions (para 30).
- Question of whether impending birth made flat unreasonable not addressed.



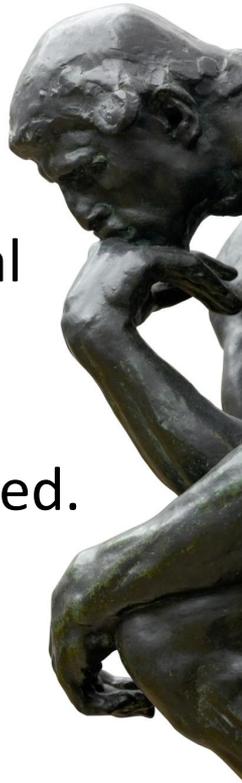
Your once chance

- Decision notification is primary evidence of how decision was made.
- Where no reasons court will infer that authority didn't have any reasons.
- Only limited circumstances in which court will allow LAs to add to reasons given in decision letter, i.e. elucidation, as opposed to alteration of reasons (*R v Westminster CC ex p Ermakov* [1996] 2 All E.R. 302).



What are we trying to achieve?

- Explaining politely to applicant **why** they have lost.
- Reflecting on arguments about whether particular legal test is satisfied.
- Weighing up the arguments – for and against.
- Analysing the how the applicant's argument is structured.
- What are the premises on which they're relying?
- Logical argument consists of:
 - Premise(s):
 - Statement in an argument that provides reason or support for the conclusion.
 - Assumption that something is true.
 - Conclusion.
- Critically pull apart their argument.
- Present your alternative argument.



Premises & conclusion – identifying flaw in reasoning

- **Example – suicidal thoughts**
 - “I have had suicidal thoughts” (PREMISE)
 - “I am therefore more likely to commit suicide if I become homeless” (CONCLUSION)
- If we *accept* the premise, how might we avoid reaching the same conclusion?
 - “There is nothing to indicate that there are concerns that you are intending to commit suicide.”
 - “You have experienced these thoughts over a long period, including while suffering difficulties such as the potential threat of homelessness, and it does not appear that you have taken any action in relation to these thoughts.”
- *A v Lewisham LBC* – example of LA not attacking premise/assumption, i.e. my children must attend school at distance from temporary accommodation.

Premises & conclusion – attacking premise / facts

- ***Example – suitability & distance***

- “The accommodation is too far from my children’s school”
- “I have concluded it is reasonable in the circumstances for your children to move schools.”
- Rejecting premise (child must go to same school).





Useful words/phrases

Introducing the applicant's reasoning

- You stated...
- It has been asserted...
- It was said...
- It may be said...
- I have considered...

Example – “I have considered the nature of your depression and the likely effects should you become homeless. **It has been asserted** by your doctor that your condition has required treatment by medication, and that your conditions are likely to worsen. In this respect she has specifically **asserted that...**”





Presenting alternative reasoning

- However...
- Notwithstanding that [e.g. you have this condition], I have concluded that...
- In spite of this...
- Even though...
- In fact...
- By contrast...
- I am mindful that...

Example – “However, I am mindful that you are being treated with standard anti-depressant medication at a moderate dose. **Although** you have had some suicidal thoughts, **there is nothing to indicate** there are any concerns that you are planning to commit suicide. **There is no evidence of** a severe or underlying psychotic illness.”



Apportioning weight

- I have given particular weight to...
- This must be balanced against...

Example – “I have afforded weight to your treating doctor’s opinion regarding the likely effects of you becoming homeless. However, **this must be balanced** against the aforementioned factors which I view as broadly consistent and indicative of your condition not being at any significant risk. I am particularly mindful that....”





Supporting your argument

- Similarly...
- Moreover...
- Furthermore...
- What is more...
- Correspondingly...
- Also...
- Again...
- In addition...
- Besides this...

Example – “**Moreover**, your condition has not required referral to any second-tier treatment. **I also observe that** you are capable of visiting your GP, collecting and administering your medication. **There is nothing to suggest that** you are unable to undertake normal daily activities.”



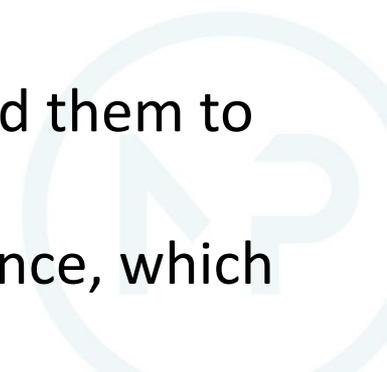
Concluding your argument

- Therefore...
- In conclusion...
- Thus...
- As a result...
- As a consequence...
- Consequently...
- Hence...
- Because of this...
- I have inferred...
- Having considered all the relevant circumstances/factors...
- In the final analysis...

Example – “In the final analysis none of your conditions will prevent you from looking after yourself and keeping yourself free from harm on a day-to-day basis.”

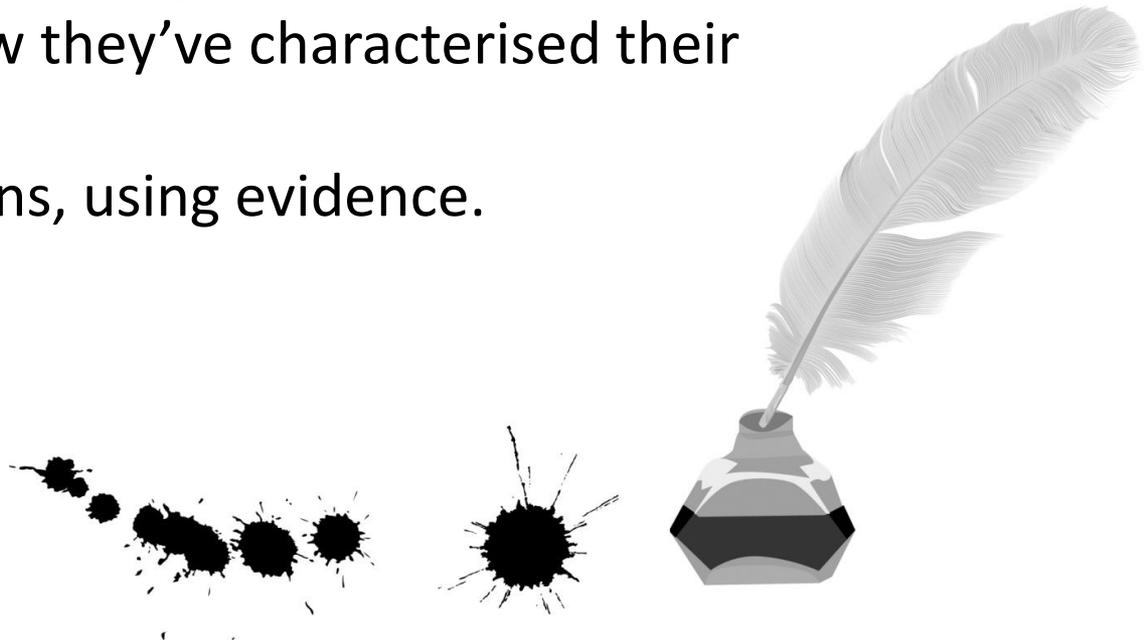
Legal reasoning

- Exercise in legal reasoning:
 - Analysing applicant's arguments.
 - Identifying the applicant's reasoning, and finding the assumptions being made.
 - Attacking the applicant's:
 - Characterisation of the facts.
 - Reasoning – e.g. the nature of my depression means I would suffer harm if homeless.
 - Providing:
 - Reasons for finding the facts are not as the applicant asserts - using evidence (see *Freeman-Roach* extract for more examples).
 - Reasons for concluding the facts (as you find them to be) do not satisfy legal test.
- Sometimes applicant will provide a lot of evidence, which must be 'sift through' and evaluate.



Drafting is a skill

- Something we develop over time.
- Look for *assumptions*:
 - Is the conclusion (“I would be vulnerable on the street”) the only one that’s possible on the facts?
- Examine the veracity (accuracy; “truthfulness”) of the facts the applicant relies on:
 - How accurate are the applicant’s statements?
 - Can we attack how they’ve characterised their circumstances?
- Justify your conclusions, using evidence.



Standard letters should prompt you to give your reasons

Why has the Council decided I became homeless intentionally?

Our reasons for deciding you became homeless intentionally are given below.

Whether there was a deliberate act or omission by you

[Summarise the relevant facts and your reasons for being satisfied the above test is met in this particular case. The following is just an example]

You told us during your interview that you decided to give up the tenancy at [address] and unilaterally gave notice to the landlord.

Whether your actions were made in good faith and in ignorance of a relevant fact

[Summarise the relevant facts and your reasons for being satisfied the above test is met, in this particular case. The following is just an example; where no factors suggested the above test might not be met]

When we discussed how you came to lose your former accommodation there was no suggestion that you were unaware of something which, had you been aware of it, would have made a difference to your decision to give notice.

Whether you ceased to occupy accommodation as a result of your actions

[Summarise the relevant facts and your reasons for being satisfied the above test is met in this particular case. The following is just an example; where no factors suggested the above test might not be met]

You told us during your interview that, having given notice to end your tenancy on [date], you duly vacated your former home on [date].

Reasons – the good news

- Reasons:
 - Can be stated briefly and simply.
 - Benevolent approach should be adopted by court (*Holmes-Moorhouse v Richmond upon Thames LBC* [2009] UKHL 7).
 - Need not be elaborate or stated with ‘judicial exactitude’ (*Eagil Trust Co Ltd v Pigott Brown* [1985] 3 All ER 119; *R v Brent LBC ex p Baruwa* (1997) 29 HLR 915, at [929]).
 - Should not be treated as if they are statutes, contracts or judgments (*Holmes-Moorhouse*).
 - Should not be subjected to a ‘pedantic exegesis’ (critique), and a benevolent approach in their assessment should be adopted by the courts (*R v Croydon LBC ex p Graham* (1993) 26 HLR 286, CA at [291], per Sir Thomas Bingham MR; *Holmes-Moorhouse*).



Reasons – the good news (2)

- Reasons:
 - May be obtained and understood by reading the decision letter as a whole (*Osmani v Camden LBC* [2004] EWCA Civ 1706).
 - 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).



Practical tips

- Ask yourself:
 - Why have I decided against the applicant?
 - How have the facts (as I've found them to be) demonstrated that the legal test was (or was not) met?
- Address the **critical issues** (including disputed issues) which arose when giving reasons, to ensure you do not omit an important issue which requires explanation.
- What is the role of standard passages of text when it comes to reasons?



Reasons & out of area placements



Location and out of district placements

- HA 1996, s.208:
 - *“So far as reasonably practicable a local housing authority shall in discharging their housing functions under this Part secure that accommodation is available for the occupation of the applicant in their district.”*



Nzolameso

- *Nzolameso v Westminster CC* [2015] UKSC 22:
 - Before offering out of district accommodation the LHA must first be satisfied that it's not reasonably practicable to offer accommodation in the borough.
 - Where not possible to accommodate in-borough the applicant must be accommodated as close to the borough as possible.
 - It must also have regard to the need to safeguard and promote the welfare of children.
 - Ideally an LHA should have a policy for procuring sufficient units of accommodation, and for allocating units.



Alibkhiat: Nzolameso applied (1)

- *Brent LBC v Alibkhiat; Adam v Westminster CC* [2018] EWCA Civ 2742.
- Published policies governing out-of-area placements & private rented sector offers.
- Final PRSO offers in Sutton (*Adam*) & Sandwell (*Alibkhiat*).
- LA entitled to take into account:
 - Its resources.
 - Difficulty of procuring sufficient TA.
 - Practicalities of securing local accommodation [46(i)].
- If there is in-district accommodation, does not follow that LA must offer it to a particular applicant [46(ii)].
- In individual case, decision may depend on a *Nzolameso* policy [46(iii), [47] – [48]; *Nzolameso* at [38].



Alibkhet: Nzolameso applied (2)

- Policy should:
 - Explain factors which would be taken into account.
 - Explain factors to be taken into account in offering units 'close to home'.
 - If shortage of such units, factors which would make it suitable to accommodate household further away [46(iv)].
 - Be publicly available [46(v)].
- Where LA properly considered lawful policy, decision in individual case will be lawful.
- Policy will usually be sufficient means of explaining why decision taken [48].
- No duty to inquire into what suitable accommodation is available over a period, before deciding that not 'reasonably practicable' (Adam's argument) where shortage of in-borough accommodation is 'constant backcloth' [75].
- No requirement to give reasons at offer stage.

Alibkhiet: Nzolameso applied (3)

- Brent's policy stated that out of borough placement would be made "where suitable, affordable accommodation is not available locally."
- Mr Alibkhiet argued that since there was one or possibly two units available in district, policy not applied, or reasons inadequate (succeeded in county court).
- Court of Appeal – held clear why Alibhiet not offered property. LA had applied Temporary Placement Policy. Mr A had not qualified for Greater London priority.

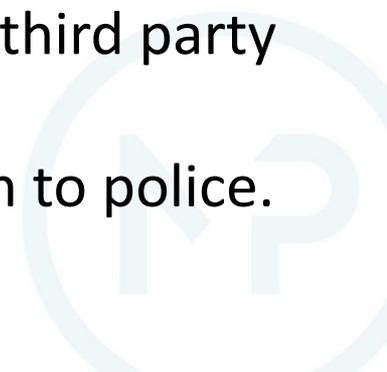


Transparency



Ensuring transparency – additional considerations

- Way in which decision reached must be transparent.
- Applicant must be able to identify how decision made.
- Ensure decision-makers exercise their powers correctly; since know way decision made is subject to scrutiny.
- Two particular issues arise for decision makers:
 - **Record keeping** – if no record kept of information obtained, regard had to various factors or how legal test applied, the courts will assume such steps not taken.
 - Can jeopardise lawfulness of decision.
 - Makes colleagues job harder.
 - **Data protection** – issue with information from third party without consent to disclose to applicant.
 - e.g. witness statement from victim of ASB given to police.



Ensuring transparency – additional considerations (2)

- Public law requires information on which decision is based to be disclosed to applicant.
- If can't – cannot take information into account.
- Can you obtain consent?
- If not, can you disclose information without disclosing person's identity? e.g. evidence in summary form, so applicant can see substance of allegations, without ability to identify individual?
- If not, can you lawfully reach conclusion without having any regard to information.
- Applicant must not be denied ability to scrutinise / opportunity to comment on facts on which adverse decision based.



DRAFTING DECISIONS



Drafting - amount of detail - affordability

- Whether accommodation reasonable to continue to occupy / applicant can afford housing costs and necessities of life (*Bernard v Enfield LBC* [2001] EWCA Civ 1831)
 - Mr Bernard had to pay £29 shortfall for accommodation.
 - Evicted and found intentionally homeless.
 - Decision letter did not need to contain detailed assessment of applicant's resources.
 - Providing reasons given adequate, as per *Ermakov*.
 - Not required to set out arithmetical calculations or itemised quantifications of Mr Bernard's various expenses.



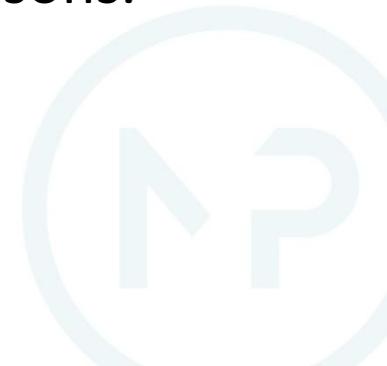
Drafting - amount of detail - generally

- Defined negatively.
- “It is not for the reviewing officer to demonstrate positively that he has correctly understood the law. It is for the applicant to show that he has not. The reviewing officer is not writing an examination paper in housing law. Nor is he required to expound on the finer points of a decision of the Supreme Court.” (*Freeman-Roach v Rother DC* [2018] EWCA Civ 368 at [52]).
- “It is not for the decision letter to “demonstrate” anything; it is for the applicant to demonstrate an error of law, not the other way round.” (*Freeman-Roach v Rother DC* [2018] EWCA Civ 368 at [52]).



Drafting – affordability – reasons

- But, must engage with issues and provide sufficient reasons
- See for example *Farah v Hillingdon LBC* [2014] EWCA Civ 359)
 - Ms Farah evicted from private rental because of rent arrears.
 - Found intentional.
 - Central issue – could she afford rent.
 - Reviewing officer failed to engage with representations.
 - No reasons given as to why certain items of expenditure were not essential or excessive when applicant's case was that all expenditure was essential.
 - Decision quashed because of failure to give reasons.



Drafting – less is sometimes more!

- See for example *Freeman-Roach v Rother DC* [2018] EWCA Civ 359)
 - Aged 54, suffered two strokes, speech impediment, osteoarthritis, asthma and high blood pressure.
 - Council decided conditions did not make him vulnerable.
 - See handout for review officer's reasoning.
 - Appeal allowed by county court.
 - Court of Appeal allowed LA's appeal.
 - Fair reading of decision letter demonstrated LA accepted applicant suffered from mental illness and physical disability but
 - Conditions either controlled by medication or did not cause him any particular functional impairment



Drafting – less is sometimes more! (2)

- None of problems would make noticeable difference to his ability to deal with consequences of homelessness.
- Decision cannot be faulted because it fails to:
 - Define “vulnerable”
 - Define “significantly” [more vulnerable than the ordinary person becoming homeless]
 - List the attributes of the ordinary person becoming homeless.
- “The reviewing officer is not writing an examination paper in housing law” (para 52)
- On appeal, the LA does not have to demonstrate the decision-maker has correctly understood the law. It’s for applicant to show that he has not (para 52).



Standard templates – a good thing?

- What **can't** template letters provide?
 - Summary of facts.
 - How the facts have been interpreted, by reference to the legal tests.
 - Deal with important issues arising in particular case. Identify what the controversial issues are.
 - Reasons for adverse findings.



Don't forget the obvious

- Aim for plain English.
- Logical argument.
- Proof read. Eliminate typos, factual errors, and poorly or imprecisely expressed arguments.



Exercise

