Neutral Citation Number: [2022] EWHC 1085 (Admin)

Case No: CO/2150/2021

Date: 11 May 2022

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Before :

HIS HONOUR JUDGE GRAHAM WOOD QC
(sitting as a Judge of the High Court)

Between :

THE QUEEN (on the application of Ms DESIREE CORT) **Claimant**

- and –

LONDON BOROUGH OF LAMBETH **Defendant**

Toby Vanhegan and Siân McGibbon (instructed by Lawstop solicitors) for the **Claimant**

Peggy Etiebet (instructed by Lambeth Legal Services) for the **Defendant**

Hearing date: 16th February 2022

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JUDGMENT

His Honour Judge Graham Wood QC

1. The Claimant is a 68-year-old woman from Guyana who currently has no immigration status in this country and no recourse to public funds (NRPF). She has sought to challenge through these judicial review proceedings the decision of Lambeth Borough Council not to provide her with emergency accommodation to avoid her sleeping on the streets during the Covid 19 pandemic. This decision was first provided on 15th June 2021, confirmed on 21st June, and further expanded on 20th July. Permission to bring these proceedings was granted by a deputy High Court judge in August of last year, after urgent interim relief was provided by Bourne J in June. The Claimant has been housed on a consensual basis since that date without any acceptance of obligation by the Defendant so to do, pending the substantive hearing of the judicial review.

2. This claim, (and doubtless the request for emergency accommodation which preceded it), has come about in the aftermath of the decision of the High Court in **R (Ncube) v Brighton and Hove City Council [2021] EWHC (Admin) 578**, ("**Ncube**") where it was held that a local authority was not precluded from providing temporary accommodation to the street homeless by virtue of section 185 of the Housing Act 1996 (part VII) and that other powers existed on a broader basis under section 138 (1) of the Local Government Act 1972 ("LGA") and section 2B(3) of the National Health Service Act 2006 ("NHSA"), although neither sections specified housing provision, and these were powers which could be exercised to alleviate the effect of those who were at risk to their health or wellbeing as a consequence of the Covid 19 pandemic emergency.

3. Essentially, however, the court is being asked to consider the significance in the local authority decision-making process on the street homeless of a declared government initiative or policy described as "*Everyone in*" which was announced at the start of the Covid pandemic, and which was aimed at removing rough sleepers from the streets regardless of their entitlement to public fund assistance not only to avoid the spread of infection, but also to protect those most vulnerable. The initiative lay at the centre of the decision in **Ncube** and in **R (ZLL) v Secretary of State for Housing Communities and Local Government [2022] EWHC 85 (Admin)** ("**ZLL**"), both of which will be considered in more detail in the course of this judgment.

4. I heard full argument from counsel Mr Vanhegan and Ms McGibbon for the Claimant, and Ms Etiebet for the Defendant on 16th February and indicated that I would reserve my judgment to consider the matter in more detail.

Background

5. The Claimant first came to this country lawfully in August 2007, entering as a visitor, but overstayed. She is of black Caribbean ethnicity. Presently she is remaining unlawfully, but it would seem that she is taking steps to apply for discretionary leave to remain. Her status is such that she cannot access any of the publicly funded services, or have provision from local authority in relation to housing and social care needs which would be open to a person with lawful immigration status. Thus she is referred to as a person of NRPF, and I will use that description without intending any disrespect.

6. For a number of years she discharged caring responsibilities, initially for a disabled niece in South-West London and subsequently for her father, and she has lived at a variety of different locations whilst doing so. Because of wider family difficulties, the Claimant ceased to care for her father in June 2020, but thereafter secured accommodation in various hostels and other charitable institutions. Friends and family members who had previously provided the Claimant with a place to stay have since declined to assist, being fearful over the Covid 19 risk to them. She was able to obtain some temporary accommodation from the Defendant on an emergency basis in December 2020, although when it became apparent that she had no entitlement as a homeless person, she was asked to leave that accommodation in February 2021 from where she moved to a hostel run by the Glass Door homeless charity.

7. The Claimant, who otherwise has no particular health issues, is unvaccinated against coronavirus by choice. In June 2021 she learnt that the hostel accommodation could not continue, and the Claimant was informed that she would have to leave after 16th June 2021.

8. When she was at risk of been rendered homeless and having to live on the streets, the Claimant consulted her present solicitors who wrote to the Defendant authority on 10th June 2021 requesting accommodation. That letter referred to the High Court decision of **Ncube**, then relatively recently promulgated, and asked the council to exercise its powers under the LGA and the NHSA to provide the Claimant with temporary emergency accommodation, acknowledging that she was not entitled to priority housing under the Housing Act 1996 Part VII. It was suggested that the council had acted unlawfully in not continuing the accommodation provided in December. Having referred to what she described as government guidance in the form of the "*Everyone in*" policy, the author of the letter identified the Claimant's particular circumstances as follows:

> 'In this case, it is clear that our client is someone who is threatened with homelessness. On the 16 June 2021, she will no longer have accommodation anywhere she is entitled to occupy. She has asked for assistance from her family and friends but no one is able to assist her with accommodation. It is clear that we are in a public health emergency due to Covid 19. Our client is at grave risk due to her housing circumstances. She is at risk of contracting Covid 19 if made homeless. She is 68 years old and cannot "sleep rough" on the streets.'

9. The letter requested temporary accommodation from the date specified, failing which judicial review proceedings would be considered.

10. The Defendant's first response to this request was in a letter dated 15th June 2021 from Martin Hastwell at Lambeth Legal Services. He acknowledged the powers which were available to the council under LGA and NHSA, the effect of the decision in **Ncube**, and also accepted that the Covid pandemic amounted to an emergency but challenged the assertion that the obligation was to provide temporary accommodation to all persons in the housing emergency, including those of NRPF status, save under the Children Act or the Care Act. In relation to the Claimant's circumstances, he said this:

> 'Our client has carefully considered your client's circumstances. She is a 68-year-old woman who has been assessed earlier this year by the Council and the conclusion was that your client did not have any care needs nor is it is it suggested in your letter that she has any medical condition or special needs. It was noted in the course of the assessment that whilst staying this country your client has been staying with various family members and friends and at the time of the assessment she had not taken any steps to obtain indefinite leave to remain in this country. It is noted that your client has now applied for discretionary leave to remain in this country, this application could take considerable time process so that your client's request is not for a limited period and is essentially an open-ended request.'

11. The Defendant sought to distinguish the prevailing circumstances at the time of the decision in **Ncube** to the situation in the summer of 2021, as the country was moving out of lockdown. In particular, it was pointed out that evictions were now allowed. In relation to the "Everyone in" policy the author said this:

> 'We are instructed that the "Everyone in" policy was primarily directed at rough sleepers and no additional funding was provided for persons with no recourse to public funds'

12. The letter finished by contending that the council had insufficient resources to fund all those in need.

13. The Claimant's solicitors responded with a letter before action, as it was described, on 21st June. There was a foreshadowing of the challenges which have been pursued within this judicial review, but essentially it was asserted on behalf of the Claimant that many of the matters taken into account were irrelevant and that the decision-making process was flawed. It was claimed that the council had not carried out of the balancing exercise correctly, and had not taken into account the Claimant's age, ethnicity, and her non-vaccinated status.

14. There was a further response on the same day from Lambeth Legal Services. There were some observations within that letter which may be of significance. In relation to the December 2020 assessment Mr Hastwell said in the third paragraph:

> 'Furthermore the reference to the assessment carried out by our client earlier this year was made in the context of examining your client's circumstances, and whether there were any exceptional reasons[1] to justify the exercise of the Council's acknowledged powers and discretion to accommodate your client. Our client does not consider that your client's age and ethnicity are exceptional, nor do they provide justification for exercising the Council's powers and/or discretion in your client's favour. Our client has also considered the new information that your client has elected to disregard medical advice and not have a vaccination thereby exposing herself and others to increased risk of contracting Covid 19. It is noted that she is placing others at risk of being infected with Covid 19 whether or not she is provided with accommodation.'

15. In respect of what was perceived to be an open-ended request the following observation was made:

> '……(your) request is, in reality, and contrary to your assertions, an open-ended request for accommodation from the Council as stated in our letter dated 15 June 2021 . The open-ended nature of the request is evident from the draft order in your client's application bundle. You claim that the request is not open-ended but that is, in our view, disingenuous. In your letter dated 10 June 2021 the request was that the Council should provide accommodation from 16 June 2021 without any time limit. Your client has given no realistic proposal for her long-term accommodation if and when the Council terminated the requested accommodation. The current restrictions in place as a result of the pandemic are much more limited than those that existed earlier this year. If the current restrictions are removed on 19 July 2021 Covid will still exist and your client, having decided not to be vaccinated, will remain at risk indefinitely with or without accommodation.'

16. In respect of the Claimant's immigration status:

> 'The Council has not criticised your client's failure to regularise her immigration status but observes that her application for discretionary leave is in its early stages at best and it is likely to be a considerable time before a decision is made on her application.'

17. I make reference to these features of the Defendant's second letter, because it is an important part of the Claimant's case that there has been inconsistent decision-making. It is said that this matter did not form part of the reasoning to any significant extent in the initial refusal.

18. Immediately after this letter, the claim for judicial review was issued, together with an application for interim relief. This was granted by the High Court on the same day (21st June) providing temporary accommodation for a limited period until 29th June, but on 24th June it was agreed that the Claimant could continue to use accommodation pending the grant of permission. At the same time that the Defendant filed its acknowledgement of service, (20th July) a letter was provided from the director of public health, Ruth Hutt. This letter has assumed some importance in the case, and therefore it requires a reasonably detailed consideration.

[1] My emphasis

19. Ms Hutt began by noting the latest government guidance in relation to the coronavirus pandemic relating to step four on the roadmap for England, which concerned vaccinations, testing and border management, with guidance rather than regulation in place. This led her to the view that the emergency arising from the pandemic had diminished with the mitigation available, meaning that section 138(a) of LGA was no longer applicable, although she accepted that Covid 19 was still a danger to life, and therefore section 138 (b) remained relevant. The measures required to be taken pursuant to section 138 (d) to alleviate the risk were her responsibility, and these were addressed in the Covid 19 Outbreak Management Plan, which was widely available to residents of Lambeth.[2]

20. Having identified the important features which related to measures put in place to prevent the spread of infection, and to allow for early identification of such infection, Ms Hutt went on to say this:

> 'It is my view that the COVID-19 Outbreak Prevention and Control Plan along with the additional steps set out above are sufficient to, at the very least, alleviate the effects of the pandemic pursuant to section 138 of the Local Government Act. As a result, our planning does not include the provision of accommodation to NRPF applicants in order to alleviate the effects of COVID-19 at this stage of the pandemic where most other restrictions have been lifted from the 19th July 2021. There is provision for those who have no recourse to public funds to access Covid-19 testing, treatment and vaccination without charge through the NHS provision in place. No documentation or proof of eligibly is required to access these services. Moving to the power contained in section 2B NHS Act 2006. Given the preventative measures set out above it is not necessary to provide accommodation to improve the health of individuals within the borough.'

21. Ms Hutt described the circumstances in which accommodation might be provided:

> 'I am aware that the Council cannot have a blanket policy on this matter, and I do hold an element of discretion in my decision making. Accordingly, there are circumstances where the short term provision of accommodation would be appropriate under these powers. Examples are of which could be where a person has an infectious disease and poses an infection risk to the wider public.'

22. She then identified what she considered to be the relevant information in the case:

> 'The information available to me in this case is as follows:
>
> - An assessment was carried out by Lambeth's No Recourse to Public Funds team in early 2021 and Ms Cort was found to have no care needs.
> - Ms Cort has decided not to be vaccinated.
> - Ms Cort is a 68-year-old Guyanese woman from an ethnic minority background and there is some medical evidence indicating that that older persons and those from minority ethnic backgrounds are at higher risk of becoming seriously ill if contracting Covid 19.

[2] The Outbreak Management Plan is a 54 page document in the bundle at tab 16, and considered in more detail later in this judgment.

- According to Ms Cort's witness statement she has no underlying health problems and is not clinically extremely vulnerable.

I am informed that Ms Cort can meet her care and support needs and follow public health guidance such as to adhere to guidance relating to hands, face, space and fresh air. She is not required to self-isolate due to her vulnerabilities. Testing is available throughout the borough on a walk-in basis. We would urge her to reconsider her decision not to be vaccinated as this remains the most effective measure to protect her and others.'

23. Ms Hutt considered the Defendant's duties in the context of the LGA and NHSA powers insofar as they applied to the Claimant, and after impliedly rejecting the suggestion that there had been a failure on the part of the Defendant she made a qualified offer to the Claimant:

'I contend that appropriate and proportionate mitigations have been put in place for our population in relation to our duties under both Council's powers under section 138 of the Local Government Act 1972 and section 2B of the National Health Service Act 2006. My responsibility is to protect the health of the population of Lambeth rather than individuals, so would concern myself as much with risks to the wider health of the public as to a particular individual. There is nothing in the current guidance to indicate that I should exercise the Council's powers to accommodate Ms Cort after the court has decided whether to grant permission to Ms Cort to judicially review the Council's decision. However, in line with the Lambeth Council offer to all residents to support control of the virus I will exercise my discretion:

- If Ms Cort should test positive for Covid-19 at any point in the future and the legislative requirement to self-isolate remains in place, we would accommodate her whilst she is infectious to others for a period of not more than 14 days from symptom onset or a positive PCR test, in line with current self-isolation guidance.'

24. The Claimant's advisers regarded this letter as representing a shifting position by the Defendant, and following the grant of permission by deputy High Court Judge Mrs Margaret Obi on 31 August 2021, filed amended grounds of review focusing on the "decision letter" of 21st July in addition to the earlier grounds.

25. Before dealing with those grounds, there are three other areas which should be dealt with in covering the background.

"Everyone In"

26. The first of these is the origin of the *Everyone in* policy or initiative. It is not the subject of any separate guidance or formal policy, but comprised in government statements and communications issued from time to time to the general public and to those responsible for ministering at a local government level the measures necessary to deal with the pandemic emergency. The first reference to *Everyone in* is the letter of the junior minister from the Ministry of Housing, Communities and Local Government (MHCLG), Mr Luke Hall MP, which was provided to local leaders on 26th March 2020 within days of the first national lockdown. The problem of keeping everyone in their homes was particularly acute with those

who did not have homes and were living rough on the streets. The relevant extracts of that letter are set out:

> 'Last week, the Government asked Dame Louise Casey to lead the Government's response to COVID-19 and rough sleeping to help make sure that we bring everyone in. It is our joint responsibility to safeguard as many homeless people as we can from COVID-19. Our strategy must be to bring in those on the streets to protect their health and stop wider transmission, particularly in hot spot areas, and those in assessment centres and shelters that are unable to comply with social distancing advice. This approach aims to reduce the impact of COVID-19 on people facing homelessness and ultimately on preventing deaths during this public health emergency. Given the nature of the emergency, the priority is to ensure that the NHS and medical services are able to cope and we have built this strategy based on NHS medical guidance and support.
>
> The basic principles are to:
>
> - focus on people who are, or are at risk of, sleeping rough, and those who are in accommodation where it is difficult to self-isolate, such as shelters and assessment centres
> - make sure that these people have access to the facilities that enable them to adhere to public health guidance on hygiene or isolation, ideally single room facilities
> - utilise alternative powers and funding to assist those with no recourse to public funds who require shelter and other forms of support[3] due to the COVID-19 pandemic
> - mitigate their own risk of infection, and transmission to others, by ensuring they are able to self-isolate as appropriate in line with public health guidance
>
> This should be done by taking the following programme of actions:
>
> 1. Convening a local coordination cell to plan and manage your response to COVID and rough sleeping involving the local authority (housing, social care and public health) and local NHS partners together. This would then report in to wider local COVID structures.
>
> 2. Seeking to stop homeless people from congregating in facilities such as day centres and street encampments where there is a higher risk of transmission.
>
> 3. Urgently procuring accommodation for people on the streets if you have not already done so – MHCLG will support you to do so if you are struggling to procure sufficient units.
>
> 4. Triaging people where possible into three cohorts driven by medical advice:
>
> - those with symptoms of COVID19;
> - those with pre-existing conditions but without symptoms; and
> - those without any of the above.
>
> Attached to this letter is additional guidance on the approach that agencies should be taking to triaging agreed with NHS England and Public Health England.
>
> 5. Getting the social care basics such as food, and clinician care to people who need it in the self-contained accommodation. It is likely that you will need to utilise your commissioned homeless services to provide support to people in this accommodation and we urge you to work with the commissioned and non-commissioned sector to make sure there are adequate levels of support provided.
>
> 6. If possible, separating people who have significant drug and alcohol needs from those who do not. In the longer term it will of course be necessary to identifying step-down arrangements for the future, including the re-opening of shelter-type accommodation.'

27. Whilst there were no specifics of how the funding would be administered to enable these objectives to be met, the Minister made this comment:

[33] My emphasis

> 'We know that this requires funding. Last week, the Government announced £1.6bn for local authorities to respond to other COVID-19 pressures including for services helping the most vulnerable, including homeless people. This grant will cover all costs incurred in the first phase of the response, but we will keep future funding need under review…….'

28. The *Everyone in* initiative was considered to be successful, although the court has not been provided with any specific statistics as to its working out. Its continuation was the subject of Parliamentary comment in February 2021, just under 12 months after the first lockdown and following the difficult initial winter, by Mr Clive Betts MP:

> 'I thank the Secretary of State for the statement. Looking back to last March, it is undeniable that the Everyone In initiative was a success, and I congratulate the councils, the charities, the Government and of course Dame Louise Casey. It was successful because it did precisely what it said: everyone, without exception, was taken off the streets and found accommodation. Does "Everyone In" still mean that while there is a public health emergency, councils have the right and the responsibility to house everyone, including those with no recourse to public funds? Recently, local authorities have told the Select Committee that there is a great deal of confusion about their legal position. Does the Secretary of State accept that if those with no recourse to public funds are not housed, "Everyone In" will have to be renamed, "Some people in, and others left outside"? Surely that cannot be acceptable.'

29. This received a positive response. The Secretary of State, Mr Robert Jenrick issued the following statement on 25 February of that year:

> 'Statement
>
> On Saturday, the Government announced the allocation of an additional £203 million to 210 areas (representing 281 local authorities) across England to tackle rough sleeping and provide support for people living on the streets. No one should have to sleep rough and that is why the Government has committed to ending rough sleeping . The Rough Sleeping Initiative is a key part of that mission.
>
> The allocations can be found at: https://www.gov.uk/government/publications/rough-sleeping-initiative-2021-to-2022-funding-allocations(opens in a new tab)
>
> Rough Sleeping
>
> During the last 12 months we took unprecedented steps to protect rough sleepers from the pandemic and in the longer-term. By the end of January, we had supported over 37,000 people since the pandemic began, with over 11,000 people currently being supported in emergency accommodation and over 26,000 already moved on into settled and supported accommodation. Figures published in February show that the number of people sleeping on our streets on a single night in Autumn fell by 37% compared to the previous year. This is a significant achievement, but our work continues, and we are proud to confirm allocations for the fourth year of this flagship programme.
>
> Rough Sleeping Initiative 2021/22'

30. It is clear from this statement that the government was pleased with its initiative, and lauding its success, although there was no distinction drawn in the statement above between those who had recourse to public funds and those who did not. [4]

[4] in the case of **ZLL** Fordham J extensively reviewed the publicly available material only working out of the initiative including a number of other Parliamentary exchanges and publications when considering whether or not it amounted to an enforceable policy. The extracts which I provided within this judgment are limited to those which have been provided within the court bundle.

31. Although it does not form part of the evidence in this case, I note that in **Ncube** reference is made to the House of Commons Communities and Local Government Select committee report of 22nd May 2020 in which it was stated that in London at that time 900 people of NRPF status were being accommodated under the "*Everyone in*" scheme.[5]

Vulnerability of ethnic minority groups

32. Because it is contended by the Claimant to be a relevant factor which should have been taken into account by the Defendant, particularly insofar as the decision was made by the director of public health for Lambeth, reference should be made to the prevailing understanding of vaccine hesitancy. This is contained in an article which was published in the British Medical Journal in February 2021, which confirmed that there was a significantly lower uptake of the vaccine amongst ethnic minority groups, particularly those to whom the Claimant belonged, and that the decision not to be vaccinated was multifactorial, and rarely attributable to conspiracy theory opposition.

Rough sleeping figures

33. Some information is available (and was provided in a more readable form during the course of the hearing) from the MHLCG Covid 19 rough sleeper accommodation survey in relation to London councils. This was dated 25th February 2021 and indicated that in the Defendant's borough there were 10 rough sleepers who were accommodated in September 2020, but none in the three months thereafter, although on a one-month assessment between December and January, 20 persons were found to be sleeping rough on the streets. From the statistics it was possible to determine that a borough such as Newham which had no less than 136 rough sleepers accommodated in January (210 in September 2020), had only 17 and 8 respectively still on the streets in December and January, suggesting that the vast majority of those who would normally sleep rough, who were at risk of sleeping rough had been accommodated. However, it is acknowledged that the survey does not distinguish between those who might otherwise be entitled to accommodation in discharge of statutory duties, and those who were persons of NRPF.

The grounds of review

34. I now deal with the grounds as set out at paragraph 9 and following in the amended detailed statement of grounds. They can be summarised as follows.

[5] See paragraph 14 of judgment in Ncube

35. First, whilst the powers relied upon are acknowledged to be discretionary, nevertheless the discretion was exercised in an arbitrary and irrational manner because (a) there was no policy adopted which would have provided a reference for the exercise of the discretion or as to how accommodation could be provided or refused to those who were street homeless and who might have been entitled to be considered under the *Everyone in* initiative and (b) the decision letter of 15th June did not explain the criteria applied in the refusal of the discretion

36. Second, with reference to the decision letter of 20th July 2021, the arbitrary nature of the decision process was continued in that reliance was placed upon a different set of criteria, based on the Covid 19 Outbreak Management Plan (OMP).

37. Third, the OMP was silent on the provision of accommodation to any person whether NRPF or not and did not make reference to the *Everyone in* initiative or subsequent initiatives, suggesting that there was no policy to inform the exercise of the discretion, or that it was operating outside the published policy of the OMP. The absence of any provision for accommodation indicated that the Defendant had ceased to operate any policy of taking in rough sleepers in accordance with the initiative. This rendered the decision unlawful.

38. Fourth, the 20th July decision was also unlawful because it did not take into account relevant considerations, namely central government guidance in the initiative, and that funding had been received to provide accommodation including for those of NRPF, (i.e. those not owed any statutory duty), and that it took into account irrelevant considerations, namely the NRPF status of the Claimant and the fact that she had not regularised her immigration status, when in fact it was such persons whom the government initiative was intended to benefit, amongst others, as they were not able to rely upon any statutory duty owed to them.

39. Fifth, the decision failed to take into account the fact that the Claimant had relevant characteristics, namely her age and ethnicity, and mistakenly regarded her refusal to have the vaccine as relevant to refusing accommodation, when these were matters which made her more vulnerable to contracting Covid 19. Reliance was placed upon the BMJ article on vaccine hesitancy amongst ethnic minorities. Taking such a characteristic into account was both arbitrary and irrational.

40. Sixth, reliance on limited housing availability was not a justification for refusing the provision of accommodation, and therefore an irrelevant matter to take into account.

41. Thus the amended grounds incorporated the decisions of the Defendant council in the three separate decision letters, to demonstrate the arbitrary nature of the decision-making, the lack of relevance, in relation to matters taken into account, and the lack of any policy to inform the exercise of the discretion.

42. In their skeleton argument, counsel for the Claimant summarise the challenges in three categories, namely (1) the failure to adopt a policy or criteria (2) the arbitrary exercise of discretion and (3) relevancy. I propose to deal with the challenge on this basis, because there is a considerable overlap in the grounds pleaded in the amended detailed statement of grounds.

The Law

43. I start with the statutory powers already referred to. Section 138 (1) of the Local Government Act 1972 (LGA) provides as follows:

> **138 Powers of principal councils with respect to emergencies or disasters.**
>
> (1) Where an emergency or disaster involving destruction of or danger to life or property occurs or is imminent or there is reasonable ground for apprehending such an emergency or disaster, and a principal council are of opinion that it is likely to affect the whole or part of their area or all or some of its inhabitants, the council may—
>
> (a) incur such expenditure as they consider necessary in taking action themselves (either alone or jointly with any other person or body and either in their area or elsewhere in or outside the United Kingdom) which is calculated to avert, alleviate or eradicate in their area or among its inhabitants the effects or potential effects of the event; and
>
> (b) make grants or loans to other persons or bodies on conditions determined by the council in respect of any such action taken by those persons or bodies.

44. It does not appear to be in dispute that the Covid 19 pandemic constituted an emergency and that this power was accessible to the Defendant council.[6]

45. Section 2B of the National Health Service Act 2006 is the second statutory power. The relevant provision is:

[6] This is a position which was probably unlikely to have been taken prior to **Ncube**.

> **2B Functions of local authorities and Secretary of State as to improvement of public health**
>
> (1) Each local authority must take such steps as it considers appropriate for improving the health of the people in its area.
>
> (2) The Secretary of State may take such steps as the Secretary of State considers appropriate for improving the health of the people of England.
>
> (3) The steps that may be taken under subsection (1) or (2) include—
>
> (a) providing information and advice;
>
> (b) providing services or facilities designed to promote healthy living (whether by helping individuals to address behaviour that is detrimental to health or in any other way);
>
> (c) providing services or facilities for the prevention, diagnosis or treatment of illness;
>
> (d) providing financial incentives to encourage individuals to adopt healthier lifestyles;
>
> (e) providing assistance (including financial assistance) to help individuals to minimise any risks to health arising from their accommodation or environment;[7]
>
> (f) providing or participating in the provision of training for persons working or seeking to work in the field of health improvement;
>
> (g) making available the services of any person or any facilities.
>
> (4) The steps that may be taken under subsection (1) also include providing grants or loans (on such terms as the local authority considers appropriate).

46. Thus both local authority and Secretary of State have wide-ranging powers in the discharge of their functions, including a power to assist financially or otherwise in relation to health risks which arise from accommodation or environment.

47. Reference has been made to the Housing Act 1996, and in particular Part VII. Under this statutory scheme provision is made in respect of the local authority's functions relating to homelessness or threatened homelessness. The scheme gives rise to a number of powers and duties which are exercisable in respect of those who qualify. However, there is an important provision in section 185 concerning the eligibility for assistance:

[7] My emphasis as relevant subsection

> **185 Persons from abroad not eligible for housing assistance.**
>
> (1) A person is not eligible for assistance under this Part if he is a person from abroad who is ineligible for housing assistance.
>
> (2) A person who is subject to immigration control within the meaning of the Asylum and Immigration Act 1996 is not eligible for housing assistance unless he is of a class prescribed by regulations made by the Secretary of State.
>
> (2A)……
>
> (3) The Secretary of State may make provision by regulations as to other descriptions of persons who are to be treated for the purposes of this Part as persons from abroad who are ineligible for housing assistance.
>
> (4) A person from abroad who is not eligible for housing assistance shall be disregarded in determining for the purposes of this Part whether a person falling within subsection (5)
>
> (a) is homeless or threatened with homelessness, or
>
> (b) has a priority need for accommodation.

48. It is accepted that the Claimant would have been disqualified under the Housing Act 1996 by reason of her immigration status.

49. The submissions of counsel have centred around the two principal authorities to which reference has already been made, namely **Ncube** and **ZLL**. I will identify the salient points arising from these cases and some of the judicial observations upon which reliance has been placed.

50. In **Ncube** the court was concerned with a similar situation to that which has arisen in the present case, although Brighton and Hove City Council had denied the existence of any powers under which they could act. The claimant there, who was in fact street homeless, was an asylum seeker who had failed in his applications and was therefore a person of NRPF. He sought temporary accommodation several months after the government had published the *Everyone in* initiative in 2020 from the defendant authority asserting that he was at risk to his health from the pandemic emergency of Covid 19, but this was refused on the basis that he was disqualified from any assistance, and therefore ineligible, because of section 185 of the 1996 Act. The defendant authority did not believe that it had the power to accommodate him either under the government initiative, or its own Covid 19 policy. It is clear that this was a prevailing view amongst a number of local authorities at the time, when some confusion had been expressed as to the applicability of the national initiative to those of NRPF, in the absence of a specific statutory provision. The claimant's case was that the LGA and NHSA

provided such powers. Freedman J agreed that both statutory provisions could be used to make temporary accommodation available to persons such as the claimant, provided that they were not being used to circumvent the restrictions of section 185. It is important to note that the case was not concerned with the exercise of a discretion, but only the existence of powers. Those powers were to be exercised in discharge of the public health functions of the local authority, in relation to the LGA in the context of an identified emergency (the pandemic) and in relation to the NHSA under the wider and more general powers to protect and improve the health of persons living within their authority area.

51. As well as denying the existence of statutory powers, the defendant authority challenged the suggestion that the emergency threshold was crossed for the purposes of section 138 (1) in the Brighton area. The learned judge noted inconsistencies in the authority's own evidence in this respect, and said this at paragraphs 58 and 59 emphasising the broader purpose of the *Everyone in* initiative:

> "58…….If it means that the pandemic was not considered to be an emergency in Brighton, that is inconsistent with the tenor of its own documents. It may be that there was a concentration on the infection rate generally, but not here on the effect of the pandemic in respect of "rough sleepers [who] have been identified as a particularly vulnerable group which we need to provide accommodation for to protect them, manage infection control and outbreak prevention and management."
>
> 59. Further and in any event, one of the reasons for managing rough sleepers in this way was not just for their own safety, but also "to manage infection control and outbreak prevention and management." On this basis, rough sleepers are not just a problem for themselves, but in transmitting infection to others……."

52. His conclusion on the section 138 power can be found at paragraph 64

> "64. For all these reasons, in my judgment, there is a power of the local authority to provide temporary accommodation under section 138 where the four conditions set out in paragraph 46 above are satisfied. The emergency and the danger to life give rise to a discretion to act. This is subject to the local authority being of opinion that the circumstances are likely to affect some of its inhabitants in which case it may incur expenditure "necessary to avert, alleviate or eradicate its effects or potential effects." The question for the purpose of this judgment is not how the local authority ought to exercise its discretion, but simply whether it has a power to accommodate even a NRPF person. In my judgment, this is provided that the power is not being used to circumvent the restrictions and prohibitions in section 185 of the Housing Act 1996 or Schedule 3 to the Nationality, Immigration and Asylum Act 2002. It is further to be noted that the discretion to provide temporary accommodation is not a duty which it owes to a street homeless person but is simply a part of its powers in a particular set of circumstances. If the person has other avenues of accommodation such that this emergency support is not required, then that is likely to be relevant to the exercise of the discretion."

53. Thus he gives no direction on how the power should be exercised, only that a discretion exists. The judge then turn to consider the NHSA provision, referring to the *target* nature of the duty which was owed. That target was to improve the health of the people within its area, and although the provision of accommodation was not specifically listed as a concomitant part of the discharge of the public health functions, provided it was not being used to circumvent section 185, there was no reason why it could not be used in such

circumstances. He said this at paragraphs 75ff, in identifying the existence and scope of both the powers and duties of the local authority under the NHSA section 2B:

> "75. There are no restrictions here in providing such assistance under section 2B of the 2006 Act to those with NRPF. Simply put, the prohibition under s.185 Housing Act 1996 does not apply to the 2006 Act. The prohibition under s.185 relates to homelessness functions under Part VII s.184 and following. The 2006 Act imposes a duty relating to public health functions, which is a separate statutory regime with distinct statutory purposes. In the section below, there will be reference to the case of *AR* in connection with the Localism Act 2011, but that case does not address public health powers, and does not answer the points of the Claimant as regards the possible application of section 2B.
>
> 76. The point is the stronger because there is no duty owed to an individual under s.2B of the National Health Service Act 2006. The question which is being addressed is whether the provision of accommodation, to the extent that it is for the purpose of satisfying a public health need, is prohibited by statute. Provided that this power is not being used to circumvent the limitations of the role of a local authority under s.185 of the Housing Act 1996 to individual applicants, then it would not be unlawful to fulfil public health functions by reference to s.2B of the National Health Service Act 2006.
>
> 77. The question in all cases is whether the particular exercise of powers by the provision of accommodation or other assistance is within the target of addressing public health functions. Thus, just as a residential death reduction initiative during extreme winter weather might be permitted under the 2006 Act if the target is met, so too in the context of the pandemic participation. This appears to be the logic underlying a response of the Government published on 25 June 2020 to the Select Committee Report, stating:
>
> > "Local authorities have powers to use their judgment is assessing what support they may lawfully give to each person on an individual basis, considering that person's specific circumstances and support needs. Local authorities will already be used to make such judgments on accommodating individuals who might otherwise be ineligible, during extreme weather for example, where there is a risk to life. Local authorities also have powers to provide basic safety net support, regardless of immigration status, if it is established that there is a genuine care need that does not arise solely from destitution, for example, where there are community care needs, migrants with serious health problems or family cases."
>
> 78. An initiative such as the accommodation under the "Everyone In" scheme or a successor initiative in order to save lives is capable of being an attempt to address its public health functions permitted under the 2006 Act. It is important to note that this part of the judgment is to the effect that there may be powers outside the Housing Act 1996 to justify accommodation under the "Everyone In" scheme or a successor scheme even of NRPF persons. It is not desirable in this judgment to outline theoretical examples of how this may work. It suffices if an initiative to remove rough sleepers from the streets during the pandemic to reduce the risk to life of the sleepers and the persons with whom they may have contact might be permitted under s.2B.
>
> 79. How far this may go is a question of fact and degree and intention in each case. The question would be whether it would be seeking to meet a public health need or a way of seeking to circumvent restrictions such as s.185 Housing Act 1996. Although section 2B (1) is couched as a duty on a local authority, it is in broad terms in that it is only in respect of "such steps as it considers appropriate". This leaves open the possibility that the local authority might rationally consider that certain steps were not appropriate e.g. since it was for central government or because its limited resources were better dedicated elsewhere. Nevertheless, the above recognises that the provision of accommodation under the "Everyone In" scheme or a successor initiative may be permitted even to NRPF persons provided that this was not an attempt to circumvent Part VII of the Housing Act 1996."

54. Again, he did not seek to circumscribe the discretion, but was clear that any extra statutory powers in relation to homelessness were not to be used to bypass the Housing Act restrictions, and he emphasised the individuality of each and every case without laying down any specific guidance. This is relied on particularly by the Defendant in the present situation.

55. Turning to the case of **ZLL**, this court was taken extensively to a number of passages within the judgment of Fordham J by both counsel to demonstrate their respective arguments.

It would not be helpful, nor does it elucidate the reasoning in my judgment to set out each and every one of those passages, but I will deal with the key aspects as I see it and address some specific passages when dealing with counsels' submissions.

56. The claim, the decision on which has only been promulgated within the last few weeks, involved a two-pronged challenge brought by the anonymized claimant, who was a Chinese national without immigration status within the UK (currently). Not only was there a claim pursued against the local authority (Camden BC) who had refused accommodation on a similar basis to that in the present case, but also against the Secretary of State (the MHCLG) in relation to the enforceability of the *Everyone in* initiative as a policy, and the unlawfulness of discontinuing its application, as the MHCLG sought to do in response to the claim. It is understood that permission has been granted in the claim against the local authority, but has been stayed pending the MHCLG challenge, in respect of which, I am told, permission has now been given to appeal.

57. After reviewing a number of basic legal principles of judicial review which might provide a contextual definition of an expressed policy by national government insofar as it related to the powers and duties of local authorities, and summarising the key events which led to the various initiatives, including the implementation of *Everyone in* and follow-up announcements in relation to rough sleepers, the judge noted that the essence of the challenge was that the Secretary of State should have issued prescriptive policy guidance to local authorities to which public law duties would be applicable; further, insofar as the public statements included prescriptive policy guidance, a duty of conformity arose which included the publication of any policy divergence or discontinuance. These arguments were rejected. It was held that even if *Everyone in* was to be described as a government policy, it did not engage the public law duties of prescription, conformity and publication because of its fluidity and lack of clarity. The government was essentially asking local authorities to work together and to exhaust all options within the law to enable those who were rough sleeping on the streets without recourse to public funds to be provided with accommodation at the height of the pandemic emergency for their own health and safety, and to avoid risks to others. These were "asks" and did not amount to external prescriptive policy.

The respective submissions

Claimant

58. Mr Vanhegan and Ms McGibbon provided a skeleton argument expanded by Mr Vanhegan in the hearing.

59. He submitted that the legal position in relation to the available powers towards rough sleepers had been reinforced in the recent case of **ZLL** following the earlier decision in **Ncube** and there could be little doubt that those with NRPF were included within the scope of those powers. He referred to paragraph 7 (3) of the judgment of Fordham J in **ZLL**:

> '….that it would, in principle, be open to a local authority in the context of the pandemic, properly exercising its statutory powers within their 'reach' – if it considered it appropriate to do so, and if it were satisfied that the statutory preconditions were met – to decide to take 'blanket' action by which it provided accommodation to all rough sleepers in the local authority's area, including all NRPF individuals who are rough sleepers. What that means is that, in principle and consistent with the 'reach of powers' point, 'Everyone In' could indeed mean "everyone".'

60. Whilst a blanket policy was not required, nor could there be any expectation that the Claimant was included and entitled to be accommodated, the decision-making process of the Defendant required the discretion to be exercised in accordance with three basic public law principles, namely not to be exercised arbitrarily, with a clear statement of policy as to the criteria to be applied, and on the basis of relevance. In relation to arbitrariness, this was acknowledged by Fordham J in **ZLL** at paragraph 7.4:

> '……As Sedley LJ had said, in the context of clawback of overpaid income support benefit, in *B v Secretary of State for Work and Pensions [2005] EWCA Civ 929 [2005] 1 WLR 3796* : "It is axiomatic in modern government that a lawful policy is necessary if an executive discretion of the significance of the one now under consideration is to be exercised, as public law requires it to be exercised, consistently from case to case but adaptively to the facts of individual cases". As can be seen from those passages, the underpinning of the public law duty to issue prescriptive policy guidance guiding the exercise of discretionary powers is a recognition of the virtues of consistency and protection against arbitrariness.'

61. As far as the application of criteria was concerned, he relied upon the judgment of Lord Dyson in **R(Lumba) v Secretary of State for the Home Department [2012] 1 AC 245** and in particular at paragraph 34:

> '34. The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised.'

62. These were requirements elucidated by Fordham J in **ZLL** in the context of the duty of publication.

63. Whilst acknowledging the ratio of the decision in **ZLL** to the effect that the *Everyone in* policy or initiative did not have the status of a prescribed policy as contended for by the Claimant in that case, it was nevertheless an exhortation or an ask at the relevant time, and throughout the pandemic, and it should have informed the Defendant's decision-making process, particularly when clear from the initiative that it was to be applied comprehensively to all rough sleepers, including those of NRPF. Mr Vanhegan placed significant reliance on a

letter from the MHCLG to the public accounts committee which was referred to at paragraph 37 in the judgment of Fordham J. Because of its significance to the Claimant's argument, I set it out in full:[8]

> '37……By a letter dated 15 November 2021 to the Chair of the House of Commons Public Accounts Committee (Dame Meg Hillier MP) the Permanent Secretary of the Department for Levelling Up, Housing and Communities (Jeremy Pocklington) followed up on information provided to the Committee (on 1.11.21). The letter included this:
>
> > *'Recourse to Public Funds. In July 2021, Eddie Hughes, Minister for Rough Sleeping and Housing, sent the attached letter to Local Authority Council Leaders asking that they ensure that they are exhausting all options within the law to support those who are unable to access statutory homelessness assistance as a result of their immigration status. This letter made clear that exhausting all options should include considering what discretionary powers can be used to support individuals; exploring partnership work with the voluntary and community sector; and engaging with Home Office on complex cases, to support regularisation of status. Any funding we have provided can be used to help anyone, including those with restricted eligibility due to their immigration status, as long as LAs are acting within the law in doing so. This includes the recently announced Winter Pressures Fund, specifically focussed on enabling LAs to build on existing RSI 2021/22 interventions where it is needed. We understand that this is a complex area, particularly in the context of the pandemic and the change in status of EEA nationals. In July we also made available to local authorities the attached information on some of the existing legal powers they have to support non-UK nationals with restricted eligibility. We are clear that the law with regards to immigration status has not changed, and it remains for each local authority to decide what assistance can be provided to people who are homeless and rough sleeping, based upon an individual assessment of a person's status, circumstances and needs'.*'

64. In respect of the relevance of the exhortation or ask, he highlighted this comment of Fordham J at paragraph 46 of **ZLL**:

> 'All of these were important "asks". They were exhortations. I accept that they were not bereft of public law consequences. I can see that the "ask" would be a legal relevancy to which a local authority acting reasonably would need to have regard, especially when put alongside the provision of resources enabling it to act as exhorted.'

65. Counsel then addressed the three primary areas of challenge, namely the failure by the Defendant to adopt a policy or criteria, the arbitrariness of the decision, and irrelevance/relevance.

66. In respect of the absence of a policy, he submitted that despite the decision of the court in **ZLL** which did not equate the *Everyone in* initiative with a prescriptive policy which was amenable to challenge, nevertheless the identified powers in LGA and NHSA, confirmed in **Ncube**, enabled the Defendant to exercise a discretion to provide emergency accommodation to rough sleepers including to those who had no immigration status (and therefore NRPF), and this gave rise to a duty of prescription which required identified criteria thus enabling informed representation. The approach to the Covid emergency was comparable to the severe weather policy which enabled the street homeless to obtain accommodation and where policy criteria existed. The Outbreak Management Plan (OMP)

[8] The emphasis is that of counsel

relied on in the later letter did not discharge this duty because it made no reference to the provision of accommodation, or these statutory powers which existed under LGA and NHSA.

67. The decision was arbitrary, said counsel, when the contents of the three decision letters were analysed to demonstrate inconsistencies of approach. By the time of the 20th July letter a different set of criteria was being used which was not excusable by reference to the fact that there had been a change in the law following **Ncube**. In fact, it might have been expected that the Defendant authority would have implemented criteria for providing such accommodation regardless of immigration status following that decision, when the contrary appears to have been the case. In any event the law had already been clarified by the time of the first decision in June.

68. The main thrust of the Claimant's argument through counsel related to relevancy and irrelevancy, and a number of features were identified by reference to the three letters.

69. In respect of irrelevance, it is submitted that inappropriate weight was placed upon the Claimant's status as a person of NRPF. This should not have been a consideration at all because the Claimant through her advisers had always acknowledged that she had no entitlement to accommodation under Part VII of the Housing Act 1996. The Defendant appears to have misdirected itself by believing that it was precluded from providing accommodation to the Claimant because of her immigration status and was fixated on the application being a device to exploit the exclusion under the 1996 Act. Second, in a similar vein there was an irrelevant reference to other statutory powers (the Care Act 2014 and the Children Act 1989) which did not avail the Claimant. It was clear that she was not owed any duty under that legislation, which is why the safety net under the *Everyone in* policy initiative in the prevailing pandemic emergency was accessible. Third, the reference to the "open-ended" nature of the request for accommodation was irrelevant, because it is clear that it could only have applied during the Covid emergency, and it would have been open to the Defendant to have brought it to an end when such circumstances no longer prevailed. Fourth, the reference to family and friends should not have impacted on the decision; it was clear that the fear of Covid infection was the reason why such assistance was not available to the Claimant.

70. In respect of matters which should have been taken into account (relevancy), the principal factor which should have informed the decision, and to which no proper reference was made, was the *Everyone in* policy, in which a clear steer was provided by central government that all rough sleepers should be taken off the streets regardless as to whether they have recourse to public funds. Insofar as it was mentioned in the 15th June letter, there was an inaccurate statement in which the writer appears to have proceeded on the basis that no additional funding was provided for persons of NRPF. If reliance is to be placed upon the OMP as the basis upon which the Defendant authority discharged its responsibilities, this did not make any reference to government policy guidance in *Everyone in*. It is submitted that the

absence of specific funding for NRPF persons did not entitle the Defendant to preclude them from consideration for accommodation, because such funding as was provided did not distinguish status. It was also relevant, but apparently not considered, that the Claimant was an elderly BAME woman who was not vaccinated and therefore particularly vulnerable. The fact that she had chosen not to have the vaccination would not in any event have justified precluding her from consideration bearing in mind the prevailing knowledge about cultural and ethnic reluctance in relation to the vaccine.

Defendant

71. In relation to the sequential decisions, the Defendant's principal argument advanced by counsel Ms Etiebet is that the decision letter dated 20th July 2021 was a review which was appropriate in the light of the evolving public health situation, and the lawfulness of that decision should be the focus, with particular reference to the OMP. Ms Etiebet accepted that the three preconditions in section 138 (1) were fulfilled (as defined by Freedman J in **Ncube**), and this case was essentially about whether or not the discretion had been lawfully exercised in relation to their response to those preconditions, and in particular the incurring of expenditure to house an individual on an emergency basis. It was a matter entirely for the council as to what was considered necessary to alleviate or eradicate the effects of Covid 19, which was comprehensively addressed in the OMP.

72. Similarly, in relation to the NHSA power (section 2B) which was a qualified target duty, and not one owed to specific individuals, which has to be used in any given situation where the health of the people in its area is to be improved. Ultimately it was a question as to whether or not the assessment had been approached rationally by the local authority and in particular the decision that accommodation was not appropriately provided save for the purposes of self-isolation. To support her argument of the broad scope of the discretion she relied upon the judgment of Freedman J in **Ncube**, at paragraph 79:

> '79. How far this may go is a question of fact and degree and intention in each case. The question would be whether it would be seeking to meet a public health need or a way of seeking to circumvent restrictions such as s.185 Housing Act 1996 . Although section 2B (1) is couched as a duty on a local authority, it is in broad terms in that it is only in respect of "such steps as it considers appropriate". This leaves open the possibility that the local authority might rationally consider that certain steps were not appropriate e.g. since it was for central government or because its limited resources were better dedicated elsewhere. Nevertheless, the above recognises that the provision of accommodation under the "Everyone In" scheme or a successor initiative may be permitted even to NRPF persons provided that this was not an attempt to circumvent Part VII of the Housing Act 1996 .'

73. This was essentially an evaluative judgment by a local authority which was being impugned. Ms Etiebet pointed out that significant qualifications were provided by Fordham J when addressing the reach of the powers available to a local authority under LGA and NHSA in **ZLL**. She referred to para 7.2 of his judgment in respect of section 138:

> 'It was for the local authority to address whether the conditions for the statutory power were satisfied and whether it was appropriate to exercise the power, which power could not be used to circumvent the restrictions and prohibitions relating to NRPF and duties owed to homeless individuals (see §64).'

74. In the same paragraph, it was submitted, he dealt with the scope of section 2B:

> 'It would be a "question of fact and degree" for the local authority to decide whether s.2B was applicable and what steps were appropriate, and accommodation could be provided to NRPF persons provided that there was no circumvention of the statutory restrictions in the homelessness provisions (see §79). The consequence of the 'no roadblock point' is twofold. First, it can in principle be within the 'reach of powers' of a local authority to accommodate an NRPF rough sleeper in the context of the pandemic. Secondly, that action necessarily involves evaluative judgments by the authority.'

75. She also relied upon the decision of Green J, as he then was, in the **National Aids Trust v National Health Service and Others [2016] EWHC 2005 (Admin)** in support of her argument that a particular service could be declined in the discharge of its powers under the exercise of its discretion a rational assessment was made as to the limited nature of a budget.

> 'The NHSA 2006 confers upon NHS England what might fairly be described as a broad discretion as to how it exercises its powers to achieve its target duties and in this connection the manner in which it exercises its judgment to achieve the most effective use of scarce financial resources is legitimately a matter calling for the exercise of judgment. The availability of resources is thus relevant at this stage; but not at the *a priori* stage of interpretation of the scope in law of that power and duty, which is what this case is about'

76. Insofar as the Claimant was seeking to rely upon the decision in **ZLL**, it was to be noted that the *Everyone in* policy was found by Fordham J to be neither prescriptive, nor engaging a public law duty of conformity, and its force as requiring every rough sleeper to be accommodated, even those of NRPF, was overstated by the Claimant. She emphasised the limited scope of the "policy" as described by Fordham J in terms of the "ask or exhortation" to local authorities, and relied in particular in paragraph 47 of his judgment:

> 'The third lockdown tweet (4.1.21: §23 above), the third lockdown announcement (8.1.21: §24 above) and the third national lockdown letter (8.1.21: §25 above) 'renewed' the inclusive language of exhorting local authorities to accommodate those currently sleeping rough. But again, that was in a further national lockdown. Indeed, what the third lockdown tweet (4.1.21: §23 above) was addressing was a claim about the 'renewal', or 'non-renewal', of the Everyone In "drive". All of this suggests an 'ebb and flow' – or a 'foot on the gas' – with a general call to all-inclusive action, in the context of national measures. All of this fits with the careful, context-specific analysis of Freedman J's 'no roadblock' analysis of statutory powers in ***Ncube*** (§7(2) above).'

77. Ms Etiebet then dealt with the individual grounds of challenge. In respect of the alleged failure to adopt a policy or criteria, she relied upon the OMP as a clear published policy which addressed the relevant discretion which the Defendant authority was required to exercise, that is whether it was considered necessary to avert, alleviate or eradicate the effects

or potential effects of Covid 19 by securing accommodation other than for self-isolation. Whilst the government's *Everyone in* initiative was described as a call to arms by Fordham J, and constituted an "ask", there was already in place a framework by which rough sleepers were to be removed from the streets with the continuation of the rough sleepers initiative (RSI) into which *Everyone in* flowed, and it was clear that this would carry with it special funding arrangements to fulfil the government's intention to have every rough sleeper of the streets within four years of 2018. Thus there was no reason for an exceptional approach in the Claimant's case, especially when Covid 19 risks were addressed in the OMP.

78. She challenged the assertion that the decision was either arbitrary or inconsistent on the basis that the factors all identified by the Claimant must be relevant to the "exceptional exercise of the discretion" were clearly covered in all three letters.

79. In respect of the question of relevance and irrelevance, Ms Etiebet made several points. First the NRPF status of the Claimant was not an exclusionary factor, and the council was entitled to consider whether or not its powers were being invoked to circumvent section 185. Second, there was no taking into account other irrelevant statutory provisions, and the references to the Care Act and the Children Act were contextual, because an assessment had been made at an earlier stage in relation to the Claimant. Third, *Everyone in* could not be regarded as a prescriptive policy which required the council to act in a particular way. In any event, it was taken into account in the letter of 21st July when the decision maker had regard to the fact that other restrictions were being largely lifted from 19th July. The limited and finite nature of resources were matters which the decision maker was entitled to take into account, when the funding stream was not open-ended or indefinite, and it was clear that "move on" accommodation, to which those of NRPF would not be entitled, was likely to be the main identified area for further funding.

Discussion

80. There was no disagreement between counsel that the lawfulness of this decision fell to be determined at the time that it was made, and the fact that pandemic circumstances have changed significantly within the past eight months does not have a bearing on the outcome. However, the fact is inescapable that as the country (or at least England) moves away from all legal restrictions and regulations, there is a different environment in which the local authority should consider the discharge of its responsibilities, including the exercise of discretionary powers. It is not appropriate for me to comment on how this might impact the Claimant's situation were this decision to be quashed, and the Defendant authority required to revisit the matter. It is not contended by the Defendant that this is a case where section 31 (2A) of the Senior Court Act 1981 applies.

81. Despite the extensive discussion in the submissions of counsel as to the recent decisions in **Ncube** and **ZLL**, and the significance of various observations made by both Freedman J and Fordham J, it seems to me that neither are determinative of the outcome of the present case, but there are three basic principles which can be drawn from those authorities and which are of application to this challenge.

82. The first, and most obvious, is that a local authority has broad and generally unfettered powers which can be used to deal with the street homeless in the course of the Covid 19 pandemic, and the discretion arising from those powers is not limited to those with legitimate immigration status.

83. The second is that it is a matter for each individual local authority when faced with an application by a rough sleeper as to whether those powers should be exercised, taking into account the personal needs of the applicant, its own resources, and such other measures as may be appropriate to diminish the risk which the applicant might face in the prevailing public health emergency. It was, as counsel says, a matter of "evaluative judgment".

84. Third the *Everyone in* initiative, as it has been described, does not have the status of a prescriptive policy amenable to public law challenge, but it is an aspirational exhortation, and should inform the approach taken by local authorities when exercising the identified statutory powers under NHSA and LGA, especially insofar as it has been accompanied by funding.

85. It is also clear that a reviewing court should be slow to interfere with the discretion exercised by a local authority, particularly where there is an absence of national policy guidance, but only an aspirational target, and where the process of reasoning by which it came to its conclusion is fully explained. There have been difficult decisions which local authorities have been required to take within the last 18 months to 2 years, as delegated responsibilities for public health management have been discharged, and when public law challenges are made raising issues such as irrationality or legitimate expectation, considerable leeway should be afforded to the decision-making process. It is expected that after the initial slow trickle of JR challenges, particularly in the context of street homelessness, the boundaries of decision making may be required to be more tightly drawn and ultimately scrutinised.

86. However, this is not a case in which the Claimant has sought to rely upon any legitimate expectation or Wednesbury unreasonableness *per se* on the part of the Defendant, despite several references by Ms Etiebet supporting the <u>rationality</u> of the detailed decision outcome. A lack of relevance, can, of course, be a concomitant part of an unreasonable decision, but it seems to me that the Claimant's challenge in this respect seeks to challenge the *process* by which the outcome was arrived at, rather than the outcome itself.

87. As I may have observed during my remarks in the course of the submissions, scrutinising that process is rendered more difficult by the fact that the decision which is challenged has been incorporated into three decision letters. The Defendant seeks to argue that it is, essentially, the third and final decision letter made by the director of public health for Lambeth which is under scrutiny, but in my judgment the Claimant is entitled to have regard to the prior decision-making process, especially when the responsibility for addressing the application for emergency temporary accommodation has been removed from the legal officer, and put in the hands of the public health officer. Inconsistency is an integral part of the challenge, supporting an argument of arbitrary decision-making.

88. With these matters in mind, I now turn to deal with each of the three areas of challenge, which are conveniently summarised in the Claimant's skeleton argument as absence of policy, arbitrariness, and relevance/irrelevance.

89. In respect of the first of these, there would appear to be no issue that the Defendant authority had not adopted or implemented any specific policy as to how it might exercise its powers under the NHSA and LGA towards the street homeless, in particular those who were of NRPF, and the first mention of a policy arises in relation to the broader Covid 19 *preventative* policy in the third decision letter. Further, it is accepted that the OMP does not refer to the identified powers, or the *Everyone in* initiative and any aspect of accommodation provision for the street homeless, save in respect of accommodation being considered for those who have to self-isolate (after infection). For the reasons outlined above a tolerant judicial analysis may be appropriate in relation to how a national initiative towards all those who were sleeping rough on the streets being housed in temporary accommodation to prevent infection and for their own safety regardless of immigration status was being applied, when that initiative, to use the words of Fordham J, was constantly in a state of *ebb and flow*, and when local authorities were being constantly reminded that care should be taken not to circumvent the restrictions in other legislation, and further that needs and resources were a matter for their own evaluative judgment.

90. On the other hand, the absence of national guidance, when powers are clearly identified, should not necessarily preclude local guidance as to how available powers might be exercised, and who might be entitled to assistance. There is no reason why this cannot be achieved, as it was by the Defendant in the **Ncube** case, Brighton and Hove City Council, as was referred to by Freedman J at paragraph 47 and following:

> 47…….. Further, the Defendant's policy documents of 14 August 2020 identify Covid-19 as an emergency posing a danger to life: the word "emergency" occurs 29 times. It starts with " **In response to the Covid-19 emergency** and in line with government guidance we have made an accommodation offer available to all rough sleepers in the city and those at risk of sleeping rough (emphasis added)." It referred to "…we are accommodating around 287 of the above people in accommodation acquired under the current Covid-19 emergency provisions…" In a press release of the same date, there is a section entitled "Covid emergency accommodation to continue beyond September." It refers to "emergency housing put in place to help keep homeless people in the city safe through the Covid-19 pandemic will be available at least until the end of December." Councillor David Gibson, joint chair of the Housing Committee referred to a commitment "not to return rough sleepers to the streets. It is

> crucial that we monitor progress towards achieving this for everyone currently in the Covid emergency accommodation…. the threat of the virus has not gone away."
> 48. Agenda 52 was appended to the Defendant's policy documents and stated:
> "7.13 People sleeping rough are amongst the most vulnerable in the city. Many have compound and complex health needs and in addition are more vulnerable if exposed to Covid. Having suitable accommodation reduces the risks to the individuals and also reduces the public health risks in the event of localised outbreaks or a wider second wave, and also reduces the impact on health services in the winter which is generally a pressure time.

91. Whilst there will be significant divergence between local authorities in terms of resources and needs, and the policy outlined above was clearly emerging at a time when the country was in substantial lockdown restriction, and further, the fact that one authority adopts a policy and another does not in response to a national initiative could not of itself render the decision-making process unlawful, it is noted that the Defendant in the present case has provided no disclosure in relation to any material addressing its response to the national initiative, whether by way of a policy or otherwise. Further, there is no evidence dealing with the housing of any street homeless prior to the Claimant's application. Such information as is available is derived from the statistical tables as to those who had been removed from the streets in the London boroughs. This court is simply in the dark as to how the Defendant proposed to respond to the national initiative, or as to how it responded in the past.

92. Although reference was made to the *Everyone in* policy in 15th June letter, in my judgment it is a valid criticism that there was no identification of any criteria which might be applied to determine those who are in need and those who are not. This was particularly important because the statement is made by the Defendant that the policy was primarily directed at rough sleepers with no additional funding provided for those with no recourse to public funds. This implies that at some stage an assessment had been made as to how funds might be administered, or perhaps that consideration had been given to an approach which would exclude those of NRPF. The letter ends in this way:

> 'The situation in the borough is that there are many individuals in need in and unfortunately the Council does not have the resources to fund all those in need and therefore must be prioritise those resources and assist those in most need.'

93. Insofar as a discretionary power existed (which is not disputed) the Claimant was entitled to know how the council might define those most in need, and in particular whether there was a policy to exclude persons with no immigration status, such as her.

94. The second letter provides no further elucidation on the part of the Defendant as to any criteria which might have determined an application for emergency temporary accommodation; it contains no more than a collection of responses to the Claimant's particular situation without any indication as to what circumstances might have justified the exercise of a discretion to house her.

95. It seems to me that the requirements of local policy guidance / criteria for those who might make such an application following the launching of the *Everyone in* initiative in March 2020 did not constitute a big "ask". It was incumbent on the Defendant authority to consider its own position in the light of the national exhortation to house all the street homeless, including those of NRPF.

96. A decision could have been made to the effect that no rough sleepers could be accommodated because there were simply no resources, despite funding. It is immaterial whether such a decision might have been reviewable on other grounds, but it would have amounted to a policy response. Equally, the council might have adopted a blanket response, which would have been acceptable, that all rough sleepers regardless of immigration status would be provided with emergency accommodation. Further, if the discretion would only be exercised in "exceptional circumstances" an applicant was entitled to know what those might be. All these approaches do not require an extensive statement of policy, but merely a short indication, either in a published minute of an appropriate council meeting or committee, or a leaflet made available through housing and charitable organisations.

97. Reference has been made in the Defendant's case to the taking of an "evaluative" judgment. The difficulty, however, is that the process by which the judgment is arrived at is not clear. On the basis of these two letters it would appear that it is the individual assessment of the legal officer as to the Claimant's particular circumstances which have informed the judgment but there is no reference to any external criteria.

98. The failure to adopt a policy or criteria for the exercise of its discretion under the LGA and NHSA would in my judgment render the decision in both the June letters flawed. By the time of the July letter the situation has changed in this respect; a clear policy is now mentioned for the first time, the OMP, a policy which is applied to the Claimant's individual circumstances (with an offer made of accommodation in the event of contracting Covid 19). Therefore, the same criticism could not be raised insofar as the decision is based on this letter alone. However, for reasons which will become apparent when considering the other aspects of challenge, this does not avail the Defendant as to the lawfulness of its decision.

99. I can deal with the second challenge relatively briefly. It must follow that a decision that has not been informed by a policy or criteria is arbitrary, in the sense that it has been arrived at on an ad hoc basis. In this respect I have little difficulty in coming to the conclusion that were this challenge dependent on the lawfulness of the first two decisions, it would succeed on such a basis. However, the overall process of decision-making is more nuanced for reasons already given.

100. Dealing with the third decision, the Claimant's case is that inconsistency has contributed to the arbitrary nature of the decision, in that the third decision letter provides a

wholly different basis for refusing the application for emergency housing. In my judgment whilst "*moving the goalposts*" as it has been described can be suggestive of an arbitrary decision, it seems to me that the Defendant was entitled to review its earlier decision, passing responsibility to the director of public health, who may have arrived at a different basis for refusing or granting the application as the case may be. The director of public health was entitled to apply different considerations if ultimately she held the "whip hand" so to speak in the decision-making process. On this basis, I would not find the decision unlawful, although as indicated above, that is not the end of the matter.

101. In respect of the third challenge, summarised as a failure to identify relevant and irrelevant considerations, it is here, in my judgment, that the Claimant is able to demonstrate that the overall decision-making process was flawed. For a reviewing court to have confidence in the lawfulness of the ultimate decision, all relevant matters must be identified, and irrelevant matters excluded. Whilst the Claimant's challenge is multi-faceted, some of the features relied upon as irrelevant carry little weight and are largely contextual. The reference to duties owed under the Housing Act 1996, the Care act or the children Act do not, it seems to me, appear to have informed the decision, nor does the Claimant's ability to rely upon family and friends to provide accommodation. In the latter respect was simply an observation that it was something the Claimant was able to do previously.

102. The more significant aspect which raises concerns that the decision has been informed by irrelevant matters is the reference to the Claimant's immigration status and the fact that she has no recourse to public funds. The point is validly made by counsel for the Claimant that this was the very reason why she was seeking assistance, in the light of **Ncube**, via the route of the broader discretionary powers available under LGA and NHSA. I accept the argument that it should not have been a factor weighed in the balance for excluding an entitlement to accommodation, although it is not entirely clear how the Defendant was approaching this. Obviously, the decision maker was entitled to consider whether or not the application was a means of seeking to circumvent section 185 of the 1996 Act.

103. In my judgment it is the absence of an appropriate and relevant consideration of the effect of the national policy and exhortation in *Everyone in*, which was supported by funding to provide accommodation for the street homeless, regardless of immigration status, which renders this decision-making process flawed. Whilst there was a limited reference to *Everyone in* in the first decision letter, there was no indication as to how it was going to be applied or that those of NRPF would ever be entitled to accommodation. The second letter did not make any reference to the national initiative or the authority's powers which existed under LGA and NHSA. The third letter, whilst undoubtedly comprehensive as to the public health measures which were being put in place for all residents in the Lambeth borough, regardless of the immigration status or recourse to public funds, did not make any mention of the national initiative of *Everyone in*, or the request which had emanated from central government approximately 15 months earlier that all persons should be accommodated regardless of their status to prevent their infection from Covid 19 and of course the risk to

their health. Instead it was fixated on *preventing* the spread of the infection, and utilising the statutory powers referred to, in order to discharge any duty which was owed. Insofar as Ms Hutt relied upon the OMP, a scrutiny of that guidance/policy document does not reveal any reference to the street homeless, or the extent to which those who were sleeping rough could be protected, bearing in mind, as the document acknowledged, that there was still a very high risk of infection spread.

104. In my judgment the Claimant, bearing in mind the application that had been made, was entitled to a consideration as to whether or not the national initiative, which was at the very least an exhortation by national government with appropriately provided funding[9], applied in her case, or whether and if so why she was being excluded from emergency accommodation. With no clear reference to the powers being exercised in this way this court cannot have confidence that all relevant considerations were taken into account. This was not difficult. It only required the decision maker to indicate how the national initiative was being interpreted and whether there was any scope for rough sleepers to be accommodated, as national government had requested.

105. The absence of this reference, in my judgment, means that an important and informative relevant consideration was missing from the decision-making process, not only in the earlier letters, but in the key decision letter in July 2021. It removes any confidence which this court can have that the decision was made on the correct basis, and thus renders the decision flawed in public law terms.

Conclusion

106. I raised with counsel during the course of the hearing the potential outcome of such a finding. Mr Vanhegan for the Claimant seeks no further remedy than that the decision is revisited, with a quashing of the original decision and its retaking with reference to national initiatives for rough sleepers. Of course the Claimant remains temporarily housed by the Defendant in any event, although this is not a matter which should make any difference to the working out of a fresh decision. It is the prevailing circumstances which exist at the time the decision is made (in other words the present time) when the statutory powers are considered on an evaluative judgement with regard to the Claimant's particular needs and any risk which she may face from Covid infection were she to be street homeless.

[9] The evidence in respect of any specific funding provided for the defendant council was not clear. Both counsel made reference to financial provision, but it was not possible for the court to conclude on the basis of the evidence how much the defendant had received, over what period, and to what particular purpose it was directed. Certainly the statistical data would suggest that very few rough sleepers were accommodated in the year before this application was made.

107. I invite counsel to agree the terms of any consequential orders, including costs, together with typographical errors, before the formal handing down of this judgment.

1.3.2022