ONE YEAR ON FROM THE SUPREME COURT

HAILE V WALTHAM FOREST LBC [2015] UKSC 34, [2015] 2 WLR 1441, SC and

NZOLAMESO V CITY OF WESTMINSTER COUNCIL [2015] UKSC 22, [2015] HLR 22, SC.

HAILE V WALTHAM FOREST LBC

1. All statutory references are to Housing Act 1996, unless otherwise stated.

2. The facts: Ms Haile lived in a hostel bedsit under a tenancy agreement which stipulated that it was for single occupancy only. She became pregnant and, in October 2011, she left the hostel because of unpleasant smells there. After a short period as a guest of a friend, she made an application for homelessness assistance. On 15 February 2012, she gave birth to her child. In August 2012, the local housing authority decided that she had become homeless intentionally. This decision was upheld on review, which concluded that the smells were not such as to justify her leaving so that she had voluntarily abandoned suitable accommodation which had been available to her until the birth of her baby and that therefore she had become homeless intentionally. Ms Haile brought a s.204 appeal arguing that she could not be classified as having become homeless intentionally after 15 February 2012, since the property would no longer have been available for her occupation. Her s.204 appeal was dismissed by the County Court and the Court of Appeal. Both courts held that the decision-maker had to consider whether the homelessness was intentional at the date the person left the accommodation, not at the date of the s.184 or review decision.

3. The Supreme Court allowed Ms Haile's appeal (Lord Carnwath JSC dissenting). The leading judgment was given by Lord Reed JSC. They held the following:

a. For the purpose of an inquiry as to whether a person is owed the main housing duty at s.193 Housing Act 1996, the correct test is for the Court to ask first whether the person deliberately had done or failed to do anything in consequence of which he or she ceased to occupy accommodation which it would have been reasonable for him

or her to continue to occupy (s.191(1), and, if so, whether his or her current homelessness had been caused by that intentional conduct (s.193(1));

b. There had to be a continuing causal connection between that deliberate act and the homelessness existing at the date of the inquiry and such causal nexus could be broken by an actual, as opposed to hypothetical, intervening event which had the effect that the person would in any event have been homeless at the date of the inquiry, regardless of his or her earlier conduct;

c. Such an approach is consistent with the purpose of Part 7, Housing Act 1996, which is designed to prevent queue jumping by persons who seek to bypass the waiting list for housing by deliberately making themselves homeless and receiving preferential treatment which they would not have otherwise have received;

d. The local authority had given no consideration to the question whether the cause of the applicant's current state of homelessness had been her surrender of the room in the hostel, or whether the causal connection between her current homelessness and that earlier conduct had been interrupted by the subsequent event of her having given birth to her baby;

e. Had the local authority given consideration to that question, the only reasonable conclusion would have been that the causal nexus had been broken so that it could no longer be said, in relation to her leaving the hostel, that if she had not done that deliberate act, she would not have become homeless; accordingly she had not become homeless intentionally.

4. The problem of Din v Wandsworth LBC[1]: in Din, a family had left a property because it was unaffordable and they owed arrears of rent and of rates. This was before the provision in what is now s.175(3) Housing Act 1996 whereby an applicant is homeless if he or she has accommodation which is not reasonable to continue to occupy. They obtained temporary accommodation where they lived for four months, and were then required to leave. When they made their applications for homelessness assistance, they argued that they would have been homeless in any event, because they would have been evicted from the first property. Lord Wilberforce said "*the local authority must look at the time (the past) when the applicants became homeless, and consider whether their action then was intentional in the statutory sense*". That moment was when the applicants left the first property. Anything else would require the local housing authority "*to inquire into hypotheses – what would have*

[1] [1983] 1 AC 657, HL

happened if the appellants had not moved, hypotheses involving uncertain attitudes of landlords, rating authorities, the applicants themselves, and even intervening physical events".

5. Lord Reed noted:

- **a.** That Din was decided at a time when there was no provision of s.173(3) and therefore there was no dispute that the first property had been reasonable to continue to occupy, despite the fact that it was unaffordable;
- **b.** That the applicants in Din had accepted that the second property had not broken the chain of causal, this was probably wrong and was clarified by the House of Lords in R v Brent LBC ex parte Awua[2];
- **c.** The applicants' arguments were mistaken, in that they argued that the local authority was required to determine not merely whether the applicant ceased to occupy accommodation as a consequence of his or her intentional action, but in addition whether he would otherwise have continued to occupy that accommodation until the time of the authority's decision; those are hypothetical issues; but they are not an inquiry into causal issues properly arising under the legislation; the House of Lords cannot have intended to bar a causal inquiry;
- **d.** Din concerned a relatively narrow issue ie the date at which the test of "becoming homeless intentionally" is to be applied, it did not bar a causal inquiry;
- **e.** the conclusion in Din that there must be a continuing causal connection between the deliberate act satisfying the definition at s.191 and the homelessness existing at the date of inquiry remains good law;
- **f.** Din was concerned with hypotheses, whereas the birth of the baby was an actual, verifiable event and the local authority accepted on the facts that she would not have continued to occupy after that date.

6. Lord Carnwath JSC dissented. He found that Din could not be distinguished and remained good law.

7. Where next? There is an interesting article by Mat Hutchings in Journal of Housing Law [2015] 116 – 119. He stresses the distinction between the actual events in Haile and the

[2] [1996[AC 55, HL

hypothetical speculation in Din. He recommends that local authorities will need urgently to review their decision making on intentional homelessness.

8. In Magouory v Brent LBC[3], the applicant was the mother of three children and in receipt of full housing benefit which paid the rent on her assured shorthold tenancy. She was due to be evicted, following a possession order. The possession proceedings had been brought because she had fallen into rent arrears of around £2,000. Six days before execution of the warrant, she received a letter from housing benefit informing her that she would be subject to the benefit cap and that her HB would be reduced by £134 per week. Following her eviction, she made an application for homelessness assistance. The council decided that she had become homeless intentionally, because the arrears had accrued due to her deliberate act in that she had failed to pass the whole of the HB onto the landlord. A review decision upheld that decision. It rejected her submission that the landlord had told her, before execution of the warrant, that even if she paid off the arrears, the warrant would be executed because the rent was due to be reduced.

9. HHJ Collender QC held that the reviews officer should have considered the likely effect of the benefit cap on the applicant's ability to pay the rent. The likelihood was that the assured shorthold tenancy would have become unaffordable in any event. There had been no investigation into that issue and no inquiries made into whether (as the council asserted) the landlord would have agreed to a further reduction in rent. Such an inquiry was essential in order for the council to ascertain whether or not the landlord would have brought the tenancy to an end as a result of the reduction in HB due to the benefit cap. He allowed the appeal and quashed the review decision.

10. Other scenarios?

- **a.** Leaving early – before the execution of a warrant or even the obtaining of an inevitable possession order?
- **b.** An expansion of the household – after leaving the accommodation but before the s.184 decision?
- **c.** A sudden injury or illness, so that accommodation which had been reasonable to continue to occupy and which applicant had left, would not have been reasonable to continue to occupy?

[3] (2015) County Court at Mayor's & City of London, (2016) Legal Action February p46.

d. Benefit cap/HB cuts/bedroom tax/other financial issues;

e. A subsequent fire or flood at the property?

f. Service of Category 1 hazard notices by local authority?

g. Landlord defaulting on mortgage payments and possession proceedings by mortgagee?

NZOLAMESO V CITY OF WESTMINSTER COUNCIL

11. Background: Section 208(1): "*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.*" Notification to the receiving local authority is required because the receiving local authority is responsible for social services, education and any other functions: R (AM) v Havering & Tower Hamlets LBCs[4]

12. Art 2 Homelessness (Suitability of Accommodation) (England) Order 2012, SI 2012/2601:

"*In determining whether accommodation is suitable for a person, the local housing authority must take into account the location of the accommodation, including –*

(a) where the accommodation is situated outside the district of the local housing authority, the distance of the accommodation from the district of the authority;

(b) the significance of any disruption which would be caused by the location of the accommodation to the employment, caring responsibilities or education of the person or members of the person's household;

(c) the proximity and accessibility of the accommodation to medical facilities and other support which –

(i) are currently used by or provided to the person or members of the person's household; and

(ii) are essential to the well-being of the person or members of the person's household; and

(d) the proximity and accessibility of the accommodation to local services, amenities and transport."

13. Supplementary Guidance on Homelessness Changes in Localism Act 2011 and on the Homelessness (Suitability of Accommodation) (England) order 2012 (DCLG, November 2012):

"47. Location of accommodation is relevant to suitability. Existing guidance on this aspect

[4] [2015] EWHC 1004, Admin.

is set out at paragraph 17.41 of the Homelessness Code of Guidance offers. The suitability of the location for all the members of the household must be considered by the authority. Section 208(1) of the 1996 Act requires that authorities shall, in discharging their housing functions under Part 7 of the 1996 Act, in so far as is reasonably practicable, secure accommodation within the authority's own district.

48 *Where it is not possible to secure accommodation within district and an authority has secured accommodation outside their district, the authority is required to take into account the distance of that accommodation from the district of the authority. Where accommodation which is otherwise suitable and affordable is available nearer to the authority's district than the accommodation which it has secured, the accommodation which it has secured is not likely to be suitable unless the authority has a justifiable reason or the applicant has specified a preference.*

49 *Generally, where possible, authorities should try to secure accommodation that is as close as possible to where an applicant was previously living. Securing accommodation for an applicant in a different location can cause difficulties for some applicants. Local authorities are required to take into account the significance of any disruption with specific regard to employment, caring responsibilities or education of the applicant or members of their household. Where possible the authority should seek to retain established links with schools, doctors, social workers and other key services and support.*

50 *In assessing the significance of disruption to **employment**, account will need to be taken of their need to reach their normal workplace from the accommodation secured.*

51 *In assessing the significance of disruption to **caring responsibilities**, account should be taken of the type and importance of the care household members provide and the likely impact the withdrawal would cause. Authorities may want to consider the cost implications of providing care where an existing care arrangement becomes unsustainable due to a change of location.*

52 *Authorities should also take into account the need to minimise disruption to the **education** of young people, particularly at critical points in time such as leading up to taking GCSE (or their equivalent) examinations.*

53 *Account should also be taken of medical facilities and other support currently provided for the applicant and their household. Housing authorities should consider the potential impact on the health and well being of an applicant or any person reasonably expected to reside with them, were such support removed or medical facilities were no longer accessible. They should also consider whether similar facilities are accessible and available near the accommodation being offered and whether there would be any specific*

difficulties in the applicant or person residing with them using those essential facilities, compared to the support they are currently receiving. Examples of other support might include support from particular individuals, groups or organisations located in the area where the applicant currently resides: for example essential support from relatives or support groups which would be difficult to replicate in another location

54 *Housing authorities should avoid placing applicants in isolated accommodation away from public transport, shops and other facilities, where possible.*

55 *Whilst authorities should, as far as is practicable, aim to secure accommodation within their own district, they should also recognise that there can be clear benefits for some applicants to be accommodated outside of the district. This could occur, for example, where the applicant, and/or a member of his or her household, would be at risk of domestic or other violence in the district and need to be accommodated elsewhere to reduce the risk of further contact with the perpetrator(s) or where ex- offenders or drug/alcohol users would benefit from being accommodated outside the district to help break links with previous contacts which could exert a negative influence. Any risk of violence or racial harassment in a particular locality must also be taken into account. Where domestic violence is involved and the applicant is not able to stay in the current home, housing authorities may need to consider the need for alternative accommodation whose location can be kept a secret and which has security measures and staffing to protect the occupants.*

56 *Similarly there may also be advantages in enabling some applicants to access employment opportunities outside of their current district. The availability, or otherwise, of employment opportunities in the new area may help to determine if that area is suitable for the applicant.*

57 *Where it is not reasonably practicable for the applicant to be placed in accommodation within the housing authority's district, and the housing authority places the applicant in accommodation in another district, section 208(2)* ***requires the housing authority to notify in writing within 14 days of the accommodation being made available to the applicant the housing authority in whose district the accommodation is situated.***

58 *Local authorities are reminded that in determining the suitability of accommodation, affordability must be taken into account. This aspect of suitability must continue to form part of your assessment when considering the location of accommodation*."

14. Plus, of course, s.11 Children Act 2004:

"(1) This section applies to each of the following–

(a) a [local authority][1] in England; ….

(2) Each person and body to whom this section applies 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

(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….

(4) Each person and body to whom this section applies must in discharging their duty under this section have regard to any guidance given to them for the purpose by the Secretary of State."

15. In addition, s.149 Equality Act 2010 (public sector equality duty) should also be considered whenever the local housing authority is considering how to perform its homelessness functions: Hotak v Southwark LBC[5] and Pieretti v Enfield LBC[6].

16. The facts: Ms Nzolameso was the single mother of 5 children. She made an application for homelessness assistance; the local housing authority owed her the main housing duty at s.193(2). It made her an offer of s.193 accommodation of a five bedroom house in Bletchley, near Milton Keynes. She rejected it on the basis that it was too far from her children's schools and that she did not know anyone there, whereas she had a number of friends in Westminster who helped her to look after her children. In addition, she wished to remain with her current GP. The review decision noted that the children were not currently sitting national exams and they could move schools without their education suffering. It also noted that Westminster is currently suffering from a severe shortage of accommodation; it is not reasonably practicable to offer temporary accommodation in the borough for everyone who applies for it.

17. Her appeal to the County Court and second appeal to the Court of Appeal were both dismissed. In addition, accommodation pending appeal was refused so that the applicant had nowhere to live. Judicial review proceedings against the refusal to accommodate pending the appeal to the Court of Appeal were dismissed: R

[5] [2015] UKSC 30, [2015] 2 WLR 1341, SC
[6] [2010] EWCA Civ 1104, [2011] HLR 3, CA

(Nzolameso) v City of Westminster Council[7]. As a result, her children were accommodated by the local authority under s.20 Children Act 1989.

18. As is well-known, the Supreme Court found that the local authority's review decision was unlawful. The local authority should have considered, pursuant to their duty at s.11 CA 2004, more than the issue of essential exams. Disruption to education and other support networks might harm their social and educational development. The authority should identify the principal needs of the children both individually and collectively when making the decision. Section 11 does not require that the children's welfare should be paramount or even primary consideration but that does emphasise the need for authorities to explain their decisions, preferably by reference to publish policies. There was no indication that the local authority had considered what accommodation might be available in Westminster, or why no such accommodation had been offered. There was no indication that, if it was not reasonably practicable to offer accommodation in Westminster, the authority were obliged to offer accommodation as near as possible to Westminster (para 48, Supplementary Guidance).

19. Every authority should have a policy for procuring sufficient units of temporary accommodation to meet the anticipated demand for the coming year; the policy should reflect their duties under Part 7, Housing Act 1996 and Children 2004. The policy should be approved by the democratically accountable members of the authority; they should also have a policy for allocating those units; where there is an anticipated shortfall of accommodation in their district, the policy should explain the factors which will be taken into account in offering accommodation further away; both policies should be publicly available.

20. R (Calgin) v Enfield LBC[8] is no longer good law.

21. Have any local authorities adopted the two policies: Harrow: http://www.harrow.gov.uk/download/downloads/id/7721/ta_allocation_policy-1_dec_2015.

[7] [2014] EWHC 409 (Admin) February 2014
[8] [2005] EWHC 1716 (Admin), [2006] 1 All ER 112, Admin Ct.

22. Forsythe-Young v Redbridge LBC[9]: council offered s.193 accommodation outside of its district, in Grays (Essex). The applicant sought a review of the suitability on the basis that her five year old daughter should continue attending her current school. The prospect of changing schools was upsetting the child (as confirmed by the head of reception at the school). The reviewing officer decided that the accommodation was suitable and that moving school was not inconceivable. The appeal was allowed. The review decision did not meet the requirements of Nzolameso. There was no finding as to the distances it would be necessary to travel in order to continue to go to the current school. Nor was there any consideration of the schools that would be available to the child or of which school would be best for her. There was also no consideration of whether there might be other properties, even outside the borough, that would better suit the child's needs. The decision was quashed.

23. In R (HA) v Ealing LBC[10], a challenge to the local authority's allocation scheme, one of the grounds of challenge was that there was nothing to show that the local authority had made arrangements to ensure that it discharged its functions having regard to the s.11 duty either in terms of formulating the policy or, more particularly, in applying it to the individual circumstances of the claimant and her children. That was accepted by the Administrative Court Judge who found the policy unlawful (on a number of grounds).

24. Inside Housing 1 March 2016: "*Councils in London are calling for greater freedom to house homeless people in cheaper areas, amid a spiralling affordability crisis in the capital"*. The "call" is led by Westminster and Kensington & Chelsea, and includes Waltham Forest, Harrow, and Tower Hamlets. In 2014/2015 there were 1,653 placements outside the capital; compared to 637 in 2012/2013.

25. The conundrum:

a. Valuation Office August 2015 figures: "*Valuation Office Agency figures show rents for a one-bedroom flat in Greenwich, south-east London, have risen by up to 30% over five years – from a median of £750 a month to £975. In Islington, in north*

[9] (2015) Central London County Court (2016) Legal Action February 2016, p46.
[10] [2015] EWHC 2375 (Admin)

London, rent for a one-bedroom flat has gone up by 20% over the same period, from £1,213 to £1,452. In all but four London boroughs, the median rent for a two-bedroom flat is more than £1,100 a month." (Guardian August 2015);

b. Benefit cap currently £26,000 pa in London, due to be cut to £23,000 pa (£20,000 outside London);

c. Social housing stock being depleted under right to buy, forthcoming requirement in Housing & Planning Bill to sell "high value" empty properties; and voluntary right to buy for housing associations.

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