Neutral Citation Number: [2020] EWHC 327 (Admin)

Case No: CO/3802/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2020

Before :

MR JUSTICE LINDEN

- -

Between :

The Queen on the application of M	**Claimant**
- and -	
LONDON BOROUGH OF NEWHAM	**Defendant**

- -
- -

Mr Edward Fitzpatrick (instructed by Javed Nazir Solicitors) for the **Claimant**
Mr Stephen Evans (instructed by London Borough of Newham) for the **Defendant**

Hearing dates: 30 January 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE LINDEN

Introduction

1. In this application for judicial review the claimant alleges that the defendant housing authority is in breach of its duty, under section 193(2) Housing Act 1996 ("the 1996 Act"), to secure that suitable accommodation is available for him to occupy. He seeks a declaration to this effect together with a mandatory order requiring the defendant to provide him with suitable accommodation within a period of eight weeks.

2. The claim form was issued on 27 September 2019, together with an application for interim relief. Whilst expressing sympathy for the claimant's position, that application was refused by Mrs Justice Lieven on 27 September 2019. Lieven J directed that the defendant serve its acknowledgement of service within seven days and that the application for interim relief be dealt with at an on notice hearing.

3. In the event, the claimant's application for interim relief was not pursued when the matter came before Upper Tribunal Judge Markus QC, sitting as a Judge of the High Court, on 13 November 2019. Instead, having given permission, the Judge directed that there be an expedited hearing in January 2020. That hearing took place before me on 30 January 2020.

4. Mr Edward Fitzpatrick appeared for the claimant and Mr Stephen Evans appeared for the council. I am grateful to both of them for their assistance.

Anonymity Order

5. I have made an order pursuant to CPR 39.2(4) that the identity of the Claimant's daughter who is the subject of these proceedings should not be disclosed, whether directly or indirectly, in any report of these proceedings. She is under eighteen years of age and the evidence in the case includes sensitive personal information about her. She is therefore referred to below as 'A'. The Order also specifically prohibits disclosure of the Claimant's address because this is likely to lead to the identification of A and I have not set out the address in this judgment. I appreciate that I could have gone further to prevent identification of A but this seems to me to be sufficient in the light of the Claimant's concerns and bearing in mind that his primary position was that he sought a more limited Order. I have also given liberty to apply.

The dispute

6. The claimant lives with his wife and four dependent children. One of his children, A, who is now aged 17, has various conditions and disabilities which impact on the sort of accommodation which the family requires. These include Hirschsprung disease, a genetic condition which causes her to be obese. She also has learning difficulties, sleep apnoea, recurring urinary tract infections and urinary incontinence. She is currently fully dependent on her mother for all of her personal care needs.

7. In January 2005, the defendant accepted that it owed the claimant the duty set out in section 193(2) of the 1996 Act. Thereafter, the claimant and his family lived in temporary accommodation in a three bedroomed house in Wanstead for approximately 13 years. No issue is raised as to the suitability of this accommodation

but it is not conceded by the claimant that it was suitable, and I gather that unsuccessful applications for a transfer were made over this period.

8. It appears that the claimant and his family could get by in the Wanstead accommodation whilst A was a young child but the difficulties increased as she got older. By the end of 2017, A now being 15 years of age, her disabilities and the effect of them were such that the claimant and his wife considered that the family urgently needed to move. The claimant therefore made an application which was supported by evidence about A's needs including a letter, dated 8 November 2017, from a Contact and Assessment Worker who had undertaken a Common Assessment Framework assessment during a home visit to the family. She described the accommodation needs of the family, and particularly those of A.

9. On 19 December 2017, the claimant was notified by the defendant that alternative temporary accommodation in a four bedroomed house had been secured for the family. As is standard where accommodation is considered "suitable" for the purposes of the 1996 Act, the defendant's letter notified the claimant that this was its view, and informed him that the defendant considered that it had discharged its statutory duty to him. The letter also warned the claimant that if he were to refuse the offer his case would be closed and it informed him of his statutory right, under section 202 of the 1996 Act, to request a review if he disagreed with the defendant's decision.

10. The claimant did not agree that the alternative accommodation was suitable. In a letter to the defendant dated 24 December 2017 he particularly emphasised that, although the accommodation had four bedrooms, it did not meet A's needs:

> *"My daughter is in vital need of bariatric bathroom and toilet equipment; and disabled toilet and an Easy Access Walk in shower/bath for her own safety and hygiene (sic)….. Without the support in place you are neglecting her needs as a disabled child and she is at risk of falling and hurting herself, as she has done previously. She is unable to support herself or bathe independently without these."*

11. In the light of the consequences if he were to refuse the offer, however, the claimant and his family moved into this accommodation whilst exercising their right to request a review of the defendant's decision. That request was supported by a letter from a civil legal advice housing adviser at Shelter, dated 12 January 2018, which outlined A's disabilities and the deficiencies in the alternative accommodation.

12. A report, dated 2 February 2018, by Ms Patricia Brook, Paediatric Occupational Therapist, was also submitted in support of the claimant's request for a review. This included the following passages:

> *"Active postural/locomotor*
>
> *[A] is independent mobilising and can negotiate the stairs. She needs full assistance for all her personal care needs at the present time, but could become independent with appropriate facilities and equipment….*

Difficulties experienced at current property:

The downstairs toilet is not large enough for [A] to use. The bathroom upstairs is also too small to accommodate [A] and her personal care needs. [A] cannot use the bath. She has a bath board but again due to the length and width of the bath [A] is unable safely to use this and have a shower. The shower runs off the taps, so there is a high risk of scalding. The basin is extremely low, which again [A] cannot access. The toilet area is not large enough to accommodate a bariatric toilet frame..…...

Recommendations

[A] and her family would benefit from having a four bedroom property, to enable [A] to have her own bedroom with preferably ensuite wet room, as [A's] personal care needs are impacting on the family's use of essential facilities. This would need to be large enough to house bariatric equipment so [A] could come independent with her personal care needs.

Options available

The current property cannot be adapted to meet [A] or the family's needs. A three-bedroom property, which could be adapted to accommodate an extra bedroom and bathroom would be an option. "

13. By letter dated 22 February 2018 the defendant notified the claimant that following a recent medical assessment of A *"we have awarded you emergency status and you are now registered on the Council's emergency housing list"* in relation to the allocation of permanent accommodation pursuant to Part VI of the 1996 Act. The letter went on to say:

"This is in recognition of the fact that your property…..requires adaptations which either cannot be carried out or can be carried out but not within reasonable cost.

The property that is recommended for [A's] medical needs is on a ground floor maximum if un-lifted, or any floor with a lift, adequate heating, accessible bathing facilities with a level access shower, bariatric toilet and space for specialist equipment. We have also assessed that [A] should have her own bedroom.

This means that properties advertised as E+ should be suitable for you and you will only be able to bid for this type of property."

14. The claimant was also told that his emergency status meant that he was entitled to place bids and that these bids would be given enhanced priority. The defendant also reserved the right to make a direct offer to him at any time regardless of whether he had bid for the accommodation which was the subject of the offer.

15. Shortly after this, on 27 February 2018, the claimant and his wife were notified of the decision of the defendant's Reviews Officer, Mr Terry Ohene, in relation to their request for a review. At paragraph 4 of his letter he said that he had considered a number of matters including *"...relevant legislation, caselaw and the Code of Guidance for local Authorities"*. He went on to say, at paragraph 5 of his letter:

> "*Following careful consideration of all the relevant facts, law relating to your case, enquiries to the review and Newham Council's Temporary Accommodation allocation policy, I have concluded that the temporary accommodation provided to you under the Housing Act 1996 is not suitable due to your daughter's need for a property that can accommodate bariatric bathroom facilities to meet her disability requirements. I have had sight of the Occupational Therapist's report and recommendations for adaptations to the property to (sic) bariatric bathroom facilities."* (emphasis added).

16. Notwithstanding this, at the time of the hearing before me, more than two years after the claimant and his family had moved in, they still live at the alternative accommodation.

17. In the meantime, further evidence in relation to the position of A has been submitted to the defendant. This includes:

    i) A letter, dated 8 January 2019, from the Paediatric and Surgery and Stoma Care department at the Royal London Hospital which says:

    "[A] is a patient at the Royal London Hospital under multiple specialities. From her bladder and bowel needs she is under the care of Mrs Joshi Paediatric surgeon. Parents have asked for a letter as their current new housing is not suitable for[A's] medical needs.

    The bathroom in this property is not suitable; [A] is incontinent of urine and faeces several times a day and night….

    She would require an adapted bathroom with walk-in shower and bariatric toilet. I feel this is something that needs to be dealt with urgently for [A's] health and hygiene needs…" (emphasis added)

    ii) A letter from A's GP, dated 31 July 2019, which says:

    "If she continues to have unsuitable bathroom and toilet facilities, she will not be able to maintain an appropriate level of hygiene, which with her background of obesity and urinary incontinence may increase her risk of developing further medical problems e.g. urine infections worsening and

progressing to a kidney infection or in the worst case sepsis; skin problems such as fungal infections.

I believe it is urgent for [A] to move to accommodation with bathroom facilities adapted appropriately to her needs in order to prevent deterioration in her health conditions." (emphasis added)

iii) A further letter from A's GP, dated 25 November 2019, which records her parents as saying that:

"the bath in their current accommodation is smaller than a standard size and because of [A's] health problems and subsequent obesity she is unable to fit in it and as a result her behaviour becomes aggressive. She is therefore not having a regular wash and this in turn is leading to her chronic psoriasis of skin to (sic) deteriorate. Due to her chronic health problems she also has urinary incontinence which causes skin rashes in her groin and therefore again she is required to have regular washes.

Parents report that the toilet is small and urine sometimes contaminates the bathroom and therefore poses a health risk to the rest of the family. They also report that she has started to complain of back pain from leaning over the sink as it is low.

Her mother… does all of [A's] personal care and tries to help [A] mobilise in and out of the bath. I confirm that I have seen [her mother] recently and she has a small tear in one of the tendons in her shoulder."

18. The claimant also confirms the situation described in the GP's letter of 25 November 2019 at paragraphs 9 and 10 of his second witness statement, dated 26 November 2019. At paragraph 10 he adds:

" Due to [A's] obesity it is now very hard for her [mother] to assist [A]. She recently has a muscular tear in her shoulder while helping [A] come out of the bath."

19. Before me, Mr Evans argued that the letters from the Royal London Hospital and A's GP should be discounted because they appear to be based on an account given by her parents and/or are not in the form of a medical report and/or do not represent a definitive medical opinion, for example as to the deterioration of A's psoriasis or the reasons for this or, indeed, the causes of her mother's injury to her shoulder. However, I do not accept that I should do so. These materials may not provide definitive medical opinions but I see no reason why I should not take them into account as an accurate account of the difficulties which A and her family are facing in their current accommodation and as evidence of the urgency with which the situation

ought to be addressed. Nor, in any event, do I see why I should discount the claimant's uncontradicted accounts of the circumstances at home.

20. Mr Evans also argued that, insofar as the GP's letters were relied on to establish a deterioration in A's circumstances since the defendant's decision of 27 February 2018, I should not accept them as evidence of deterioration. However, Mr Fitzpatrick did not appear to rely on them or the claimant's witness statements for this purpose. His position was that they are merely evidence of the current situation, and that it is not necessary for him to establish a deterioration in A's circumstances. His case is that the passage of time is, of itself, sufficient: if, which he disputes, the decision of the defendant on 27 February 2018 was that the Claimant's current accommodation was suitable accommodation for the family for a limited period of time, that period has long since expired.

21. In short, Mr Fitzpatrick's case is that the defendant has, since 27 February 2018, been in continuing breach of its statutory duty to the claimant under section 193(2) of the 1996 Act, effectively by its own admission. The defendant's letter of that date admits in terms that the Claimant's current accommodation is unsuitable. In the alternative, if the defendant is not strictly bound by its own admission, that letter, combined with the other evidence in the case, demonstrates that the defendant is currently in breach of its section 193(2) duty.

22. For its part, the defendant denies that it is in breach of statutory duty. Mr Evans argues that the defendant has discharged its obligations in that the Claimant's current accommodation is "suitable" accommodation, at least for the time being. He contends that whether or not accommodation should be regarded as "suitable" is a public law question. The passage of time is not sufficient to render suitable accommodation unsuitable – there has to be a deterioration in the circumstance of the applicant's accommodation - and, in any event, the point has not yet been reached at which the court is entitled to say that the current accommodation is not suitable in the relevant sense.

23. Mr Evans emphasises the limited resources of the defendant and the shortage of available housing stock. He relies on the steps which he says the defendant has taken to make alternative accommodation available to the claimant. He argues that the claimant himself has not taken sufficient steps to bid for accommodation and he relies on delay as a basis for dismissing the claim. He also argues that, as a matter of discretion, I should refuse to make a mandatory order.

<u>The legislative framework</u>.

24. Part VI of the Housing Act 1996 sets out the statutory regime that applies to the allocation of a local authority's housing stock on a permanent basis. Section 167 requires each authority to have an allocation scheme in place which it must apply.

25. Part VII of the 1996 Act deals with *"Homelessness and threatened homelessness"*. Section 175 defines these concepts. Relevant to the present case are:

    i) Section 175(1), which provides, so far as material, that:

> *"a person is homeless if he has no accommodation available for his occupation, in the United Kingdom or elsewhere…., "*

ii) Section 175(3) which provides as follows:

> *"A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy."*

26. Section 176 of the 1996 Act, so far as material, defines *"accommodation available for occupation"* as follows:

> *"Accommodation shall be regarded as available for a person's occupation only if it is available for occupation by him together with-*
>
> *(a) any other person who normally resides with him as a member of his family,…"*

27. It is on the basis of this provision that the claimant is entitled to have the needs of A taken into account in determining whether he should be treated as having accommodation for the purposes of section 175 and/or whether any accommodation which is made available to him is suitable.

28. Section 177 of the 1996 Act contains provisions which deal with the question *"whether it is reasonable for a person to continue to occupy accommodation"*. These include section 177(2) which provides as follows:

> *"In determining whether it would be, or would have been, reasonable for a person to continue to occupy accommodation, regard may be had to the general circumstances prevailing in relation to housing in the district of the local housing authority to whom he has applied for accommodation or for assistance in obtaining accommodation."*

29. Sections 183 of the 1996 Act onwards apply *"where a person applies to a local housing authority for accommodation, or for assistance in obtaining accommodation, and the authority have reason to believe that he is or may be homeless or threatened with homelessness"*. Section 184 places an obligation on the local housing authority to make such inquiries as are necessary in the circumstances. Sections 185-189 then address the question of eligibility for assistance including, under section 189, by defining the concept of a *"priority need for accommodation"*. The categories include, under section 189(1):

> *"(b) a person with whom dependent children reside or might reasonably be expected to reside;*

> *(c) a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside;.."*

30. It was no doubt pursuant to both of these provisions that the claimant has, since 2005, been accepted by the defendant as being in the priority need category.

31. Section 193 of the 1996 Act sets out the local housing authority's *"Duty to persons with priority need who are not homeless intentionally"*. The test for the duty, and the scope of the duty, are set out as follows:

> *"(1) This section applies where the local housing authority are satisfied that an applicant is homeless, eligible for assistance and has a priority need, and are not satisfied that he became homeless intentionally."*
>
> *(2) Unless the authority refer the application to another local housing authority (see section 198), they shall secure that accommodation is available for occupation by the applicant."* (emphasis added)

32. Section 206 (1) of the 1996 Act provides, in summary, that the housing authority, may *"only"* discharge its obligations under section 193(2) by directly or indirectly securing that *"suitable"* accommodation is available for the applicant. The concept of "suitability" is not defined.

33. Section 193(5) of the 1996 Act provides that the local housing authority shall cease to be subject to any duty under section 193, in summary, if the applicant is offered accommodation other than under Part VI or a private rented sector offer, and having been told that the authority regards itself as ceasing to be subject to the section 193 duty, and having been informed of the possible consequence of a refusal and of the right to request a review, the applicant *"refuses an offer of accommodation which the authority are satisfied is suitable for the applicant"*. Section 193(7) makes similar provision in relation to final offers of accommodation under Part VI.

34. Section 202(f) gives an applicant the right to request a review of *"any decision of a local housing authority as to suitability of accommodation offered to him in discharge of their duty under"* section 193.

35. Under section 204 a *"decision"* on a request for a review under section 202 may be appealed to the County Court. If no decision on a request is made within the period prescribed under section 203, the applicant may appeal the decision in respect of which the review was requested. In each case the appeal must be *"on any point of law arising from the decision or, as the case may be, the original decision"*.

The central legal issue.

36. The central legal issue between the parties was as to the approach to determining whether a local housing authority is in breach of section 193(2) in circumstances where it accepts that it owes the applicant the relevant duty but has not yet made

accommodation available to him. Where the applicant has accommodation at the time of the application to the housing authority, and the duty is accepted by the authority as having arisen, it is implicit that the accommodation occupied by the applicant is not such as *"it would be reasonable for him to continue to occupy"* for the purposes of section 175 (3), given that it is on this basis that he is "*homeless"*.

i) Does it follow from this that the housing authority which leaves the applicant in his existing accommodation, even for a short period, is necessarily in breach of statutory duty because the applicant's existing accommodation cannot be regarded as "suitable" within the meaning of section 206 of the 1996 Act?

ii) If this does follow, is the authority automatically in breach of statutory duty or does it have a reasonable time in which to secure suitable accommodation?

iii) On either view, how should the question of relief be approached?

37. Thus, as noted above, the defendant accepts that it owes the claimant the section 193(2) duty and, on 27 February 2018, accepted that the Claimant's current accommodation is not "suitable" accommodation for the claimant and his family, so that its section 193(2) duty continued rather than being discharged. Nearly two years later they are still living in that accommodation: does this mean that the defendant is therefore necessarily in breach? This may not be the case if the defendant is able to argue that the current accommodation is "suitable" on a short-term basis notwithstanding that it would not be reasonable for the claimant to continue to occupy it on a long-term or permanent basis or, alternatively, if the duty under section 193(2) is merely to make suitable accommodation available within a reasonable time or to take all reasonable steps to secure the availability of such accommodation.

Relevant case law

Anderson and Sembi

38. In his Skeleton Argument dated 28 January 2020, although not in his oral submissions until I asked him about them, Mr Evans relied on two authorities which suggest that there is no time limit within which a local housing authority is required to comply with the section 193(2) duty.

39. The first is *R v Southwark LBC ex parte Anderson* (1998) 32 HLR 96, 98. where the housing authority had accepted that it owed the section 193(2) duty to the applicant and had made offers of alternative accommodation, all of which had been rejected by the applicant on grounds of unsuitability. Three of the refusals were admitted by the authority to be reasonable and the fourth was subject to a pending appeal. The issue was whether the authority was necessarily in breach of statutory duty because it had not yet made suitable accommodation available.

40. In dismissing the claim Moses J (as he then was) said:

> *"the statutory scheme under the Housing Act shows that there is no time limit within which a housing authority is obliged under the statute to comply with a duty to secure available accommodation for those who fall within section 193…..*

> *The provisions within the Housing Act, which require housing authorities to put in place an allocations policy and to comply with that policy, are contained within Part VI of the Housing Act. They demonstrate that there will be those to whom a duty is owed under section 193 of the Act who will not be housed immediately or within any particular time. There may be those in respect of whom, the housing authority will be under an obligation, in accordance with their allocations policy, to give a greater part priority."* (page 98)

41. Moses J appeared to take the view that a housing authority would not be in breach of the section 193 duty if it was taking steps to secure alternative accommodation as opposed to "*merely sitting upon their hands and ignoring the needs of these applicants"* (page 99).

42. In *R v Merton LBC ex parte Sembi* (1999) 32 HLR 438 the housing authority accepted that it owed the applicant the section 193(2) duty by reason of her disabilities. By the time of the hearing, five months later, she had been offered accommodation in a nursing home which she had moved into. The housing authority regarded this accommodation as suitable on a temporary basis. Jowitt J noted that the availability of a review of this decision under section 202 of the 1996 Act meant that there was an alternative remedy available to the claimant but he considered the application for judicial review on its merits nevertheless.

43. In dismissing the claim, at page 443 Jowitt J said that he found *Anderson* helpful. He also accepted a concession on behalf of the claimant that *"the respondent is entitled to a reasonable time in which to make its investigations and seek to find suitable accommodation"*. The issue, as he saw it, was whether "*the respondent has delayed in providing suitable longer term accommodation, to the point at which it becomes right to say it has simply failed to discharge the duty which it owes to Miss Sembi"*. He noted that *"Inevitably,….it takes time to find a suitable property. It is not possible to simply conjure up accommodation out of thin air"*.

44. It is worth noting that both Moses and Jowitt JJ appear to have been proceeding on the basis that the duty under section 193(2) is to find the applicant permanent suitable accommodation under Part VI. This may well have made them more sympathetic to arguments that the housing authority was to be given time to find such accommodation. They do not appear to have attached a great deal of weight to possibility that the duty under Part VII may be discharged by the provision of accommodation which is suitable on a temporary basis. Had they done so, they might have been less receptive to arguments based on the difficulty of finding suitable alternative accommodation. In any event, I consider that *Anderson* and *Sembi* have been overtaken by the authorities discussed below, with which they are fundamentally inconsistent.

Ex parte Begum

45. Both *Anderson* and *Sembi* were disapproved by Collins J in *R v Newham LBC ex parte Begum* (1999) 32 HLR 808. Here, the housing authority accepted that it had not yet provided the claimants with suitable accommodation. The statutory review

mechanism was therefore not available to the claimants but judicial review was. The housing authority relied on *Anderson* and *Sembi* to contend that it was not in breach of section 193(2) but Collins J disagreed with what Moses J had said in the *Anderson* case (pages 817/818). He considered that Moses J had conflated what are two distinct duties under Parts VI and VII of the 1996 Act. Although, on the facts of *Anderson*, it may have been that the claimant was not entitled to relief, given the steps which the housing authority had taken, Collins J considered that the housing authority in the *Anderson* case was in breach of its section 193 (2) duty *"because no suitable accommodation had been provided since the duty arose*" (page 818).

46. Collins J's analysis was based on his acceptance that:

> *"Part VII of the Act is consistent only with the assumption that the housing duties under section 188, 190, 200 and 193 cannot be deferred."*(pages 815-816)

47. He therefore rejected a submission on behalf of the housing authority that:

> *"the duty must be construed as being one to make suitable accommodation available within a reasonable time and what is reasonable will depend upon the circumstances of each case and in particular upon whether the council has the necessary accommodation available."* (pages 815-816)

48. Collins J went on to say:

> *"While I have considerable sympathy with the Council, I do not think that the qualifications which [the Council] submits are necessary can be read into the words of the statute. Parliament has not qualified the duty in any way: it could have done. However, the situation for the Council is not quite as desperate as might be thought. While the duty exists, no court will enforce it unreasonably."* (page 816)

49. He added:

> *"Furthermore, whether or not accommodation is suitable may depend upon how long it is to be occupied and what is available. It may be reasonable to expect a family to put up with conditions for a few days which would be clearly unsuitable if they had to be tolerated for a number of weeks. But there is a line to be drawn below which the standard of accommodation cannot fall."* (page 816)

50. Based on this analysis, Collins J also declined to follow *ex parte Sembi* insofar as the reasoning in that case was based on what Moses J had said in *Anderson*, albeit again accepting that the result might well have been the same, whichever approach was adopted, given that relief would likely have been refused:

> *"The flexibility of the concept of suitability and the recognition by the court that it cannot order a council to do the impossible may mean that the delay in providing accommodation which an applicant feels to be suitable will be tolerated. But the court must always bear in mind that Parliament has decided that the duty is unqualified and so should not be persuaded by alleged impossibility in finding suitable accommodation unless satisfied that all reasonable steps have been taken."* (page 818)

51. Collins J went on to say that the Council's decision not to use its own stock meant that it had not taken all reasonable steps and the delay therefore could not be excused. He therefore allowed the application for judicial review and gave declaratory relief.

52. It can be seen that Collins J's analysis of the law did not preclude the possibility that a period of time would elapse between the authority's acceptance of the section 193(2) duty and the making available of alternative accommodation. But this was on the basis that the concept of suitability would, in appropriate cases, allow that the existing accommodation was *"suitable"* for a short period of time and that the authority therefore was not in breach. Even if the existing accommodation was not suitable, the court's discretion in relation to relief was sufficient to ensure that unreasonable orders were not made.

Codona

53. In *Codona v Mid-Bedfordshire District Council* [2005] HLR 1 the issue was as to the suitability of accommodation which the claimant had been offered. The Court of Appeal dismissed an appeal from the County Court in a case where the claimant had been offered bed and breakfast accommodation pending a final offer of accommodation. She argued that "bricks and mortar" accommodation was unsuitable given that she was a member of the travelling community. The housing authority's position was that it had met its obligations for the time being by making suitable accommodation available to her, albeit on a short-term basis pending a final offer of accommodation.

54. Auld LJ (with whom Thomas LJ and Holman J agreed) set out a number of basic propositions in relation to the meaning of "suitability" at paragraphs 33-39:

    i) First, suitability is to be determined by reference to *"the person or persons to whom the duty is owed"*.

    ii) Second, the term must be given a broad meaning encompassing *"considerations of the range, nature and location of accommodation as well as of its standard of condition and the likely duration of the applicant's occupancy of it. Standards of the condition of property are clearly important…."* He then approved the passage from the judgement of Collins J in *ex parte Begum* set out at paragraph 49 above in which Collins J said that accommodation may be suitable on a short term basis even if it is not suitable for a longer period.

iii) Third, Auld LJ accepted that *"the duty to provide suitable accommodation is absolute in the sense that there is no statutory entitlement of, or duty on, a local housing authority, when determining suitability, to have regard to its resources or general practicability of offering accommodation to homeless persons."*. He went on, however, to approve a passage from the judgement of Collins J in *R v Newham LBC ex parte Ojuri* (No 3) (1998) HLR 452 to the effect that, although financial constraints and limited housing stock are matters that can be taken into account in determining suitability, there is a line to be drawn below which the standard of accommodation cannot fall.

iv) Fourth, Auld LJ said this at paragraph 38:

> *"where it is shown that a local housing authority has been doing all that it could, the court would not make an order to force it to do the impossible. Its duty was to secure the availability of suitable accommodation within a reasonable period of time, the reasonableness of that period depending on the circumstances in each case and on what accommodation was available."* (emphasis added)

v) Auld LJ then apparently approved the passage from the judgement of Collins J in *ex parte Begum* set out at paragraph 48 above where he said that the section 193(3) is not qualified but that the court will not enforce it unreasonably.

55. It is to be noted that the passage with which Auld LJ agreed actually stated that the section 193 (2) duty is not qualified "in any way". Collins J's conclusion in the *ex parte Begum* case was actually that the statutory duty was *not* to provide suitable accommodation within a reasonable period of time: it was to provide suitable accommodation *full stop*. Collins J accepted, however, that accommodation may be "suitable" for a short period of time even if it is not suitable on an indefinite basis and that relief would not be granted where it was unreasonable to do so.

56. Given that paragraph 38 of the judgment of Auld LJ appeared in a section of his judgement which was concerned with the meaning of "suitability", and given his apparent approval of Collins J's approach, it may be that he was not intending to recast the section 193(2) duty and was merely purporting to reiterate what Collins J had said about relief. It may also be that the Court of Appeal considered that in practical terms it did not matter whether considerations of the reasonableness of the local housing authority's position went to the issue of breach or to relief.

57. At paragraph 39 Auld LJ added:

> *"suitability in this context should be regarded as an elastic concept in that the line below which no reasonable authority could consider accommodation to be suitable in an individual case is the Wednesbury line."*

58. It is important to note, however, that this was said in the context of the local housing authority having actually decided that the accommodation offered to the particular applicant in the *Codona* case was suitable and it defending that decision. Under section 204 of the 1996 Act the Court of Appeal's jurisdiction on appeal from the County Court was therefore limited to error of law, as noted above.

The decision of the Court of Appeal in the Birmingham City Council case

59. In *R (on the application of Aweys) v Birmingham City Council* [2008] HLR 32 the Court of Appeal considered an appeal by Birmingham City Council in six cases in which the Council had accepted that the applicants were "homeless" but there were delays in finding alternative accommodation for them. In some of these cases the applicants had, since the section 193(2) duty was accepted by the Council, moved into accommodation which had been offered to them but had challenged its suitability. It was said by all applicants that their existing accommodation was not suitable and in some cases (*Ali*, *Abdulle* and *Adam*) the Council had formally accepted this in the context of the statutory review process.

60. The central question which the Court of Appeal was asked to decide was:

> "*is it a lawful discharge of the council's duty under section 193(2) to leave a homeless family in the accommodation they were occupying in circumstances where they were found to be homeless because it would not be reasonable for them to continue to occupy those very premises? Put shortly, can they leave the homeless at home for a temporary period while they hunt for permanent accommodation?"* (paragraph 36).

61. This issue was presented in the Court of Appeal as being one of pure law, rather than the outcome of the six cases being potentially fact sensitive: if the section 193(2) duty did not allow a reasonable or any period for compliance the Council would necessarily be in breach and the only issue would be relief.

62. Upholding the decision of Collins J at first instance, the Court of Appeal held that, if a person cannot reasonably be expected to continue to occupy given accommodation, and is therefore to be treated as not having accommodation for the purposes of the definition of *"homeless"* under section 175 of the 1996 Act, logically if they remain in the same accommodation they must also be treated as not having accommodation for the purposes of the duty to make accommodation available under section 193(2). If the law regards them as not having accommodation for the purposes of both previsions it must follow that a local housing authority which leaves them in that accommodation has failed to discharge its duty because they continue to be *"homeless"* as defined (paragraphs 37 and 38).

63. It will be seen that this approach, which focusses on the concept of *"accommodation"*, was not the same as that of Collins J in *ex parte Begum* which focussed on the issues of suitability and relief and allowed greater flexibility where there were delays in finding alternative accommodation. On the Court of Appeal's approach, it was necessarily a breach of statutory duty to leave a person in

accommodation in which he had been declared homeless because he could not be expected to continue to occupy it. The only issue would be relief.

64. Ward LJ, with whom Arden and Smith LJJ agreed, gave the leading judgement in *Aweys*. Having added some observations of her own on the homelessness issue Arden LJ (as she then was) said, at paragraph 61, that she was *"concerned that another answer to the first issue may be that the local authority has an interval of time for finding accommodation that satisfies its duty under section 193 (2)"*. She went on to disagree with the characterisation of this duty by the Court of Appeal in *Codona* by which she did not regard herself as bound. She pointed out that:

> *"The core duty in section 193 (2) is not qualified by any expression defining the time within which the duty is to be performed. Moreover, the duty is not qualified by some such word as "forthwith". Equally, it is not watered down by some such words as "as soon as possible". Nor is the duty expressed in terms of best endeavours or taking reasonable steps…."* (paragraph 62)

65. At paragraph 65 she said this:

> *"In my judgement, the key point is that section 193(2) is expressed in terms of producing a result, namely securing accommodation to be made available. Because the duty is expressed in terms of securing a result, and the context is homelessness, which of its nature requires some urgent action, I do not consider that there can properly be an implication into the statute that it is sufficient to comply with the duty imposed by section 193(2) within a reasonable time. However, I would not (at least without further argument) rule out the possibility that the court may decline to make a mandatory order against a local authority to perform its duty to secure accommodation for an applicant in a case where the local authority is placed in what is in effect an impossible situation…."*

The decision of the House of Lords in the Birmingham City Council cases

66. The *Aweys* cases were appealed to the House of Lords and became known as *Ali & Others v Birmingham City Council*. They were heard with the case of *Moran v Manchester City Council* which concerned the question whether a woman who had left her home because of domestic violence, and had been offered accommodation in a women's refuge, was *"homeless"*. That mattered because Ms Moran had been evicted from the women's refuge on grounds of her behaviour. If the refuge was *"accommodation… which it would have been reasonable for her to continue to occupy"* it would follow from this that she was intentionally homeless within the meaning of section 191(1) of the 1996 Act and therefore ceased to be owed any duty under section 193(2) as a result. Both cases are reported at [2009] 1 WLR 1506.

67. Baroness Hale gave the leading opinion, to which Lord Neuberger also contributed. Lords Hope, Scott and Walker agreed with them, although Lord Hope added some observations of his own to which I will return.

68. In the *Moran* case, Baroness Hale reasoned that the *"homelessness"* issue under sections 175(3) and 191(1) of the 1996 Act turned on the requirement that the accommodation be *"reasonable… to continue to occupy"* rather on than arcane arguments as to whether a women's refuge may or may not amount to *"accommodation"* under either provision. In dealing with the "homelessness" issue at paragraphs 34 and following she said this:

> *"34 …. Does section 175(3) mean that a person is only homeless if she has accommodation which it is not reasonable for her to occupy another night? Or does it mean that she can be homeless if she has accommodation which it is not reasonable for her to continue to occupy for as long as she would occupy it if the local authority did not intervene?*
>
> *35 The Court of Appeal in the* Manchester *case, the courts below in the* Birmingham *case, and perhaps other courts before them, have assumed that… section 175(3) is concerned with the reasonableness of present occupation. Obviously, once it is unreasonable for the person to stay there one more night, section 175(3) is met; the person is homeless and cannot be intentionally homeless if she leaves.*
>
> *36 However, the language suggests that both sections 175(3) and 191(1) are looking to the future as well as to the present. They do not say "which it* is *reasonable for him to occupy" or "which it* was *reasonable for him to occupy". They both use the words "continue to". This suggests that they are looking at occupation over time. This suggestion is reinforced by the words "would be" and "would have been". These again suggest an element of looking to the future as well as to the present. They contrast with section 177(1) which provides that "it is not reasonable" to continue to occupy accommodation where there is a risk of violence."……..*
>
> *38 In the* Birmingham *case, this interpretation has the advantage that the council can accept that a family is homeless even though they can actually get by where they are for a little while longer. The council can begin the hunt for more suitable accommodation for them. Otherwise the council would have to reject the application until the family could not stay there any longer. The likely result would be that the family would have to go into very short-term (even bed and breakfast) accommodation, which is highly unsatisfactory."*

69. It also followed that because it was not reasonable for Ms Moran to occupy a women's refuge indefinitely she was *"homeless"* when she was accommodated there even if she could have been expected to occupy the refuge for longer. The fact that her behaviour had led to her eviction therefore did not mean that she was *"intentionally homeless"* as she was homeless already.

70. In the *Birmingham* cases, it was accepted by the Council that the claimants were homeless and the issue therefore related to the *suitability* of their accommodation. The key legal issue for present purposes was stated by Baroness Hale to be:

> *"(1) whether accommodation which it is not reasonable to expect the applicant to continue to occupy can nevertheless be suitable accommodation for the purposes of the duty under section 193(2)"*(emphasis added)

71. If that question was answered in the affirmative it was at least open in principle for a housing authority to accept that an applicant was homeless but argue that they were not in breach of the relevant duty in leaving the applicant where they were, on the basis that the accommodation was suitable for the time being. At paragraph 41, Baroness Hale cited Lord Hoffmann in *R v Brent London Borough Council, Ex p Awua* [1996]AC 55, 68 where he said:

> *"there is nothing in the Act to say that a local authority cannot take the view that a person can reasonably be expected to continue to occupy accommodation which is temporary ... the extent to which the accommodation is physically suitable, so that it would be reasonable for a person to continue to occupy it, must be related to the time for which he has been there and is expected to stay."*

72. She added:

> *"41…Those observations were directed to the question of when it ceases to be reasonable for a person to continue to occupy accommodation in the context of the meaning of "accommodation", but they apply equally to the point at issue here.*
>
> *42 Given that an authority can satisfy their "full" housing duty under section 193(2) by providing temporary accommodation (which must of course be followed by the provision of further accommodation, so long as the section 193(2) duty survives), these observations clearly do not only apply to section 188. They emphasise that accommodation which may be unreasonable for a person to occupy for a long period may be reasonable for him to occupy for a short period. Accordingly, there will be cases where an applicant occupies accommodation which (a) it would not be reasonable for him to continue to occupy on a relatively long-term basis, which he would have to do if the authority did not accept him as homeless, but (b) it would not be unreasonable to expect him to continue to occupy for a short period while the authority investigate his application and rights, and even thereafter while they look for accommodation to satisfy their continuing section 193 duty."*

73. Having returned to the *Moran* case and the definition of homelessness, Baroness Hale said this in relation to "suitability" in the context of the *Birmingham City Council* cases:

> *"47 This does not mean that Birmingham were entitled to leave these families where they were indefinitely. Obviously, there would come a point where they could not continue to occupy for another night and the council would have to act immediately. But there is more to it than that. It does not follow that, because that point has not yet been reached, the accommodation is "suitable" for the family within the meaning of section 206(1). There are degrees of suitability. What is suitable for occupation in the short term may not be suitable for occupation in the medium term, and what is suitable for occupation in the medium term may not be suitable for occupation in the longer term. ....*
>
> *48 Hence Birmingham were entitled to decide that these families were homeless even though they could stay where they were for a little while. But they were not entitled to leave them there indefinitely. There was bound to come a time when their accommodation could no longer be described as "suitable" in the discharge of the duty under section 193(2).*
>
> *49....While the council were entitled in principle to leave the families in their current accommodation for a period notwithstanding that it was accepted that that accommodation "would [not] be reasonable for [them and their families] to continue to occupy" (section 175(3)), it must be a question, which turns on the particular facts, whether, in any particular case, the period was simply too long."*

74. It will be seen that this was essentially the approach of Collins J in *ex parte Begum* which recognised that the flexibility of the concept of suitability could allow for alternative accommodation not to be offered immediately. Moreover, these passages are entirely inconsistent with Mr Evans' submission that the claimant in the present case needs to show a deterioration in A's circumstances and that the passage or elapsing of time is not sufficient to render suitable accommodation unsuitable. That is not so: see further *Kannan v Newham LBC* [2019] HLR 22 CA at paragraph 20.

75. Baroness Hale then turned to the practicalities of the ruling of the House on the issue of principle and said this:

> *"50 It is right to face up to the practical implications of this conclusion. First, there is the approach to be adopted by a court, when considering the question whether a local housing authority have left an applicant who occupies "accommodation which it would [not] be reasonable for him to continue to occupy" in that accommodation for too long a period. The question is of course primarily one for the authority, and a court should normally be slow to accept that the authority have left an applicant in his unsatisfactory accommodation too long. In a place such as Birmingham, there are many families in unsatisfactory accommodation, severe constraints on budgets and personnel, and a very limited number of satisfactory*

> *properties for large families and those with disabilities. It would be wrong to ignore those pressures when deciding whether, in a particular case, an authority had left an applicant in her present accommodation for an unacceptably long period.*
>
> *51 None the less, there will be cases where the court ought to step in and require an authority to offer alternative accommodation, or at least to declare that they are in breach of their duty so long as they fail to do so. While one must take into account the practical realities of the situation in which authorities find themselves, one cannot overlook the fact that Parliament has imposed on them clear duties to the homeless, including those occupying unsuitable accommodation. In some cases, the situation of a particular applicant in her present accommodation may be so bad, or her occupation may have continued for so long, that the court will conclude that enough is enough."*(highlighting added)

76. Lord Hope put the same point at paragraph 4:

> *"I agree with Baroness Hale that the court must have regard to the practicalities of the situation. As Auld LJ said in* Codona *, at para 38, the court will not make an order to force a local authority to do the impossible. On the other hand it may well feel that it is proper for it to step in where the time that is allowed to elapse becomes intolerable."* (highlighting added)

77. Lord Scott also expressed his agreement with the views of Lord Hope at paragraphs 3 and 4 of his opinion.

78. Unfortunately, the House of Lords did not then consider the individual *Birmingham* cases on their facts other than to observe, in the context of a discussion of how long would need to elapse before accommodation was to be regarded as unsuitable:

> "*49 It may be that, in some, or conceivably all, of the* Birmingham *cases, a critical examination of the facts would establish that the council were at some point in breach of their duty under Part VII of the 1996 Act. Thus the time it has taken to find Mr Ali suitable accommodation may well be beyond what is defensible."*

79. This was because, as noted above, the issue was argued below as a pure question of law:

> "*… the basis upon which the applicants in the* Birmingham *cases argued their claims (and succeeded before Collins J and the Court of Appeal) meant that it was unnecessary to consider the detailed facts of their respective cases. Accordingly, once that line of argument is rejected, there is no longer any basis for a decision in their favour."*(emphasis added)

80. The fact that, as the defendant has in the present case, in three of the Birmingham cases (including *Ali*) the Council had accepted *both* that the claimants were "homeless" *and* that their existing accommodation was "unsuitable" was not specifically addressed by the House. On one view, this admission by the Council meant that it admitted breach of section 193(2) and that the question how long the families would have to remain in the same accommodation before it could no longer be regarded as suitable was academic.

81. Instead, the Council's appeal was allowed:

> *"64…to the extent that it is lawful for them to decide that an applicant is homeless because it is not reasonable for him to remain in his present accommodation indefinitely but to leave him there for the short term. We would not agree that it is lawful for them to leave such families where they are until a house becomes available under the council's allocation scheme. The present accommodation may become unsuitable long before then. We would make a declaration to that effect".* (emphasis added)

82. A declaration to this effect was then made at paragraph 66. Because the claimants had all been allocated suitable accommodation by the time of the hearing, no other remedy was called for and the House declined to address the issues as to the criteria for the grant of mandatory injunctions in homelessness cases.

83. Finally, in addition to agreeing with Baroness Hale's opinion at paragraphs 3 and 4 Lord Hope referred to the difference of opinion between the Court of Appeal in *Codona* and what Arden LJ had said in the instant case. He concluded paragraph 4 with the following words:

> "*The point which I wish to stress is that the description of the duty in* Codona *is, with respect, the one that should be adopted in preference to that recommended by Arden LJ."*

Discussion and conclusions.

84. Given what are arguably areas of uncertainty arising from the authorities highlighted above as they apply to this case, I have reached my decision on alternative bases.

85. First, I accept Mr Fitzpatrick's submission that the defendant has, by its letter of 27 February 2018, admitted breach of section 193(2) so that the only issue is relief.

86. The key point here is that Mr Ohene was the defendant's appointed Reviews Officer. The context in which he was writing was that the question of homelessness was no longer in issue: the issue was to the suitability or otherwise of the current accommodation. As noted above, paragraph 4 of his letter stated that he had considered, amongst other things *"relevant legislation, case law and the Code of Guidance for local Authorities"* and paragraph 5 stated that he had given *"careful consideration"* to *"the… law relating to your case"*. By now, of course, the law

included the decision of the House of Lords in the *Birmingham City Council* case which had confirmed that accommodation may be suitable on a temporary or short-term basis. Mr Ohene was also communicating his decision in relation to a request for a statutory review as to *suitability*. He must, therefore, be taken to have used his words advisedly when he said: *"I have concluded that the temporary accommodation provided to you under the Housing Act 1996 is not suitable…"*.

87. I therefore reject Mr Evans' submission that the letter of 27 February 2018 should be read as a decision by the defendant that the Claimant's current accommodation was suitable accommodation for the time being, with which decision I may only interfere on public law grounds. Had this been Mr Ohene's decision he would have said so, particularly given that the *Birmingham City Council* case clearly permitted such an approach at least in principle. I find it impossible to read Mr Ohene's letter in this way. Mr Evans' interpretation is also particularly unattractive when one considers that the consequence of the finding of unsuitability would be to render an appeal by the claimant academic, even assuming for the sake of argument that it was technically available under section 204 of the 1996 Act. In any event, the claimant would not have seen any point in appealing Mr Ohene's decision given the content of the letter, which conveyed to the claimant that his request for a review had been successful and that, as the defendant's letter of 22 February 2018 had also indicated, the claimant was now a *"high priority to receive an offer"* of alternative accommodation, albeit the timescale for securing such accommodation was uncertain.

88. On this analysis, it is not open to the defendant now to rely on the principle established in the *Birmingham City Council* case. The House of Lords accepted that a housing authority may *"decide"* that an applicant's current accommodation is such that they are homeless whilst, at the same time, the accommodation is suitable on a short-term basis. Providing that decision is not tainted by an error of law, and therefore liable to be set aside on appeal, the position is that the housing authority has discharged its section 193(2) duty for the time being and is not in breach. However, here the position is that the housing authority has decided that the accommodation is not *"suitable"* pursuant to the relevant statutory review procedure, and has not come to a different view since then. Subject to arguments about whether the duty is merely to make suitable alternative accommodation available within a reasonable time (which I consider below), then, it is difficult to see how the authority can, at one and the same time, maintain that it is discharging its obligation to make "suitable" accommodation available to the applicant by leaving them in that very accommodation.

89. I appreciate that this is not the only possible reading of the decision of the House of Lords. As pointed out above, three of the *Birmingham City Council* cases were ones in which the housing authority had accepted, in the context of the statutory review procedure, that the claimant's current accommodation was not *"suitable"*. Baroness Hale might therefore have said that, on any view, the Council's appeal in those cases succeeded. She did not. Indeed, as noted above, she specifically commented on one of those three cases, *Ali*, and indicated that he may well have established that his present accommodation was unsuitable, not on the basis that the Council accepted that it was, but on the basis that he had been in the accommodation for too long.

90. In my judgement, however, the House of Lords made clear that it was confining itself to deciding the key issues of principle given the way in which the *Birmingham City Council* case had been argued below and that it would not decide the appeals on the

basis of the particular facts of each case or any arguments which were not run below. The claimants had apparently not argued, in the alternative, that they should win on the facts in the event that the Council was not automatically in breach by virtue of having failed to secure suitable alternative accommodation whilst accepting that the claimants were homeless. Nor does it appear that the claimants had argued that the Council was bound by its admission of unsuitability in the three relevant cases. This may well be because, at the time of the Council's decisions in these cases, the difference between the concepts of *"homelessness"* and *"suitability"* which the House of Lords identified had not been sufficiently clearly established in law, so that the Council's admissions could not fairly be regarded as binding. In any event, whatever the reasons for the claimants' approach, as noted above Baroness Hale made clear that it was not open to them to succeed on any basis other than winning the issue of principle. As a result, it does not appear that the House of Lords considered and rejected this argument, such that it would not be open to the claimant in the present case.

91. The House of Lords also appeared to assume for the purposes of deciding the issues of principle that there would, at least in future cases, be a *decision* by the housing authority that the relevant accommodation was *"suitable"* on a short-term basis. Again, there is room to argue the contrary on the basis of the facts of the *Birmingham City Council* cases and, indeed, some aspects of the reasoning of the House of Lords. But the declaration which the House made at paragraphs 64 (quoted above at paragraph 81) and 66 indicates that what was contemplated was a decision as to homelessness and the suitability of the applicant's current accommodation. Paragraph 50 of the speech of Baroness Hale, which refers to the question as being *"primarily one for the authority"* also appears to assume that the housing authority has addressed its mind to the question and concluded that the accommodation is *"suitable"* for the time being. And this analysis is also consistent with the existence of the statutory machinery for a review and appeal to the County Court under sections 202 and 204 of the 1996 Act respectively, which assumes a decision on suitability and then enables the applicant to challenge it. Absent such a decision, that machinery is not available to an applicant, who would be left to apply for judicial review on the basis of breach of statutory duty. Here, of course, there has been no decision by the defendant other than that the claimant's current accommodation was and is unsuitable.

92. Second, I respectfully prefer the approach of Collins J in *ex parte Begum* and of the Court of Appeal in the *Birmingham City Council* case at least insofar as they held or implied that, once it is accepted or established that the accommodation currently occupied by the applicant is not suitable, the housing authority which owes the applicant a section 193(2) duty will be in breach of that duty. As Arden LJ (as she then was) pointed out, the statutory duty is not to make suitable accommodation available "within a reasonable time" although the considerations which go to the question whether the housing authority has acted within a reasonable time may be relevant to relief. I appreciate that this *may* be contrary to what Auld LJ said at paragraph 38 of his judgment in *Codona* but, as I have pointed out, he made his remarks in the context of a discussion of the concept of *"suitability*", which was the issue in that case, rather than the issue being as to the reasonableness of a delay in facilitating a move out of unsuitable accommodation. And, given that he agreed with what Collins J had said about the concept of suitability in *ex parte Begum*, it is not absolutely clear whether he was describing the circumstances in which breach of

statutory duty will be established or the approach which would be taken to the question of relief once it has been.

93. Similarly, I appreciate that Lord Hope expressly endorsed Auld LJ's *"description of the duty"* and Lord Scott agreed with Lord Hope. But they also agreed with Baroness Hale's opinion. In my judgement it was implicit in Baroness Hale's approach that reasonable delay in finding alternative accommodation would only be permissible if the accommodation was regarded as suitable for the time being, and that the housing authority would otherwise be in breach of its duty under section 193(2). Had the House of Lords considered that the duty is merely to make suitable accommodation available within a reasonable time, Baroness Hale would surely have said so. Instead, as I have pointed out, the analysis in relation to the issue of principle was based on the question whether or not the existing accommodation could be regarded as *"suitable"*, so that the authority was in fact discharging its statutory duty, and the premise for the discussion was that, if it could not be so regarded, the housing authority would be in breach.

94. It is, of course, theoretically possible for existing accommodation to be suitable on a short or medium term basis and for the duty to be to make suitable accommodation available within a reasonable time of the expiry of that period (i.e. within a reasonable time of the point at which the accommodation ceased to be suitable). But, again, that would be a surprising position given that a housing authority could be expected to look ahead and to avoid a hiatus between the existing accommodation ceasing to be suitable and the securing of alternative accommodation. Again, if that is what the House of Lords had in mind, one would have expected it to be clearly articulated. I therefore do not consider that this is the position in law.

95. Third, in case I am wrong in my analysis thus far I have considered whether a reasonable time for the defendant to make suitable alternative accommodation available to the claimant has now expired. I have done so in the context of the question whether the existing accommodation remains suitable, as the ratio of the *Birmingham City Council* case suggests I should, but have also considered the question of reasonableness more generally in accordance with the description of the duty in *Codona*. For the reasons to which I now turn, I consider that the defendant fails whichever approach is adopted.

96. The starting point, it seems to me, is the difficulties for A and her family which are caused by their current accommodation. These are summarised above but, in short, they significantly undermine her health and well-being, her dignity and her ability to lead a reasonably independent life at home. They also impact on A's family and on her mother, in particular. The evidence is that, for some time, these issues have needed to be addressed as a matter of urgency.

97. Second, as noted above, the claimant and his family have occupied the current accommodation for more than two years now. If, as Mr Evans submitted, the test is whether the current conditions there are *"intolerable"* to use Lord Hope's word in the *Birmingham City Council* case, or *"enough is enough"* in the words of Baroness Hale, on the evidence I am satisfied that that point has been reached. I am also satisfied that the accommodation is below the standard which is required reasonably to regard it as suitable. As noted above and below, this is the defendant's own view.

98. Third, even if the defendant's decision of 27 February 2018 was not fatal to its case at that point, it is powerful additional evidence that the time has passed during which the current accommodation can be regarded as suitable for the claimant and his family. It does not appear that the defendant considered, in February 2018, that two years or more could reasonably elapse before suitable alternative accommodation was made available. As I have pointed out, the defendant's position as at 22 February 2018 was that A's needs warranted an award of *"emergency status"*.

99. Counsel also agreed that Mr Ohene's letter of 27 February 2018 advised the claimant to stay put for the time being, not on the basis that the current accommodation was suitable on a short-term basis but because the claimant had been given *"high priority to receive an offer"*. He had this level of priority because the existing accommodation was so deficient relative to A's needs. If he and his family moved to better accommodation on a temporary basis, therefore, he would risk losing his priority status. The advice was that they should therefore aim for long term/permanent suitable accommodation rather than move to better temporary accommodation. Although Mr Ohene said that the timescales for moving could not be stated with any certainty it seems unlikely that he would have been giving this advice if he contemplated that such a long period would elapse with no offer of alternative accommodation.

100. Fourth, Mr Evans submitted that the test is not, in the words of Collins J, whether the defendant has taken "all reasonable steps" to secure suitable accommodation. I agree that this is may not be the test where the issue is suitability but consider that the steps taken by a housing authority in this type of case are relevant to the question of whether suitable accommodation has been made available within a reasonable time. A housing authority which has taken all reasonable steps will also be in a good position to prove, if that is the case, that it has not been possible to locate suitable accommodation and to argue that a mandatory order would require it to do the impossible.

101. An examination of the evidence about the efforts which have been made by the defendant in relation to the claimant and his family suggests that no real coherent thought has been given to their situation and that very little has been done to assist them. In this connection, it is worth noting that, at the hearing on 13 November 2019, Upper Tribunal Judge Markus QC specifically directed that:

> *"4 The Defendant to file and serve Detailed Grounds and any further evidence by 4 PM on 11 December 2019. This is to include a witness statement from an officer addressing the steps that have been taken to identify, locate, and offer alternative suitable accommodation to the Claimant."*

102. The defendant was therefore alerted to the evidence which, obviously, it would need to adduce and given plenty of time to prepare that evidence. In the event, nothing was served until January 2020 when the defendant served the Detailed Grounds and two witness statements from Mr Robert Lindsay, the first dated 8 November 2019 and the second dated 13 January 2020.

103. No satisfactory explanation was given for the delay. Mr Lindsay's first witness statement deals with the steps taken by the defendant and the claimant to locate alternative accommodation having seen the claimant's first witness statement dated 19 September 2019. But, for reasons which I will explain in a moment, it is unimpressive. Mr Lindsay's second witness statement simply confirms that the defendant's Allocations Policy was approved by Cabinet in January 2017 and revised in May 2017. The Policy is then exhibited. Again, this statement was written after sight of the claimant's second witness statement dated 26 November 2019 and the order of Judge Markus QC but it does not comment on or seek to contradict the claimant's evidence or advance any further evidence specifically about the claimant's case.

104. Mr Lindsay is apparently employed by the defendant as a Temporary Accommodation (Local Space) Team Manager, but in neither statement does he explain what this entails or claim to have been personally involved in the claimant's case. In answer to questions from me, Mr Fitzpatrick confirmed that it would have been reasonable for the court to expect what he described as a "procurement officer", who had been involved in the claimant's case, to give evidence on behalf of the defendant which explained, in detail, the efforts which had been made on the claimant's behalf and exhibited documents to support his evidence, for example from the claimant's case file. Mr Evans did not disagree.

105. No documents other than the defendant's policies were exhibited by Mr Lindsay. This is a surprising omission given the vagueness of Mr Lindsay's evidence and given the dispute between the parties.

106. The contents of Mr Lindsay's witness statements add to the impression that, far from taking all reasonable steps, the defendant has not taken the claimant's case seriously. On one view it is sufficient to note that, contrary to Mr Evans' submission, Mr Lindsay himself records at paragraph 4 of his first witness statement, that Mr Ohene had accepted that the current accommodation was *"unsuitable"*. Mr Lindsay does not suggest that the defendant has since taken a different view or, at any stage since then, has formed that view that this accommodation is suitable, whether on a short-term basis or at all. Mr Lindsay then gives evidence about steps which have been taken in relation to alternative accommodation but prefaced this, at paragraph 5, with an acceptance that the defendant *"has been unable to source accommodation that would be considered suitable"*.

107. Even before considering the steps taken, then, the defendant's own evidential position was and is that the current accommodation was and is unsuitable and no suitable alternative accommodation has been identified by it or offered to the claimant. There therefore does not appear to me to be any decision of the defendant, whether express or implied, which it is able to defend on the basis that I may only interfere on public law grounds as suggested at paragraph 50 of the opinion of Baroness Hale in the *Birmingham City Council* case.

108. In relation to the question of steps to find suitable alternative accommodation, Mr Lindsay's evidence in his first witness statement has various strands. One is an implied criticism of the claimant for failing to bid for all of the seven 4 or 5 bedroomed properties which have been available at some point *"in the last year"* as permanent accommodation under Part VI of the 1996 Act. He gives evidence about

this at paragraphs 7 to 12 of his first witness statement where he accepts that the claimant made four bids on three properties which were all unsuccessful. He does not give evidence that these, or the properties for which the claimant did not bid, were rated E+ or otherwise suitable given A's needs. Indeed, it appears that he did not have details of this sort in relation to the properties mentioned *"as the system will not allow me to access those details"*. He also accepts that "*It may not necessarily be the Claimant's fault that they were unsuccessful in securing alternative accommodation"* although he attributes this to the claimant's *"selection criteria"* being *"very stringent"* and to the scarcity of property matching the claimant's criteria. At paragraph 16 he then says that there were *"3 other 4 bedroom properties in Borough but they were allocated to applicants with higher priority"*.

109. Notably, at paragraph 13, Mr Lindsay misstates A's requirements as being *"a 4 bedroom property with a ground floor bathroom and shower."* In fact, as noted above, Ms Brook said that A could negotiate the stairs, a three bedroomed property might be an option and that the key requirement was that any alternative accommodation had a sufficiently large bathroom for A's needs and/or could be adapted to meet those needs. Mr Ohene also recognised, in his decision letter dated 27th February 2018, that the key requirement was for *"a property that can accommodate bariatric bathroom facilities to meet her disability requirements"*. This misunderstanding of what was needed tends to undermine Mr Lindsay's evidence further. Moreover, contrary to Mr Lindsay's characterisation I do not accept that A's needs are elaborate or complicated. This, in itself, ought to mean that the task of finding appropriate accommodation is easier than Mr Lindsay indicates.

110. Having misstated A's requirements Mr Lindsay goes on, at paragraph 14 of his first witness statement, to say that he has reviewed *"the history of 4 bedroom accommodation availability in the private sector from the claimant's tenancy at [the current accommodation] (sic)… in 2018"* and that *"there were only 5 semi-suitable properties which had four bedrooms but did not meet [A's] needs because two were in the London Boroughs of Redbridge and Greenwich and another was located in Nottingham"*. No further detail is provided by him. It is not clear what researches he carried out, or what the sources of his information are, or how he was able to assess the bathroom facilities in these properties. But it is not credible that, as he appears to imply, only five 4 bedroomed properties have been available for rental in the private sector in the last two years, even looking as far afield as Nottingham. In any event, as I have noted, Mr Lindsay does not appear to have been clear about what A's needs are.

111. At paragraphs 17-19 Mr Lindsay gives evidence that, between 20 and 22 May 2019 the defendant was in negotiations with a private landlord for a property in Ilford but that *"no agreement was reached as the landlord decided to let the property privately"*. This step appears to have been prompted by the claimant's threat of an immediate application for judicial review in a solicitor's letter dated 16 May 2019. He provides virtually no detail about these negotiations, nor any supporting documentation, and he does not explain why no similar negotiations were attempted with other landlords during the period of two years which have elapsed.

112. At paragraph 15, Mr Lindsay says that the defendant *"has 114 approved housing providers who are alerted of the defendant's housing needs"* with updating *"regularly on a 4 to 6 week cycle to take into account changes in demand by the*

defendant and availability in the local housing market". Again, no details or supporting documentation are provided.

113. Mr Lindsay also gives evidence about alleged offers to the claimant. At paragraph 6 he refers to what counsel agree must be 102 Kenwood Gardens (although Mr Lindsay does not give the address), which he says was offered at the end of 2018. Consistently with what he said in paragraph 5, he does not suggest that the accommodation was suitable. Nor does he provide any real detail. This issue is dealt with at paragraph 16 of the claimant's first witness statement where he says that he did not refuse an offer. What actually happened is that he booked an appointment to view the property, but when he turned up he was told that there was no appointment booked for him. In a subsequent telephone call with a housing officer he was told that the property did not have appropriate bathroom facilities and could not be adapted. Mr Lindsay did not seek to address or contradict this evidence in his second witness statement and, in the circumstances, I prefer the claimant's evidence.

114. Mr Evans also placed reliance on an alleged offer made at the end of 2019, after this Claim had been issued. However, the email evidence which I saw showed that an offer of a property on a "nightly let" basis was made on 11 December 2019. The property, which is in the E6 area, was "*not capable of full adaptation"* to meet A's needs. Nevertheless, on 12 December 2019 the claimant asked for an opportunity to view the property and said that he was available to do so immediately and that he would accept it if he was satisfied with the bathroom facilities. On 13 December 2019 he received a call from a person called "Nancy" who said that she would interpret his request to view the property as a refusal. The claimant's solicitor then emailed the defendant to make clear that he was not refusing the offer and that he wanted to view the property. The solicitor also asked relevant questions including as to the cost of the property, whether it was in the E+ category, the size of the bathroom and whether the defendant was willing to install a bariatric toilet. He received no response to this email and nor did the claimant receive a response to a subsequent email, dated 16 December 2019, in which he gave his account of the conversation with Nancy and emphasised that he was not refusing the offer and merely wanted to view the property.

115. This passage at arms does not show the defendant in a favourable light. Mr Evans pointed out that there is case law to the effect that a policy of refusing to allow homeless people to view bed and breakfast accommodation before deciding whether to accept it is not necessarily unlawful: *R (Khatun) v Newham LBC* [2005] HLR 29 CA. But that is not the issue here: having apparently done very little for a period of nearly 2 years, the defendant appears to have made an offer of accommodation in response to these proceedings, which it does not actually claim is suitable, and then to have reacted unreasonably when the claimant asked to view it and for additional information which would enable him to decide whether to move his family a significant distance from where they were living. "Nancy" appears from the claimant's uncontradicted email account of 16 December 2019 to have been rude and aggressive in her telephone conversation with him on 13 December 2019 and her "take it or leave it" stance was entirely unreasonable in the circumstances.

116. Apart from this, the claimant was a recipient of group email notifications regarding two properties ([an address]), in December 2018 and June 2019 but
the defendant has only placed passing reliance on the second of these, presumably because it accepts that they were not suitable for the reasons given by the claimant at

paragraph 6 of his second witness statement. Mr Lindsay does not appear to give evidence about either of these properties and I therefore accept the claimant's evidence that they were not suitable.

117. The key point for present purposes is that the defendant does not claim to have made offers of suitable alternative accommodation to the claimant and certainly has not proved in evidence that it is done so. Although it is implicit in Mr Lindsay's evidence that he says that it is not been possible to secure suitable accommodation and that it will not be possible to do so in the near future, nor am I satisfied that this has been established on the evidence. I appreciate that affordable housing which meets A's needs may not be in abundant supply, that the defendant has limited resources, and that there will be higher priority applicants, as the defendant's policies indicate. But, as I put to Mr Evans and he appeared to accept, there is a difference between stating these generalities in a policy and proving that, notwithstanding reasonable steps having been taken to secure suitable alternative accommodation in a particular case, this is not proved possible in a period of two years and will not be in the near future.

Relief

118. Mr Evans submitted that I should refuse a mandatory order on the grounds of delay. His argument, based on *R v Secretary of State for Trade and Industry ex parte Greenpeace Ltd* [1998] Env LR 415, 424 was that this is a case of a challenge to the defendant's decision of 27 February 2018 which is the basis of the complaint. Proceedings have therefore been issued long out of time and an extension of time should be refused. I reject this argument:

    i) The Claim is not a challenge to Mr Ohene's decision of 27 February 2018. On the contrary, the claimant relies on that decision which was in his favour. Nor is it a challenge which is dressed up as a challenge to the consequences of that decision. Rather, it is a complaint about a continuing breach of statutory duty notwithstanding that decision.

    ii) Even if I had accepted Mr Evans' case that any breach must have occurred after 27 February 2018 and at the point at which suitable accommodation in the form of the current accommodation became unsuitable through the passage of time, in my judgement the complaint would remain one of an ongoing breach of statutory duty which continues, as far as I am aware, to this day.

    iii) Moreover, if it were necessary to grant an extension of time I would have done so. As Mr Fitzpatrick explained, in the light of the case law a claimant in this type of case risks a refusal of relief on the grounds of prematurity if proceedings are issued too early. Although the claimant's solicitors threatened judicial review in the course of 2019 they were also told that the defendant would comply with its obligations. It was only when it was abundantly clear that no serious attempt to do so was being made that proceedings were issued. No prejudice has been occasioned to the defendant by reason of any delay: on the contrary, it has benefited from its failure to provide the claimant with suitable accommodation earlier.

    iv) In my view it would therefore not be appropriate to refuse relief on the grounds of delay.

119. In the course of the hearing I drew the attention of the parties to the decision of Scott-Baker J (as he then was) in *R (Nazir) v Newham LBC* [2001] EWHC Admin 589 as potentially being of assistance in deciding whether to take the relatively unusual step of making a mandatory order in this type of case. Without suggesting that he was proposing an exhaustive account of the relevant factors in relation to the court's discretion Scott-Baker J considered, first, the nature of the temporary accommodation being occupied by the family; second, the length of time for which the housing authority had been in breach of its statutory duty; third, the efforts which had been made by the authority to find suitable accommodation; fourth the likelihood of accommodation becoming available in the near future (an order might not be made if there was an undertaking to provide accommodation in the near future) and, fifth, any of the other particular factors in relation to the case.

120. I have considered these matters at paragraphs 95-117 above. In summary, I regard the deficiencies in the current accommodation as serious in terms of their nature and effect as, apparently, did the defendant at least in February 2018. Secondly, for the reasons given above I consider that the defendant has been in breach of statutory duty for a considerable time, particularly having regard to the needs of A and her family. I have found the evidence as to the defendant's efforts to find suitable accommodation unsatisfactory to the point at which it does not appear to be taking the claimant's case seriously. Nor am I satisfied on the evidence that it is unreasonable to expect greater efforts or that it is impossible or unreasonably difficult to find suitable alternative accommodation for the claimant. Nor has any suggestion been made that the defendant will redouble its efforts and/or that suitable accommodation will be made available to the claimant in the near future.

121. In the light of these considerations and the evidence as a whole, I am not satisfied that I should merely make a declaration that the defendant is in breach of statutory duty. The short-lived efforts that were made in May 2019 when judicial review was threatened and in December 2019 after proceedings were issued suggest to me that a mere declaration will not lead to a sustained and thoughtful effort to assist the claimant and his family. I will therefore make a mandatory order which gives the defendant 12 weeks to secure that suitable accommodation is available to the claimant in accordance with section 193(2) of the Housing Act 1996.