Neutral Citation Number: [2019] EWCA Civ 1405

Case No: B5/2019/0391

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
HIS HONOUR JUDGE LUBA QC
E40CL183

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/08/2019

Before :

LORD JUSTICE LEWISON
LORD JUSTICE McCOMBE
and
LORD JUSTICE BEAN

- -

Between :

JOY ADESOTU	**Appellant**
- and -	
LEWISHAM LONDON BOROUGH COUNCIL	**Respondent**

- -
- -

Liz Davies and **Nick Bano** (instructed by **Morrison Spowart**) for the **Appellant**
Dean Underwood and **Riccardo Calzavara** (instructed by **Lewisham LBC Legal Services**) for the **Respondent**
Justin Bates (instructed by **Francine Morris**) for the **Equality and Human Rights Commission**, intervening by way of written submissions only.

Hearing date: 10 July 2019

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Approved Judgment

Lord Justice Bean :

1. The issue raised in this case is whether the County Court has jurisdiction to determine allegations of discrimination in a statutory appeal brought under section 204 of the Housing Act 1996. The challenge is to a decision of His Honour Judge Luba QC (in a reserved judgment reported on Bailii at [2019] EW Misc 3 (CC)) striking out certain paragraphs of Ms Adesotu's appeal to the County Court. The judge granted permission to appeal from his decision, directed pursuant to CPR 52.23 that the appeal against his order be transferred to this court; and stayed the hearing of those parts of the appeal to the County Court which he had not struck out, pending determination of the appeal to this court.

The facts

2. I adopt with gratitude the judge's narrative of the facts:-

> "9. The Appellant, Ms Adesotu, is a single parent of three young children. In 2017, she applied to the Respondent, Lewisham Council ('the council') for homelessness assistance. The council provided her with interim accommodation pending the outcome of her application.
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> 10. On 11 May 2018, the council notified her of a decision that she was owed the main housing duty under the Housing Act 1996 Part 7 (*Homelessness*) albeit that it was inaccurately referred to by the council as the 'full' housing duty. The duty required the council to secure suitable accommodation for her occupation. The notification informed her that the interim accommodation that she had been occupying was now being provided in performance of the main housing duty.
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> 11. On 22 May 2018, the council wrote her a letter headed "OFFER OF TEMPORARY ACCOMMODATION". It stated that it was "pleased to be able to provide you [with] temporary accommodation". The letter described the size and rent of the offered accommodation and stated that its provision was made in performance of the main housing duty.
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> 12. The body of the letter did not indicate the address of the offered accommodation but the letter was addressed to Ms Adesotu at the address of "220 Algernon Road" where she was not living. The letter was delivered to her by hand, at what had been her interim accommodation, on Friday 25 May 2018.
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> 13. It was later to transpire that the council was offering accommodation at 220 Algernon Road that it had itself leased from a private owner specifically for provision to homeless households as part of a Private Sector Leasing (PSL) arrangement.

14. The text of the letter set out that the council considered the offered accommodation suitable for the household and that its decision as to suitability might be subject to review by Ms Adesotu whether she accepted or refused the offer. It cautioned as to the consequences of a refusal of the offer and a subsequent unsuccessful review.

15. Nothing in the letter indicated how, or by when, the offer was to be accepted or refused.

16. Later in the day on 25 May 2018, an Email containing the following text passed between council officers:

> "Above client was offered PSL today, she has been given a copy of the offer letter but she has not signed. She is saying she needs more time, she tried to kill herself last year etc etc. Please can you have a word?"

17. Prompted by his receipt of that Email, Mr Brian Frederick of the council spoke to Ms Adesotu by telephone later in the afternoon of 25 May 2018. She told him that she had refused the offer of Algernon Road because it was too far from her children's school and she was too depressed to move. Mr Frederick recorded that he:

> "advised her that the council does not like moving people from place to place but it does sometimes become necessary as it has in her case so she needs to accept the property offered or I would have to close her case".

18. That evening, Mr Frederick sent an email to Ms Adesotu which stated that:

> "You have been offered accommodation which you have confirmed that you do not wish to accept. You provided your reasons for refusal and confirmed receipt of the offer letter. Unfortunately, I do not agree that the reasons you gave for refusal justify withdrawing the property. As a result, if you do not confirm by midday of Tuesday next week, after the bank holiday, that you are going to accept the property, I will discharge the duty owed to you and cancel your homeless application".

19. That Email was sent at 18.45 on Friday 25 May 2018. May 26–27 was a weekend. May 28 was Bank Holiday Monday.

20. Ms Adesotu replied to Mr Frederick in a rather confusing Email, sent by her on the Saturday evening. By then, she had been to see 220 Algernon Road. In her Email she not only "accepted the offer of the property" but set out her detailed concerns about it. Her message indicated that she had been to

see the property and "from what I saw I cannot move into the property". She concluded with: "Having outlined my major reasons of refusal, I am requesting a review" and referred to a written request for review that she had sent to the review team.

21. On Tuesday 29 May 2018, Mr Frederick sent a short Email in response which included "OK thank you. I will treat this as a refusal".

22. On Wednesday 30 May 2018, Mr Frederick telephoned Ms Adesotu to "clarify her position". He records that in his first call he:

> "told her that unless she is going to sign the papers, take the keys and move in then it is a refusal, I require an answer, yes or no because she has had enough time. I told her that if she does not confirm with "yes" to all of that it will be a refusal and the property offered to someone else."

23. Ms Adesotu indicated that she could not give an immediate answer because she was breastfeeding her youngest child. Mr Frederick told her that he would call back two hours later and that if she did not take the phone call "it will be the end of the chances I have given her to accept".

24. His note of the second call reads:

> "after talking all around this issue for a while I told her that she was either going to move in or not and I require an answer. She said the property is not safe for her children. She refused to confirm that she would move in. I told her that I concluded that her position is that of refusal".

25. By letter dated the same day (30 May 2018) Mr Frederick notified Ms Adesotu that, because she had refused an offer of suitable accommodation, the council's duty to accommodate her had come to an end. The letter stated:

> "You later visited the address and despite being given several opportunities to confirm your acceptance of the property, you had failed to do so, over a week after the date of the offer letter. You were given a final opportunity to accept the property today but you refused to do so. You, today, claimed that the property was unsafe for your children".

26. In due course, the council received the written request for review that Ms Adesotu had already made by a letter dated 27 May 2018 about the suitability of the accommodation. That referred to: the front door opening onto a main road with no

> guard or safety measures to protect her children from danger; the distance to their schools; and the facts that she had recently given birth and was a "patient of depression".
>
> 27. The council decided that Ms Adesotu could remain in what had been the interim accommodation until the review concluded.
>
> 28. On 6 June 2018, the reviewing officer sent a letter setting out the decision on review that he was 'minded to' reach and invited representations. No representations were made.
>
> 29. On 25 June 2018, the reviewing officer sent a letter giving a decision on the review, namely that the accommodation had been suitable and that the decision "to discharge duty on your homeless application was the correct one". The letter set out the conclusions made by the reviewing officer and the reasons for them over 10 pages of typescript."

3. The reviewing officer's letter of 25 June 2018 contained the following paragraph under the heading "Equality Act 2010":-

> "For clarification I would like to point out that I have given careful and critical scrutiny on your application, in making this decision, to the Equality Act 2010. … I have considered all the protected characteristics with respect to the said legislation relating to your case. That is, I have considered that you have recently given birth and have a history of mental health issues (including PTSD), and are currently under the treatment of the Perinatal Mental Health Team at University Lewisham Hospital, however I am currently minded that you do not meet the definition of disability under that Act, but you are a 36 year old woman with four year old and ten month old sons and an eight month old daughter."

The appeal to the County Court

4. Section 193 of the Housing Act 1996 imposes a duty on a local housing authority to an applicant who they are satisfied is homeless, eligible for assistance and with a priority need, and where they are not satisfied that she became homeless intentionally, to secure that accommodation is available for her occupation. Section 193(5) states that the authority shall cease to be subject to the duty in certain circumstances where the applicant refuses an offer of accommodation which the authority are satisfied is suitable. Section 202 gives the applicant the right to request a review of any decision of the authority as to what duty (if any) is owed to her under s 193 or as to the suitability of accommodation offered.

5. Section 204(1), so far as material, provides that an applicant who has requested a review under s 202 and is dissatisfied with the decision on the review may appeal to the County Court "on any point of law arising from the decision." On appeal the court

may (s 204(3)) make such order confirming, quashing or varying the decision as it thinks fit.

6. On 10 July 2018 Ms Adesotu's solicitors filed a notice of appeal to the County Court under s 204. The Grounds of Appeal (as subsequently amended) were as follows:-

> **"Ground 1**. The Respondent breached section 19 of the Equality Act 2010 by applying provisions, criteria or practices that are discriminatory in relation to the Appellant's disability, and which cannot be justified. The policies, criteria or practices are:
>
> a. Operating a short and inflexible time limit during which an applicant may accept or refuse an offer of accommodation;
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> b. Not permitting an applicant time in which to take professional advice in respect of an offer of accommodation;
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> c. Treating an equivocal acceptance of the accommodation as a refusal of the accommodation; and/or
>
> d. Treating a failure to immediately occupy the accommodation as a refusal of the accommodation.
>
> **Ground 2**. The Respondent breached section 15 of the Equality Act 2010 by treating the Appellant unfavourably (deciding that the section 193 duty was discharged) because of something arising in consequence of her disability (her delayed and equivocal decision as to whether to accept the accommodation), and the unfavourable treatment was not a proportionate means of achieving a legitimate aim.
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> **Ground 3**. The Respondent breached section 149 of the Equality Act 2010 in that it:
>
> a. Failed to focus very sharply on the Appellant's disability, the extent of the disability and the impact of the disability upon her (*Hotak & Ors v Southwark London Borough Council & Anor* [2016] AC 811);
>
> b. Failed to take into account the Appellant's disability in deciding whether the accommodation was suitable; and
>
> c. Failed to accommodate the Appellant's disability by allowing her time to reach a decision as to whether to accept the offer and/or by allowing her time to take legal advice (in breach of sub-sections 149(3)(a)-(b), 149(4) and 149(6)).

> **Ground 4** . The Respondent misdirected itself in law in respect of whether there had been a 'refusal' in that:
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> a. The correct approach is whether there is 'sufficient acceptance for it not to be possible to treat an applicant's communication as a refusal', and not whether the applicant fails to actually occupy the accommodation offered (*R (Muslu) v London Borough of Haringey* (unrep.) CO/3028/2000);
>
> b. The Appellant explicitly accepted the offer by email on 26 May 2018; and
>
> c. The review decision failed to reconsider whether the Appellant had, in fact, rejected the offer (*Nzamy v Brent London Borough Council* [2011] HLR 20, CA).
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> **Ground 5** . The Respondent misdirected itself in law in that the review decision considered whether the accommodation was suitable as temporary accommodation. Instead, because the Respondent owed the Appellant a duty under section 193(2) of the Housing Act 1996, the Respondent was bound to assess suitability on the basis that it was discharging the open-ended permanent accommodation duty.
>
> **Ground 6** . The Respondent misdirected itself in law in that it failed to judge suitability by reference to the condition of the property at the time of the offer, but instead took into account proposed adaptations that were not certain, binding or enforceable (child barriers, child-proof latches and/or extra locks or latches on the windows) (*Boreh v Ealing Borough Council* [2009] HLR 22)."

7. The appeal was listed for 9 October 2018. Skeleton arguments were lodged dealing with all the Grounds of Appeal. However, shortly before the hearing was due to begin Mr Dean Underwood, who appeared then for the Council as he has before us, lodged a further skeleton argument in support of an application to strike out Grounds 1 and 2, arguing that the County Court had no jurisdiction to consider them. Since the point raised went to jurisdiction the judge decided that he was bound to deal with it, despite its lateness, and Mr Nick Bano for the Appellant did not oppose the Council being given permission to raise the point. The judge treated the application as also embracing Ground 3(c), observing that this ground appeared not to be concerned with anything done (or omitted to be done) by the reviewing officer but was rather addressed to other, prior decisions of officers of the Council or of the Council itself. Mr Underwood made it clear that he took no issue with the remaining amended grounds of appeal, which he conceded the court had jurisdiction to entertain.

8. The strike-out application was made on alternative footings. The first ("the Equality Act point") was that in a section 204 appeal the County Court has no jurisdiction to determine claims alleging unlawful discrimination under sections 15 or 19 of the Equality Act 2010. The second ("the Housing Act point") was that in a section 204

appeal the County Court has no jurisdiction to make findings of fact. The Council further submitted that the points of law in Grounds 1, 2 and 3(c) were not points "arising from" the decision of the reviewing officer and were thus not within the proper scope of a s 204 appeal.

9. The judge accepted the Council's arguments and accordingly struck out Grounds 1, 2 and 3(c) of Ms Adesotu's grounds of appeal to the County Court. As already noted, he granted permission to appeal and transferred the appeal to this court. By a decision made on the papers on 12 March 2019 Asplin LJ ordered that the appeal should remain in this court.

10. On 16 May 2019 the Equality and Human Rights Commission were granted permission by McCombe LJ to intervene by way of written submissions only.

11. In a rider to their Respondent's Notice lodged on 23 April 2019 the Council asked this court to uphold the judge's order on the additional ground that the Appellant had never invited the reviewing officer to consider whether she had been discriminated against in any of the ways alleged, nor did she draw the reviewing officer's attention to any of the factors on which she now relied as giving rise to discrimination; nor were any of them so obvious that the reviewing officer should have considered them regardless. In these circumstances it was submitted that it was not open to her to invite the County Court to quash or vary the review decision on those bases.

The Equality Act point

12. Part 9 of the Equality Act 2010 is headed "Enforcement". Section 114(1) confers jurisdiction on the County Court to determine a claim relating to a contravention of Part 3 (services and public functions), which includes the provision of homelessness assistance under Part 7 of the 1996 Act: see *Hotak v Southwark LBC* [2015] UKSC 30; [2016] AC 811 at [16]. In proceedings on a claim within s 114(1), assessors must be appointed under s 63(1) of the County Courts Act 1984 unless the judge is satisfied that there are good reasons for not doing so (s 114(7)).

13. Section 113(1) states unequivocally that "proceedings relating to a contravention of this Act must be brought in accordance with this Part." There are some exceptions set out in s 113(3). The one under discussion for present purposes is s 113(3)(a), which states that subsection (1) does not prevent "a claim for judicial review".

14. In her argument for the Appellant, Ms Liz Davies submitted that the correct interpretation of this provision is that Parliament intended that s 204 appeals should fall within the judicial review exception. She notes that until s 204 came into force any homelessness applicant who wished to challenge a decision under Part 3 of the Housing Act 1985 (the predecessor to Part 7 of the 1996 Act) would do so by judicial review. Paragraph 5 of Schedule 3 to the Disability Discrimination Act 1995 specifically permitted disability discrimination claims to be raised in judicial review proceedings.

15. Ms Davies cited the decision of this court in *Nipa Begum v Tower Hamlets LBC* [2000] 1 WLR 306 in which it was held that a s 204 appeal was not limited to matters of legal interpretation but (*per* Auld LJ at 313E) could deal also with the full range of issues which would otherwise be the subject of an application to the High Court for

judicial review. This was approved by the House of Lords in *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430, where Lord Bingham of Cornhill said at [7]:-

> "Although the County Court's jurisdiction [under s 204] is appellate it is in substance the same as that of the High Court in judicial review: *Nipa Begum v Tower Hamlets LBC* [2000] 1 WLR 306. Thus the court may not only quash the authority's decision under s 204(3) if it is held to be vitiated by legal misdirection or procedural impropriety, or unfairness or bias or irrationality or bad faith, but also if there is no evidence to support factual findings made or they are plainly untenable; or … if the decision maker is shown to have misunderstood or been ignorant of an established and relevant fact."

16. These well-known dicta point out many similarities between the s 204 jurisdiction and judicial review, in particular as to the issues which may be raised; but they do not amount to saying that a statutory appeal to the County Court *is* a claim for judicial review. The contrary has been decided by this court in *Hamnett v Essex CC* [2017] EWCA Civ 6; [2017] 1 WLR 1155. Gross LJ, with whom Tomlinson and King LJJ agreed, upheld the decision of Singh J (as he then was), reported at [2014] 1 WLR 2562, that the phrase "claim for judicial review" in s 113(3)(a) of the Equality Act 2010 is a term of art and refers only to a claim for judicial review in the strict sense, that is one brought in the High Court under Part 54 of the Civil Procedure Rules. Gross LJ said at paragraph 24 (vi) that he could not accept that "the statutory review here in issue could be characterised as an application for judicial review and therefore within the s 113(3) exception".

17. *Hamnett* was not a homelessness appeal but a High Court claim for a statutory review of an experimental traffic regulation order, which the claimant, a disabled blue badge holder, challenged on the grounds of alleged disability discrimination and an alleged breach of the highway authority's public sector equality duty. Nevertheless the case is in my view binding authority for the proposition that a statutory appeal or statutory review is not a "claim for judicial review" within the meaning of s 113(3)(a) of the Equality Act 2010. Parliament might have added appeals under s 204 of the Housing Act 1996 to the list of exceptions in s 113 of the 2010 Act, but the fact is that it did not do so.

18. Grounds 1 and 2 of the Grounds of Appeal to the County Court raised issues of disputed fact which fell within the exclusive jurisdiction of the County Court under Part 9 of the 2010 Act. The most important of these was whether or not the Appellant was disabled. I cannot accept Ms Davies' submissions that this was an issue of law. Of course the statutory definition of disability is a question of law, but whether the Appellant fell within it depended on findings of fact, followed by an evaluative judgment as to whether those facts fitted the statutory definition.

19. This is not a purely technical point. A discrimination claim would have to be brought as a civil case resulting in disclosure, the service of witness statements, a trial before a judge and assessors, the cross-examination of witnesses and so forth. I appreciate Ms Davies' argument that legal aid is more difficult to obtain for such a claim than for a homelessness appeal; but that cannot justify departing from the decision in *Hamnett*, nor from the plain wording of ss 113-114 (in particular s 113(3)(a)) of the 2010 Act.

20. The judge's decision to strike out Grounds 1 and 2 was therefore clearly correct on the Equality Act point alone, even before one turns to the Housing Act point.

The Housing Act point

21. Mr Underwood's main argument under this heading is a simple one. Section 204 of the 1996 Act allows an appeal only on a point of law arising from the decision. There is binding authority that on a s 204 appeal the County Court cannot decide disputed facts itself. In *Bubb v Wandsworth LBC* [2011] EWCA Civ 1285; [2012] PTSR 1011 Lord Neuberger of Abbotsbury MR, with whom Jackson and Gross LJJ agreed, said that "any appeal" to the County Court against the reviewer's decision on the issue [of whether the homelessness duty has ceased] is limited to a point of law: see s 204(1). Accordingly, there is no jurisdiction under the statutory scheme for the County Court to set itself up as a finder of the relevant primary facts for itself. He added that this analysis appeared to him to be entirely consistent with the notion that the exercise carried out by the County Court under s 204 is "in substance the same as that of the High Court in judicial review", as it was described by Lord Bingham in *Runa Begum*.

22. Ms Davies drew to our attention that in paragraph 24 of Lord Neuberger's judgment in *Bubb* he accepted that as a matter of principle it is open to a judge hearing a judicial review application to permit oral evidence to be adduced. But Lord Neuberger did add that:

> "……..for reasons of both principle and practice, such a course should only be taken in the most exceptional case. As its name suggests, judicial review involves a judge reviewing a decision, not making it; if the judge receives evidence to make fresh findings of fact for himself, he is likely to make his own decision rather than to review the original decision. Also, if judges regularly allow witnesses and cross-examination in judicial review cases, the court time and legal costs involved in such cases will spiral."

23. He continued at [25]:-

> "However, particularly given the nature of hearings under s 204 of the 1996 Act, the wide terms of s 204(3), and the good sense and experience of County Court judges, nothing in these observations is intended to cut down the flexible and practical approach to s 204 appeals adopted by the County Court."

24. The Appellant drew our attention to the Mr Bates' written submissions on behalf of the EHRC, in which it was argued that the decision in *Bubb* can no longer be relied upon in the light of observations of Lord Hodge JSC in the Supreme Court in *R (CN) v Lewisham LBC* [2014] UK SC 62; [2015] AC 1259. In that case a local authority decided to terminate a licence given to the family of the claimant to occupy temporary accommodation. For the reasons given in the decision of the Supreme Court the premises were not a "dwelling" for the purposes of the Protection From Eviction Act 1977, with the result that the housing authority were not required to bring a claim for possession in the County Court. If they had been so required, it would have been open to the occupant (as defendant to that possession action) to plead by way of defence

and counterclaim that the family's human rights under Article 8 of the ECHR meant that recovery of possession was not a proportionate means of achieving the local authority's legitimate aims: *Manchester City Council v Pinnock* [2011] 2 AC 104.

25. Since no possession action was required, the occupants had to take the initiative and (in each of two cases) sought judicial review of the housing authority's decision to terminate the accommodation. The leading judgment in the Supreme Court was given by Lord Hodge. He held on the facts of each case that recovery of possession was proportionate. He noted, however, that there are safeguards in the decision-making process in such cases which allow an occupant, through an appeal to the County Court or by judicial review in the Administrative Court, to raise the question of proportionality before an independent tribunal. Among the safeguards he listed were the entitlement of the applicant to have the adverse decision reviewed under s 202 of the 1996 Act; and to appeal the review decision to the County Court on a point of law pursuant to s 204. Mr Bates noted paragraph [71] of the judgment of Lord Hodge, in which he said:-

> "71. Sixthly, the decisions of this court in 2011, in *Manchester City Council v Pinnock* and *Hounslow London Borough Council v Powell*, extended the powers of the County Court when hearing applications by a local authority to recover possession of a property in order to comply with article 8 of ECHR. It appears to me that it is necessary for the same reason to interpret section 204 of the 1996 Act as empowering that court to assess the issue of proportionality of a proposed eviction following an adverse section 184 or 202 decision (if the issue is raised) and resolve any relevant dispute of fact in a section 204 appeal. As there is no other domestic provision involving the court in the repossession of the accommodation after an adverse decision, the section 204 appeal, which reviews the authority's decision on eligibility for assistance, is the obvious place for the occupier of the temporary accommodation to raise the issue of the proportionality of the withdrawal of the accommodation. Alternatively, as Moses LJ stated in this case ([2013] EWCA Civ 804) at para 89, the occupier of the temporary accommodation may raise the issue of proportionality of such an eviction by way of judicial review in the Administrative Court, which similarly could resolve relevant factual disputes. An occupier might have to resort to judicial review if an authority were not willing to continue the provision of interim accommodation pending a review."

26. I do not accept that these observations have overruled the decision in *Bubb. Bubb* is not referred to in the judgments of the Supreme Court or of this court and was not even cited in argument by either side. It is inconceivable that the very experienced counsel in *CN*, or Lord Neuberger PSC who presided in that case as he had in *Bubb*, would not have referred to it if it had been thought relevant. The observations at paragraph 71 of Lord Hodge's judgment are in my view to be read in the light of the cases before the Supreme Court being challenges to the proportionality of an occupant or occupants being evicted from local authority accommodation. As I have

already noted, it has long been established on high authority (*Manchester CC v Pinnock*) that human rights considerations or other policy considerations can be raised by way of defence to a claim for possession. *CN* decided that, in the more unusual case where a possession action is not required, an Article 8 issue as to the proportionality of evicting the occupants may be raised in a judicial review or a s 204 homelessness appeal. But there is a distinction between a challenge to the proportionality of eviction and a challenge to a decision that an applicant's refusal to accept an offer of accommodation which the local authority regard as suitable entitles them to treat their homelessness duty as discharged. There is also a significant distinction between a proportionality issue under the Human Rights Act and the ECHR on the one hand and a claim of discrimination contrary to the Equality Act 2010 on the other: see per Lord Neuberger PSC in *Aster Communities Ltd v Akerman-Livingstone* [2015] UKSC 15; [2015] AC 1399 at [57].

Did the issues "arise from the decision"?

27. It should also be borne in mind that s 204 confines the jurisdiction of the County Court not simply to questions of law but to questions of law "arising from the decision". It was held by this court in *Abed v City of Westminster* [2011] EWCA Civ 1406 that in a case where a review has taken place it is the review decision, not the original decision, which is the subject of the s 204 appeal. Lloyd LJ, with whom Ward and Kitchin LJJ agreed, said at paragraph 20 that the right of appeal is "on a point of law said to be erroneous in the review decision". He continued at paragraph 26 by saying that in a case where a statutory review process is available:-

> "… the Act has provided for the applicant to challenge the decision and have it fully reconsidered, with the opportunity to ensure that the full facts are taken into account. That seems to me to exclude as illegitimate a challenge on the grounds such as [that] the original process was incorrect or even unlawful, because a point of that kind is superseded by the question as to whether the review process was carried out properly and reached a legally correct solution."

He added at paragraph 28 that the review is "a continuation or a replacement for the initial decision-making process."

28. Lloyd LJ continued at paragraph 29:-

> "Accordingly, even if the local authority failed in its duty to make proper enquiries on the issues relevant to the suitability of the accommodation before making an offer in my judgment the remedy for a disappointed applicant is to exercise the right of review. The applicant thereby has a second chance to have the matter properly considered with the fullest opportunity for representations to be made and a fresh duty on the local authority to make the proper enquiries. Only if the result of that process is so flawed as to be wrong in law is there any further recourse by way of appeal [under] s 204."

29. This means that in the present case the question of whether the local authority did not give the applicant enough time to decide whether to accept or reject the offer of accommodation before reaching the original decision becomes academic provided that she was given enough time (as plainly she was) to raise any points she wished to make before the review decision was made.

The Respondent's Notice

30. The Council also seek to uphold the judge's decision on a further ground raised in a rider to their Respondent's Notice, namely that Ms Adesotu never alleged either at the stage of the original decision or when seeking a review that she was the victim of unlawful discrimination on the grounds of disability; indeed it is far from clear that she was alleging, or that it should have been obvious to the Council that she was alleging, that she was disabled within the meaning of the Equality Act 2010.

31. The original decision had contained a (no doubt standard) paragraph stating that the decision-maker did not consider that any of the protected characteristics under the Equality Act 2010 were relevant. In seeking a review the applicant wrote that "I am a patient of depression plus I just gave birth. So this should be put into consideration while dealing with this issue. Presently the whole issue is already having effect on me seriously." There was apparently a nurse's letter to similar effect, though it has not been placed before us. One of the attendance notes cited by the judge also noted that the Appellant had said on the phone that she had tried to kill herself a year previously. These factors indicated cause for concern about the Appellant, but I do not think that they can be said to have put the Council on notice that she was entitled to be treated as disabled within the meaning of the 2010 Act.

32. At paragraph 98 of his judgment Judge Luba held:

> "In the instant case, it was not suggested at any point prior to this reviewing officer's decision, that there had been any public law irregularity or other unlawfulness in the council's handling of this homelessness application. Accordingly I do not accept that grounds 1, 2 and 3(c) take points "arising from" the reviewing officer's decision and I hold that this court does not have jurisdiction to entertain them."

33. I agree. On this basis also I would uphold the judge's decision, in respect not only of Grounds 1 and 2 but also in respect of Ground 3 (c).

The antecedent policy point

34. Mr Underwood relied, both before the judge and in this court, on a broader basis for striking out Grounds 1, 2 and 3(c), namely that they were points arising not from the decision of the reviewing officer but from a policy or practice of the Council (requiring an applicant to accept or reject an offer of accommodation within 4-6 days of receipt) which was antecedent to the Council's original decision in the present case that their duty had ended.

35. As the judge noted, there is some tension between the authorities relied on by each party on the question of whether a s 204 appellant can argue that an antecedent policy

decision of the housing authority is unlawful in public law terms and that such unlawfulness infects the decision in the specific case. In *Tachie v Welwyn Hatfield BC* [2013] EWHC 3972 (QB); [2014] PTSR 662, Jay J held that the words "arising from" in s 204 were to be given a broad meaning and that "any *ultra vires* issue in the *Anisminic* sense" was therefore capable of being taken. On the other hand, in a postscript to his judgment in *Panayiotou v Waltham Forest LBC* [2017] EWCA Civ 1624; [2018] QB 1232 at 90 Lewison LJ, having referred to the decision in *Tachie*, said that he would not regard the point as by any means settled. He expressed his disquiet that such wide-ranging challenges to the actions of a local authority should be permitted in s 204 appeals to the County Court.

36. Judge Luba expressed the view that the doubts expressed *obiter* in *Panayiotou* were "not easy to reconcile" with dicta of Lady Hale in *Nzolameso v City of Westminster* [2015] UK SC 22; [2015] 2 All ER 942. Having considered these authorities and the more recent decision of this court in *Alibkhiet v Brent LBC* [2018] EWCA Civ 2742, he said at [97]:-

> "In the event, and much influenced by the dictum in *Panayiotou*, I am satisfied that a reviewing officer is entitled (particularly in the absence of any contrary point having been expressly raised to treat any policy or practice of the council applied to the applicant by his/her own decision as lawful. As in all public law cases, there must be a presumption that a public authority behaves and has behaved lawfully (the presumption of regularity)."

37. I would not embark on resolving this controversy in the present case for the following reasons. Firstly, it is not necessary for the disposal of the appeal. Resolving it should wait for a case where it is or may be determinative. Second, I do not consider that this case is really about an antecedent policy at all. The only antecedent policy relied on is the one of requiring applicants to whom an offer has been made to accept or reject it within a matter of days. Even if – and it is a big "if" – this could somehow be regarded as unlawful, the Appellant then had another opportunity to accept or reject the property, and then a further opportunity after that to seek a review, in the course of which she received a "minded to discharge" letter to which she did not respond. The issues which remain to be resolved in the present case, when it returns to the County Court, are fact-specific. The antecedent policy question highlighted by Lewison LJ in *Panayiotou* should be resolved in a case where it really matters.

Conclusion

38. I would dismiss this appeal.

McCombe LJ:

39. I agree.

Lewison LJ:

40. I also agree.