**Homelessness Update**

**December 2019**

**Connor Johnston, Barrister at Garden Court Chambers**

## Out of borough placements

*Alibkhiet v London Borough of Brent* [2018] EWCA Civ 2742, [2019] HLR 15, 6 December 2018

1. Mr Alibkhiet, an Eritrean national, was accommodated, together with his wife and young daughter, by Brent LBC pursuant to the main housing duty under s193(2) Housing Act 1996. On 18 January 2017, Mr Alibkhiet was interviewed by Brent and was made an offer of accommodation in Smethwick. He voiced a number of concerns with this offer in the course of the interview, relating to his daughter's special needs, the lack of any Arabic speaking community in the area, the lack of employment prospects and the fact that his support network was in London. Nevertheless, the following day Brent sent Mr Alibkhiet a formal offer of accommodation in Smethwick warning him of the consequences should he fail to accept and of his right to request a review. Mr Alibkhiet travelled to Smethwick to view the property but, having done so, refused it for the reasons he had cited in interview coupled with the fact that the property had no washing machine. Brent duly discharged their duty toward him.

2. Brent's decision was upheld on review but quashed on appeal to the county court. Their Temporary Accommodation Placement Policy prioritised certain applicants for accommodation in-borough and in Greater London. Mr Alibkhiet did not fall into any of the relevant categories. However, the policy also contained a general presumption that out of borough placements would only be used 'where suitable, affordable accommodation is not available locally'. By the time the appeal was heard it had become apparent that at the time of the review decision there had actually been two properties available to Brent more locally: one in Acton and one in Harlesden. These properties had not been referred to within the review decision which had stated that 'at the point of offer, the property [in Smethwick] was the only property available on that date that was suitable to your household's needs'. HHJ Saggerson quashed the review decision on the basis that there had been a 'a total absence, in the process from offer through to discharge letter, including the review decision letter, of any explanation, let alone a cogent explanation, as to why on the date of the offer, 18th January 2017, the Acton property … was not a property that was offered to this family.'

3. The Court of Appeal allowed Brent's appeal. There had been no obligation to give reasons in the offer letter explaining why Mr Alibkhiet was being made an offer of out of borough accommodation. As to reasons given in the review decision, it was 'clear enough' from looking at the Temporary Accommodation Placement Policy why Mr Alibkhiet had not been offered the Acton accommodation.



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Under that policy his case was not treated as a priority for accommodation in Greater London and the fact there were one or two properties available locally at the time the offer was made did not 'undermine the application of that policy'. In addition, the explanation Brent had given within the review decision as to why it had not been practicable to procure more accommodation in London and between London and Birmingham was adequate.

**Looking to the future when considering whether applicant homeless at home, and procedural fairness in review process**

*Safi v Sandwell MBC* [2018] EWCA Civ 2876, 21 December 2018

4. The Appellant, Ms Safi, lived in a one-bedroom flat in Smethwick with her husband and their young son. The property comprised of the single bedroom together with a living room, kitchen and bathroom.

5. In November 2015, a few months after the birth of her son, Ms Safi sought homelessness assistance from the Respondent, Sandwell MBC. Her case was that she was homeless as it was not reasonable for her to continue to occupy the flat on the basis that it was overcrowded, affected by damp and mould, and difficult to access. The access issues arose from the fact that the flat was located on the first-floor of a block of flats with no lift, making it difficult to negotiate with a pram or pushchair.

6. Having considered Ms Safi's application, Sandwell reached the view that she was not homeless. Ms Safi requested a review of this decision and, in February 2016, the review panel issued her with a decision indicating that they were minded-to uphold the original decision. This letter was not a true minded-to letter, for the purposes of regulation 8(2) of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999, SI 1999/71, as it did not identify any deficiency or irregularity in the original decision.

7. In June 2016, Ms Safi's solicitors responded to the minded-to letter. Three points were advanced on her behalf. First, that she was pregnant with a second child, due in October 2016, which would exacerbate the overcrowding issues. Second, the unsuitable access arrangements had not been considered by the panel, and these had recently resulted in Ms Safi falling on the stairs. Third, that the damp and mould issues – which Sandwell had suggested had been resolved – had recurred.

8. Later that month, the review panel issued a final decision upholding the original decision that Ms Safi was not homeless. In relation to the overcrowding, the position taken was that Ms Safi was registered on Sandwell's allocation scheme and that if she was flexible in respect of the areas where she would be willing to live, then she would be rehoused within a reasonable period of time. In relation to the access arrangements, such problems were not uncommon and Ms Safi could use a baby carrier or a sling so as to keep her arms free when accessing the flat. In relation to the damp, an inspector would visit the property to arrange any necessary repairs or give advice if the damp was due to lifestyle choices.



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9. Ms Safi's appeal to the county court was dismissed. The Court of Appeal allowed a second appeal. In considering whether the property was reasonable to continue to occupy, the review panel had failed to properly follow the approach set down in *Birmingham City Council v Ali* [2009] UKHL 36, [2009] 1 WLR 1506 and consider whether the property would be reasonable to continue to occupy for the foreseeable future pending rehousing. In particular, the panel had failed to address the question of whether the impending birth of Ms Safi's second child in October 2016 made it unreasonable to continue to occupy the flat in the long-term. Although Sandwell were entitled to take into account the likelihood of Ms Safi being rehoused under the allocation scheme, they had neglected to consider how long the property might be reasonable for the household to continue to occupy in the short-term and whether or not a suitable property would become available during that period.

10. In addition, the decision making process adopted by the panel had not been in accordance with regulation 6 of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 or complied with the principles of natural justice. In particular, the panel had not informed Ms Safi or her solicitors of the procedure to be followed during the review by (among other things) informing them of the deadline for the making of representations in connection with the review. This failure had a knock-on effect on the decision making process. Had Ms Safi and her solicitors been informed of the timescales in which a decision was to be made, it was likely that representations would have been made before the minded-to decision was issued, allowing the panel to respond to the new matters she was raising in their minded-to decision. Ms Safi and her solicitors would then have had a chance to respond to the new points before a final decision was made.

11. A ground arguing that the decision making process was not in accordance with regulation 8(2) as the minded-to letter had informed Ms Safi of her write to make oral or written representations (as opposed to orally and/or in writing) was rejected. The breach had had no material impact as Ms Safi's solicitors had submitted written representations and had not intended to make oral representations. Grounds arguing that there had been a lack of compliance with s11 Children Act 2004 and s149 Equality Act 2010 (in connection with the characteristics of pregnancy and maternity) were also rejected. The panel had had regard to the interests of the children and Ms Safi's pregnancy and maternity, and were not required to refer to these statutory obligations expressly.

**Medical evidence and vulnerability**

*R (Al-Ali) v Brent LBC* [2018] EWHC 3634 (Admin), 12 December 2018

12. JR of refusal to provide accommodation pending review, in circumstances were AA had forged/doctored medical evidence put forward in support of household's application. No error of law in LA's approach. Case totally without merit. Suggestion (though not entirely clear) that this was a *Porteous* type case where decision on application had been revisited following discovery of fraud.

**Suitability and PSED**

*Kannan v Newham LBC* [2019] EWCA Civ 57, 4 February 2019



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13. App owed MHD; app had medical conditions which seriously affected mobility; accommodated in first floor property above casino for 2 ½ years with external metal staircase to access and no shower; climb to property caused him severe pain; real difficulties washing and risk of falling; app challenged suitability of accommodation; Now Medical assessment (carried out in Pt VI context) suggested ground floor or lifted property needed with bathing facilities; nevertheless property held to be suitable on review; standard *Kanu* type para about PSED; comparison made with others in accommodation in area which is not ideal. CA allowed appeal: necessary to look to future in considering suitability and passage of time may render accommodation that is suitable in short-term, unsuitable; PSED requires same approach across Pt VII (*Kanu*, *Haque*, *Lomax*); reviewing officer had misunderstood Now Medical advice; passage of time in accommodation not taken into account; treatment of disability not satisfactory; app's description of pain had been downgraded without evidence or explanation (meaning no 'sharp focus'); need for bathing facilities overlooked without reasons being given; reference made to local housing conditions without consideration of whether those living in less than ideal conditions had disabilities (again, illustrating lack of sharp focus); recitation of *Kanu* formula no substitute for doing the job.

**Discharge of duty, repeat applications and intentional homelessness**

*Godson v London Borough of Enfield* [2019] EWCA Civ 486, 22 March 2019

14. App applied to LA as homeless in July 2012; provided with IA (Bury St) that day, under licence; MHD accepted in August 2012; made offer of tenancy in July 2013; refused; Enfield conclude that duty has come to an end; decision upheld on review; app did not appeal; app and family evicted from Bury St in January 2014; app finds B&B accommodation at Railway Inn; stays there until 2016; reapplies as homeless; LA accept application and initially decide Railway Inn suitable and app not homeless; later accept this is not the case and provide IA (Friern Barnet Road); in September 2017 LA decide that app hade made self IH from Bury St; decision upheld on review and on appeal.

15. CoA dismissed second appeal. App was seeking to argue that offer of accommodation made when he was at Bury St was not a lawful offer, and so his refusal was not the cause of his homelessness. This was, in effect, a challenge to the first review decision and was not open to him on an appeal against the second review decision. Applies (and endorses) Neuberger LJ's *obiter* reasoning in *Tower Hamlets LBC v Rahanara Begum* [2005] EWCA Civ 116, [2006] HLR 9:

> "[32] Part 7 of the 1996 Act requires a housing authority to be the initial decision-maker on questions concerning a person's homeless status and housing rights, and it includes a tolerably clear appeals procedure, with relatively short and fairly strict time limits, for the benefit of a person dissatisfied with any decision of the authority. Where, as here, possession proceedings are brought by the authority, and the defence involves impugning a decision of the authority under Pt 7 of the 1996 Act, which could have been, but was not, appealed, and the time for appeal has long since expired, it appears to me to be wrong in principle that the court hearing the possession action should be able freely to reconsider, and if necessary to reverse, the authority's decision with regard to its duty.



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> [33] Where a statute provides that the entitlement to a right is to be determined by a particular entity, and further provides for a specific appeals procedure, including time limits, in relation to any such determination, I consider that it would be wrong in principle, at least in the absence of exceptional circumstances, to permit the determination to be challenged by a different procedure much later. To hold otherwise would effectively enable a person such as the respondent to have the benefit of the statutory provisions, in this case s.193, without taking the concomitant burden, namely the procedure and time limits in ss.202–204."

16. In any event, first review decision was lawful. App's argument was that once LA continued to accommodate him at Bury St post acceptance of MHD, MHD had been discharged and LA could not compel him to accept accommodation elsewhere. This was a misunderstanding of distinction between performance and discharge of MHD. Duty continued until brought to an end in accordance with terms of s193 i.e. when accommodation offered and then refused. LAs are entitled in performing MHD to choose how they perform it and to require applicants to move from one unit of accommodation to another and app has no right to 'waive' such accommodation. (Suggestion of waiver predicated on earlier remarks that app could choose to stay in unsuitable home, waiving right to IS, while LA search for something more permanent.) A benefit/right can only be waived where it is entirely in an applicant's favour. Whereas the right in this case had a public interest element to it. E.g. emergency accommodation was particularly expensive and should be reserved for emergency use.

17. In light of which, decision that app intentionally homeless was correct one. App was homeless when he left Bury St and subsequent stay in Railway Inn did not interrupt that. Operative cause of homelessness was his refusal of offer.

**Out of time appeals**

*Tower Hamlets LBC v Al Ahmed* [2019] EWHC 749 (QB), 26 March 2019

18. Mr Al-Ahmed sought to appeal against a decision finding that he was not vulnerable and did not have a priority need. However – despite fairly diligent efforts on his part and the assistance of his support worker from Crisis – he was unable to find a solicitor who could take on his case until around one month after the appeal deadline had passed. His appeal was duly filed around one month late with an application for permission to extend the time limit for hearing the appeal under s204(2A) Housing Act 1996.

19. At first instance, Mr Al-Ahmed's application was allowed, the judge holding that there was a 'good reason' for the delay as 'without a legal representative this appeal was never going to go anywhere'.

20. Dove J allowed Tower Hamlet's appeal. Following the approach of the Court of Appeal in *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, [2015] 1 WLR 2472, and *R (Kigen) v Secretary of State for the Home Department* [2015] EWCA Civ 1286, [2016] 1 WLR 723 he held that 'it is clear, therefore, that the fact that a party is not professionally represented could play only a very limited, if any, part in the assessment of whether or not there was a good reason for a departure from the time limit in bringing the appeal in cases of this sort'. See [14]. Further, the steps



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that must be taken by an applicant to issue a s204 appeal 'are not especially sophisticated or taxing'. See [15]. Accordingly Mr Al-Ahmed had no good reason for his failure to bring his appeal in time.

21. Mr Al-Ahmed's appeal against this decision is due to be heard by the Court of Appeal in January 2020.

**Occupation agreement with homeless applicant did not attract security of tenure**

*Mohamed v Barnet LBC* [2019] EWHC 1012 (QB), 17 April 2019

22. In 2016 the appellant, Ms Mohamed, was accommodated together with her daughter by Barnet LBC, pursuant to its duties under the Children Act 1989. The property where Ms Mohamed was accommodated was owned by a private individual named Mr Kumar. However, Mr Kumar acting through his agent, Rent Connect, had granted Barnet a licence to use the property for the purposes of providing temporary accommodation. The licence agreement between Rent Connect and Barnet, which had commenced in 2015, was for an initial fixed term of 12-months and thereafter from month to month.

23. In February 2018, Barnet served a notice to quit (NTQ) on Ms Mohamed and subsequently issued possession proceedings. The possession claim was dismissed by HHJ Luba QC on the ground that there had been a failure to serve the NTQ. However, the judge rejected an argument advanced on behalf of Ms Mohamed that she had security of tenure under the Housing Act 1985. Barnet then served a new NTQ and Ms Mohamed sought to appeal against the finding that she lacked security of tenure, since the effectiveness of the new NTQ turned on that issue.

24. The issue arose because the licence agreement between Rent Connect and Barnet provided that the licence was for 'an initial period of 12 months from and including Licence Rent Commencement Date and thereafter from month to month until determined in accordance with Clause 5' of the agreement which, in turn, provided that 'Either Party may terminate this Licence by giving the other not less than 14 days' notice in writing of its intention'.

25. The question for the court was whether this clause meant that the licence fell within the exemption from security of tenure contained in para 6, Sch 1 Housing Act 1985:

> "A tenancy is a not a secure tenancy if –
>
> (a) the dwelling-house has been leased to the landlord with vacant possession for use as temporary housing accommodation,
>
> (b) the terms on which it has been leased include provision for the lessor to obtain vacant possession from the landlord on the expiry of a specified period or when required by the lessor,
>
> (c) the lessor is not a body which is capable of granting secure tenancies, and
>
> (d) the landlord has no interest in the dwelling-house other than under the lease in question or as a mortgagee"



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26. Specifically, the issue was whether or not the clause satisfied para 6(b). This required consideration of what appeared to be an inconsistency in the case law as to whether, in order to satisfy para 6(b), the terms of the head-lease or licence between the owner of the property and the local authority had to contain a 'single twin-track provision for possession on expiry of a specified period or when required is required', or whether a provision allowing solely for vacant possession when required would suffice.

27. In *London Borough of Tower Hamlets v Abdi* (1993) 25 HLR 80 the Court of Appeal had held that a clause in a head licence agreement allowing the licensor to terminate the licence on the giving of not less than seven days' notice in writing, allowed the licensor to 'obtain possession when he required' and that this was sufficient to satisfy para 6(b) meaning the sub-licence did not attract security of tenure.

28. Whereas in *Haringey LBC v Hickey* [2006] EWCA Civ 373 the Court of Appeal had held that para 6(b) required one single provision within a lease for obtaining vacant possession either on the expiry of a specified period or when required by the lessor. The head lease in that case contained a provision which allowed for the lessor to obtain vacant possession at the expiry of the fixed-term. But it did not also allow him to obtain vacant possession 'when required'. Accordingly, para 6(b) was not satisfied and the sub-lease attracted security of tenure.

29. Thornton J dismissed Ms Mohamed's appeal. The judge below had been correct to hold that, despite first appearances, there was no inconsistency between the decisions in *Abdi* and *Hickey*. The former decision was in the context of an indeterminate agreement. The latter was in the context of a fixed-term agreement. Where an agreement is for a 'specified period' (i.e. a fixed term), it will automatically terminate at the end of that specified period, meaning that for para 6(b) to be satisfied there there must be a supplementary provision within the agreement allowing for termination by the lessor whenever he or she requires, even if that is before the fixed-term has ended. In contrast, where an agreement is indeterminate (i.e. a periodic arrangement) it need only provide for termination when the lessor requires.

30. In this case, the arrangement between Rent Connect and Barnet was for an initial fixed term, followed by occupation on a monthly periodic basis. By the time Ms Mohamed took up occupation the agreement had entered the periodic phase. That brought it within the ambit of the decision in *Abdi*. Meaning that the clause allowing for termination on 14-days' notice was sufficient to satisfy para 6(b) and that Ms Mohamed's occupation agreement did not attract security of tenure.

**Eligibility**

*Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) (EU Exit) Regulations* 2019 SI 2019/861



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31. Regulation 4 of the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) (EU Exit) Regulations 2019 SI 2019/861 amended (with effect from 7 May 2019) regulation 6 of the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006, SI 2006/1294 as follows:

> **6.— Other persons from abroad who are ineligible for housing assistance**
> (1) A person who is not subject to immigration control is to be treated as a person from abroad who is ineligible for housing assistance under Part 7 of the 1996 Act if—
> (a) subject to paragraph (2), he is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man, or the Republic of Ireland;
> (b) his only right to reside in the United Kingdom—
> (i) is derived from his status as a jobseeker or the family member of a jobseeker; or
> (ii) is an initial right to reside for a period not exceeding three months under regulation 13 of the EEA Regulations; or
> [(iii) is a derivative right to reside to which he is entitled under regulation 15A(1) of the EEA Regulations, but only in a case where the right exists under that regulation because the applicant satisfies the criteria in regulation 15A(4A) of those Regulations; or
> (iv) is derived from Article 20 of the Treaty on the Functioning of the European Union in a case where the right to reside arises because a British citizen would otherwise be deprived of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen; or]
> [(c) his only right to reside in the Channel Islands, the Isle of Man or the Republic of Ireland—
> (i) is a right equivalent to one of those mentioned in sub-paragraph (b)(i),(ii) or (iii) which is derived from the Treaty on the Functioning of the European Union; or
> (ii) is derived from Article 20 of the Treaty on the Functioning of the European Union, in a case where the right to reside—
> (a) in the Republic of Ireland arises because an Irish citizen, or
> (b) in the Channel Islands or the Isle of Man arises because a British citizen also entitled to reside there
> would otherwise be deprived of the genuine enjoyment of the substance of their rights as a European Union citizen.]
> [(1A) For the purposes of determining whether the only right to reside that a person has is of the kind mentioned in paragraph (1)(b) or (c), a right to reside by virtue of having been granted limited leave to enter or remain in the United Kingdom under the Immigration Act 1971 by virtue of Appendix EU to the immigration rules made under section 3 of that Act is to be disregarded.]

32. The backdrop to this change is the new Appendix EU to the Immigration Rules which sets out – in anticipation of Brexit – the basis on which an EEA citizen and their family members will, if they apply under it, be granted indefinite leave to enter or remain or limited leave to enter or remain.

33. In very broad terms, under the new scheme, indefinite leave to remain (ILR) may be granted to, relevant EEA citizens, their family members and to Zambrano carers who have completed a 'continuous qualifying period' of five years residence (among others). ILR may also be granted to



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family members of qualifying British Citizens. See EU2 and EU11-12. This is referred to as 'settled status'.

34. Those who have completed a continuous qualifying period of less than five years may be eligible for the grant of five years limited leave to remain. See EU3 and EU14. This is referred to as 'pre-settled status'.

35. A person who is eligible for settled status should already be eligible for homelessness assistance by virtue of the length of time he or she has spent exercising his or her treaty rights. If he or she obtains settled status this will not change.

36. The amendments to the eligibility regulations are directed instead at those who have pre-settled status. If, prior to obtaining pre-settled status, a person is already eligible for homelessness assistance – for example because he or she is a worker – then he or she will remain eligible after pre-settled status is obtained. Alternatively if he or she is not eligible for homelessness assistance – for example because his or her only right to reside arises from his or her status as a jobseeker – then obtaining pre-settled status will not render him or her eligible.

**Affordability of accommodation and intentional homelessness**

*Samuels v Birmingham City Council* [2019] UKSC 28, 12 June 2019

37. Ms Samuels, the appellant, was an assured shorthold tenant. She lived together with four children and her income consisted of housing benefit, child tax credit, child benefit and income support. However – like many occupiers in the private rented sector her housing benefit award was not sufficient to cover her rent in full leaving her with a short fall of £151.49 per month which she had to meet from her other benefits.

38. Ms Samuels was unable to pay the shortfall consistently and over time rent arrears accrued and she was given notice to leave her accommodation. She then applied to Birmingham City Council, the respondent, as homeless. However, Birmingham concluded that she was not owed the main housing duty as she had become homeless intentionally. This decision was upheld on review with Birmingham reasoning that there was sufficient 'flexibility' in the amount of benefits Ms Samuels received for her to cover the shortfall. That decision was upheld on appeal to the county court and on a second appeal to the Court of Appeal.

39. Ms Samuels appealed to the Supreme Court. Her grounds of appeal raised three issues:
    i. The correct interpretation of paragraph 17.40 of the *Homelessness Code of Guidance for Local Authorities* (DCLG, 2006).
    ii. Whether accommodation can be regarded as affordable, and therefore reasonable to continue to occupy, where an applicant, after meeting their housing costs, would be left with a residual income less than the level of subsistence benefits (e.g. income support, child tax credit and housing benefit) to which he or she was entitled.
    iii. The quality of the reasons given in the decision.



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40. Paragraph 17.40 of the code (which has since been superseded by the paragraph 17.46 of the 2018 code, which refers to Universal Credit) provided that:

> 'In considering an applicant's residual income after meeting the costs of the accommodation, the Secretary of State recommends that housing authorities regard accommodation as not being affordable if the applicant would be left with a residual income which would be less than the level of income support or income-based jobseekers allowance that is applicable in respect of the applicant, or would be applicable if he or she was entitled to claim such benefit.'

41. Ms Samuels argued that this section of the code needed to be interpreted in the context of the rules on welfare benefits as they had existed at the time the guidance had first been drafted. Specifically, the guidance had been drafted at a time when income support included an award in respect of children, which had since been replaced by child tax credit. Child benefit also used to be factored into the calculation of an applicant's entitlement in a different manner to the modern regime. Therefore the benchmark provided by the code – the level of income support – should be understood as referring to income support *and* child tax credit *and* child benefit. On a true interpretation of the code Ms Samuel's argued, accommodation should not be regarded as affordable, if an applicant would be left with a residual income less than this after meeting housing costs.

42. In a unanimous judgment, the Supreme Court allowed the appeal. In relation to the interpretation of the code, Lord Carnwath (giving a judgment with which the other justices agreed) remarked [33] that:

> 'There is an attraction in the argument that references to "income support" in paragraph 17.40 should be understood in the sense in which that expression was apparently used at the time of the earlier versions of the Code. It seems surprising, even nonsensical, that the level of income support should be maintained as a guide to affordability, but without regard to the changes which excluded from income support any allowance for the children of the family.'

43. However, it was not necessary of the court to determine this issue. Instead, the appropriate starting point was article 2 of the Homelessness (Suitability of Accommodation) Order 1996 which requires all sources of income which an applicant has, including welfare benefits, to be taken into account. The applicant's income should then be compared with his or her reasonable living expenses. The assessment of 'reasonable living expenses' was to be carried out objectively, and not based on the reviewing offer's subjective views of what was or was not reasonable, and on the basis that the applicant's accommodation would be available indefinitely. See [34].

44. Whatever the correct interpretation of the code, the reference to income support by way of a benchmark did not preclude the taking into account of child-related benefits in the assessment of affordability. Benefit levels were not 'generally designed to provide a surplus above subsistence needs for the family'. As such, benefit levels were 'at least a good starting point for assessing reasonable living expenses'. See [35].



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45. The court held that the reviewing officer dealing with Ms Samuels' case had asked himself the wrong question: 'The question was not whether, faced with… [the shortfall of £151.49], she could somehow manage her finances to bridge the gap; but what were her reasonable living expenses (other than rent), that being determined having regard to both her needs and those of the children, including the promotion of their welfare.' Ms Samuels' living expenses, Lord Carnwath observed, were 'well within the amount regarded as appropriate by way of welfare benefits'. As such, 'in the absence of any other source of objective guidance on this issue it is difficult to see by what standard that level of expenses could be regarded as other than reasonable'. See [36].

46. The matter was remitted for reconsideration by Birmingham, but with the indication that it was 'hard to see on what basis the finding of intentional homelessness could be properly upheld', on the basis of the law as the court had explained it. See [37].

47. In view of the court's finding on the subsistence benefits issue, there was no need to consider the reasons challenge.

**Discrimination arguments in homelessness appeals**

*Adesotu v Lewisham LBC* [2019] EWCA Civ 1405, 2 August 2019

48. The appellant, Ms Adesotu, applied to the Respondent, Lewisham LBC, for homelessness assistance. Lewisham accepted that she was owed the main housing duty and made her an offer of accommodation. Ms Adesotu indicated that she wished to refuse the offer as it was too far from her children's school and because she was to depressed to move. Lewisham responded by email to Ms Adesotu expressing the view that her reasons did not justify the refusal and that if she did not accept the property by the following week then the duty owed to her would be discharged. There followed a further exchange of communications between the parties. But Ms Adesotu would not agree to move into the property she had been offered and Lewisham treated this as a refusal, thereby ending the duty owed to her.

49. The decision to discharge the duty was upheld on review. On appeal to the county court Ms Adesotu sought to argue a number of grounds which sought to characterise Lewisham's decision making process as discriminatory, under ss15 and 19 Equality Act 2010, on the basis that she was a disabled person (by virtue of a combination of mental health conditions) and that she should have been given more time to decide whether to accept or refuse the offer and to seek advice.

50. On Lewisham's application, HHJ Luba QC struck out the relevant elements of the grounds of appeal. The county court, he held, had no jurisdiction to determine claims of unlawful discrimination under ss15 or 19 Equality Act 2010 in the context of an appeal under s204 Housing Act 1996, or to resolve the issues of fact that determination of such claims would entail. In addition, Ms Adesotu was – in effect – seeking to challenge Lewisham's antecedent practice or policy of requiring homeless applicant's to make a decision whether to refuse or accept accommodation within a 4-6 day period.



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This antecedent policy or practice could not, on the facts of this particular case, be characterised as a 'point of law arising from' the review decision for the purposes of s204(1):

> '…much influenced by the dictum in Panayiotou, I am satisfied that a reviewing officer is entitled (particularly in the absence of any contrary point having been expressly raised to treat any policy or practice of the council applied to the applicant by his/her own decision as lawful. As in all public law cases, there must be a presumption that a public authority behaves and has behaved lawfully (the presumption of regularity).'

51. The Court of Appeal dismissed Ms Adesotu's appeal. In accordance with ss113-114 Equality Act 2010, proceedings alleging contraventions of Part 3 Equality Act 2010 (services and public functions) generally had to be brought by means of issuing a claim in the county court. An exception to this general rule was provided by s113(a) which allowed such matters to be raised in the context of a claim for judicial review. Appeals under s204 Housing Act 1996 do not fall within this exception. In addition, save for certain cases involving Art.8 ECHR, the county court lacked the jurisdiction in the s204 context to decide the disputes of fact which the resolution of complaints of discrimination would require.

52. The court also accepted that the grounds advanced by Ms Adesotu could not truly be characterised as matters arising from the review decision, as there had been no suggestion during the review process that there had been anything irregular about the earlier handling of her homelessness application. However, the court declined to express a view on the more general principle as to whether or not it was open to a homeless applicant to seek to challenge an antecedent policy or practice on an appeal under s204. See [35]-[37] per Bean LJ:

> 'As the judge noted, there is some tension between the authorities relied on by each party on the question of whether a s 204 appellant can argue that an antecedent policy decision of the housing authority is unlawful in public law terms and that such unlawfulness infects the decision in the specific case. In *Tachie v Welwyn Hatfield BC* [2013] EWHC 3972 (QB); [2014] PTSR 662, Jay J held that the words "arising from" in s 204 were to be given a broad meaning and that "any ultra vires issue in the *Anisminic* sense" was therefore capable of being taken. On the other hand, in a postscript to his judgment in *Panayiotou v Waltham Forest LBC* [2017] EWCA Civ 1624; [2018] QB 1232 at 90 Lewison LJ, having referred to the decision in *Tachie*, said that he would not regard the point as by any means settled. He expressed his disquiet that such wide-ranging challenges to the actions of a local authority should be permitted in s 204 appeals to the County Court.
> …
> I would not embark on resolving this controversy in the present case for the following reasons. Firstly, it is not necessary for the disposal of the appeal. Resolving it should wait for a case where it is or may be determinative. Second, I do not consider that this case is really about an antecedent policy at all. The only antecedent policy relied on is the one of requiring applicants to whom an offer has been made to accept or reject it within a matter of days. Even if – and it is a big "if" – this could somehow be regarded as unlawful, the Appellant then had another opportunity to accept or reject the property, and then a further opportunity after that to seek a



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review, in the course of which she received a "minded to discharge" letter to which she did not respond. The issues which remain to be resolved in the present case, when it returns to the County Court, are fact-specific. The antecedent policy question highlighted by Lewison LJ in *Panayiotou* should be resolved in a case where it really matters.'

**Accommodation pending review**

*R (Laryea) v Ealing LBC* unreported, 29 August 2019

53. Local authority had erred in failing to accommodate pending review of decision to discharged relief duty under s189B(2) Housing Act 1996. LA had failed to properly consider with app's personal circumstances. *[Transcript not yet available.]*

**Discharge of homelessness duties**

*R (SH) v Waltham Forest BC* [2019] EWHC 2618 (Admin), 11 October 2019

54. The claimant, SH, arrived in the UK in 2012. She was a victim of human trafficking and sexual exploitation and was granted refugee status. In September 2014 she applied to Waltham Forest, the defendant, as homeless. In April 2015, Waltham Forest accepted that she was owed the main housing duty. Then, in May 2016, SH was provided with private sector accommodation in Ilford. She was later evicted, through no fault of her own, and sought further assistance from Waltham Forest who, in August 2017, provided her with private sector accommodation in Tottenham. From the outset there were very real problems with the Tottenham property: the communal grounds of the property were used as an 'open air brothel', and witnessing such activity was having a serious impact on both SH and her young daughter.

55. In July 2018, as a result of the problems at the Tottenham property, SH approached Waltham Forest as homeless again. Her approach was treated as a fresh homelessness application and, in October 2018, was made an offer of accommodation in Kettering pursuant to the relief duty under Housing Act 1993 s189B(2). SH refused this offer and Waltham Forest took the view that the duties owed to her had been discharged.

56. SH sought judicial review. David Pittaway QC allowed her claim. SH's approach to Waltham Forest in July 2018 could not properly be characterised as a new application, as the original homelessness duty under s193(2) Housing Act 1996 which Waltham Forest had accepted in April 2015 subsisted.

57. The 2015 duty had not been brought to an end by means of the provision of accommodation in Ilford. That was because Waltham Forest had not met the procedural requirements necessary for the offer of accommodation to be regarded as a private rented sector (PRS) offer for the purposes of s193(7AA)-(7AF). Specifically, SH had not been given an offer letter meeting the requirements of s193(7AA) and (7AB), informing her of the consequences of refusal of the accommodation and her right to request a review.



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58. Further, the 2015 duty had not been brought to an end by means of the provision of accommodation in Tottenham. Because that accommodation was never suitable accommodation: 'any proper due diligence should have alerted the defendant to the unlawful sexual activity that was taking place in the communal gardens of the Tottenham property'. See [23].

59. As the main housing duty had been ongoing since April 2015 and had never been discharged, there could be no question of the lesser duty under s189B(2) Housing Act 1996 subsequently arising. Meaning that Waltham Forest's decision that the duty owed to SH had been brought to an end by virtue of that section was wrong in law and the main housing duty continued.

**Vulnerability and medical evidence**

*Guiste v Lambeth LBC* [2019] EWCA Civ 1758, 22 October 2019

60. The appellant, TG, was a 23 year old man who suffered from a number of health conditions, both physical and mental.

61. In relation to physical health, he was diagnosed with hypoparathyroidism: a condition which can lead to convulsions if not adequately controlled with prescription medication. Medical evidence from his consultant paediatrician stated that '[d]omestic circumstances for safe and proper storage of the medication are absolutely essential'.

62. In relation to mental health, Dr Judith Freedman had been commissioned by TG's solicitors to provide a report on his condition. Dr Freedman is a Fellow of the Royal College of Psychiatrists who works as an independent consultant having previously been a consultant psychiatrist in psychotherapy. Following a lengthy interview with TG, she reported that his symptoms included depression, anxiety, auditory and visual hallucinations, which have told him to harm himself, leading him to cut his fingers and try to hang himself. Various diagnoses had previously been considered for him, including severe depression and Posttraumatic Stress Disorder (PTSD). In addition, he is genetically predisposed to schizophrenia. As a result of complicating factors, such as TG's cannabis use and hypoparathyroidism, she was not able to offer a 'firm diagnosis'. However, she noted 'he suffers from depression and anxiety, and he is at risk for harming or even killing himself by responding to command hallucinations'. She concluded as follows:

> "Although I do not have a firm diagnosis for him, the array of symptoms I described above constitute a vulnerable state. He functions at a low cognitive level, and he would find it more challenging than an ordinary person made homeless to understand his options, how he might manage, and how to keep himself safe if made homeless.
>
> He also is at physical risk of failing to take his medication for hypocalcaemia, secondary to hypoparathyroidism. As his doctors have stressed to him, failure to take his medication regularly would place him at risk for significant physical harm, if not death. He told me that if he was made homeless, he would not keep track of his medication. He added, "What's the



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point?" In other words, his depression in the face of an overwhelming situation, with which he would not know how to cope, would place him at risk for passive suicide by failing to take his medication.

With regard to his mental health, if he is made homeless, he would be at risk for a worsening of his symptoms, including even lower self-esteem and confidence, increased use of cannabis and in turn worsening of his depression, hallucinations, and paranoid thinking. He particularly would be at risk for command hallucinations, demanding that he self-harm and/or hang himself."

63. This psychiatric report was provided to the respondent, Lambeth LBC, in the course of a homeless application by TG. The report was considered by the reviewing officer in the case who sought medical advice from various psychiatric advisers at Now Medical at various points during the review. None of these advisers had met with TG. Their qualifications were not of the same level as Dr Freedman's. And an invitation to discuss their conclusions with Dr Freedman, made by TG's solicitors, was turned down for unspecified reasons.

64. The reviewing officer concluded that TG was not vulnerable and did not have a priority need for the purposes of s189(1)(c) Housing Act 1996. That decision was upheld on appeal. The Court of Appeal allowed a second appeal.

65. In relation to TG's physical health, the court rejected the suggestion that there had been anything wrong with the reviewing officer's conclusion that this did not render TG vulnerable. Although the paediatrician had said that '[d]omestic circumstances for safe and proper storage of the medication are absolutely essential', the basis of that assertion was not clear. The medication took the form of packs of ordinary tablets which could be stored at ambient temperature and taken with a glass of water. 'It cannot be the case', Henderson LJ reasoned 'that every person who takes prescribed medication of this straightforward kind must be treated as in priority need' and the reviewing officer had been 'entitled to use her own common sense, and form her own assessment of the probable impact of homelessness on the practical ability' of TG to take his medication. Although Dr Freedman's views on this particular issue had not been referred to expressly by the reviewing officer, and 'it would have been better if she had done so', to allow the appeal on that ground would 'run counter to the benevolent approach which must be adopted when interpreting a review decision'.

66. However, the appeal was allowed on the footing that the reviewing officer had not properly dealt with the evidence in relation to TG's mental health conditions. Specifically, in relation to Dr Freedman's evidence, which had been implicitly rejected by the reviewing officer, Henderson LJ concluded at [64]-[65] that:

> This evidence, from a distinguished consultant psychiatrist, and directed to the key legal point in issue, could not in my view be disregarded, and if the review officer was going to depart from it, I think it was necessary for her to provide a rational explanation of why she was doing so. The difficulty which I have is that, even on a benevolent reading, I am unable to find any such rational explanation in the Review Decision. On the contrary, I find it very hard, if not



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impossible, to trace a coherent line of reasoning in paragraphs 66 to 75 of the Review Decision. Furthermore, in paragraph 75 Ms Ubiam appears to have accepted that "further suicidality in response to various life stressors" was not unlikely, which on the face of it appears to be consistent with Dr Freedman's own prognosis. In the very next sentence, however, Ms Ubiam said she thought there was no current evidence to indicate that Mr Guiste would experience harm or deterioration as a result of homelessness. That appears to amount to a rejection of Dr Freedman's firmly stated opinion to the contrary, but I am unable to find any clear indication why Ms Ubiam took this view, especially as she appeared to accept the likelihood of further suicidality. Instead, the ensuing paragraphs of the Review Decision veer off into generalities and paraphrases of Hotak. If Ms Ubiam was intending to base her conclusion on the views of the two psychiatrists instructed by NowMedical, she needed to explain why their views should prevail over that of Dr Freedman, when they were less highly qualified that she is, and (more importantly) they had never met or interviewed Mr Guiste. Equally, I find it hard to see how Ms Ubiam could rationally have given more weight to the report of the consultation at St George's Hospital in September 2017 than to the more recent and much fuller report of Dr Freedman, which (unlike the earlier report) also focused on the critical question of the effect that homelessness would have on Mr Guiste's mental health.

In view of these shortcomings, I am driven to the conclusion that the Review Decision simply does not do justice to this crucial part of Mr Guiste's case. The question whether Mr Guiste's mental illness makes him more vulnerable than an ordinary person to the risk of suicide if made homeless is self-evidently a very serious matter, which requires careful consideration of all the relevant evidence and an adequately reasoned conclusion. While I have every sympathy for Ms Ubiam in the difficult task which she had to perform, I have to say that in my judgment the parts of the Review Decision dealing with this critical issue do not meet the requisite standard. Such a failure is in my view properly characterised as an error of law, because there has been a breach of the principles of rationality and fair decision-making.

67. The court went on to reject an argument put forward on behalf of Lambeth that, when applying the guidance in *Hotak v Southwark London Borough Council* [2015] UKSC 30, [2016] AC 811 and *Panayiotou v Waltham Forest London Borough Council* [2017] EWCA Civ 1624, [2018] QB 1232 and considering whether an applicant is vulnerable, ‘there is an additional requirement of "functionality" which needs to be satisfied by an applicant’. I.e. the question for a local housing authority when assessing vulnerability is not whether the particular circumstances of the homeless applicant would affect his or her *functionality* so as to make a noticeable difference to his or her ability to deal with the consequences of being homeless. See [68]-[70].

68. The court declined to decide whether or not s31(2A) Senior Courts Act 1989 (which restricts the grant of relief in judicial review cases in cases where it is ‘highly likely’ that the outcome would not have been ‘substantially different’) applied to appeals under s204 Housing Act 1996. It would have been appropriate to grant relief in this case in any event so the point did not arise. However, Henderson LJ expressed the provisional view that ‘there is no proper basis for extending the scope of the new test in section 31(2A), by judicial decision, to statutory housing appeals under section 204 of the 1996 Act’.



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**Late appeals**

*Emambee v Islington LBC* [2019] EWHC 2835 (QB), 25 October 2019

69. The appellant, Ms Emambee, was involved in a dispute with the respondent, Islington LBC, as to whether she had voluntarily ceased to occupy accommodation provided to her under the main housing duty and, as a result, whether the duty owed to her had come to an end. Islington took the view that it had and communicated that to Ms Emambee by means of a review decision which was posted to her Aunt's address – which Ms Emambee had given as her correspondence address – by second class post on 21 December 2018. However, Ms Emambee's Aunt was away at the time and so Ms Emambee did not receive the review decision until after her Aunt returned on 8 January 2019. Ms Emambee sought legal advice. She had an initial appointment on 15 January 2019 and an appeal was drafted later that day and recorded by the court office as having been filed on 18 January 2019.

70. HHJ Hellman held that the review decision had been 'notified' to Ms Emambee on the date that the decision had been delivered to the property. Given there was some uncertainty over when this had occurred he could not be satisfied that the appeal had been brought in time. And in the absence of any evidence as to why she Ms Emambee took no action until 15 January 2019 or why, having instructed solicitors, the appeal was not filed until 18 January 2019, he was not prepared to accept that there was a 'good reason' for bringing the appeal late and so refused an extension of time to bring the appeal.

71. Ms Emambee appealed to the High Court. Stewart J dismissed her appeal. Given the uncertainty over the date on which the decision had been delivered the judge had been entitled to take the view that there was insufficient evidence to establish that the appeal had been brought in time. Further, having reached that view, the judge had made no error in his analysis of whether there was a good reason for bringing the appeal late. The witness statements that had not been filed did not provide any explanation for the critical period of delay between 8 and 15 January 2019.

72. No challenge was made to HHJ Hellman's decision that notification of the review decision meant the date of delivery and not the date of receipt. Accordingly Stewart J did not adjudicate on this issue.

**Out of borough placements**

*Waltham Forest LBC v Saleh* [2019] EWCA Civ 1944, 19 November 2019

73. Mr Saleh was accommodated by Waltham Forest, together with his six children, under the main housing duty. They were placed in accommodation in Romford in October 2014. In the meantime, Mr Saleh's daughter, Sara, began going to school in Walthamstow.

74. One year later, in October 2015, Mr Saleh's mother came to live with them. Mr Saleh then sought to challenge the suitability of the accommodation contending that, among other things, it was too small. The council accepted this and offered the household accommodation in Newham. Mr Saleh accepted



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the accommodation but asked to be rehoused in-borough for reasons relating to Sara's health. She had type 1 diabetes which had required hospital admissions and had also suffered episodes of incontinence during the one hour trip to school and so Mr Saleh asked for the household to be accommodated as close as possible to her school, family, friends and hospital.

75. Waltham Forest considered this information but took the view that the accommodation in Newham was suitable for the household. That decision was upheld on review. HHJ Saggerson allowed an appeal against this decision holding that the review officer had failed to consider whether, at the time of the review (as opposed to the time of the offer), there had been any accommodation available within or closer to the council's district.

76. The Court of Appeal dismissed Waltham Forest's appeal. Where a local housing authority proposes to allocate accommodation out of borough in performance of the main housing duty, it must have regard both to the distance of the accommodation from the district and the effect on the links of members of the applicant's household with schools and other services, when assessing suitability. This requires consideration of whether, at the time of the decision, other accommodation is available either within or closer to the authority's district and whether the existence of such accommodation means that the out of borough placement is unsuitable even if, in the absence of other suitable accommodation, it could be said to meet household's needs. See [24]. Where suitable accommodation is available closer to the local housing authority's district that is is likely 'all other things being equal, to displace on grounds of suitability other available accommodation which is further away'. See [26]. The duty to keep the suitability of accommodation under review was a continuing one. See [32]. It was consistent with this principle, and with various authorities, that in circumstances where an applicant had accepted an offer of accommodation its suitability was to be adjudged with reference to the facts – including the availability of other accommodation – as they existed at the time of the review decision. See [33]-[39].

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