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Dealing with Homelessness appeals

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Cornerstone Barristers
Housing Webinar Programme 2021

The Speakers

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Pre-appeal issues

Andy Lane

Introduction

Pre-hearing

1. **Time-limits** – is the appeal out of time?

2. **Early merits review & conferences** – what are the merits of the appeal and settlement options?

3. **Appeal 'test'** – what does the appellant need to show and can they do so?

Time-limits

Review decisions & Appeals

- 21 days to appeal: s204(2), Housing Act 1996
  - Pre s204 determination for s204A appeal

- Can seek extension: s204(2A), Housing Act 1996
  - *Tower Hamlets LBC v Al Ahmed* [2020] 1 W.L.R. 1546
  - *Short v Birmingham CC* [2005] H.L.R. 6

- 56-days to reach (most)review decisions:
  - s203(7), Housing Act 1996
  - S204(1)(b), Housing Act 1996

Late Appeal

Section 204(2A), Housing Act 1996

The court may give permission for an appeal to be brought after the end of the period allowed by subsection (2), but only if it is satisfied—

(a)where permission is sought before the end of that period, that there is a good reason for the applicant to be unable to bring the appeal in time; or

(b)where permission is sought after that time, that there was a good reason for the applicant's failure to bring the appeal in time and for any delay in applying for permission.

Sir Stephen Richards

Al-Ahmed, para. 35

"In no way does that view give carte blanche to delay. The basic rule remains the 21-day time limit, with which Parliament must have intended applicants in general to comply. Compliance may present little difficulty in practice if an applicant already has a solicitor acting for him in relation to the review (as might have been the position in Mr Al Ahmed's case had it not been for a breakdown in the relationship between him and his solicitor). Where an applicant relies on the fact that he was unrepresented and was seeking legal aid as a reason for non-compliance, the circumstances will need to be examined with care, including scrutiny of the diligence with which he acted in seeking legal aid. And even if the court is satisfied as to good reason, that simply opens up a discretion to give permission for an appeal to be brought out of time. At that stage the court is able to take into account all other relevant considerations, including the position of the local authority, in deciding how to exercise its discretion."

Late review decision

Reg. 9, The Homeless (Review Procedure etc.) Regulations 2018

"**37.** It would be surprising if Parliament had intended that, in a case such as the present, if a review decision is made, the parties and the court should ignore it, and then go through an argument as to the adequacy of the original decision and potentially start the whole procedure all over again. This seems a strange result in a case in which the review decision is in the applicant's hands even before he/she begins an appeal against the original decision."

(McCombe LJ in *Ohio Stanley*)

- *Stanley v Welwyn Hatfield BC* [2020] EWCA Civ 1458
- *Ngnoguem v Milton Keynes Council* – 11 March 2021

Early merits review

Before the appeal

- Assess prospects – Conference?
  - *Holmes-Moorhouse v Richmond-upon-Thames LBC* [2009] 1 W.L.R. 413 at paras. 47-50 Lord Neuberger: benevolent approach /nit-picking

- Input of reviewing officer
  - *Firoozmand v Lambeth LBC* [2016] P.T.S.R. 65 at para. 38 - review decision-makers can be "*assumed to have relevant background knowledge of what they should consider*"
  - In *Poshteh v Kensington & Chelsea RLBC* [2017] AC 624 at para. 39 it was held that that an "*over-zealous linguistic analysis*" should not be adopted, and that the statutory review decision letter should be read as a whole against the "*background of serious shortage of housing and overwhelming demand from other applicants*"

- Settlement
  - PD52A, paras. 6.1-6.4

Appeal 'test'

What is Judge considering?

- **No** permission required but strike out possible
  - *Rother DC v Freeman-Roach* [2019] P.T.S.R. 61 at para. 31: burden of showing error on appellant
  - CPR r. 52.18: *Turner v Haworth Associates* [2001] EWCA Civ 370, CA

- **Judicial review** in the county court
  - *Nipa Begum v Tower Hamlets LBC* [2000] 1 W.L.R. 306 at [313E-F];
  - *R v Hillingdon LBC, ex parte Puhlhofer* [1986] AC 484 at 518
  - *James v Hertsmere BC* [2020] 1 W.L.R. 3606 (power to make decision)
  - *Adesotu v Lewisham LBC* [2019] 1 W.L.R. 5637 (discrimination)

- Ground(s) succeed but **appeal fails**
  - *Barty-King v. Ministry of Defence* [1979] 2 All E.R. 80, QBD
  - *Ali and Nessa v Newham LBC* [2002] HLR 20 at [13] and [21]

Lord Bingham of Cornhill

***Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430 at [7]**

"Although the County Court's jurisdiction [under section 204] is appellate, it is in substance the same as that of the High Court in judicial review: *Nipa Begum v Tower Hamlets London Borough Council* [2000] 1 WLR 306. Thus the court may not only quash the authority's decision under section 204(3) if it is held to be vitiated by legal misdirection or procedural impropriety or unfairness or bias or irrationality or bad faith but also if there is no evidence to support factual findings made or they are plainly untenable; or . . . if the decision maker is shown to have misunderstood or been ignorant of an established and relevant fact."

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Directions, grounds, and witness statements

Catherine Rowlands

Standard directions?

- What is needed in this case?
- There should be no need for a directions hearing.
- You are not bound by either the directions A has suggested, or your local court's standard directions!

Standard directions?

- Directions should cover:
  - disclosure – both sides
  - filing skeleton arguments which stand as pleadings
    - should be sequential
    - no need for R's notice
  - witness statements if required
  - listing and time estimates
  - specific issues

Standard directions – amended grounds?

- Some courts routinely provide for A to amend Grounds
- Is this right or necessary?
- Do you need clarification of grounds?
- Strike out some grounds?
  - Eg grounds which go to disability as a fact, or EA? *Adesotu v Lewisham London Borough Council* [2019] EWCA Civ 1405
  - CPR 52.18

Standard directions – discrete issues?

- Should you give directions for deciding whether the appeal was brought in time as a preliminary issue?
  - *Always* check it was lodged in time!
  - If A has not asked for an extension of time and it appears to be out of time, apply to strike out?
- Is it against the right decision?
- Should you give directions in relation to any issue of accommodation pending appeal?
  - Has there in fact been a decision on accommodation pending appeal?

Witness statements

- The normal rule is that witness statements are not admissible
  - evidence not before the first instance decisionmaker ought not normally to be admitted for the purposes of the appeal: *R v Westminster City Council, ex parte Ermakov* [1996] 2 All ER 302
  - That applies to both sides

Witness statements: exceptions?

- It is possible to supplement a decision if there is an omission
  - Not the same as giving different reasons for the decision
    - disability?
    - Correcting typos?
  - Showing that the error would make no difference to the outcome

Witness statements: exceptions

- Dealing with a factual issue
  - How a decision letter was sent out
  - Identity or status of a reviewing officer
  - Contracting out
  - Rebutting allegations of fraud, prejudice etc
  - Whether the accommodation offered was as described
  - Explaining or producing a policy

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The skeleton argument/remote hearings

Rowan Clapp

The skeleton argument: usually a job for counsel?

Yes, **BUT**

- Lots of the preliminary/procedural points will be useful for assessing merits.
- Therefore, may be central to whether you decide to defend at all.
- May be asked to review/amend.
- Make sure you're taking all the best points.

The skeleton argument

The papers…

What should the skeleton do?

- **Persuade** – often lots of papers in homelessness cases, lengthy housing file etc. Skeleton can focus the court's attention on the docs you say are most important, and provide an overview of your argument.
- **Succinct factual summary** – explain background (usually chronologically) – set out procedural steps taken – explain relevant detail on pertinent aspects of the case. Consider: too long? Has anything (important) been left out?
- **Grounds** – identify/simplify/group.

The skeleton argument: what it should do (2)

- **Law and Guidance** (Homelessness Code of Guidance for Local Authorities): Set out the relevant legal principles. No need to quote all of Part VII. Refer to key aspects of Guidance. For example:

"2. Main housing duty: An applicant who is homeless, eligible for assistance with a priority need and not homeless intentionally (s.193(1) HA 1996) is owed the 'full housing duty' by the receiving local housing authority to "secure that accommodation is available for occupation by the appellant" (s.193(2) HA 1996)

[…]

5. Guidance on intentionality The Homelessness code of Guidance (**'the Guidance'**) states that eviction due to anti-social behaviour, nuisance, harassment, violence or threats of violence will likely comprise a deliberate action by an applicant (para.9.20(e)). The Guidance also highlights that:

a. If an authority believes an applicant is incapable of managing his affairs by reason of mental illness, his actions will likely not be considered deliberate (para.9.17(b))

b. If an authority believes an applicant is suffering from limited mental capacity and/or temporary aberration of mind due to mental illness, his actions will likely not be considered deliberate (para.9.17(c))."

Key case – deference to decision maker: R v Hillingdon LBC, ex parte Puhlhofer [1986] AC 484

"Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."

Key case: burden of proof, standard of proof, reasons: Rother District Council v Stephen Freeman-Roach [2018] EWCA Civ 368

"51. These and many other cases were reviewed by Lord Brown in *South Bucks DC v Porter (No 2) [2004] UKHL 33, [2004] 1 WLR 1953* . He confirmed at [29] that the burden is on the challenger to show that the decision maker made an error of law. His well-known summary of principle is at [36]. For the purposes of this case it will suffice if I only quote part of it:

> "Reasons can be briefly stated, the degree of particularity required depending 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. But such adverse inference will not readily be drawn. … Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced."

52. Accordingly, in the present context 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 […]."

Key Cases: reasons/level of review

- Holmes-Moorhouse v Richmond upon Thames LBC [2009] 1WLR 413 - "[…] a benevolent approach should be adopted to the interpretation of review decisions. The court should not take too technical a view of the language used, or search for inconsistencies, or adopt a nit-picking approach, when confronted with an appeal against a review decision. That is not to say that the court should approve incomprehensible or misguided reasoning, but it should be realistic and practical in its approach to the interpretation of review decisions."

- Posteh v Kensington and Chelsea RLBC [2017] UKSC 36 – Warns against "over-linguistic analysis," and also highlights: "the length and detail of the decision-letter show that the writer was fully aware of this responsibility. Viewed as a whole, it reads as a conscientious attempt by a hard-pressed housing officer to cover every conceivable issue raised in the case. He was doing so, as he said, against the background of serious shortage of housing and overwhelming demand from other applicants, many no doubt equally deserving."

Common issue: PSED

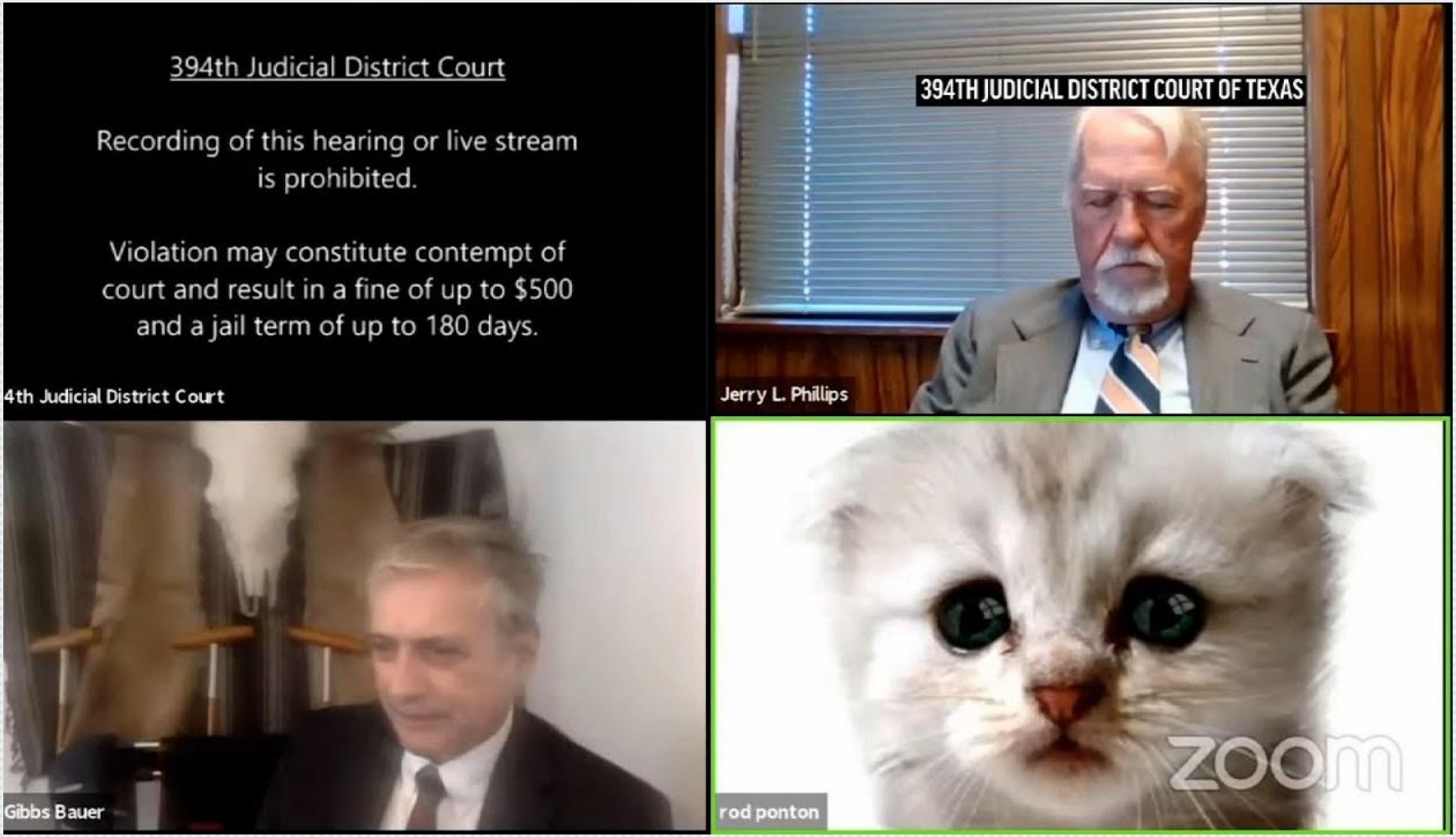
- “Substance not form” - R(McDonald) v Royal Borough of Kensington & Chelsea [2011] UKSC 33

- “it is not there to set technical traps for conscientious attempts by hard-pressed reviewing officers to cover every conceivable issue. Nor is it a disciplinary stick with which to beat them” - Kiefer v Hertsmere Borough Council [2020] EWCA Civ 497

Common issue: Unreasonableness

- VERY high standard
- is the decision so unreasonable that no reasonable authority could ever have come to it? (Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 K.B 223)
- “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” - Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374
- “unreasonableness verging on an absurdity” - Puhlhofer

Remote hearings



Remote hearings cont.

- Here to stay.
- Emphasises importance of written pleadings.
- Provide court with relevant contact details.
- Confirm electronic bundle (linked if possible).
- Access to devices.
- Pre-zoom?
- Can the team complete the hearing in one location?
- If not how will they communicate (WhatsApp group?)
- Mute…

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Interim accommodation/Covid/Settlement/Costs

Tara O’Leary

Interim accommodation - summary

1. Pending s.184 decision:
   - **Duty** to accommodate under s.188(1) if "*have reason to believe*" A is homeless, eligible and in PN – low threshold
   - Any decision relating to s.188 duty challenged by JR **only**: *e.g.* refusal to accept duty or suitability of housing
   - JR may include app for mandatory order to accommodate

2. Pending s.202 review:
   - **Discretion** to accommodate per s.188(3)
   - Decision: *R v Camden LBC ex p Mohammed* (1998) 30 ACR 315, QBD and Code Guidance para. 15.26
   - Refusal to accommodate or suitability challenged by JR **only**
   - JR may include app for mandatory order to accommodate

Interim accommodation - summary

3. Pending s.204 appeal:

- **Discretion** to accommodate per s.204(4) but **only** if the LHA was under a prior duty to accommodate under ss.188, 190, 199A or 200
- Decision: *Mohammed* and Code Guidance para. 15.30
- Any refusal to accommodate may be appealed to the County Court pursuant to s.204A:
  - May order LHA to accommodate pending s.204 appeal; and
  - Shall confirm or quash the *Mohammed* decision (variation of decision is not permitted)

Interim accommodation

Factors to consider – *Mohammed* and more:

- Balancing exercise between the needs of other homeless (if A not owed main duty) vs possibility A may succeed on review/ appeal
- Was underlying decision finely balanced or is there a serious point to argue?
- Any new material/evidence which may have real effect on decision on review/appeal?
- Consider A's personal circumstances carefully:
  - Will they be prejudiced on review/appeal if no accommodation?
  - Consequences of adverse decision on interim accommodation?
  - Children in household: s.11 Children Act 2004
  - Disability or other protected characteristics: PSED

Interim accommodation – Judicial Review

- Usual Judicial Review Pre-Action Protocol, permission test and other principles apply per CPR 54
- A must show decision not to accommodate was wrong in law

- *R v Brighton & Hove ex p Nacion* [1999] 31 HLR 1095
  - High threshold: court will not lightly interfere with a decision which has properly considered *Mohammed* criteria
  - Parliament has allowed LHAs a wide discretion
  - LHAs are entitled to treat the power as suited to use only in exceptional cases
  - Burden rests on A to persuade LHA (and court) why they should be treated differently

Interim accommodation – Judicial Review

Applications for urgent interim injunction for accommodation pending hearing

Principles derived from *De Falco v Crawley BC* [1980] QC 460:

1. Burden on A to show they have a strong *prima facie* case on JR; **and**
2. Consider consequences for **both** parties of granting or refusing relief, including wider public interests

Interim accommodation – Judicial Review

Failure to comply with any injunction may put LHA in contempt of court: *Mohammad v SoSHD* [2021] EWHC 240 (Admin)

A's own conduct & that of their legal team is paramount: *R (Lawer) v Restormel BC* [2007] EWHC 2299 (Admin); *R (Hamid) v SOSHD* [2012] EWHC 3070 (Admin); *R (Ncube) v Brighton & Hove* [2020] EWHC 3646 (Admin)

Procedural guidance: *R (Nolson) v Stevenage BC* [2020] EWCA Civ 379

Interim accommodation – s.204A appeal

- Are statutory conditions fulfilled – *i.e.* accommodation previously provided under ss.188, 190, 199A or 200?
- Has A actually asked for discretionary grant of accommodation?
- Should be issued as separate appeal or formally noted on N161
- Court should give separate directions for urgent hearing

- *Francis v RBKC* [2003] EWCA Civ 443:
  - Usual JR principles apply, not interim relief on JR
  - Court should not lightly interfere with LHA's decision
  - Not for the court to embark on detailed consideration of merits of underlying s.204 appeal

- Apply the usual suspects: *e.g. Mohammed, Puhlhofer, Holmes-Moorhouse, Posteh etc.*

What about COVID-19?

COVID-19 at the courts

1. All rough sleepers are **not** automatically in priority need merely because of the pandemic: *Bankole-Jones v Watford BC* [2020] EWHC 3100 (Admin)

2. LHAs **CAN** lawfully accommodate persons excluded from Part VII HA 96 under s.138 LGA 1972 and s.2B of the NHS Act 2006: *R (Ncube) v Brighton & Hove CC* [2021] EWHC 578 (Admin)
   - The pandemic is an 'emergency' for the purposes of s.138 – including outside 'full' lockdown. But when will it end?
   - s2B: providing accommodation to improve health of people in an LHA's district – lowering risk of transmission
   - Section 180 HA 96 and ss1-2 Localism Act 2011 do **not** apply
   - These are powers **not** duties – but approach with caution

COVID-19 at the courts

3. *Ncube* - Part VII HA 96 does **not** apply. Different tests apply under s.138 LGA 1972:
    - There has been or is an emergency or disaster;
    - The type of disaster is one involving danger to life or property;
    - The local authority is of the opinion that it is likely to affect its area or some of its inhabitants;
    - **If so, the local authority can incur such expenditure as it considers necessary to avert, alleviate or eradicate its effects or potential effects.**

4. What can be done using Pt VII HA 96? See *Covid-19, homelessness and rough sleepers: how to help persons ineligible for support,* June 2020, Cornerstone Barristers' website

COVID-19 at the courts

5. Challenges to any decision refusing to accommodate under s.138 LGA 1972 should be brought by JR, **not** s.202/204 HA 96

   - See *e.g. R (AQS) v SoSHD* [2020] EWHC 843 (Admin): JR of Home Office policy regarding accommodation for asylum seekers with symptoms of covid-19

6. The *De Falco* test for applications for interim injunctions has not changed:
   - *R (Nnaji) v Spelthorne BC* [2020] EWHC 2610 (Admin)
   - *R (Ncube) v Brighton & Hove* [2020] EWHC 3646 (Admin)

Settlement

- When to settle s.204 appeal? When the risk of losing appeal outweighs the time and resources spent remaking decision (usually)
- CPR PD 52A paras. 6.1 – 6.4: power to dismiss s.204 appeal by consent, with or without costs
- CPR PD 54A para. 17.1 – 17.4: settling judicial review, *e.g.* of interim refusal to accommodate

Costs

- CPR 52.20(2)(e): power of appeal court to make costs order
- PD 52A, paras. 6.1 – 6.4: costs by consent
- PD 52A, para. 5.3: appeal costs schedule must show amount claimed for skeleton separately

- Costs usually follow the event – both on settlement & at court
  - *M v Croydon LBC* [2012] EWCA Civ 595
  - Detailed assessment vs agreement of fixed costs sum

- Possible exceptions:
  - Decision not quashed despite error of law
  - Material change in circumstances following s.202 review
  - Set off: *Waltham Forest v Maloba* [2007] EWCA Civ 1281

Questions

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