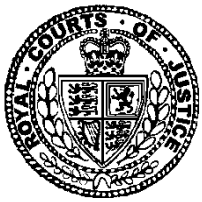

Neutral Citation Number: [2021] EWHC 739 (Admin)

Case No: CO/889/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 March 2021

Before :

MATHEW GULLICK QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

THE QUEEN (on the application of RUBA IMAM)	**Claimant**
- and -	
THE LONDON BOROUGH OF CROYDON	**Defendant**

- -
- -

Sarah Steinhardt (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Kelvin Rutledge QC (instructed by **Browne Jacobson LLP**) for the **Defendant**

Hearing date: 6 October 2020

- -

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:30 am on Friday 26 March 2021.

Approved Judgment

Deputy Judge Mathew Gullick QC:

Introduction

1. This is a claim for judicial review in respect of the Defendant's failure to provide suitable accommodation for the Claimant pursuant to its duty under section 193(2) of the Housing Act 1996 ("the 1996 Act"). The Defendant admits that it is in breach of its statutory duty because the accommodation that it is presently providing to her is not suitable. The issue between the parties in relation to breach of statutory duty is as to the relief which should be granted to the Claimant: she contends that a mandatory order should now be made requiring the Defendant to provide suitable accommodation to her. The Claimant also raises other challenges, including alleged breaches of the Equality Act 2010 ("the Equality Act") and an allegation of unlawfully failing to determine the Claimant's request to be given Band 1 priority under the Defendant's housing allocation scheme.

2. The hearing of the Claim took place by way of video-conferencing using the Microsoft Teams platform, under the arrangements adopted in consequence of the COVID-19 pandemic. I am very grateful to both Counsel for the assistance provided to me in their skeleton arguments and at the hearing in relation to all the issues which I have to determine. The written and oral arguments on Ground 1 were of a particularly high standard. I have considered all the evidence and arguments put before me when reaching my conclusions, although I will only refer in this judgment to those matters which are necessary for me to reach my decision.

Background

3. The Claimant is a wheelchair user and is disabled within the meaning of section 6 of the Equality Act. In February 2014, she applied to the Defendant for accommodation to be provided to her. The Claimant is a single mother who has for the last six years (i.e. since October 2014) lived with her three children in a property in Croydon, which was allocated to her by the Defendant as temporary accommodation under Part 7 of the 1996 Act ("the Property"); before that, the Defendant had accommodated the Claimant in 'bed and breakfast' accommodation. The Claimant's partner also moved into the Property in around March 2019. The Claimant is on the waiting list for permanent accommodation to be provided to her by the Defendant under Part 6 of the 1996 Act. She has been given priority under the Defendant's housing allocation scheme, being placed in priority Band 3.

4. The Property is a terraced house with a large garden, although the garden is not wheelchair-accessible and the family's use of the garden is therefore limited. No issue has been raised regarding the location of the Property, in terms of its suitability for access to services such as public transport and schools. The Property has been the subject of certain adaptations. There are three bedrooms on the upper floor, one of which (the Claimant's) is partly filled by a large lift which also takes up much of the living room below it and which enables the Claimant to travel between the ground floor and the upper floor. The only bathroom at the Property is on the ground floor; it has been adapted into a 'wet room' with a toilet.

5. The Defendant's initial disability housing assessment, conducted in February 2014, noted that the Claimant was a full-time wheelchair user and recommended

accommodation with a number of features including a single level property or one that had a through-floor lift, an adapted kitchen and a wheelchair-accessible bathroom that was on the same level as the bedrooms (and, if the property was on more than one level, a further wheelchair-accessible downstairs toilet).

6. The Claimant viewed the Property in September 2014 and accepted the Defendant's offer to accommodate her at the Property. When the Claimant moved into the Property she was wheelchair bound and was unable to walk; a previous medical report on the Claimant's housing file had indicated that she did have limited mobility and could use walking sticks. Soon after the Claimant accepted the offer of the Property as alternative temporary accommodation, she requested (through her Solicitors, Deighton Pierce Glynn, who have represented her throughout) a statutory review of its suitability. Detailed submissions on the suitability of the Property were made by the Claimant's Solicitors on 21 November 2014. They contended that:

    i) The Property had not been sufficiently adapted for a wheelchair user. The kitchen cupboards were too high for the Claimant to reach, the windows were too high for her to open and the bathroom had not been fully adapted.

    ii) The lift that occupied much of the Claimant's bedroom and the living room on the ground floor (as well as the furniture in the living room) meant that the space available for her to manoeuvre around was insufficient. It was also not possible for the Claimant to move in and out of all three bedrooms in her wheelchair, or to turn her wheelchair in any of them, which was not desirable as she had young children.

    iii) The Claimant required a level access property. However, in default of that she asked the Defendant to consider adaptations to the kitchen and the reconfiguration of the lift at the Property.

7. In February 2015, the Property was assessed by an Occupational Therapist as part of the Defendant's review. The Occupational Therapist, who visited the Property and spoke to the Claimant, noted that the Claimant had told her that the Property was much better than being in 'bed and breakfast' accommodation and that the Claimant was happy to remain in it temporarily. In her report, she raised concerns about the Claimant being unable to reach the kitchen cupboards and slipping from the shower seat in the bathroom. It was also noted that the Claimant was unable to access the garden via the back door, due to the layout of the kitchen (although the Claimant did not wish to have a particular kitchen cupboard removed, which might have improved access to the back door) and that there was no upstairs toilet. The Occupational Therapist considered that the Property, although "not ideal" in meeting all the recommendations made in the Defendant's initial disability housing assessment, was "sufficient in the short term… until a more suitable property can be found."

8. The Defendant wrote to the Claimant's Solicitors on 24 February 2015, stating that it was minded to decide that the Property remained suitable and giving its proposed reasons. The Defendant gave the Claimant an opportunity to comment on the proposed findings. On 23 April 2015, the Claimant's Solicitors responded. In that letter they raised an additional argument as to why the Property was not suitable, which was that there was no upstairs toilet and that the Claimant, due to difficulties with continence, was unable to reach the ground floor toilet, located in the bathroom,

in time during the night. It was stated that the Claimant had experienced accidents, on an unspecified number of occasions, which she had found humiliating and distressing.

9. On 5 June 2015, the Defendant accepted that the Property was not suitable accommodation. The sole reason given for this decision by the Defendant was that the only bathroom at the Property was on a different floor from the Claimant's bedroom, which was contrary to one of the requirements that had been specified in the initial disability assessment that had been undertaken in February 2014. None of the other arguments raised by the Claimant's Solicitors were addressed in the Defendant's decision letter, although it is right to point out that they had been addressed in some detail (and rejected) in the Defendant's earlier 'minded to' letter of 24 February 2015. I accordingly infer that the sole and decisive reason for the Defendant's finding that the Property was not suitable accommodation was the issue of the location of the bathroom. The Defendant's letter of 5 June 2015 stated:

> "In view of this, the Council will make another offer of accommodation.
>
> Your client will be contacted once alternative, suitable accommodation has been identified…"

10. On 8 June, the Claimant's Solicitors asked whether the Claimant needed to take any action following the review decision, or whether she would be contacted by the Defendant; the Defendant's response on 10 June was that the Claimant would be contacted directly once suitable accommodation was available. There was apparently some delay in commencing the search for such accommodation during the latter part of 2015 when the Defendant was awaiting a report from its medical adviser. On 23 December 2015, the Defendant wrote to the Claimant stating that the report had been received and that it was "actively trying to source accommodation for the [Claimant's] family".

11. On 7 March 2016, the Claimant's Solicitors wrote to the Defendant stating that no offer of suitable accommodation had been made and asking the Defendant to confirm the steps it had taken to find such accommodation for the Claimant. The Defendant did not respond to that letter; however, the Defendant did then offer the Property to the Claimant as permanent accommodation. The Claimant's Solicitors wrote to the Defendant on 28 June 2016 to ask whether this offer of the Property had been made in error given it had already been found to be unsuitable and noting that no response had been received to their letter of 7 March. Despite the terms of this letter, in August 2016 the Defendant again offered the Claimant a five-year tenancy of the Property. The Claimant's Solicitors wrote to the Defendant again stating that the Property had already been determined to be unsuitable for the Claimant and requesting a response to their letters of 7 March and 28 June. On 19 September 2016, the Claimant's Solicitors sent a Pre-Action Protocol letter to the Defendant noting that their previous letters had still not been responded to and setting out a proposed judicial review claim for breach of statutory duty.

12. On 23 September 2016, the Defendant responded to the Pre-Action Protocol letter. The Defendant noted that certain recommendations had been made by its medical adviser regarding the accommodation which would be suitable for the Claimant,

including in relation to the location of the toilet and bathroom, the specification of the kitchen and the width of doors and corridors, and that it was:

> "… not possible to establish on [sic] how long it will be before a suitable offer is made to [the Claimant]. It is not a matter of just placing [the Claimant] into alternative accommodation, it is a matter of making sure that the right accommodation is provided for [the Claimant's] needs. Therefore all offers of accommodation will need to go via the [Occupational Therapist] in order for them to assess whether or not it is a suitable offer, whether this is social or private rented accommodation."

The Defendant went on to state that the Claimant's case was being considered by its Allocations team in relation to potential social housing and by its Housing Initiatives team in relation to possible accommodation in the private sector. The letter concluded as follows:

> "I have today resent a change of TA (Temporary Accommodation) request over to our temporary accommodation team so that they can continue to see if they can assist [the Claimant] and her family in accommodating them in accommodation which will be more suited to her needs. Our Emergency Accommodation team's process is to deal with cases requiring TA which are then placed in 'a waiting list' in line with when the request was received. For those cases already in TA, they are placed on a separate list highlighting why there is a need for a change of TA, for example at risk of violence / need smaller/larger property, need adaptations etc. When a property becomes available, dependent in [sic] the size etc., their list is checked and where a suitable match is found, the property is allocated. Priority is given to those at risk of harm in their accommodation, those whose accommodation is impacting on their health and cases that require adapted accommodation. As this type of accommodation is incredibly scarce, it is difficult to give timeframes on how long an adapted accommodation will take to become available."

13. The Claimant did not proceed with her proposed judicial review claim. In January 2017, the Claimant was offered another property owned by the Defendant, but this was deemed to be unsuitable. On 16 November 2017, the Defendant again offered the Claimant a five-year tenancy of the Property. The Claimant's Solicitors wrote to the Defendant on 22 November, again reminding the Defendant that the Property had already been determined to be unsuitable for the Claimant. They stated:

> "We had understood from your letter of 22nd of September 2016 that you were seeking assistance from your Allocations team and the Housing Initiatives team and were in the process of searching for alternative accommodation for our client.

> Based on this assurance no further action was taken in respect of the proposed challenge.
>
> We are disappointed that we have not heard further from you with confirmation of the efforts made, and are concerned that notwithstanding your assurances that efforts would be made to identify suitable accommodation, these have not been forthcoming."

The letter concluded with a request under the Data Protection Act that the Defendant's file on the Claimant's application for rehousing should be provided to the Claimant.

14. On 21 December 2018, the Claimant's Solicitors wrote to the Defendant to request either:

    i) adaptation of the Property to make it suitable for the Claimant;

    ii) the provision of other suitable accommodation;

    iii) placing the Claimant in the highest priority Band 1 of the Defendant's housing allocation scheme (the Claimant having previously been placed in Band 3).

    The Claimant's Solicitors noted that the Defendant had given assurances over the previous three years that the Claimant would be allocated suitable accommodation but they had not resulted in any offers and that the Defendant remained in breach of its duty to the Claimant. They also contended that the Defendant was in breach of sections 19 and 21 of the Equality Act, which respectively prohibit indirect discrimination and require reasonable adjustments to be made for disabled persons in certain circumstances.

15. On 2 April 2019, the Claimant's Solicitors wrote to the Defendant noting that no response to their letter of 21 December 2018 had been received. They requested a response by 16 April 2019, failing which they would send a further formal pre-action letter.

16. On 7 November 2019, the Claimant's Solicitors sent a second Pre-Action Protocol letter to the Defendant in which they raised a challenge to the Defendant's continuing breach of duty under section 193(2) of the 1996 Act and also an alleged failure by the Defendant to comply with the provisions of sections 15, 19, 29 and 149 of the Equality Act.

17. On 14 January 2020, the Claimant's Solicitors wrote to the Defendant noting that they had not received a response to their Pre-Action Protocol letter of 7 November 2019. An additional allegation of unlawfully failing to award the Claimant additional preference under section 166A(3) of the 1996 Act was raised. It was again contended that the Claimant should be placed in Band 1 of the Defendant's housing allocation scheme.

18. This Claim was filed on 5 March 2020. The Defendant instructed its Solicitors, Browne Jacobson, on 25 March, and filed an Acknowledgment of Service and

Summary Grounds of Defence. Permission to apply for judicial review was granted on the papers by John Howell QC, sitting as a Deputy High Court Judge, on 19 May 2020. Following the grant of permission, the Defendant filed Detailed Grounds of Defence and evidence.

19. In June 2020, Mr Simon Beasley, an experienced Housing Operations Manager employed by the Defendant, visited the Property to conduct an assessment of whether it could be adapted to meet the Claimant's needs. Mr Beasley considered that this was unlikely to be practicable due to the size and the boundaries of the Property, although his evidence (in his witness statement dated 31 July 2020) was that the Defendant was in the process of commissioning a study by an independent Occupational Therapist and that if positive recommendations were then made that a feasibility study would be carried out by a surveyor. The Defendant did not however provide any update on these matters either prior to or at the trial.

20. In the Defendant's Summary and Detailed Grounds of Defence, the Defendant stated that it intended to make a direct offer of a suitable property to the Claimant, in accordance with its applicable policy and its public law obligations to other applicants. The Claimant attended viewings of two further properties with Mr Beasley in June and July 2020, but neither property was suitable for the Claimant's particular needs; in one of them the kitchen and bathroom were both too small and in the other it was not possible to install a through-floor lift.

21. Finally, I refer to the witness evidence that was relied on by both parties. No witness statement, whether from the Claimant herself or anyone else, was filed with the Claim Form. Following the filing of the Detailed Grounds of Defence and the Defendant's evidence, the Claimant filed a witness statement dated 16 September 2020 "in order to deal with issues raised in the Defendant's evidence" (as it was put by her Solicitors in the Application Notice). This was the only direct evidence from the Claimant herself. The statement is brief, running to five paragraphs over two A4 pages. In it, the Claimant disputes two issues raised in the Defendant's evidence, filed with the Detailed Grounds of Defence, regarding being given information about the bidding process for properties and the amount of furniture that is in her living room at the Property. The only reference to the suitability of the Property is in the final paragraph, where the Claimant states:

> "I was offered two properties but neither was suitable, and which I understand the Housing department accepted. The Housing department have also accepted that the accommodation which I currently occupy is unsuitable for me."

22. The Defendant relies on the witness statement dated 31 July 2020 made by Mr Beasley, to which I have already made reference. The statement ran to 135 paragraphs and dealt with a number of issues in relation to the Defendant's housing policies and their operation generally, and the Claimant's particular case. In summary, Mr Beasley makes the following points:

    i) Mr Beasley states that there is a national housing crisis which is particularly acute in the South East of England. Although the Defendant has taken steps to increase the availability of social housing (e.g. by ensuring that it has the right to nominate a very high proportion of the tenants of local housing association

properties, by purchasing properties on the open market from developers and through membership of the Homefinder UK housing mobility scheme), demand for social housing in Croydon far outstrips supply.

ii) The Defendant has two schemes which set out how priorities are determined and how housing is allocated in the Borough under both Part 6 and Part 7 of the 1996 Act. I shall refer to those schemes in more detail later in this judgment. Mr Beasley explains in his evidence that the premise behind the operation of these schemes is that each property which becomes available is allocated to the applicant in most urgent need of re-housing to accommodation of that type, and that when a property becomes available it should be allocated to the applicant in highest priority need. The Defendant keeps its pool of properties under constant review and will move them between Part 6 and Part 7, as required. The Claimant has been considered for all available properties, whether under Part 6 or Part 7.

iii) Three-bedroom properties with the level of adaptation required in the Claimant's case make up a very small proportion (significantly less than 10 per cent) of the social housing stock in the Borough of Croydon. There are not enough wheelchair-adapted three-bedroom properties to meet the needs of all those who require them. Even within those properties that are wheelchair-adapted, only a small number may be suitable to meet the Claimant's needs, e.g. because some properties will have stairlifts rather than the through-floor lift that is required in the Claimant's case.

iv) The Defendant's decision to offer the Property to the Claimant in September 2014 as temporary accommodation under Part 7 of the 1996 Act was an exercise of the discretion vested in the Defendant's Director of Housing by the Defendant's policy on Part 7 accommodation; the Claimant was thereby prioritised over other homeless households who had been living in emergency temporary accommodation longer than she had. The Defendant believed, when the Property was offered to the Claimant, that it was suitable for her. The Claimant had previously, in June 2014 and July 2014, been nominated for two other properties in the exercise of that discretion but they had both been found not to be suitable for her.

v) Since the Defendant determined, in June 2015, that the Property was not suitable for the Claimant it has considered the Claimant for both temporary accommodation (in accordance with its Part 7 scheme) and permanent accommodation (in accordance with its Part 6 scheme). The full range of properties available to the Defendant, including those which it owns and those owned by housing associations, private landlords or which are let by the Defendant on a short-term basis have been considered. The Claimant was considered for all available properties across all pools of potential accommodation; no property was excluded from consideration.

vi) The Defendant's Part 6 scheme gives reasonable preference to those applicants with high levels of housing need; such applicants will be placed into one of three priority bands, which together form the Defendant's housing register. This covers the overwhelming majority of housing applicants. Band 1 covers those assessed as having the highest priority. Priority within each band is

determined by the date of application. It is not possible for all disabled applicants to be put into the highest priority band of the Defendant's Part 6 scheme. Each individual's circumstances need to be carefully considered, including the representations received and the relevant medical and occupational health advice. That the Claimant's current accommodation is unsuitable does not mean, in Mr Beasley's view, that the Claimant should be moved from Band 3 (which is the band she was placed in when originally assessed) into Band 1. Mr Beasley's opinion is that the Claimant's situation does not justify a move to priority Band 1; he notes, amongst other things, that the Claimant has three hours of assistance from a carer each day.

vii) At 30 June 2020, there were 5,789 applicants for housing who were in one of the Defendant's three priority bands. Of those, 477 were in Band 1; 2,415 were in Band 2; and 2,897 were in Band 3.

viii) Between 5 June 2015, when the Defendant determined that the Property was not suitable, and 26 March 2020, the Defendant directly awarded 166 wheelchair-adapted three-bedroom properties to applicants on the housing register. The Claimant has been considered for each and every adapted or adaptable three-bedroom property that has become available, but on each occasion such property was allocated to an applicant in a higher priority band, or one within the Claimant's band who had been waiting longer.

ix) The Defendant operates a choice-based lettings scheme, Croydon Choice, which permits applicants to view adverts for available properties and to submit bids for those they wish to apply for. Although the Claimant has not submitted any direct bids for properties under that system (something which the Claimant in her evidence in reply said was because she had not been sent information about bidding), automatic bids have been submitted on her behalf for wheelchair-adapted properties. The Claimant has been shortlisted for one property but was 47th out of 68 bidders. The chances of her securing that property were accordingly small, as the 46 bidders with higher priority would have had to decline it.

x) At 29 July 2020, there were 29 applicants in need of re-housing to a wheelchair-adapted three-bedroom property. Five of these were in priority Band 1, and nine were in Band 2. Of those in Band 3, the earliest date of application was 31 March 2004, i.e. that applicant had been waiting for 11 years longer than the Claimant. In an annex to his statement, Mr Beasley describes in some detail the individual circumstances of four such applicants, two of whom are in priority Band 1 but have been waiting for a property for more than 15 years.

xi) Mr Beasley's view is that the only way of solving the problem in the Claimant's case is for the Defendant to commit significantly more resources to delivering an increased supply of housing, something which he describes as "ultimately a political question", or for the Claimant to be prioritised over other applicants who have previously been determined as having a higher priority need or who have been given the same priority but have been waiting longer.

The Claimant's Grounds

23. The issues raised by the Grounds upon which the Claim is brought are as follows:

i) Ground 1: What relief should be granted to the Claimant in respect of the Defendant's admitted breach of its statutory duty.

ii) Ground 2: Whether the Defendant is in breach of the duty to make reasonable adjustments for the Claimant as a disabled person, contrary to the relevant provisions of Equality Act.

iii) Ground 3: Whether the Defendant has unlawfully failed to consider the Claimant for Band 1 priority under his housing policy and/or a direct offer on a discretionary basis.

Relevant Statutory Provisions

Housing Act 1985

24. Section 9 of the Housing Act 1985 ("the 1985 Act") provides, insofar as relevant:

> "**Provision of housing accommodation**
>
> (1) A local housing authority may provide housing accommodation—
>
> (a) by erecting houses, or converting buildings into houses, on land acquired by them for the purposes of this Part, or
>
> (b) by acquiring houses.
>
> (2) The authority may alter, enlarge, repair or improve a house so erected, converted or acquired.
>
> (3) These powers may equally be exercised in relation to land acquired for the purpose—
>
> (a) of disposing of houses provided, or to be provided, on the land, or
>
> (b) of disposing of the land to a person who intends to provide housing accommodation on it."

25. Section 17(1) of the 1985 Act provides:

> "**Acquisition of land for housing purposes**
>
> (1) A local housing authority may for the purposes of this Part—
>
> (a) acquire land as a site for the erection of houses,

> (b) acquire houses, or buildings which may be made suitable as houses, together with any land occupied with the houses or buildings,
>
> (c) acquire land proposed to be used for any purpose authorised by sections 11, 12 and 15(1) (facilities provided in connection with housing accommodation), and
>
> (d) acquire land in order to carry out on it works for the purpose of, or connected with, the alteration, enlarging, repair or improvement of an adjoining house."

26. Section 32 of the 1985 Act provides, relevantly:

> "**Power to dispose of land held for purposes of this Part**
>
> (1) Without prejudice to the provisions of Part V (the right to buy), a local authority have power by this section, and not otherwise, to dispose of land held by them for the purposes of this Part.
>
> (2) A disposal under this section may be effected in any manner but, subject to subsection (3), shall not be made without the consent of the Secretary of State.
>
> (3) No consent is required for the letting of land under a secure tenancy or an introductory tenancy or under what would be a secure tenancy but for any of paragraphs 2 to 12 of Schedule 1 (tenancies, other than long leases and introductory tenancies, which are not secure).
>
> (4) For the purposes of this section the grant of an option to purchase the freehold of, or any other interest in, land is a disposal and a consent given to such a disposal extends to a disposal made in pursuance of the option."

Housing Act 1996

27. Part 6 of the 1996 Act sets out the statutory regime that applies to the allocation of local authorities' housing stock on a permanent basis.

28. Section 159 of the 1996 Act provides, as relevant:

> "**Allocation of housing accommodation**
>
> (1) A local housing authority shall comply with the provisions of this Part in allocating housing accommodation.
>
> (2) For the purposes of his Part a local housing authority allocate housing accommodation when they –

> (a) select a person to be a secure or introductory tenant of housing accommodation held by them,
>
> (b) nominate a person to be a secure or introductory tenant of housing accommodation held by another person, or
>
> (c) nominate a person to be an assured tenant of housing accommodation held by a private registered provider of social housing or a registered social landlord."

29. Section 166A of the 1996 Act provides, relevantly:

> "**Allocation in accordance with allocation scheme: England**
>
> (1) Every local housing authority in England must have a scheme (their "allocation scheme") for determining priorities, and as to the procedure to be followed, in allocating housing accommodation. For this purpose "*procedure*" includes all aspects of the allocation process, including the persons or descriptions of persons by whom decisions are taken.
>
> …
>
> (3) As regards priorities, the scheme shall, subject to subsection (4), be framed so as to secure that reasonable preference is given to—
>
> (a) people who are homeless (within the meaning of Part 7);
>
> (b) people who are owed a duty by any local housing authority under section 190(2), 193(2) or 195(2) (or under section 65(2) or 68(2) of the Housing Act 1985) or who are occupying accommodation secured by any such authority under section 192(3);
>
> (c) people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions;
>
> (d) people who need to move on medical or welfare grounds (including any grounds relating to a disability); and
>
> (e) people who need to move to a particular locality in the district of the authority, where failure to meet that need would cause hardship (to themselves or to others)."

30. Part 7 of the 1996 Act places certain duties on local authorities to assist persons who are homeless or threatened with homelessness. The amendments made to Part 7 of the 1996 Act by the Homelessness Reduction Act 2017 do not apply in the case of the Claimant, because her application for assistance was made before they came into force. I shall therefore refer to the unamended provisions of the 1996 Act.

31. Section 175 of the 1996 provides, relevantly:

> "**Homelessness and threatened homelessness**
>
> (1) A person is homeless if he has no accommodation available for his occupation, in the United Kingdom or elsewhere, which he—
>
> (a) is entitled to occupy by virtue of an interest in it or by virtue of an order of a court,
>
> (b) has an express or implied licence to occupy, or
>
> (c) occupies as a residence by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of another person to recover possession.
>
> …
>
> (3) A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy."

32. Section 193 of the 1996 Act provides, as relevant:

> "**Duty to persons with priority need who are not homeless intentionally**
>
> (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.
>
> (3) The authority are subject to the duty under this section until it ceases by virtue of any of the following provisions of this section.
>
> …
>
> (5) The local housing authority shall cease to be subject to the duty under this section if—
>
> (a) the applicant, having been informed by the authority of the possible consequence of refusal or acceptance and of the right to request a review of the suitability of the accommodation, refuses an offer of accommodation which the authority are satisfied is suitable for the applicant,

(b) that offer of accommodation is not an offer of accommodation under Part 6 or a private rented sector offer, and

(c) the authority notify the applicant that they regard themselves as ceasing to be subject to the duty under this section.

(6) The local housing authority shall cease to be subject to the duty under this section if the applicant—

(a) ceases to be eligible for assistance,

(b) becomes homeless intentionally from the accommodation made available for his occupation,

(c) accepts an offer of accommodation under Part 6 (allocation of housing), or

(cc) accepts an offer of an assured tenancy (other than an assured shorthold tenancy) from a private landlord,

(d) otherwise voluntarily ceases to occupy as his only or principal home the accommodation made available for his occupation.

(7) The local housing authority shall also cease to be subject to the duty under this section if the applicant, having been informed of the possible consequence of refusal or acceptance and of his right to request a review of the suitability of the accommodation, refuses a final offer of accommodation under Part 6."

33. Section 202 of the 1996 Act provides, relevantly:

"**Right to request review of decision**

(1) An applicant has the right to request a review of—

…

(b) any decision of a local housing authority as to what duty (if any) is owed to him under sections 189B to 193C and 195 (duties to persons found to be homeless or threatened with homelessness),

…

(f) any decision of a local housing authority as to the suitability of accommodation offered to him in discharge of their duty under any of the provisions mentioned in

> paragraph (b) or (e) or as to the suitability of accommodation offered to him as mentioned in section 193(7),
>
> …"

34. Section 206(1) of the 1996 Act provides:

> "**Discharge of functions by local housing authorities.**
>
> (1) A local housing authority may discharge their housing functions under this Part only in the following ways—
>
> (a) by securing that suitable accommodation provided by them is available,
>
> (b) by securing that he obtains suitable accommodation from some other person, or
>
> (c) by giving him such advice and assistance as will secure that suitable accommodation is available from some other person."

When considering whether Part 7 accommodation is "suitable", as required by section 206(1), a local authority is required to assess the reasonable needs and requirements of the applicant and their household: see *R (on the application v Sacupima) v Newham London Borough Council* [2001] 1 WLR 563.

35. The duties arising under Part 6 and Part 7 of the 1996 Act are distinct; so a local authority's Part 7 duty to an applicant under section 193(2) of the 1996 Act, often referred to as the 'main housing duty', may be ended by the provision of permanent accommodation to the applicant under Part 6. But the Part 7 duty under section 193(2) applies whilst that is not done.

36. It is established that the local authority's duty under section 193(2) is an immediate duty. It is not, for example, a duty to provide suitable accommodation within a reasonable period of time: see *per* Collins J in *R v London Borough of Newham, ex parte Begum* (1999) 32 HLR 808 ("*Begum v Newham*") at 814-816; and the duty may be fulfilled by the provision of accommodation which is suitable on a temporary basis, as Linden J observed in *R (on the application of M) v London Borough of Newham* [2020] EWHC 327 (Admin), [2020] PTSR 1077 ("*M v Newham*") at [44]. In *Birmingham City Council v Ali & Others* [2009] UKHL 36, [2009] 1 WLR 1506 ("*Ali*"), Lady Hale reiterated at [47] the separate nature of the duties under Parts 6 and 7 of the 1996 Act and described accommodation provided under section 193(2) as, "another kind of staging post, along the way to permanent accommodation in either the public or the private sector." I shall consider all those judgments in more detail when dealing with Ground 1.

37. Although the duty under Part 7 is often referred to as arising in relation to the provision of temporary (i.e. non-permanent) accommodation, the cases demonstrate that the periods of time which applicants actually spend in accommodation provided

under Part 7 whilst waiting for permanent (i.e. with security of tenure) accommodation under Part 6 may, as in the Claimant's case, be considerable.

Equality Act 2010

38. It is common ground that the Claimant is a disabled person for the purposes of the Equality Act. The Defendant accepts that in carrying out its public functions in relation to housing, the duty in the Equality Act to make reasonable adjustments for disabled persons applies to it. Section 20 of the Equality Act provides, relevantly:

> "**Duty to make adjustments**
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…"

39. Section 21 of the Equality Act provides, relevantly:

> "**Failure to comply with duty**
>
> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."

40. Section 29 of the Equality Act provides, relevantly:

> "**Provision of services, etc.**
>
> …
>
> (6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation."
>
> (7) A duty to make reasonable adjustments applies to—
>
> …

(b) a person who exercises a public function that is not the provision of a service to the public or a section of the public.

…"

41. Schedule 2 to the Equality Act contains further provision in relation to the duty to make reasonable adjustments in connection with the exercise of public functions, relevantly in paragraph 2:

"**2. The duty**

(1) A must comply with the first, second and third requirements.

(2) For the purposes of this paragraph, the reference in section 20(3), (4) or (5) to a disabled person is to disabled persons generally.

…

(4) In relation to each requirement, the relevant matter is the provision of the service, or the exercise of the function, by A.

(5) Being placed at a substantial disadvantage in relation to the exercise of a function means –

(a) if a benefit is or may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit…

…

(8) If A exercises a public function, nothing in this paragraph requires A to take a step which A has no power to take."

42. Section 136 of the Equality Act provides, relevantly:

"**Burden of proof**

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

43. Section 149 of the Equality Act provides, relevantly:

> "**Public sector equality duty**
>
> (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;
>
> (c) foster good relations 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;

…"

Localism Act 2011

44. Section 1 of the Localism Act 2011 provides, relevantly:

> "**Local authority's general power of competence**
>
> (1) A local authority has power to do anything that individuals generally may do."

45. Section 2 of the Localism Act 2011 provides, relevantly:

> "**Boundaries of the general power**
>
> (1) If exercise of a pre-commencement power of a local authority is subject to restrictions, those restrictions apply also to exercise of the general power so far as it is overlapped by the pre-commencement power.
>
> (2) The general power does not enable a local authority to do –
>
> (a) anything which the authority is unable to do by virtue of a pre-commencement limitation…"

Senior Courts Act 1981

46. Section 31(2A) of the Senior Courts Act 1981 provides that:

> "The High Court—
>
> (a) must refuse to grant relief on an application for judicial review…
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

The Defendant's Policies

The Part 6 Scheme

47. The Defendant has adopted a Housing Allocations Scheme, as it is required to do under Part 6 of the 1996 Act. I shall refer to this as "the Part 6 Scheme". The version shown to me was approved in October 2019 and runs to 94 pages. Applicants assessed as having "reasonable preference" for the purposes of section 166A of the 1996 Act will be placed into one of the three priority bands; within each band, applicants are prioritised in order of the date of their application. Band 1 is the highest priority; and the categories specified in the policy as meriting placement in that band include (although this is by no means an exhaustive list) applicants living in severely overcrowded conditions, and applicants living in accommodation that poses an

ongoing and serious threat to their health. There are also provisions permitting Band 1 priority to be given in exceptional cases, as a matter of discretion:

> "**Other urgent applications – band 1**
>
> 184. We will place other applications that we need to move urgently, that allow us to make the best use of our housing stock, or that need to move as a result of exceptional circumstances as approved by the director of housing needs and strategy or a nominated deputy in band 1, as follows:
>
> …
>
> 192. Other housing applications may be awarded additional priority in exceptional circumstances approved by the director of housing needs and strategy or a nominated deputy."

48. Paragraph 285 of the Part 6 Scheme also states:

> "285. The director of housing needs or a nominated deputy also has the authority in exceptional circumstances to place your application in a higher band."

49. The Defendant operates what the policy describes as a "Choice Based Lettings" system which enables applicants to submit bids for available properties when they are advertised. The highest priority eligible bidder for a property is usually offered it first, then the next highest priority bidder, and so on until the property is accepted. However, the scheme also contains provision for properties to be offered directly to applicants without advertisement. Paragraph 307 of the policy states:

> "307. The council will as far as possible let the majority of property through the Choice Based Lettings scheme. However, the council can offer a home directly to some applicants without advertising the home through the scheme if circumstances justify it. Reasons for this can be: to meet the need of a high priority applicant; or to meet a legal obligation; to facilitate an under occupation move, or for effective management of the council's housing stock; in relation to public protection cases; as part of overcrowding reduction initiatives; or for split households."

50. Direct offers are discussed in more detail in section 13 of the Part 6 Scheme, which deals with offers of accommodation. Materially, this provides:

> "**Direct offers**
>
> 353. Direct offers are made to one specific applicant on the housing register where the applicant requires a particular type of accommodation, or needs to move very urgently, or where the council has specific statutory responsibilities. For example, we would not use open viewing for adapted accommodation or housing for older people, nor for applicants needing to move urgently due to exceptional circumstances, nor for people needing to move as a result of violence, severe harassment, domestic violence or those acting as a witness and being subject to severe intimidation.

> **Direct offers to applicants accepted due to exceptional circumstances at the director's discretion**
>
> 354. Offers made to applicants accepted as a result of exceptional circumstances at the director of Housing Needs discretion will be made by direct offer.
>
> …
>
> **Direct offers of housing adapted for disabled people**
>
> 356. Vacancies which are adapted or which are suitable for adaptation for applicants with a substantial disability may be offered directly to the most appropriate applicant. Where the housing has significant adaptations or is wheelchair accessible, this will be on suitability alone and outside any strict date order. For homes which are not adapted, or have limited adaptations, there may be several applicants who could 'fit' the vacancy, and we will allocate in band and then date order."

The Part 7 Policy

51. The Defendant also has a policy in relation to the provision of accommodation under Part 7 of the 1996 Act. Although referred to by Mr Beasley in his evidence as the "Part 7 Scheme" (to distinguish it from the allocation scheme under Part 6, set out above), it is not a statutory scheme of the same type as the Part 6 Scheme. I shall refer to the policy as "the Part 7 Policy".

52. The Part 7 Policy provides, materially, as follows:

> "1.6 The objectives of this policy are to ensure that when discharging its statutory duties and exercising its powers, the council:
>
> 1.6.1 allocates temporary accommodation in a way that is fair to homeless households it is required to assist; and
>
> 1.6.2 fulfils its statutory duties and obligations contained within homelessness legislation, statutory guidance and case law; and
>
> 1.6.3 has regard to its duty to safeguard and promote the welfare of any children in the household (Children Act 2004, s11); and
>
> 1.6.4 has regard to the Public Sector Equality Duty (Equality Act 2010, s149."
>
> "4.1 Due to the high level of homelessness demand within Croydon, homeless households are usually accommodated through a two-stage process. They are:
>
> 4.1.1 Placed in nightly let emergency accommodation; then

> 4.1.2 Moved onto longer term [temporary accommodation] supplied through a variety of providers under differing arrangements; or
>
> 4.1.3 Offered a private rented sector offer (PRSO) to end the council's main housing duty."
>
> "4.3 Where there is more than one household requiring move on from nightly let accommodation at any one time, 2nd stage accommodation will normally be offered to the homeless household with the earliest booking date for emergency nightly let accommodation. Exceptions will be at the discretion of the Director of Housing Need. When exercising that discretion, the Director may take account of the demand for and the supply of accommodation and the general housing circumstances within the London Borough of Croydon. The following are examples of circumstances where the Director may exercise their discretion. This is not an exhaustive list:
>
> 4.3.1. Households where their current housing is impacting on their health and/or safety.
>
> …
>
> 4.3.5. Some temporary accommodation is specialist, for example for those with physical disabilities or mental health needs. The units will only be offered to those who meet the criteria for this type of accommodation…"

53. In his witness statement, Mr Beasley describes the effect of the Part 7 Policy as being that the allocation of longer-term temporary accommodation is to those who have been waiting the longest time, with an exception to exercise discretion to disapply this default position in relation to households which, amongst other things, require specially adapted accommodation.

Discussion

Ground 1

54. The issue that arises on Ground 1 is, as I have already set out, what relief should be granted in respect of the Defendant's ongoing breach of its duty under section 193(2) of the 1996 Act, which has persisted since at least the Defendant's own recognition, on 5 June 2015, that the Property was not suitable accommodation for the Claimant, as required by section 206(1) of the 1996 Act. The submissions of Counsel on this Ground were, in summary, as follows.

55. For the Claimant, Ms Steinhardt accepted that whether to grant a mandatory order as relief in relation to the Defendant's breach of its statutory duty was a matter of discretion. Ms Steinhardt submitted that this was a case in which a mandatory order requiring the Defendant to provide suitable accommodation to the Claimant should now be made, the test (insofar as there is one) being whether or not a mandatory order

would require the Defendant to "do the impossible". She submitted that it was not necessary, for a mandatory order to be made, that the Claimant's situation should be found, in the words of Lord Hope and Lady Hale in their speeches in *Ali*, to be "intolerable" or one in which "enough is enough", and that these observations were not relevant to the grant of mandatory relief in the case of accommodation which was unsuitable because they addressed the different question of when short-term accommodation might become unsuitable. Ms Steinhardt submitted in the alternative that, in any event, the Claimant's circumstances did reach the threshold described in the speeches in *Ali*. She contended that not making a mandatory order would have the effect of stripping the duty under section 193(2) of its power and force, turning it into a 'best endeavours' duty, and would do so for those with the most profound disabilities who are most in need of assistance.

56. On behalf of the Defendant, Mr Rutledge QC accepted that the Defendant owed the Claimant the duty under section 193(2) of the 1996 Act and that the Property was unsuitable for the reason given in the 2015 review decision. He agreed with Ms Steinhardt that the issue was therefore solely that of the appropriate relief. Mr Rutledge submitted that there was a wide spectrum of potential breaches of the statutory duty under section 193(2), and that where on the spectrum the breach was in the particular case was relevant to the question of relief. He submitted that breach in the present case was at the less serious end of that spectrum and that the Property, although unsuitable overall, could on the evidence be described as "nine-tenths suitable". He relied on what he submitted was an absence of evidence from the Claimant about her current situation, noting that in the reported cases, including *M v Newham*, there was such evidence. Mr Rutledge also submitted that the Court could not, when considering what relief to grant in the Claimant's case, focus on her individual circumstances and would need to take into account the position of other applicants. He submitted that it would require a compelling case (which this was not) for the court to make a mandatory order knowing that there were other applicants who would lose out as a direct result. He submitted that the question of the local authority's resources was relevant to relief, and that the Claimant had not challenged the allocation of resources to housing by the Defendant; it was not for the court to say that more money ought to be spent. Mr Rutledge was content to accept that an order should not be made if it would require the local authority to "do the impossible" but submitted that this did not set a particularly high hurdle: it meant only not requiring the authority to do something that was not possible either in practical or legal terms. Mr Rutledge also submitted, in substantial disagreement with Ms Steinhardt, that the passages from the speeches of Lord Hope and Lady Hale in *Ali*, to which I have made reference, were also of relevance to the issue of whether mandatory relief should be granted, and that accommodation might cease to be suitable without the situation becoming "intolerable".

The Public Sector Equality Duty

57. Although not advanced as a freestanding claim, one feature of the argument on Ground 1 was the impact of the Public Sector Equality Duty ("PSED") in section 149 of the Equality Act on the Defendant's duty under Part 7 of the 1996 Act. Ms Steinhardt submitted that the duty under the PSED was relevant to the question of whether it was "impossible" for the Defendant to comply with its statutory obligations under Part 7, that the Defendant had failed to comply with the PSED and that if it had

complied then it might have identified other means by which it could have complied with its duty in the Claimant's case. Ms Steinhardt emphasised that the duty did not arise at the point of decision-making but was more broadly applicable to the Defendant's functions. She accepted that it was a question of substance, not form. Ms Steinhardt pointed out that the duty to have "due regard" meant that proper regard and full weight must be given to the issue: see *R (on the application of Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin), [2010] RTR 5 at [63-64]. Ms Steinhardt submitted that persons with the Claimant's disability suffered from a disadvantage because of the scarcity of suitable accommodation and the consequent delay in providing accommodation, as set out in Mr Beasley's evidence. She submitted that there was no evidence that the Defendant had due regard to minimising that disadvantage, e.g. by procuring more suitable properties to put them into the pool of available properties. Ms Steinhardt submitted that the Defendant could not rely, in this regard, on the scarcity of suitably adapted properties because it was itself responsible for that scarcity by failing to procure a sufficient number of such properties.

58. I reject the Claimant's argument that there has been a breach of the PSED. Although the Part 7 Policy makes express reference to the PSED at paragraph 1.6.4, the matter is indeed one of substance, not form: see *R (on the application of McDonald) v Royal Borough of Kensington & Chelsea* [2011] UKSC 33, [2011] PTSR 1266 at [24], *per* Lord Brown. I accept Mr Rutledge QC's submission that the Claimant's disability, and the impact which it has on her housing needs, has been at the heart of the Defendant's decision-making in this case and that more generally the Defendant's policies do demonstrate that it has paid due regard to the need to advance equality of opportunity between disabled and non-disabled persons, including those such as the Claimant who require specially adapted accommodation. The Claimant's disability has meant that she has received priority over non-disabled housing applicants, in accordance with the Defendant's policies. I accept that the Defendant has complied with the PSED by adopting policies which give disabled persons priority for the allocation of housing, and which permits those in greatest need the highest level of priority by being placed in Band 1. The policies also make express and detailed references to the way in which the position of disabled applicants requiring specially adapted housing are to be addressed. In relation to the question of procurement, Mr Beasley's evidence is that there is a general shortage of wheelchair-adapted properties, and it is clear from his efforts in the summer of 2020 that the Defendant is willing to consider making the necessary adaptations in cases such as the Claimant's – the difficulty being not a lack of due regard to the objectives of the PSED but that the Property (and the other properties which the Claimant was then shown) is not, apparently, capable of being fully adapted to meet the Claimant's needs. Nor does Mr Beasley's reference, elsewhere in his evidence, to the question of whether, in general terms, adaptations to temporary (as opposed to permanent) accommodation will be cost-effective demonstrate a breach of the PSED: the duty is to have due regard to the equality considerations, not to achieve a particular result.

59. The Defendant has, in my judgment, complied with the requirements of the PSED. In any event, I do not consider that, even if a breach of the PSED had been established by the Claimant, this would have resulted in an outcome different to that which I have reached at paragraphs 81-82 below, on the question of whether the mandatory order that is sought should be made in the particular circumstances of this case. It might

have led to other relief being granted; although, as I have already set out, the allegation regarding breach of the PSED was not advanced as a discrete claim.

The Correctness of the Defendant's Approach

60. Two other initial questions are raised by the arguments advanced by the Claimant:

    i) Has the Defendant wrongly approached its continuing breach of duty under Part 7 of the 1996 Act on the basis that it can only be remedied once the Claimant is allocated accommodation under Part 6?

    ii) Has the Defendant in any event misdirected itself as to the scope of its powers to provide suitable accommodation to the Claimant, in fulfilment of its Part 7 duty?

61. On the first of these questions, I accept the submissions made by Mr Rutledge QC that the Defendant has not approached the provision of suitable temporary accommodation under Part 7 of the 1996 Act as only being possible by allocating the Claimant permanent accommodation in accordance with the Part 6 Scheme. Mr Beasley's evidence is that the Claimant has been actively considered for further properties under both the Part 6 Scheme and the Part 7 Policy. Mr Beasley stated that the Defendant has:

> "… considered the Claimant for both temporary accommodation (in accordance with the Part 7 scheme) and permanent accommodation (in accordance with the Part 6 Scheme). In this way, we were able to consider the full range of properties available to us including Council-owned housing, housing association properties, private rented accommodation and accommodation that was let by the Defendant on a nightly or other short-term basis…"

Mr Beasley also stated that:

> "… We weren't applying the Part 6 Scheme to the exclusion of the Part 7 Scheme. We were actively considering the Claimant for properties under both schemes – thus ensuring that she was considered for all available properties across all potential pools of accommodation available to us and that no property was excluded from consideration."

62. The second question raises an issue of law. Ms Steinhardt contends that the Defendant has misdirected itself because it has failed to appreciate that it can lawfully purchase, lease, build or adapt a property specifically for the Claimant in order to fulfil its duty under Part 7. However, I accept Mr Rutledge's submission that purchasing, building, leasing or adapting a property specifically to accommodate the Claimant pursuant to the duty under Part 7 of the 1996 Act is not a solution that is open to the Defendant. The Defendant's powers to acquire land and buildings for use as housing accommodation are set out in Part II of the Housing Act 1985, and specifically in sections 9 and 17 of that Act. Once acquired, such land is subject to the restrictions set out in the statute. This would permit the Defendant to let that land under a secure

tenancy or one of the types of non-secure tenancies set out in paragraphs 2 to 12 of Schedule 1 to the 1986 Act (including a tenancy under Part 7 of the 1996 Act). The issue then becomes whether the Defendant may lawfully override either the Part 6 Scheme or the Part 7 Policy by allocating such a property specifically to the Claimant. The same issue arises in respect of adapting a property. I do not consider that it is open to the Defendant simply to disapply its policies on the allocation of accommodation in this way, for the reasons given by Stanley Burnton J in *R (on the application of Begum) v London Borough of Tower Hamlets*, [2002] EWHC 633 (Admin), [2003] HLR 8 ("*Begum v Tower Hamlets*") at [29]:

> "… I am satisfied that only in exceptional circumstances, if at all, may a local authority lawfully earmark a property for a particular Applicant on its waiting list before that property is allocated. It must apply its policy, and exercise any residual discretion, when it allocates the accommodation in question, not before. There is otherwise a risk that when the accommodation is allocated, there will be someone who has priority according to the allocation scheme over the person for whom the property has been earmarked…"

Stanley Burnton J went on to state, in the same paragraph of his judgment, that whether under Part 6 of the 1996 Act or Part 7 of the 1996 Act, an applicant "has no right to be allocated any particular accommodation". To the extent that earlier authorities such as *R (on the application of Batantu) v London Borough of Islington* (2001) 33 HLR 76 (at [41]) suggest that it is open to a local authority, at least ordinarily, to resolve the situation of an individual applicant by purchasing property specifically to lease to them, I respectfully prefer the approach of Stanley Burnton J in *Begum*. Further, as Mr Rutledge pointed out, those authorities were decided in relation to the former duty under section 21 of the National Assistance Act 1948, not under the 1996 Act, and are distinguishable on that basis in any event.

63. I also accept Mr Rutledge QC's submission that section 1 of the Localism Act, relied on by the Claimant to support her case on this question, does not materially alter the position. The provisions of section 2 of the Localism Act make clear that the general power of competence does not override the statutory restrictions on the disposition of housing accommodation contained in the Housing Act 1985, and nor can it be used as a vehicle to disapply the requirements of the policies otherwise adopted by the Defendant.

64. I do not, therefore, consider that the Defendant has wrongly approached the question of how its duty under Part 7 of the 1996 Act can be discharged or that it has misdirected itself regarding its powers to provide accommodation to the Claimant.

Should a mandatory order be made?

65. The questions remains whether a mandatory order should be made in this case to require the Defendant now to provide suitable accommodation to the Claimant within a specific period of time. The Claimant had, in the Claim Form and her Grounds, requested an order that she be provided with suitable accommodation within six weeks, but in her oral submissions Ms Steinhardt said that the Claimant was not

focused on that particular period and simply required certainty as to when she was going to be given suitable accommodation.

66. So as to put the application for a mandatory order into its proper context, it is necessary to refer to a number of the decided cases. They deal with the two questions of whether there has been a breach of the statutory duty on the local authority (which is not disputed in this case) and what remedy the court should order as a result.

67. In *Begum v Newham*, at pages 815-816 of the report, Collins J addressed both of these questions. He held:

> "…. Part 7 of the Act is consistent only with the assumption that the housing duties under sections 188, 190, 200 and 193 cannot be deferred. Newham, like most if not all Inner London Boroughs, has appalling difficulties in finding accommodation for the homeless, particularly if there are problems such as a large family. It contends that it is doing its best and Parliament cannot have intended that it should be required to provide accommodation when it has none available. Accordingly, submits [Counsel for Newham], the duty must be construed as being one to make suitable accommodation available within a reasonable time and what is reasonable will depend on the circumstances of each case and in particular upon whether the council has the necessary accommodation available.
>
> While I have considerable sympathy with the Council, I do not think that the qualifications which [Counsel for Newham] submits are necessary can be read in to 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. [Counsel for the Claimant] accepts that it would be unreasonable for an applicant to seek mandamus within a few days of the duty arising if it were clear that the Council was doing all that it could, nor, in its discretion, would a court make such an order. Indeed, permission would probably be refused…
>
> However, the court must bear in mind that Parliament has not qualified the duty and must not be too ready to accept that the Council is taking all appropriate steps…"

68. In *Begum v Newham*, Collins J granted a declaration (see page 819 of the report). The Court of Appeal considered Collins J's judgment in *Codona v Mid-Bedfordshire District Council* [2004] EWCA Civ 925, [2005] HLR 1 ("*Codona*"). Auld LJ, with whom Thomas LJ and Holman J agreed, set out what he described as a number of basic propositions demonstrated by the relevant authorities. These included, at [38], the following proposition, stated to be based on Collins J's judgment in *Begum v Newham*:

> "… 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 of each case and on what accommodation was available…"

69. In *Birmingham City Council v Aweys & Others* [2008] EWCA Civ 48, [2008] 1 WLR 3205 ("*Aweys*"), the Court of Appeal further considered the nature of the duty under section 193(2) of the 1996 Act. Ward LJ gave the leading judgment, with which Arden LJ, in a concurring judgment, agreed subject to one qualification. Smith LJ agreed with both the judgments. In her judgment, Arden LJ expressed that qualification in the following terms:

> "61. In the judgment of Ward LJ, it is unnecessary to deal with any further question as to the time within which the duty under s 193(2) may be performed. I am, however, 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 s 193(2). I therefore consider that it is necessary to address the further question, to which I now turn.
>
> 62. The core duty in s 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 (c.f. s 195(2) set out in [10] above).
>
> 63. We were referred to *Codona v Mid-Bedfordshire DC* [2005] HLR 1. In that case, this court held, applying the earlier decision of the judge in *R v Newham LBC ex parte Begum* (1999) 32 HLR 808, that the court would not make an order to force a local authority to do the impossible (see [38] per Auld LJ, with whom Thomas LJ and Holman J agreed). This court added that the duty of the authority:
>
> > "was to secure the availability of suitable accommodation within a reasonable period of time, the reasonableness of that period depending on the circumstances of each case and the accommodation available".
>
> 64. This would mean that the local authority only had to provide accommodation under s 193(2) within a reasonable time. However, the point did not arise for decision and is therefore not binding on this court. Moreover, this court was stating propositions suggested by the decided authorities and did not expressly state that they were going no further than Collins J had done *in ex parte Begum*, the only authority cited

> on the point now under scrutiny. In all the circumstances, I consider that the passage I have cited neither prevents nor should persuade this court from coming to a different conclusion.
>
> 65. In my judgment, 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 s 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 (see *ex parte Begum*, above).
>
> 66. In conclusion, subject to the last point, it would not in my judgment be open to the local authority in a case such as the present cases to assert that it was entitled to rely on having an interval of time for the performance of its duty."

70. More recently, in *M v Newham* Linden J considered all these authorities and stated at [55-56]:

> "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."

71. Linden J went on to hold that:

"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."

72. Although the Defendant accepts that it is in breach of duty in the Claimant's case, the nature of the duty that has been breached is an important consideration when it comes to considering the question of relief. The court cannot consider what action it should take without first determining what it is that has gone wrong. I accept Ms Steinhardt's submission that the duty under section 193 of the 1996 is not a duty to take reasonable endeavours. It is expressed by Parliament in terms devoid of any such qualification. I respectfully agree with the reasoning and conclusion of Linden J in the *M v Newham* case on this issue, and with his analysis of the decisions of the Court of Appeal in the *Codona* and *Aweys* cases and that of the House of Lords in *Ali*.

73. I agree with Mr Rutledge QC that the first question to be addressed, when considering the correct approach in law to the grant of mandatory relief in a case such as this, is to consider the approach set out in the appellate authorities. In *Aweys*, Arden LJ (with whom Smith LJ agreed) stated at [65], having considered Collins J's judgment in *Begum v Newham* and Auld LJ's judgment in *Codona* that she would not "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."

74. The *Aweys* case went on appeal to the House of Lords and is reported as *Birmingham City Council v Ali & Others*, to which I have already made reference. The issue was to what extent the question of whether it was reasonable for the applicants and their families to continue to occupy their accommodation involved looking at the position into the future, rather than at the time of making the relevant decision. Lord Hope, in a short concurring speech, agreed at [4] with Lady Hale that the court must have regard to "the practical realities of the situation". Lord Hope approved Auld LJ's formulation in *Codona*, stating that:

> "… 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…"

Lord Scott expressly agreed with this part of Lord Hope's speech (see at [5]); however, none of the other members of the Appellate Committee expressed their agreement with Lord Hope.

75. Lady Hale (with whose opinion the other members of the Appellate Committee, including Lord Hope and Lord Scott, agreed), held at [36] that the statute was looking at the concept of "occupation over time", and accommodation which was suitable in the very short term might still be unsuitable for the purposes of the statute. Lady Hale went on to state:

> "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. Nonetheless, 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."

76. Although Lady Hale's observations in these paragraphs of her opinion were primarily directed to the issue of when it would no longer be reasonable for an applicant to occupy her accommodation and thus to whether the local authority was in breach of the statutory duty at all, their application is not, in my judgment, limited to that question. These factors are also relevant to the grant of relief where the local authority is in breach. Lady Hale recognised that there will be cases in which the court ought to require a local authority to offer alternative accommodation to an applicant; equally, she made clear that (amongst other things) budgetary constraints and the limited number of properties available for those with disabilities were matters which were relevant considerations and that the practical realities of the situation in which local authorities find themselves must be taken into account. It is also right to record that the issue of mandatory relief did not arise in the *Ali* cases because all the applicants had been rehoused by the time that the appeal came to be determined; and Lady Hale at [64] stated that she "would not be inclined to enter into debate about the criteria governing the grant of mandatory injunctions in homelessness cases". The Claimant's case, in contrast, is primarily about the grant of mandatory relief.

77. However, I reject Ms Steinhardt's submission that the statements by Lord Hope and Lady Hale in *Ali*, to which I have referred, are not relevant to the issue of whether mandatory relief should be granted or that, if they are, they are to be limited to situations in which there is a dispute about whether accommodation is suitable or not. In my judgment, these observations, which were expressed in general terms (and where the House of Lords had before it what Arden LJ had said at [65] of her

judgment in the Court of Appeal), are highly pertinent to the question of whether mandatory relief should be granted in the event of breach of statutory duty being admitted, as in this case. Nor do I accept that the effect of such an approach is to strip the duty under section 193(2) of its force and render it a 'best endeavours' duty. A mandatory order can be made in an appropriate case. *M v Newham* was, on its particular facts, such a case.

78. In the *M v Newham* case, Linden J considered the issue of relief in the concluding paragraphs of his judgment at [118-121], as follows:

> "Relief
>
> 118. [Counsel for Newham] 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 [Counsel for Newham's] 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 [Counsel for the Claimant] 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."

79. I note that at [120], in his discussion of what relief should be granted, Linden J referred to earlier paragraphs of his judgment, at [95-117], dealing with the question of breach of duty, where (at [97]) he had applied the reasoning of Lord Hope and Lady Hale in the *Ali* case and had determined that the evidence showed that the situation of the claimant in *M v Newham* was "intolerable" and that "enough [was] enough". That Linden J referred back to this part of his analysis when dealing with the issue of relief supports the conclusion that I have reached regarding the relevance, in this regard, of the statements made by Lord Hope and Lady Hale in *Ali*.

80. In his judgment in *R (Nazir) v Newham LBC* [2001] EWHC Admin 589, to which Linden J made reference, Scott Baker J identified five factors relevant to the court's discretion to grant mandatory relief. These were not, as the learned Judge stated, intended to be an exhaustive list; and like Linden J, I consider that they are of assistance in determining whether a mandatory order should be made. At [15-17] of his judgment, Scott Baker J rejected the local authority's argument in that case that the resources available to it were a relevant consideration when deciding what relief to grant, relying on authorities which discussed the relevance of a local authority's resources to the question of whether or not there was a breach of duty. I do not, however, consider that these paragraphs of Scott Baker J's judgment are consistent with Lady Hale's subsequent statement in *Ali* at [51] that the "practical realities" must be taken into account when the court is deciding what to do in a situation such as the present. In my judgment, those "practical realities" must include the financial position of the local authority and the availability of specially adapted accommodation, matters which Lady Hale had referred to expressly in the preceding paragraph of her opinion. Even if what Lady Hale said in those paragraphs may strictly be *obiter* in respect of the issue of relief, I consider that I ought to follow the approach set out by the House of Lords in this regard.

81. Although the Defendant is in breach of its statutory duty, I have decided, in the exercise of my discretion, that a mandatory order should not be made in the circumstances of this case, for the reasons which I now set out.

    i) I accept Mr Rutledge QC's submission that there is a spectrum of seriousness in terms of the range of possible breaches of the duty under section 193(2). As the Defendant points out, the Property has a number of positive features. There is no issue raised about its location or any issue regarding overcrowding. The Claimant can access the Property through the ramp at the front door; she declined to have a kitchen cupboard removed, which might have improved access to the garden. The Property also benefits from the through-floor lift which the Claimant needs in the event of being accommodated in a property that has more than one level. Although I would not adopt Mr Rutledge's description of the Property as being "nine-tenths suitable" for the Claimant, I do accept that on the evidence before me, the Claimant has not established that the conditions in which she is presently living are having an extremely serious effect on her, or that the situation is "intolerable" (*per* Lord Hope in *Ali*) or that "enough is enough" (*per* Lady Hale in *Ali*), which were the conclusions reached by Linden J in *M v Newham* at [97]. Mr Rutledge points out that not only is there no evidence on this issue from the Claimant but also that there is no evidence before me about the effect on the Claimant of the unsuitable conditions in which she is living, beyond the terms of the letter from the

Claimant's Solicitors of 23 April 2015 which I have set out at paragraph 8, above. No such evidence was filed with the Claim Form; the Claimant's own subsequent witness statement is silent on the issue. There is simply no evidence about the present effects on the Claimant's day-to-day life of the unsuitable features of the Property. As Mr Rutledge correctly submitted, the court does not know what the current impact is of the problem regarding the location of the bathroom in the Property, or whether the Claimant has found any practical ways to manage such difficulties as she encounters. I do not accept Ms Steinhardt's submission that it was unnecessary for the Claimant to give any evidence about the effects of the unsuitable features of the Property because the breach of statutory duty is admitted by the Defendant and there is no factual dispute between the parties which the Claimant's evidence needed to address. In my judgment, the particular difficulties faced by a person in the Claimant's position are a highly relevant consideration when it comes to the issue of relief. Here, the only witness statement provided by the Claimant makes no mention at all of the difficulties which she is presently encountering as a result of the unsuitable features of the Property. Whilst the Property has been and remains unsuitable for the reason accepted by the Defendant, the Claimant has not, as I have said, established by evidence that her present situation is at the level discussed in the speeches of the members of the Appellate Committee of the House of Lords in *Ali*.

ii) The Defendant has not refused to comply with its statutory duty. It accepts that it is subject to the statutory duty and that it is in breach of it. The Defendant has been willing to consider ways in which the identified deficiency with the Property can be remedied, including by considering the possibility of further adapting the Property to meet the Claimant's needs – albeit Mr Beasley's evidence is that it is unlikely to be practicable to carry out the level of adaptations requested by the Claimant. The Defendant has also been searching for suitable properties for the Claimant, and during 2020 has shown the Claimant two properties. I accept Mr Beasley's evidence that the Defendant is doing what it reasonably can, consistent with the proper application of its policies and the limited resources available to it, to fulfil its statutory duty to the Claimant in the circumstances of this case. The Claimant has, according to Mr Beasley, been "considered for all available properties across all potential pools of accommodation available to [the Defendant] and… no property was excluded from consideration". Ms Steinhardt criticised this as a bare assertion, but I see no reason to reject Mr Beasley's evidence on this point; indeed, the Defendant has ensured that despite the Claimant (for whatever reason) not submitting any bids herself on the Croydon Choice system, automatic bids were submitted for properties on her behalf. The Defendant has been prepared to, and has, exercised discretion under the Part 7 Policy to offer properties to the Claimant (albeit none of them have proved to be suitable). That the Defendant has not yet found a suitable property for the Claimant does not demonstrate that its efforts are insufficient. The Defendant has not fallen into the error identified by Collins J in *Begum v Newham*, where he held at pages 816-817 of the report that the local authority had not taken all appropriate steps to provide accommodation to the claimant under section 193(2) of the 1996 Act because it had "adopted a policy which has disabled it from having all possible accommodation available", i.e. not using its own housing stock to

provide accommodation under Part 7. Collins J held at pages 818-819 of the report that "… the Council's policy in deciding not to use its own stock means that it has not taken all reasonable steps and so the delay cannot be excused." That is not the situation in the present case.

iii) I accept, however, that due to the general shortage of accommodation which is set out in Mr Beasley's evidence it is unlikely that a suitable property will be provided in the near future. I also consider that the significance of this issue is that, as Linden J stated in *M v Newham* at [119], it enhances rather than diminishes the case for a mandatory order to be made.

iv) I accept that the Claimant has now been waiting a very long time – more than five years – since the Defendant accepted that the accommodation at the Property was not suitable, and that in some of the cases where mandatory orders have been made the periods of occupation of the unsuitable accommodation were much shorter. I also accept Ms Steinhardt's submission that it does not avail the Defendant, at least when considering the reasonableness of the length of time which the Claimant has been waiting for new accommodation, to point to other applicants who have been waiting as long or even longer than she has (in some cases, many years longer). But the effluxion of time is not, in and of itself, determinative of whether a mandatory order should be made and must also be considered in the context of the evidence as to the ongoing consequences of the breach of duty; I do not consider that Lady Hale's reference in *Ali* at [51] to occupation "having continued for so long… that enough is enough" means that the time which an applicant has spent in unsuitable accommodation is to be separated from all the other circumstances of the case.

v) I accept Mr Rutledge QC's submission that when considering the question of relief, the court must consider the wider context. In the present case, the Defendant's resources are finite; the evidence before me was that its projected budgetary overspend in the current financial year is £67 million. The Claimant has not sought in these judicial review proceedings to challenge as unlawful any part of the Defendant's budget or its allocation of resources to discharge its statutory duties under Parts 6 or 7 of the 1996 Act. I agree with Mr Rutledge that the resources available to the Defendant are relevant to the question of whether mandatory relief should be granted, and that unchallenged budgetary decisions already taken must be the starting point: see *R (on the application of Domb & Others) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 ("*Domb v Hammersmith & Fulham*") at [60-61] *per* Rix LJ (with whom Lord Clarke MR and Sedley LJ agreed). In granting a mandatory order in terms which required the Defendant to provide a property for the Claimant, the court would either be requiring the Defendant to spend money which on the evidence it does not have, or to reallocate money from the provision of other public services in order to provide accommodation to the Claimant.

vi) The Claimant's position was not, as I understood it, that she should be granted mandatory relief which had the effect of now requiring the Defendant to provide permanent accommodation to her under Part 6 of the 1996 Act. Nonetheless, it is convenient here to address why that would not have been an

appropriate solution for the court to adopt, because similar (although not identical) questions arise in relation to a mandatory order for the provision of further temporary accommodation under Part 7. Such an order would inevitably have had an adverse impact on those higher than the Claimant in the waiting list for such housing (a point analogous to that discussed by Stanley Burnton J in *Begum v Tower Hamlets* in relation to the consequences of 'earmarking' a property for a particular applicant, see paragraph 62 above). There are 29 applicants in need of re-housing by the Defendant to a wheelchair-adapted three-bedroom property. The Claimant is sixteenth on the waiting list for such a property – i.e. there are fifteen applicants who either have a higher priority banding or who have been waiting longer. The Defendant also filed evidence setting out, in summary form, the needs and history of some of those applicants. They include two applicants with Band 1 priority whose cases involve significant medical needs and who been waiting for a suitable three-bedroom wheelchair adapted property for more than 15 years (i.e. three times longer than the Claimant). Requiring the Defendant to provide such a property to the Claimant immediately, in preference to those legitimately ahead of her in the housing register, would have been unfair to those applicants and would have resulted in the allocation of permanent housing by the Defendant under Part 6 being otherwise than in accordance with the statutory Part 6 Scheme; remedying that situation by providing properties to those applicants would, according to Mr Beasley's evidence, have cost the Defendant several million pounds.

vii) Providing permanent accommodation to the Claimant under Part 6 of the 1996 Act is not, however, the only route by which the Defendant can fulfil (or rather, as Ms Steinhardt put it in relation to the consequences of the provision of permanent accommodation under Part 6, bring to an end) its duty to provide suitable accommodation under Part 7 of the 1996 Act. The Claimant argues that the Defendant could purchase, build, lease or pay for the adaptation of a property and then allocate it to the Claimant as temporary accommodation provided under Part 7 of the 1996 Act. Mr Rutledge QC submitted that requiring the Defendant to do this in the case of the Claimant would similarly have a prejudicial effect on the position of others waiting for the provision of suitable temporary accommodation under Part 7, including others on the waiting list for Part 6 accommodation who are currently being accommodated in unsuitable temporary accommodation. I accept Mr Rutledge's submission that requiring the Defendant to provide such a property to the Claimant immediately would be to require it to depart from the terms of the Part 7 Policy (which policy has not been challenged as unlawful), in that it would require the Claimant to be given priority over other applicants who are also waiting for suitable temporary accommodation under the Part 7 Policy. Mr Rutledge submitted, and I accept, that in deciding whether to order mandatory relief of the nature sought the court cannot focus exclusively on the position of the Claimant and that for the court to require the Defendant forthwith to provide accommodation to the Claimant would result in a 'collision', as Mr Rutledge put it, with the terms of the Part 7 policy (and see, again, Stanley Burnton J's view in *Begum v Tower Hamlets*, quoted at paragraph 62 above). As Lady Hale said in *R (on the application of Ahmad) v London Borough of Newham* [2009] UKHL 14, [2009] PTSR 632 ("*Ahmad v Newham*") at [15],

the court is not in a position to "weigh the claims of the multitude who are not before the court against the claims of the few who are." This part of Mr Rutledge's argument might have carried significantly less weight had the Claimant positively established that her situation had reached the level described by Lord Hope in *Ali* at [4] and by Lady Hale in *Ali* at [51]; but, for the reasons that I have already given, she has not done so.

viii) Linden J granted a mandatory order in the *M v Newham* case, but the arguments and evidence in that case were significantly different. The basis upon which the local authority sought to resist a mandatory order is recorded at [118] of his judgment as being the Claimant's delay in bringing proceedings (not a point raised in the present case), and it appears that only during the hearing was the parties' attention drawn to the issues that had been identified by Scott Baker J in *Nazir*. By contrast, in the present case the Defendant has raised a number of arguments against the grant of mandatory relief and has presented detailed evidence regarding its limited resources and the position of those higher on its waiting list. In *M v Newham* there was also a significant amount of evidence about the ongoing effects of the breach of statutory duty on the claimant and his family: see at [17-18] of Linden J's judgment. This included, in particular, medical evidence that the claimant's daughter's health would deteriorate if she were not urgently moved to specially adapted accommodation. There is no such evidence in this case. In *Batantu*, a mandatory order was made in circumstances where Henriques J held at [44] that, where the medical evidence was that the claimant's housing situation was a factor in his severe mental illness, where he displayed outbursts of anger and hostility to his wife and children and the family were living in severely overcrowded accommodation, "It is not overstating the case to refer to this as an emergency." Again, the evidence in the present case is, as I have already indicated, significantly different.

82. Taking into account the factors set out above, I decline to grant the mandatory order that is sought by the Claimant. In doing so I regard as particularly significant the issue I have addressed in sub-paragraph 81(i) above, regarding the lack of evidence about the impact on the Claimant of the conditions in which she is living at the Property. Additionally, whilst the Claimant has been waiting a long time for suitable accommodation and it does not appear likely that such accommodation will be provided to her in the near future, there are a number of countervailing factors to consider including the limited resources available to the Defendant and the position of other applicants who are also waiting for housing. To that extent, the Defendant is placed in an "impossible situation", *per* Arden LJ in *Aweys*.

83. Given that the Defendant accepts in these proceedings that it has been and remains in breach of its statutory duty, it is unnecessary to grant any other relief to the Claimant under Ground 1.

84. Ms Steinhardt also relied on a recent report by the Local Government Ombudsman, published on 17 August 2020, in relation to a complaint against the London Borough of Enfield. Ms Steinhardt described that as a very similar case. In resolving that complaint, the Ombudsman found the local authority to be at fault in not having an adequate procurement policy and in not having procured sufficient accommodation. As I have already noted at sub-paragraph 81(v) above, the Claimant's claim does not,

however, challenge as unlawful the Defendant's allocation of resources to fulfil its statutory duties under the 1996 Act, or its procurement policies (save in relation to the specific issues raised under the Equality Act which are dealt with in this judgment). As was the situation in *Domb v Hammersmith & Fulham*, such matters are not before the court (see *per* Sedley LJ at [80]).

85. The Claimant has been waiting for several years for the provision of suitable accommodation. It is clearly desirable that the Defendant's statutory duty towards the Claimant should be fulfilled and that she should be accommodated in a property which is suitable, as required under Part 7 of the 1996 Act, pending the provision of permanent accommodation, under Part 6 of the 1996 Act. However, on the basis of the evidence and arguments advanced before me, I do not consider that the mandatory order that is now sought in this Claim should be made.

Ground 2

86. The Claimant contends that the Defendant is in breach of the duty under the Equality Act to make reasonable adjustments. No issue was taken by the Defendant about the appropriateness of making such a claim in proceedings for judicial review. Ms Steinhardt referred me to a number of authorities on several aspects of the duty, largely (although by no means exclusively) in the field of employment law. For the reasons which follow, in my judgment Ground 2 of this claim fails on the facts.

87. The duty to make reasonable adjustments under section 20 of the Equality Act arises, in this context, from the application of a provision, criterion or practice ("PCP"). Having identified the nature and extent of the PCP, the court must then consider the further questions of whether the PCP results in there being a substantial (i.e. more than minor or trivial) disadvantage when compared to non-disabled persons and, if it does, the reasonableness of the claimed adjustment. During her submissions, Ms Steinhardt referred to the decision of the Court of Appeal in *Sanders v Newham Sixth Form College* [2014] EWCA Civ 734 ("*Sanders*"), in which Laws LJ (with whom Tomlinson and Briggs LJJ agreed) explained the steps that must be taken when considering whether there has been a breach of the duty. In that case, the application of the PCP was not in dispute; but the Employment Tribunal's analysis of the substantial disadvantage and the resulting reasonableness of the claimed adjustments was. Having referred to and approved the relevant authorities on this issue at Employment Appeal Tribunal level, the learned Lord Justice stated:

> "12. The stepped approach… requires, among other things, that the ET identify the nature and extent of the substantial disadvantage to which the disabled person is placed by reason of the PCP in question. Unless that is done, the ET cannot make proper findings as to whether there has been a failure to make reasonable adjustments.
>
> 13. Here the respondents say that the ET failed to undertake any proper analysis of the nature and extent, in particular the extent, of the substantial disadvantage in question; and they made no finding as to the state of the respondent employer's knowledge specifically concerning the nature and extent of the substantial disadvantage. They failed also, it is said, in any event to make a proper assessment of the reasonableness of the proposed adjustment.

> 14. In my judgment these three aspects of the case -- nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustments -- necessarily run together. An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage. Implicit in this is the proposition, perhaps obvious, that an adjustment will only be reasonable if it is, so to speak, tailored to the disadvantage in question; and the extent of the disadvantage is important since an adjustment which is either excessive or inadequate will not be reasonable."

88. The three PCPs alleged by the Claimant to have been applied and which she contends have resulted in there being a substantial disadvantage in the conferment of the relevant benefit (i.e. the provision of housing) for the purposes of this claim are set out at paragraph 64 of her Grounds, as follows (arguments based on two other alleged PCPs set out in that paragraph were not pursued by Ms Steinhardt):

> "(a) An allocations scheme
>
> (b) A policy or practice in relation to the allocation of temporary accommodation including as to:-
>
> (i) The resources / staffing that would be devoted to identifying suitable temporary accommodation;
>
> (ii) The use of preferred or designated suppliers;
>
> (iii) The budget that would be spent on temporary accommodation;
>
> (iv) The adaptations that the Defendant would be prepared to make or to consider;
>
> (c) a practice or policy as to the procurement of accommodation for use as temporary accommodation (including as to the use of approved or designated providers) and as to whether the Defendant was prepared to purchase property…"

89. I pause to observe that the Detailed Grounds of Defence (not, I should point out, settled by Mr Rutledge QC) do not address the issues arising on this aspect of the claim with the necessary degree of clarity or precision. As cases such as *Sanders* and the Employment Appeal Tribunal authorities approved by Laws LJ make clear, a stepped approach is required when addressing allegations of breach of this particular statutory duty. The PCP must be identified. It must be established that the PCP is applied. It must be established that a substantial disadvantage is suffered, in relation to the comparator, by the application of the PCP and what the nature and extent of the substantial disadvantage is. What adjustments it was reasonable to make in order to attempt to alleviate that disadvantage must then be considered. Although the Defendant denies that there is any substantial disadvantage here, the Detailed Grounds of Defence in this case focus on the last of these steps, contending that none of the

claimed adjustments would be reasonable on the basis that they would "subvert the scheme of the legislation which has deliberately left these resource driven and politically sensitive issues to the judgment of the local housing authority". But, as Laws LJ pointed out in *Sanders*, the reasonableness of the claimed adjustments cannot be considered without appreciating the nature and extent of any substantial disadvantage; and that can only be determined by reference to the PCP that is applied. A greater focus in the Defendant's statement of case on the statutory language in the Equality Act (and on the required stages of the analysis, as established by authority) would have been of assistance.

90. As modified by paragraph 2 of Schedule 2 to the Equality Act, section 20 of the Act requires that there be a PCP which puts disabled persons generally at a substantial disadvantage compared with non-disabled persons. It is unnecessary to determine whether the correct comparison involves all non-disabled housing applicants or only other applicants who do not have the Claimant's particular disability, i.e. other applicants who do not require wheelchair-adapted accommodation, because the claim for failure to make reasonable adjustments fails in this case irrespective of the precise nature of the comparator groups involved.

91. Do the PCPs relied on by the Claimant put disabled applicants (including the Claimant) at a substantial disadvantage when compared to other applicants? The Claimant contends at paragraph 65 of her Grounds that the application of the PCPs results in a substantial disadvantage because the provision of suitable accommodation is likely to take longer than in the case of such an applicant, the Claimant is more likely to be adversely affected by such delays, and that the PCPs result in the Claimant having a lesser chance of being allocated a suitable property.

92. In my judgment, the Claimant's case fails at this stage of the analysis, because the evidence does not establish that the application of any of the PCPs that are relied on (assuming for present purposes that they are PCPs which are applied by the Defendant) puts disabled applicants generally, or disabled applicants who require wheelchair-adapted accommodation, at a substantial disadvantage in relation to the provision of housing when compared to a non-disabled applicant. Although assertions to this effect are made in the Claimant's Grounds, the Claimant filed no such evidence with her Claim. There is, for example, no evidence about how (if at all) other applicants are in a more advantageous position than the Claimant or other disabled applicants have been, in terms of delays in the provision of accommodation and the chances of being allocated a property, as a result of the application of the Defendant's Part 6 Scheme (which, as the Defendant points out, contains provision for the prioritisation of disabled applicants), or by the mechanisms for the allocation of temporary accommodation (including the Part 7 Policy, which also contains provision permitting the prioritisation of disabled applicants), or by the Defendant's policy or practice on the procurement of temporary accommodation.

93. Although the Claimant filed no evidence going to the question of the substantial disadvantage to disabled housing applicants arising in consequence of the application of the PCPs, Ms Steinhardt relied on several passages from Mr Beasley's evidence which she contended made the Claimant's case for her in this respect. These parts of Mr Beasley's witness statement deal with the relatively scarce nature of specially adapted housing and the delays which the Claimant and other disabled applicants have endured in being allocated suitable accommodation by the Defendant. But they do not

establish that the PCPs relied on by the Claimant, by their application, put her or other disabled housing applicants at a substantial disadvantage when compared with non-disabled housing applicants. That the Claimant has had to wait a long time for a suitable property does not in and of itself demonstrate any substantial disadvantage – still less the necessary level of specificity in terms of the nature and extent of that disadvantage – resulting from the application of the PCPs that are relied on, when compared to a non-disabled housing applicant.

94. Ms Steinhardt submitted that this part of the claim should succeed, notwithstanding any deficiencies in the evidence, because the burden of proof had shifted to the Defendant and had not been discharged. In my judgment, however, the burden of proof has not shifted in this case. In order for the burden of proof to shift under section 136 of the Equality Act, a claimant must establish facts from which the court could decide, in the absence of any other explanation, that there has been a contravention (i.e. a breach) of the relevant duty. The burden does not shift in relation to demonstrating that the duty arises. The duty to make reasonable adjustments only arises if the PCP is applied and if it results in there being substantial disadvantage in relation to the comparator. These matters must be established by evidence, and the burden remains on a claimant to do that. In a reasonable adjustments case, the necessary matters that must be established before the burden of proof shifts to the defendant include the application of the PCP, the existence of a substantial disadvantage in relation to the comparator, and that there is an apparently reasonable adjustment.

95. Ms Steinhardt relied on what Lord Dyson MR (with whom Jackson and Gloster LJJ agreed) said at [38] of his judgment in *Finnigan v Chief Constable of Northumbria* [2013] EWCA Civ 1191, [2014] 1 WLR 445, that the burden of proof shifts "once a potential reasonable adjustment has been identified by the claimant"; but an adjustment can only be identified as a potentially reasonable one once the nature and extent of any substantial disadvantage arising from the application of the PCP is known. In *Finnigan* (which was a case under section 21E of the Disability Discrimination Act 1995, and in which the adverse effect of the relevant provision, accepted by the trial judge, does not appear to have been in issue before the Court of Appeal), the Master of the Rolls relied on *Project Management Institute v Latif* [2007] IRLR 579 at [53] for the proposition which he identified. However, the Employment Appeal Tribunal in that case made clear that its view was that the burden of proof did not shift in relation to the prior questions of the establishment of the PCP or the demonstration of the substantial disadvantage. I do not, therefore, consider that the proposition set out in *Finnigan* at [38] assists the Claimant in establishing her claim.

96. For these reasons, Ground 2 of the Claim fails. Although Counsel spent some time addressing me on the reasonableness of the various potential adjustments proposed on behalf of the Claimant, it is unnecessary to deal with those arguments and particularly so given, as Laws LJ stated in his judgment in *Sanders*, that analysis will depend on the court having first identified the nature and extent of the substantial disadvantage arising from the application of the relevant PCP.

Ground 3

97. The third Ground is that the Defendant has unlawfully failed to consider putting the Claimant into Band 1 of its priority system, and that it has unlawfully failed to consider making a direct offer of accommodation to the Claimant.

98. I can deal shortly with the allegation regarding failure to consider making a direct offer, because the evidence clearly establishes that the Defendant has considered and continues to consider making the Claimant a direct offer of accommodation. Mr Beasley's evidence on this issue is that:

> "The Claimant has been considered for each and every adaptable three-bedroom property that has become available since she was placed on the Housing Register. However, on each occasion the property has been allocated to another disabled applicant who requires adapted accommodation and who was either in a higher priority band than the Claimant, or who has also in priority band 3 (i.e. had an equivalent need) but who had been waiting longer for a property."

99. Since the Claim was filed, the Claimant attended two viewings of potential properties with Mr Beasley in June and July 2020, although neither property was found to be suitable. It my judgment, the evidence establishes that the Defendant has considered the Claimant for a potential direct offer in accordance with the terms of its policy. There is no unlawfulness, as alleged, in this respect.

100. The remaining issue between the parties under Ground 3 is the alleged failure to consider the Claimant's request that she be moved into Band 1 of the priority bands. Ms Steinhardt submitted that the Defendant was under a duty to "consider whether it should exercise its powers" in this respect (see *Stovin v Wise* [1996] AC 923 at 950 *per* Lord Hoffmann), the Claimant having requested that it do so. She submitted that the Defendant conspicuously failed to do what it ought to have done in this case. Her argument was that the Defendant ought to have considered whether to exercise the discretion in paragraphs 192 and 285 of the Part 6 Scheme; instead, it had simply ignored the Claimant's requests to be put into Band 1.

101. In their letter of 21 December 2018, the Claimant's Solicitors requested that, as an alternative to being immediately provided with suitable accommodation, the Claimant should be placed into Band 1 of the Defendant's allocation scheme, pursuant to paragraph 185 of the Part 6 Scheme. This request was not addressed in any further detail within the letter, which focused on the Claimant's claim that there had been a breach of the Equality Act. The Defendant did not respond to that letter.

102. In their second Pre-Action Protocol letter of 7 November 2019, the Claimant's Solicitors referred to the letter of 21 December 2018 as having contained a request that the Claimant be placed into priority Band 1 but did not make any specific complaint of an unlawful failure to deal with that request. The letter of 14 January 2020 did deal with this issue. The Claimant's Solicitors referred to and repeated their request that had been made in their letter of 21 December 2018 that the Claimant should be placed in Band 1 of the scheme, and expressly cited paragraph 184 of the Part 6 Scheme (which refers to the discretion to prioritise in exceptional circumstances that is set out later in paragraph 192). It was contended that, the Defendant had unlawfully failed even to consider placing the Claimant in Band 1. The

Claimant's Solicitors expressly requested that the Claimant's case be put before the Defendant's Director of Housing for consideration of whether she should be placed into Band 1.

103. In the Claimant's Grounds, it was alleged that the Defendant had unlawfully failed to consider these requests. The Claimant contended that the Defendant was required to consider whether to place the Claimant in Band 1, or to make her a direct offer, both because of the express requests made to it by the Claimant's Solicitors and because the Defendant was, in any event, under a duty to consider the appropriate Band into which the Claimant should be placed.

104. The Detailed Grounds of Defence do not address what, if any, consideration was given to the Claimant's requests, made on at least two occasions (i.e. the letters of 21 December 2018 and 14 January 2020) that she be placed into Band 1 and, on the latter occasion, that her case be referred to the Director of Housing for such consideration. Instead, the Defendant's pleaded case is that to succeed on Ground 3, the Claimant must demonstrate that it was "irrational of the Defendant not to place the Claimant in Band 1 and/or not make a direct offer to the Claimant" and that the evidence demonstrates that the Defendant "is not prepared to exercise that discretion in the Claimant's favour". This reference to "the evidence" appears to be to what Mr Beasley says on this topic in his witness statement.

105. Mr Beasley's witness statement discusses the history of the Claimant's case in considerable detail. However, the only pre-action correspondence to which Mr Beasley makes reference is that sent between the parties in September 2016. Mr Beasley does not refer at all to the Claimant's Solicitors' letters of 21 December 2018 and 14 January 2020. He does not explain why the Defendant did not respond to them. He also does not indicate that any consideration was given by the Defendant, when the issue was raised in those letters, to placing the Claimant in Band 1, or that the Claimant's case was referred to the Director of Housing or a nominated deputy under paragraph 184 of the Part 6 Scheme.

106. Mr Beasley does in his witness statement explain why he considers that the Claimant was correctly awarded Band 3 priority in 2015. He also refers to the exercise that is undertaken by the Defendant when deciding to place disabled applicants into the different priority bands. Mr Beasley states:

> "66. Unfortunately, there are many disabled applicants for housing who need specialist adapted accommodation in the Borough. It simply isn't possible for the Defendant to put every single disabled applicant in need of adapted accommodation into priority band 1. Even in cases concerning disabled applicants, our housing and allocations officers still need to carefully consider each applicant's individual circumstances and their particular needs for housing and to allocate them priority according to their needs, relative to other applicants on the Housing Register (both those with impairments and those without).
>
> 67. This is a difficult balancing act and one that requires the Defendant to carefully consider, and weigh, the rights and needs of applicants with protected characteristics. In undertaking this balancing exercise, the Defendant has regard to each applicant's circumstances, their representations on the issue and on relevant medical and occupational health advice."

107. As I have already noted, there is no evidence of any such consideration by the Defendant of the Claimant's position having been undertaken in response to her two requests to be placed in Band 1. These requests were made in 2018 and 2020 and post-dated by several years the Defendant's decision, made in 2015, to place the Claimant in Band 3. Mr Beasley does not suggest – because his evidence does not address the 2018 and 2020 requests at all – that the Claimant was not at that point entitled to request a reconsideration of the priority Band into which she had been placed several years before. Rather, Mr Beasley states that he is satisfied that the Claimant was correctly placed into Band 3 in 2015 and that his view is that as things presently stand the Claimant's accommodation "moderately affects her disability but the impact on her is not severe enough to warrant urgent allocation under band 1 priority."

108. In my judgment, the Defendant acted unlawfully in failing to take any decision in response to the two express requests made by the Claimant that she should be moved into Band 1. Ms Steinhardt is, in my judgment, correct in her submission that the Defendant was under an obligation, as a matter of public law, to consider and decide those requests. It did not do so. In the circumstances, it is unnecessary to consider whether the Defendant was under a separate duty to reconsider the issue of its own motion: specific requests for re-categorisation were made by the Claimant and were, it appears, ignored by the Defendant.

109. I reject Mr Rutledge QC's submission that this argument invites the Court to gainsay the opinion of Mr Beasley, in his witness statement, that the Claimant was correctly placed into Band 3. Mr Beasley's witness evidence to the court is not, as such, a substitute for the lawful consideration and determination of the Claimant's requests for Band 1 priority that the Defendant failed to undertake. Rather, it is to the effect that had the proper consideration of the Claimant's requests been undertaken, the result would not have been different to that which presently pertains (i.e. that the Claimant is in Band 3).

110. I do not, however, consider that Mr Beasley's evidence is sufficient to demonstrate that the test in section 31(2A) of the Senior Courts Act 1981, i.e. that it is highly likely that the result for the Claimant would not have been substantially different, is met here. Paragraph 67 of Mr Beasley's statement refers to the process of prioritisation involving "a difficult balancing act", but his evidence does not, for example, consider medical and occupational health advice in connection with his view as to the level of priority which should be afforded to the Claimant (e.g. Mr Beasley refers at paragraph 68 of his statement to the Property having "many of the specialist adaptations" recommended by the occupational therapist, but he does not address, in his analysis, the consequences of those recommendations that are lacking). Mr Beasley states at paragraph 72 of his witness statement that his view of the Claimant's situation is that she is moderately affected by the unsuitable accommodation and that this effect "is not severe enough to warrant urgent allocation under band 1 priority" but gives no reasons for this conclusion. In particular, he does not give evidence that he is either the director or the nominated deputy to whom paragraphs 184 and 295 of the Part 6 Scheme refer in relation to discretionary prioritisation decisions, or that he has consulted such officials of the Defendant in relation to his view about the appropriate band for the Claimant. I do not consider that his evidence demonstrates that it is highly likely that, had the Defendant properly considered the Claimant's

requests for Band 1 priority in accordance with the Part 6 Scheme, she would have remained in Band 3.

111. I should not be taken as expressing any view on the merits of the Claimant's request to be moved to Band 1 priority, or as indicating that the Claimant's case does fall within the criteria or examples in relation to Band 1 given in the Part 6 Scheme. That is a matter for the Defendant to decide. My conclusion on Ground 3 does not involve, as Mr Rutledge submitted it would, an impermissible intrusion by the court into the merits of the Defendant's decision-making process in the way described by Lord Neuberger at [46] and [62] of his opinion in *Ahmad v Newham*. My decision is no more than that the Defendant has unlawfully failed to determine the Claimant's requests to be given Band 1 priority, and the Defendant has not then demonstrated in this litigation, in particular through the evidence given by Mr Beasley, that it is highly likely that had those requests been properly considered and determined (as they should have been), the result would have been that the Claimant remained in Band 3.

Conclusion and Disposal

112. The Claim succeeds on Ground 3. I will make a declaration that the Defendant has unlawfully failed to determine the Claimant's request that she be given Band 1 priority within its Part 6 Scheme. It will be for the Defendant to determine that request, in accordance with its policy.