Neutral Citation Number: [2022] EWCA Civ 888

Case No: CA-2021-001567

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
HHJ Hellman
Case No: G40CL350

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/6/2022

Before:

LORD JUSTICE PETER JACKSON
LADY JUSTICE ASPLIN
and
LORD JUSTICE WARBY

- -

Between:

TARYN BAPTIE	**Claimant/ Respondent**
- and -	
THE ROYAL BOROUGH OF KINGSTON UPON THAMES	**Defendant/ Appellant**

- -
- -

Nicholas Grundy QC and Victoria Osler (instructed by **South London Legal Partnership**) for the **Appellant**
Adrian Marshall Williams (instructed by **Burke Niazi Solicitors**) for the **Respondent**

Hearing date: 25 May 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 30 June 2022

LORD JUSTICE WARBY:

Introduction

1. When a homeless person applies to a local housing authority ("LHA") for accommodation one thing the LHA needs to decide is whether the applicant has become homeless intentionally. That may be the case if the applicant was evicted from their "last settled accommodation" for non-payment of rent which was "affordable" for them. Affordability depends on whether the applicant would have been able both to pay the rent and meet their "reasonable living expenses". In this case the LHA decided that both could have been done. The question raised by this appeal is whether that affordability decision was unlawful because it was based on an irrational approach to the assessment of the applicant's reasonable living expenses.

A nutshell summary

2. Ms Taryn Baptie is a lone parent who used to live with her seven children in Chessington, Kingston-upon-Thames, as a tenant of London and Quadrant Housing Association. She failed to pay the rent and the family was evicted. Having spent some time living in a caravan belonging to a friend Ms Baptie applied to her LHA, the Royal Borough of Kingston-upon-Thames ("the Council"), for accommodation.

3. Section 193(2) of the Housing Act 1996 ("the 1996 Act") imposes a duty on an LHA to secure that accommodation is available for occupation by an applicant where the LHA is satisfied she is homeless, eligible for assistance, and has a priority need, and not satisfied that she became homeless intentionally. If the applicant did become homeless intentionally the LHA's duties are the less onerous ones identified in s 190(1) and (2) of the 1996 Act: to secure that accommodation is available to the applicant for such period as it considers will give her a reasonable opportunity of securing accommodation and to give advice and assistance.

4. The Council was satisfied, and it has been common ground throughout, that Ms Baptie was homeless, eligible, and had a priority need. But the Council decided that she had become homeless intentionally. That decision was confirmed by a reviewing officer on a statutory review. It was common ground that the Chessington address was the "last settled accommodation". The reviewing officer's reasoning was, in essence, that the rent due to the Housing Association had been affordable for Ms Baptie, but she had failed to claim tax credits to which she was entitled and spent an unreasonable amount on living expenses. On the second point, the officer relied in part on figures contained in guidance issued by the Association of Housing Advice Services ("AHAS").

5. Ms Baptie appealed to the County Court. HHJ Hellmann ("the Judge") dismissed Ms Baptie's challenge to the relevant findings about her income, but allowed the appeal on the basis that the decision on reasonable living expenses was unlawful. The Judge held that the reviewing officer's reliance on the AHAS guidance was irrational, that she had failed to refer to the benefit cap, which would have "provided a valuable sanity check", and that the decision that the rent was affordable was therefore irrational. He varied the decision to one that Ms Baptie did *not* become homeless intentionally and that the Council *was* subject to the duty under s 193(2).

6. The Council now brings this second appeal with the permission of Arnold LJ, maintaining that the reviewer was entitled to have regard to the AHAS guidance, was not required to have regard to the benefit cap when considering expenses, and the Judge was wrong to interfere with her multifactorial decision. The Council asks us to reverse the decision of the Judge and to substitute an order upholding the decision of the reviewing officer. Ms Baptie invites us to uphold the decision of the Judge and puts forward additional reasons for doing so. These include an assertion that the assessment of an applicant's reasonable living expenses must take account of current Universal Credit allowances without regard to the benefit cap.

The legal and policy framework

7. Intentional homelessness is defined by s 191(1) of the 1996 Act:

> "A person becomes homeless intentionally if he deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy".

8. Article 2 of the Homelessness (Suitability of Accommodation) Order 1996 ("the 1996 Order") identifies matters which an LHA must take into account "in determining whether it … would have been, reasonable for a person to continue to occupy accommodation". These include:

> "… whether or not the accommodation is affordable for that person and, in particular, the following matters –
>
> **(a)** the financial resources available to that person, including, but not limited to, (i) salary, fees and other remuneration; (ii) social security benefits; …
>
> …
>
> **(b)** the costs in respect of the accommodation, including, but not limited to, (i) payments of, or by way of, rent; …
>
> …
>
> **(d)** that person's other reasonable living expenses."

9. Article 2 requires the LHA to take into account all sources of income, including all forms of benefit, and to compare these with the applicant's rent and her reasonable living expenses; a decision as to what is "reasonable" requires an objective assessment, having regard to the needs of the applicant and her children, and cannot depend on the subjective view of the case officer: *Samuels v Birmingham City Council* [2019] UKSC 98, [2019] PTSR 1229 ("*Samuels*").

10. Section 182 of the 1996 Act provides that in the exercise of its functions relating to homelessness an LHA "must have regard" to such guidance as may from time to time be given by the Secretary of State. Such guidance has been set out in a Homelessness Code of Guidance. A version issued in 2006 ("the 2006 Code") was considered by the Supreme Court in *Samuels*. It said (at Paragraph 17.40, emphasis added):

> "In considering an applicant's residual income after meeting the costs of the accommodation the Secretary of State *recommends* that authorities should 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 jobseeker's allowance that is applicable in respect of the applicant* … A current tariff of applicable amounts in respect of such benefits should be available within the authority's housing benefit section."

11. The 2006 Code went on:

> "Housing authorities will need to consider whether the applicant can afford the housing costs without being deprived of basic essentials such as food, clothing, heating, transport and other essentials."

12. In *Samuels* the Supreme Court identified the levels of income support and income-based jobseeker's allowance as objective guidance on the issue of an applicant's reasonable living expenses, having regard to her needs and those of her children. The reviewing officer in that case, making his decision in 2013, had not considered the applicable benefit levels, nor any other guidance. The Supreme Court held that his decision was unlawful. At [36] Lord Carnwath (with whom the other members of the court agreed) said this:

> "The amount shown in the schedule [of living expenses] provided by [Ms Samuels'] solicitors (£1,234·99) was well within the amount regarded as appropriate by way of welfare benefits (£1,349·33). 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."

13. The Welfare Reform Act 2012 ("the 2012 Act") provided that the weekly-paid benefits referred to in the 2006 Code (income support and income-based jobseeker's allowance) should no longer be available to new claimants and introduced "Universal Credit" payable monthly. Universal Credit calculations include a "standard allowance" for all claimants and additional "elements" for those who have children, or need help with rent, and other categories of claimant. Section 96 of the 2012 Act provided for a cap on welfare benefits. This was £26,000 a year for a single person resident in Greater London. Section 8 of the Welfare Reform and Work Act 2016 ("the 2016 Act") amended the 2012 Act, reducing the relevant benefit cap to £23,000. Section 11 of the 2016 Act froze certain benefits at 2016 levels for each of the four following tax years. These included Universal Credit.

14. In 2018, the Secretary of State issued a new version of the Homelessness Code of Guidance ("the 2018 Code"). This version does not contain the recommendation or other text quoted at [10] above. It does contain the words quoted at [11] above but it continues differently (at para 17.46) as follows:-

> "Housing costs should not be regarded as affordable if the applicant would be left with a residual income that is insufficient to meet these essential needs. *Housing authorities may be guided by Universal Credit standard allowances when assessing the income that an applicant will require to meet essential needs aside from housing costs*, but should ensure that the wishes, needs and circumstances of the applicant and their household are taken into account. The wider context of the applicant's particular circumstances should be considered when considering their household expenditure especially when these are higher than might be expected…."

The emphasis here and in subsequent citations is mine, unless stated otherwise.

15. The relationship between the statutory test in Article 2 of the 1996 Order ("reasonable living expenses") and the reference to "essential needs" in paragraph 17.46 of the 2018 Code was explained by this court in *Patel v Hackney LBC* [2021] EWCA Civ 897, [2021] HLR 39 ("*Patel*"). Rejecting a submission that the two were inconsistent Sir Nicholas Patten, with whom Arnold and Lewison LJJ agreed, said at [13] that:

> "… para 17.46 is no more than an elaboration of what level of expenditure it should be reasonable to take into account in deciding whether the accommodation was affordable ... The statutory test requires the local housing authority to determine what in the particular case was a reasonable level of expenditure and the guidance in the Code suggests that this should be measured by *what the applicant requires in order to provide as a minimum standard the basic essentials of life*."

16. At [14]-[16] Sir Nicholas pointed out that the 2006 Code had formulated the test in terms of "basic essentials" (see [11] above), and that the same or similar language had been used in a number of authorities on affordability in the context of homelessness.

The AHAS guidance

17. AHAS is a non-statutory body which conducts and publishes research to assist advisers and decision-makers in the sphere of housing, in a document entitled "Evidence base for cost of living and guidance for caseworkers" ("the AHAS guidance"). The AHAS guidance was not considered by the reviewing officer in *Samuels* but a version dated 2013/2017 was placed before the Supreme Court by the interveners in the case, and referred to in paragraphs [29] and [41] of the judgment of Lord Carnwath. I shall have to come back to what he said, and its significance for this case.

18. In 2019, AHAS issued a revised version of its guidance ("the 2019 guidance") with an introductory rubric stating, "This is the latest version of this guidance updating prices and taking on board Supreme Court decision in Samuels v Birmingham CC".

19. The "Background" section of the 2019 guidance said this:

> "Whilst originally developed for the household benefit cap, now there is a considerable gap between actual private rents in the

> market and the amounts HB/LHA/UC pay toward housing costs. Many lower income households face a possible shortfall on their rent. The total benefit and other income for families may be enough for them to make extra payments towards their housing costs, so this guidance is relevant for homelessness prevention and relief assistance for both working and non working households.
>
> This aims to provide evidence to identify *reasonable levels of expenditure for the necessities of family life* to offer a guide as to what resources are available for paying for housing".

20. Section 2.1 explained the "Purpose of guidance" which included the following:

> "The key aims are to give caseworkers
>
> - an *objective mechanism* to determine how much households *could reasonably be able to pay* towards their housing by providing an evidence base of a *reasonable minimum cost of living*. The research has been done in London."

21. At the centre of the 2019 guidance was a step-by-step "Methodology" for "Calculating *minimum* family *expenditure*", also referred to in the text as "the family's *reasonable expenditure*". The guidance addressed nine categories of household expenditure, identifying recommended allowances for each. These allowances were calculated weekly to match the way legacy benefits are calculated. Appendices provided supporting detail. Thus, for example, at step 1 of the Methodology AHAS suggested caseworkers allow £21 per person per week for food, an increase of 5% on 2017 to allow for inflation. Caseworkers were advised to "see Appendix 1a for recipes, food costs, etc.". Appendix 1a contained worked examples of breakfasts and main meals, identifying and comparing supermarket prices for the ingredients, using Sainsbury's (generally own brand or basics), Tesco and Asda.

22. The Methodology section stated that the objective of this exercise was "not to produce an absolute minimum budget that would be hard to maintain in the long term. The information here *aims to calculate reasonable expenditure in the long term*; for example it includes costs for replacing white goods, etc." Replacement of white goods and other devices featured at step 7 of the 2019 guidance. This, like its 2017 predecessor, recommended an allowance of £8 a week for this element of household expenditure.

23. This aspect of the AHAS guidance was considered in *Patel.* The appellant was a self-employed taxi driver with other earned income as well as income from benefits. The housing officer's affordability calculations included an allowance of £32 a week for replacement of white goods. The reviewing officer excluded this, stating "I do not believe this to be an essential expense" and "I believe there is sufficient flexibility in your weekly expenditure to cater for such eventualities". Rejecting a challenge to that decision, Sir Nicholas Patten observed that it was unclear where the housing officer's figure had come from; the appellant had originally made no claim for the cost of replacing white goods. Sir Nicholas referred to the £8 a week allowance recommended in the AHAS guidance and held that it was open to the reviewing officer to conclude

on the facts before him that the appellant's budget would allow for occasional expenditure of this kind.

The background facts in more detail

24. Ms Baptie's tenancy with London and Quadrant began in November 2011 and ended with her eviction in January 2018. Ms Baptie's family circumstances and her income varied during this period. At the start of the tenancy she had six children. Her seventh was born in 2012. From 2011 until June 2017 she was entirely reliant on benefits, including child benefit. Initially, there was no cap on the amount of benefits Ms Baptie could receive. From 22 July 2013 the benefit cap applied, limiting her benefits to £2,166.67 a month. That ceased on 30 September 2015. Her benefits remained at the same capped level until 7 November 2016, when the reduced cap came into force, bringing her monthly benefits down to £1,916.67. She started working on 17 June 2017.

25. Her rental history is that she fell into rent arrears from the start of her tenancy and remained in rent arrears throughout, save for a short period in mid-2015. She had been in receipt of discretionary housing payments ("DHPs"). When these put her account in credit she asked for and was given a cheque for £1,647.50. Her DHPs came to an end. She did not use the proceeds of the cheque to meet her rent but fell back into arrears so that by the end of November 2015 she was nearly £900 behind. In April 2016 the Housing Association applied for possession. In May 2016 a suspended possession order was made on the condition that Ms Baptie pay her rent plus £7.50 per week towards the arrears. She failed to meet that condition. By 21 November 2016 she was in arrears by £9,002. On 20 December 2016 the court made an order for possession and payment of the arrears plus costs.

26. On an application to suspend the warrant of possession Ms Baptie was given time to provide details of her income and expenditure and ordered to pay £50 a week for her rent, and to produce evidence she had appealed relevant benefit decisions. But she failed to comply, and failed to attend a hearing in September 2017. After an unsuccessful second attempt to suspend the warrant of possession she was evicted on 28 January 2018, owing her landlord £18,878.81. From June 2018 the family stayed in a caravan belonging to a friend who was away travelling. In January 2019 they were required to leave that accommodation and Ms Baptie made a homeless application to the Council.

27. On 22 May 2020 a housing officer made a decision pursuant to s 184 of the 1996 Act that Ms Baptie was intentionally homeless because she had failed to engage with welfare officers to make renewed applications for DHPs, and that failure was an act that was not in good faith. Ms Baptie applied for a review under s 202 of the 1996 Act and made written representations in support.

28. On 16 November 2020 the reviewing officer issued a "Minded To" letter under the applicable regulations indicating that she was minded to find that Ms Baptie was intentionally homeless for reasons different from those given in the s 184 letter. In summary, the reviewer said she considered that throughout the period in which her arrears had accrued Ms Baptie had sufficient income to pay both her rent and her household's reasonable living expenses. The reviewer made reference to the AHAS guidance of 2019. Ms Baptie's solicitors made written representations against those conclusions. They relied on the application to Ms Baptie of the benefit cap and objected to the use of the AHAS figures which they described as lacking objectivity because the

AHAS members come from contracted and statutory housing services. The solicitors proposed the use of figures from Money Advice Services ("MAS") and the Office for National Statistics ("ONS") which they described as "more objective".

29. The officer's final review decision noted that *Samuels* had made it clear that deciding on affordability "is a much more objective process than a number of local authorities had understood." She adopted a three-step process, identifying (1) the family's income, (2) its reasonable living expenses other than rent, and (3) whether the remaining income was larger than the rental liability.

30. In determining the family's reasonable living expenses the officer took account of Ms Baptie's housing benefit records, a financial statement Ms Baptie had completed on 7 October 2013, and figures for the costs of the Chessington premises which Ms Baptie's solicitor had provided. The officer continued to rely on the AHAS figures, taking account of the MAS figures where these were favourable to Ms Baptie, but leaving the ONS figures out of account as they were less favourable than AHAS. The officer's key reasoning was set out in two paragraphs as follows:-

> "22. An objective source that I use when assessing reasonable living expenses is the research carried out by the Association of Housing Advice Services (AHAS) in 2013. They updated their advice in 2019 which is the figures I will be using despite the fact you were evicted from your home in 2018. Your solicitor said she was only able to use figures from 2017. However, version 4 is dated from 2019 is located on their website and I have provided a link to it in my listing of documents above in this letter. Further, your solicitor stated that this guide should not be used in assessing affordability since it is less objective and instead the Office for National Statistics and/or the Money Advice Service should be used as these give guides for the United Kingdom. Her reasoning is because AHAS is not objective since its members come from contracted and statutory housing services. She also said this guide was not meant to be used to determine affordability under the statutes. I disagree. The guide is specific in that it says, *Evidence base for cost of living and guidance for caseworkers*. It is based on London pricing due to it being more expensive to live than in other parts of the country. In fact, AHAS is specifically for local authorities in London and the Southeast. They have done their research into average costs of food in London and other average costs.
>
> 23. The Money Advice Service gives information on cutting costs from insurance to not buying name brand items, but it does not give evidence based average cost of living in London for food, etc. However, I did use it when you claimed … your utility bill was £390 a month. Thus, using your own solicitor's representations it should be used, then I am happy with the amount they advised for your average utility cost. The Office of National Statistics states from 2018 until 2019, the average household spending on food was £61.90 per week which is much lower than the £21 per week per person allocated from AHAS.

> Your solicitor said the average household spending based on 2.6 people in 2018 was £2964.76 a month in London. These include things like mortgage, which you did not have as you were in social housing. If I used their advice rather than AHAS, your estimated reasonable food bill would be much lower. Thus, I have used AHAS as it is specific to the London region, the amounts are higher than the Office of National Statistics and AHAS have researched it."

31. Applying this approach, the reviewer found that the family's reasonable living expenses came to £1,202.40 a month. She rejected as unreasonable the appellant's actual average monthly expenditure net of rent, as stated in her solicitor's response to the "minded to" letter, of £1,901.63. On the basis of this analysis the reviewer found that Ms Baptie's income after reasonable living expenses was at all times sufficient to pay her rent and that she was therefore intentionally homeless.

32. In reaching her conclusions the reviewer addressed 11 heads of expenditure. She relied on the AHAS guidance in relation to three of these: (i) For food and household goods she allowed £728 per month, on the basis of AHAS figure of £24 per adult per week, in preference to the lower ONS figures suggested on behalf of Ms Baptie; (ii) for clothing, she relied on the AHAS figure of £4 per person per week, identifying sources of cheaper clothes and suggesting clothes be handed down to younger siblings; (iii) for white goods she made the £8 a week allowance recommended by AHAS, amounting to £34.67 a month.

The Judge's decision

33. The Judge cited the relevant provisions of the 1996 Act, the 1996 Order and paragraph 17.46 of the 2018 Guidance, and reminded himself of the approach to be taken to appeals under s 204. He set out the background facts. He then dealt with the reviewer's approach to income, and dismissed Ms Baptie's challenge to that. We are not concerned with that aspect of the Judge's decision, which is not challenged in this court.

34. Turning to the issue of expenditure, the Judge cited *Samuels* which he said provided "the context" for Ms Baptie's submissions on that issue. The Judge set out paragraph [36] of Lord Carnwath's judgment, from which I have cited above. The Judge went on to cite two passages from paragraphs [29] and [41] of *Samuels*. In the first passage, Lord Carnwath had referred to a submission on behalf of the interveners in that case that there was "a lack of any generally accepted guidance for authorities to assess the reasonableness of living expenses under the 1996 order". He had mentioned some evidence from the Chief Executive of Shelter which was critical of the then AHAS guideline figures on the grounds, among others, that they were not designed for assessing affordability under the Housing Act. In the second passage, at [41], Lord Carnwath had referred to the intervener's evidence as showing a "shortage of reliable objective guidance on reasonable levels of living expenditure". He expressed the hope that steps would be taken to address the problem and to give clearer guidance to LHAs.

35. Having dealt with *Samuels* the Judge then cited from the AHAS 2019 guidance, setting out the introductory rubric, the Background section, paragraph 2.1 and a passage in the Budgeting Advice section which stated, "We are going to have to advise customers on

how to cut down on other expenditure in order to be able to prioritise paying the rent. Here are some suggestions for what we can say".

36. The Judge rejected the claim in the introductory rubric that the Guidance "took on board" the decision in *Samuels*, stating "In my judgment the 2019 AHAS guidance does nothing of the sort. The methodology remains unchanged…". He described the approach set out in the Budgeting Advice as "closely akin to the approach condemned in *Samuels* as unlawful." The Judge was critical of paragraph 22 of the officer's decision, observing as follows (emphasis in original):

> "38. However, the AHAS guidance does not give the *average* cost of food and other items: it gives what the AHAS guidance describes as "*reasonable minimum costs*". In light of *Samuels*, it was permissible for the reviewing officer to consider the AHAS guidance as evidence of minimum costs but not as evidence of what is objectively reasonable.

37. The Judge went on:-

> "39. Notwithstanding *Samuels*, the reviewing officer did not refer to the benefit ceiling of £1,916.67 per month, or £23,000 per annum, even though she was referred to it by the appellant's solicitors and even though it is mentioned in the AHAS guidance. The benefit ceiling would have provided a valuable sanity check when assessing both the reasonableness of the appellant's actual expenditure and the reasonableness of the alternative figure at which the reviewing officer arrived. The reviewing officer gave no reason for not taking the benefit ceiling into account."

38. The Judge then summarised his reasoning:

> "40. In my judgment, the reviewing officer's finding that monthly expenses of £1,901.63 were unreasonable was irrational. She may well have been led into error by failing to appreciate that, in light of *Samuels*, the AHAS guidance does not offer objective guidance as to what constitutes reasonable living expenses; and by failing to have regard to the reasoning of the Court at paragraph 36 of *Samuels* which, in the absence of objective guidance, is applicable to the present case. The reviewing officer in effect asked what were the lowest living expenses that could reasonably be allowed. That is the wrong question, and it is not the same question as whether the appellant's living expenses were reasonable."

39. At [41], the Judge illustrated his reasoning by reference to paragraph 25 of the review decision, where the officer had stated, "If you chose to buy your daughter a mobile phone in 2018, that was a want and not a need." The Judge considered this to be wrong because "The test is not whether it was a need but whether it was a reasonable expense." He held that the officer's finding "that a mobile was an unreasonable expense" was itself unreasonable because "Mobiles enable teenagers to participate meaningfully in a

social life with their peers and, if smartphones, function as a tracking device to enable their parents or guardians to monitor their whereabouts."

40. There has been some debate on this appeal about how to interpret these paragraphs of the judgment. To the extent that it matters, it seems clear to me that the Judge treated *Samuels* as binding authority that a reviewing officer assessing reasonable living costs (a) may not lawfully treat the AHAS guidance as a relevant objective source of guidance on reasonable living costs and (b) in the absence of any other objective guidance, is obliged to have regard to the sum allowed by way of benefits under the benefit cap.

41. At [42]-[44] the Judge said, "I therefore find that the decision that the accommodation was affordable was one that no reasonable authority properly directing itself could have reached", allowed the appeal, and varied the decision in the manner I have explained.

The issues on this appeal

42. The Council's grounds of appeal and Ms Baptie's alternative grounds for upholding the decision of the Judge give rise to four main issues:

(1) Did the reviewer err in law by treating the AHAS guidance as relevant objective guidance as to reasonable living expenses?

(2) Did the reviewer err in law by (a) failing to treat the benefit cap as a 'sanity check' (as the Judge held) and/or by (b) failing to treat the standard allowances for Universal Credit as relevant objective guidance as to reasonable living expenses, without regard to the benefit cap (as Ms Baptie maintains)?

(3) If the reviewer did not make any of the above errors, has Ms Baptie identified any other good and sufficient basis on which to interfere with the reviewer's multifactorial assessment?

(4) If the reviewer did err in law, was the Judge right to reverse her decision, rather than remit the matter for a fresh decision?

The role of the appeal court

43. Section 204 gives an applicant who is dissatisfied with the review decision a right of appeal to the County Court "on any point of law arising from the decision". This means public law grounds such as error of law or irrationality. The role of the court is supervisory only. It should not be drawn into conducting any form of merits review. As Sir Nicholas Patten said in *Patel* at [32]:-

> "Provided that the officer making the assessment has paid due regard to the relevant guidance and has reached a conclusion open to him or her on the material available then there are no grounds for interfering with the decision which is reached. It is not for the County Court on a statutory appeal on a point of law under s.204 HA 1996 to review the multifactorial assessment which the housing or the review officer has carried out. Unless it can be shown that the officer materially misdirected himself or

> failed to take relevant matters into account there is no error of law."

44. On a second appeal such as this one the function of the Court of Appeal is not to review the decision of the County Court but, again, to exercise a supervisory jurisdiction over the decision of the public authority, applying judicial review principles: *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5, [2003] 1 AC 430 [7], *Danesh v Kensington & Chelsea RLBC* [2006] EWCA Civ 1404, [2007] 1 WLR 69 [30]. This court has warned against "judicialisation of claims to welfare services": see, most recently, *Alibkhiet v Brent LBC* [2018] EWCA Civ 2742, [2019] HLR 15 [38].

45. That said, on an appeal such as this the court will have regard to the reasoning of the County Court Judge and any additional legal points advanced by the respondent. If we conclude that the Judge or the respondent has identified a material legal error in in the officer's approach, we must give effect to that conclusion.

Discussion

Affordability

46. The relevant criterion is the affordability of particular accommodation for the individual applicant. If the rent is affordable, it is likely to be reasonable for the applicant to continue living in the accommodation. Affordability is plainly not a question of whether the applicant's actual residual income after living expenses is enough to meet the rent obligation. As Sir Nicholas Patten said in *Patel* at [13]:

> "Loss of accommodation through the non-payment of rent requires an explanation which must satisfy a test of reasonableness. This cannot be satisfied simply by reference to how the applicant has chosen to spend the money available to him at the relevant time."

47. An LHA must therefore determine whether the rent is one that the applicant *could* afford. This depends on the applicant's available income and her "reasonable" living expenses. Speaking generally, various different levels of expense may fairly be described as "reasonable". It depends on the yardstick that is applied. One possible approach would be to start with the actual costs incurred by the applicant and ask whether it would be unreasonable for a person in the applicant's position to incur a particular expense or to spend as much as she did on the item in question. One might answer that question by reference to a range of reasonable prices for the goods or services in question, or by reference to the average cost of acquiring an asset or service. But the 1996 Order and the 2018 Code in combination prescribe a different approach. The 2018 Code identifies the task as "assessing the income that an applicant will *require* to meet *essential needs* aside from housing costs …" (emphasis added). Another way of putting it that reflects *Patel* and the other authorities cited in that decision is that in the context of an affordability assessment the "reasonable living costs" of an individual or household are the sum they reasonably need to provide the necessities of life to a minimum standard.

The AHAS guidance

48. The stated purposes and aims of the AHAS guidance are consistent with this way of putting the matter. It follows that in my judgment the Judge was wrong at [38] to treat the AHAS guidance as legally irrelevant on the footing that the statutory provisions call for an assessment of reasonableness by reference to "the average cost of food and other items" and not "reasonable minimum costs". In deciding what an individual applicant reasonably requires to meet essential needs, evidence of the "reasonable minimum cost" of meeting such needs is precisely the kind of evidence to which a reviewing officer can properly have regard.

49. The Judge was also mistaken when he said at [40] that the question was "whether the appellant's living expenses were reasonable". The question was what she reasonably required to meet the essential needs of the family. And the Judge was wrong to say at [41] that the test for the cost of a mobile phone was "not whether it was a need but whether it was a reasonable expense". In fairness to the Judge, it may be pointed out that the decision in *Patel* was handed down two days after his own decision. The fact remains, however, that the Judge's conclusion that the AHAS guidance was irrelevant followed from a mistaken view of what the law required.

50. Was it nonetheless legally wrong for the reviewer to take account of the AHAS guidance in this case? In my judgment it was not. Contrary to the view of the Judge and the argument on behalf of Ms Baptie, *Samuels* is not authority that the AHAS guidance of the time was not reliable objective evidence to which a reviewer may have regard. Still less does *Samuels* stand as authority that the later guidance of 2019 lacks those qualities and must therefore be disregarded when calculating reasonable living expenses as part of an affordability assessment.

51. Although there was evidence before the court that was critical of the AHAS guidance of the time, the Supreme Court cannot be taken to have made a decision about that evidence or about the AHAS guidance itself. The court decided that current benefit levels were "a source of objective guidance" on the issue of reasonable living expenses to which the officer should have had regard. That is because the 2006 Code contained a recommendation to that effect amounting in substance to a benchmark of affordability. But when Lord Carnwath referred to "the absence of any other source of objective guidance" he was not denouncing the AHAS guidance. The reviewer had not relied on or referred to that guidance. The propriety of doing so was not an issue before the court. The point Lord Carnwath was making was that the officer had not resorted to *any* objective guidance to support his decision that the expenses claimed were unreasonable, with the result that his decision was purely subjective and hence unjustifiable. The wider discussion about objective guidance does not form part of the court's essential reasoning. It is in general terms which do not engage with the method or the detail of the AHAS document. In my view, therefore, the Judge was wrong to conclude that the 2019 guidance adopted a methodology or approach that was "condemned as unlawful" in *Samuels.*

52. Nor do I believe it can be said independently of authority that the relevant parts of the AHAS guidance lack the qualities of objectivity and reliability, so that it was a legal error for the reviewer to take account of them in this case. Ms Baptie has not pursued the argument which her solicitors unsuccessfully advanced to the reviewer, that AHAS itself lacks objectivity in the sense that its membership is biased or partial. Apart from

his mistaken contention that *Samuels* is binding authority on this question, the only argument advanced to us by Counsel for Ms Baptie is one that relies on wording in the 2013/2017 version of the guidance:

> "The project aims to provide evidence to justify amounts that could reasonably be expected to be paid from benefit income, whilst leaving sufficient for the necessities of life for those whose benefit is being capped."

53. The argument is that the aim stated in this passage is not compatible with the purpose of assessing reasonable living expenditure in the context of an affordability assessment of this kind and the guidance "was not therefore intended as an objective measure". Counsel submits that the guidance was "driven to a particular outcome" using a "stripped-back approach" to finding "the cheapest possible deals". I find this argument unconvincing on its own terms. On analysis, it has two strands. The first is an attack on the impartiality of the guidance. This is a semantic argument that rests largely if not entirely on the use of the word "justify". In this context I think the word "identify" could be substituted without changing the meaning. The second strand is not so much an argument about objectivity as an attack on the relevance of the stated aim. It is close, if not identical, to the Judge's approach that reasonable expenses are not to be judged by reference to the minimum reasonably required to acquire life's necessities. That is an approach that I have rejected for the reasons already given.

54. Perhaps the shorter answer to this submission is that we are not concerned with the old guidance, but with the post-*Samuels* guidance of 2019. This contains different wording which, as I have explained, is clearly and explicitly concerned with issues that are relevant. As I see it, the key test of objectivity for present purposes is whether the relevant aspects of the 2019 guidance are "evidence-based" rather than depending on the subjective view of the case officer. I do not think it can be said that the guidance fails that test, nor that it is unreliable. The guidance purports to be objective and on its face relies on evidence of prices at which relevant goods are offered for sale by mainstream supermarkets, identified by research carried out in London. This court treated the AHAS guidance as a reliable objective source when deciding the appeal in *Patel.* I see no reason to think it was wrong to do so, or that the reviewing officer in this case was wrong to do the same.

The cap or ceiling

55. I can well see that where an applicant is subject to the benefit cap or ceiling a reviewing officer must take that into account at the first stage. As an overall limit on the benefit income that can be obtained it must feature in any calculation of the sources of income available to such an applicant. The Judge so held in this case, and his decision in that respect is not challenged. The Judge appears to have said that the officer should have taken account of the cap again at the second stage, when she was dealing with the reasonable living expenses of the applicant and her family. On the face of it, that is hard to understand. But I think the explanation is that what the Judge was saying in his paragraph [39] was not so much that the cap or ceiling as such should have been taken into account, but rather that the officer should have used the resulting maximum monthly benefit income available to Ms Baptie as a way of checking the validity of her conclusions. Put another way, the Judge was saying that the amount of benefit available

to Ms Baptie should have been treated as a benchmark for how much she could reasonably spend on living expenses.

56. I have not been able to see the force of this point on the facts. The officer was well aware of the maximum level of benefits available to Ms Baptie. Ms Baptie's solicitors had made a point of it and the officer recorded this in her decision letter. A comparison of the maximum benefit available to Ms Baptie with the total she claimed to have actually spent on living expenses would not have been a useful one for this purpose. And the capped benefits figure including rent (£1,916.67 a month) was higher than the officer's assessment of Ms Baptie's reasonable monthly living expenses plus rent (£1,903.79). That was the position even before allowance was made for the unclaimed tax credits which the Judge held had been rightly taken into account by the officer. So comparison with the capped benefit figure would not have tended to show that the officer's assessment was too low. The error, if there had been one, would surely have been immaterial.

57. I do not consider there was an error of law. I infer that in concluding that there was, the Judge was drawing on what Lord Carnwath said in *Samuels* at [36]. That however was based upon the wording of the 2006 Code with its "recommendation", the effect of which was that "in the absence of any other source of objective guidance" the officer in that case should have treated the applicable levels of income support and income-based jobseeker's allowance as a benchmark for reasonable living expenses. But the legal landscape was different in 2019, when the reviewer made her decision. There had been major changes in the benefit system in 2012 and 2016, and the language of the 2018 Code was significantly different. It did not refer to the legacy benefits. It was not directory or even advisory. It was permissive. It identified Universal Credit "standard allowances" as a factor by which LHAs "may be guided" when assessing the income an applicant would require to meet essential needs. It did not refer to the benefit cap. The factual position here was also different, as the reviewer had the AHAS figures.

58. The Judge cited para 17.46 of the 2018 Code but did not address the significance of its wording or the impact of the differences and changes I have listed. He did not refer to the Universal Credit standard allowances. He gave no reasons for concluding that against this background the officer in this case was legally obliged to treat the maximum benefit available to Ms Baptie as a measure or benchmark of her reasonable living expenses. For reasons I shall expand upon in dealing with the next point, I do not think the Judge's approach can be sustained. On the facts of this case, it was not irrational or unlawful for the officer to reach a conclusion without explicitly comparing her own figures with the maximum amount of benefit available to the Baptie family.

The standard allowances

59. I do not consider the Judge's overall conclusion can be justified on the alternative basis advanced by Counsel for Ms Baptie. He does not defend the reasoning I have identified but advances a different and more radical argument. This is that the reviewing officer should have had regard to the current tariffs of welfare benefits for Ms Baptie and her children *without* regard to the benefit cap. He submits that a reviewing officer is obliged in law to do this and that the Judge should have held that the reviewing officer in this case erred in law in this respect. Counsel submits that the allowances which are legally required to be taken into account in this way include not only the Universal Credit standard allowance for a single person aged 25 or more (£317.82), but also the child

element for the first child (£277.08) and the child element for the second to seventh children (£231.67) together with the sum of the available child benefit (£445.90) making a monthly total of £2,430.82. Counsel provides an alternative calculation based on the income support regime, which he places at a total of £2,421.68 less child benefit. In support of this submission he relies on paragraph [36] of *Samuels,* para 17.46 of the 2018 Guide, and a passage in the judgment of King LJ, DBE in *Paley v Waltham Forest LBC* [2022] EWCA Civ 112 ("*Paley*") at [76], with which Asplin LJ and Francis J agreed. I would reject these arguments.

60. First, I do not accept Counsel's submission that *Samuels* is authority for the proposition that in assessing reasonable living expenses regard must be had to the amounts of welfare benefits for all family members. The Supreme Court decided that all sources of income are to be taken into account at the first stage. As for the second stage the court decided (1) that the needs of all family members must be taken into account and (2) that "in the absence of any other objective guidance" the sums available via the benefits specified in the 2006 Code should have been treated as a benchmark of the reasonable cost of meeting those needs. The latter conclusion followed from the language of the 2006 Code coupled with the failure of the reviewer in that case to take account of any other objective source of guidance. It did not reflect any wider legal principle.

61. Secondly, I do not think we would be justified in treating the language of the 2018 Code as having the same benchmarking effect as the Supreme Court held to be implicit in the different wording of the 2006 version. The 2018 Code does not refer to all benefits. It only mentions Universal Credit standard allowances. It does not say that officers must or should undertake any exercise using those figures or that officers are advised or recommended to do this. It says only that they "may be guided" by Universal Credit standard allowances.

62. Thirdly, if the language leaves room for doubt about the matter I think it would be unreal to suppose that the Secretary of State, as author of the 2018 Code, intended it to have the effect alleged on behalf of Ms Baptie. That would mean that the Secretary of State, having promoted legislation to cap the amount of benefit available to large families, then promulgated a Code identifying higher "uncapped" amounts (which no claimant would ever receive in fact) as a guide to the sums those same families would reasonably require to obtain the basic necessities of life.

63. Thus, whilst there could be circumstances in which it would be irrational not to do what the Code says can be done, and use the specified allowances as a "guide", I do not think it can be said that the current framework gives those allowances the same status as the Supreme Court attributed to the benefits specified in the 2006 Code. Nor can it be said that the 2018 Code makes reference to the standard allowances legally mandatory in all cases. The Code itself is not mandatory but guidance to which an LHA must "have regard". The Code manifestly envisages that circumstances would arise in which an LHA might properly *not* be guided by those allowances. The relevance of standard allowances and the need to take them into account will vary according to the circumstances of the case.

64. In this context, although we did not receive argument on this point and I would not rest my decision upon it, I think the use of the term "standard allowances" in the 2018 Code has some significance. It has been treated by Counsel for Ms Baptie as if it meant the total amount of Universal Credit or other benefits that would be available to the family

but for the cap. But "standard allowance" is a statutory term of art which refers to Universal Credit allowances for adults. The standard allowance for an adult aged 25 or more would amount to less than £4,000 a year, far below the benefit cap. It is additional payments for children (and other factors) that may trigger the application of the cap. That, as is well-known, was the original policy driver behind the legislation, which tied the cap to the estimate average net earnings of a working household. The statutory term for these additional payments in the Universal Credit scheme is "elements" not "standard allowances". On this analysis, the 2018 Guide does not refer to these elements even as a factor by which officers may be "guided". The utility of a comparison with a standard allowance properly so-called will vary. It is hard to see that it could be of any help when assessing the reasonable living expenses of a large family such as the Bapties.

65. Fourthly, I am not persuaded that *Paley* supports this aspect of Counsel's argument. In the passage relied on, King LJ was certainly saying that the benefit cap is relevant when assessing the affordability of a property. I agree with that for the reasons I have given: where the cap applies it is relevant at stage one because it affects an applicant's available income. But that lends no support to Ms Baptie's case on the issue now under discussion. It is far from clear to me that King LJ was saying anything that does support that case. In any event this paragraph did not form part of the essential reasoning of the court. The essence of the decision in *Paley* was that the LHA had failed to make a proper assessment of the affordability of an out-of-Borough property it had offered to Ms Paley because it had failed to make proper enquiries about her real needs and had failed to take account of information which she had provided to it on that score: see in particular the grounds of appeal at [58] and the reasoning at [72]-[73], [77] and [80]-[84].

66. Finally, if the standard allowances (in whatever meaning) are at best a tool which LHAs may use as a guide without being legally required to do so, then I do not think this officer acted irrationally in setting the Baptie family's reasonable living expenses at the level she did. She had available to her and used another legitimate source of relevant objective information about the reasonable minimum cost of food, household items, clothing and white goods for the Baptie family. It was not irrational for her to rely on the AHAS figures for these purposes, leaving the standard allowance(s) to one side.

Was the reviewer's approach otherwise irrational?

67. Next, Counsel for Ms Baptie argues that we should uphold the Judge's decision on the basis that the reviewer's conclusions were unlawful for reasons independent of the points about AHAS, the benefit cap, and Universal Credit standard allowances with which I have dealt so far. It is said that in reaching his decision the Judge "must be taken" to have had regard to other issues raised before him "such as" the fact that the calculation was undertaken on the mistaken basis that Ms Baptie had only six dependent children, when she had seven for most of the relevant period. I do not think this can be read into the judgment. The Judge's grounds of decision were that the reviewer acted irrationally in relying on AHAS figures and failing to use the capped benefit figure as a check. The reality is that this is a new and additional point which is not covered by the Respondent's Notice and is not open to Ms Baptie.

68. I would reject this argument anyway. The reviewing officer carried out a detailed multifactorial analysis of Ms Baptie's income and expenditure across the period during

which Ms Baptie's arrears accrued. The onus is on Ms Baptie to show that this analysis was vitiated by a public law error. The courts do not conduct merits reviews of these decisions. The only point of substance that is now advanced is the one I have alluded to: that the assessment mistakenly treated Ms Baptie as having six dependent children when there were in fact seven for much of the material time. I see no merit in the point.

69. What happened is that the "minded to" letter calculated food and household expenses on the footing that there were five dependent children. Ms Baptie's solicitors then complained that the Council had "not included B's two eldest sons" and asked that the figures be adjusted to reflect six dependents. The reviewer did so. It is now said that she adopted the wrong date for the calculation and should have gone up to seven. But a reviewer cannot be said to have acted irrationally in doing what the applicant requested of her. Nor was it irrational to conduct an assessment by reference to November 2017 (by which time the eldest son had left home). These calculations have to involve snapshots. I would accept the Council's submission: the reviewer's analysis is unimpeachable in public law terms.

Should the reviewer's decision have been reversed?

70. In the circumstances, this issue does not arise and I need say nothing about it.

Conclusion

71. The reviewing officer's assessment was not unlawful for the reasons given by the Judge or for any of the additional reasons advanced by Ms Baptie. I would allow the appeal, set aside the Judge's order and substitute an order dismissing the appeal to the County Court.

LADY JUSTICE ASPLIN:-

72. I agree.

LORD JUSTICE PETER JACKSON:-

73. I also agree.