Neutral Citation Number: [2011] EWCA Civ 355

Case No: B5/2010/0504, B5/2010/0983
and B5/2010/1540

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BIRMINGHAM COUNTY COURT
His Honour Judge Worster
His Honour Judge Owen QC
BM90261A
BM90166A

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2011

Before :

LORD JUSTICE MAURICE KAY
(Vice President of the Court of Appeal Civil Division)
LORD JUSTICE RIMER
and
LORD JUSTICE ETHERTON

- -

Between :

ISOKONDE MAKISI	**Appellant**
- and -	
BIRMINGHAM CITY COUNCIL	**Respondent**
SELAM YOSIEF	**Appellant**
- and -	
BIRMINGHAM CITY COUNCIL	**Respondent**
HUSSEIN NAGI	**Appellant**
- and -	
BIRMINGHAM CITY COUNCIL	**Respondent**

- -
- -

James Stark (instructed by Community Law Partnership) for the **1st Appellant**
Patricia Tueje (instructed by Community Law Partnership) for the **2nd Appellant**
Nicholas Nicol (instructed by Community Law Partnership) for the **3rd Appellant**
Jonathan Manning, Emily Orme, Stephanie Smith and Annette Cafferkey (instructed by **Birmingham City Council Legal Services**) for the **Respondents**

Hearing dates : 14th and 15th February 2011

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Approved Judgment

Lord Justice Etherton :

Introduction

1. The appeals in these three cases concern the review procedure under the homelessness provisions in Part 7 of the Housing Act 1996 ("the Act"). They all raise the issue whether, on a review under section 202 of the Act, regulation 8(2) of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 ("the 1999 Review Procedures Regulations") confers on an applicant the right to an oral hearing. The appellants, Isokonde Makisi, Selam Yosief and Hussein Nagi, say that it does. The respondent in each case, Birmingham City Council, contends that it is for the local housing authority's reviewer to decide how any oral representations which the applicant is entitled to make under regulation 8(2) are to be made, that is to say whether at an oral hearing or by some other means, such as by telephone.

2. In the cases under appeal the respondent refused the appellants' requests for an oral hearing and was only willing to receive their oral representations by telephone. In each case the review was decided against the appellant, and, on an appeal to the County Court under section 204 of the Act, the judge rejected the submission of the appellant that he or she ought to have been allowed to make oral representations at a hearing, that is to say at a face to face meeting with the reviewer. Their appeals were all dismissed: in the case of Ms Makisi, by HH Judge Worster in the Birmingham County Court on 11 January 2010; in the case of Ms Yosief, by HH Judge Robert Owen QC in the Birmingham County Court on 18 March 2010; and in the case of Mr Nagi, by HH Judge Robert Owen QC in the Birmingham County Court on 3 June 2010.

The statutory framework

3. The statutory framework, so far as relevant only to the determination of these appeals, may be summarised as follows.

4. Part 7 of the Act sets out the duties and powers of a local housing authority in relation to receiving and reaching a decision on an application from a homeless person for accommodation and assistance under that Part.

5. When an application for housing or assistance under Part 7 is received by a local housing authority section 184(1) and (2) of the Act require the authority to carry out inquiries to satisfy itself whether the applicant is eligible for assistance, and, if so, what duty is owed to the applicant under Part 7. Section 184(3) requires the authority, on completion of those inquiries, to notify the applicant of its decision, and, so far as any issue is decided against the applicant's interests, inform the applicant of the reasons.

6. Section 193(2) of the Act imposes on a local housing authority a duty to secure that accommodation is available for occupation by an applicant who is homeless, eligible for assistance and has a priority need, and has not become homeless intentionally. By section 193(7) the authority ceases to be subject to that duty if the applicant, having been informed of the possible consequences of refusal and of his or her right to request a review of the suitability of the accommodation, refuses a final offer of accommodation under Part 6 (allocation of housing accommodation). Section

193(7F) provides that the authority must not make such a final offer unless it is satisfied that the accommodation is suitable for the applicant and that it is reasonable for him or her to accept the offer.

7. Section 202 of the Act confers on the applicant a right to request a review by the authority of its decision that the offered accommodation is suitable and that it is reasonable for the applicant to accept it, and of any decision by the authority that it has discharged its duty under section 193(2) by, for example, an offer and its refusal within section 193(7). Section 203 makes provision for the procedure on such a review. It provides as follows, so far as material to these appeals:

> "(1) The Secretary of State may make provision by regulations as to the procedure to be followed in connection with a review under section 202.
>
> Nothing in the following provisions affects the generality of this power.
>
> (2) Provision may be made by regulations—
>
> (a) requiring the decision on review to be made by a person of appropriate seniority who was not involved in the original decision, and
>
> (b) as to the circumstances in which the applicant is entitled to an oral hearing, and whether and by whom he may be represented at such a hearing.
>
> …
>
> (7) Provision may be made by regulations as to the period within which the review must be carried out and notice given of the decision."

8. The 1999 Review Procedures Regulations were made in exercise of the powers conferred by, among other provisions, section 203(2) and (7) of the Act. Regulations 6 and 8 provide as follows, so far as relevant:

> "6(1) A request for a review under s. 202 shall be made –
>
> (a) to the authority, where the original decision falls with section 202(1)(a), (b), (c), (e) or (f);
>
> (b)…
>
> (2)….the authority to whom a request for a review under section 202 has been made shall –
>
> (a) notify the applicant that he, or someone acting on his behalf, may make representations in writing to the authority in connection with the review; and

(b) if they have not already done so, notify the applicant of the procedure to be followed in connection with the review."

"8(1) The reviewer shall….consider

(a) any representations made under regulation 6 … ; and

(b) any representations made under paragraph (2) below.

(2) If the reviewer considers that there is a deficiency or irregularity in the original decision, or in the manner in which it was made, but is minded nonetheless to make a decision which is against the interests of the applicant on one or more issues, the reviewer shall notify the applicant –

(a) that the reviewer is so minded and the reasons why; and

(b) that the applicant, or someone acting on his behalf, may make representations to the reviewer orally or in writing or both orally and in writing."

9. Section 182 of the Act provides that, in the exercise of its functions relating to homelessness, a local housing authority must have regard to any guidance issued by the Secretary of State. The Secretary of State's current guidance is The Homelessness Code of Guidance for Local Authorities (2006) ("the Code"). Chapter 19 of the Code is concerned with, among other things, reviews under section 202 of the Act. Paragraph 19.12, which appears under the heading "Oral hearings", is concerned with regulation 8 of the 1999 Review Procedures Regulations, and is as follows:

> "19.12. Regulation 8 provides that in cases where a review has been requested, if the housing authority, authorities or person carrying out the review consider that there is a deficiency or irregularity in the original decision, or in the manner in which it was made, but they are minded nonetheless to make a decision that is against the applicant's interests on one or more issues, they should notify the applicant:
>
> (a) that they are so minded and the reasons why; and,
>
> (b) that the applicant, or someone acting on his or her behalf, may, within a reasonable period, make oral representations, further written representations, or both oral and written representations."

10. Section 203(3) of the Act provides that the authority shall notify the applicant of the decision on the review. If the decision on the review is to confirm the original decision on any issue against the interests of the applicant, section 203(4) requires the authority to notify the applicant of the reasons. By virtue of section 204 of the Act the applicant has a right to appeal to the County Court on a point of law if he or she is dissatisfied with the decision on the review.

Factual background

11. Save in the case of Mr Nagi, it is not necessary to set out in detail the factual background to each appellant's case. The following is sufficient.

12. The respondent accepted that it owed a full housing duty to Ms Makisi pursuant to section 193(2) of the Act, and on 2 April 2009 made her a final offer of 17 Crosby Close, Ladywood, Birmingham ("Crosby Close"). On 7 April 2009 the respondent wrote to Ms Makisi saying that it had discharged its duty to her under the Act, but without giving any reasons. Ms Makisi considered that Crosby Close was not suitable because of its location, and she requested a review. On 15 July 2009 the respondent's review officer sent Ms Makisi a letter indicating that she was minded to uphold the original decision that Crosby Close was suitable, and offering her the opportunity to respond. The letter concluded:

> "If you have any further information in response to this decision which you would like to be taken into account, you or someone acting on your behalf may make oral representations, further written representations, or both oral and written representations. …"

13. By letter dated 21 July 2009 Ms Makisi's solicitors requested the opportunity to make oral representations at a meeting.

14. On 27 July 2009 the review officer apparently had a telephone conversation with the Ms Makisi, with the assistance of an interpreter.

15. On 29 July 2009 Ms Makisi's solicitors requested the opportunity for her to make oral representations at a hearing in accordance with her rights under regulation 8(2) of the 1999 Review Procedures Regulations. The respondent refused. By letter dated 14 August 2009 Ms Makisi was notified of the review officer's decision to uphold the original decision that Crosby Close was suitable.

16. In response to Ms Yosief's homeless application, the respondent decided that Ms Yosief was intentionally homeless, and so informed her, but without giving reasons or explaining what it meant. Ms Yosief's solicitors requested a review of that decision. The review officer wrote to Ms Yosief on 16 November 2009 saying that he considered the original decision to be deficient because it did not specifically state why it was considered that all the elements of intentional homelessness had been met, but that he was minded to uphold the decision that she was intentionally homeless. The letter ended with a statement as to Ms Yosief's right to make representations either by herself or somebody acting on her behalf or both and either in writing, orally or both in writing and orally. It also said the following as regards oral submissions:

> "Please note that where oral submissions are made, these are ordinarily taken by telephone, unless there is a genuine practical reason why submissions cannot be made by telephone."

17. By letter dated 27 November 2009 Ms Yosief's solicitors referred to regulation 8 of the 1999 Review Procedures Regulations, and said:

> "Our client would like to make oral representations in person with a representative and an interpreter. We do not consider that making oral representations on the telephone would be adequate in this case, because it would be difficult to hear all of the information necessary at the same time. In order to ensure fairness, we consider that an oral hearing should be arranged where our client would be given the opportunity to make submissions or to have submissions made on her behalf, including by ourselves: this would also give us the opportunity to minute the hearing to ensure fairness."

18. On 2 December 2009 the respondent's review officer sent a fax response to Ms Yosief's solicitors explaining that an oral hearing would not be convened as it was not considered that a genuine practical reason existed. The relevant part of the letter stated:

> "I note that you have stated that an 'in person' meeting would be preferable as it would not be possible to hear all of the information at the same time over the telephone. I consider that an in person meeting where all parties were attempting to present information at the same time would not be beneficial. I consider it far more beneficial to take representations over the telephone, where each person can speak in turn and make the relevant points. If your client wishes to have a representative speak on her behalf, I consider that this can be achieved over the telephone. Given that you have repeatedly commented on your client's lack of English, I assume that she will not be making the oral representations herself but will be making them through an interpreter. The City Council can provide an approved interpreter for your applicant."

19. The letter continued:

> "I note that you have expressed a preference to minute the meeting to ensure fairness. I am aware that review officers have previously conducted conversations with clients at your offices over the telephone whilst representatives of your firm have listened in on speaker phone. I consider that by doing the same, you would be able to minute the conversation to your satisfaction. These minutes can then be mutually agreed by fax or post prior to a final decision being made. I do not accept that there is any practical reason why making oral representations by telephone will not be possible in this case, or why this would be prejudicial to your client's review.
>
> I intend to make my final decision in this case on 7th December 2009.
>
> I note that you have taken instructions from your client in response to my minded to letter and that you have outlined her further submissions in your letter. I would invite you to clarify,

> no later than 4th December 2009, whether you wish me to consider the representations made in this letter or whether you will be making further oral submissions in the format proposed. If you wish to refuse the opportunity to make oral submissions via telephone, please contact me to confirm this no later than 5pm on Friday 4th December. If I receive no further contact by this time I will assume that you are refusing the right to make further oral submissions in the manner prescribed and I will make my decision accordingly on 7th December after considering the contents of your letter. Submissions received after the review has been completed will not be considered."

20. By letter dated 4 December 2009 Ms Yosief's solicitors said that it was "crucial" for their client to have an oral "hearing" "because credibility is in issue", on the basis that the respondent had, thus far, accepted her landlord's version of events over hers.

21. On 7 December 2009 the respondent's review officer telephoned Ms Yosief to ask her whether there was anything further that she wanted to tell him before he made a decision. An interpreter was present for that call.

22. By letter dated 8 December 2009 the review officer notified Ms Yosief of his decision to uphold the original decision. The letter summarised the telephone discussion which took place on 7 December, and confirmed that during that conversation Ms Yosief had commented on several of the grounds for review and had added some further information, but she had not made any new submissions that had not previously been considered. The letter said:

> "At the conclusion of our conversation, I asked again if you had any further grounds for review that had not previously been submitted or if you wished to add any further information in support of your review, after being made aware of the contents of my letter of 16th November. You stated that the reason previously submitted remained your grounds for requesting a review of the decision and that you had no new information to add."

23. Mr Nagi's appeal raises an additional question to the common issue about the right to an oral hearing. This requires a fuller statement of the factual background to his case, which is set out in the Appendix to this judgment. For the purpose of the common issue, the following is sufficient.

24. Having accepted that it owed a full housing duty to Mr Nagi under section 193(2) of the Act, the respondent provided Mr Nagi with accommodation at 29B Hunslet Road, Quinton, Birmingham ("Hunslet Road"). Mr Nagi subsequently applied for a transfer on the ground that Hunslet Road had become unsuitable because of his wife's medical condition. The respondent rejected that application on the ground that Hunslet Road was still suitable for his occupation. The respondent notified Mr Nagi that it did not consider him to be homeless. Mr Nagi's solicitors requested a review.

25. The respondent's review officer sent a detailed letter dated 22 January 2010 to Mr Nagi's solicitors notifying them that he was minded to hold against Mr Nagi. The

review officer said that, although he did not consider there to be any irregularity or deficiency in the original decision, he was nonetheless offering an opportunity for Mr Nagi to respond. He said that, if Mr Nagi or his wife wished to provide any further information on those matters on which the review officer was minded to find against them, they or someone acting on their behalf could make oral representations, further written representations, or both oral and written representations.

26. In their reply dated 11 February 2010 Mr Nagi's solicitors said there should be an "oral face-to-face hearing because…you question [Mr Nagi's] credibility in relation to the fact that his wife fell down the stairs."

27. By letter of 15 February 2010 the review officer replied, expressing his view that an oral hearing was unnecessary but that he would be willing to take further representations by telephone conference

28. In their reply dated 22 February 2010 Mr Nagi's solicitors said:

> "We do not consider that a telephone hearing would give our client an adequate opportunity to put his case to you. We consider the best way for our client to make representations would be face to face and we could offer our office space to do this."

29. That letter crossed with the respondent's review decision of the same date, which broadly followed the "minded to" letter, and concluded that Mr Nagi was not homeless for the purposes of Part 7 of the Act.

30. Each appellant appealed to the County Court pursuant to section 204 of the Act. Each appellant advanced several grounds for the appeal, but they all included non-compliance of the respondent with regulation 8(2) of the 1999 Review Procedures Regulations by reason of the respondent's refusal to permit an oral hearing, that is to say a face to face meeting with the respondent's review officer. Each appeal was dismissed.

The judgments

31. Each of the judgments dismissing the appellants' appeals under section 204 of the Act is a full, clear and careful judgment. The relevant parts of those judgments dealing with the issue of the respondent's refusal to permit an oral hearing are as follows.

32. In his judgment on Ms Makisi's appeal, HH Judge Worster said:

> "59. I have to construe these regulations by considering the ordinary and natural meaning of the words in the context of their purpose and the enabling powers.
>
> (i) Regulation 8(2)(b) provides for the applicant to make representations. The draftsman has allied the right to make oral representations with the right to make written representations – or to make both.

(ii) Despite the enabling provisions the draftsman has made no express provision for a hearing.

(iii) There is a real distinction between oral representations and oral hearings. Oral representations may be made at an oral hearing, but technology allows them to be made in other ways.

The natural and ordinary meaning of the words lead me to the view that the right to make representations orally does not require a face to face hearing. It includes any proper opportunity to make representations orally, and that can be done by telephone."

"66. The point which troubles me is the one which lies at the heart of what Mr Stark [counsel for Ms Makisi] says. It is that a telephone call does not give the same opportunity for the exercise of the art of advocacy as a face to face hearing. Although Lord Justice Rimer does not consider this question in [*Lambeth LBC v Johnston* [2008] EWCA Civ 690; [2009] HLR 10], what he says at paragraph [54] of his judgment suggests that he is contemplating the sort of opportunities normally associated with a hearing.

67. That said the use of technology allows representations to be made in other ways. Giving the words their natural and ordinary meaning in context I conclude that regulation 8 allows for representations to be made orally by telephone. A face to face hearing may be the best way to make that oral representation and to exercise the art of advocacy, but it is not the only way. Accordingly I dismiss Ground 5 and with it the appeal. ...."

33. In the case of Ms Yosief, HH Judge Robert Owen QC said:

"41. The Respondent owed no duty to convene a face-to-face meeting or an 'oral hearing' for the Appellant, for the purposes of Regulation 8(2) or otherwise. The regulation does not confer upon the Appellant any such right to any such hearing. It confers a right to make or have made representations. The form by which those representations may be made is a matter for the Appellant, namely, in writing or orally, personally or by her representative. However, the manner by which they may be received by the reviewer is a matter for him to determine.

42. Ms Tueje [counsel for Ms Yosief] submits that on the facts of this case there should have been an oral hearing as the only proper way fairly to determine the application and to arrive at a proper decision in relation to the review. Indeed, the Appellant's solicitors raised the prospect of there being a form of adversarial hearing before the reviewing officer. The

Respondent is not obliged, by the operation of this regulation, or otherwise, to convene such a hearing. Doubtless, such 'face-to-face' hearing would give rise to complaints about the fairness, or not, of the hearing, the weight attached to particular 'evidence' or its conclusions. The applicant in these circumstances does not enjoy any such ('civil') right of the kind contended for. In my judgment, it is clear that the reviewing officer may determine, on the facts of the case, how he wants to assess the representations received under the regulation and he is not obliged to convene a hearing for the applicant (and her witnesses, and so on).

43. The Regulation does not in fact refer to a hearing, but it does confer upon an applicant the right to make representations or somebody acting on his or her behalf. It is quite clear that the decision not to convene an oral hearing, contrary to the submissions or representations made by the Appellant's solicitors, was a decision to which the review officer was entitled to come having regard to the plain terms of the regulation.

44. A further complaint or criticism is made that having arrived at that decision the Respondent failed to comply with the requirements of Regulation 8(2) in telephoning the Appellant on 7th December without notice sufficient to allow, for example, a three-way telephone conference facility to be arranged or at the very least without sufficient notice to allow it to take place with the solicitors in attendance. I am satisfied that there is no substance in that criticism. There was certainly no wrongful act on the part of the review officer in relation to this aspect of the process.

45. I am satisfied that there is no proper criticism to be made of the review officer on the facts of this case. It is quite clear that having made representations to the Respondent following the initial decision of 14th October 2009, detailed representations were made on her behalf in respect of a matter where the facts were fairly narrow and that having received the 'minded to' letter of 16th November the Appellant, through her representatives, made further representations (and that is the phrase used in their letter of 27th November and again in their letter of the 4th December).

46. Within the letter of the 4th December 2009 the Appellant's solicitors do not suggest that they had additional representations to make on behalf of the Appellant. Rather they sought, having made some representations, to press for the oral hearing. In those circumstances and where the Appellant is a capable person, as she plainly is, with access to the services of an appropriate interpreter and in circumstances where she was fully informed as to the purpose of the telephone conversation

and the Appellant did not make any suggestion that she wished further representations to be made by her solicitor, and I am satisfied that the manner in which the review officer conducted this review shows that there is no merit in the assertion that there was any material irregularity or that there was any manifest injustice in the way in which it was conducted and in particular that there was any failure to comply with the provisions of Regulation 8(2). The Appellant had utilised representatives to make representations in writing on her behalf and on 7th December she made additional representations herself. It was in those circumstances that the essential requirements of the rights conferred upon the Applicant identified at the outset of this judgment were, in my judgment, respected and fulfilled and that there was no material irregularity."

34. In the case of Mr Nagi, HH Judge Robert Owen QC said:

> "52. The first question that arises under this ground is whether there was a material deficiency or irregularity in the decision of 20th October [2009] [notifying Mr Nagi of the Respondent's original decision that it did not consider Mr Nagi to be homeless] which required a letter or notice pursuant to Regulation 8(2). As I have previously indicated Mr. Nicol [counsel for Mr Nagi] submits that such a letter was necessary. Ms Kafaki, on behalf of the Respondent, challenges that assertion on the basis that there is no material deficiency or irregularity identified in the letter, or, indeed, on appeal. I prefer Ms Kafaki's submissions on that point.
>
> 53. ... Assuming for present purposes that Mr. Nicol's submission is correct and that such a letter was, in fact, required, without having to decide the matter, the practical question which arises in this case is whether or not the request by and on behalf of the Appellant for there to be an oral hearing and the Respondent's refusal to accede to that request was, in the circumstances, unreasonable; that is, given the facts, no reasonable decision maker could reasonably have refused the request for a face to face meeting or an oral hearing.
>
> 54. In this context, Mr. Nicol drew to the court's attention and cited the recent decision of the Court of Appeal in *Bury Metropolitan Borough Council v John Gibbons* [2010] EWCA (Civ) 327 and the leading judgment of Jackson LJ ..."
>
> "58. Mr. Nicol submits, in light of that decision in particular, that, in principle, an oral hearing could be acceded to but, as I understood his submission, it would depend on the facts of the case as to whether or not that was the only way in which oral representations sufficient to meet the rights

conferred upon the person concerned, pursuant to Regulation 8(2), could be secured.

59. Given my principal findings, it is strictly unnecessary for me to deal with the ground 8 of the appeal but I do so in case I am wrong in relation to the preliminary point on this ground and having regard to the fact that it does constitute, as it were, a free-standing ground of appeal and I have heard submissions from both counsel on it.

60. It is my judgment that, having regard to the terms of Regulation 8(2), whilst a right is conferred upon the person concerned to make oral and/or written representations by himself or on behalf of his or her representatives, the Regulation does not, in fact, confer expressly upon that person a right to an oral hearing, that is, a face to face meeting of the kind contended for on behalf of the Appellant by his instructing solicitors. That is, whilst the local authority is duty bound to ensure that steps are taken to see that the right conferred upon the person in question to present oral representations is met, it does not follow that they are concurrently duty bound to accede to a request for an oral hearing in the context of a face to face meeting, as opposed to an oral hearing in the context of a telephone conference, which, in this case, was offered.

61. The decision of the Court of Appeal in *Bury Metropolitan Borough Council* appears to me to be explained on the basis that it truly is an exceptional case in that, on the facts of that case, which appear to be highly unusual, there was but one way and one way only in which the person concerned could enjoy the right conferred upon him by that regulation to make oral representations. The case is distinguishable on the facts from this case, in any event, since the evidence does not support the necessary conclusion that a face to face meeting was the only way in which this Appellant could make oral representations which would meet the right conferred upon him by Regulation 8(2).

62. Furthermore, I am not unhappy in arriving at this conclusion, certainly on the facts of this case. It is evident that if the Appellant's solicitors' request was bound to be acceded to, as their letter shows and as submissions developed by Mr. Nicol confirm, inevitably what would happen, as the Appellant's legal team appear to accept, is that the reviewing officer would then be bound to convene a quasi-judicial environment in which he, the reviewing officer, would be bound to hear evidence, see it tested, as Mr. Nicol said, "weigh the credibility or weight to be attached to such evidence," so as to come to his conclusion.

> 63. This request was made in the belief by the Appellant's instructing solicitors that it was pursuant to and concomitant with his Article 6 rights. That request on that basis was misconceived. If right, no doubt, it would follow as a ground of appeal that the reviewing officer prefers a particular person's evidence over and above somebody else's and when no properly directed fact finder could have come to that conclusion.
>
> 64. In short, I am satisfied that, on the facts of this case, the Respondent was not bound to accede to the request for the face to face hearing. The appropriate response on the facts of this case was to offer the Appellant the opportunity to make oral representations which could well have been made by him, or by his instructing solicitors, or whom he may ever have wished to have make those representations and that that method would have met the rights conferred upon him by Regulation 8(2)."

The grounds of appeal

35. Each of the appellants has appealed to this Court on several grounds. The grounds for which permission has been granted are limited to the issue whether, under regulation 8(2) of the 1999 Review Procedures Regulations, the appellant was entitled to an oral hearing, which the respondent wrongly refused, and, in the case of Mr Nagi, whether the respondent's original decision letter of 20 October 2009 contained a "deficiency or irregularity" within that regulation.

The appeals

36. Each appellant was separately represented on the appeal and submitted a separate detailed skeleton argument. At the oral hearing, Mr James Stark, counsel for Ms Makisi, took the lead. He was followed more briefly by Mr Nicholas Nicol, counsel for Mr Nagi, and Ms Patricia Tueje, counsel for Ms Yosief, both counsel largely adopting Mr Stark's submissions. I shall not distinguish between the appellants or their counsel, save where it is necessary to do so.

37. The appellants do not dispute that the oral representations mentioned in regulation 8(2) of the 1999 Review Procedures Regulations can include representations made on the telephone as well as at a face to face meeting. That was the view expressed in *Bury MBC v Gibbons* [2010] EWCA Civ 327, [2010] HLR 33, by Jackson LJ, with whom Sedley LJ and Jacob LJ agreed. That case was concerned with whether the housing authority and its review officer had rightly concluded that the applicant, Mr Gibbons, was intentionally homeless for the purposes of Part 7 of the Act and whether the authority's original decision had a deficiency for the purposes of regulation 8(2). Following the sending of a "minded to" letter by the review officer, Bury Law Centre asked for a meeting with the authority before it reached a decision on the review, but the authority never responded to that request and no such meeting took place before the review officer notified the Mr Gibbons of her decision that he had made himself intentionally homeless. The authority appealed to the Court of Appeal from the judgment of the county court judge allowing Mr Gibbons' appeal from the review

officer's decision. The Court of Appeal dismissed the appeal. Having rejected the authority's first two grounds of appeal, and, on the third ground of appeal, concluded that there had been a "deficiency" in the authority's original decision within regulation 8(2), Jackson LJ turned to the question of Mr Gibbon's entitlement to an oral hearing. He said:

> "46. In the instant case, the question then arises whether the effect of regulation 8(2) is that Mr Gibbons was entitled to a full hearing before the reviewing officer, with both himself and his lawyer present. Mr Johnson submits that the requirements of regulation (2) may be satisfied if oral submissions are made by telephone. For my part, I can see that on some occasions a telephone call may suffice for the purposes of regulation 8(2). In the present case, however, after considering the "minded to" letter dated 31st March 2009 (setting out the proposed new factual basis) Bury Law Centre requested a meeting at which they and Mr Gibbons would be present. See the letter from Bury Law Centre to the Council dated 8th April 2009. The Council responded on 9th April 2009, granting an extension of time, but saying nothing about the request for a meeting. It was clear that without legal assistance Mr Gibbons did not have the ability to make any relevant submissions or comments concerning the "minded to" letter dated 31st March 2009. Mr Gibbons made this plain when he attended the housing department on 8th April 2009 …
>
> 47. In the circumstances of this case it seems to me that the only way the Council could receive any relevant oral representations on behalf of Mr Gibbons was by acceding to Bury Law Centre's request for a meeting. I have therefore come to the conclusion that the judge did not err in his interpretation of regulation 8(2) or his application of that regulation to the facts of this case."

38. The appellants' case is that it is for the applicant, and not the housing authority, to decide whether the oral representations should be at a meeting rather than, for example, on the telephone.

39. It is common ground, as appears from the 1999 Review Procedures Regulations themselves, that those Regulations were made pursuant to, among other provisions, section 203(2) of the Act. The appellants submit that regulation 8(2)(b) was made pursuant to section 203(2)(b), which stipulates that provision may be made by regulations as to the circumstances in which the applicant is entitled to an oral hearing, and whether and by whom he may be represented at that hearing. That submission reflects the view expressed by Carnwath LJ in *Hall v Wandsworth London Borough Council* [2004] EWCA Civ 1740 at [26].

40. The appellants say that view and their case generally are also supported by the heading - "Oral hearings" - to paragraph 19.12 of the Code, which is a commentary on regulation 8(2). In that respect there is an obvious contrast with paragraphs 19.10 and 19.11 of the Code, which are headed "Written representations".

41. The appellants emphasise that regulation 8(2) confers on the applicant the choice whether to make oral or written representations or both, and they say it would be odd for the housing authority then to be given the right to determine how those representations should be delivered. They submit that, if that had been the intention, the 1999 Review Procedures Regulations could have, and should have, expressly so provided, but they do not.

42. The appellants emphasise, moreover, the considerable advantages to an applicant in some cases of having an opportunity to persuade the review officer at a face to face meeting. They rely in that respect on what was said by Rimer LJ in *Lambeth LBC v Johnston* [2008] EWCA Civ 690, [2009] HLR 10, with whom Lawrence Collins LJ and Smith LJ agreed. The issue in that case was whether the review officer's decision, upholding the original decision of the housing authority that the applicant did not have a priority need for the purposes of Part 7 of the Act, was flawed because she had not sent a "minded to" letter under regulation 8(2). The applicant's appeal to the County Court was upheld. The Court of Appeal dismissed the authority's appeal. In the course of his judgment, Rimer LJ said the following in relation to a "minded to" notice under regulation 8(2):

> "[52] It can perhaps be said that the benefit that such a notice gives to an applicant may not in some cases – and the present one is probably a good example – appear obviously as valuable as it might in others. If, as in this case, the applicant has been able – in advance of the review decision – to address all the issues he knows the review officer is considering, the opportunity to make further representations in response to the review officer's reasons for his provisionally adverse views may not be as necessary to the applicant as, for example, it would in the extreme example given by Mr Holbrook to which I have referred. But, having said that, it appears to me that regulation 8(2) confers a potentially invaluable procedural right in all cases.
>
> [53] It is one thing for an applicant to be able to make representations on the matters in issue and then apprehensively await the review officer's decision, whichever way it may go. It is quite another for an applicant, not just to be able to make such representations, but then also to be given (i) advance notice of the review officer's reasons for his provisionally adverse views, and (ii) the opportunity not just to make further written representations as to why those views are not justified by his reasons, but also oral representations to that effect. Previously the applicant will simply have addressed the issues as best he can. Now he will have the opportunity to respond specifically to the review officer's own reasons as to how he proposes to deal with the issues. That is a most important advantage to the applicant. It may well, in many cases, enable him to engage in no more than an exercise of advocacy. But advocacy can turn a case. There can be few judges who, having formed a provisionally adverse view on a skeleton argument

> advanced in support of a case, have not then found their view transformed by the subsequent oral argument for which, in the art of advocacy, there is no comparable substitute. The opportunity open to an applicant to try, by written and/or oral argument, to persuade the review officer that his reasoning for his provisional conclusion is mistaken is—at the very least—potentially of great benefit to an applicant. To be deprived of that right is or may be seriously prejudicial."

43. The appellants submit that it would be very strange if, without any express provision to that effect in the 1999 Review Procedures Regulations, regulation 8(2) implicitly provides that it is entirely in the discretion of the housing authority, subject only to the usual public law principles, to decide whether or not that valuable right of oral persuasion at a meeting should be permitted. The appellants emphasise that the review officer would only be able to make that decision on the basis of the material in his or her possession. Furthermore, the right to an oral hearing would be likely to be most valuable in a weak case, and also where the applicant has no legal representation or the writing skills of the applicant are poor, and in cases where the credibility or factual account of the applicant is in doubt. Those, however, are precisely the situations in which the review officer is most likely to refuse a request for an oral hearing. The appellants submit that, for those reasons, the review officer is the least qualified person to make the decision. Ms Tueje drew attention to the following paragraph in the witness statement of Ms Yosief dated 19 February 2010:

> "19. I consider that if I had had an oral hearing it would have given me a much better chance to put my case to the Council and for the Council to understand what really happened. They could have also invited my previous Landlord to the hearing and I could have asked the friends that I had used to interpret for me to attend."

44. The appellants contend that, at an oral hearing requested pursuant to regulation 8(2), not only can oral representations be made by the applicant and the applicant's legal or other advisers, but third parties can give evidence. This, it is said, could be highly advantageous, as would be the ability of the applicant to see how the review officer is receiving such representations and evidence. That would be particularly advantageous because the matters in issue, such as suitability of the offered accommodation and the vulnerability of the applicant, are matters for the judgment and personal evaluation of the review officer. The appellants point out that an applicant can provide new evidence at any time prior to the conclusion of the review, and that to bring third parties to an oral hearing might be the best way to do so.

45. Ms Tueje envisaged that the review officer might also ask third parties to give evidence at such an oral hearing, and, if they did, that the applicant or the applicant's representatives would be able, in effect, to cross-examine them. Mr Stark also considered that there might be circumstances in which a third party could be cross-examined by the applicant or the applicant's representative. Mr Nicol, on the other hand, submitted that the review officer could refuse to permit any cross-examination at such a hearing.

46. Whatever the scope for oral evidence and cross-examination at such a hearing, the appellants' counsel pointed out that the hearing would only take place in the limited circumstances specified in regulation 8(2), namely where there has been a deficiency or irregularity in the original decision and so there has never been a full and reliable consideration of the merits of the application at the initial stage.

47. Mr Nicol submitted that, while the housing authority has no power to refuse a request for an oral hearing under regulation 8(2), save in the case of a request in bad faith, the authority could determine the procedural aspects of the hearing, subject to the usual public law constraints. It could, for example, require the hearing to be at the authority's offices. He also considered the review officer could limit the number of witnesses, and could, as I have said, refuse to permit cross-examination, and could ask the applicant in advance of the meeting who would be attending and what they intended to say.

48. The respondent agrees with the appellants to this extent - that the right under regulation 8(2)(b) to make representations orally to the reviewer embraces any means of making oral representations, including a face to face meeting. The critical point, on which it disagrees with the appellants, is whether the choice as to the method of making such oral representations lies with the housing authority or the applicant.

49. Mr Jonathan Manning was the lead counsel for the respondent on the hearing of the appeals. His starting point was that the legislative framework indicates that matters of procedure in relation to homelessness applications are generally a matter for the housing authority. He submitted that, under section 184 of the Act, for example, it is for the authority to make such inquiries as are necessary to satisfy itself whether the applicant is eligible for assistance and what, if any, duty is owed under Part 7. There is, he said, no question of an applicant at that stage having any right to dictate what representations he or she can make, and when and how they should be made – subject, of course, to the usual principles of public law. Turning to the review procedure, Mr Manning pointed to regulation 6(2)(b) of the 1999 Review Procedures Regulations which provides that, subject to certain exceptions which are not material on the present appeals, where a request is made for a review under section 202 of the Act the authority shall "notify the applicant of the procedure to be followed in connection with the review".

50. Mr Manning emphasised the unlikelihood of Parliament intending to confer on an applicant an entitlement to demand the kind of extensive hearing for which the appellants contend, with the calling of oral evidence and, according to Mr Stark and Ms Tueje, even cross-examination. He pointed out that there is nothing in regulation 8(2)(b) which requires the authority to notify the applicant of the right to a hearing. Furthermore, the respondent does not accept that regulation 8(2)(b) was made pursuant to section 203(2)(b) of the Act, which refers to an oral hearing. Mr Manning submitted that regulation 8(2)(b) was made pursuant to the more general provision in section 203(1) of the Act, which stipulates that the Secretary of State may make provision by regulations as to the procedure to be followed in connection with a section 202 review. Mr Manning explained the reference to section 203(2) in the preamble to the 1999 Review Procedures Regulations as a reference to section 203(2)(a), which requires decisions on a review to be made by a person of appropriate seniority who was not involved in the original decision. He pointed to the provision to that effect in regulation 2 of the 1999 Review Procedures Regulations. He

submitted that the appellants' reliance on the statement of Carnwath LJ in *Hall v Wandsworth London Borough Council* at [26] - that regulation 8(2)(b) was made pursuant to section 203(2)(b) - was misplaced since the point was not argued or in issue in that case.

51. The respondent itself relies on *Hall v Wandsworth London Borough Council* for a quite different point, namely that, as stated by Carnwath LJ at [25], "the role of the reviewer remains that of an administrator, not an independent tribunal". The review process, Mr Manning observed, is not a judicial one but an administrative one: the right of an applicant to demand a hearing, certainly of the kind envisaged by the appellants, is not consistent with such an administrative, non-judicial, process.

52. There is, Mr Manning submitted, no indication at all in the 1999 Review Procedures Regulations that the Secretary of State intended to confer on the applicant the choice of an oral hearing. At each stage of the review (regulation 6 and regulation 8) only the right to make "representations" is conferred on the applicant. That is to be contrasted, Mr Manning said, with the Introductory Tenants (Review) Regulations 1997 ("the Introductory Tenants Review Regulations") and the Demoted Tenancies (Review of Decisions) Regulations 2004 ("the Demoted Tenancies Review Regulations") also made under the Act.

53. The Introductory Tenants Review Regulations contain provisions governing a review, requested by the tenant pursuant to section 129 of the Act, of the decision of a local authority landlord to seek an order for possession of a dwelling house let under an introductory tenancy. The Demoted Tenancies Review Regulations contain provisions governing a review, requested by the tenant pursuant to section 143F of the Act, of the decision of a local authority landlord to terminate a demoted tenancy. Both sets of Regulations were made pursuant to provisions in the Act (section 129(3) and (4) in respect of introductory tenancies and section 143F(3) and (4) in respect of demoted tenancies) in all material respects in the same terms as section 203(1) and (2). Both the Introductory Tenants Review Regulations and the Demoted Tenancies Review Regulations confer on the tenant in express terms a right to request an oral hearing and specify with some detail the procedure to be followed at such a hearing. They provide that the landlord is to give the tenant not less than five days' notice of the date, time and place of the hearing; the tenant has the right to be accompanied and represented at the hearing, and is entitled to call witnesses, and to put questions to any person who gives evidence, and to make representations in writing; and, subject to those rights, the procedure at the hearing is to be determined by the reviewer.

54. The respondent contends that provisions of that kind would have been contained in the 1999 Review Procedures Regulations if the Secretary of State had intended to confer on the applicant a right to demand an oral hearing on a homelessness review. Mr Manning observed, in that connection, that the 1999 Review Procedure Regulations were the third set of review procedure regulations made under section 203(1) and (2) of the Act. The first set, which were laid before Parliament on 17 December 1996 and came into force on 20 January 1997 ("the 1996 Review Procedures Regulations"), also provided, in regulation 8(2)(b), for the applicant to make oral representations to the authority. They made no express reference, however, to an oral hearing, let alone any express right of the applicant to demand one, even though they were more or less contemporaneous with the making and coming into effect of the Introductory Tenants Review Regulations.

55. Mr Manning said that it was difficult to see what power the authority would have to control the type of hearing envisaged by the appellants, with the calling of witnesses, including expert witnesses, and possible cross-examination, and that it is inevitable that such a hearing would be expensive. Such a remedy, he said, would be disproportionate. He submitted that the respondent's position, that the housing authority has the right to select the method by which the applicant shall make oral representations on the review, is consistent with what he described as the usual principle that, where there are two ways of complying with the law, the decision maker can chose between them.

56. In the respondent's skeleton argument it appeared to be conceded that at an oral hearing the applicant could ask a witness to take part. In the course of his oral submissions, however, Mr Manning contended that under no circumstances does an applicant have a right to call witnesses. The whole procedure is, he said, coloured by the nature of the decision which the review officer has to reach. Unlike the position in reviews of decisions by a council to regain possession of premises let under an introductory tenancy and to terminate a demoted tenancy, that is to say a review of the council's decision to bring to an end an existing property interest and the current right of enjoyment of residential accommodation, the review officer in a homelessness case is carrying out an administrative function, making his or her own inquiries, having regard to what the applicant has to say, and trying to reach the right decision about prospective accommodation on the material available. To confer upon the applicant a right to demand an oral hearing would be to judicialise that process.

57. The respondent allies to that point the issue of resources. Mr Manning and other counsel acting with him for the respondent addressed that issue in detail in their substantial skeleton argument. The respondent's proposition is that, in the field of statutory social welfare schemes, where the administering authority's obligations under the scheme could, equally viably, be construed (1) in two or more ways, one of which would permit a significantly lower expenditure of resources than the other or others, or (2) as permitting the authority to take account of its resources in deciding how to perform the duty, the court should prefer the construction that allows resources to be conserved rather than an alternative construction which would require the greater expenditure of resources. In other words, the authority should be allowed the benefit of a choice to perform its functions in a less expensive manner. The respondent's skeleton argument cites in support of that proposition *R v Gloucestershire County Council ex p Barry* [1997] AC 584, esp at 604E-F and 605 (Lord Nicholls), *R v East Sussex County Council ex p Tandy* [1997] AC 714, esp at 747B (Lord Browne-Wilkinson), and *Ali v Birmingham CC* [2010] UKSC 8; [2010] 2 AC 39, at [4] –[6] (Lord Hope).

58. Mr Manning emphasised that the respondent's position does not mean that an authority has an unfettered discretion as to the procedure to be adopted, including the holding and manner of conducting an oral hearing. In accordance with the usual public law principles, the authority must act rationally, with procedural fairness, and in accordance with natural justice.

59. Mr Manning did not consider that *Bury MBC v Gibbons* provides much assistance. In that case the authority simply ignored completely the request for an oral hearing. It was not a case in which the authority had made a conscious decision to permit the

applicant to make oral representations only by telephone or some other means than at a face to face meeting.

Discussion

60. Regulation 8(2) of the 1999 Review Procedures Regulations neither prescribes nor limits the manner in which oral representations may be made by the applicant. It is common ground that an oral hearing is capable of falling within its ambit. The two questions for decision on this appeal on the interpretation of regulation 8(2) are whether it is for the housing authority or the applicant to determine whether there should be an oral hearing rather than some other way of making the oral representations, such as by telephone, and the nature of any such hearing.

61. I agree with the appellants that regulation 8(2) confers on the applicant the right to demand an oral hearing.

62. The preamble to the 1999 Review Procedures Regulations makes clear that they were made in exercise of, among other things, the power conferred on the Secretary of State by section 203(1) and (2) of the Act. Section 203(2)(b) shows that the Secretary of State had in mind an entitlement by the applicant to demand an oral hearing as part of the review process. That subsection came into force, together with the rest of section 203(1) and (2), on 1 October 1996. Regulation 8(2) of the 1996 Review Procedures Regulations, which were made by the Secretary of State on 9 December 1996 and were laid before Parliament on 17 December 1996, conferred on the applicant a right to make oral representations. A right to make oral representations is most naturally understood to be a right exercisable at a face to face meeting, even if it is not confined to such a meeting. Regulation 8(2) of the 1996 Review Procedures Regulations came into force on 20 January 1997. The combination of the close proximity of the commencement of Regulation 8(2)(b) of the 1996 Review Procedures Regulations and of section 203(2)(b) of the Act, the preamble to those Regulations, and the more natural understanding of the way a right to make oral representations would normally be exercised, strongly indicates that regulation 8(2)(b) of the 1996 Review Procedures Regulations was made pursuant to section 203(2)(b) of the Act.

63. There is no reason to think that regulation 8(2)(b) of the 1999 Review Procedures Regulations, the preamble to which also referred to section 203(2) of the Act, was in that respect any different to regulation 8(2)(b) of the 1996 Review Procedures Regulations. It differed from the earlier version only insofar it conferred a right to make written as well as oral representations.

64. The conclusion that regulation 8(2)(b) of the 1996 Review Procedures Regulations and regulation 8(2)(b) of the 1999 Review Procedures Regulations were made pursuant to section 203(2)(b) of the Act is also strongly supported by the Code, to which housing authorities are required by section 182 of the Act to have regard in exercise of their functions relating to homelessness. In particular, it is significant that the heading to paragraph 19.12 of the Code, which provides a commentary on, among other things, regulation 8(2)(b) of the 1999 Review Procedures Regulations, is "Oral hearings". I agree, therefore, with Carnwath LJ's instinctive reaction in *Hall v Wandsworth London Borough Council* at [26] that the statutory source of regulation 8(2)(b) of the 1999 Review Procedures Regulations was section 203(2)(b) of the Act.

65. If, as I conclude, regulation 8(2)(b) of the 1999 Procedure Regulations was made pursuant to section 203(2)(b) of the Act, that would indicate that the Secretary of State intended to confer a right on the applicant to demand an oral hearing. There are other factors which support such an entitlement. I have referred earlier in this judgment to the views expressed by Rimer LJ in *Lambeth LBC v Johnston* at [52] and [53] about the important advantage to the applicant of persuading the review officer by oral advocacy. Rimer LJ described it at [52] as conferring "a potentially invaluable procedural right in all cases". I agree. The terms in which Rimer LJ described the right indicate that he envisaged that the right would be exercised at a face to face meeting with the review officer. I also agree with the appellants that it would be odd if the Secretary of State intended, without any express provision to that effect, to confer on the housing authority the power to decide whether or not that invaluable right to persuade by oral advocacy at such a meeting should or should not be enjoyed in any particular case.

66. The analysis of Jackson LJ in *Bury MBC v Gibbons*, to which I have referred earlier, does not assist materially one way or the other on this question. As Mr Manning observed, in that case the authority had simply ignored altogether Mr Gibbons' request for a meeting. Jackson LJ, while acknowledging that on some occasions a telephone call may suffice for the purposes of regulation 8(2), considered ([47]) that the only way the authority could receive any relevant oral representations on behalf of Mr Gibbons was by acceding to his request for a meeting. Jackson LJ seems to have reached that conclusion because ([46]) "[i]t was clear that without legal assistance Mr Gibbons did not have the ability to make any relevant submission or comments concerning the "minded to" letter …". On the one hand, that appears to be inconsistent with the submissions of the respondent that the review officer is entitled to insist that a conference telephone call, attended by both the applicant and his solicitor, is sufficient for the purposes of regulation 8(2), subject only to public law principles. On the other hand, it does not appear to be consistent with the submissions of the appellants that the choice is always that of the applicant. The explanation is probably that the argument by the appellants in the present case that the applicant always has the right to choose an oral hearing under regulation 8(2) was not advanced in *Bury MBC v Gibbons* and so the submissions of counsel in that case proceeded on different line to those advanced on the present appeals.

67. I do not accept Mr Manning's submissions that section 184 of the Act or regulation 6 of the 1999 Review Procedures Regulations lend weight to the respondent's argument that regulation 8(2) confers on the authority the discretion whether or not to hold an oral hearing. Those provisions are concerned with earlier and different stages of the processing of a homelessness application. Regulation 8(2)(b) is triggered where, and only where, there is a deficiency or irregularity in the original decision, but the review officer is nevertheless minded to make a decision against the interests of the applicant. It is in that specific situation alone that a right to make oral representations is conferred on the applicant. In contrast to section 184, section 203(2) of the Act provides expressly for the possibility that there may be circumstances in which the applicant should have a right on a review to demand an oral hearing, and to be represented at that hearing.

68. Nor does the respondent's argument derive any material support from the fact that the 1999 Review Procedures Regulations and earlier versions of those Regulations

mention only oral representations and not oral hearings, by contrast with the Introductory Tenants Review Regulations and the Demoted Tenancies Review Regulations, both of which were made under identical statutory provisions in the Act to those in section 203(1) and (2). The Introductory Tenants Review Regulations and the Demoted Tenancies Review Regulations concern a local authority landlord's decision to terminate an existing tenancy and to obtain possession, bringing to an end an existing property interest and the current right of enjoyment of residential accommodation. It is entirely understandable why, in such circumstances, it was thought necessary to confer on the tenant an express right to request an oral hearing, at which witnesses could be called and questioned, and to describe and prescribe in detail the procedure to be followed, including the powers of the reviewer to determine the procedure. By contrast, as both the appellants and the respondent emphasised, and the reported cases show, regulation 8(2) of the 1999 Review Procedures Regulations and its predecessor Regulations are concerned with the review of an administrative decision about the provision of new accommodation, including its suitability. It is common ground that the review process under regulation 8 does not engage Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is entirely understandable why, therefore, regulation 8(2) does not refer to a single specific way in which oral representations may be made, namely at a hearing, but leaves at large the way in which the applicant may choose to make oral representations.

69. Mr Manning made powerful submissions about the way in which the appellants' interpretation of regulation 8(2) would judicialise the administrative process of the review and the administrative nature of the local authority's decision, and, connected with that, the difficulty the authority would have to control the hearing contemplated by the appellants and the resources that would be entailed. As I have said, the appellants contend that that an applicant would be entitled to call third party witnesses, including expert witnesses, at the hearing. According to Mr Stark and Ms Tueje, there could be cross-examination of any witnesses called by the review officer. As I have said, the respondent itself, in its skeleton argument, also contemplated that the applicant would be entitled to call witnesses at any hearing, but that was later retracted by Mr Manning in his oral submissions.

70. I reject the appellants' submissions on this point. Regulation 8(2) provides only that that the applicant, or someone acting on his or her behalf, may make representations to the reviewer. It does not authorise the calling of any third party witnesses, let alone cross-examination. It authorises only a face to face meeting between the applicant, with or without a person acting on the applicant's behalf, and the review officer, at which oral representations can be made to the review officer. The review officer is, subject to that, able to determine where and when the hearing takes place and the procedure to be followed, including finding out in advance who will attend. What is contemplated and authorised by the 1999 Review Procedures Regulations is not the potentially elaborate and extensive hearing specified in the Introductory Tenants Review Regulations and the Demoted Tenancies Review Regulations, but a simple and relatively brief opportunity for the applicant to make oral representations to the review officer.

71. Finally, I do not accept the respondent's submissions that the issue of resources supports its interpretation of regulation 8(2). Aside from what I have said about the

limited nature of a hearing under that regulation, I do not consider that this aspect of the respondent's case is supported by the authorities on which the respondent relies. *R v Gloucestershire County Council ex p Barry* and *R v East Sussex County Council ex p Tandy* were cases concerned with the quite different question of the extent to which a local authority was entitled to take into account resource considerations in deciding what welfare services it should provide. *Ali v Birmingham City Council* was concerned with whether Article 6 of the Convention was engaged by decision-making functions of a local housing authority and its review officer under the homelessness provisions of Part 7 of the Act. That is not an issue in the cases under appeal. In any event, the short procedural answer to the respondent's submissions on resources is that there was no evidence in any of the trials of the cases under appeal, and there is no evidence before us, as to the resource implications of applicant's right under regulation 8(2) to demand a hearing of the kind I have described; and there is no respondent's notice in any of the appeals raising the issue of resources.

72. For those reasons, I would allow the appeals of Ms Makisi and Ms Yosief.

Mr Nagi's appeal – deficiency or irregularity in the original decision

73. Mr Nagi's appeal can only succeed if HH Judge Robert Owen QC was wrong to conclude that regulation 8(2) of the 1999 Review Procedures Regulations was not engaged in Mr Nagi's case because the respondent's original decision did not contain "a deficiency or irregularity" within the meaning of that regulation.

74. The material parts of the respondent's original decision letter dated 20 October 2009 are set out in the Appendix to this judgment. Mr Nicol made the following submissions as to the deficiencies or irregularities in the letter, within the meaning of regulation 8(2). First, the words beneath the bullet points - "The facts upon which we have based the decision are:" are left hanging. What follows are not statements of fact, and so the sentence was incomplete. Secondly, the next sentence - "In respect of the medical condition you suffer from, which you have stated in your homeless application dated 01/09/09." - is nonsensical. Thirdly, the next sentence - "We have taken into account your medical condition and personal circumstances when making this decision." – is misconceived because the relevant condition was not that of Mr Nagi, the addressee of the letter, but his wife. The paragraph does not disclose what the respondent understood the medical issues or "personal circumstances" to be. Fourthly, the last sentence of the next paragraph - "Having considered information provided by both you and NowMedical Ltd" – is incomplete and makes no sense. Fifthly, the sentence in the following paragraph - "I conclude that your wife's condition does not prevent her undertaking some stairs." – was misconceived because neither Mr Nagi nor anyone else had ever argued that Mrs Hassan was prevented from undertaking some stairs. Her problem was that she had difficulty due to her leg and back problems and was at risk due to her epilepsy. The letter of 20 October 2009 did not attempt to address either of those issues. Mr Nicol submitted that the overall impression created by the letter was that the respondent had failed to take into account all the relevant facts, and had taken into accounts facts not mentioned in the letter. He contrasted that letter with the extensive review decision letter of 22 January 2010.

75. In *Hall v Wandsworth London Borough Council* Carnwath LJ considered what constitutes a "deficiency" for the purpose of regulation 8(2) of the 1999 Review Procedures Regulations. He said in [28] that he agreed with the trial judge that an

original decision would be deficient if it failed to communicate to the applicant with sufficient clarity the essential basis on which his application was being dismissed. Carnwath LJ considered, however, that was not broad enough. He said:

> "[29] However, I would put it more broadly. The word 'deficiency' does not have any particular legal connotation. It simply means 'something lacking'. There is nothing in the words of the rule to limit it to failings which would give grounds for legal challenge. If that were the intention, one would have expected it to have been stated expressly. Furthermore, since the judgment is that of the reviewing officer, who is unlikely to be a lawyer, it would be surprising if the criterion were one depending solely on legal judgment. On the other hand, the 'something lacking' must be of sufficient importance to the fairness of the procedure to justify an extra procedural safeguard. Whether that is so involves an exercise of 'evaluative judgment' (see *Runa Begum v Tower Hamlets London BC* [2003] 1 All ER 731 at [114], [2003] 2 AC at [114] per Lord Walker of Gestinghorpe), on which the officer's conclusion will only be challengeable on Wednesbury grounds.
>
> [30] To summarise, the reviewing officer should treat reg 8(2) as applicable, not merely when he finds some significant legal or procedural error in the decision, but whenever (looking at the matter broadly and untechnically) he considers that an important aspect of the case was either not addressed, or not addressed adequately, by the original decision-maker. …"

76. Mr Nagi's appeal can only succeed, therefore, if he can establish that no reasonable review officer could have concluded that regulation 8(2) was not engaged because the letter of 20 October 2010 disclosed neither a significant legal or procedural error nor that the respondent had failed to address, or address adequately, an important aspect bearing on the decision. In making that evaluative judgment as to whether an important aspect had not been addressed, or addressed adequately, the review officer would, as Carnwath LJ said, look at the matter in a broad and untechnical way. As Lord Neuberger said in *Holmes-Moorhouse –v- Richmond upon Thames London Borough Council* [2009] UKHL 7, [2009] 1WLR 413, at [47]:

> "… housing officers … are not lawyers. It is not therefore appropriate to subject their decisions to the same sort of analysis as may be applied to a contract drafted by solicitors, to an Act of Parliament, or to a court's judgment."

77. In the light of those principles, the Judge was plainly right to conclude that there was no deficiency or irregularity in the respondent's original decision letter for the purposes of regulation 8(2)(b). The letter of 20 October 2009 was certainly poorly worded. It bears, as Mr Nicol submitted, the hallmarks of a standard form letter clumsily adapted and completed. Contrary to Mr Nicol's submissions, however, it plainly addressed all the important aspects and cannot have left a reasonable reader, in

Mr Nagi's position, with any real doubt as to the basis for the respondent's decision. No such reader would have been left in any doubt that the respondent intended to address the medical condition of Mrs Hassan. The one reference to "your" medical condition was plainly an error. In the paragraphs on which Mr Nagi relies there were three express references to "your wife's medical condition". The letter expressly referred to both Mrs Hassan's physical difficulties and, more particularly, the safety aspects of her use of the stairs in her medical condition. Moreover, the bullet points stated expressly that the respondent had taken into account the information in Mr Nagi's application form, the information he had supplied about his wife's medical condition, and the advice given by NowMedical. No reasonable review officer could have been left in doubt that all the significant issues had been addressed. As Mr Manning observed, the letter from Mr Nagi's solicitors requesting a review did not make any criticism that the original decision letter had not addressed all the major points or was incomprehensible.

78. For those reasons, I would dismiss Mr Nagi's appeal.

Conclusions

79. I would allow the appeal of Ms Makisi and Ms Yosief. I would dismiss the appeal of Mr Nagi.

Lord Justice Rimer:

80. I agree.

Lord Justice Maurice Kay:

81. I also agree but wish to add a few words about the decision letter of 20 October 2009 in the case of Mr Nagi. I am more critical of it than Etherton LJ is. It is not an impressive document. Leaving aside its drafting shortcomings, I have come close to concluding that, even on the basis of the broad approach we are required to take, it falls short of achieving sufficiency of reasons. In particular, the sentence "I conclude that your wife's condition does not prevent her undertaking some stairs" is taken from the report of Dr Keen. However, that report was more explicit. It went on to say:

> "I acknowledge her concern regarding safety on stairs, but the description of her fits … does not indicate that these are of sudden or dramatic onset and are preceded by a period of shakiness which acts as sufficient warning to her if on stairs."

82. In my view, the decision would have been more intelligible if it had included this explanation. I am content to agree that the reasoning in the decision letter was sufficient but the carelessness and the laconic nature of the explanation did cause me to hesitate.

APPENDIX

Mr Nagi is a Somali national, who has been given leave to remain in the United Kingdom. He was joined by his wife ("Mrs Hassan") and their then four children in April 2006. He made an application for accommodation on the basis that he was a homeless person. The respondent accepted a full housing duty to him. He was allocated permanent accommodation at 29B Hunslet Road, Quinton, Birmingham ("Hunslet Road"). It is a first floor maisonette. A steep slope leads up to it, followed by a step into the hallway. There is a steep flight of stairs in the hallway, with handrails on either side. Mr Nagi and his family have resided there ever since, the family having grown in the meantime with the addition of three further children, and the eldest having left.

In September 2009 Mr Nagi made an application for a transfer. He contended that Hunslet Road was not suitable because of his wife's medical condition. His application form recorded his wife's medical diagnosis as "Epilepsy, back & leg problems", and that she "has regular seizures and requires the use of a walking aid at all times. She is finding it difficult to walk up flights of stairs and therefore is requesting a level access property."

The respondent referred all of the medical forms relied upon by Mr Nagi to Dr Keen of NowMedical, the respondent's medical adviser. He was specifically required to consider the medical condition of Mrs Hassan, having particular regard to her present and future accommodation needs. His report dated 16 October 2009 concentrated exclusively on Mrs Hassan's epilepsy, without reference to the other physical problems. Dr. Keen's conclusion was that her condition was not substantially disabling and did not preclude the use of some stairs. He advised that epilepsy was generally amenable to reasonable control with appropriate medication and that the priority was for Mrs Hassan to continue to engage with hospital neurology services to achieve that. So far as concerned the suitability of the accommodation, Dr Keen's conclusion was that, whilst there was some concern regarding Mrs Hassan's safety on stairs, it was not such as to suggest to him that relocation was necessary on medical grounds.

By letter dated 20 October 2009 the respondent notified Mr Nagi that it did not consider Mr Nagi to be homeless. The letter explained the reasons for that decision as follows:

> "In reaching this conclusion I have taken into account the following:
>
> - Homeless Application Form dated 01/09/09
> - Information you provided regarding your wife's medical condition
> - Medical Advice from NowMedical Ltd, dated 16/10/2009
>
> The facts upon which we have based the decision are:
>
> In respect of the medical condition you suffer from, which you have stated in your homeless application dated 01/09/09. We have taken into account your medical condition and personal circumstances when making this decision.
>
> In making our decision we have made regard to the medical information you provided in support of your wife's medical condition and then sought advice from our independent medical

> advisors NowMedical Ltd. Having considered information provided by both you and NowMedical Ltd.
>
> Therefore when making this decision I have taken into account information submitted by you, in support of your Homeless Application. I conclude that your wife's condition does not prevent her undertaking some stairs. I acknowledge her condition regarding safety on the stairs; however, I do not consider relocation necessary on any medical grounds.
>
> Accordingly you do not qualify for assistance under Part VII of the Housing Act 1996. However, we will provide advice and assistance to help you find your own alternative accommodation."

On 9 November 2009 Mr Nagi's solicitors requested a review. Their letter said that Mrs. Hassan had lost consciousness whilst going up the stairs and that she lost consciousness about twice a week. They also said that she suffered from severe back and leg pain as a result of a gunshot wound she had sustained in Somalia, which made it impossible for her to go upstairs carrying a child or pushchair. The respondent requested further information about those matters, and also, as part of the review, contacted Mrs Hassan's general practitioner, Dr Harley-Mason. He replied by letter dated 18 January 2010. He confirmed that, whilst it was understood that she had fallen on the stairs in 2008, there was no record of this in her medical notes. He also confirmed that during that period of time she was suffering from back pain and pain in the leg as well as "funny turns" which were being investigated. It was noted at that time that there was not a history of a number of seizures at any time, but there were two occasions, once whilst on a 'bus and once whilst cooking. Dr Harley-Mason concluded:

> "It is my professional opinion that a one storey flat with no lift access is unsuitable for Mrs. Hassan. She suffers from frequent epileptic attacks as well as ongoing severe leg and back pain and I think she is at risk of falling and injuring herself at any time and, in particular, whilst climbing stairs. She would, no doubt, be safer if supervised. However, given her busy family, this is probably an unrealistic expectation. I hope that you will be able to find alternative accommodation for her and her family as soon as possible."

The respondent also had available and considered letters of June 2008 provided by the then treating consultant, Dr. Pirie, which were copied to Mrs Hassan's treating consultant neurologist, Dr. Sterne. In that correspondence it was confirmed that Mrs. Hassan appeared to have episodes which sounded like epilepsy, although there was some uncertainty over the correct diagnosis. It recorded how such episodes manifested themselves, namely, that Mrs Hassan's hands began to shake, she would feel strange and then would lose consciousness for up to twenty minutes or so. It was on that basis that the doctors agreed that a reasonable diagnosis would suggest epilepsy, but that there were features raised which suggested that this was a non-epileptic attack disorder.

The respondent's review officer sent a detailed letter dated 22 January 2010 to Mr Nagi's solicitors notifying them that he was minded to hold against Mr Nagi. Among other matters, the review officer accepted and noted that Mrs. Hassan had mobility problems and suffered

from epilepsy which rendered her vulnerable to injury. He said that he was minded to conclude that the current accommodation did not impact heavily upon that and, whilst there might well be some difficulty in using stairs, proper access was, nonetheless, enjoyed. He noted from the medical evidence that the condition was such that Mrs Hassan experienced an aura which gave some warning of an impending episode. He was minded to consider that it was not unreasonable for her to undertake the tasks she had to undertake within her existing accommodation and that, accordingly, it would not be unreasonable for Mr Nagi with his wife to remain or to continue to occupy those premises.

The reviewing officer indicated that, although he did not consider there to be any irregularity or deficiency in the original decision, he was nonetheless offering an opportunity for Mr Nagi to respond. He said that, if Mr Nagi or his wife, wished to provide any further information on the matters on which the review officer was minded to find against them, they or someone acting on their behalf could make oral representations, further written representations, or both oral and written representations.

Mr Nagi's solicitors replied by letter dated 11 February 2010. They pointed out, among other matters, that Dr Keen of NowMedical had not been aware of relevant matters and that the warning signs of an impending epileptic fit were insufficient for Mrs Hassan to protect herself from the risk of injury without assistance. They further said that, given an apparent conflict, if not between medical practitioners, certainly between Mrs Hassan's description of her condition and her ability to manage that condition when compared to the conclusions of, for example, Dr. Keen, Mr Nagi wished to have an opportunity to present representations orally at a face to face meeting. They said there should be an "oral face-to-face hearing because…you question [Mr Nagi's] credibility in relation to the fact that his wife fell down the stairs."

By letter of 15 February 2010 the review officer replied, expressing his view that an oral hearing was unnecessary but that he would be willing to take further representations by telephone conference

In their reply dated 22 February 2010 Mr Nagi's solicitors said:

> "we do not consider that a telephone hearing would give our client an adequate opportunity to put his case to you. We consider the best way for our client to make representations would be face-to-face and we could offer our office space to do this."

That letter crossed with the respondent's review decision of the same date, which broadly followed the "minded to" letter, and concluded that Mr Nagi was not homeless for the purposes of Part 7. Among other things, it was noted that Mrs Hassan's medical records did not appear to support her version of events; and that, whilst the aura or potential for warning referred to by the doctors did not guarantee safety, it certainly reduced the risk of injury; and that there was no record, in fact, of Mrs. Hassan having suffered serious injury as a result of her condition. The review officer accepted that there were obvious mobility problems with potential vulnerability to injury from epilepsy and that Mrs Hassan might well benefit from a property with level access, but his judgment was that, having regard to Mrs Hassan's condition, it was not unreasonable for Mr Nagi to continue to remain in occupation the current property.