Case No: E40CL183

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building,
Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 8 February 2019

BEFORE:

HIS HONOUR JUDGE LUBA QC

BETWEEN:
JOY ADESOTU

Appellant

- and -

LEWISHAM LONDON BOROUGH COUNCIL

Respondent

MR NICK BANO (of Counsel) appeared on behalf of the Appellant

MR DEAN UNDERWOOD (of Counsel) appeared on behalf of the Respondent

Hearing date: 9 October 2018
Final written submissions: 17 December 2018

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no recording shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Introduction

1. This is my judgment on an application to strike out part of an Appellant's Notice.[1] The application was made orally by counsel for the Respondent immediately prior to commencement of the hearing of the appeal. The appeal itself is a statutory homelessness appeal from the decision of the Respondent's reviewing officer. [2]

2. No objection was taken by the Appellant to my entertaining the oral application. I received careful argument upon it from each counsel, accompanied by the citation of a good deal of authority.

3. Both counsel, each a specialist in this subject-area, agreed that the application raised an important issue of principle and practice such that they considered that the unsuccessful party on the application should be granted permission to appeal. Moreover that, if possible, such appeal should be directed or transferred to the Court of Appeal.

4. Unusually, given the nature of the point raised by the application, the lack of significant notice of the application, and the range of authority cited, I indicated that I would reserve judgment.

5. By agreement, the parties asked that the substantive appeal hearing be vacated, pending my judgment and order on the application and, thereafter, the determination of any appeal.

6. Being satisfied that the Appellant would be suitably accommodated by the Respondent pending the outcome,[3] I acceded to that request.

7. Later, in the course of preparing the judgment, it became clear (as will be seen below) that there appeared to be a tension between certain passages in the earlier authorities binding upon me. Further, that the tension might be addressed and resolved by an upcoming appeal hearing in the Court of Appeal. I delayed preparation of this Judgment to await the outcome of that appeal.

8. Judgment was delivered in that appeal on 6 December 2018.[4] I invited written submissions upon it from counsel. I am grateful for those submissions, each dated 17 December 2018.

Essential Factual Background

[1] CPR r52.18
[2] Housing Act 1996 section 204(1)
[3] Housing Act 1996 section 204(4)
[4] *Alibkhiet v London Borough of Brent* and *Adam v City of Westminster* [2018] EWCA Civ 2742

9. The Appellant, Ms Adesotu, is a single parent of three young children. In 2017, she applied to the Respondent, Lewisham Council ('the council') for homelessness assistance. The council provided her with interim accommodation pending the outcome of her application.[5]

10. On 11 May 2018, the council notified her of a decision that she was owed the main housing duty under the Housing Act 1996 Part 7 (*Homelessness*) albeit that it was inaccurately referred-to by the council as the 'full' housing duty. The duty required the council to secure suitable accommodation for her occupation.[6] The notification informed her that the interim accommodation that she had been occupying was now being provided in performance of the main housing duty.

11. On 22 May 2018, the council wrote her a letter headed "OFFER OF TEMPORARY ACCOMMODATION". It stated that it was "pleased to be able to provide you [with] temporary accommodation". The letter described the size and rent of the offered accommodation and stated that its provision was made in performance of the main housing duty.[7]

12. The body of the letter did not indicate the address of the offered accommodation but the letter was addressed to Ms Adesotu at the address of "220 Algernon Road" where she was not living. The letter was delivered to her by hand, at what had been her interim accommodation, on Friday 25 May 2018.

13. It was later to transpire that the council was offering accommodation at 220 Algernon Road that it had itself leased from a private owner specifically for provision to homeless households as part of a Private Sector Leasing (PSL) arrangement.

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

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

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

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

[5] Housing Act 1996 section 188(1)
[6] Ibid section 193(2)
[7] Ibid section 193(5)

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

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

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

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

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

20. Ms Adesotu replied to Mr Frederick in a rather confusing Email, sent by her on the Saturday evening. By then, she had been to see 220 Algernon Road. In her Email she not only "accepted the offer of the property" but set out her detailed concerns about it. Her message indicated that she had been to see the property and "from what I saw I cannot move into the property". She concluded with: "Having outlined my major reasons of refusal, I am requesting a review" and referred to a written request for review that she had sent to the review team.

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

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

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

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

24. His note of the second call reads:

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

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

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

26. In due course, the council received the written request for review that Ms Adesotu had already made by a letter dated 27 May 2018 about the suitability of the accommodation. That referred to: the front door opening onto a main road with no guard or safety measures to protect her children from danger; the distance to their schools; and the facts that she had recently given birth and was a "patient of depression".

27. The council decided that Ms Adesotu could remain in what had been the interim accommodation until the review concluded.

28. On 6 June 2018, the reviewing officer sent a letter setting out the decision on review that he was 'minded to' reach and invited representations. No representations were made.

29. On 25 June 2018, the reviewing officer sent a letter giving a decision on the review, namely that the accommodation had been suitable and that the decision "to discharge duty on your homeless application was the correct one". The letter set out the conclusions made by the reviewing officer and the reasons for them over 10 pages of typescript.

30. The reasoning of the reviewing officer will no doubt be subject to scrutiny at the full hearing of this appeal and, in those circumstances, I need not set it out and shall not comment upon it.

The Relevant Statutory Provisions

31. The provisions of Housing Act 1996 Part 7 address a local housing authority's functions in dealing with applications for homelessness assistance.

32. As already indicated, section 193(2) sets out the 'main housing duty'[8] which is the highest duty that can be owed to an applicant.

33. Section 193(5) identifies one of the routes by which that duty can be brought to an end. It provides:

> "(5) The local housing authority shall cease to be subject to the duty under this section if—
>
> (a) the applicant, having been informed by the authority of the possible consequence of refusal or acceptance and of the right to request a review of the suitability of the accommodation, **refuses an offer** of accommodation which the authority are satisfied is **suitable** for the applicant,
>
> (b) that offer of accommodation is not an offer of accommodation under Part 6 or a private rented sector offer, and
>
> (c) the authority notify the applicant that they regard themselves as ceasing to be subject to the duty under this section."

34. I have highlighted the two passages in that sub-section which raise questions of particular importance on the facts of this case.

35. An applicant dissatisfied with the decisions made by a local housing authority has a right to seek a review.[9] From the decision made on review there is a right of appeal to the County Court conferred by Housing Act 1996 section 204 in these terms:

> "(1) If an applicant who has requested a review under section 202—
> (a) is dissatisfied with the decision on the review,
> (b) …
> he may appeal to the county court on any point of law arising from the decision or, as the case may be, the original decision."

The Appeal Proceedings

36. The Appellant's Notice was filed on 10 July 2018 accompanied by Grounds of Appeal dated 2 July 2018.

37. Case management directions on the appeal were given by an Order made on 12 July 2018 and they gave permission for Amended Grounds of Appeal to be filed.

38. Such Amended Grounds were served and filed and were dated 10 August 2018. There are six grounds:

[8] So described, inter alia, at Housing Act 1996 section 200(1)(b)
[9] Housing Act 1996 section 202

"In its decision that the Appellant refused a suitable offer of accommodation and, accordingly, that the duty under section 193 of the Housing Act 1996 is discharged the Respondent erred in law in that:

Ground 1. The Respondent breached section 19 of the Equality Act 2010 by applying provisions, criteria or practices that are discriminatory in relation to the Appellant's disability, and which cannot be justified. The policies, criteria or practices are:

a. Operating a short and inflexible time limit during which an applicant may accept or refuse an offer of accommodation;
b. Not permitting an applicant time in which to take professional advice in respect of an offer of accommodation;
c. Treating an equivocal acceptance of the accommodation as a refusal of the accommodation; and/or
d. Treating a failure to immediately occupy the accommodation as a refusal of the accommodation.

Ground 2. The Respondent breached section 15 of the Equality Act 2010 by treating the Appellant unfavourably (deciding that the section 193 duty was discharged) because of something arising in consequence of her disability (her delayed and equivocal decision as to whether to accept the accommodation), and the unfavourable treatment was not a proportionate means of achieving a legitimate aim.

Ground 3. The Respondent breached section 149 of the Equality Act 2010 in that it:

a. Failed to focus very sharply on the Appellant's disability, the extent of the disability and the impact of the disability upon her (*Hotak & Ors v Southwark London Borough Council & Anor* [2016] AC 811);
b. Failed to take into account the Appellant's disability in deciding whether the accommodation was suitable; and
c. Failed to accommodate the Appellant's disability by allowing her time to reach a decision as to whether to accept the offer and/or by allowing her time to take legal advice (in breach of sub-sections 149(3)(a)-(b), 149(4) and 149(6)).

Ground 4. The Respondent misdirected itself in law in respect of whether there had been a 'refusal' in that:

a. The correct approach is whether there is 'sufficient acceptance for it not to be possible to treat an applicant's communication as a refusal', and not whether the applicant fails to actually occupy the accommodation offered (*R (Muslu) v London Borough of Haringey* (unrep.) CO/3028/2000);
b. The Appellant explicitly accepted the offer by email on 26th May 2018; and
c. The review decision failed to reconsider whether the Appellant had, in fact, rejected the offer (*Nzamy v Brent London Borough Council* [2011] HLR 20, CA).

Ground 5. The Respondent misdirected itself in law in that the review decision considered whether the accommodation was suitable as temporary accommodation. Instead, because the Respondent owed the Appellant a duty under section 193(2) of the Housing Act 1996, the Respondent was bound to assess suitability on the basis that it was discharging the open-ended permanent accommodation duty.

Ground 6. The Respondent misdirected itself in law in that it failed to judge suitability by reference to the condition of the property at the time of the offer, but

> instead took into account proposed adaptations that were not certain, binding or enforceable (child barriers, child-proof latches and/or extra locks or latches on the windows) (*Boreh v Ealing Borough Council* [2009] HLR 22)."

39. The Amended Grounds were accompanied by a Skeleton Argument for the Appeal settled by Mr Nick Bano of counsel, also dated 10 August 2018.

40. Notice of the Hearing of the Appeal was given on 18 August 2018 for a one-day listing on 9 October 2018.

41. On 18 September 2018, the council filed an Application Notice seeking permission to adduce a witness statement at the hearing of the appeal. The reasons for the application were given as:

> "The Appellant raises grounds of appeal which are **claims of discrimination under the Equality Act (EA) 2010**. In those circumstances, the Court will be required to make findings **as the tribunal of fact** and there is relevant evidence that the Respondent seeks to rely upon, including evidence **to discharge its burden to prove proportionality** under sections 15 and 19 Equality Act 2010, **if the Court finds that** there has been disadvantage under section 15 or a discriminatory provision, criterion or practice under section 19 Equality Act 2010"

42. Those reasons (to which I have added my own emphasis) can only sensibly be understood as suggesting that the council wished to put in evidence for use at a fact-finding trial of a claim as to whether it had been guilty of discrimination contrary to the Equality Act 2010. The Application Notice was accompanied by a 40-paragraph witness statement made by the reviewing officer.

43. Also filed with the Application Notice was a Skeleton Argument for the Respondent settled by Ms Jennifer Oscroft of counsel and dated 13 September 2018. It addressed all the six Amended Grounds of Appeal and set out the council's position in answer to the discrimination claims.

44. By order of 2 October 2018, the Application Notice was listed to be considered at the commencement of the appeal listed for 9 October 2018.

45. An Appeal Bundle extending to 96 pages was assembled for the hearing of the appeal. The Court's standard directions required that counsel for the parties each file a perfected skeleton argument containing cross references to the Appeal Bundle not less than one clear working day before the hearing. Mr Bano furnished a perfected skeleton argument dated 5 October 2018.

The present application

46. At 16.13 on 8 October 2018, Mr Underwood – now instructed for the council – sent an urgent Email to the Court attaching his perfected skeleton argument. At paragraph [18] that skeleton argument reads:

> "The Respondent submits the court must determine the issues under the first and second grounds of appeal for itself, see for example the approach of the Administrative Court (to make findings for itself on the issue of unlawful discrimination and proportionality) in the context of a judicial review including a claim of indirect discrimination in the allocation of housing: *R(XC) v Southwark LBC* [2017] EWHC 736 (Admin); [2017] HLR 24 (13) and the county court in the context of a possession claim, see: *Aster Communities Ltd v Akerman-Livingstone* [2015] UKSC 15; [2015] AC 1399 (10) at [38]."

47. The covering Email message read:

> "Please also ask the judge to note that the local authority is presently considering the position adopted at paragraph 18 of the attached skeleton, concerning the court's jurisdiction to determine the issues to which the discrimination-related grounds of appeal give rise. The local authority's position is that the jurisdictional issue raised by these grounds is a preliminary issue in the proceedings, and it may withdraw the submission that the court has jurisdiction to determine them. In that case, I will of course endeavour to inform the court of any change in position as soon as possible."

48. The council's instructions were secured overnight. At 9.39 the following morning (within an hour of the scheduled commencement of the appeal) Mr Underwood sent a further Email to the court in these term:

> "…please find attached a supplementary skeleton argument on behalf of the local authority, addressing the jurisdictional issues to which the above appeal gives rise. I confirm that I will send a copy of this skeleton to my opponent, Mr Bano, who has been forewarned of these issues and the local authority's position.

49. That Email was accompanied by a "Skeleton Argument – Jurisdiction" which at paragraph 3 reads:

> "Grounds [1 and 2] require the court to consider, as a preliminary issue, whether it has jurisdiction to determine such claims under Part 7 and, more particularly, s.204 Housing Act 1996."

50. Upon the appeal being called-on, I took first the council's application to adduce its evidence (see paragraph 41 above). Mr Bano indicated that it was not opposed and, accordingly, I allowed it.

51. Mr Underwood then sought permission to take his new 'jurisdiction' point orally and at short notice. Again, Mr Bano indicated that such permission was not opposed and, accordingly, I granted it.

52. As formulated by Mr Underwood on his feet, his oral application was that:

> "In exercise of its power under CPR 52.18(1)(a), the court should strike out part of the Appeal Notice, namely Grounds 1 and 2 of the Amended Grounds of Appeal, because it has no jurisdiction to entertain and determine such grounds."

53. I have treated the application as also embracing Ground 3(c) which would, like Grounds 1 and 2, appear not to be concerned with anything done (or omitted to be done) by the reviewing officer but, rather, was addressed to other prior conduct of officers of the council or of the council itself.

54. For the avoidance of doubt, Mr Underwood indicated that no issue was taken with the remaining Amended Grounds of Appeal which he conceded the Court had jurisdiction to entertain.

55. In the course of his submissions to me, Mr Bano appeared to be inviting an interpretation of his Ground 1 which could not be brought within its literal terms. I gave him an opportunity to consider whether he wished to seek to re-amend that Ground or any of his Grounds. In the event, he indicated that he invited the Court to determine the jurisdictional questions on the Grounds precisely as framed in the Amended Grounds of Appeal (see paragraph 38 above).

Discussion and Conclusion on the Application

56. Mr Underwood advanced his application on two alternative footings:

- First, the County Court does not have jurisdiction under Housing Act 1996 s204 to determine claims alleging unlawful discrimination under sections 15 and 19 Equality Act 2010 as advanced in Grounds 1 and 2, nor can it appropriately do so. (*The Equality Act Point*)

- Second, the points of law raised by Grounds 1 and 2 were not points 'arising from' the decision made on 25 June 2018 and were therefore not within the scope of Housing Act 1996 section 204(1) *(The Section 204 Point).*

57. I shall deal with each in turn.

The Equality Act Point

58. Mr Underwood submitted that the statutory jurisdiction exercised by a County Court under the Housing Act 1996, while appellate in form, is supervisory in nature, so that, in effect, the County Court exercises the same jurisdiction as the Administrative Court would in a judicial review: *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5, [2003] 2 AC 430 at [7].

59. He contended that such jurisdiction does not permit the County Court to reach its own decisions about the facts concerning an application for homelessness assistance and that to do so would be in excess of its statutory jurisdiction: *Kruja v Enfield LBC* [2004] EWCA Civ 1769; [2005] HLR 13 at [22]; and *Bubb v Wandsworth LBC* [2011] EWCA 1285; [2012] HLR 13 at [21] and [22].

60. Issues of fact about alleged discrimination might well be canvassed in the County Court if and when it was exercising its originating jurisdiction to determine discrimination claims pursuant to Equality Act 2010 sections 113 and 114.

61. It followed, he submitted, that the County Court has no jurisdiction in a statutory homelessness appeal to determine issues of fact, or make findings of fact, that are a prerequisite to a finding of unlawful discrimination under the Equality Act 2010 sections 15 or 19 such as:

    (a) whether an applicant for homelessness assistance has a disability or other protected characteristic;

    (b) whether there is a causal connection between any such disability or other protected characteristic and a local housing authority's treatment of the applicant; and

    (c) whether the authority's treatment of an applicant was a proportionate means of achieving its legitimate aims.

62. Mr Underwood accepted that, in a homelessness appeal, the County Court would have jurisdiction to review a decision by a reviewing officer that the council had not discriminated against the Appellant, by requiring her to accept or refuse its offer of accommodation within four to six days of its receipt. In that case, he acknowledged, the Court would be exercising its statutory, supervisory jurisdiction and would not be required to make findings of primary fact. I need not determine whether such concession was correctly made.

63. He submitted, however, that - in any event - that was not what the Appellant invited the Court to do in this appeal.

64. Mr Bano countered that the County Court had ample jurisdiction to determine whether, for the purposes of Grounds 1 and/or 2, the council had been guilty of breaches of the prohibitions on unlawful discrimination in Equality Act 2010 sections 15 and 19.

65. Such discrimination had, he submitted, arisen in the context of Part 3 of the 2010 Act (services and public functions) and/or Part 4 (premises). In either case, the County Court was the tribunal vested by the 2010 Act with jurisdiction over matters falling under those Parts.[10]

66. When the County Court was exercising supervisory powers akin to those of the High Court, it should not be debarred from examining allegations of discriminatory conduct by a local housing authority which the Administrative Court had recently shown, in a housing related context, could be raised in a claim for judicial review. Reliance was placed on *R(on the application of XC) v Southwark LBC* [2017] EWHC 736 (Admin), [2017] H.L.R. 24, (2017) 20 C.C.L. Rep. 338.

67. Mr Bano was driven to assert - in order to make good his point that Equality Act 2010 section 114 vested the County Court with jurisdiction - that a statutory appeal to the County Court could be used as a vehicle to "determine a claim" of discrimination even where: (a) no proceedings by way of such claim had been brought; and (b) there were no admitted and uncontested facts such as to enable the court to determine the claim without finding the facts.

68. In my judgment, Mr Underwood is correct on *The Equality Act Point* essentially for the reasons given in his argument.

69. The Equality Act 2010 section 113 is careful to constrain access to, and the availability of, remedies for breach of that statute. It provides that proceedings for contravention "must be brought" in accordance with its terms. Those terms contain, inter alia, time limits,[11] particular statutory defences available to defendants, and limits on the availability of remedies.

70. If a statutory appeal constituted "a claim" it would escape those strictures of the 2010 Act. As Mr Underwood submitted, the 'defendant' would by that means be deprived of such protections as offered not only by the 2010 Act but also by access to the provisions of the Civil Procedure Rules which relate only to claims. There would be no particulars of claim, no defence, no disclosure, no witness statements, no witnesses, and no access to facilities such as the ability to apply for summary judgment in favour of a defendant.[12] Those points were unanswerable.

[10] Equality Act 2010 section 114
[11] Equality Act 2010 s118
[12] CPR Part 24.

71. To my mind, and even more telling, is the inappropriateness of the Court's powers in a section 204 appeal (to vary, quash or confirm a reviewing officer's decision) for a case in which the real issue would be whether the council's conduct and procedures - at a stage well before any review from such an officer had even been sought - had been discriminatory.

72. Mr Bano suggested that if the council were found on an appeal to have been guilty of such discrimination, a declaration to that effect might be granted and damages might then later be obtained (if sought at all) in a second and separate civil claim under Equality Act 2010 section 114. This seemed to me both unattractive and unrealistic.

73. The answer to Mr Bano's point relying on *R(XC)* is that Equality Act 2010 section 113(3)(a) expressly lifts the inhibition on raising points under that Act where a court is dealing with "a claim for judicial review". A statutory appeal is not such a claim.

74. The simple truth is that embarking on an allegation of unlawful discrimination in a section 204 homelessness appeal would require the court to resolve disputes as to primary fact wholly outwith the true framework of a statutory appeal.

75. If, as in *Kruga*, a homelessness appeal does not permit a judge of the County Court to determine whether a person is "mentally ill"[13] how is a judge permitted to determine if an Appellant is "disabled" or has some other protected characteristic?

76. *A fortiori*, that restriction has application to the present case in which the reviewing officer expressly found "that you do not meet the definition of disability".[14] Disability is the only protected characteristic mentioned in Grounds 1 and 2. Moving beyond that issue, how would the judge on the appeal find or resolve the facts relating to such matters as 'causation' or 'proportionality' essential to many Equality Act 2010 disputes?

77. As Lord Neuberger MR said in *Bubb*:

> "there is no jurisdiction under the statutory scheme for the county court to set itself up as a finder of the relevant primary facts"[15]

78. It might be suggested that this conclusion on jurisdiction allows a reviewing officer to rely on an earlier 'wrong' (a council's earlier discriminatory treatment of an applicant) to ground a decision adverse an applicant's interests. To that extent the council is relying on its own wrongful discrimination, just as had been asserted in *Malcolm v Lewisham LBC,*[16] and the House of Lords had there permitted the defendant to take that point. As Lord Bingham had said at [19]: "Parliament has

---

[13] *Kruga* at [22]
[14] Reviewing officer's decision, page 9 last paragraph.
[15] *Bubb* at [20](v).
[16] [2008] UKHL 43 | [2008] 1 A.C. 1399

enacted that discriminatory acts proscribed by [statute] are unlawful. The courts cannot be required to give legal effect to acts proscribed as unlawful".

79. In my judgment, there are two answers to that suggestion. First, *Malcolm* acknowledged a possible defence to a claim. It says nothing as to the scope of a statutory appeal. Second, the reviewing officer in a homelessness case is not, in my view, required to start from a premise that an earlier policy, practice or action of the council was unlawful or to investigate its legality. *A fortiori* in this case, in which no such assertion was made in the review request or in any representations to the reviewing officer.

The Section 204 Point

80. This alternative basis for Mr Underwood's application to strike out raises broader questions on the true reach of a section 204 appeal and the limits (if any) to the grounds that an appellant in such an appeal may deploy. Although my judgment (above) on the first basis for the applications is determinative, the points raised on the second basis are important in their own right and run beyond Grounds 1 and 2 so as, in my mind, to call into question the jurisdiction of the Court over the point advanced at Ground 3(c).

81. Mr Underwood submitted that the points of law raised here by Grounds 1 and 2 were not, in truth, points 'arising from' the reviewing officer's decision of 25 June 2018, within the meaning of section 204. Rather, they were points arising from a policy or practice of the council or the decision of another council officer (requiring the Appellant to accept or reject an offer of accommodation within four to six days of receipt) which was antecedent to the council's primary (as distinct from 'review') decision that its duty had ended. The same is true of the assertion in Ground 3(c).

82. Mr Bano countered that the scope of a County Court section 204 appeal had been authoritatively settled to be as broad as that of the Administrative Court in judicial review; any public law point capable of being taken in the latter forum could be pursued in the former. He submitted that Mr Underwood's application was seeking to narrow or cut down avenues of challenge that might be pursued against a reviewing officer's decision on appeal. The issue in the instant case was whether the council "had validly discharged its [main housing] duty" just as in *Nzamy v Brent LBC* [2011] EWCA Civ 283; [2011] H.L.R. 20. There should be no fetter on the public law challenge that might be mounted in such a case.

83. Mr Bano submitted (and Mr Underwood appeared to accept) that grounds of appeal in homelessness appeals under section 204 not infrequently raised points addressing the illegality of some prior policy of a local housing authority or some failure earlier in the process of the handling of a homelessness application which was asserted to

represent a breach of, for example, the duty in Equality Act 2010 section 149[17]. Indeed, the question of whether the reviewing officer's decision was reached as a result of his non-compliance with that duty is itself raised by Grounds 3(a) and 3(b) to which no objection was taken.

84. It was from this juncture in the argument that the tension between the authorities relied upon on by each party emerged. Not least, on the question of whether it could be maintained by an appellant on a section 204 appeal that a procedure or policy adopted by a council and applied to their application (before any discharge of the duty owed to them or any decision of a reviewing officer) was unlawful – in public law terms - and that such unlawfulness infected the subsequent decision(s).

85. Examples readily spring to mind. A local housing authority might have all manner of procedures and policies that apply to the receiving and processing of applications and as to the handling or treatment of applicants. Not least as to what accommodation or other services to provide, how and when and where.

86. Although it was an authority against him, Mr Underwood very properly drew attention to *Tachie v Welwyn Hatfield BC* [2013] EWHC 3972 (QB) [2014] PTSR 662 in which, in the context of a section 204 appeal, there was raised a challenge to the local housing authority's decision to contract-out its statutory review functions. Mr Justice Jay held that the words 'arising from' in section 204 were to be given a broad meaning. At paragraph [17] he stated that:

> "The point has not previously arisen for judicial determination but in broad terms it is quite clear both on principle and authority that the statutory appeal on a point of law in this class of case is designed to operate in exactly the same way as judicial review, and that <u>any ultra vires issue</u> (in the sense explained by the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147) is therefore capable of being taken. I discern no merit in the argument that "arising from" should be read restrictively. Furthermore, had there been any merit in this somewhat arid and technical point I could always have reconstituted myself as an Administrative Court possessing the judicial review jurisdiction which Mr Bhose agrees is ample enough to encompass challenges of this nature. In my judgment, section 204 is sufficiently broad to permit Mr Vanhegan to raise the various matters which he seeks to under the umbrella of the common issues, and I must therefore proceed to address the merits of his case."

87. Mr Underwood submitted, however, that this construction of section 204 has been neither applied nor followed and, in fact, had since been doubted. In a postscript to *Panayiotou v Waltham Forest LBC* [2017] EWCA Civ 1624; [2018] QB 1232, at [90] Lewison LJ had stated that:

[17] As in *Hotak v Southwark LBC* [2016] AC 811.

> "I cannot leave this case without expressing my disquiet that such wide ranging challenges to the actions of a local authority as Mr Smith has argued are permitted to arise in appeals under section 204 of the Housing Act 1996. The scope of such an appeal was not argued in *De-Winter Heald* and although in *Tachie* Jay J held that such arguments were available to an appellant under section 204, I would not regard the point as by any means settled. The original right to apply to the Administrative Court for judicial review was transferred to the County Court because County Courts were thought to have expertise in housing, not in administrative law generally. The right of appeal against a decision on review is a right limited to a point of law arising from the review decision, whereas in substance the points raised are challenges to Haringey's antecedent decision to contract out its functions. The right of appeal under section 204 is unfettered, whereas an applicant for judicial review requires the permission of the Administrative Court. Time for the making of an appeal under section 204 runs from the date when the appellant is notified of the review decision, whereas the substantive decision to contract out may have been made many years beforehand; and an application for judicial review would therefore be out of time. In addition, challenges to public procurement decisions are in general susceptible to challenge under the prescriptive regime laid down by the Public Contracts Regulations 2015 (SI 2015/102). Mr Vanhegan referred us to the decision of this court in *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] PTSR 749. In that case it was decided that a person might be able to challenge a public procurement decision by judicial review if he has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way; and that he may have such an interest if he can show that performance of the competitive tendering procedure might have led to a different outcome that would have had a direct impact on him: see para 77. This is certainly not an invitation to pursue technical points that do not affect the individual. Mr Smith was entitled to a decision which was lawful in the sense that the test required by the Housing Act 1996 had to be correctly applied, irrespective of the person who applied it. This question was not, however, formally in issue on this appeal and Mr Vanhegan fairly argued that we ought not to decide it. I reluctantly agree; so what I have said on this topic is entirely obiter (a practice which I usually deprecate)."

88. Mr Underwood might have made the additional point that the course open to the judge in *Tachie* (to re-constitute himself as a judge of the Administrative Court) is not open to any judge of the County Court hearing a section 204 appeal.

89. At the conclusion of argument, it seemed to me that these doubts expressed obiter by Lewison LJ were not easy to reconcile with the approach that Lady Hale had taken in *Nzolameso v City of Westminster* [2015] UKSC 22; [2015] 2 All ER 942; [2015] HLR 22. That was a case in which a reviewing officer's decision was said, on a section 204 appeal, to have been rendered in error of law by the application of a prior and unlawful policy of the local housing authority as to offers of accommodation. Lady

Hale stated, while giving guidance to local housing authorities to adopt and publish their policies, that:

> "Indeed, it would also enable a general challenge to those policies to be brought by way of judicial review. In some ways this might be preferable to a challenge by way of an individual appeal to a county court. But it may not always be practicable to mount a judicial review of an authority's policy, and **an individual must be able to rely upon any point of law arising from the decision under appeal, including the legality of the policy which has been applied in her case**." [Emphasis added]

90. It became clear that a further opportunity to give guidance on the matter might arise from an extant appeal before the Court of Appeal and the finalisation of this judgment was stayed to abide that result.

91. On 6 December 2018, the Court of Appeal gave judgment in two linked appeals in turn arising from two section 204 appeals: *Alibkhiet v London Borough of Brent* and *Adam v City of Westminster* [2018] EWCA Civ 2742. The judgment was delivered by Lewison LJ. It cites extensively from the speech of Lady Hale in *Nzolameso*. It contains above paragraph [47] the heading "**Adoption and application of a policy**". It might be thought to have provided an opportunity to resolve the tension between earlier authorities that I have described.

92. As indicated above, I invited and have received helpful written submissions on the implications of this new judgment for the points raised in the instant case.

93. Mr Bano acknowledges that the judgment does not, in fact, directly answer the question before the Court but he draws some comfort from paragraph [48] of Lewison LJ's judgment:

> "Although [Lady Hale] said that the decision in any individual case "will" depend on the policies, it is only necessary to go as far as saying that it may do. The contrary argument must establish that the decision in any individual case cannot depend on the policy. The policy must, of course, be a lawful one; and conformably with public law principles relating to policies there must be room for the exceptional case. But in principle, where a public authority has a lawful policy, then provided that it implements the policy correctly its decision in an individual case will itself be lawful: see, for example, *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546 at [31].

94. Mr Bano submits that, by implication, where a public authority has an *unlawful* policy its decision in an individual case may not be lawful. Further, that the general propositions as to public law illegality discussed in the judgment apply to both the County Court and the Administrative Court. Mr Bano adds, powerfully, that the basis

for the court's jurisdiction to quash a review decision impugned by discrimination is clearer than it is for a decision impugned by a policy that is unlawful for any other public law reason. That is because discrimination is not a matter of discretion

95. Mr Underwood submits that no comfort can be drawn by the present appellant from the recent decision in *Alibkhiet.* Whatever the general meaning and application of that judgment it can have, he submits, no bite on the present case. He contends that the policy, practice or decision criticised by Ms Adesotu - the council's decision to give an applicant a limited time to accept an offer temporary accommodation - preceded not only the review decision, but the precedent decision that the council's duty towards her had ended. It was not, he submitted, a policy or practice applied, or a decision taken, by the reviewing officer; nor was the officer invited to consider its lawfulness; nor was its lawfulness so obvious an issue that the officer should have considered it regardless. For good measure, Mr Underwood took the opportunity to remind me that in Mr Bano's skeleton argument for this appeal (at paragraph [16]) he had written:

> "…the Appellant accepts that the error of law is not contained in the section 202 review decision itself (but rather it is part of an earlier stage of the decision-making process) …"

96. I consider the arguments on the second limb of the strike-out application to be significantly more finely balanced. Like all first-instance judges, I am anxious that the present tension of the authorities on these issues should be resolved.

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

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

99. While further guidance is awaited, I would suggest that a useful 'litmus test' as to whether any particular ground of appeal raises a point 'arising from' a reviewing officer's decision for the purposes of section 204 would be to see whether the ground of appeal in question - often formulated, as here, as "The Respondent…" failed/erred/breached/misdirected/etc - can properly be re-written as: "The reviewing officer…"; "The reviewing officer's decision…"; or, perhaps, "The procedure on review…". If not, the point taken cannot be said to be a point arising from or out of the reviewing officer's decision.

Outcome

100. For all the above reasons, the council's application to strike-out part of the Appellant's Notice is allowed. I would use my powers under CPR 52.18 to strike out Grounds 1, 2 and 3(c) of the Amended Grounds of Appeal for the compelling reason that the Court has no jurisdiction to entertain them.

101. This judgment is being released in draft to counsel in the usual way. I would invite them to submit a suitable Minute of Order which I can make upon the formal handing down of judgment. Attendance is excused.

102. I grant the Appellant permission to appeal from my Order. Moreover, if counsel are able to agree on a route by which I might direct the appeal to the Court of Appeal, I shall make an Order to that effect.

103. The section 204 appeal itself shall be stayed until the expiry of the time limit in which to appeal from my Order. If such appeal is made, the section 204 appeal will be further stayed until the disposal of the appeal from my Order.

HHJ Luba QC

8 February 2019