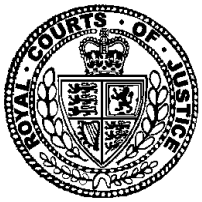

Neutral Citation Number: [2021] EWCA Civ 1688

Case No: B5/2021/0599 / B5/2021/0676

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
RECORDER COHEN QC AND HIS HONOUR JUDGE GERALD
G40CL294 and G40CL307

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/11/2021

Before :

LORD JUSTICE BEAN
LORD JUSTICE NUGEE
and
MRS JUSTICE FALK

- -

Between :

IBRAHIM HAJJAJ	**Appellant**
- and -	
CITY OF WESTMINSTER	**Respondent**

-and-

Between :

MORIUM AKHTER	**Appellant**
- and -	
LONDON BOROUGH OF WALTHAM FOREST	**Respondent**

- -
- -

Iain Colville (instructed by Hodge, Jones and Allen and KC Solicitors) for both Appellants
Ian Peacock (instructed by **Bi-Borough Legal Services**) for the **City of Westminster**
Nicholas Grundy QC and **Michael Mullin** (instructed by **Waltham Forest Legal Services**) for the London Borough of Waltham Forest

Hearing date: 26 October 2021

- -

Approved Judgment

Lord Justice Bean :

Introduction

1. These two appeals address the use of the private rented sector by local housing authorities in causing their duty under s. 193(2) of the Housing Act 1996 to cease.

2. The use of the private sector accommodation as a way of unilaterally bringing to an end the s. 193(2) duty under the Act was introduced by ss.148 and 149 of the Localism Act 2011. The new power, introduced as part of the government's wider social housing reforms, permits local authorities to end the main homelessness duty with offers of accommodation in the private rented sector without requiring the applicant's agreement. The purpose of the change was to give local authorities freedom to make better use of good quality private sector accommodation that can provide suitable accommodation for households accepted as homeless. Prior to this amendment to Part 7 the private rented sector could only be relied upon in final discharge where an applicant "accept[ed] an offer of an assured tenancy (other than an assured shorthold tenancy) from a private landlord": s.193(6)(cc) or "accept[ed] a qualifying offer of an assured shorthold tenancy which is made by a private landlord in relation to any accommodation which is, or may become, available for the applicant's occupation" (s.193(7B).

3. There are two issues in the appeals. The main question, common to both cases, is in what circumstances accommodation should be regarded as not "suitable" to form the subject of a valid private rented sector offer (PRSO) for the purposes of s 193(7F) of the 1996 Act. An additional ground raised in the Akhter case only is whether a local housing authority may lawfully discharge their duty under s 208 of the Act when approving a PRSO of accommodation located out of their district in the absence of a relevant procurement policy.

The facts of Hajjaj v Westminster

4. In late July 2018 the Appellant applied to Westminster for housing assistance under Part 7 of the 1996 Act. The Council accepted that it owed him what is generally known as the main housing duty under s.193 of the Act. He was housed in temporary accommodation.

5. On 30 April 2019 Emma Noel of the Council's Housing Solutions Service wrote to Mr Hajjaj. The letter said:

> "Offer of private rented sector accommodation at 58c Picardy Road, Dartford, DA17 5QN under the Housing Act 1996, Section 193 (7AA)
>
> I am pleased to offer you a tenancy at the above address. This is a two bedroom flat on the ground floor with no lift suitable for up to four people. The property is unfurnished. The rent is £204.05 which is within the current LHA for that post code. The landlord of the property is St Mungo's. We have an arrangement

> with St Mungo's allowing us to offer you the tenancy on their behalf, but if you take the tenancy your landlord will be St Mungo's not Westminster City Council. We believe St Mungo's to be a fit and proper landlord.
>
> The tenancy will be an assured shorthold tenancy with a term of two years. We have been provided with a copy of the landlord's written tenancy agreement and we consider it to be appropriate and adequate. We have arranged for you to look at the property on Thursday 02nd May 2019 at 11.00am.
>
> The landlord will meet you at 58c Picardy Road, Dartford, DA17 5QN.
>
> If you cannot make this appointment, please phone us. If you don't turn up without letting us know why, we will assume you are refusing our offer.
>
> We believe this accommodation is suitable for you and we hope you like it. In our view it is:
>
> - Large enough for you and your family.
> - Affordable for you and your family
> - Income — Universal Credit £389.24, Disability Living Allowance £45.30, Council Tax Reduction £22.95, Child Benefit £20.70 which totals to £478.19 a week.
> - In reasonable condition.
> - Reasonably safe for you and your family to occupy and meets all the legal requirements including those relating to electrical equipment, gas and carbon monoxide safety and energy performance.
>
> We have also considered the following:
>
> - The information on your housing file including our assessment of your and your family's housing needs
> - The distance of the property from Westminster……"

6. Ms Noel's letter went on to deal with the issue of location, referred to the Council's 2016 Placement Policy, and told Mr Hajjaj that he could be offered accommodation in locations up to and including Band 3. The letter informed him that if he accepted the offer the Council's housing duty to him would end and they would close the application file. It went on, as s 193(7AB) of the Act requires, to warn him of the consequences of refusal:-

> "Our housing duty will end if you refuse our offer. We will close your application and stop providing you with accommodation at Abbotts Hotel, Room 206, 283-285 Willesden Lane, NW2 5JA. You have, however, the right to ask us to reconsider (review) our decision that the property we are offering you is suitable.
>
> Given the consequences of refusing our offer, we strongly advise you to view the property and, afterwards, if you are thinking of refusing the offer, discuss the matter with your housing officer. Please note that we cannot hold this offer open and if you do not accept the property by Friday 3rd May 2019 we will assume that you have refused it.
>
> You can ask us to review our decision whether you accept or reject this property. This means that you can move into the accommodation and ask us to reconsider our decision that it is suitable. If you request a review and we change our decision, we will offer you another home, although this might not happen straight away.
>
> Your right to ask for a review lasts for 21 days from the day you receive this letter."

7. Mr Hajjaj viewed the property and refused the offer. In a further letter of 15 May 2019 Ms Noel wrote:-

> "**Notice that our housing duty has ended**
>
> I am writing further to my letter dated 09th May 2019 offering you a property at 58c Picardy Road. Dartford, DA17 SQN. This was a permanent private rented sector offer under the Housing Act 1996, Section 193 (7AA — 7AC) as amended by s.148 (5)-(7) Localism Act 2011.
>
> When you applied for housing we accepted a duty to make sure you had somewhere suitable in which to live. Section 193 of the Housing Act 1996 gave us this duty. In our letters offering you this property, we advised you that if you refused our offer without a sufficiently good reason our housing duty under section 193 would end.
>
> Your first original viewing was on the 10th May 2019 at 11.00am to where you was over two hours late for your appointment which meant that the viewing didn't go ahead and had to be rearranged with St Mungo's - when I spoke to you regarding this you advised me that the property wasn't suitable based on these issues you stated that the school, Shops, Doctor Surgery and Hospital [were] too far away from the property to which I advised you a suitability check was conducted for all the places you mentioned above I advised you they are within a 10 -

> 15 minutes' walk of the property which is reasonable, you then went on to say that you were too far away from your family.
>
> On 13th May 2019 you went for a second viewing at the property and you have subsequently refused this property because you now state that you are a carer for a family member. When I asked you when you became a carer for the family member you stated that you couldn't remember when I asked for an average time of being a few days, weeks or months you then said you have been a carer for four months. When we conducted a housing needs assessment with you on 18th February 2019 you didn't mention at the time you were a carer or helping anyone out with care due to this we only took in to account the information we had on the housing need assessment and with this I find the property that you viewed suitable for yourself and your family.
>
> *I believe that the property was suitable* and I am also satisfied that you have been given plenty of opportunity to accept this accommodation and that you understand the consequences of refusing this property as I outlined in my letter of 09th May 2019. Because you refused the offer, our duty under Section 193 of the Housing Act 1996 has come to an end and we are no longer required to provide you with accommodation.
>
> We are currently providing you with temporary accommodation at Abbotts Hotel Room 206, 283-285 Willesden Lane, NW2 5JA. As we no longer have a duty to make sure you have a home, we intend to instruct Abbotts Hotel, your landlord, to end your tenancy on 05th June 2019. After your tenancy ends you will have to leave your accommodation. When your tenancy ends we do not intend to offer you somewhere else to live." [emphasis added]

8. Mr Hajjaj was informed of his right to request a review. He exercised that right. The first review decision and an appeal against it lodged with the County Court were withdrawn by agreement on 10 February 2020, and we have not been concerned with them. Further representations on review were submitted in a letter on 13 March 2020 by the Appellant's solicitors, Hodge, Jones and Allen, which stated:-

> "There does not appear to be any evidence that the criteria set out in Article 3 of the Homelessness (Suitability of Accommodation) (England) Order 2012 have been determined as not applicable. It is a requirement that it is shown that these criteria do not apply and that the offer of private rented accommodation [is] suitable. With these steps not having been taken, the offer of accommodation could not be deemed to [be] suitable for the purposes of Article 3. In addition, there was no consideration of the same during the first review".

9. A few days after this letter was sent the first national lockdown during the pandemic began. We were told that Mr Hajjaj is in fact still resident in the temporary accommodation which he was occupying at the start of 2020.

10. The Council's review decision was contained in a 20-page letter of 3 September 2020 from Anisa Asif of the Housing Solutions Service. It included the following passages relevant to the issues raised in Mr Hajjaj's appeal to this court:-

> "….You argue that there does not appear to be any evidence that the criteria set out in Article 3 of The Homelessness (Suitability of Accommodation) (England) Order 2012 have been determined as not applicable. You state that it is a requirement that it is shown that these criteria do not apply and that the offer of private rented accommodation [is] suitable. You state that with these steps not having taken place, the offer of accommodation could not be deemed as 'suitable' for the purposes of Article 3. You state that there was also no consideration of this during the first review."

After dealing in considerable detail with the topics of Mr Hajjaj's role as a carer for his elderly mother; his support network; the interests of his daughter; the location of the property in Dartford; the issue of affordability; and the Council's public sector equality duty, the letter mentioned Article 3 of the 2012 Order only briefly, saying:-

> "I note your reference to Article 3 of The Homelessness (Suitability of Accommodation) (England) Order 2012. I am satisfied that sufficient regard was had to Article 3 when the offer of accommodation was made to Mr Hajjaj."

Akhter v Waltham Forest: The facts

11. By a letter dated 9 September 2016, the Council accepted they owed Ms Akhter the main housing duty. They initially accommodated Ms Akhter and her daughter (who was born in January 2017) in temporary accommodation. At the time of the decisions under review this accommodation was in Harlow.

12. On 25 February 2020 the Council completed an "Accommodation Needs Form" which concluded that Ms Akhter was suitable for a PRSO and was in Zone B for the purpose of their Temporary Accommodation Allocations Policy - accommodation in Greater London and neighbouring districts in Essex and Hertfordshire. In a letter sent on the same date Ms Ismail, the Council's Private Sector Lettings Officer, offered Ms Akhter another property in Harlow as a PRSO.

13. In making the offer Ms Ismail stated: "Mears Housing Management (managing on behalf of More Homes WF) will contact you within two working days to arrange a viewing appointment". In concluding that the property was suitable, Ms Ismail stated:

> "I have also considered whether the accommodation offered is in the view of the Council in a reasonable condition and have used the guidance in Part 2 of the Homelessness (Suitability of Accommodation) (England) Order 2012 to help guide me on the

> suitability of the accommodation offered itself. Mears Housing Management (managing on behalf of More Homes WF) will provide you with copies of the landlord compliance information; EPC certificate, Gas Safety Certificate, Electrical Safety Certificate" .

14. Ms Akhter viewed the property on 27 February 2020 and was not impressed by what she saw. The next day she sent two emails to the Council. The first included the following:-

> "I am contacting you in regards to the offer of permanent housing. Upon viewing the property yesterday afternoon I wanted to raise several concerns [I] have with the state of the property. When looking around I had noted there is damp in parts of the property which looks like it has been unprofessionally painted over. When running the taps they are barely working with little to no pressure. The property's heating does not work properly and I expressed these concerns to the person who conducted the viewing. The property also has no shower unit as well as the toilet being absolutely horrible with flush not working. The property had been freezing even after switching the radiators on. I have previously mentioned my daughters health as she suffers from bronchiolitis which turned into severe asthma and has to regularly take steroids and inhalers everyday. I cannot [accept] a property while I know will definitely cause issues to my daughter health I need a property which has a good heating system and is not [damp], I feel my child's health is getting ignored even though several times on the phone I have explained it to abner ismail (temporary accommodation officer) saying please don't put us anywhere which is [damp]because my child will need oxygen if she stays in [damp] or a place that doesn't have good heating system. A slight cold it triggers her asthma she is only 3 years old I can't afford my child falling ill due housing situation but what happens everything gets ignored and I was told to sign a place that has really bad heating system, no shower system, taps not working, [flush] not working filthy toilet with human waste in the toilet, wall being [damp]. I have pictures and videos for evidence.
>
> I also expressed my concerns whilst I was living in Barnet with the health visitor for my daughter in which I stated the Barnet property had damp and she had reported this back, So I cannot accept a permanent property based on the damp and the chance of my daughter falling severely ill due to the property being freezing and barely any hot water, let alone water.
>
> I also signed a contract as I was moved from one temporary property to my current property based on the fact that the previous property was going up for sale and the agreement between yourself and the housing association came to an end this property was in Barnet. When placed into my current home I was

> reassured that it would be a long term temporary property for a minimum of 3 Years. I understand if permanent housing is found within this time however the housing officer who I spoke to Abeer Ismail had stated the reason to move me to another property was based on my current property being too expensive for the council but the difference is only £10 between the current and permanent offers.
>
> I have been on the temporary housing register for almost 4 years. I have been moved from Enfield to Barnet and now to Harlow with the latest permanent offer also is Harlow. From what I understand there are considerations to be made when offering permanent housing. I understand that health issues have to be considered when being placed or offered long term housing. I have expressed regarding my daughters health several times. I have never had anti social behaviour issues in any of the properties you have placed me in I have been paying my rent on time and have done everything asked of me from yourselves when being placed in temporary housing. I have previously expressed the need for me to be closer to my mother's property as my daughter is regularly in and out of royal london hospital and most times admitted. Being based in Harlow, it is difficult to get any support when emergencies occur as the distance is miles away from any family or friends. I myself am currently suffering from major health issues and have recently been admitted for over 4 days in hospital and this was followed up with an MRI this month and surgery required next month. I feel that this is affecting my physical and mental state as well as the fact that I am not getting the support of loved ones as I am isolated.
>
> I have spoken to the association representative and mentioned the concerns I have with the property and was given a number of excuses as well as being made to wait over an hour in the cold with my daughter as the representative had completely forgotten about the appointment which yourselves booked. After viewing I notified him that I have decided to decline this offer under the above concerns and state of the property.
>
> I hope that this reaches you well and upon reading this, take my concerns seriously and look at my circumstances when deciding upon a permanent housing offer."

15. Shortly after sending this email Ms Akhter rang the Council's temporary accommodation team. The conversation was unproductive and later that day she sent an email complaining of alleged rudeness on behalf of the officer to whom she spoke and repeating points made in the first email.

16. On 21 July 2020 Patricia Addow of the Council's Resident Services Directorate sent a "minded to" letter giving a provisional decision that the accommodation offered was suitable, with 16 pages of reasons, and giving Ms Akhter "an opportunity to comment on and/or refute the evidence which has led me to reach this provisional conclusion for

the reasons given above", before a final decision was reached. She asked for any further information to be submitted by 31 July 2020. On 30 July 2020 a 12 page letter was sent to Ms Addow by KC Solicitors on behalf of the Appellant. This raised issues about the health of the Appellant and her daughter, arguing that each of them was disabled within the meaning of the Equality Act 2010 and that this should have been taken into account in the decision about accommodation. The letter further argued that the location of the property was unsuitable having regard to the medical condition of the Appellant and her daughter.

17. Ms Addow was not persuaded. By a further letter of 12 October 2020 she issued a review decision adhering to the previous finding that Ms Akhter had been offered suitable accommodation which ended the Council's statutory duty under s.193 of the 1996 Act. The review decision is 28 pages long and I will only quote short extracts. On the issues of location and size of the property Ms Addow wrote:-

> "87. With regards to offering you 59 Dadswood, Harlow I emphasise the fact that you were offered a property in line with the case law of Nzolameso v City of Westminster [2015] UKSC 22, Lady Hale stated that "local authorities have a statutory duty to accommodate within their area so far as this is reasonably practicable. "Reasonable practicability" imports a stronger duty than simply being reasonable. But if it is not reasonably practicable to accommodate "in borough", they must generally, and where possible, try to place the household as close as possible to where they were previously living".
>
> 88. As it was not possible to offer you a property in Waltham Forest or close to Waltham Forest, you were offered a property 'as close as possible' to where you previously lived.
>
> 89. The Council's housing policies are devised to fairly allocate accommodation based on the circumstances of each applicant and during a time of severe shortages of properties. [In] the case law of Alibkhiet vs Brent and Adam vs Westminster (December 2018) Lord Justice Lewison highlighted that 'You would need to be a hermit not to know that there is an acute shortage of housing, especially affordable housing, in London; and that local government finance is severely stretched. Under the homelessness legislation housing authorities in London have duties to procure housing for the homeless; and must so far as it is reasonably practicable to do so, accommodate such persons within their own district'. The Council officers did procure properties in Waltham Forest which the evidence shows.
>
> 90. Section 208 of the Act provides that so far as reasonably practicable a local housing authority shall in discharging their housing functions under this Part secure that the accommodation is available for the occupation of the applicant in their district. When you were offered accommodations in Harlow the council provided you accommodation 'so far as reasonably practicable'

> 91. I remind you that on the 25th February 2020, when you were offered 59 Dadswood, Harlow there were 7 other applicants offered available accommodation. There were 6 temporary accommodations: a studio in E4, 2 x 2 bedrooms in E16 and E17, a 3 bedroom in E5 (Hackney) and a 4 bedroom in RM17 (Grays, Essex). There was also a 2 bedroom, private rented property in E11.
>
> 92. The 2 bedroom properties in E16 and E17 were allocated to applicants with medical conditions and involvement with social services and the E11 property was allocated to an employed applicant with a school age child who had a medical condition. Your solicitor is of the view that you should have been offered one of the 2 bedroom properties instead of the other applicants. The decision as to who receives what accommodation is governed by applicants circumstances, housing legislation, code of guidance and the council's Temporary Accommodation Allocation Policy and the Private Rented Sector Offer Policy. When officers are offering accommodation they have to consider personal circumstances of each applicant, whether they have access to transport, a car, the age of the child/s, schooling, Social Services involvement and the severity of any medical conditions. The Council would have acted unlawfully if officers had ignored the housing needs of the other applicants. The Council has a responsibility to all homeless applicants and has to ensure that the relevant housing legislations and council policies are adhered to.
>
> 93. Based on your family circumstances and the medical conditions I am satisfied that a suitable accommodation was offered to you in accordance with the Council's Private Rented Sector Offer Policy. I point out that the PRSO Policy states at 3.3 that 'Where it is not reasonably practicable to offer property in Zone A within a reasonable time, having regard to the demand and supply of housing and any costs to the Council of maintaining the household in temporary accommodation, a property in Zone B or Zone C may be offered, depending on its suitability for the applicant and his/her household.'"

18. On the issue of alleged disrepair the letter stated:-

> "108. With regards the impact of the disrepair problems on your family's medical condition. Firstly, I note that the offer letter said 'nobody in your household suffers from any physical or mental health issues that would impact mobility or the housing needs of the household'. However, it is clear that the Accommodation Needs Form said that you suffer from severe depression and your daughter from asthma.
>
> 109. Secondly, I note that the disrepair problems were resolvable and did not prevent you from accepting the offer.

110. With regards there being no shower in the bathroom, I am of the view that if you wanted to have a shower attachment connected to the bath taps you could have organised this yourself. Not all bathrooms have separate showers and/or shower attachments to the bath taps and the lack of a shower would not have made the property unsuitable.

111. With regards the kitchen taps which were not working properly as the water was trickling out rather than a continuous flow. The agents would have repaired this problem, as they would have done with the heaters not emitting enough heat and cleaning and repairing the toilet. Based on what I consider minor disrepair issues, you refused the offer of suitable accommodation and even though you informed the viewing officer about the repairs required you felt that the viewing officer made excuses. I do not find advising you that repairs would be carried out as excuses, after all these were issues which could be repaired.

112. I have also checked with the Temporary Accommodation Team the information they received about the disrepair and I note from your housing record that the agents Mears reported that the stop cock was turned off hence the water was not running properly.

113. With regards your main concern that the property had damp because there were watermark lines on the kitchen walls and the walls in the property were very cold. The property had been inspected and I have attached the certificates for the property. I am of the view that the watermarks in the kitchen were likely to be sign of condensation as I noted you did not report signs of mildew, dark patches of discolouration or that the walls in the kitchen were wet when touched. Therefore, it was unlikely there was damp in the property to cause your daughter's asthma to worsen.

114. I do not find that the property was unsuitable as the agents would have been instructed by the council to complete the disrepair issues you reported. It is unfortunately that the toilet had not been cleaned before your viewing however the presentation of the property did not make the property unsuitable.

115. In making my decision that the property was suitable I considered Article 3 of the Homelessness (Suitability of Accommodation) (England) Order 2012, where the council in making an offer of private rented accommodation must make checks that the property is suitable. I find that the property was suitable in terms of the physical condition, electrical equipment meeting the statutory safety requirements, reasonable fire safety precaution and precaution preventing possibility of carbon monoxide."

19. The certificates to which paragraph 113 of the review decision referred included a final inspection certificate completed when the property was certified on 31 January 2020 as being ready for occupation. This had an "agreed snagging list" which read as follows:-

> *Kitchen*
>
> Draws and shelves to be replaced.
>
> *Bathroom*
>
> Mastic not replaced. Vanity release is wrong one as remove bolt lock.
>
> *Generally*
>
> Ease adjust doors.
>
> Final Clean
>
> Nets, drapes, shades and bulbs.
>
> Note window restrictions installed in the wrong place.
>
> *Proposed date for completion*
>
> 07.02.2020

20. The Council also had on file a domestic electrical installation certificate issued on 16 January 2020, an asbestos refurbishment survey report dated 24 November 2019, a fire risk assessment report dated 13 March 2018 and an energy performance certificate issued on 15 December 2018.

21. Ms Akhter's appeal also raises a ground concerning Waltham Forest's lack of a published policy for the procurement of private sector property in which to place homeless applicants.

22. Waltham Forest has a Temporary Accommodation Allocation Policy dealing with the allocation of available property to homeless applicants other than offers made under Part 6 of the 1996 Act ("the Allocation Policy"). The Council also has a PRSO Policy dealing with the requirements of PRSO Offers ("the PRSO Policy").

23. 'Key Principles' of the PRSO Policy are that:

> "2.1 The Council's policy is to make available suitable PRSO accommodation within Waltham Forest wherever reasonably practicable, except in cases where there is a specific reason why the household should not be accommodated within the borough (e.g. those at risk of violence in Waltham Forest).
>
> 2.2 Accommodation may be acquired from providers by the Council's housing services, or applicants may find their own property through the Self Help Scheme.

> 2.2 [sic] Changes to the local housing market and other factors largely outside the Council's control have made it increasingly difficult to acquire properties for use as PRSO accommodation in the borough and in surrounding areas that meet the standards that are required. The service may therefore acquire properties in a range of other locations where it appears the supply of units in the borough will not be sufficient for the anticipated demand.
>
> 2.3 All accommodation offered as a PRSO will conform to agreed minimum property standards. Where applicants have found their own properties (see 2.2) which have not been inspected by the Council, the Council will obtain evidence from the landlord that confirms its suitability. These standards take account of the requirements of the Homelessness (Suitability of Accommodation) Order 2012……
>
> 2.7 Any decisions regarding an offer of a PRSO will have regard to the provisions of the Homelessness (Suitability of Accommodation) Order 2012."

24. In relation to the location of accommodation offered the PRSO Policy at paras 3.2 and 3.3 states as follows:

> "3.2 All properties provided to be used for PRSOs will be zoned as follows:
>
> • Zone A - located in the London Borough of Waltham Forest
>
> • Zone B - located in Greater London and neighbouring districts in Essex/Hertfortshire
>
> • Zone C — located outside Zones A and B
>
> 3.3 Where it is not reasonably practicable to offer a property in Zone A within a reasonable time, having regard to the demand and supply of housing and any costs to the Council of maintaining the household in temporary accommodation, a property in Zone B or Zone C may be offered, depending on its suitability for the applicant and his/her household."

25. At paras 3.6 and 3.7 the Policy makes the following provision in relation to the location of accommodation offered and the prioritisation of applicants:

> "3.6 Before an offer is made, a matching exercise will be carried out taking into account the requirements of the household and the nature and location of the individual property; the results of this matching exercise will be recorded in full on the applicant's file.
>
> 3.7 The following households will normally be given highest priority for accommodation within or close to the borough (or

close to their place of employment/medical facilities/place of education as appropriate):

• Households with one child (or more) in secondary school in their final year of Key Stage 4 (generally Year 11)

• Households with one child (or more) who has a Statement of Special Educational Needs

• Households with one child (or more) who is the subject of a Child Protection Plan

• Households where one person (or more) is receiving NHS treatment for mental health problems from Secondary mental health services , (e.g. from the Community Mental Health team) and/or is on the Care Programme Approach (CPA) I

• Households where one person (or more) is in permanent and settled part time or full time employment and has been for at least six months prior to the date of their homelessness application - this group will be prioritised for housing as close as possible to their workplace.

• Households where a member of the household is caring for another person in the borough who falls into one of the following categories:

a) Over 75 years old and living alone, or with no other member of the household under 75 years of age, OR

b) In receipt of a registered care package, OR

c) In receipt of the medium or higher rate of the care component or the higher rate of the mobility component of the Disability".

The legislative scheme

26. The duties of local housing authorities towards the homeless are set out in Part 7 of the 1996 Act. The statutory scheme is a safety net designed to resolve or prevent homelessness. By virtue of s 184(1), where a person applies to a local housing authority for assistance under Part 7 of the Act, if the local housing authority have reason to believe that the applicant may be homeless or threatened with homelessness, they must make such inquiries as are necessary to satisfy themselves whether the applicant is eligible for assistance and, if so, whether a duty is owed to the applicant under the provisions of Part 7.

27. The main housing duty is contained in section 193, the relevant parts of which provide:

"(1) This section applies where-

(a) the local housing authority-

(i) are satisfied that an applicant is homeless and eligible for assistance, and

(ii) are not satisfied that the applicant became homeless intentionally,

(b) the authority are also satisfied that the applicant has a priority need, and

(c) the authority's duty to the applicant under section 189B(2) has come to an end...

(2) Unless the authority refer the application to another local housing authority (see section 198), they shall secure that accommodation is available for occupation by the applicant.

(3) The authority are subject to the duty under this section until it ceases by virtue of any of the following provisions of this section.

…….

(7AA) The authority shall also cease to be subject to the duty under this section if the applicant, having been informed in writing of the matters mentioned in subsection (7AB)-

(a) accepts a private rented sector offer, or

(b) refuses such an offer.

(7AB) The matters are-

(a) the possible consequence of refusal or acceptance of the offer, and

(b) that the applicant has the right to request a review of the suitability of the accommodation, and

(c) in a case which is not a restricted case, the effect under section 195A of a further application to a local housing authority within two years of acceptance of the offer.

(7AC) For the purposes of this section an offer is a private rented sector offer if-

(a) it is an offer of an assured shorthold tenancy made by a private landlord to the applicant in relation to any accommodation which is, or may become, available for the applicant's occupation,

(b) it is made with the approval of the authority, in pursuance of arrangements made by the authority with the landlord with

a view to bringing the authority's duty under this section to an end, and

(c) the tenancy being offered is a fixed term tenancy (within the meaning of Part 1 of the Housing Act 1988) for a period of at least 12 months...

(7F) The local housing authority shall not-...

(ab) approve a private rented sector offer, unless they are satisfied that the accommodation is suitable for the applicant and that subsection (8) does not apply to the applicant.

(8) This subsection applies to an applicant if-

(a) the applicant is under contractual or other obligations in respect of the applicant's existing accommodation, and

(b) the applicant is not able to bring those obligations to an end before being required to take up the offer..."

28. The relevant parts of section 202 provide:

"(1) An applicant has the right to request a review of-...

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

(g) any decision of a local housing authority as to the suitability of accommodation offered to him by way of a private rented sector offer within the meaning of section 193,...

(1A) An applicant who is offered accommodation as mentioned in section 193... (7AA) may under subsection (1)... (g) request a review of the suitability of the accommodation offered to him whether or not he has accepted the offer.

(2) There is no right to request a review of the decision reached on an earlier review.

(3) A request for review must be made before the end of the period of 21 days beginning with the day on which he is notified of the authority's decision or such longer period as the authority may in writing allow.

(4) On a request being duly made to them, the authority or authorities concerned shall review their decision."

29. Section 206(1) provides:

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

30. Section 208(1) provides:

> "So far as reasonably practicable a local housing authority shall in discharging their housing functions under this Part secure that accommodation is available for the occupation of the applicant in their district."

31. Section 210(2) provides:

> "(2) The Secretary of State may by order specify-
>
> (a) circumstances in which accommodation is or is not to be regarded as suitable for a person, and
>
> (b) matters to be taken into account or disregarded in determining whether accommodation is suitable for a person."

32. The Secretary of State has made The Homelessness (Suitability of Accommodation) (England) Order 2012 ("the 2012 Order") under the power given by s 210. Article 2 of the Order states that "in determining whether accommodation is suitable for a person, the local housing authority must take into account the location of the accommodation", and goes on to make detailed provision as to matters to be taken into account for that purpose. Article 2 is not, however, the focus of these appeals. Rather the focus is Article 3, which is headed "circumstances in which accommodation is not to be regarded as suitable for a person".

33. The relevant parts of Article 3 provide:

> "(1) For the purposes mentioned in paragraph (2), accommodation shall not be regarded as suitable where one or more of the following apply-
>
> (a) the local housing authority are of the view that the accommodation is not in a reasonable physical condition;
>
> (b) the local housing authority are of the view that any electrical equipment supplied with the accommodation does not meet the requirements of Schedule 1 to the Electrical Equipment (Safety) Regulations 2016;

(c) the local housing authority are of the view that the landlord has not taken reasonable fire safety precautions with the accommodation and any furnishings supplied with it;

(d) the local housing authority are of the view that the landlord has not taken reasonable precautions to prevent the possibility of carbon monoxide poisoning in the accommodation;

(e) the local housing authority are of the view that the landlord is not a fit and proper person to act in the capacity of landlord, having considered if the person has:

(i) committed any offence involving fraud or other dishonesty, or violence or illegal drugs, or any offence listed in Schedule 3 to the Sexual Offences Act 2003 (offences attracting notification requirements);

(ii) practised unlawful discrimination on grounds of sex, race, age, disability, marriage or civil partnership, pregnancy or maternity, religion or belief, sexual orientation, gender identity or gender reassignment in, or in connection with, the carrying on of any business;

(iii) contravened any provision of the law relating to housing (including landlord or tenant law); or

(iv) acted otherwise than in accordance with any applicable code of practice for the management of a house in multiple occupation, approved under section 233 of the Housing Act 2004;

(f) the accommodation is a house in multiple occupation subject to licensing under section 55 of the Housing Act 2004 and is not licensed;

(g) the accommodation is a house in multiple occupation subject to additional licensing under section 56 of the Housing Act 2004 and is not licensed;

(h) the accommodation is or forms part of residential property which does not have a valid energy certificate as required by the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007;

(i) the accommodation is or forms part of relevant premises which do not have a current gas safety record in accordance with regulation 36 of the Gas Safety (Installations and Use) Regulations 1998; or

(j) the landlord has not provided to the local housing authority a written tenancy agreement, which the landlord proposes to

> use for the purposes of a private rented sector offer, and which the local housing authority considers to be adequate.
>
> (2) The purposes are-
>
> (a) determining, in accordance with section 193(7F) of the Housing Act 1996, whether a local housing authority may approve a private rented sector offer..."

34. An Explanatory Memorandum issued alongside the 2012 Order describes the mischief at which Article 3 was directed:

> "7.5 During the passage of the Localism Act 2011, members and peers of both Houses of Parliament and homelessness organisations raised concerns about the quality of private rented sector accommodation. Particular issues of damp, cold, mould and the possibility of using rogue landlords were raised. In response to those concerns, the Government decided that additional regulatory safeguards were necessary to prevent the use of poor quality accommodation for households owed the main homelessness duty, given the some homeless households may be vulnerable and offered accommodation over which they have less choice. The circumstances set out in the Order were chosen specifically to address those concerns raised. To determine which factors would be effective in protecting vulnerable tenants yet would not place such a burden on local authorities and landlords that no accommodation would be made available, the Government looked at existing landlord accreditation schemes across the country.
>
> 7.6 The Government has considered the common elements of those schemes, looking at how they operated in practice and developed a set of factors such that where one element was lacking it would indicate poor quality accommodation. Particular attention was paid to the physical condition of the building to ensure issues of damp, cold and mould were addressed. Health and safety issues were also considered and elements of fire, gas, electrical and carbon monoxide safety were included. To address concerns around the use of rogue landlords Government have applied the "fit and proper" test that currently applies to Houses of Multiple Occupancy to all accommodation secured under s193(7F). We then consulted on the circumstances in which accommodation is not to be regarded as suitable.
>
> 7.7 Concerns were also raised that some local authorities were considering placing homeless households many miles away from the places they previously lived. Government believes it is neither desirable nor fair for local authorities to place families great distances away from their previous home where it is avoidable. Government therefore consulted on whether existing provisions on location and suitability should be strengthened. In

> order to achieve this policy aim, factors were developed that considered the impact a change in location would have on households. These, for example, included disruption to employment, education and caring responsibilities.
>
> 7.8 This Order will help prevent the use of poor quality accommodation for homeless households placed in the private rented sector and also prevent them being placed hundreds of miles away from their previous home when there is available, affordable accommodation nearer to them."

35. Section 182(1) of the 1996 Act provides:-

> "In the exercise of their functions relating to homelessness and the prevention of homelessness, a local housing authority or social services authority in England shall have regard to such guidance as may from time to time be given by the Secretary of State."

36. The 2018 Edition of the Code of Guidance issued by the Secretary of State pursuant to this provision states at paragraph 17.17:-

> "To determine whether or not accommodation meets the requirements set out in Article 3 housing authorities are advised to ensure it is visited by a local authority officer or someone able to act on their behalf to carry out in an inspection. Attention should be paid to signs of damp or mould and indications that the property would be cold as well as to a visual check made of electrical installations and equipment (for example; looking for loose wiring, cracked or broken electrical sockets, light switches that do not work and appliances which do not appear to have been safety tested)."

The appeals to the county court and this court

37. On 4 March 2021 Mr Recorder Cohen QC dismissed Mr Hajjaj's appeal against the decision of the City of Westminster ("Westminster"), dated 23 September 2020, that 58c Picardy Road, Dartford DA17 5QN ('the property'), being a private rented sector offer, was suitable accommodation for the purposes of s.206 of Housing Act 1996 (as amended) ('the Act') in final discharge of their duty.

38. On 22 March 2021 HHJ Gerald QC dismissed Ms Akhter's appeal against the decision of the London Borough of Waltham Forest ("Waltham Forest"), dated 12 October 2020, that 59 Dadswood, Haydens Road, Harlow CM20 1JL ('the property'), being a private rented sector offer, was suitable accommodation provided for the purposes of s.206 of the Act and that Ms Akhter's refusal finally discharged their duty.

39. While Mr Hajjaj and Ms Akhter each seeks to quash the respective judge's decision, in a second appeal such as this the primary question is normally not whether the tribunal deciding the first appeal is right but whether the original decision is lawful: *Danesh v Kensington & Chelsea RLBC* [2007] 1 WLR 69, *per* Neuberger LJ at [30].

Consequently the appeals focussed on the Councils' review decisions, and the judgments in the county court were scarcely mentioned in argument before us.

40. On 5 July 2021 Arnold LJ granted permission to appeal in both appeals and ordered they be heard together. On the point common to both appeals he wrote: "I consider that the ground of appeal has a real prospect of success and that it raises an important point of principle or practice regarding the operation of the PRSO scheme used by local authorities to discharge their duties under Part 7 of the Housing Act 1996". On the additional ground in the *Akhter* appeal he wrote that he was "more doubtful, but on balance consider that permission should also be granted on this ground".

The Article 3 issue

The Appellants' submissions

41. Mr Colville submits that Article 3(1) of the 2012 Order sets out 10 requirements that must be satisfied for any accommodation offered as a PRSO to be capable of being suitable, and that to satisfy the requirements of Art.3(1) an authority must expressly consider each one. This is demonstrated not only by the wording "where one or more of the following apply" but by the terms of each requirement imposed. For example, Art.3(1)(a) stipulates that accommodation offered as a PRSO is not suitable if "the local housing authority are of the view that the accommodation is not in a reasonable physical condition". Paragraph 17.17 of the Code of Guidance shows that to take a "view" there must be active consideration of the issue by inspecting the property and then addressing the report of that inspection. Art.3(1)(f)-(i) clearly requires inquiries to be made to determine whether the necessary licence or certificate is in place; how else, Mr Colville asks, will an authority know? Article 3(1)(j) requires the local authority to require the landlord to provide the proposed written tenancy agreement and then consider whether its terms are "adequate", which means the written tenancy agreement must be procured and then its terms considered. By stating that accommodation cannot be suitable "where one or more of" subparagraphs (a) to (j) applies, the Secretary of State requires the local housing authority ("LHA") to consider each requirement and make a reasoned decision as to whether it applies. This is supported by the Explanatory Memorandum.

42. The use of the negative in Art.3(1) not only reinforces that need for a recorded decision on each subparagraph, but the wording imposes a default, namely that in the absence of any or any proper consideration, the accommodation "shall not be regarded as suitable". An authority that has not, for example, received the proposed written tenancy agreement and therefore not assessed it, cannot have considered it to be "adequate" for the purposes of subpara.(j): therefore the accommodation is to be deemed not suitable because subpara.(j) is not satisfied. The Article is mandatory. Accordingly, a PRSO made without lawfully addressing any of the requirements of Art.3(1) cannot be "approved" for the purposes of s.193(7F)(ab) and therefore is not an offer that causes the s. 193(2) duty to cease..

43. Mr Colville argues that his construction is supported by the Code of Guidance. The Secretary of State has made it clear that housing authorities have to either send an officer to visit the property or ensure it is visited by someone acting on their behalf able to carry out an inspection. The inspection report – which must be based on an actual

assessment of the physical condition and the installations in the property –will not just inform the officer allocating the property, but assist any reviewing officer where the offer is refused and a review is requested. It is not open to an authority, within the wording "to take a view", to rely upon assumptions absent any investigation. That defeats the purpose of the 2012 Order.

44. It is not for an applicant to raise the need for compliance with Art.3, or prove that one or more of the requirements are not met. Approval, which precipitates the PRSO, can only take place after an authority's suitability assessment, a process undertaken without the involvement of the applicant. At no stage does the burden shift to an applicant to refute or prove the opposite.

45. All the information obtained from the necessary inquiries undertaken by an authority will be or should be on the applicant's file dealing with his application before the PRSO is approved. The absence of the expected documentation or evidence of inquiries addressing any one or more of the 10 requirements of Art.3(1) means the accommodation to be offered under a PRSO is deemed unsuitable and cannot be approved. There is no scope for an assumption to be made on any of the requirements, for example, because it is assumed the proposed tenancy agreement will be adequate because of the identity of the landlord.

46. Whilst an authority need not give reasons when offering accommodation approved as a PRSO, if a review is requested the reviewing officer must consider Art.3(1) requirements independent of the officer making the offer, and set out in any adverse decision his/her reasons why each requirement is satisfied: s.203(4). The necessary inspection report / licence / certificate / written tenancy agreement must be before the reviewing officer in order for him/her to be satisfied that the accommodation is suitable before s/he makes the review decision. Absent the relevant documents / inquiries, the accommodation is deemed unsuitable and the offer does not bring the s. 193(2) duty to an end.

47. In their decision Westminster state: "I am satisfied that sufficient regard was had to Article 3 when the offer of accommodation was made to Mr Hajjaj". Westminster concede the reviewing officer assumed Art.3 had been complied with, but contend it was open to her to make that assumption based on the officer's assessment in allocating the property. However, there is no evidence of any lawful assessment by the officer when allocating the property to Mr Hajjaj, so the assumption by the reviewing officer was without any substance. Compliance with Art.3(1) is not simply a technicality. The standards imposed by Art.3(1) are to ensure that any private sector accommodation used in making a PRSO is of a standard that is acceptable, both in terms of its physicality, but also in terms of the tenancy.

48. The reviewing officer's finding that the disrepair problems reported by Ms Akhter "were resolvable and did not prevent you accepting the offer" amounted to saying that although there was a disrepair complaint the property was still suitable because she assumed it would be repaired in the future.

The Respondents' submissions

49. Mr Peacock submits on behalf of Westminster that the first five sub-paragraphs of article 3(1) apply if the authority is "of the view" that certain matters are the case. If an

authority has no information as to whether or not any of those matters is the case, it would not be "of the view" that any of them is the case. As a result Article 3 would not prevent the authority regarding the accommodation as suitable.

50. Taking Article 3(1)(a) as an example, where an authority has no information as to the condition of the accommodation, it will not be "of the view that the accommodation is not in a reasonable physical condition" with the result that Article 3 will not prevent it regarding the accommodation as suitable.

51. If the authority has no information as to the condition of the accommodation, it might be said that any reasonable authority would have made inquiries as to the condition of the accommodation before approving the offer. But the necessary inquiries will depend on the circumstances of the case.

52. Where the accommodation is offered by a new provider with no track record, or by a provider known to the authority but with a history of letting sub-standard accommodation, it may be that any reasonable authority would make inquiries as to the condition of the accommodation. Similarly, where an applicant returns from viewing the accommodation with complaints of its poor condition.

53. However, where the accommodation is being made available by an established provider with a reliable track record for the purpose of being offered pursuant to a private rented sector offer, the authority may be entitled to assume that the provider would not be making the accommodation available if it was not in a reasonable physical condition.

54. Similarly, in such a situation the authority may be entitled to assume that the provider would not be making the accommodation available if it had unsafe electrical equipment or if reasonable fire safety precautions had not been taken. Further, there would be nothing to suggest that the provider was *not* a fit and proper person to act in the capacity of landlord.

55. The next four sub-paragraphs of Article 3(1) apply if certain statutory requirements are not met – if the accommodation should be licensed but is not, or if there is no valid energy performance certificate or current gas safety record. Again, Mr Peacock submitted that the scope of the inquiries which it will be necessary for an authority to carry out before approving an offer will depend on the circumstances of the case. Where the accommodation is being made available by an established provider with a reliable track record for the purpose of being offered pursuant to a private rented sector offer, the authority may be entitled to assume that the accommodation would not be being made available unless any necessary licensing requirements had been complied with and the necessary energy performance certificate and gas safety record were in place.

56. The final sub-paragraph of Article 3(1) provides that the accommodation should not be regarded as suitable if the landlord has not provided to the authority a written tenancy agreement, which the landlord proposes to use and which the authority considers to be adequate. An established provider is likely to have a standard tenancy agreement which the authority will have seen (and considered adequate) in relation to previous accommodation let by the provider. Mr Peacock submits that in such a case an authority would not need to obtain a further copy of the agreement but could reasonably assume that the provider would have informed the authority if it was proposing to depart from its standard agreement.

57. Mr Peacock argued that Westminster's approach is also consistent with the Code of Guidance. The Code recognises that accommodation might be inspected by someone on behalf of the authority. That does not preclude the inspection being carried out by a trusted provider itself on the authority's behalf in appropriate circumstances.

58. Mr Grundy, on behalf of Waltham Forest, supported the submissions made by Mr Peacock but added some further ones. The first of these was that it was not open to Ms Akhter to raise on appeal to the county court or subsequently to this court issues which were not raised in Ms Akhter's application for review. He submitted that it is well established that in an appeal to the county court under section 204 of the 1996 Act the court is confined to considering the lawfulness of the review decision. He referred us to *Cramp v Hastings BC* [2005] EWCA Civ 1005; [2005] HLR 48 where Brooke LJ said at [14]:-

> "As I have shown, the review procedure gives the applicant and/or another person on his behalf the opportunity of making representations about the elements of the original decision that dissatisfy them, and of course they may suggest that further inquiries ought to have been made on particular aspects of the case. In *Surdonja v Ealing LBC* [2000] 2 All ER 597, 607 Henry LJ described "review" as the appropriate word for the act of submitting for examination and revision an inquisitorial administrative decision affecting the applicant's most basic social requirement. Given the full-scale nature of the review, a court whose powers are limited to considering points of law should now be even more hesitant than the High Court was encouraged to be at the time of *ex p Bayani* [in 1990] if the appellant's ground of appeal relates to a matter which the reviewing officer was never invited to consider, and which was not an obvious matter he should have considered. For the nature of the county court's duty, see *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5 at [7]; [2003] 2 AC 430."

59. Mr Grundy further submits that Waltham Forest had ample evidence on which the reviewing officer could properly find that the accommodation offered to Ms Akhter was suitable. The offer letter dated 25 February 2020 stated that the reviewing officer had used the guidance in the 2012 Order to help guide her on the suitability of the accommodation. It stated that Mears Housing Management, who managed the property on behalf of More Homes WF (which we were told is a limited liability partnership between Waltham Forest and Mears Housing Management (Holdings) Limited) would provide her with copies of the landlord compliance information, the EPC certificate, the gas safety certificate, and the electrical safety certificate. As noted above, an inspection report had been prepared for the Council on 31 January 2020 before Ms Akhter was offered the property. The review decision indicates that the fact that there was no shower in the bathroom was not sufficient to make the property unsuitable by reason of its condition; and the issues with kitchen taps, heating, and cleaning the toilet would have been dealt with by the Council's agents. The property has no gas installations and accordingly the Council was entitled to take the view that the issue of precautions against carbon monoxide poisoning did not arise. As to failure to provide a written tenancy agreement, Mr Grundy submits:-

> "This condition does not require that the landlord provide the relevant LHA with a copy of tenancy agreement in all cases. Where accommodation is provided through a long-standing arrangement, it is sufficient that the LHA has a copy of the pro forma tenancy agreement used by the provider of the accommodation and that that LHA considers the terms of that pro forma to be adequate. There is no obligation on the council to state in the letter offering any accommodation that it has a copy of the tenancy agreement that the landlord proposes to grant to the applicant."

60. Mr Grundy goes on to point out that the review decision does not deal with this issue because it was not raised at the time, and submits that Ms Akhter cannot now challenge the suitability of the accommodation on the basis of a criterion not raised on the review.

61. Mr Grundy notes that in the county court Judge Gerald held that:-

> "The actual offered property, as I understand it, is provided by an established provider of private accommodation to the local authority, and it is perfectly reasonable and proper to infer that, even though there is an absence of a written tenancy agreement on the file, the Respondent was fully aware of the terms and conditions which would be applicable and which would be offered for probably a fairly standard 12 month tenancy. This is a point without any real substance."

62. Mr Grundy also reminded us of the warning given by Lady Hale in *R(A) v Croydon LBC* [2009] UKSC 8; [2009] WLR 2557 against the "judicialisation of claims to welfare services"; and of the observations of Lewison LJ in *Alibkhiet v Brent LBC* [2018] EWCA Civ 2742; [2019] HLR 15 at [38]:-

> "A court must be wary about imposing onerous duties on housing authorities struggling to cope with the number of applications they receive from the homeless, in the context of a severe housing shortage and overstretched financial and staffing resources. That said, the court is the guardian of legality; and it must not hesitate to quash an unlawful decision."

The procurement policy issue in Ms Akhter's case

Appellant's submissions

63. The additional ground of appeal in Ms Akhter's case for which Arnold LJ granted permission, although he was more doubtful about it than the other ground, is that Judge Gerald erred in concluding that the Respondents did not breach their duty under s.208 of the Act given the absence of a procurement policy, in particular on the procurement of accommodation from the private sector. It is also submitted that the judge was wrong to find that it was not necessary for the Respondents to record how or why the Appellant was allocated the particular property. It is also suggested that the reviewing officer was obliged to and failed to carry out her own assessment of the allocation of the property.

64. Mr Colville referred us to paragraph 39 of the judgment of Lady Hale in *Nzolameso v City of Westminster* [2015] UKSC 22; [2015] H.L.R. 2 in which she said that:-

> "39. Ideally, each local authority should have, and keep up to date, a policy for procuring sufficient units of temporary accommodation to meet the anticipated demand during the coming year. … Secondly, each local authority should have, and keep up to date, a policy for allocating those units to individual homeless households."

65. Mr Colville also referred us to paragraph 17.48 of the Code of Guidance which states that:-

> "Housing authorities, particularly those that find it necessary to make out of district placements, are advised to *develop policies for the procurement* and allocation of temporary accommodation which will help to ensure suitability requirements are met" [emphasis added]."

66. We were shown a copy of Westminster's procurement policy but it appears that there is and was at the relevant time no equivalent policy document issued by Waltham Forest. Mr Colville submits that a lawful procurement policy enables an applicant and (on any challenge) the court to understand how the authority propose to procure the housing they require to meet the identified need in their district, which will then be allocated pursuant to their allocation policy. Both policies rely upon each other. The absence of a procurement policy means there is no means to assess what the identified need is and how it is proposed to be met. To rely simply on an allocation policy fails to address the steps taken and to be taken in meeting the housing need in the authority's district, pursuant to s 208. It is not only allocating in a vacuum, but considering allocation decisions without all the relevant information.

67. Mr Colville accepts that Waltham Forest have adopted policies for the allocation of temporary accommodation and for the allocation of accommodation the subject of PRSOs. He submits, however, that since there is no policy for procuring accommodation to be offered as PRSOs, there is no means of assessing how Waltham Forest procure accommodation in the private sector. He argues that the absence of a lawful procurement policy renders the PRSO made to Ms Akhter unlawful.

Respondent's submissions

68. Mr Grundy reminded us that in *Nzolameso* the Supreme Court held that out of borough PRSOs are lawful provided that it is not reasonably practicable to accommodate an applicant within the borough or district. He submits (correctly, in my view) that Lady Hale's statement that "ideally" each local authority should have a procurement policy as well as an allocation policy was an obiter recommendation rather than an instruction. He notes that in *Alibkhiet* the fact that the Respondent council (Brent) did not have a procurement policy was not fatal where the review decision adequately explained the council's strategy for procuring accommodation. Lewison LJ said at [45] that *Nzolameso* was "in essence a reasons challenge". He said at [46] that the key points to be drawn from *Nzolameso* were:-

> "i) A housing authority is entitled to take account of the resources available to it, the difficulties of procuring sufficient units of temporary accommodation at affordable prices in its area, and the practicalities of procuring accommodation in nearby boroughs.
>
> ii) If there is available accommodation within-borough, it does not follow that the authority *must* offer it to a particular applicant because it may be acceptable to retain a few units, if it can be predicted that applicants with a particularly pressing need to remain in the borough will come forward in the relatively near future.
>
> iii) The decision in an individual case may depend on a policy that the authority has adopted for the procurement and allocation of accommodation.
>
> iv) The policy should explain the factors which would be taken into account in offering households those units, the factors which would be taken into account in offering units close to home, and if there was a shortage of such units, the factors which would make it suitable to accommodate a household further away.
>
> v) The policy should be publicly available."

Discussion

69. Article 3 of the 2012 Order begins by providing that accommodation shall not be regarded as suitable where one or more of ten listed conditions applies. The first five are evaluative, using the phrase "the local housing authority are of the view that…" Others are binary questions of fact, such as whether the accommodation is or forms part of residential property which does not have a valid energy performance certificate. Mr Peacock and Mr Grundy place much emphasis on the negative wording of Article 3(1). It does not say that accommodation is only to be regarded as suitable if all ten positive criteria are fulfilled (for example, that the LHA are of the view that the accommodation *is* in a reasonable physical condition). Instead it says that accommodation shall not be regarded as suitable where one or more of ten negative criteria applies.

70. For my part, I do not think that the negative wording of Article 3 is as significant as the Respondents suggest. Section 193(7F) of the 1996 Act is quite clear. It says that the LHA *shall not* approve a PRSO unless they are satisfied that the accommodation *is* suitable. Suitability is a multi-faceted concept. It includes size, location, accessibility if the applicant is elderly or disabled, as well as the physical condition and other matters listed in Article 3(1). The local housing authority must in my judgment be satisfied that none of the ten bars to suitability established by Article 3(1) applies. Moreover, I accept Mr Colville's central submission that they must be satisfied on the basis of evidence rather than assumptions. Taking "reasonable physical condition" as an example, it is not enough to take the view that because the proposed landlord is established and respectable, therefore all properties owned by that landlord should be assumed to be in a reasonable physical condition unless a "red flag" is raised either by the applicant or

by some other adverse information which happens to be to hand about the particular property.

71. It cannot be right that it is for the applicant for the accommodation to raise a red flag. At the time the PRSO is made, the applicant has had no input at all. It would be contrary to the scheme of the Act to shift the burden onto the prospective tenant to object, particularly since a failure to accept the PRSO has potentially drastic adverse consequences if the objection is not upheld. The PRSO must not be made unless the LHA are satisfied that the accommodation is suitable: section 193(7F).

72. I have said that the LHA must be satisfied on the basis of evidence rather than assumptions. This is not, of course, to say that the LHA must have first hand evidence such as could be placed before a jury in a criminal trial. Satisfactory hearsay evidence may be enough. The Mears inspection report of 31 January 2020 in Ms Akhter's case is a good example. The member of Mears' staff who compiled the report had inspected the property, found that save for some minor snagging issues it was fit for occupation the following week, and ticked boxes to show the existence of certain documents. By contrast, in Mr Hajjaj's case, as Mr Peacock rightly conceded, the statement in the offer letter that "I believe the accommodation is in a reasonable physical condition" was simply based on assumptions. So far as we are aware there was no evidence available to Westminster that the property had been inspected at all.

73. If the prospective landlord has a patchy record of compliance with standards, or is a newcomer with no track record, it may be necessary for an inspection to be carried out by or on behalf of the LHA itself. Where, as is agreed to be the case with St Mungo's, the offer is for property owned by an established landlord with a high reputation, a report on the lines of the 31 January 2020 document in Ms Akhter's case is likely to be sufficient; so likewise would be a sign off document from such an established landlord stating that (for example) there is an energy performance certificate in force relating to the property.

74. The possible outlier among the ten subparagraphs of Article 3(1) is the last one, subparagraph (j). This appears to make it mandatory that the landlord has provided to the LHA "a written tenancy agreement, which the landlord proposes to use for the purposes of a private rented sector offer and which the local housing authority considers to be adequate". We were not shown any umbrella contracts or service agreements between Westminster and St Mungo's. Common sense would suggest that where the letting is to be on the terms of a standard form tenancy agreement, the text of which has been supplied to the LHA, the only remaining information being the name of the tenant, the address of the property, the rent and the duration of the tenancy, it is not necessary for the text to be sent again to the LHA each time a property is to be let. But this issue is not critical to the outcome of either of the present appeals, and it may have to be reargued in a future case.

75. The contrast between these two appeals on the facts is very striking. In Mr Hajjaj's case Westminster simply assumed that because St Mungo's are good landlords the property must be suitable. They had information as to its location and size, but nothing about the physical condition of the property, let alone other matters such as fire safety precautions or an energy performance certificate. They did not obtain any of the evidence about the property of the kind available to the decision-makers at Waltham Forest in Ms Akhter's case.

76. If local housing authorities do not have such evidence and do not have the property inspected as the statutory Code of Guidance advises they should, there is in my view a serious risk that the mischief identified in the Explanatory Memorandum to the 2012 Order will not be cured. I do not accept that this represents a judicialisation of housing allocation policy. The reliance on assumptions is such a departure from what the Act and the 2012 Order require that the decision in Mr Hajjaj's case cannot be allowed to stand. I would therefore allow his appeal and quash the review decision dated 23 September 2020.

77. Ms Akhter is not in the same position. Dealing first with the Article 3 issue, the Council had ample evidence on which the review officer was entitled to find that the property was in a reasonable physical condition and that the "safety check" aspects of Article 3(1) had been satisfied. As for the lack of a draft tenancy agreement on Ms Akhter's file: even if it was necessary for such a document to be provided in the individual case, it would be unfair to Waltham Forest to allow this point to be raised for the first time on appeal when it was not raised prior to the review decision.

78. Turning to the procurement policy issue, Mr Colville accepted that there is no previous decision of this court, or any court, holding that it is necessary for a local authority to publish a procurement policy as well as an allocation policy. I can see no reason why it should be necessary. There is no evidence that either the original offer or the review decision breached the allocation policy or failed to explain to Ms Akhter why she was being offered accommodation in Harlow. I do not consider that Waltham Forest were acting contrary to the principles set out in *Nzolameso* as summarised by Lewison LJ in *Alikhbiet.*

79. I would therefore dismiss Ms Akhter's appeal on both grounds.

Lord Justice Nugee

80. I agree.

Mrs Justice Falk

81. I also agree.

Claim No.: G40CL307; Appeal Claim Ref.No.:2021/0676

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT
AT CENTRAL LONDON
(HHJ Gerald QC)

BETWEEN:

MORIUM AKHTER

Appellant

and

LONDON BOROUGH OF WALTHAM FOREST

Respondents

AKHTER

ORDER

UPON HEARING Mr Iain Colville of Counsel on behalf of the Appellant and Mr Nicholas Grundy QC and Mr Michael Mullin of Counsel on behalf of the Respondents at a hearing on 26 October 2021.

IT IS ORDERED THAT:

1. The appeal is dismissed.

2. The Appellant do pay the Respondent's costs to be assessed, if not agreed, but the amount of costs payable by the Appellant is to be determined under s.26(1) of the Legal Aid, Sentencing & Punishment of Offenders Act 2012.

3. There be a detailed assessment of the Appellant's costs for public funding purposes.

Claim No.:G40CL294 Appeal Claim Ref.No.:2021/0599

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT
AT CENTRAL LONDON
(Recorder Cohen QC)

BETWEEN:
IBRAHIM HAJJAJ

Appellant

and

CITY OF WESTMINSTER

Respondent

IBRAHIM HAJJAJ

ORDER

UPON HEARING Mr Iain Colville of Counsel of Counsel on behalf of the Appellant and Mr Ian Peacock on behalf of the Respondent at a hearing on 26 October 2021.

IT IS ORDERED THAT:

1. The appeal is allowed.

2. The Respondents' review decision, dated 23 September 2020, is quashed.

3. The Respondents do pay both the Appellant's costs of the appeal and the costs of the appeal before the county court, to be assessed if not agreed.

4. There be a detailed assessment of the Appellant's costs for public funding purposes.

Dated: