HOUSE OF LORDS

SESSION 2008–09

[2009] UKHL 36

on appeal from: [2008]EWCA Civ 1228
[2008]EWCA Civ 378

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Birmingham City Council (Appellants) *v* Ali (FC) and others (FC) (Respondents)
Moran (FC) (Appellant) *v* Manchester City Council (Respondents)

Appellate Committee
Lord Hope of Craighead
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Neuberger of Abbotsbury

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Interveners: Women's Aid Federation:
Stephen Knafler
Liz Davies
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Interveners: Secretary of State for Communities and Local Government:
Martin Chamberlain
(Instructed by Treasury Solicitors)

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LORD HOPE OF CRAIGHEAD

My Lords,

1. I have had the privilege of reading in draft the opinion which has been prepared by my noble and learned friend Baroness Hale of Richmond, to which my noble and learned friend Lord Neuberger of Abbotsbury has contributed. I agree with it, and for the reasons they have given I would allow both appeals.

2. As Baroness Hale explains, both cases concern the duties of local housing authorities towards homeless people under Part VII of the Housing Act 1996. The question which lies at the heart of the *Birmingham* case is whether it is a lawful discharge of the housing authority's duty under section 193(2) of the Act to leave a family in accommodation which requires them to be treated as homeless under section 175(3) because it is accommodation which it is not reasonable to expect them to continue to occupy. In the *Manchester* case it is how the provisions of Part VII are to be applied to a woman who flees domestic violence and is provided with a place in a women's refuge. The cases were heard separately on different dates, but it was obvious from the outset that there was much common ground. So judgment in the *Birmingham* case was reserved until after the hearing of the *Manchester* case, and it makes good sense for them now to be dealt with in a single judgment. I wish to pay tribute to counsel in both cases for their assistance, which included the making of further written submissions in the *Birmingham* case in the light of the written and oral submissions that were made to the Committee in the *Manchester* case.

3. I wish also to associate myself particularly with Baroness Hale's observation in para 36 that both sections 175(3) and 191 look to the future as well as the present. I would make the same point about the duty in section 193(2), which requires the housing authority to secure that accommodation "is available for occupation by the applicant". The equivalent provision in section 31(2) of the Housing (Scotland) Act 1987 uses the phrase "becomes available". In my opinion the effect of these two provisions is the same. In *Codona v Mid-Bedfordshire District Council* [2004] EWCA Civ 925, [2005] LGR 241, para 38, Auld LJ said that the duty of the authority was to secure the availability of suitable accommodation within a reasonable period of time, the reasonableness of the period depending on the circumstances of each case and on what accommodation was available. Collins J took a different approach in the *Birmingham* case: *R (Aweys) v Birmingham City Council* [2007] EWHC 52 (Admin). He said that it was a breach of the authority's duty for it to require families to remain in unsuitable accommodation even for a short time. I prefer the approach which Auld LJ adopted. But he recommended discussion leading to agreement, not compulsion.

4. In the Court of Appeal Arden LJ disagreed with the way the duty was expressed in *Codona*: *R (Aweys) v Birmingham City Council* [2008] EWCA Civ 48, [2008] 1 WLR 2305, paras 62-65. She said that the duty in section 193(2) was expressed in terms of producing a result in the context of homelessness, which of its nature requires some urgent action. But the words of the subsection need to be seen in their overall context. The urgency of the action that is needed will vary from case to case, including the way the authority fulfils its interim duty under section 188(1). Each of these two duties needs to be seen in the light of what can be done in the performance of the other. There may be cases where it would not be unreasonable for a homeless person to be expected to continue to occupy for a short period accommodation which it would not be reasonable for him to occupy for a long time while the authority looks for accommodation which will release it from its duty under section 193(2). I agree with Baroness Hale that the court must have regard to the practicalities of the situation. As Auld LJ said in *Codona*, para 38, the court will not make an order to force a local authority to do the impossible. On the other hand it may well feel that it is proper for it to step in where the time that is allowed to elapse becomes intolerable. The point which I wish to stress is that the description of the duty in *Codona* is, with respect, the one that should be adopted in preference to that recommended by Arden LJ.

LORD SCOTT OF FOSCOTE

My Lords,

5. I, too, have had the advantage of reading in draft the opinion prepared by my noble and learned friend Baroness Hale of Richmond. For the reasons given in that opinion, with which I am in full agreement, I, too, would allow both these appeals. I want to express my agreement also with the views of my noble and learned friend Lord Hope of Craighead expressed in paragraphs 3 and 4 of his opinion.

LORD WALKER OF GESTINGTHORPE

My Lords,

6. I have had the great advantage of reading in draft the opinion of my noble and learned friend by Baroness Hale (in collaboration with my noble and learned friend Lord Neuberger of Abbotsbury). I am in full agreement with it and for the reasons which they give I would allow these appeals and make the orders proposed.

BARONESS HALE OF RICHMOND

My Lords,

7. My noble and learned friend Lord Neuberger of Abbotsbury and I have both contributed to the drafting of this opinion, which embodies the views which we both share.

8. On the surface, these two cases seem poles apart, except that they both concern the duties of local housing authorities towards homeless people under Part 7 of the Housing Act 1996. In the *Birmingham* case, six families, each with at least six children, were living in accommodation which had become seriously over-crowded. The City Council accepted that they were unintentionally homeless and in priority need. Nevertheless the families were left in that accommodation for many months or even years before permanent accommodation was found for them. In the *Manchester* case, a mother left the family home

with her two children because of her partner's violence and went to a women's refuge. A few weeks later she was evicted from the refuge because of her behaviour towards the staff. The City Council gave her temporary accommodation but soon decided that although she was homeless and in priority need she had become homeless intentionally.

9. In each case, several issues have been raised, but common to both is the meaning of the phrase "accommodation which it would be reasonable for him to continue to occupy" in section 175(3) of the 1996 Act. Does this mean that a person is only homeless if it would not be reasonable for him to stay where he is for another night? Or does it incorporate some element of looking to the future, so that a person may be homeless if it is not reasonable to expect him to stay where he is indefinitely or for the foreseeable future? This question did not arise under the homelessness legislation as originally enacted and some account of how that legislation has evolved is necessary to understanding how the argument has arisen.

10. Under the Housing (Homeless Persons) Act 1977, a person were homeless if he had no accommodation which he and his family were entitled to occupy, by virtue of some interest, court order, express or implied licence or statutory right to occupy (1977 Act, s 1(1)). There was no reference in the definition of homelessness to whether or not it was reasonable for him to continue to occupy the accommodation to which he was entitled. Thus in *Puhlhofer v Hillingdon London Borough Council* [1986] AC 484, this House decided that a couple living with their two young children in one room in a guest house without cooking or laundry facilities were not homeless within the meaning of the Act. However intolerable their living conditions were, there was no requirement that their accommodation be appropriate or reasonable, as long as it could properly be described as accommodation and was available for them to occupy.

11. Hence under the 1977 Act none of the Birmingham families would have been regarded as homeless. Curiously, however, if they had taken the plunge and left their overcrowded accommodation, they might not have been found to be intentionally homeless. The 1977 Act provided that a person became homeless intentionally if he deliberately did or failed to do something which resulted in him ceasing to occupy accommodation "which it would have been reasonable for him to continue to occupy" (1977 Act, s 17(1)). So leaving their accommodation and sleeping on the streets might mean that the council was under a duty to find them accommodation.

12. Parliament reacted to the *Puhlhofer* decision by inserting new provisions into the Housing Act 1985, Part III of which had replaced the 1977 Act. First, it was provided that "a person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy" (1985 Act, s 58(2A), inserted by Housing and Planning Act 1986, s 14(1),(2)). Second, it was provided that, in determining whether it would be reasonable for a person to continue to occupy accommodation, regard could be had to the general circumstances prevailing in relation to housing in the district (1985 Act, s 58(2B), inserted by 1986 Act, s 14(1),(2)). It is because of the successor to these provisions that the Birmingham families were accepted as homeless although they did have some sort of roof over their heads.

13. On the other hand, the 1977 Act did make special provision for victims of domestic violence. Even if a person had accommodation which she was entitled to occupy, she was also homeless if she could not gain entry to it or if it was probable that her occupation of it would lead to violence (or threats which were likely to carried out) against her from some other person living there (1977 Act, s 1(2)(a) and (b)). In *R v Ealing London Borough Council, ex p Sidhu* (1982) 80 LGR 534, a woman had left her home because of domestic violence and gone to stay in a refuge. The local authority argued that she was not homeless because she had accommodation available to her in the refuge. That argument got short shrift from Hodgson J, who did not regard a crisis refuge of this sort as accommodation within the meaning of the 1977 Act. It was essential that women who had gone to refuges were still seen as homeless. Otherwise the refuges would have to give them 28 days notice when they came in so that they would be under threat of homelessness (under s 1(3) of the 1977 Act). This would be totally undesirable and add stress to stress. The protection of the Act would be watered down or removed from a whole class of people whom it was set up to help. At that date it was not possible for the judge to hold that it was not reasonable for a woman to continue to occupy her place in the refuge. That humane decision so obviously accorded with the purpose of the 1977 Act that it has never been expressly overruled, although we have heard much argument about whether it could possibly have survived the decision of this House in *Puhlhofer*.

The present law

14. Part III of the 1985 Act has now been replaced by Part 7 of the 1996 Act. Part 7 (which contains sections 175 to 218) deals with

"Homelessness" whereas Part 6 (containing sections 159 to 174) is concerned with "Allocation of Housing Accommodation". As was explained by Lord Hoffmann in relation to the predecessor legislation, in *R v Brent London Borough Council, Ex p Awua* [1996] AC 55, 71G-72B, it is important when considering an authority's duty under Part 7 not to confuse it with their duty under Part 6.

15. In the more than twenty years which have passed since then, the stock of local authority accommodation available under Part 6 has been substantially diminished, so that, in many areas, it has ceased to exist. Nonetheless, many authorities still own housing accommodation, and Part 6 contains the statutory regime that applies to its allocation. Section 167 requires every authority to have an allocation scheme, to which they must adhere. Subsection (2) requires every such scheme to accord "reasonable preference" to certain categories of person. They include "people who are homeless (within the meaning of Part 7)", other people to whom there is a duty to provide accommodation under Part 7, people in housing which is insanitary, overcrowded or the like, and people who need to move on welfare grounds. However, Part 6 is concerned with the local authority's policy in allocating housing, whereas Part 7 is concerned with their duties towards individual people who face the immediate problem of homelessness.

16. Homelessness and threatened homelessness are defined in section 175:

> "(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.
>
> (2) A person is also homeless if he has accommodation but –
>
> (a) he cannot secure entry to it, or
>
> (b) [relates to moveable living quarters without a place to park or moor].

(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.

(4) A person is threatened with homelessness if it is likely that he will become homeless within 28 days."

Section 176 deals with other members of the family or household:

"Accommodation shall be regarded as available for a person's occupation only if it is available for occupation by him together with –

(a) any other person who normally resides with him as a member of his family, or

(b) any other person who might reasonably be expected to live with him.

References in this Part to securing that accommodation is available for a person's occupation shall be construed accordingly."

Further provision as to whether it is reasonable to continue to occupy accommodation is made in section 177 (as amended by the Homelessness Act 2002):

"(1) It is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to domestic violence or other violence against him, or against –

(a) a person who normally resides with him as a member of his family, or

(b) any other person who might reasonably be expected to reside with him.

(1A) For this purpose 'violence' means –

(a) violence from another person; or

(b) threats of violence from another person which are likely to be carried out…

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

Thus the risk of violence is now provided for as an example of the "reasonableness" of continuing to occupy the accommodation available. The Secretary of State may also specify matters to be taken into account in deciding reasonableness (s 177(3) and Homelessness (Suitability of Accommodation) (England) Order 2003).

17. Homelessness gives rise to a graduated series of duties on the local housing authority. If the authority have reason to believe that someone who applies to them for accommodation or help with accommodation may be homeless or threatened with homelessness, they must make inquiries in order to satisfy themselves whether he is eligible for their help and if so what duty, if any, they owe to him under Part 7 (1996 Act, s 184). Certain persons from abroad and asylum seekers are not eligible for help under Part 7 (ss 185 and 186). If the authority have reason to believe that an applicant "may be homeless, eligible for assistance and have a priority need", they must secure that accommodation is available for his occupation pending a decision as to what duty is owed (s 188(1)). Priority need is then defined, and includes families with dependent children (s 189(1)(b)). If the local authority decide that the applicant is homeless, eligible for assistance and in priority need, but became homeless intentionally, they must secure that accommodation is available for him "for such period as they consider will give him a reasonable opportunity" of finding his own accommodation and provide him with advice and assistance in doing so (s 190(1) and (2)). We are told that up to six weeks is usually thought enough for this although there is no statutory limit. If an intentionally homeless person does not have a priority need, the authority only have to provide him with advice and help to find somewhere for himself (s 190(3)). If the local authority are satisfied that an applicant is homeless and has a priority need, and are not satisfied that he became homeless intentionally, then they "shall secure that accommodation is available for occupation by the applicant" (s 193(1) and (2), unless they are able to refer the applicant to another local authority under s 198).

18. Whether the authority are securing interim accommodation under section 188(1) pending a decision, or securing accommodation after the decision has been made under section 190(2) or 193(2), they may provide the accommodation themselves or secure that it is provided by someone else. However, the accommodation secured has to be "suitable" (1996 Act, s 206(1)). In deciding what is "suitable" the council must "have regard" to Parts 9 and 10 of the Housing Act 1985 and Parts 1 to 4 of the Housing Act 2004 (which relate to slum clearance and over-crowding) and also to matters specified by the Secretary of State (1996 Act, s 210(1) and (2)). Clearly, however, what is regarded as

suitable for discharging the interim duty may be rather different from what is regarded as suitable for discharging the more open-ended duty in section 193(2); but what is suitable for discharging the "full" duty in section 193(2) does not have to be long life accommodation with security of tenure such as would arise if the family were allocated the tenancy of a council house under the council's allocation policy determined in accordance with Part 6 of the 1996 Act. It is expressly provided that a person who is secured accommodation under Part 7 of the 1996 Act does not become a secure tenant unless the council say so (Housing Act 1985, Sched 1, para 4).

19. The duty under section 193(2) is the highest duty which is owed under Part 7. From 1996 until amendments made by the Homelessness Act 2002, that duty lasted for a fixed period of two years (with a power thereafter). Now, however, it is unlimited in time but comes to an end in the various ways which are listed in section 193(5) to (8). In summary, these involve accepting an offer of private housing or social housing under Part 6 of the 1996 Act, refusing a final offer under Part 6, leaving voluntarily for other accommodation, or becoming homeless intentionally.

20. Becoming homeless intentionally is defined in section 191, the material part of which for our purposes is section 191(1):

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

It will thus be apparent that section 175(3) and section 191(1) are counterparts. A person is homeless even if he has accommodation but it would not be reasonable for him to continue to occupy it. A person becomes homeless intentionally if he is responsible for losing accommodation which it would have been reasonable for him to continue to occupy.

21. The main issue in the *Birmingham* case, therefore, is whether it was open to the council to accept that it was not reasonable for a family to continue to occupy their present home but to accommodate them there until something appropriate for them could be found. One of the issues in the *Manchester* case is whether it was reasonable to expect Ms

Moran to continue to occupy her place in the refuge, so that she became homeless intentionally when she behaved in such a way that she was evicted. However, there are additional issues in each case.

The Birmingham cases

22. Each of the six applicants applied to the council as a homeless person. Each had a large family and needed a four or five bedroomed property to be properly housed. Birmingham is the largest housing authority in the country with a long waiting list for social housing. It also receives around one fifth of all the homelessness applications in the country. Inner city clearance programmes and the right to buy have reduced its stock of council housing. The supply of large houses needed by families like these is very limited. Each of these families has now been properly housed, but it was a struggle.

23. The council eventually accepted that each of these families was homeless and was owed the "full" duty under section 193(2). In four cases this was because it was not reasonable to expect them to continue to occupy their current homes, which were over-crowded or in disrepair. Mr Aweys, his wife and six children were living in the two bedroomed council flat which he had been allocated when he arrived alone as a refugee from Somalia. It took a year for the council to accept that he was owed the "full" duty and a further 16 months for him to be offered a suitable house. Mr Adam also occupied a two bedroomed council flat with his wife and initially five children. The council accepted that he was owed the "full" duty in November 2005. A sixth child was born in 2007. Various properties were offered but either withdrawn or unsuitable. The family were given permanent accommodation in January 2008. Ms Sharif was more fortunate. She was tenant of a three bedroomed flat in which eleven people were living. The council accepted that it owed her the "full" duty in February 2006 and she was offered permanent accommodation ten months later in December 2006. Ms Omar was not a council tenant but had an assured shorthold tenancy when she applied in 2004 because of over-crowding, rat infestation and damp. The council finally accepted that she was owed the "full" duty in mid 2006 but that duty came to an end when she refused an offer and she later found accommodation of her own.

24. In two cases, the applicants were provided with accommodation by the council but it was later accepted that this was not suitable for them. Ms Abdulle, with her husband and five children, was evicted from

privately owned accommodation in 2003 and the council accepted that the "full" duty was owed. It took some months before they were provided with temporary accommodation. In June 2004 they were offered a three bedroomed property which they accepted while requesting a review of its suitability. Two more children were born. In February 2008 they were still waiting for an offer. Mr Ali is disabled. In June 2002, the council accepted the "full" duty towards him, his wife and their four children, one of whom is severely disabled. In December they were offered a three bedroomed property which Mr Ali accepted while challenging its suitability. Two more children have since been born. Properties were offered but not found suitable. They eventually moved into suitable permanent accommodation in December 2008.

25. In essence the council's approach was that they could accept that the family was homeless because of over-crowding or the condition of the property they were currently occupying, and that the "full" duty under section 193(2) was owed because the family was in priority need and had not become homeless intentionally, but that they could discharge their duty by leaving the family in their existing home until suitable permanent accommodation could be found. Coupled with this was the council's policy for allocating the limited stock of social housing available to them for permanent letting. Homeless households whom the council had placed in temporary accommodation were placed in the highest priority band A, while homeless households for whom the council had not arranged temporary accommodation, including families such as these, were placed in band B.

26. Each applicant sought judicial review of the council's alleged failure to perform the duty under section 193(2) and of the council's allocation policy. Collins J granted a declaration that the allocation policy was unlawful in that it failed to secure reasonable preference for homeless applicants to whom the "main housing duty" under section 193(2) was owed. He also held that to include a person in the allocation scheme was not enough to discharge the section 193(2) duty. Suitable accommodation had to be provided directly or within a reasonably short time. Hence he made mandatory orders that within a week the council make offers of suitable accommodation to the families who did not yet have it: [2007] EWHC 52 (Admin). In February 2008, the Court of Appeal dismissed the council's appeal: [2008] EWCA Civ 48, [2008] 1 WLR 2305.

27. The issues for this House, therefore, are (1) whether accommodation which it is not reasonable to expect the applicant to

continue to occupy can nevertheless be suitable accommodation for the purposes of the duty under section 193(2); (2) whether the council's allocation policy was unlawful in giving greater priority to people in temporary accommodation than to people left in accommodation which it was not reasonable for them to occupy; and (3) the remedies for breach of the duty under section 193(2).

The Manchester case

28. Ms Moran is a young woman with two children, who were aged three and two at the time of the relevant events in 2006. She also has mental health problems and "chronic poor coping skills". She had a secure tenancy of a house in Moss Side, Manchester, which she left with her two children on 20 September 2006 because of domestic violence from her former partner. (She had done so twice before.) She went first to Trafford Women's Aid but moved on 18 October 2006 to North Manchester Women's Aid to be nearer to her mother and further from her partner.

29. She signed a licence agreement which did not entitle her to any particular room but allowed her to stay there "as long as you need it while you decide what to do". Because it was a safe house for women and children escaping domestic violence, there were some special rules – such as not to bring any men into the refuge or the surrounding area, not to have any visitors or to give the address to anyone, and not to have contact with the neighbours or disclose the nature of the building. Breach of the rules could lead to withdrawal of the licence, as could failure to pay the accommodation charge, violence, threatening behaviour, harassment or any behaviour which caused nuisance or annoyance to residents, visitors or staff. All members of staff had authority to ask her to leave immediately.

30. On 30 October 2006, Ms Moran was evicted from the refuge. The precise facts have never been found but she had an argument with the staff, the police were called and she was removed. She applied to the council as a homeless person the same day. The council gave her temporary accommodation pending their decision. But next day they decided that because of her conduct she had made herself intentionally homeless (and therefore would have to leave her temporary accommodation in three weeks' time). On 6 March 2007, the decision was upheld on review, the reviewing officer determining that the refuge

was accommodation available to Ms Moran and her family which it was reasonable for her to continue to occupy.

31. On appeal to the county court, Mr Recorder Rigby held that the reviewing officer had failed to take account of the decision in *Sidhu* and the advice in paragraph 8.34 of the then Code of Guidance:

> "[S]ome types of accommodation, for example, women's refuges, direct access hostels and night shelters, are intended to provide very short term temporary accommodation in a crisis and it should not be regarded as reasonable to continue to occupy such accommodation in the medium and longer term."

Although he did not feel able to say that, as a matter of law, a refuge could not be "accommodation which it would have been reasonable for him to continue to occupy" within the meaning of section 191(1), "there must be a very strong inference when interpreting this section that a women's refuge is most unlikely to be such accommodation." He therefore quashed the decision and sent it back to be decided by the reviewing officer once more.

32. On appeal, the Court of Appeal held that *Sidhu* was wrong and the Guidance should be reconsidered. A refuge could be accommodation which it would be reasonable to continue to occupy. The court gave guidance as to the factors to be taken into account in deciding whether it was (paras 49 and 50). On the facts of this particular case, the court held that the reviewing officer could not reasonably have come to any other decision: [2008] EWCA Civ 378, [2008] 1 WLR 2387.

33. The first issue before this House, therefore, is whether a women's refuge is "accommodation" at all for the purposes of section 175 of the 1996 Act. If it is accommodation, the second issue is whether it is accommodation which it would be reasonable for the person to continue to occupy. Subsidiary issues are, if it is capable of being such accommodation, what factors should be taken into account in assessing this, and finally whether it was open to the reviewing officer to find as she did.

"Reasonable to continue to occupy"

34. It is convenient to deal with this issue first because, if Mr Ashley Underwood QC, who appears for Birmingham, and Mr Jan Luba QC, who appears for Ms Moran, are right about it, it provides the solution to both cases. Does section 175(3) mean that a person is only homeless if she has accommodation which it is not reasonable for her to occupy another night? Or does it mean that she can be homeless if she has accommodation which it is not reasonable for her to continue to occupy for as long as she would occupy it if the local authority did not intervene?

35. The Court of Appeal in the Manchester case, the courts below in the Birmingham case, and perhaps other courts before them, have assumed that the former is the case: that section 175(3) is concerned with the reasonableness of present occupation. Obviously, once it is unreasonable for the person to stay there one more night, section 175(3) is met; the person is homeless and cannot be intentionally homeless if she leaves.

36. However, the language suggests that both sections 175(3) and 191(1) are looking to the future as well as to the present. They do not say "which it *is* reasonable for him to occupy" or "which it *was* reasonable for him to occupy". They both use the words "continue to". This suggests that they are looking at occupation over time. This suggestion is reinforced by the words "would be" and "would have been". These again suggest an element of looking to the future as well as to the present. They contrast with section 177(1) which provides that "it is not reasonable" to continue to occupy accommodation where there is a risk of violence.

37. These linguistic reasons are reinforced by the policy of the Act. The words defined in section 175 are "homeless" and "threatened with homelessness". The aim is to provide help to people who have lost the homes to which they were entitled and where they could be expected to stay. Section 175(3) was introduced for a case like the Puhlhofers, who could no doubt have been expected to stay a little while longer in their cramped accommodation, but not for the length of time that they would have to stay there if the local authority did not intervene.

38. In the *Birmingham* case, this interpretation has the advantage that the council can accept that a family is homeless even though they can actually get by where they are for a little while longer. The council can begin the hunt for more suitable accommodation for them. Otherwise the council would have to reject the application until the family could not stay there any longer. The likely result would be that the family would have to go into very short term (even bed and breakfast) accommodation, which is highly unsatisfactory.

39. It also has the advantage that the family do not have to make repeated applications. If their application is rejected on the ground that it is reasonable for them to stay one more night, they cannot apply again until there is a different factual basis for the application. How are they to judge whether the council will consider that the tipping point has been reached, when this is such an uncertain event?

40. Furthermore, while it is true that, if a family have no home and are on the streets, the authority's duty under section 188 to provide them with temporary accommodation immediately accords with practicality and no doubt with the family's wishes, the position will often be different in a case where the family have accommodation. They might well prefer to remain where they were while their application was being considered. As Collins J said at first instance (para 23), "families may sometimes prefer to remain in unsuitable accommodation for a short time rather than move to temporary accommodation" and there should be "discussion leading to agreement and no compulsion". However, the combination of section 188(1) and section 206(1) means that the council's interim duty under section 188 is to provide "suitable" accommodation. If an applicant is occupying accommodation which it is unreasonable for him to continue occupying for even one night, it is hard to see how such accommodation could ever satisfy section 188(1). Section 175(3) obviously includes such cases but does not have to be limited to them.

41. This then feeds into the duty under section 193. As Lord Hoffmann said in *Awua* [1996] AC 55, 68A-C:

> "[T]here is nothing in the Act to say that a local authority cannot take the view that a person can reasonably be expected to continue to occupy accommodation which is temporary. … [T]he extent to which the accommodation is physically suitable, so that it would be reasonable for a person to continue to occupy it, must

be related to the time for which he has been there and is expected to stay."

Those observations were directed to the question of when it ceases to be reasonable for a person to continue to occupy accommodation in the context of the meaning of "accommodation", but they apply equally to the point at issue here.

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

43. In the *Manchester* case, this interpretation has the advantage that a woman who has lost her home because of domestic violence remains homeless even though she has a roof over her head in the refuge. We have been greatly assisted by the submissions of Mr Stephen Knafler on behalf of the Women's Aid Federation of England, who are understandably worried about the "bed-blocking" effect if women in refuges are no longer regarded as homeless. They point out that a refuge is not simply crisis intervention for a few nights. It is a safe haven in which to find peace and support. But it is not a place to live. There are rules which are necessary for the protection of residents but make it impossible to live a normal family life. It is a place to gather one's strength and one's thoughts and to decide what to do with one's life. The choices facing a woman who flees domestic violence are complex and difficult. Should she return home in the hope that she will be safe? Is this what her children would like her to do ("he is their father after all")? Should she risk taking court proceedings for a non-molestation order to give her some protection or will this simply inflame matters further? Should she take proceedings for an occupation order to exclude him from the home? Dare she take the risk that she may not win (if the court decides the remedy is too "draconian")? Should she make a complaint to the police and have him prosecuted? Can she predict the outcome with

enough confidence to make it safe for her to do this? Does she really want him punished anyway ("it's only the drink that does it")? Is she ready to accept that he will never change, make the break and start a new life in a new home?

44. It was no doubt for all these reasons that Hodgson J instinctively felt, in our view rightly, that Parliament did not intend that a woman who left her violent partner and found temporary shelter in a women's refuge should no longer be considered homeless. The refuge was a mere staging post until she had decided where to go from there. Hodgson J quoted a judge in the county court who had said that it was important that refuges were treated as temporary crisis accommodation and that women living in refuges were still homeless under the terms of the Act. If they were not, it would be necessary for refuges to issue immediate 28 days' notice so that they would be "threatened with homelessness". "This would be totally undesirable and would simply add stress to stress". The Act would be watered down and its protection removed "from a whole class of persons that it was set up to help and for whom it was extremely important" (*Sidhu*, p 53).

45. But when *Sidhu* was decided, the forerunner of section 175(3) had not yet been enacted. There was no tool available to the judge to enable him to decide that she remained homeless apart from deciding that the refuge was not "accommodation" at all. It could be (although who can say?) that the same perception that the outcome in *Sidhu* was right explains why it was not overruled in *Puhlhofer*, although it was several times cited to their lordships and is hard to reconcile with their decision.

46. However, another tool is now available and in our view it is proper for a local authority to decide that it would not be reasonable for a person to continue to occupy the accommodation which is available to him or her, even if it is reasonable for that person to occupy it for a little while longer, if it would not be reasonable for the person to continue to occupy the accommodation for as long as he or she will have to do so unless the authority take action.

47. This does not mean that Birmingham were entitled to leave these families where they were indefinitely. Obviously, there would come a point where they could not continue to occupy for another night and the council would have to act immediately. But there is more to it than that. It does not follow that, because that point has not yet been reached, the

accommodation is "suitable" for the family within the meaning of section 206(1). There are degrees of suitability. What is suitable for occupation in the short term may not be suitable for occupation in the medium term, and what is suitable for occupation in the medium term may not be suitable for occupation in the longer term. The council seem to have thought that they could discharge their duty under section 193(2) by putting these families on the waiting list for permanent council accommodation under their Part 6 allocation scheme. But the duty to secure that suitable accommodation is available for a homeless family under section 193(2) is quite separate from the allocation of council housing under Part 6. There are many different ways of discharging it, and if a council house is provided, this does not create a secure tenancy unless the council decides that it should. As we have already pointed out, the suitability of a place can be linked to the time that a person is expected to live there. Suitability for the purpose of section 193(2) does not imply permanence or security of tenure. Accommodation under section 193(2) is another kind of staging post, along the way to permanent accommodation in either the public or the private sector.

48. Hence Birmingham were entitled to decide that these families were homeless even though they could stay where they were for a little while. But they were not entitled to leave them there indefinitely. There was bound to come a time when their accommodation could no longer be described as "suitable" in the discharge of the duty under section 193(2).

49. It may be that, in some, or conceivably all, of the Birmingham cases, a critical examination of the facts would establish that the council were at some point in breach of their duty under Part 7 of the 1996 Act. Thus the time it has taken to find Mr Ali suitable accommodation may well be beyond what is defensible. While the council were entitled in principle to leave the families in their current accommodation for a period notwithstanding that it was accepted that that accommodation "would [not] be reasonable for [them and their families] to continue to occupy", it must be a question, which turns on the particular facts, whether, in any particular case, the period was simply too long. However, the basis upon which the applicants in the Birmingham cases argued their claims (and succeeded before Collins J and the Court of Appeal) meant that it was unnecessary to consider the detailed facts of their respective cases. Accordingly, once that line of argument is rejected, there is no longer any basis for a decision in their favour.

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.

The accommodation issue

52. Once it is decided that it would not be reasonable for a particular woman in a refuge to continue to occupy her place there indefinitely, it becomes unnecessary to decide whether the refuge is "accommodation". Women will be homeless while they are in the refuge and remain homeless when they leave. A woman who loses her place there, even because of her own conduct, does not become homeless intentionally, because it would not have been reasonable for her to continue to occupy the refuge indefinitely. Nevertheless, we should do the parties in the Manchester case the courtesy of saying a few words upon the principal issue which they argued before us.

53. Mr Jan Luba QC, for Ms Moran, argued with all his usual persuasive force that *Sidhu* was rightly decided. A person who has fled

her proper "home" because of domestic violence cannot be regarded as having "accommodation" just because she has a temporary roof over her head. Some places simply cannot be regarded as "accommodation" for this purpose at all. A night shelter where a person was given a bed if one was available but turned out during the day is one example: see *R v Waveney District Council, Ex parte Bowers*, *The Times*, 25 May 1982.

54. Furthermore, there are other situations under the Act in which a person may have a roof over his or her head – indeed a roof which is described as "accommodation" for one purpose – but is still regarded as without accommodation for the purpose of section 175(1). Thus it is no longer suggested that a person who has been provided with interim accommodation under section 188(1) is no longer "homeless" for the purpose of section 175(1) for this would defeat the whole scheme of the Act: see *R (Alam) v London Borough of Tower Hamlets* [2009] EWHC 44 (Admin) and the decision of Her Honour Judge Angelica Mitchell in *Khatun v London Borough of Newham* (2000) November *Legal Action* 22. It would be anomalous if a woman who goes directly to a refuge is treated as having accommodation, while a woman who goes to her local housing authority and is given accommodation in the same refuge under section 188(1) is not. It would also be anomalous if the first woman is denied the reasonable preference which, under section 167(2) of the 1996 Act, must be given to a homeless person in the council's allocation scheme, while the second woman is not.

55. Mr Clive Freedman QC, for Manchester, accepts that a person provided with interim accommodation under section 188 is still homeless within the meaning of section 175. However, he argues that the word "accommodation" must refer to the same type of place in both sections. So if a refuge is accommodation for the purpose of section 188 it must also be accommodation for the purpose of sections 175 and 191. *Sidhu* was wrongly decided and cannot survive the decision in *Puhlhofer*. In that case Lord Brightman said this, at p 517E to G:

> "What is properly to be regarded as accommodation is a question of fact to be decided by the local authority. There are no rules. Clearly some places in which a person might choose or be constrained to live could not properly be regarded as accommodation at all; it would be a misuse of language to describe Diogenes as having occupied accommodation within the meaning of the Act. What the local authority have to consider . . . is whether he has what can properly be described as

> accommodation within the ordinary meaning of that word in the English language."

Puhlhofer was cited by Lord Hoffmann (albeit in the context of deciding a rather different question) in *Awua*, at 69H, where he held that "accommodation" means "a place which can fairly be described as accommodation".

56. We have heard some interesting debate upon whether a prison cell, or a hospital ward, could amount to accommodation under the Act: see *Stewart v Lambeth London Borough Council* [2002] EWCA Civ 753, [2002] HLR 40, *R (B) v Southwark London Borough Council* [2003] EWHC 1678 (Admin), [2004] HLR 3. If the answer to the *Sidhu* question can now generally be found in section 175(3), we would be inclined to accept that its approach to the question of "accommodation" cannot survive the decisions of this House in *Puhlhofer* and *Awua*. It does not need to do so and the concerns so clearly expressed by Hodgson J can be addressed in another way. But we would not be inclined to enter into any further discussion of whether a prison cell or a hospital bed amounts to "accommodation" within the meaning of the Act until the need arises.

The Birmingham allocation policy

57. We have heard very little argument on this point. The Court of Appeal (paras 45 and 46) decided that the policy of putting the "homeless at home" into band B was unlawful because there should not have been such a category. Once it was decided that the family was homeless, they should not have been left at home but put into temporary accommodation and thus into band A for allocation purposes. Collins J decided that the policy was unlawful because it was incapable of complying with Part 7 of the Act for the homeless to whom the full section 193(2) duty was owed. Simply including them in the allocation policy was not sufficient to discharge the duty under Part 7 (paras 26 and 27).

58. Were it to be the case that Birmingham relied upon their allocation policy to fulfil their obligations under section 193(2), and thus to leave homeless families in accommodation which they cannot be expected to live in for another night or which is otherwise not suitable for them for more than the short term, then we would agree that it is unlawful for them to do so. They might remedy this indirectly by

revising their allocation policy or more directly by adopting a different policy towards the discharge of their duty under section 193(2).

59. As already explained, Part 6 and Part 7 of the 1996 Act involve very different duties. One is to have a lawful allocation policy and to operate it fairly. The other is to accommodate homeless people. The fact that an authority may have performed their duty under Part 6 does not mean that the duty under Part 7 is thereby satisfied or vice versa. Indeed, many applicants under Part 6 may not be in a position to invoke a Part 7 duty.

60. If an applicant is in occupation of accommodation which it would not be reasonable to expect her family to occupy other than temporarily, the council could not say that it would automatically satisfy the Part 7 duty to place the applicant even in band A. In any case where the applicant could not be expected to spend another night in her accommodation, the council would be obliged to provide her with new accommodation forthwith. As already explained, that new accommodation could be anything from very temporary to effectively permanent. But in such a case, unless being placed in band A would guarantee immediate new accommodation, it would not suffice to satisfy the Part 7 duty. To that extent we agree with Collins J. On the other hand, where the applicant could reasonably be expected to remain in her present accommodation for a period, simply placing her in band A (or indeed in band B) may well satisfy the Part 7 duty: whether it did so or not would depend on whether it would result in her being offered suitable accommodation before it ceased to be reasonable for her to continue in occupation of her present accommodation for another night.

61. The Court of Appeal's view was that it was unlawful for the council to give priority to those who had been placed in temporary accommodation (who were in band A) over those who had been left in their current accommodation, even though it was not accommodation which it would be reasonable for them to occupy (who were in band B). In so far as this view was based on the conclusion that the latter applicants could not lawfully have been left in their current accommodation, we cannot support it. However, the Court of Appeal's view was also based on the fact that the council's Part 7 duty to both groups of applicant was identical, and therefore it was unlawful to prioritise one group over the other. To put the point another way, because applicants in both groups were in accommodation which could only be regarded as temporary, and were therefore entitled to

"reasonable preference" for Part 6 purposes by virtue of section 167(2), there was no proper basis for distinguishing between them.

62. In *R (Ahmad) v London Borough of Newham* [2009] UKHL 14 (decided almost a year after the Court of Appeal handed down judgment in the Birmingham cases), this House made it clear that the courts should be very slow indeed to interfere with a local housing authority's allocation policy, unless it breached the requirements of Part 6. Provided that "reasonable preference" is given to all those who are homeless within the meaning of Part 7, there is no reason why an authority should not decide to give some homeless groups priority over others, as long as the decision is not irrational. The question, which is very difficult to determine on the sparse information available, is therefore whether it is irrational to accord priority to those placed in new accommodation on a temporary basis over those who are left in their current accommodation on a similarly temporary basis.

63. The council's explanation for this priority is to "assert the premise on which the Allocation Policy is based [namely] that those in greatest need are dealt with first". This bald statement is not enough to justify the priority accorded to those in new temporary accommodation over those left temporarily in their existing accommodation. Both groups are in accommodation which is temporary. Indeed, at least on the face of it, if anything, it would appear that the latter group would have the more pressing claim. They are, *ex hypothesi*, in accommodation which has been found to be such that it would not be reasonable for them to continue in occupation. No such finding will necessarily have been made as to the accommodation now occupied by the former group. It may be that the council could have shown that, as a matter of fact, applicants in the former group are normally in worse accommodation than those in the latter group: if so, the priority would be justifiable. It may be, for example, that when the council refer to "temporary accommodation" they are referring to bed and breakfast hotels or hostels. But no such evidence, not even an opinion to that effect, has been put forward in the evidence. Accordingly, on this, relatively narrow aspect, we would agree with the decision of the Court of Appeal.

Disposal

64. My Lords, we would allow Birmingham's appeal, to the extent that it is lawful for them to decide that an applicant is homeless because it is not reasonable for him to remain in his present accommodation

indefinitely but to leave him there for the short term. We would not agree that it is lawful for them to leave such families where they are until a house becomes available under the council's allocation scheme. The present accommodation may become unsuitable long before then. We would make a declaration to that effect. We would also uphold the Court of Appeal's view that the allocation policy distinction is unlawful if and to the extent that it gives preference to people in one type of temporary accommodation which is no less satisfactory than the accommodation in which homeless families are left temporarily at home. As all these families have now been allocated suitable accommodation, no other remedy is called for and we would not be inclined to enter into debate about the criteria governing the grant of mandatory injunctions in homelessness cases.

65. We would also allow the appeal in the Manchester case. Although there may be circumstances in which it is reasonable to continue to occupy a place in a refuge indefinitely, there is nothing to suggest that it was so in this case. As it all happened so long ago, and the situation of Ms Moran and her family has changed so much (and not for the better), the practical solution is simply to quash the finding that she had become homeless from the refuge intentionally and replace it with a finding that she had not. This will remove what has been called the "mark of Cain". There may come a case in which we should re-examine the circumstances in which a finding of intentional homelessness ceases to colour all future decisions under the Act but there is no need for us to do so now. The important principle established here is that in most cases a woman who has left her home because of domestic (or other) violence within it remains homeless even if she has found a temporary haven in a women's refuge.

66. For those reasons, we would allow both of these appeals. In the *Ali* case, we would declare that it is lawful for the Council to decide that a family is homeless because it is not reasonable for the family to remain in their present accommodation indefinitely and to accommodate them there for as long as it is suitable as short term accommodation; but that it is not lawful for them automatically to leave such families where they are until a house becomes available under the Council's allocation scheme. In the *Moran* case we would quash the finding that the appellant had become homeless from the refuge intentionally and substitute a finding that she had not.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

67. I have had the opportunity of reading in draft the opinion prepared by my noble and learned friend Baroness Hale of Richmond. As she explains, I have had some input into that opinion, but it is only right to record that her contribution was significantly greater than mine. As she says, the opinion accurately represents my views, and accordingly I too would allow these two appeals to the extent that she indicates.