Neutral Citation Number: **[2021] EWHC 2616 (Admin)**

Case No: CO/316/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1st October 2021

Before :

MR JUSTICE SOOLE

- -

Between :

THE QUEEN **(on the application of DORA TENDRESSE IBRAHIM)**	**Claimant**
- and –	
WESTMINSTER CITY COUNCIL	**Defendant**

Edward Fitzpatrick (instructed by **Osbornes Law LLP**) for the Claimant
Ian Peacock (instructed by **Tasnim Shawkat**, Director of Law) for the Defendant

Hearing date: 5 May 2021

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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 SOOLE

Mr Justice Soole :

1. By successive decisions the Defendant local housing authority has held and maintained that the Claimant is intentionally homeless within the meaning of s.191 Housing Act 1996; and that in consequence it has no duty to secure that accommodation is made available for her pursuant to s.193 of the Act. There is no dispute that the Claimant otherwise meets the statutory requirements, i.e. is homeless, eligible for assistance and has a priority need for accommodation as a vulnerable person within the meaning of s.189(1)(c). Pending resolution of this claim the Claimant is in interim accommodation provided by the Defendant pursuant to s.188 or s.190 of the Act.

2. Pursuant to permission granted by Collins Rice J the Claimant seeks judicial review of the Defendant's decisions dated (i) 3.11.20, refusing to withdraw its s.202 review decision dated 28.8.20 and (ii) 17.11.20, refusing to treat the Claimant's further application for accommodation dated 30.10.20 as a new application.

3. Part VII of the Act sets out the statutory framework for homelessness applications. Where the housing authority has reason to believe that an applicant is homeless or threatened with homelessness it is required by s.184(1) to make enquiries to satisfy itself whether the applicant is eligible for assistance and if so whether any duty, and if so what duty, is owed to him or her. One such duty is the s.193 duty to secure accommodation for those in priority need. Under s.188 there is an interim duty to accommodate applicants who may be in priority need pending the s.184 decision. By s. 202 the applicant has the right to a review of an adverse s.184 decision; and s.204 gives the right to appeal an adverse review to the County Court on any point of law.

4. For the purpose of this claim the material provisions of the Act are:

   s.191: *'(1) 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.*

   (2) For the purpose of subsection (1) an act or omission in good faith on the part of a person shall not be treated as deliberate.'

   s.177: *'(1) It is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to domestic violence or other violence against him…'.*

   s.202: *'(2) There is no right to request a review of the decision reached on an earlier review'*

   s.204: *'(2) An appeal must be brought within 21 days of his being notified of the decision or, as the case may be, of the date on which he should have been notified of a decision on review.*

   (2A) The court may give permission for an appeal to be brought after the end of the period allowed by ss.(2), but only if it is satisfied – (a) where permission is sought

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

Narrative

5. The Claimant is aged 30 (date of birth 20.12.90) and a national of the Democratic Republic of Congo. She arrived in the UK in March 2014 and claimed asylum. On her unchallenged account and as recorded in the relevant interviews with the Home Office her husband had been a bodyguard for a General in the Congolese military and in August 2013 she had been raped by the General and threatened that she would be killed. Her husband and parents were later killed. Having gone into hiding she fled the country, believing her life to be under threat. Unsurprisingly these terrible events have had a serious and lasting effect on her mental health. The Claimant was granted asylum and given leave to remain in the UK.

6. Pending the grant of asylum, she was provided with NASS accommodation at two successive addresses in Middlesbrough. In June 2016 she suffered two incidents of harassment from a gang of local young men in the area which particularly scared her. On the second occasion they followed her to her home. The police sent patrols around every day. In March 2017 the Claimant was granted 5 years limited leave to remain refugee status. This brought to an end her NASS accommodation and she was directed to Middlesbrough Council housing department.

7. With effect from 5 June 2017 she had a tenancy from the North Star Housing Association of a one bedroom first floor flat above a shop (124A Parliament Road). One morning in June/July 2017 the male occupant of the adjoining flat (126) entered her flat through her bedroom window and went through to her bathroom where she was naked. She was terrified and shouted at him to leave which he eventually did. Her witness statement records *'I felt shocked, shaken and terrified by what had happened. It brought back all the horrible memories and feelings from what had happened to me in the Congo'.* She called the police who interviewed her that day. One of the officers told her that he thought the neighbour had intended to either kill or rape. The neighbour was arrested but subsequently released; and two days later she saw him outside the door of his flat.

8. In consequence the Claimant felt she had to leave this accommodation: *'I felt I had no choice other than to leave to protect my life, but I had nowhere to go'*. She left in mid-August 2017; and went to stay with the only people she knew, a friend and his wife in their one-bed flat in London, sleeping in the living room. Through a Medical Centre in Soho, she was in November 2017 first seen by a Consultant Psychiatrist working there, Dr Sara Ketteley. Dr Ketteley's first report of 5.12.17 ('To whom it may concern') recorded her trauma in the Congo; the incidents in Middlesbrough; symptoms of PTSD and a severe depression; and concluded that she would not be able to return to Middlesbrough: *'In my view, I think that her mental health will deteriorate if she is returned to live in Middlesbrough, as from our interviews, it is clear that she no longer feels safe there, and that this has re-triggered her PTSD…Dora is more vulnerable than average whilst homeless and in my view, due the nature of the intrusions, and her own personal history of trauma, I think that she will not be able to return to Middlesbrough'*.

9. In February 2018 her friend's wife was no longer happy for her to stay with them and asked her to leave. The Claimant went to a nearby homeless hostel, from where she made an application to the Defendant for homelessness assistance pursuant to Part VII of the Act. This was supported by the reports from Dr Ketteley dated 5.12.17 and a further report dated 6.2.18. The latter included: *'She has an established diagnosis of PTSD and depression. Her PTSD has worsened in the last 6 months following the incidents of harassment and invasion of her property by a man whilst living in Middlesbrough. This reminded her so greatly of her original trauma in Congo that she was unable to stay in her new flat and fled to London to stay on the floor of the only other person that she knew in the UK.'*

10. In the light of her application the Defendant provided the Claimant with interim accommodation pursuant to s.188 at an address in London SW1 where she has lived ever since.

Decision letter 5.8.18

11. By letter dated 5.8.18 the Defendant (by Paul Persaud, Housing caseworker) advised of its conclusion that she was homeless, eligible for assistance and had a priority need for housing; but had become intentionally homeless within the meaning of s.191.

12. Its opinion was that she had become intentionally homeless *'as a direct consequence of your decision to leave your last reasonable, available and affordable accommodation at 124a Parliament Road…before ensuring that you had first secured alternative reasonable, available and affordable accommodation in order to ensure that you did not become homeless.'* It had considered her explanation for leaving that accommodation; and had liaised with Middlesbrough police who had confirmed the report of the incident. However *'The police advised you had previously had good relations with this neighbour and he had previously been allowed to enter your home without permission. He had on the last occasion entered your home in order to return your kettle*'. The police had not pressed charges; and had confirmed that they had not advised her to leave her home for her own safety and were not of the opinion that remaining at home posed a risk to her.

13. Pausing there, this account of the information from the police does not reflect the terms of a file note of the telephone conversation dated 27.6.18 between Mr Persaud and the police. This includes *'The police arrested the neighbour at his own home and he advised he had good relations with the client and had regularly been allowed to enter her home without permission. He advised that on this occasion he'd gone to her home to return a kettle and inadvertently the client had been in the bath at the time. The client made a statement to the police but no charges were pressed against her neighbour. They gave the client home safety advice regarding keeping her windows and door locked. The police did not advise the client to leave her home & they have not advised her that she needed to leave the Middlesbrough area for her own safety.'* As Mr Peacock rightly accepted, this note does not support the implication in the decision letter of 5.8.18 that the police had accepted and adopted the account given by the neighbour.

14. That letter then referred to the interval between the incident in June/July 2017 and the notice given by the Claimant to her landlord one month later in August 2017; and concluded that she had become homeless intentionally. As to the s.191 ingredient of

intentional homelessness that *'it would have been reasonable for* [her] *to continue to occupy the accommodation'* in Middlesbrough, the letter stated that it was a self-contained one-bedroom property with appropriate bathroom, toilet and kitchen facilities; she had been granted a tenancy agreement with exclusive possession; and had not indicated any concerns in relation to unaffordability, disrepair *'or any other reason why it would be unreasonable for you to continue to occupy this property'*.

15. The letter also referred to the Defendant's public sector equality duty (PSED) under s.149 Equality Act 2010 and the Claimant's acknowledged protected characteristic of disability. It had given consideration to her *'history of depression, anxiety, PTSD, sinuses problems, chest pain and breast pain'*; but *'we are satisfied there is insufficient cause to indicate that you did not have sufficient capacity and insight into the consequences of your decision-making'*.

16. The letter advised that the interim accommodation would continue until 28.8.18; and that she had the right to seek review of the decision within 21 days.

Application for review/'Minded to' response 1.11.18

17. With the assistance of the Notre Dame Refugee Centre and by its email letter of 6.9.18, the Claimant exercised that right of review. On 1.11.18 the Defendant replied by a draft response (a 'Minded to' letter) which dismissed the review. Notre Dame's response on the same day included the point that the Claimant denied the alleged police account of her relations with her neighbour.

First review decision : 19.11.18

18. The subsequent decision letter of 19.11.18 upheld the decision that the Claimant was intentionally homeless. The letter rehearsed the information from the police in similar terms to before: *'The Police advised that Ms Ibrahim and her neighbour were on good relations and that he had visited her on several occasions. They stated that the incident was just a misunderstanding'*. Further *'I do agree that the police are subjective and that they are entitled to their own version of events. Additionally, I also do acknowledge that Ms Ibrahim's account of events may be equally reliable as the Police's. However, as stated above in determining the risk of violence, we are entitled to have regard to objective facts. Ms Ibrahim also did not raise any issues of concern regarding her neighbour with her landlord or the Police after the incident had occurred.'*

19. The letter also noted: *'Additionally, you also state that the intrusion of Ms Ibrahim's neighbour, even if she was objectively wrong in assessing its intent was highly traumatic and frightening for her'.*

20. On the s.191 issue of whether it would be reasonable for her to continue to occupy the accommodation in Middlesbrough, the letter cited s.177 and associated authority on the issue of domestic or other violence; and referred again to the interval of one month before she gave notice. Whilst acknowledging that the incident with the neighbour *'may have been upsetting…there is no evidence to suggest that Ms Ibrahim was at risk from violence or threats of violence'*. The reviewer concluded *'I am therefore satisfied that the accommodation was reasonable for her to occupy.'*

21. The question and answer on this issue were summarised later in the letter as follows: *'Was the accommodation at* [Parliament Road] *reasonable for the applicant to continue to occupy the accommodation?* (sic). *The property in question was a one-bedroom, self-contained flat with the necessary facilities. The property was affordable, as she could claim Housing Benefit to assist with her rent. For the reasons outlined above I am satisfied that the accommodation was reasonable for Ms Ibrahim.'*

22. For substantially the same reasons as supported the decision on whether it would have been reasonable to continue to occupy the accommodation, the decision letter also concluded that it was not satisfied that the Claimant had acted in good faith : cf. s.191(2).

No appeal

23. Notre Dame Refugee Centre then referred her case to solicitors (Hansen Palomares) to appeal the review decision pursuant to s.204. As far as the Claimant was aware Notre Dame forwarded all the relevant documents in good time. However on 14.12.18 the solicitors wrote to say that they had only received the documents on 10.12.18 and that it was now too late to ask for an appeal.

Fresh application

24. In January 2019 of the Claimant made a fresh application for housing assistance. In addition to the existing material on file, this was subsequently supported by a further report from Dr Ketteley dated 20.8.19. This confirmed that she continued to suffer from PTSD; and had had a period of stability in late 2018 and early 2019. However, since learning that she needed to move on from her safe housing provided as interim accommodation, there had been an *'intense return'* of her PTSD symptoms, in particular more intense nightmares and flashbacks. Dr Ketteley concluded that the Claimant *'remains more vulnerable than the average homeless person due to her experience of mental illness. In my opinion, it would be significantly detrimental for her to be forced to return to Middlesbrough, and I am sure she would elect not to go. This action would be likely to increase her suicidal risk. If she were accommodated in Westminster, due her past history prior to her trauma being relatively stable, I think it is likely that she will engage well with learning opportunities and employment and may make a good recovery.'* Further details of her treatment were provided by letter dated 13.9.19 from a GP at the same Medical Centre.

Decision 2.1.20

25. By decision letter of 2.1.20 (mistyped 2.1.19) the Defendant rejected the application. Having referred to relevant authority (R. v. Borough of Tower Hamlets, ex p. Begum [2005] EWCA Civ 340), it concluded that there had been no change in the facts of the case and that consequently it did not constitute an application for assistance within the meaning of Part VII : *'We are of the opinion that your current approach does not constitute a new homelessness application under section 183, but is in fact a repetitious claim as there are no new facts in support of a second application that were not known to us when the original decision was made. You have not obtained any settled accommodation nor has there been any supervening event to demonstrate that this approach differs from your previous application.'*

26. As to the medical information supplied, there was no evidence that the Claimant's mental health had a detrimental impact on her rational thinking or decision-making. The reason for her loss of accommodation in Middlesbrough was because she had voluntarily relinquished her right to the property. Further *'I am also satisfied that the accommodation was also reasonable for you to reside in as it was affordable, of adequate size and in a reasonable condition.'* The letter described that accommodation in the same terms as before; and concluded *'There was no indication that the property was unaffordable or unsuitable due to any disrepair or any other reason. Therefore I am satisfied that your accommodation at* [Parliament Road] *would have been reasonable, available and affordable for you to have continued to occupy had you not made the decision to voluntarily give up the property.'*

27. The letter also stated that the writer had considered the PSED, concluding: *'While I am satisfied that your health conditions (sinuses, chest pain and breast pain) does constitute as a disability under the Equality Act, there is no evidence that your conditions affected your ability to understand the consequences of your actions which led to the loss of your accommodation at* [Parliament Road]'.

28. In consequence of this letter the Claimant in January 2020 contacted solicitors (Haris Ali Solicitors) whose telephone number had been given to her by the Job Centre. The firm accepted her instructions to challenge the decision letter of 2.1.20, by way of an application for review.

Application for review: solicitors instructed; further report Dr Ketteley

29. For this purpose a further report dated 11.2.20 was obtained from Dr Ketteley. This stated that the news of her impending eviction had caused her mood to deteriorate and that there had been a *'re-emergence of suicidal thinking'*. The report continued: *'I think that the impending eviction is having an understandable negative impact on Dora's fragile mental health. I am concerned that she is being considered intentionally homeless from Middlesborough, as in light of her personal history of trauma it is obvious that she could not have remained in the property in Middlesborough and that having had to move once already due to racist attitudes, and then to have her private space intruded it is obvious that with her heightened experience of trauma and distress that she responded by fleeing from the area. I think that the question of intentionality could be challenged based on her own stress system and personal story, and that the option to flee may have been the only option available to her – and may well have been mediated by her stress system rather than it being a cognitive choice. I continue to recommend that the severity of her personal trauma, and her sense of shame and worthlessness are significant contributors to her poor mental health and that they make her more vulnerable than average when it comes to her housing. I would urge a reconsideration of the finding that she was intentionally homeless. She has not yet had a re-emergence of her severe depression with psychosis, but I anticipate that this may be a significant risk if she were to return to being street homeless'.*

30. The Claimant picked up the report from Dr Ketteley's office and took it the same day to the Defendant's offices, where a female member of staff took a photocopy, which she signed dated and kept, and handed back the original. It is not disputed that this document was received by the Defendant; nor that it never reached the housing file nor therefore the review officer. With the help of a member of staff at the interim accommodation this new report was scanned to the Claimant and then onto her new

solicitors Haris Ali on 24 February 2020. She duly relied on that firm to deal with the matter appropriately on her behalf. On the available evidence they did not do so.

Draft response 26.6.20

31. By an e-mail letter headed 'Minded to Find Notice' to Haris Ali dated 26.6.20, the Defendant's Review officer Mahlet Berhanu responded to the application. The letter states that was based on *'your submissions and the information on the housing file'* and that the officer intended to uphold the decision of 2.1.20.

32. The papers contain no copy of any submissions from Haris Ali. The 'Minded to Notice' of 26.6.20 says that the officer has taken into account *'your initial submissions'*; but then notes that *'you have not provided further submissions although the housing file was sent to you on 10 February 2020.'* At the present hearing it was suggested that the 'initial submissions' came from the previous advisers. At any rate, it appears that no submissions were received after the housing file was sent to Haris Ali on 10.2.20; and that *'Consequently, I have had no choice but to write the review based on the information available to me and the relevant information on your client's housing file'.*

33. As to the reasons for leaving the accommodation in Middlesbrough, the officer recorded the information on file that the Claimant had left home after her neighbour had entered her flat without permission and seen her naked; and that she did not feel safe in continuing to live at the accommodation *'as the area was frequented gang of youths'*. It noted the submission that the Claimant *'…is vulnerable as a result of the fact that she fled her previous settled accommodation due to the threat of violence and her mental health issues'* and the documents from her GP that she had a history of PTSD, depression and anxiety, for which she was on medication. It repeated the statement that the police were not of the opinion that remaining in her accommodation posed a risk.

34. The review officer continued *'Ms Ibrahim further stated that she did not feel safe in Middlesbrough due to gangs of youths however, again there was no indication she suffered any threat of violence or anti-social behaviour in Middlesbrough. In light of this I do not accept justifiable your reasons for why Ms Ibrahim left her accommodation was due to threats of violence'.* Further, *'I am satisfied that the accommodation was affordable, suitable and reasonable for Ms Ibrahim for her continuance occupation had she not relinquished her tenancy.'*

35. In answer to the question *'Was it reasonable for the applicant to continue to occupy the accommodation?',* the officer then referred to its facilities and affordability and concluded: *'For the reasons outlined above I am satisfied that the accommodation was reasonable for Ms Ibrahim to reside in. In the absence of any submissions from you or your client to the contrary, I am satisfied that the accommodation was not unreasonable on any other basis.'*

36. As to the PSED, the officer noted *'the medical letters on file and the GP letters you have provided as part of your submissions'*; acknowledged that her conditions constituted a disability under the Act; but concluded that she was capable of managing her affairs prior to leaving her accommodation. Accordingly *'Despite her mental health difficulties, I am satisfied she did understand that by leaving her home, she would be making herself homeless. Therefore, I am not satisfied that her condition affected her*

ability to understand the consequences of her actions which led to the loss of her accommodation at [Parliament Road]*'.*

37. In its final paragraph, the Notice stated that the officer would allow the solicitors or the Claimant to make any further representations in support of the case, to be supplied by 3.7.20.

The solicitors' response

38. The first response from the solicitors (Sophia Zaman) was an email on 21.7.20. This apologised for the delay in responding and stated that the firm was facing a backlog of work due to staff being on furlough and the rest working remotely; and requested an extension of time to submit final representations until 29.7.20. By response on the same date the review officer agreed to that extension.

39. By further email dated 29.7.20, Ms Zaman stated that the solicitors would be submitting their representations by the following day; and apologised for the delay stating that it was *'unavoidable due to a number of urgent matters to be dealt with'.*

40. On 18.8.20, no such representations having been received, the same Review officer sent a further 'minded to' Notice to Haris Ali, again by email. This was in essentially the same terms as the previous Notice of 26.6.20; and requested any further representations by 25 August. In the absence of a response or representations, the officer would conclude the review. No response was received.

41. The Claimant was not aware of either of these notices or the email exchanges. Her evidence is that she had great difficulties in contacting her assigned solicitor (Aishah Khan) throughout 2020; and that when she did make contact the solicitor complained that the housing officer had not responded to her emails or calls. She also had difficulty in speaking to her housing officer (Lucy) at the Defendant; and that when she did speak to her she said that she had not received any missed calls or emails from the solicitors.

Review decision 28.8.20

42. By email letter to the solicitors dated 28.8.20 the review officer duly sent a review decision in the same essential terms as the minded to notice. The decision concluded with the advice that the Claimant had the right to appeal the decision within 21 days of receipt of the letter *'if you believe my decision is wrong in law.'*

43. The Claimant did not receive a copy of the decision letter until its attachment to an email letter from Haris Ali dated 17.9.20. The email stated *'We write further to our telephone conversation earlier today, as you were unable to attend a scheduled meeting last week. As discussed the review has been completed by Westminster Council and they have refused this and upheld the decision that you have made yourself intentionally homeless. Please find attached a copy of the decision letter. You have the right to appeal to the County Court and as advised the deadline to file this is 18 September 2020. You can apply to the Court to extend this deadline if you wish to do so. We also explained that we are closing our housing department and are therefore unable to assist you any further with your matter. Please find attached a further letter in this regard.'* The attached letter of the same date referred to the telephone conversation earlier that day and stated *'As advised unfortunately we are closing our Housing department and are*

therefore unable to carry out any further work on a Legal Aid basis with immediate effect.' The letter advised that a list of local solicitors could be obtained via the Law Society website or Legal Aid Agency websites.

Instructions to Osbornes

44. As a result of assistance promptly sought from the Single Homeless Project and then from St Mungo's, and after further delays for which she was not responsible, the Claimant was ultimately put in contact with her current solicitors, Osbornes, who accepted instructions and opened their file on 15.10.20.

45. Having taken advice from Counsel experienced in this field, the solicitors advised the Claimant against an application to extend the time for making an appeal against the review decision letter of 28.8.20.

Osbornes letter 30.10.20

46. By letter to the Defendant dated 30.10.20, Osbornes made two alternative requests. First, to withdraw the decision of 28.8.20 and make a fresh review decision having considered further enclosed evidence; alternatively, to accept a fresh homelessness application again taking that evidence into account.

47. The letter referred to the Claimant's hand-delivery of Dr Ketteley's further report dated 11.2.20 and noted that the report did not appear to be in the housing file. It cited in particular its passage that *'in light of her personal history of trauma it is obvious that she could not have remained in the property in Middlesbrough'*. The letter stated that this was highly relevant evidence as to the Claimant's compromised capacity at the time of deciding whether to leave the accommodation and as to whether she acted in ignorance of a relevant fact and in good faith.

48. In support of the application for the review decision to be withdrawn, it submitted that this was a far more pragmatic option than both parties incurring significant costs at public expense to litigate an out of time s.204 appeal. In support of the alternative application, it submitted that the Defendant could only refuse to do so if the new application contained no new facts (or only new facts which were fanciful or trivial), citing Begum and R v Harrow LBC, ex p Fahia [1998] 1 WLR 1396, HL; and that Dr Ketteley's unconsidered report of 11.2.20 presented material facts which were new to the reviewing officer and highly relevant to the application.

Defendant's decision 3.11.20 on request to withdraw the review decision

49. By email dated 3.11.20 the review officer stated *'We will not be withdrawing the decision however, I have asked the casework team to respond to your request for a new application to be taken.'*

50. By pre-action Protocol letter to the Defendant dated 16.11.20 Osbornes advanced the alternative claims in similar terms.

Defendant's decision 17.11.20 on request to accept fresh application

51. By letter dated 17.11.20, the Defendant (by Mr Persaud) refused to accept that there was a new application. In particular he stated that *'Having considered your client's*

current personal circumstances we are satisfied there has not been any change in the facts of her case. Your client has not obtained any subsequent settled accommodation and there has not been any supervening event'. Following reference to Begum, the letter concluded: *'Bearing in mind the aforementioned case I have decided that your current homeless application is not a new one* [but] *a repetitious claim as the facts are identical to the first application. There are no new facts to demonstrate that your current application is different from your previous application.'* Accordingly the decision of 2.1.20 must stand.

52. In a further pre-action protocol letter dated 18.12.20 Osbornes returned to Dr Ketteley's further report of 11.2.20 and contended that it also contained new facts relating to the question of whether it was reasonable for the Claimant to continue to occupy the accommodation in Middlesbrough. Thus : *'The report challenges the Defendant's misconceived focus on whether the Claimant was objectively safe from imminent physical violence, instead focusing on the fact that, in light of the incident, the Claimant's continuing fears in relation to her safety and the way in which these impacted on her particular condition meant that it was no longer reasonable for her to continue to occupy the accommodation. The Defendant fails to consider this and instead focuses only on whether the Claimant was capable of managing her affairs at the time and whether there has been any changes to the Claimant's* 'current personal circumstances'. *It is irrational for the Defendant to conclude that the facts before it are identical to the first application.'* The letter continued that *'All the reports make it clear that the Claimant cannot and should not return to Middlesbrough as a result of what happened to her'* and cited passages from each of Dr Ketteley's reports.

53. Turning to the PSED, the Defendant had failed to undertake a proper assessment in that it had focused on whether the Claimant lacked capacity when she left the property, rather than whether it was reasonable for her to continue to occupy the premises due to the impact on her mental health. Citing authority, it had failed to apply the necessary 'sharp focus' as to whether, given her condition, she could remain in the property; nor given proper consideration as to whether she should be treated more favourably as a result of her mental health condition.

54. By email dated 22.12.20, the Defendant advised that its position on the 'new application' remained as set out in its letter of 17.11.20.

55. By pre-action protocol response letter dated 15.1.21 the Defendant stated that the challenge to the refusal to withdraw the review was not susceptible to judicial review, given the remedy by way of appeal under s.204. As to the alternative application, the alleged new application was based on 'exactly the same facts' as that which had been disposed of by the review decision of 28 August; and that *'She is not asserting any change in her situation since the review decision'*.

Ground 1: New application

The law

56. In Fahia, a case under the predecessor provisions of the Housing Act 1985, the House of Lords examined the following question under the heading 'Duty to enquire': *'The problem is this. When a local authority, having discharged their statutory duties in relation to one application for accommodation, then receive a second application from*

the same applicant, are they bound in all circumstances to go through the whole statutory enquiry procedure and provide interim accommodation or is there a "threshold test" which the second application must satisfy if it is to be treated as an application under the Act?' : per Lord Browne-Wilkinson at p.1401G-H.

57. The House held that an applicant who has been given temporary accommodation and is then found to be intentionally homeless *'... cannot then make a further application based on exactly the same facts as his earlier application.'* It is only in such a case that *'...it is possible to say that there is no application for the local authority and therefore the mandatory duty...has not arisen.'* In the instant case that the applicant had presented a new application, because *'It is impossible to say that there has been no relevant change in circumstances at all'* : p.1402C-E.

58. In Begum, the Court of Appeal stated the effect of the reasoning in Fahia as follows: *'The effect of the reasoning of the House of Lords in* Fahia *is that, at least under Pt 3 of the 1985 Act, on receipt of what purports to be an application, an authority are bound to make enquiries, if they have reason to believe that the applicant is or may be homeless, unless the purported application is shown to be no application. The only relevant basis upon which a purported subsequent application may be treated as no application, according to* Fahia*...appears to be where it is based on "exactly the same facts as [the] earlier application". That is a rather different formulation from the "material change of circumstances since the original decision"* applied in earlier decisions of the Court of Appeal : per Neuberger LJ at [39].

59. As to the correct approach by a local housing authority: *'... on receiving a subsequent purported application, an authority should compare the circumstances revealed by that application with the circumstances as they were known to the authority to have been at the date of the authority's decision (or their review, if there was one) on the earlier application, in order to determine whether the subsequent application is "no application"* [43]. Also, '*…it seems to me that it is not a misuse of language to judge the circumstances or "facts [of an] application" by reference to the actual facts when the earlier application concerned was determined (or reviewed), rather than the facts as they were alleged by the applicant on the date he or she made that application'* [44].

60. Further, *'...the circumstances of the subsequent application must, at least in the absence of unusual facts, be taken to be those revealed by the document by which the subsequent application was made…Accordingly, in order to check whether a subsequent purported application is based on "exactly the same facts" as an earlier application, the authority must compare the circumstances as they were at the time when the earlier application was disposed of (i.e. when it was decided or when the decision was reviewed) with those revealed in the document by which the subsequent application is made (and any other associated documentation).'* : [45-46].

61. Further, *'...there is no room to imply a further requirement which has to be satisfied, such as establishing a material change of circumstances since the refusal of an offer of accommodation pursuant to an earlier application, before the clear words of ss.183 and 184 can take effect. Any such application faces insuperable difficulties in light of the decision, but also the reasoning, in* Fahia*'* [50].

62. It was for an applicant to identify in the subsequent application the facts which are said to render the application different from the earlier application. The authority may or

should normally reject as incompetent an application which failed to do so [59]; likewise where the application purported to reveal new facts which are *'…to the authority's knowledge, and without further investigation, not new, fanciful or trivial… The facts may not be new because they were known to, and taken into account by, the authority when it offered the applicant accommodation to satisfy the earlier application'* [60].

63. Further, *'…one would expect it to be a relatively rare case where the facts of the two applications will be "exactly the same"'* : [53]. The Court saw the *'obvious force'* in the concern expressed in decisions before Fahia that a voluntary homeless person, with apparent priority need and entitled only to temporary accommodation, could effectively be housed indefinitely through the medium of successive applications. However *'…it seems likely that, at least in the great majority of cases involving successive applications, the time will come, often fairly soon, when one of the subsequent applications will be based on precisely the same facts as its immediate predecessor application, and will accordingly be treated as of no effect.'* : [57].

64. There is no dispute that the decisions in Fahia and Begum have equal application to the material provisions of Part VII of the 1996 Act.

65. In the first instance decision of R (Hoyte) v Lambeth LBC [2016] EWHC 1665 (Admin); [2016] H.L.R. 35, Ms Amanda Yip QC (as she then was), and following Begum at [44], stated that *'…the fact that material is before a decision maker does not necessarily mean that the facts claimed from it have been accepted to be the facts actually existing at the time the decision was made.*'[43]; and that *'…A person who is presented with evidence but rejects it cannot reasonably say "I knew that all along" when later presented with fresh evidence of the fact alleged.'* [44].

66. In Hoyte it was undisputed, and the judge accepted, that a decision that there was no new application could only be challenged on conventional judicial review of grounds: *'In order to quash the decision I would have to conclude that no reasonable authority acting rationally and properly directed in law could have concluded that the application was "exactly the same" as the previous one and so refused to process it'* [32]. On the facts, she held that the decision could not be upheld.

Claimant's submissions on ground 1

67. In support of his submission that the Claimant has presented a new application to the Defendant, Mr Fitzpatrick places his focus on two interrelated matters. First, the further report of Dr Ketteley dated 11.2.20. Secondly, the necessary ingredient of a finding of intentional homelessness that the accommodation which the applicant has ceased to occupy *'…would have been reasonable for him to continue to occupy.'*

68. As is undisputed, Dr Ketteley's further report was personally delivered by the Claimant to the Defendant but for some reason did not reach the housing file and was in consequence not taken into consideration by the review officer.

69. The report provided updated information from the Claimant's treating Consultant Psychiatrist about her mental health; and as to decision to leave the accommodation at Parliament Road gave expert evidence which was directly relevant to the question of

whether it would have been reasonable for her to stay there. This was described by both Counsel as the issue of 'subjective reasonableness'.

70. Mr Fitzpatrick accepted that the point, about the effect of the underlying events in the Congo and the triggering episode with the neighbour in Middlesbrough on the decision to leave, had been made in Dr Ketteley's report of 6.2.18 : *'Her PTSD has worsened in the last 6 months following the incidents of harassment and invasion of her property by a man whilst living in Middlesbrough. This reminded her so greatly of her original trauma in Congo that she was unable to stay in her new flat and fled to London to stay on the floor of the only other person that she knew in the UK'.* However the updated report of 11.2.20 had expressed it in the clearest terms to date. That report clearly 'crossed the line' of providing new facts. It should have been taken into account in the review decision of 28.8.20, but was not. Nor was there any difference between a case where new facts were supplied to the authority after the decision was made and the present case where they had been supplied before the decision but for some reason had not reached the housing file nor therefore the review officer.

71. The whole point about the medical evidence as it bore on the Claimant's decision to leave should have been 'front and centre' in the Defendant's consideration of the application; and in particular on the issue of whether it would have been reasonable for the Claimant to continue to occupy the accommodation. On the assumption that the reference in the decision letter to *'the medical letters on file and the GP letters'* included the previous reports of Dr Ketteley, they were treated by the review officer as being relevant only to the issues of whether the Claimant had understood the consequences of her actions in leaving the accommodation and had lost her accommodation as a result of her deliberate act.

72. By contrast, no account was taken of Dr Ketteley's evidence when considering the question of whether it was reasonable for the Claimant to continue to occupy the accommodation. The review officer had answered that question in two ways. First, in her conclusion that there was no indication she suffered any threat of violence or antisocial behaviour in Middlesbrough. Secondly, in her finding that the self-contained flat was '*affordable, suitable and reasonable for her continuance occupation'*; and that in consequence *'I am satisfied that the accommodation was reasonable for Ms Ibrahim to reside in'.*

73. The first consideration reflected only the provisions of s.177 and the specific statutory question of whether it was probable that continued occupation would lead to domestic violence or other violence against her. That section identified but one circumstance in which it would not be reasonable for a person to continue to occupy accommodation. It did not touch on the distinct question as to whether it would have been reasonable for the Claimant to continue occupation in the circumstances identified in the narrative of underlying trauma and triggering event and the associated opinion of Dr Ketteley. The second consideration reflected only the description of the accommodation and its suitability and affordability.

74. Mr Fitzpatrick acknowledged that those who had previously represented or assisted the Claimant had not made submissions as to the relevance of Dr Ketteley's evidence in this respect. Indeed the solicitors Haris Ali appeared to have made no submissions at all. However it should have been considered by the authority as an 'obvious matter' in the decision-making process: cf. Cramp v. Hastings BC [2005] H.L.R. 48, CA at [14]:

'Given the full-scale nature of the review, a court whose powers are limited to considering points of law should now be even more hesitant than the High Court was encouraged to be at the time of Ex p. Bayani *if the appellant's ground of appeal relates to a matter which the reviewing officer was never invited to consider, and which was not an obvious matter he should have considered.'*

75. He also emphasised the importance to be attached to the opinion of a treating specialist, citing e.g. Guiste v. Lambeth LBC [2019] EWCA Civ 1758; [2020] H.L.R. 12 at [64] : *'This evidence, from a distinguished consultant psychiatrist, and directed to the key legal point in issue, could not in my view be disregarded, and if the review officer was going to depart from it, I think it was necessary for her to provide a rational explanation of why she was doing so.'*

76. The decision in Hoyte was also applicable to this ground. The authority could not contend that the application contained new facts by relying on facts which it had implicitly rejected in the review decision of 28.8.20. In Hoyte, the first decision had implicitly rejected evidence from a clinical psychologist that the applicant was a suicide risk; and it was held that this rejected evidence could not be relied on so as to argue that a new application supported by further evidence of suicidal ideation was simply 'more of the same'. The situation was no different where, as here, the authority had taken no account of Dr Ketteley's evidence in the relevant context of subjective reasonableness to continue to occupy the accommodation.

77. The Defendant's refusal letter of 17.11.20 had continued with the same error. The letter cited one passage from Dr Ketteley's report (*'the option to flee may have been the only option available to her'*) but failed to cite the critical preceding statement that *'…in light of her personal history of trauma it is obvious that she could not have remained in the property in Middlesbrough…'*

78. Mr Fitzpatrick submitted that the challenge to a decision on whether there was a new fact was not confined to conventional grounds of judicial review. He pointed to Begum at [54] where the Court of Appeal had held the facts to be new without reference to tests of rationality or Wednesbury unreasonableness. In any event, there was no rational or reasonable basis for the Defendant to conclude that the further application was based on exactly the same facts as those which had been before it on the review of 28.8.20.

Defendant's submissions

79. In resisting the challenge on this ground, Mr Peacock accepted that when considering the specific issue in s.191 of whether it would have been reasonable to continue to occupy accommodation, everything was at large. The fact that there was no objective risk of violence was not conclusive; and subjective circumstances may mean that it is not reasonable to continue to occupy.

80. As to the history of the authority's approach to the evidence from the police, he accepted that the first decision dated 5.8.18 had made an apparent error in treating the neighbour's account as if it had been accepted by the police. Although that error had continued in one part of the review decision dated 19.11.18, it had been at least partially cured by a passage which stated *'Additionally, I also do acknowledge that Ms Ibrahim's account of events may be equally reliable as the police's.'*

81. Furthermore that same review had taken account of the subjective element in the Claimant's stated fear (*'Additionally, you also state that the intrusion of Ms Ibrahim's neighbour, even if she was objectively wrong in assessing its intent, was highly traumatic and frightening for her'*); and had carried this forward to the section headed 'Traumatic experiences', concluding *'Whilst I do sympathise with Ms Ibrahim's past traumatic experiences, I am not satisfied that it justifies her decision to leave her accommodation'*; and *'I am also satisfied that despite her health problems, the accommodation was reasonable for Ms Ibrahim to continue to occupy'*. Thus it was wrong to say that the point was completely ignored.

82. Mr Peacock accepted that there was no equivalent in the second review process, i.e. there was no discussion of the 'subjective reasonableness' point in the review letter of 28.8.20. However that review had to be considered in the context of what had gone before, including the lack of response to the 'minded to' letters.

83. As to the failure of those advising and assisting the Claimant to raise the point of 'subjective reasonableness' expressly, he pointed to authority where the failure to raise a point had been a complete answer: Adesotu v. Lewisham LBC [2019] EWCA Civ 1405; [2019] H.L.R. 48. In that case the applicant had never alleged at the stage of the original decision or when seeking a review that she was a victim of unlawful discrimination on the grounds of disability. Mr Peacock acknowledged that the failure to raise a point was not universally a complete answer; but submitted that it was on the facts and history of this case.

84. Turning to the Defendant's 'Minded to' letter of 26.6.20, this correctly identified the relevant test : *'Was it reasonable for the applicant to continue to occupy the accommodation?'* He accepted that the answer to that question did not deal with subjective unreasonableness. In that section, it was confined to the facilities and affordability of the accommodation, but concluded *'In the absence of any submissions from you or your client to the contrary, I am satisfied that the accommodation was not unreasonable on any other basis'*. That offered the Claimant and her advisers the clearest opportunity to raise the point which was now made; but there was silence. Given the clarity of that invitation, the decision in Adesotu was comparable. There could be no complaint where there had been no response to that invitation, which was then repeated in the subsequent minded to letter of 18.8.20. The Review decision of 28.8.20 was then unsurprisingly in the same terms as the 'Minded to' letters.

85. Dr Ketteley's letters constituted evidence, but they were not presented in the context of the statutory provisions concerning whether it was reasonable to continue to occupy the accommodation.

86. Nor was the point 'obvious'. It had not been raised by the Notre Dame Refugee Centre or Haris Ali; and was not even raised by Osbornes in their letter of 30.10.20. On the contrary, having cited the relevant section of Dr Ketteley's report of 11.2.20, that letter focused solely on the issues of capacity and good faith. Nor was the point raised in the Pre-action protocol letter of 16.11.20. In these circumstances, it could not be described as an obvious point.

87. In consequence it was unsurprising that the Defendant's decision letter of 17.11.20, replying to Osbornes' letter of 30.10.20, responded only to the case as presented; and cited only that part of the report of 11.2.20 which was relevant to those issues. The issue

of subjective reasonableness only emerged in Osbornes' further pre-action protocol letter of 18.12.20.

88. Turning to the law, Mr Peacock agreed that on the face of it an applicant can make repeated applications provided that they do not offend the principles identified in Fahia, as more fully explained in Begum. However, on a proper analysis of those decisions, the true extent of the departure from the previously understood legal position was that the test had simply changed from the need to show a 'change of material circumstances' to 'a change of circumstances'. In effect, the word 'material' had been removed from the test.

89. This reflected the true ratio in Begum at [46], namely that *'…in order to check whether a subsequent purported application is based on "exactly the same facts" as an earlier application, the authority must compare the circumstances as they were at the time when the earlier application was disposed of (i.e. when it was decided or when the decision was reviewed) with those revealed in the document by which the subsequent application is made (and any other associated documentation).'* Thus the Court of Appeal treated 'exactly the same facts' (Fahia) as meaning 'no change of circumstances'. There had to be some change of circumstances between the final disposal of the original application and the new application, i.e. the new fact had to have occurred since the previous decision.

90. It followed that ground 1 must fail, because the Claimant did not assert any new facts or circumstance or event which had arisen since the original decision of 2.1.20.

91. As to that part of Begum which stated that the circumstances at the date of the original decision were *'as they were known to the authority'* ([43]), that was not part of the ratio which was contained only in [46]. In any event, Hoyte provided no assistance to the Claimant, as on the facts of that case a highly significant new event had occurred as between the date of the original decision and the new application, namely an ultimately thwarted plan to commit suicide which led to the further medical report about suicidal ideation. The deputy judge had described that as *'a new development in the form of events…and those events resulted in new evidence from those responsible for the claimant's primary healthcare'*; and had contrasted that with *'the drip feeding of evidence said to support the same facts originally alleged'* [51].

92. All of the reported cases of 'new facts' involved the occurrence of a new event between the original decision and the new application. Any other approach would leave the homelessness system open to abuse, by allowing applicants to add pieces of evidence so as to prolong the decision-making process and remain in interim accommodation; see the observations in Begum at [56]: *'The concern expressed by the courts in the cases before* Fahia*, namely, that a voluntarily homeless person, with apparent priority need, entitled only to temporary accommodation under s.188, can effectively be housed indefinitely through the medium of successive applications, has obvious force.'*

93. Thus in the event of discovery, after the original decision, of relevant new material which predated that decision, that would not constitute 'new facts'. In such a case the applicant would have to apply to a different local housing authority. Mr Peacock acknowledged that this might result in the authority referring the application to the original authority pursuant to the referral provisions in s.198, i.e. '*…the kind of roundabout applications…where the disappointed applicant simply goes to the*

neighbouring housing authority with the result that, if successful, the matter is referred back to the first authority': R. (C) v. Lewisham LBC [2003] EWCA Civ 927; [2004] H.L.R. 4 at [59].

94. In any event, even if it was not necessary for the new fact or circumstance or event to postdate the original decision, there was still none in the present case. In particular, the statement by Dr Ketteley in the report of 11.2.20 ('*in light of her personal history of trauma it is obvious that she could not have remained in the property in Middlesbrough*') went no further than the statement in her report of 6.2.18 that the incidents in Middlesbrough *'…reminded her so greatly of her original trauma in Congo that she was unable to stay in her new flat and fled to London to stay on the floor of the only other person that she knew in the UK.'* That evidence had been implicitly rejected; and that contained in the report of 11.2.20 was simply repetitious. Where alleged facts had been considered and rejected, there could not be a 'rolling situation' whereby further evidence on the same point, e.g. another letter from a GP or a neighbour, could trigger a 'new' application. The process would never end. There had to be finality.

95. The decision letter of 17.11.20 had engaged with the significance of the new report in a rational way. The criticism that it did not deal with the issue of 'subjective reasonableness' was defeated by the fact that the point had not been raised even at that stage.

96. As to the test for challenge to an authority's decision on whether it was a new application, it was necessary to show irrationality or Wednesbury unreasonableness; as Hoyte confirmed. However Mr Peacock acknowledged that the less evaluative the decision, the easier to satisfy the test.

Conclusion on ground 1

97. I am fully persuaded that the Council's decision of 17.11.20 is wrong and cannot stand.

98. First, I do not accept Mr Peacock's submission that a new application is dependent on the occurrence of a new fact or circumstance or event which postdates the original decision. In my judgment the reasoning of the House of Lords in Fahia provides no basis for that contention, nor did the Court of Appeal in Begum so find. I do not accept that the effect of Fahia was simply to remove the word 'material' from the previously understood test of 'change of material circumstances'; that the ratio of Begum is confined to [46]; or that its use of the phrase 'compare the circumstances' has that effect. Whilst no doubt it will typically be the case that the new fact or circumstance postdates the original decision, I can see neither authority or reason to exclude a relevant new fact or circumstance which does not postdate the original decision; not least, as here, where the relevant material has been supplied to the authority but by some error has not been placed before the review officer. On a proper reading of Fahia and Begum, there simply has to be a comparison between the facts and circumstances known to the authority at the date of the original decision and those identified in the purported new application.

99. Secondly, I do not accept that this construction is undermined by the proper concern that the local housing authority must be protected against applicants who seek to secure permanent temporary accommodation by a continuing cycle of repetitious applications supported by additional pieces of evidence. In such cases, the authority would be

entitled to reject such applications as abusive. In the present case there is no question of any abuse of the system by this Claimant.

100. Thirdly, I do not accept that the failure of those advising and assisting the Claimant to identify and make submissions to the authority on the issue of subjective reasonableness should be a bar in the present case. I consider that this was an obvious point for the authority to consider as part of its duty of enquiry and in the light of the evidence supplied; and notwithstanding that the point was also repeatedly missed by those advising the Claimant. Everyday experience demonstrates that the obvious is missed from time to time. As Mr Peacock rightly acknowledges. the decision in Adesotu does not hold that an applicant for judicial review of a decision on homelessness is in all circumstances unable to advance an argument that was not raised before the authority. The issue in that case was very different.

101. In my judgment the history of this application as it applies to the ingredient of whether it would have been reasonable for the Claimant to continue to occupy the accommodation demonstrated an undue and exclusive focus on (i) the nature of the facilities provided by the accommodation and its affordability and (ii) the specific statutory factor in s.177 concerning potential domestic or other violence against the applicant. By contrast, no consideration was given to the evidence of the Claimant's history of trauma and associated mental state as bore directly on the issue of whether it was reasonable for her to continue to occupy the accommodation in Middlesborough. On the most benevolent interpretation, the review decision cannot be read as if that point was implicitly considered and rejected. Whilst I have considerable sympathy for hard-pressed review officers in situations where submissions have been sought but not provided, in my judgment this was a case where the point stood out for consideration in any event.

102. Fourthly, the failure to consider that issue is highly material to the question of whether or not the new application is based on identical facts to those which were the subject of the review decision of 28.8.80. The significance of facts depends on the purpose for which they are considered. True it is that the material before the review officer included Dr Ketteley's report of 6.2.18 and its statement that the incidents in Middlesbrough *'…reminded her so greatly of her original trauma in Congo that she was unable to stay in her flat.'* However the review officer did not consider that evidence as it related to the issue of 'subjective reasonableness'. It formed no part of the reasoning and decision; and accordingly should be disregarded when the comparison is made between the original and the 'new' application.

103. Fifthly, and in any event, I agree with Mr Fitzpatrick that Dr Ketteley's updated report of 11.2.20 made the point in terms of particular clarity and force. Indeed its language goes beyond the terms of the report of 6.2.18, in that it is clearly expressed as an opinion, in strong terms, linking the triggering of the personal history of trauma so that *'that she could not have remained in the property in Middlesbrough'.*

104. Sixthly, as to the test for intervention by the Court, I proceed on the basis that it is necessary to establish conventional grounds for judicial review, but that this is easier to satisfy in the case of a decision such as this which depends on a comparison of the facts and circumstances in the original decision and the subsequent application. In my judgment it is clear that no reasonable authority could have concluded that this was not a new application.

105. I reach this conclusion independently of the PSED. However, for the reasons given under Ground 4 below, I consider that there was a failure to apply the necessary 'sharp focus' to the Claimant's mental disability as it bore on the reasons for her decision to leave the accommodation.

106. In these circumstances, grounds 2 and 3 must fall away; for if the Council must consider a new application in accordance with its statutory duty, there can no basis to require further extra-statutory review of the original decision. However having received full argument I will deal with it shortly.

Grounds 2 and 3

107. Here the Claimant contends that the Council by its decision of 3.11.20 irrationally and/or unreasonably exercised its discretion to refuse the application to withdraw the review decision and reconsider the matter.

108. By s.202(2) there is no right to request a review of the decision reached on an earlier review. That express exclusion of a right to request a review does not preclude the authority from extra-statutory reconsideration of the decision if it is minded to do so : see R v. Westminster City Council, ex p. Ellioua 31 H.L.R. 440, CA per Judge LJ at 444. However in that case the challenge by way of judicial review was refused on the basis of the available statutory remedy of appeal to the County Court on a point of law against the review (s.204). At that time (1997) the statute contained no power to extend the 21 day limit for appeal.

109. In the first instance decision of R (Van der Stolk) v. LB Camden [2002] EWHC 1261 (Admin) the authority's refusal to undertake an extra-statutory reconsideration of a review decision was successfully challenged on the particular facts. However it appears that the court was not cited the decision in Ellioua.

110. In R. (C) v. Lewisham LBC the Court of Appeal stated that: *'…a housing authority is not bound to entertain a succession of applications for review or for extensions of time for review given that Parliament has circumscribed the applicant's right to seek them. The scheme envisages only one review, or, if the 21-day time limit has expired, one application to extend time for review. That is not to say that a local authority may not choose as a matter of their discretion to entertain such a request for a further review or a further extension of time. This may be granted for sound pragmatic policy reasons to prevent the kind of roundabout applications to which Mr Luba referred, where the disappointed applicant simply goes to the neighbouring housing authority with the result that, if successful, the matter is referred back to the first authority. The authority may choose to reconsider matters of fact or new matters of fact which would lie outside the scope of an appeal to the County Court. These are, however, decisions of good housing management and this extra-statutory discretion of the local housing authority is likely to be held to be close to being absolute'*: [59].

111. In Bubb v. Wandsworth LBC [2011] EWCA Civ 1285; [2012] H.L.R. 13 the Court of Appeal reaffirmed that the jurisdiction of the County Court on a s.204 appeal on 'any point of law' was a jurisdiction in substance the same as that of the High Court in judicial review. Accordingly an appeal could be brought on grounds which included that there was *'…no evidence to support factual findings made or they are plainly untenable or… if the decision-maker is shown to have misunderstood or been ignorant*

of an established and relevant fact' (citing Begum (Runa) v Tower Hamlets LBC [2003] UKHL 5; [2003] 2 A.C. 430 per Lord Bingham at [7].

112. Mr Fitzpatrick explained that the Claimant had been advised by specialist Counsel against making an application under s.204(2A) to bring an appeal out of time against the review decision of 28.8.20. As to the substance of an appeal if permission to appeal out of time had been granted, he accepted that it was at least arguable that the points raised by way of judicial review could have been raised.

113. Whilst acknowledging that the authorities identified only a very limited scope for challenge by judicial review to the decision of the housing authority not to carry out a non-statutory further review, he submitted that this was a truly exceptional case where the jurisdiction should be exercised. In particular he relied on (i) the failure of the Council to consider the issue of subjective reasonableness or the evidence of Dr Ketteley as bore directly on that point; and (ii) the conduct of the Claimant's previous solicitors in (a) failing to present any submissions to the Council, notwithstanding repeated invitations to do so and (b) notifying her of the review decision and providing her with a copy of the decision letter on the day before the expiry of the primary period for lodging an appeal and at the same time advising her that their housing law department was closing with immediate effect. In any event, the remedy of appeal was not an absolute bar to judicial review; as was observed in C v. Lewisham, judicial review in Ellioua was held to be inappropriate *'*[o]n *the facts of that case'* [57]. He submits that the factors in the Claimant's case were more exceptional than those which persuaded the Court to intervene in Van der Stolk.

Conclusion on grounds 2 and 3

114. As Mr Peacock rightly accepted, the authorities do not go so far as to hold that such decisions are not justiciable. However they make clear that it will require a truly exceptional case for intervention by judicial review.

115. For the reasons essentially advanced by Mr Peacock I do not consider that there would have been sufficient basis to grant relief in respect of the Defendant's refusal to undertake an extra-statutory further review.

116. First, if I had concluded that there were no new facts to place before the authority, I do not consider that the Claimant could be placed in a better position through the exercise of this very limited jurisdiction.

117. Secondly, the essential remedy for a challenge to a review is provided by the provisions for appeal under s.204; and these now include provision for the grant of permission to appeal outside the strict time limit. The Court of Appeal has made clear that the requirement of a 'good reason' for the failure to appeal within time is a straightforward statutory test to which no gloss is or should be applied: Tower Hamlets LBC v. Al Ahmed [2020] EWCA Civ 51; [2020] 1 WLR 1546.

118. I acknowledge of course that the Claimant had, through no fault of her own, no opportunity to lodge an appeal in time; and that she then received advice from specialist Counsel against applying for permission to appeal out of time. There has quite properly been no waiver of privilege as to the reasons for that advice. However, without such reasons and in any event, I am not persuaded that the alternative remedy by way of

appeal can be disregarded as an objection to intervention by way of judicial review in this case. In my judgment this applies equally to the complaint of breach of the PSED, which could equally be raised on an appeal.

Ground 4 : PSED

119. This free-standing ground is that the Defendant's refusal decisions of 3.11.20 and 17.11.20 each failed to recognise that the review decision of 28.8.20 had in breach of its PSED failed to consider the impact on the Claimant's mental health of having to stay at the accommodation in Middlesbrough, and for that purpose to consider the psychiatric evidence of Dr Ketteley; and thus in turn the refusal decisions of November 2020 were each in breach of its PSED.

120. Section 149 of the Equality Act 2010 provides as material:

'(1) A public authority must, in the exercise of its functions, have due regard to the need to – (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

…(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to – (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;…

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

…(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are – …disability…'

121. Following Hotak v. Southwark LBC [2015] UKSC 30; [2015] H.L.R. 23 and other decisions, the Court of Appeal in Hackney LBC v. Haque [2017] EWCA Civ 4; [2017] H.L.R. 14, identified the relevant underlying principles of the PSED as: (i) its aim is to bring equality issues into the mainstream, so that they become an essential element in public decision-making; (ii) the duty is a matter of substance rather than form. It requires the decision-maker to be aware of the duty to have due regard to the relevant matters. The duty must be exercised in substance, with rigour and with an open mind. It is not a question of ticking boxes; (iii) the concept of 'due regard' is to be distinguished from a requirement to give the PSED considerations specific weight. It is not a duty to achieve a particular result : [21]-[23]. Hotak had referred to the need to *'focus very sharply'* on the questions of the existence, extent and effect of the alleged protected characteristic on the relevant issues in the homelessness application ([78]). In

Hotak, the issue was as to vulnerability and priority need (s.189); in Haque the issue was the suitability of the applicant's offered accommodation.

122. In the Claimant's case there is no dispute that the Claimant has the protected characteristic of disability by reason of her mental condition. Mr Fitzpatrick submits that in consequence the PSED has at all stages required the necessary 'sharp focus' as to the effect of her disability on any relevant aspect of the application. Further, as s.149(6) provides, the duty can mean that an applicant with a protected characteristic should in some circumstances be treated more favourably than an applicant who does not have a protected characteristic.

123. He submits that the PSED assessment in the review decision of 28.8.20 failed to apply that necessary sharp focus to the question of whether or not it would have been reasonable for her to continue to occupy the accommodation having regard to the likely adverse effect on her mental health if she were to stay there. The duty equally applied to those considering the alternative applications presented on 30.10.20. In each case the identified question was simply not addressed. The principle that the PSED is a matter of substance not form only serves to strengthen the Claimant's argument.

124. Mr Peacock submits that the review officer had considered the Claimant's mental health problems to the extent relevant to the issues on the review; and had thus complied with the PSED; likewise the review officer who refused to withdraw the review decision and the decision maker who refused to accept a fresh application. For those decisions in November 2020, the decision-makers inevitably focused on the Claimant's mental health; and did so in the context of the issues which were identified by Osbornes on behalf of the Claimant, namely her capacity and good faith. In any event these were matters which could have been raised on an appeal.

Conclusion on ground 4

125. In my judgment, the PSED did as a matter of substance require each of the relevant decision-makers to maintain a sharp focus on the Claimant's mental health and consequent protected characteristic of disability as it affected the question of whether it would have been reasonable for her to remain at the accommodation; and in particular on the sub-issue of subjective reasonableness.

126. For essentially the same reasons as have led to my conclusion that this was an obvious matter to consider at each stage, I conclude that there was a breach of PSED in this respect; and notwithstanding that the point was not expressly raised in submissions by or on behalf of the Claimant.

127. However in my judgment this takes the claim no further. As I have held under ground 1, the Claimant has in any event presented a new application under Part VII which the Defendant must consider. As I have held under grounds 2 and 3, breach of PSED is a point to raise on appeal and provides no independent reason for the Court to grant relief in respect of the refusal to undertake an extra-statutory further review.

Conclusion

128. I conclude that the Defendant's letter of 17.11.20 was wrong in its refusal to treat the further application as a new application. I will hear Counsel on the appropriate form of order.