

# Reviewing homelessness decisions under section 202 of the Housing Act 1996



**MARK  
PRICHARD**  
SOCIAL HOUSING CONSULTANT

07835 545 409  
mark@markprichard.co.uk  
markprichard.co.uk

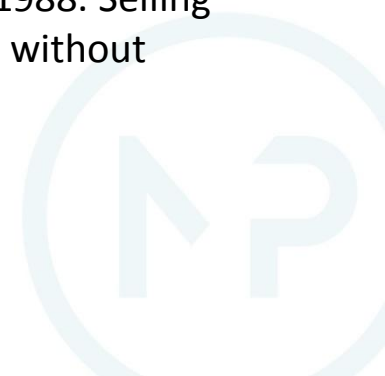
# Disclaimer

- The purpose of these notes is to provide a reminder of your training day, and to provide information for the purpose of general awareness and discussion.
- The training and these materials, including these notes, should not be construed as legal advice, or relied upon as a substitute for legal advice regarding any actual legal issue, dispute, or matter.
- Mark Prichard will not be liable by reason of breach of contract, negligence or otherwise for any loss or consequential loss incurred by any person acting or omitting to act in reliance upon any presentation or material or, except to the extent that any such loss does not exceed the fee for the event, arising from or connected with any error or omission in the presentation material.

# Copyright

© Mark Prichard 2020. The rights of the author to be identified as author of this work have been asserted by him in accordance with the Copyright, Designs and Patent Act 1988. Selling without prior written consent prohibited. Not to be reproduced in whole or part without permission. In all cases this notice must remain intact.

These materials are not to be disclosed to any third party.



# Expedited procedure – when does it apply?

- Expedited process where review requested of following decisions:
  - **Decision about steps council will take to perform**
    - s.195(2) **prevention duty.**
    - s.189(2) **relief duty.**
  - **Decision to end s.195(2) prevention duty by:**
    - Giving notice under s.195(5) (7 primary grounds), or
    - Giving notice under s.193B(2) (non-cooperation).



# Expedited procedure – time limits

## *Inviting / receipt of representations*

- Must notify applicant that any representations in connection with review must be made **within 2 weeks of review request** (or such longer period that applicant and reviewing officer agrees in writing) (Reg.5(3)(b)).

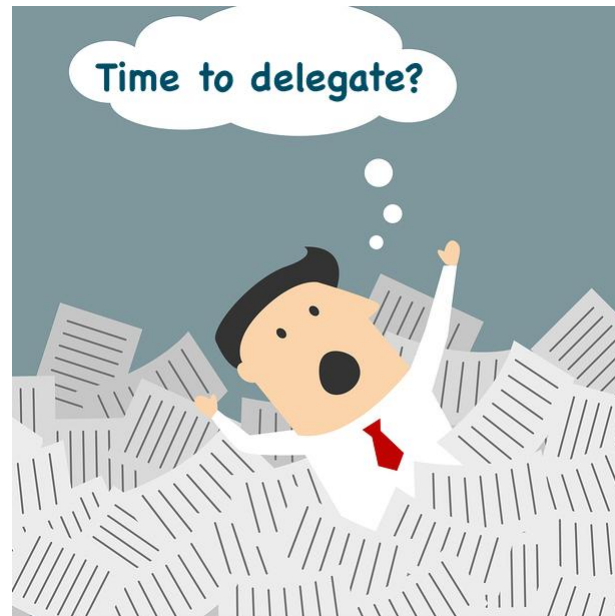
## *Notifying review decision*

- Review decision must be notified within **three weeks** from:
  - Review request, or
  - (if applicable) from date on which representations received (Reg.9(a)), or
  - Within period applicant and LA agreed in writing (Reg.9(1)).



# Expedited procedure – implications

- 14 day time limit applies unless extension agreed in writing.
- Importance of promptly identifying relevant requests.
- Delegate and educate!



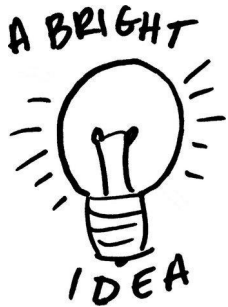
# Acknowledgement time limit (non-expedited)

- Otherwise, no statutory time limit.
- But still want prompt acknowledgement.



# Deadline for representations (non-expedited)

- Matter of discretion for LA

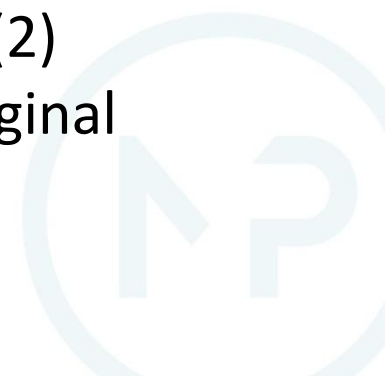


- Acknowledge request promptly and specify a deadline a.s.a.p. after receipt of request.
  - Moves matters along, and
  - Gives time ahead of decision deadline for inquiries.



# Setting deadline for receipt of submissions

- Period must not be so short as to:
  - be *Wednesbury* unreasonable.
  - render process unfair.
- See, for example:
  - *Harman v Greenwich LBC* (2010) January *Legal Action* 36, Lambeth County Court – **7 days** for submissions following Reg.8(2) ‘minded to’ letter sent to solicitors. Held unreasonably short. S.204 appeal allowed.
  - *Connors v Birmingham CC* (2010) May *Legal Action* 25, Birmingham County Court – **fewer than 7 days, including postal delivery**, for submissions following Reg.8(2) ‘minded to’ letter, where no reasons given in original ‘discharge of duty’ notice. Held unfair.
- Give at least **14 days** from likely receipt to deadline?



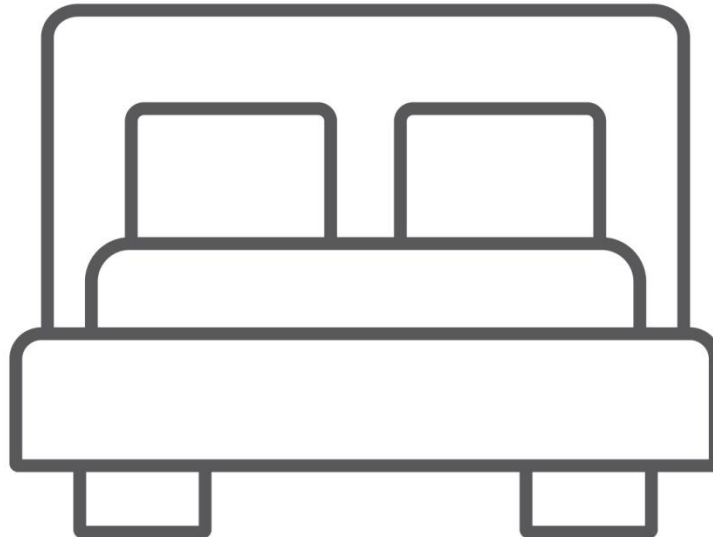


# Accommodation pending review



# Power, not a duty

- LA has **power** to secure interim TA for the applicant pending outcome of review (s.188(3)).



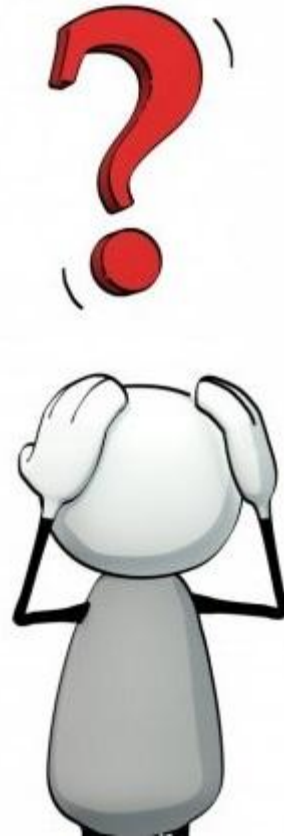
# Must be requested

- No obligation to consider as matter of course in all cases.
- Applicant **must request** (*R v Camden LBC ex p Mohammed* [1997] EWHC Admin 502).



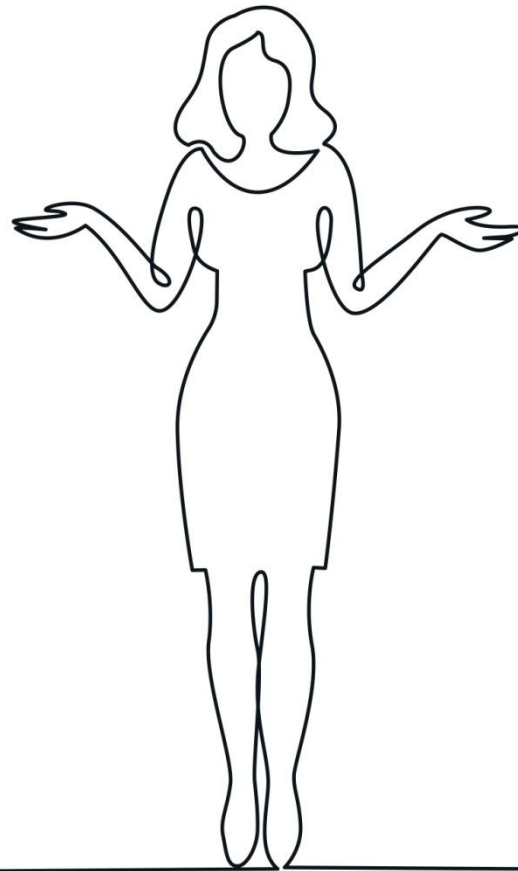
# Requirement for LA to consider request

- Refusing or otherwise **failing to consider** whether to exercise the power to accommodate pending review (once requested) is **unlawful**.



# Two approaches?

- Strict.
- Just put most up.



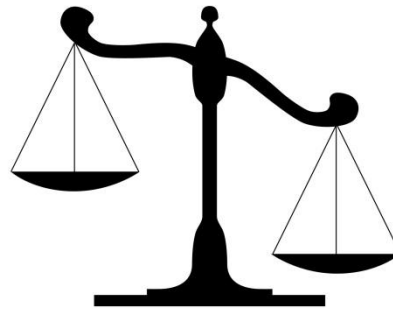
# Guidance on how discretion to accommodate should be exercised – the *Mohammed* principles

- Wide discretion (*R v Camden LBC ex p Mohammed* [1997] EWHC Admin 502)
- A **policy** restricting the exercise of the power to those cases where there are “**exceptional reasons**” is not unlawful, providing the decision-maker does not make an error of law in reaching the decision (*Mohammed*)



# The *Mohammed* principles (2)

- Underlying requirement - to keep in mind objective of fairness between:
  - Homeless persons not owed duty, and
  - Requirement to give proper consideration to possibility that the applicant ***may be right***, and to deprive them of accommodation could result in the ***denial of an entitlement***.



# The *Mohammed* principles (3)

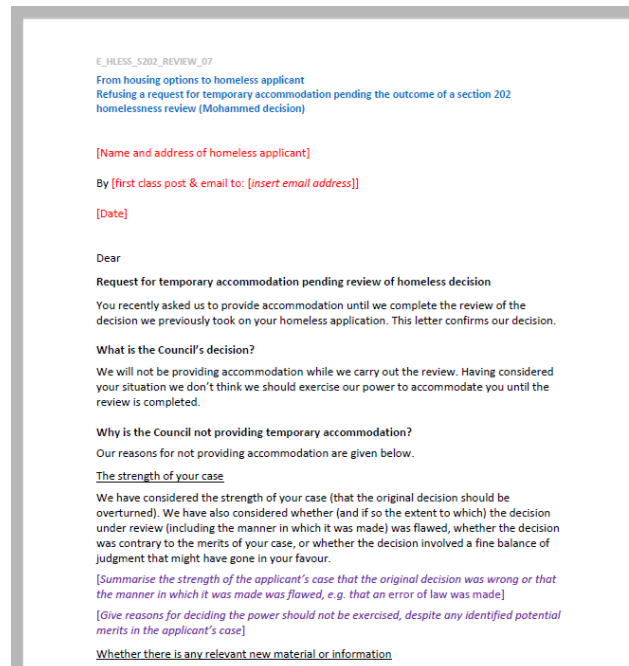
- When carrying out the balancing exercise, the decision must always address following issues:
  - The **merits** of the applicant's case that the authority's original decision is flawed (*R v Newham LBC ex p Lumley* (2001) 33 HLR 11, QBD)
  - Whether there is any **new material**, information or argument put before the authority which could have a real effect on the decision under review
  - The **personal circumstances** of the applicant, and the consequences to him of a decision not to exercise the discretion
  - **Other factors** may, depending on the facts, require consideration.





# The *Mohammed* principles (4)

- In appropriate cases LA must also consider:
  - **Public sector equality duty** (i.e. if disability or protected characteristic; Equality Act 2010, ss. 4, 149).
  - LA duty to have regard to need to **safeguard and promote welfare of children** (if children; Children Act 2014, s.11).
- Example letter - #5.



# *Mohammed* applied in Administrative Court

- If the *Mohammed* principles are properly applied, any application for judicial review will be ‘futile’ (*R v Brighton and Hove Council ex p Nacion* (1999) 31 HLR 1095):

*“Where a council...has obviously considered the material factors which Latham J identified in [Mohammed], it is an entirely futile exercise to seek to say that in some way that discretion was wrongly exercised...”* (*Nacion* (1999) 31 HLR 1095 at 1100, per Tuckey LJ)



## *Mohammed* applied in Administrative Court (2)

- However, the LA must do more than merely pay ‘**lip service**’, and must properly apply the Mohammed factors (*R (Paul-Coker) v Southwark LBC* [2006] EWHC 497 (Admin)).
- Where the original decision under review was unlawful, justice may require the authority to accommodate. See, for example, *R v Newham LBC ex p Lumley* [2000] EWHC Admin 285 where:
  - Inadequate inquiries.
  - Failure to put medical advisor’s adverse views to applicant.
  - No reasons in non-priority decision.
  - Neither flaw considered by decision-maker.

Accordingly, refusal of APR unlawful.

- **Demonstrate how applied principles to particular facts.**



# Method of challenge

- No right to review of exercise of power to accommodate.
- Any challenge must therefore be made by application for **judicial review**.

## Judicial Review Claim Form

Notes for guidance are available which explain how to complete the judicial review claim form. Please read them carefully before you complete the form.

For Court use only	
Administrative Court Reference No.	
Date filed	

In the High Court of Justice Administrative Court	
Help with Fees - Ref no. (if applicable)	H   W   F - [ ] [ ] [ ] - [ ] [ ] [ ]



Is your claim in respect of refusal of an application for fee remission?  Yes  No

### SECTION 1 Details of the claimant(s) and defendant(s)

Claimant(s) name and address(es)

name
------

1st Defendant

name
------



# Grounds of challenge

- An applicant seeking a mandatory order via JR requiring LA to accommodate them pending review decision is required to demonstrate:
  - LA's decision (in refusing to accommodate) was **unlawful**,  
or
  - LA has refused to consider or **failed to consider** the request.



# Failure to take steps

- An applicant's failure to follow his housing plan does not negate the need for the council to consider the *Mohammed* factors (*R (Laryea) v Ealing LBC* (2019) QBD (Admin) 29, August 2019).



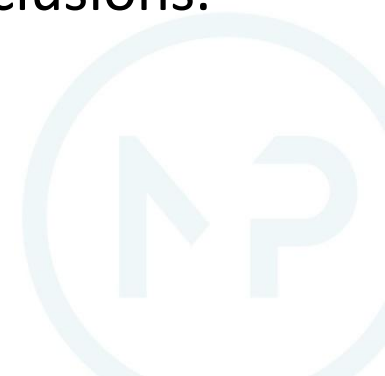
# Identity of APR decision maker

- It is **not unfair/unlawful** for a decision on whether to accommodate pending review to be made by the **same person** who made the original decision which is to be reviewed (*R (Abdi) v Lambeth LBC* [2007] EWHC 1565 (Admin)).



# Timescale for making APR decision

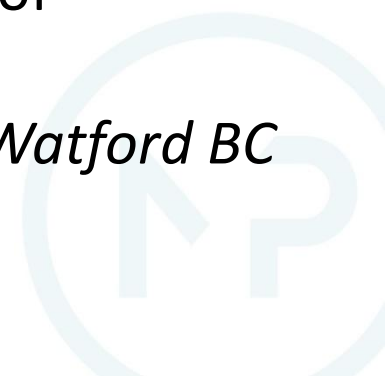
- In the context of an urgent application for accommodation pending review, a failure to respond may give rise to an arguable contention that the authority has failed to consider the request (*R v Haringey LBC ex p Erdogan* (1998) August *Legal Action* 23, QBD)
- In *Erdogan*, an injunction was granted by the High Court where the authority had failed to respond to a request for accommodation pending review, after **two days**.
- Practical problem:
  - Where factual assertions.
  - **Inquiries often required** to dispute facts or conclusions.





# Power to accommodate pending appeal

- May appeal to county court refusal to exercise s.204A(1) power to accommodate pending appeal.
- s.204A appeal may be exercised before s.204 appeal application (although CPR suggests not good practice).
- LA should apply *Mohammed* principles (*R v Brighton and Hove Council ex p Nacion* (1999) 31 HLR 1095).
- Higher bar for applicant – errors in original decision usually rectified on review (see Arden, para 10.55).
- JR applications to be ‘strongly discouraged’. ‘Only in exceptional case’ (*Nacion*).
- Applicant should instead apply to expedite hearing of substantive s.204 appeal (*Nacion*).
- But JR only remedy if no review decision (*Davies v Watford BC* [2018] EWCA Civ 529).



## Power to accommodate pending appeal (2)

- If s.204 appeal dismissed – county court no power to consider refusal to accommodate pending appeal to Court of Appeal. Must be JR. (s.204(3); *Johnson v Westminster CC* [2013] EWCA Civ 773).



# Recent case on JR hearing costs

- Fraudulent doctor's letters submitted by applicant.
- Applied for JR against refusal to accommodate pending review.
- No arguable basis for claim.
- Claim always bound to fail, applying *Mount Cook Land Ltd* [2003] EWCA Civ 1346.
- Court satisfied that **exceptional circumstances justifying claimant paying costs** of hearing.
- Claimant ordered to pay Defendant's costs, assessed at £3,620.35 (*R (Al-Ali) v Brent LBC* [2018] EWHC 3634 (Admin))



# Children Act 2004, s.11(2)



# Children & safeguarding duty

- Children Act 2004, s.11 duty:
  - Duty to have regard to the need to safeguard and promote the welfare of children.



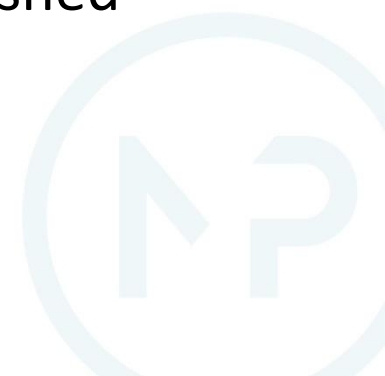
# Does duty mandate a particular outcome?

- 'Due regard'.
- Not any particular outcome.



# Children & safeguarding duty (2)

- **Distinction between factual decisions and exercise of discretion or evaluation.**
- Thus held s.11 did not add any additional criteria to intentional homeless (*Huzrat v Hounslow LBC* [2013] EWCA Civ 1865, approved in *Nzolameso v Westminster CC* [2015] UKSC 22).
- Where decision involves discretion or evaluation decision maker should identify principal needs of children, both individually and collectively (*Nzolameso* at [22] to [30]).
- Decision-maker should **explain choices made** affecting children's welfare, preferably by reference to published policies (*ibid*).



## s.11 & reviewing suitability - *Nzolameso*

*Nzolameso v Westminster CC* [2015] UKSC 22:

- LA required to have regard to need to promote and safeguard welfare of any children in household [27].
- Identify principal needs of children, both individually and collectively [27].
- However, s.11 does not in terms require children's welfare to be paramount or even primary consideration [28].





# Children & safeguarding duty (3)

- *A v Lewisham LBC*, County Court at Central London, 5 July 2018; (2018) December *Legal Action* 46:
  - Failure to consider duty when reviewing suitability of TA requiring 80-minute commute to school.
  - Pre-school child would be taken on four x 80 minute journeys every school day.
  - Needed to consider what child's needs are and how to promote/protect them.
  - *"The son's interests needed to [be] a focus"*.
  - Needed to be express consideration of impact of journey over prolonged period, in terms of development and ability to have fulfilling life.

