Neutral Citation Number: [2022] EWCA Civ 601

Case No: CA 2021-000621 & CA 2021-001377

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
STEYN J
CO/716/2020; CO/4291/2020, CO/4413/2020 and CO/3687/2020

And

MATTHEW GULLICK QC SITTING AS A DEPUTY HIGH COURT JUDGE
CO/889/2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 May 2022

Before:
LORD JUSTICE UNDERHILL
(VICE-PRESIDENT OF THE COURT OF APPEAL (CIVIL DIVISION))
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE LEWIS

- -

Between:

THE QUEEN (on the application of

(1) ABDELMOTALIB ELKUNDI
(2) ROBERTA ROSS
(3) CALI HAAJI AHMED
(4) ABDULWARETH AL-SHAMERI) — **Claimants/ Respondents**

- and -

BIRMINGHAM CITY COUNCIL — **Appellant/ Defendant**

Between:

THE QUEEN (on the application of RUBA IMAM) — **Claimant/ Appellant**

- and -

LONDON BOROUGH OF CROYDON — **Defendant/ Respondent**

- -
- -

Timothy Straker Q.C. Jonathan Manning, Annette Cafferkey, and Annabel Heath (instructed by **Director of Legal Services, Birmingham City Council**) for the **Appellant in the first appeal**
Zia Nabi and Joseph Markus (instructed by **the Community Law Partnership**) for the **Respondents in the first appeal**
Martin Westgate Q.C. and Sarah Steinhardt (instructed by **Deighton Pierce Glynn**) for the **Appellant in the second appeal**
Kelvin Rutledge Q.C. (instructed by **Browne Jacobson LLP)** for the **Respondent in the second appeal**

Hearing dates: 1 to 3 March 2022

Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 4 May 2022.

Lord Justice Lewis:

INTRODUCTION

1. The principal issue in the first appeal is the nature of the duty owed by local housing authorities to homeless persons under section 193(2) of the Housing Act 1966 ("the 1996 Act"). That section provides that a local housing authority "shall secure that accommodation is available for occupation by the applicant".

2. Steyn J ("the Judge") held that the duty imposed an immediate, unqualified and non-deferrable duty on the local housing authority to secure that accommodation is available once it accepted that the applicant was homeless, eligible for assistance, had a priority need and was not intentionally homeless. The appellant local housing authority, Birmingham City Council, ("Birmingham") contends that the Judge erred as the duty was not an immediate and unqualified duty to secure accommodation but, rather, a duty to secure that accommodation is available within a reasonable period of time, the reasonableness of the period depending upon the circumstances of each case and what accommodation is available.

3. Birmingham also contends that the Judge erred in three other respects. First, it contends that the Judge erred in concluding that Birmingham was operating an unlawful system by placing homeless persons who are owed a duty under section 193(2) on a waiting list and allocating appropriate properties according to the length of time that they had been on the waiting list. Secondly, it contends that the Judge erred in granting a mandatory order requiring it to secure that accommodation was available for the third respondent, Mr Ahmed, within 12 weeks. Thirdly, it contends that the Judge erred in finding that the fourth respondent, Mr Al-Shameri, had not waived his right to accommodation in April 2018 and therefore erred in declaring that Birmingham was in breach of its duty in respect of Mr Al-Shameri between 27 April 2018 and 28 September 2020.

4. The sole issue in the second appeal concerns the circumstances in which a court may in the exercise of its discretion properly refuse a mandatory order to enforce a duty owed under section 193(2). The local housing authority, the London Borough of Croydon ("Croydon"), accepted that it was in breach of its duty as it had failed to secure that suitable accommodation was available for occupation by the respondent, Mrs Imam. Mr Matthew Gullick Q.C., sitting as a deputy judge of the High Court ("the Deputy Judge") declined to grant a mandatory order requiring Croydon to comply with its statutory duty. Ms Imam contends that it was wrong in principle for the Deputy Judge to refuse a mandatory order in the exercise of his discretion.

THE LEGISLATIVE FRAMEWORK

Part VI of the Housing Act 1996: Allocation of Housing Accommodation

5. Local housing authorities have power to provide housing accommodation: see Part II of the Housing Act 1985. Part VI of the 1996 Act deals with the allocation of housing accommodation. Section 159 requires the authority to comply with the provisions of Part VI when allocating housing accommodation. Section 166A requires the authority to have an allocation scheme for determining priorities in the grant of housing and to give reasonable preference to particular groups, including the homeless and those

owed duties under, amongst other provisions, section 193(2). Applicants for housing are placed on the local housing authority's register and properties are allocated in accordance with the allocation scheme as properties become available. In view of the shortage of housing accommodation, it is possible for an applicant to remain on the housing register for many years, sometimes for life, without being allocated housing under Part VI. Housing allocated under Part VI is granted on a secure tenancy or an introductory tenancy (that is a tenancy for a trial period which leads to a secure tenancy).

Part VII of the 1996 Act: The Homelessness Provisions

6. Part VII of the 1996 Act imposes duties in respect of those who are homeless or threatened with homelessness. The provisions of Part VII have been amended over time, including by amendments made by the Homelessness Reduction Act 2017 ("the 2017 Act") which introduced additional duties in respect of cases where applications for assistance were made after 3 April 2018. The provisions of the 2017 Act, however, do not apply in four of the five cases in the present appeals as the applications were made before that date. The amended provisions do apply in one case, that of Mr Ahmed, but the additional duties are not material in his case. For those reasons, the summary below considers only the provisions of the 1996 Act prior to the amendments made by the 2017 Act.

Meaning of Homelessness

7. A person is homeless if he has no accommodation available for occupation by him and any person who normally resides with him as a member of his family or who might reasonably be expected to reside with him: see sections 175(1) and 176 of the 1996 Act. Section 175(3) of the 1996 Act provides that:

> "A person shall not to be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy."

8. Regard may be had to the general circumstances prevailing in relation to housing in the authority's area in determining whether it is reasonable for a person to continue to occupy accommodation: see section 177(2) of the 1996 Act. Section 177(1) provides that it is not reasonable to continue to occupy accommodation if it is probable that that would lead to a risk of domestic violence. The Secretary of State may prescribe other circumstances in which it is, or is not, reasonable to continue to occupy accommodation: see section 177(3) of the 1996 Act.

9. There are, therefore a number of situations in which a person may be regarded as homeless under the 1996 Act. They include circumstances where persons have no accommodation physically available to them at all. They also include situations where persons have some accommodation physically available to them but it is not reasonable for them to occupy it because, for example, it is overcrowded or may not address their needs. The accommodation, for example, may be on an upper floor of a block of flats and the person may have mobility issues. Or the person may have a disability and the property may not be adapted to meet their needs.

10. Furthermore, while it may be reasonable for the person and his family to continue to occupy accommodation for a short period, it may not be reasonable for them to continue to do so in the longer term. In those circumstances, the requirements of section 175(3) are met and the applicant and his family are still homeless for the purposes of Part VII of the 1996 Act even though they are living in accommodation which is, at present, reasonable for them to occupy: see the speech of Baroness Hale, with whom the other members of the House of Lords agreed, *Ali v Birmingham City Council* [2009] UKHL 36, [2009]1 W.L.R. 1506, especially at paragraphs 34 to 38.

11. A person is threatened with homelessness if it is likely that he will become homeless within 28 days (now amended by the 2017 Act to 56 days): see section 175(4) of the 1996 Act.

The Duties Imposed by Part VII of the 1996 Act

12. A person may apply to the local housing authority for accommodation. If the authority have reason to believe that he is or may be homeless or threatened with homelessness, they must carry out certain inquiries to determine if the person is eligible for assistance (which largely depends upon his immigration status) and whether any of the duties under the 1996 Act are owed to him. They must notify the person concerned of their decision and, if any issue is decided against the person's interests, give reasons for the decision: see section 184 of the 1996 Act.

13. An interim duty may be owed pending the outcome of these inquiries in cases of apparent priority need: see section 188 of the 1996 Act. Persons having a priority need are defined to include a pregnant woman, a person with whom dependent children might reside, a person who is vulnerable as a result of specified circumstances such as old age, mental illness or physical disability, or a person who is homeless as a result of an emergency such as flood or fire or other disaster: see section 189 of the 1996 Act. Section 188 provides, so far as material, that:

> **"Section 188. Interim duty to accommodate in cases of apparent priority need.**
>
> (1) If the local housing authority have reason to believe that an applicant may be homeless, eligible for assistance and have a priority need, they must secure that accommodation is available for the applicant's occupation."

14. The provisions of Part VII impose other duties depending on the outcome of the authority's inquiries. By way of example, section 190 of the 1996 Act imposes a duty in respect of eligible persons who are homeless and have a priority need but who became homeless intentionally. There, the duty on the local housing authority is to secure that accommodation is available for the person's occupation "for such period as they consider will give him a reasonable opportunity to secure accommodation" together with advice and assistance: see section 190(2) of the 1996 Act. If the housing authority are satisfied that a person eligible for assistance is threatened with homelessness, has a priority need and is not homeless intentionally, the duty is to "take reasonable steps to secure that accommodation does not cease to be available for his occupation": see section 195(2) of the 1996 Act.

The Section 193 Duty

15. The duty under section 193(2) of the 1996 Act, often referred to as the "main" or "full" duty, applies when the local housing authority are satisfied that an applicant is homeless, eligible for assistance, has a priority need, and became homeless unintentionally. The material provisions of section 193 of the 1996 Act provide as follows:

> "**193.— Duty to persons with priority need who are not homeless intentionally."**
>
> (1) This section applies where the local housing authority are satisfied that an applicant is homeless, eligible for assistance, and has a priority need, and are not satisfied that he became homeless intentionally.
>
> (2) Unless the authority refer the application to another local housing authority (see section 198), they shall secure that accommodation is available for occupation by the applicant.
>
> (3) The authority are subject to the duty under this section until it ceases by virtue of any of the following provisions of this section.
>
> ….
>
> (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.
>
> (6) The local housing authority shall cease to be subject to the duty under this section if the applicant—
>
> (a) ceases to be eligible for assistance,
>
> (b) becomes homeless intentionally from the accommodation made available for his occupation,

(c) accepts an offer of accommodation under Part VI (allocation of housing), or

(cc) accepts an offer of an assured tenancy (other than an assured shorthold tenancy) from a private landlord,

(d) otherwise voluntarily ceases to occupy as his only or principal home the accommodation made available for his occupation.

(7) The local housing authority shall also cease to be subject to the duty under this section if the applicant, having been informed of the possible consequence of refusal or acceptance and of his right to request a review of the suitability of the accommodation, refuses a final offer of accommodation under Part 6.

(7A) An offer of accommodation under Part 6 is a final offer for the purposes of subsection (7) if it is made in writing and states that it is a final offer for the purposes of subsection (7).

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

(a) accepts a private rented sector offer, or

(b) refuses such an offer.

…..

(7F) The local housing authority shall not—

(a) make a final offer of accommodation under Part 6 for the purposes of subsection (7); or

(ab) approve a private rented sector offer,

unless they are satisfied that the accommodation is suitable for the applicant and that subsection (8) does not apply to the applicant.

…..

(9) A person who ceases to be owed the duty under this section may make a fresh application to the authority for accommodation or assistance in obtaining accommodation.

….”

16. Section 206 of the 1996 Act provides how a local housing authority may discharge their functions under Part VII. It provides, so far as material, that:

> "(1) A local housing authority may discharge their housing functions under this Part only in the following ways—"
>
> (a) by securing that suitable accommodation provided by them is available,
>
> (b) by securing that he obtains suitable accommodation from some other person, or
>
> (c) by giving him such advice and assistance as will secure that suitable accommodation is available from some other person."

17. Section 210 of the 1996 Act provides that local housing authorities must have regard to the provisions dealing with slum clearance and overcrowding in the 1985 Act, and those dealing with housing standards and houses in multiple occupation in Parts 1 to 4 of the Housing Act 2004, in determining whether accommodation is suitable. A local housing authority must, so far as reasonably practicable, secure that accommodation is available for occupation within its district: see section 208 of the 1996 Act.

18. Section 182 of the 1996 Act provides that local housing authorities must have regard to guidance given by the Secretary of State in exercising their functions relating to homelessness. The Secretary of State has issued a Homelessness Code of Guidance for Local Authorities ("the Code of Guidance"). That provides that consideration of whether accommodation is suitable requires an assessment of the accommodation in the light of relevant needs, requirements and circumstances of the homeless person and his household. Space and arrangement are said to be key factors and location is said always to be a relevant factor. Local authorities are told that they will need to consider carefully the suitability of accommodation for households with particular medical or physical needs. Paragraphs 17.7 and 17.8 of the Code of Guidance provide that:

> "17.7 Accommodation that is suitable for a short period, for example accommodation used to discharge an interim duty pending inquiries under section 188, may not necessarily be suitable for a longer period, for example to discharge a duty under section 193(2).
>
> 17.8 Housing authorities have a continuing obligation to keep the suitability of accommodation under review, and to respond to any relevant change in circumstances which may affect suitability, until such time as the accommodation duty is brought to an end."

19. An applicant has a right to request a review of specified decisions of the authority. These include decisions on which duty is owed to the applicant and any decision of a local housing authority as to "the suitability of accommodation offered to him in the discharge of their duty" under, amongst other sections, section 193(2): see section 202 of the 1996 Act. There is an appeal to the county court on a point of law pursuant to section 204 of the 1996 Act.

THE FACTS

The Four Respondents in the First Appeal

20. The following facts are significant for the purposes of this appeal. Birmingham accepted that the duty under section 193(2) was owed to each of the four respondents. The first three respondents were provided with accommodation but each requested a review of its suitability under section 202 of the 1996 Act. In each case, the reviewing officer decided that the "current accommodation is unsuitable". The Judge held that, on a proper interpretation of the decision letters, the reviewing officer had decided in each case that the accommodation currently being occupied by each of the first three respondents and their families was unsuitable. She rejected submissions that the review letters, properly construed, did not mean that the accommodation was immediately unsuitable but meant that the accommodation was suitable in the short term but would become unsuitable in the longer term. See paragraphs 243 to 251 of her judgment in the case of the first respondent, Mr Elkundi, paragraphs 265 to 271 in the case of the second respondent, Ms Ross, and paragraphs 252 to 258 in the case of the third respondent, Mr Ahmed. There is no appeal against those findings. This appeal, therefore, proceeds on the basis that the accommodation that Birmingham had secured for the first three respondents was not suitable. In the case of the fourth respondent, Mr Al-Shameri, Birmingham raised a different issue, namely whether Mr Al-Shameri had waived his right to have suitable accommodation provided under section 193(2) as he wished to remain in his current accommodation.

21. The facts in the respondents' cases are set out fully in the judgment below. The following brief summary is sufficient for the purposes of this appeal.

Mr Elkundi

22. At the time of the hearing before the Judge in March 2021, Mr Elkundi lived with his wife, three sons, who were aged 6, 13, and 23, and two daughters, who were aged 12 and 16. Mr Elkundi suffered from osteoarthritis of the knees which restricted his mobility, particularly climbing stairs. He applied to Birmingham as a homeless person seeking housing assistance on 17 November 2014. On the same day, he was placed on Birmingham's housing register under Part VI. On 16 January 2015, Birmingham provided the Elkundi family with accommodation, pursuant to the interim duty under section 188, in a three-bedroom property which is referred to in this judgment, and the judgment below as "No 40".

23. On 17 March 2015, following a review under section 202 of the 1996 Act, Birmingham accepted it owed Mr Elkundi a duty under section 193(2). It continued to secure accommodation for the family at No 40 (but pursuant to its duty under section 193(2) rather than section 188(1) of the 1996 Act).

24. In March 2017, Mr Elkundi told Birmingham over the telephone that No 40 was unsuitable due, amongst other things, to the impact of his osteoarthritis on his ability to use the stairs. In November 2017, Birmingham offered Mr Elkundi No 40 on a permanent basis but he declined the offer due to his mobility issues.

25. In March 2018, Mr Elkundi submitted a letter from his GP concerning his osteoarthritis. On 7 November 2019, Mr Elkundi's solicitors requested a statutory

review of the suitability of No 40. Birmingham obtained reports from an occupational therapist dated 23 July 2018 and 8 April 2019 which recommended that Mr Elkundi move to a property with level access or a maximum of one or two steps. By a decision contained in a letter dated 3 January 2020, the reviewing officer concluded that:

> "2. I have now completed my enquiries and I consider that your current accommodation is unsuitable on mobility grounds, given the difficulties you have in accessing the accommodation and the recommendations made by the Council's occupational therapist. I have notified the temporary accommodation team and have requested that alternative suitable temporary accommodation is identified as soon as possible."

26. On 24 February 2020, Mr Elkundi brought a claim for judicial review of what was described as the decision not to move him to alternative suitable accommodation. Mr Elkundi and his family were still living in No 40 at the time of the hearing before the Judge in March 2021, that is approximately 14 months after Birmingham accepted that the accommodation provided pursuant to the section 193(2) duty was unsuitable.

Ms Ross

27. Ms Ross is disabled and suffers from multiple serious health conditions. She uses a powered wheelchair and has been a wheelchair user since 2012. Ms Ross requires regular care in the form of overnight care and carers visit regularly during the day.

28. From some time in 2006, Ms Ross lived in a bungalow in respect of which she had an assured tenancy. In September 2013, in light of her deteriorating health, Ms Ross moved out of the bungalow and into her mother's home. On 26 September 2013, Ms Ross applied to Birmingham as a homeless person seeking housing assistance. On 9 December 2013, Birmingham accepted that it owed Ms Ross a duty under section 193(2).

29. Ms Ross continued to live at her mother's home until 19 July 2018 although her mother's home could not be appropriately adapted for a wheelchair user. In October 2015, and again in July 2018, Ms Ross requested that Birmingham secure accommodation for her. Birmingham accommodated Ms Ross for about seven or eight weeks in hotel or bed and breakfast accommodation.

30. On 6 September 2018, Birmingham arranged for Ms Ross to move into a two-bedroom property (referred to in this judgment and the judgment below as "No 45"). No 45 was a semi-detached two-bedroom bungalow, with a wet room, a level path to the front door, off-road parking and a garden. In September 2018, an occupational therapist carried out an assessment and confirmed that No 45 needed to be adapted in various ways to accommodate wheelchair use. In fact, adaptations were not carried out as Ms Ross wanted to move as her mother, carer, friends and her church were all in another area of Birmingham.

31. Ms Ross sought a review of the suitability of the accommodation at No 45 in September 2019. Birmingham did not carry out a review. Ms Ross made a further request for a review in August 2020. By a decision letter dated 23 October 2020

(which replaced an earlier letter which was withdrawn as it was internally inconsistent), the reviewing officer stated that:

> "9 When considering the submissions made, and to the medical supporting information and the opinion of the Council's occupational therapy service, I consider that at the present time it cannot be asserted that your client's current accommodation is suitable for her under the relevant legislation, and that the only conclusion is that the accommodation is unsuitable. I would however state that I consider that this situation has occurred largely as a consequence of your client accepting the accommodation as was and then a short time later refusing to allow the identified adaptations to be carried out and instead wanting to move from the property; had your client agreed to the approved adaptations in August 2019 they would have been carried out and the accommodation would have met your client's mobility needs and been suitable for her. However, given that the Council remains under the section 193 duty at this time, it is apparent that the accommodation is presently unsuitable and that it unlikely that this will change given that no adaptations are scheduled as your client has refused these to take place at this particular property."

32. The letter confirmed that the offer to adapt Ms Ross's current accommodation at No 45 remained available subject to the condition that Ms Ross would have to agree to accept an offer of the accommodation under the relevant legislation with the proviso that the necessary adaptations would be carried out to render it suitable for her needs.

33. By a claim form issued sometime after 11 November 2020, Ms Ross brought a claim for judicial review of Birmingham's failure to secure suitable accommodation for her pursuant to its duty under section 193(2) of the 1996 Act.

Mr Ahmed

34. Mr Ahmed is a single parent, living with seven of his eight children. His oldest son, who is now in his mid-twenties, moved out in September 2019. His other seven children were aged 8, 12, 13, 15, 16, 19, and 20 at the time of the hearing before the Judge. Mr Ahmed's then eight-year-old son has been diagnosed with severe autism and epilepsy. His disability is such that he receives disability living allowance with both higher rate care and mobility components. Mr Ahmed's then 13-year-old daughter has a deformity in her right leg which causes her to walk with crutches.

35. On 29 October 2018, Mr Ahmed applied to Birmingham as a homeless person seeking housing assistance. On 18 February 2019, Birmingham concluded its section 184 inquiries and determined that it owed Mr Ahmed a duty under section 193(2).

36. On 21 March 2019, Birmingham offered Mr Ahmed temporary accommodation in a three-bedroom property referred to in this judgment and the judgment below as "No 165". Mr Ahmed accepted the accommodation offered and sought a review of its suitability on 8 October 2019. By a decision contained in a letter dated 18 October 2019, the reviewing officer stated that:

> "2. I have now completed my enquiries and I consider that your current accommodation is unsuitable on the basis of overcrowding. I have notified the temporary accommodation team of my decision and have requested that they identify alternative suitable temporary accommodation as soon as possible.

37. By a claim form issued on 23 November 2020, Mr Ahmed sought judicial review of Birmingham's failure to move him and his household into suitable accommodation in performance of their duty under section 193(2) of the 1996 Act. The Judge described the evidence of the family's living conditions at the time of the hearing before her in March 2021 in the following terms:

> "35. The Ahmed family are still living at No 165. Mr Ahmed has explained that three of his sons (the 16, 15 and 12 year olds), and his 13-year-old daughter, share one bedroom which has two bunk beds. Mr Ahmed and his eight-year-old son sleep in a second bedroom. Mr Ahmed's 20-year-old son, who is studying engineering at university, sleeps in the third and smallest bedroom. He has a bed and a small desk, but the room is so small that the bed prevents the door being closed, which is distracting when he studies, particularly because of the behaviour of Mr Ahmed's autistic eight-year-old son. At the time of the hearing, Mr Ahmed's 19-year-old daughter was temporarily living with her mother, but the Council acknowledged that she normally resides with Mr Ahmed (within the meaning of section 176). Although the Council accepts No 165 is overcrowded, the Council draws attention to the fact that in addition to three bedrooms, the property has a living room, in which it is suggested some of the family could sleep if they chose."
>
> 36. Mr Ahmed has given evidence that his 13-year-old daughter was due to have an operation in September 2020 to tighten her calf and to balance her feet. The operation could not go ahead because, while she recovers from the operation, she will not be able to use stairs and so will need a bedroom on the ground floor, which is not available at No 165 as there is no bedroom or living room on the ground floor."

Mr Al-Shameri

38. Mr Al-Shameri lives with his wife, four daughters and two sons. His youngest daughter was born in December 2020. His other three daughters were 8, 12, and 15 years old, while his two sons were 2½ and 8 years old, at the date of the hearing before the Judge. Mr Al-Shameri's younger son is severely disabled. He was diagnosed at birth with complete agenesis of the corpus callosum and has motor delay with low truncal tone. He is also diagnosed with Gene 8 syndrome, a condition that involves heart and urinary tract abnormalities, moderate to severe intellectual disability and distinctive facial appearance, and talipes, a deformity of the ankles which means he cannot walk.

39. Mr Al-Shameri's wife had an assured tenancy in respect of a housing association property referred to in this judgment and below as "No 5". It was described in the tenancy agreement as a "two-bedroom, three person house". When they moved into No 5 in October 2006, the couple had only one young child. No 5 comprised two living rooms and a kitchen (downstairs), and two bedrooms and a bathroom (upstairs). One of the bedrooms was a double room and the other was a small single room. As the family increased, the two boys slept in the double bedroom with their parents and the three girls slept in the other bedroom. Following the birth of their sixth child, the youngest daughter, in December 2020, the older boy moved into the second bedroom where he and his three older sisters slept on mattresses which were laid wall-to-wall across the floor.

40. On 30 January 2018, Mr Al-Shameri applied to Birmingham as a homeless person seeking housing assistance. At that stage, he and his wife had four children and his wife was pregnant with their fifth child. The question arose as to whether Mr Al-Shameri should be provided with alternative accommodation under the interim duty provided for in section 188 of the 1996 Act pending the outcome of Birmingham's investigations. Mr Al-Shameri preferred to remain in the housing association flat at No. 5, where his wife was an assured tenant, rather than move to accommodation provided under section 188 of the 1996 Act.

41. The decision on Mr Al-Shameri's homelessness application was contained in a five-page letter dated 27 April 2018. In that letter, Birmingham accepted it owed Mr Al-Shameri the main housing duty under section 193(2) of the 1996 Act. In relation to whether Birmingham should now secure suitable accommodation, even if short-term or temporary, the letter said that:

> "You have agreed with the council to remain 'homeless at home' rather than be placed in temporary accommodation. I must stress that the Council does have a duty to provide you with suitable temporary accommodation. If your circumstances change, or if you are asked to leave your current accommodation, you must contact us immediately so that we can make arrangement to provide you with temporary accommodation. Regrettably, it is not possible for us to predict at this stage where or what temporary accommodation you will be offered."

42. Birmingham took no steps to accommodate Mr Al-Shameri at that stage as it considered that he wished to remain in his current accommodation. However, he was not asked, after Birmingham had accepted that it owed him the main duty under section 193(2), whether he still wished to remain in the current accommodation or whether he wished to be provided with suitable, even if short-term, accommodation under section 193(2). Nor was he informed of what the consequences would be at that stage of waiving the right to have accommodation secured for his occupation. In the light of that, the Judge found that Mr Al-Shameri had not waived his right to have accommodation secured for him. Birmingham was therefore in breach of its duty from 27 April 2018.

43. By a claim form issued on 8 October 2020, Mr Al-Shameri sought judicial review of Birmingham's failure to secure suitable accommodation. On 16 November 2020,

Birmingham offered Mr Al-Shameri temporary accommodation in a three-bedroom property referred to in this judgment and the judgment below as "Flat 6" from 23 November 2020. Flat 6 was a flat on the second floor of a block (that is, two floors above ground level). There is no lift access. The three bedrooms and one living room are on the same level. No assessment of need was carried out before this offer was made. Mr Al-Shameri viewed the property on 23 November 2020 and refused the offer. A letter from his solicitors dated 24 November 2020 notified Birmingham of his reasons for doing so. Following a request to review the suitability of Flat 6, Birmingham determined that it was suitable. Mr Al-Shameri had a right of appeal against that decision to the county court under section 204 of the 1996 Act.

The Allocation of Housing in Birmingham

44. The housing situation in Birmingham, and Birmingham's system of allocation of properties to homeless persons is described in detail in the Judge's judgment at paragraphs 88 to 112. The following are the material facts for the purpose of this appeal.

45. Birmingham is the largest local authority in England. In 2019, it was estimated that it had a population of 1,141,816 living in approximately 451,664 houses. In December 2020, Birmingham had 60,673 units of housing stock that it owned, of which 58,738 were already let. It had 14,209 people on its housing list waiting to be allocated Part VI accommodation.

46. In terms of homelessness, as at 22 February 2021 there were 3,575 households owed a duty under sections 188 or 193 of the 1996 Act and who were provided with accommodation by Birmingham. It maintained a Planned Move List (the "PML") which contained 702 of those 3,575 households who were to be moved to other accommodation. Some on the PML were in accommodation that was suitable in the short or medium term but would not be suitable in the long term. Others on the PML were in accommodation which was unsuitable at present. If the situation were reached where that person and his household could not stay another night in the accommodation, they would be moved to emergency accommodation (usually bed and breakfast accommodation).

47. Birmingham had no written policy governing the way in which accommodation under Part VII is secured for homeless persons. There is no legal obligation on a housing authority to have a written policy. Nevertheless, it is good practice for a local housing authority to have a policy explaining how properties are allocated to homeless applicants. Such policies may help structure and improve decision-making, ensure that individuals understand the basis of decisions, and reduce the risk of legal challenges. Baroness Hale recognised the desirability of housing authorities having such policies at paragraphs 39 and 40 of her judgment in *Nzolameso v Westminster City Council* [2015] UKSC 22l; [2015] PTSR 549.

48. The PML was arranged by reference to the number of bedrooms that a household needed and by date order, the date for an individual applicant being either the date when they applied for assistance or when they were placed on the PML. The evidence was that Birmingham has a list of properties used for Part VII purposes. Each morning Birmingham's officers would receive a list of empty properties. The officers would match the property to persons on the PML. That was done by identifying the

number of bedrooms in the property, its location and whether it had adaptations. Once a match had been made with applicants seeking a property with that number of bedrooms, the property was offered to the person who had been longest on the PML. If the property was adapted, the property was offered to the person whose needs matched that property and who had been longest on the PML. Birmingham has properties with one, two, or three bedrooms earmarked for Part VII housing. It owns four-bedroomed houses but those are not earmarked for Part VII housing. If a five-bedroomed property is needed, Birmingham has to secure that type of accommodation from the private sector. Over the three years prior to the hearing, it had secured, on average, six five-bedroomed properties a year.

The Second Appeal – Mrs Imam

49. Mrs Imam is the mother of three children. She is a wheelchair user and is disabled within the meaning of section 6 of the Equality 2010 Act ("the 2010 Act"). Mrs Imam first applied for assistance as a homeless person in about February 2014. Croydon first accommodated her and her children in bed and breakfast accommodation in the borough. Croydon carried out a disability housing assessment in February 2014. That made a number of recommendations about accommodation including that the bathroom should be on the same level as the bedroom, and there should be a downstairs toilet if the property was on more than one level.

50. Croydon offered Mrs Imam a terraced house ("the property") pursuant to its duties under Part VII of the 1996 Act which she viewed in September 2014. Mrs Imam has lived with her three children in that property since October 2014. Her partner also moved into the property in around March 2019.

51. The property is a terraced house with a large garden, although the garden is not wheelchair-accessible and the family's use of the garden is therefore limited. No issue has been raised regarding the location of the property, in terms of its suitability for access to services such as public transport and schools. The property has been the subject of certain adaptations. There are three bedrooms on the upper floor, one of which (Mrs Imam's) is partly filled by a large lift which also takes up much of the living room below it and which enables Mrs Imam to travel between the ground floor and the upper floor. The only bathroom at the property is on the ground floor; it has been adapted into a "wet room" with a toilet.

52. On about 22 October 2014, solicitors for Mrs Imam requested a review of the suitability of the property setting out reasons why it was not considered suitable. On 3 March 2015, the property was assessed by an occupational therapist as part of the review. The occupational therapist's report identified difficulties. These were that the kitchen units and cooker were not at convenient wheelchair working heights although Mrs Imam had a carer who came in to assist with meal preparation and cooking. There was no wheelchair access to the garden due to the position of a storage cupboard. That cupboard could be removed to improve access but Mrs Imam was recorded as not wanting to remove the cupboard because it was useful for storage. There was no upstairs toilet. The occupational therapist concluded that the property, although not ideal in meeting the recommendations in the disability housing assessment, was sufficient in the short term to meet her essential living needs whilst caring for her children until a more suitable property could be found.

53. Croydon wrote to Mrs Imam stating that it was minded to decide that the property remained suitable and giving its proposed reasons. Mrs Imam was given an opportunity to comment. On 23 April 2015, Mrs Imam's solicitors responded, raising an additional argument as to why the property was not suitable, which was that there was no upstairs toilet and that Mrs Imam, due to difficulties with continence, was unable to reach the ground floor toilet, located in the bathroom, in time during the night. It was stated that she had experienced accidents, on an unspecified number of occasions, which she had found humiliating and distressing.

54. On 5 June 2015, Croydon accepted that the property was not suitable accommodation. The sole reason given for this decision by the defendant was that the only bathroom at the property was on a different floor from the bedroom, which was contrary to one of the requirements that had been specified in the initial disability assessment that had been undertaken in February 2014.

55. Croydon has not offered suitable alternative accommodation and Mrs Imam and her family remain in the property. On 5 March 2020, Mrs Imam brought a claim for judicial review of the failure by Croydon to provide suitable accommodation. The claim was not accompanied by any witness statement explaining the impact of the failure on Mrs Imam. She did make a witness statement in response to Croydon's evidence dealing with specific matters raised in that evidence. These were Mrs Imam's understanding of the system for bidding for properties, the amount of furniture in the living room at the property and the fact that two other properties had been offered to her but neither was suitable.

56. Croydon has accepted that it owes a duty under section 193(2) of the 1996 Act. It accepts that the current accommodation is not suitable. In its evidence, summarised at paragraph 22 of the judgment below, it explained it had a total of 13,433 properties as at the end of June 2020. The number of three-bedroom properties with adaptations within the housing stock was small, significantly less than 10% of the housing stock, and the number of properties with the adaptations required in Mrs Imam's case is likely to be smaller still.

57. It had an allocation scheme for determining priorities for allocating housing accommodation under Part VI. It also had a policy dealing with how it would discharge its duties under Part VII. Its housing stock is used for Part VI housing and some is earmarked for Part VII housing for the homeless. Croydon keeps its pool of properties under review and will move them between Part VI and Part VII as required.

58. There were 5,789 applicants for Part VI housing as at 30 June 2020. They were divided into three priority bands. Of those, 477 applicants were in band 1, that is, the band with highest priority; 2,415 were in band 2 and 2,897 were in band 3. Mrs Imam was also on the housing register for Part VI accommodation (as well as having accommodation secured for her under Part VII) and was placed in band 3. Between 5 June 2015 when Croydon accepted that the property was not suitable for Mrs Imam and 26 March 2020, Croydon allocated 166 wheelchair-adapted properties to applicants on the housing register under Part VI. Mrs Imam was considered for each property but on each occasion the property was awarded to a person on the housing register who had been waiting longer than Mrs Imam. As at 29 July 2020, there were 29 applicants on the housing register who wanted to be re-housed in a wheelchair-adapted, three-bedroomed property. Five applicants were in band 1 and nine were in

band 2. Of the 15 in band 3 (including Mrs Imam), the earliest date of application was 31 March 2004 (that is, the person had been waiting for Part VI housing for 11 years longer than Mrs Imam).

THE JUDGMENTS BELOW

The First Appeal

59. The Judge held that the duty under section 193(2) of the 1996 Act was an immediate, unqualified, non-deferrable duty. It was not a duty to secure accommodation "within a reasonable time". It was immediate in the sense that it arose when the criteria in 193(2) were satisfied and it was unqualified in the sense that the duty had to be performed from the date that it was owed: see paragraphs 162 to 169 of her judgment. At paragraph 170, the Judge said:

> "170. Interpreting the duty as unqualified does not mean that the circumstances in which the local housing authority is seeking to perform its duty are relegated to be considered *only* at the relief stage. First, they are taken into account in determining whether a person is homeless under section 175(3) (see para 122 above). Second, the flexible concept of suitability imports considerations such as the length of time an applicant has been in a particular type of accommodation and the dearth of availability of the type of accommodation the applicant requires in the longer term. However, if the local housing authority has determined that the accommodation it has secured is unsuitable (that being a question for it, subject to appeal) then it follows from the unqualified nature of the duty that so long as the applicant remains in that unsuitable accommodation the authority will be in breach of the main housing duty."

60. The Judge undertook a comprehensive review of the case law. She concluded that her interpretation of section 193(2) of the 1996 Act was consistent with the earlier authorities. She made a declaration accordingly.

61. The Judge further held that Birmingham had been operating an unlawful system for the performance of its duty under section 193(2) of the 1996 Act. First, this followed from the fact that Birmingham considered that a person who was in accommodation which it had decided was unsuitable could be left in that unsuitable accommodation as Birmingham, erroneously, considered that it had a reasonable time to find suitable accommodation. Secondly, a proportion of the applicants on the PML may be in accommodation that was suitable in the short or medium term but who needed to move to other accommodation in the longer term. Birmingham, however, operated the system on the basis of allocating properties as they became available to the next person on the PML who needed a property of that type irrespective of whether their current accommodation was unsuitable at present or would only become unsuitable in the future. The Judge held that simply putting homeless applicants on a waiting list for suitable accommodation failed rationally to distinguish between those whose accommodation was unsuitable at present (and so should be offered other accommodation) and those whose accommodation was suitable in the short or

medium term but would become unsuitable in the longer term. Furthermore, Birmingham had not demonstrated that they had complied with their duty under section 149 of the 2010 Act to have due regard to certain matters, including disability, in the exercise of their functions: see paragraphs 306 to 314 of her judgment. She made a declaration in those terms.

62. In terms of remedies in the individual cases, the Judge made a mandatory order requiring Birmingham to secure accommodation for Mr Ahmed within 12 weeks. Birmingham was in breach of its duty and, whilst the Judge understood it did not wish to allocate its Part VI housing stock for accommodation under Part VII, Birmingham had failed to appreciate the unqualified nature of the section 193(2). It would not be impossible or unreasonably difficult for Birmingham to comply with mandatory orders. Furthermore, the accommodation in Mr Ahmed's case was unsuitable on the basis of overcrowding. The impact of the lack of space was made more severe for the Ahmed family because one of Mr Ahmed's sons has severe autism and epilepsy. Birmingham had been in breach of its duty for 16 months.

63. The Judge would also have made a mandatory order in Mr Elkundi's case. In the event, he was offered accommodation on 12 March 2021 and the Judge made a declaration that Birmingham was in breach of its duty owed to Mr Elkundi under section 193(2) of the 1996 Act between 27 April 2018 and 12 March 2021: see paragraphs 321 to 333 of the judgment below.

64. In the case of Ms Ross, the Judge made a declaration that Birmingham was in breach of its duty but declined to make a mandatory order. Birmingham had been in breach of its duty for seven months. It had secured a semi-detached two-bedroom bungalow, with level access, a wet-room, garden and off-road parking for the car driven by her carer. She had a secure tenancy of that property. The property was unsuitable as it had not been adapted internally for a wheelchair-user. That had a significant impact on Ms Ross as she could not access the kitchen. The Judge determined however that Birmingham had taken all reasonable steps to secure that suitable accommodation was available to her. First, it had decided to make adaptations to the bungalow where Ms Ross lived and had arranged funding. The adaptations were not carried out as Ms Ross wished to move. The offer to carry out adaptations remained if Ms Ross chose to stay there. Secondly, Birmingham was prepared to adapt another property to which Ms Ross might move. It was assisting Ms Ross to obtain another property. She was on the housing register for Part VI accommodation. She was in the highest priority band and had a good prospect of being the highest placed bidder for any property for which she bid. Thirdly, it had given Ms Ross assistance on bidding for properties. Fourthly, it had sought to secure accommodation at a social housing scheme where Birmingham had the right to nominate a certain number of tenants. However, this was unsuccessful as the scheme took the view that Ms Ross' demands and behaviour were such that it felt that Ms Ross would not fit into the scheme with the other residents. The Judge held that Birmingham was taking all reasonable steps to secure accommodation and if the court were to make a mandatory order in the circumstances it would be enforcing the duty unreasonably: see paragraphs 324 to 328 of the judgment below. There is no appeal against the Judge's refusal to make a mandatory order in Ms Ross's case.

65. Finally, the Judge made a declaration that Birmingham was in breach of its duty to Mr Al-Shameri between 27 April 2018 and 28 September 2020. The Judge made no findings in respect of the period between 28 September 2020 and 23 November 2020.

Thereafter, Birmingham had made an offer of accommodation which it said was suitable and it maintained that decision following a review. The appropriate remedy for Mr Al-Shameri in respect of the period after 23 November 2020 was to appeal to the county court under section 204 against Birmingham's decision that the accommodation offered was suitable: see paragraphs 329 to 331 of the judgment below.

66. A question arose as to whether Birmingham would be entitled to reach a decision that accommodation which it had previously found on a review under section 202 of the 1996 Act to be unsuitable was, in fact, suitable. On the facts the Judge held that that issue did not arise for determination. However, she expressed the view, obiter, that a local housing authority would be bound by an earlier decision on a review under section 204 that accommodation was unsuitable. She considered that the 1996 Act did not permit the withdrawal or review of a favourable decision. The Judge would, therefore, it seems, have regarded Birmingham as functus, that is having no function, or power, to reach another decision on the suitability of the accommodation ee paragraphs 281 to 283 of the judgment below.

The Second Appeal

67. The Deputy Judge in the second appeal refused to make a mandatory order requiring Croydon to secure that suitable accommodation was available for Mrs Imam. Although, as was accepted, Croydon was in breach of its statutory duty, the Deputy Judge decided, in the exercise of his discretion, not to make a mandatory order for the reasons set out in paragraphs 81 to 82 of his judgment. The factors identified as relevant to the exercise of the discretion were:

    (1) There was a spectrum of seriousness in relation to breaches of the section 193(2) duty. In the present case, the property had a number of positive features and there was no issue of overcrowding or as to its location. It was accessible via a ramp, had a lift to access the first floor and access to the garden might have been improved if Mrs Imam agreed to the removal of a cupboard. There was no evidence from Mrs Imam establishing that the conditions in which she was presently living were having an extremely serious effect on her, or that the conditions were "intolerable" or that "enough was enough". There was evidence in the form of a letter dated 24 February 2015 from her solicitors that the property was not suitable as there was no upstairs toilet and because, of continence difficulties, Mrs Imam could not reach the bathroom on the ground floor via the lift in time at night. There was no evidence about the present effects of the unsuitable features of the property on Mrs Imam's day-to-day life;

    (2) Croydon accepted that it was subject to the statutory duty and was in breach of that duty. It had considered ways in which the identified deficiency could be remedied. It had considered adaptions albeit the evidence was that it was unlikely to be practicable to carry those out. She had been shown two properties in 2020 (Mrs Imam's evidence was these were unsuitable and the housing department had accepted that). The Deputy Judge accepted that Croydon was "doing what it reasonably can, consistent with the proper application of its policies and the limited resources available to it, to fulfil its statutory duty".

(3) There was a general shortage of accommodation in the area and it was unlikely that a suitable property would be found in the near future; that enhanced, rather than diminished the case for a mandatory order;

(4) Mrs Imam had been waiting a long time, at that stage more than five years, since Croydon determined that the accommodation was not suitable but the effluxion of time was not of itself determinative of whether a mandatory order should be granted;

(5) Croydon's resources were finite. Its estimated budgetary overspend in the current year was £67 million;

(6) Mrs Imam was not now contending that she ought to be granted a secure tenancy of accommodation under Part VI. In any event, the Deputy Judge considered that making such an order would have inevitably had an adverse impact on those higher on the waiting list for Part VI accommodation.

(7) Similarly, purchasing, leasing or building accommodation and paying for adaptations would have a prejudicial effect upon, and would be unfair to, those who had been waiting longer for suitable accommodation under Part VII.

68. The Deputy Judge concluded that he should refuse the mandatory order sought as explained in paragraph 82 of his judgment:

> "82. Taking into account the factors set out above, I decline to grant the mandatory order that is sought by the claimant. In doing so I regard as particularly significant the issue I have addressed in subpara. 81(i) above, regarding the lack of evidence about the impact on the claimant of the conditions in which she is living at the Property. Additionally, whilst the claimant has been waiting a long time for suitable accommodation and it does not appear likely that such accommodation will be provided to her in the near future, there are a number of countervailing factors to consider including the limited resources available to the defendant and the position of other applicants who are also waiting for housing. To that extent, the defendant is placed in an "impossible situation", *per* Arden LJ in *Aweys*."

69. The Deputy Judge also declined to grant a declaration as it was unnecessary to do so, given that Croydon accepted in the proceedings that it had been, and remained, in breach of its statutory duty. The Deputy Judge therefore dismissed the claim for judicial review.

THE APPEALS

70. In the first appeal, Birmingham appeals on five grounds namely, that the Judge erred:

(1) by construing section 193(2) of the 1996 Act as imposing an immediate, unqualified and non-deferrable duty rather than a duty to secure that suitable accommodation is available within a reasonable time;

(2) by holding that the system of putting persons owed a duty under section 193(2) on a waiting list for accommodation was not a lawful means of performing the section 193(2) duty, was irrational and failed to comply with the requirements of section 149 of the 2010 Act;

(3) by applying a test of "impossibility" or "difficulty of compliance" in deciding to grant a mandatory order; the Judge should have asked whether Birmingham had taken all reasonable steps to perform its duty under section 193(2) of the 1996 Act;

(4) by holding that, where a housing authority had decided that accommodation was unsuitable, it was not able to consider subsequently that the accommodation had become unsuitable; and

(5) by finding that Mr Ahmed did not waive his right to accommodation under section 193(2) of the 1996 Act.

71. In the second appeal, Mrs Imam has permission to appeal on the ground that the Deputy Judge erred in principle in dismissing the claim for judicial review and declining to grant any relief in respect of Croydon's breach of duty under section 193(2) of the 1996 Act. Although the ground of appeal refers to any relief, it is clear, read as a whole, that the ground relates to the refusal of a mandatory order. That is confirmed by her notice of appeal where Mrs Imam does not seek a declaration but seeks a mandatory order that Croydon secures suitable accommodation within 12 weeks.

THE FIRST ISSUE - THE PROPER INTERPRETATION OF SECTION 193(2) OF THE 1996 ACT

Submissions

72. Mr Straker Q.C., together with Mr Manning, Ms Cafferkey, and Ms Heath, for Birmingham submits that section 193(2) properly interpreted requires local housing authorities to secure that accommodation is available within a reasonable time of the duty arising, the reasonableness of the period depending on the circumstances of the case and the accommodation available. The duty is not, he submits, one that requires the provision of accommodation immediately the duty arises. That follows from the wording of section 193(2) itself. By requiring that the housing authority "shall secure that accommodation" is available, Parliament intended that the authority would make arrangements for the provision of accommodation in the future. That was consistent with section 206(1)(c) of the 1996 Act which contemplates that one of the ways in which a local housing authority may perform its duties under section 193(2) is giving the applicant such advice and assistance "as will secure that suitable accommodation is available". Further that interpretation is consistent with the fact that the responsibility for management of housing stock rests with the local housing authority and the courts should be reluctant to interpret duties in a way which unduly or unreasonably constrains the housing authority's management powers. Furthermore,

Mr Straker submitted that this Court is bound, in particular, by the decisions in *Codona v Mid-Bedfordshire District Council* [2005] EWCA Civ 925, [2005] 1 H.L.R. 1 and *Slattery v Basildon Borough Council* [2014] EWCA Civ 30, [2014] H.L.R. 16 to hold that the duty is to secure accommodation within a reasonable time. On a proper reading of the speeches in the House of Lords in *Ali v Birmingham City Council*, the House of Lords also interpreted section 193(2) as imposing a duty to secure accommodation within a reasonable time.

73. Mr Nabi, with Mr Markus, for the four respondents in the first appeal, submits that the Judge was correct to conclude that the section 193(2) duty was an immediate, non-deferrable and unqualified duty. There are no words in section 193(2) to qualify the duty or to indicate that it is one to be performed within a reasonable time. By contrast, Parliament has qualified other duties imposed by the 1996 Act. By way of example, the duty imposed by section 195 which is owed to eligible persons threatened with homelessness, is a duty to "take reasonable steps" to help the applicant to secure accommodation. The respondents' interpretation was consistent with the object of the legislation which was to assist those who were homeless as they had no accommodation which it was reasonable for them to occupy.

Discussion

The Statutory Provisions

74. The starting point must be the words of section 193(2) of the 1996 Act read in context and having regard to the purpose underlying the legislation. The context is that Part VII of the 1996 Act deals with the imposition of duties on local housing authorities to persons who are homeless, that is persons who do not have accommodation which it is reasonable for them, and members of their family or household, to continue to occupy. Part VII, including section 193(2), is concerned, therefore, with duties owed "towards individual people who face the immediate problem of homelessness" (per Baroness Hale in *Ali* at paragraph 14).

75. Section 193 of the 1996 Act is structured in the following way. Section 193(1) sets out when the section applies. Section 193(2) describes the content of the duty. Section 193(3) provides that the housing authority are subject to the duty under this section "until it ceases by virtue of any of the following provisions of this section".

76. The section applies when certain criteria are satisfied, i.e. that the local housing authority are satisfied that the person is homeless, eligible for assistance, has a priority need and is not homeless intentionally: see section 193(1). It will have reached that conclusion following its inquiries under section 184 as to whether the person is eligible for assistance and if so, whether any duty and if so what duty is owed to the individual. The local housing authority must then notify the individual of its decision.

77. Section 193(2) defines the content of the duty. The local authority "shall secure that accommodation is available" for occupation. "Shall" in this context means "must". "Secure" in this context means that the housing authority is responsible for ensuring that accommodation "is available for occupation". "Is available" means that suitable accommodation is to be available from the time when the duty is owed, that is from the time when the local housing authority is satisfied that the person meets the criteria

so that the duty is owed to him. The natural reading of those words, read in context, is that, once the duty is owed, the obligation on the housing authority is to ensure that accommodation is available for that person. In that sense, the duty is immediate, arising when the duty is owed. It is non-deferrable and unqualified, in that the duty is to secure that accommodation "is available for occupation", not that accommodation will become available within a reasonable period of time.

78. That interpretation is reinforced by other considerations. First, the interpretation fits with the structure of section 193. Section 193(1) sets out when the section applies. Section 193(3) and following sets out when the duty comes to an end, principally, when the individual accepts a final offer of accommodation under Part VI, that is, he is offered a secure tenancy of a house or an assured tenancy from a private sector landlord (effectively permanent accommodation): see section 193(6) of the 1996 Act. The duty may also come to an end when the individual is offered accommodation which the housing authority considers is suitable but the individual refuses that accommodation (section 193(5) of the 1996 Act). The natural implication is that the duty to secure that accommodation is available is owed between those times – that is, between the duty arising and the duty coming to an end – with the local housing authority being under a duty to secure that accommodation is available between those dates. Secondly, there are no words in section 193(2) to indicate that the duty is qualified and imposes a duty only to secure that accommodation is available for occupation "within a reasonable time".

79. Nor do I consider that section 206(1)(c) of the 1996 Act indicates a different conclusion. That section is concerned with the discharge of all of the local housing authority's functions under Part VII, not merely the duty under section 193(2). Section 206(1) provides that a local housing authority "may discharge" their functions in the following three ways, i.e. (a) by securing that suitable accommodation is provided by them, or (b) by securing that the individual obtains suitable accommodation from some other person, or (c) by giving him advice and assistance as will secure that suitable accommodation is available from some other person. I do not consider that the general, permissive words used in section 206(1)(c) are intended to indicate that the duty under section 193(2) is qualified in some way. Rather section 206 provides that an authority's functions can only be discharged in one of the three ways set out (and not by any other method). It does not prescribe that all three methods must be available for use in respect of each duty, or each set of circumstances. If only two of the methods would discharge the section 193(2) duty in a particular case, and the third would not, the local housing authority will have to use one of the first two methods. Thus, if the actions would not lead to the discharge of the duty, because the duty is one to secure that the accommodation "is available for occupation" and the actions taken under section 206(1)(c) would only secure that accommodation "will become available" in future, that would not be an appropriate method of discharging the section 193(2) duty.

80. There is a further consideration applicable in relation to section 206(1)(c). As explained below, the duty under section 193(2) may be required to be performed over time. There may be different types of accommodation provided at different times. It is possible, for example, that immediate bed and breakfast accommodation will be provided for a few nights together with advice and assistance to ensure that accommodation will be available once the bed and breakfast accommodation comes

to an end. By that means, the duty overall to secure that accommodation is available for accommodation is met. The section 206(1)(c) method may be one part of the way in which the duty is discharged. Interpreting section 193(2) as imposing an immediate duty, rather than a duty to secure accommodation within a reasonable time, does not render section 206(1)(c) meaningless, even in the context of section 193(2).

81. For those reasons, I consider that the Judge was correct to hold that section 193(2) of the 1996 Act imposed an immediate, non-deferrable and unqualified duty and to make a declaration to that effect. It is, however, important to bear in mind that that decision deals with the time when the duty arises and its nature. The duty itself is a duty to secure that accommodation is available for occupation and, by virtue of section 206, that accommodation must be suitable. The duty will continue until it comes to an end in the circumstances prescribed by section 193. Whilst the duty is owed, it is to be performed by securing that suitable accommodation is available. Suitability is, as the Judge said, a flexible concept. It will include factors such as the nature of the accommodation, the length of time that the homeless person has been in the accommodation and his and his family's needs. The lack of alternative accommodation may also be a factor affecting what is suitable in the short or medium term as may the fact that the housing authority has limited resources available to secure accommodation. There may be other factors which are relevant either generally or in a particular case. This judgment is not intended to suggest any exhaustive list of factors capable of being relevant to the question of suitability.

82. In other words, the duty to secure that suitable accommodation is available does not mean that permanent accommodation suitable for long term occupation must be provided immediately once the duty is owed. Different accommodation may be provided at different times to ensure that the duty is being performed. There may be stages on the way to the offer of secure accommodation under Part VI, or an assured tenancy in the private sector. What is suitable may, therefore, evolve or change over time depending on all the circumstances.

83. If, however, a local authority decides that the accommodation that is currently being occupied is unsuitable, then it follows that it must provide other accommodation which is suitable. In the present case, that is what the Judge found that Birmingham had decided. It decided, as appeared from the review decisions, that the current accommodation was unsuitable - not that it was suitable in the short term but would become unsuitable in the long term. Once that position had been reached, then, as the Judge observed at paragraph 170 of her judgment set out above, so long as the applicant remained in that unsuitable accommodation, the local housing authority would be in breach of its duty under section 193(2) of the 1996 Act. The corollary is that local housing authorities will need to consider with care the question that they are addressing. They will need to consider whether the accommodation currently being occupied is suitable in the short or medium term but unsuitable in the longer term, or whether the accommodation is currently unsuitable. They will need to ensure that their decision letters clearly reflect the conclusion that they reach on that issue.

The Case Law

84. I turn next to whether this interpretation of section 193(2) of the 1996 Act is consistent with earlier decisions of the Court of Appeal and the House of Lords. I note that there are decisions of the High Court which differ on the scope of the duty. Some,

such as *R v Southwark London Borough Council, Ex p. Anderson* (1999) 32 HLR 96 and *R v Merton London Borough Council, Ex p. Sembi* (1999) 32 HLR 439, indicate that the duty is to secure that suitable accommodation is made available within a reasonable time. Others, such as *R v Newham London Borough, Ex p. Begum* [2000] 2 All ER 72 and *R (M) v Newham London Borough Council* [2020] EWHC 327 (Admin), [2020] PTSR 1077, take a different view and consider that, once the duty arises, it is a duty to secure that suitable accommodation is available (although the accommodation may only be suitable in the short-term and may need to be replaced with other accommodation in the medium or longer-term). It is not necessary to consider those decisions in greater detail as they are not binding on this Court.

85. The first decision in this Court is *Codona*. There, the local housing authority had accepted that it owed a duty under section 193 of the 1996 Act to a Gypsy who lived with her extended family in a caravan. The applicant wished to be provided with a pitch for her caravan. The housing authority proposed to secure accommodation in a bed and breakfast establishment. The issue was identified by Auld LJ, with whom Thomas LJ and Holman J agreed, as "whether a local housing authority discharges its duty under the 1996 Act to secure suitable accommodation for a homeless gypsy caravan dweller, with an aversion to conventional 'bricks and mortar accommodation', by offering her such accommodation in the form of temporary bed and breakfast accommodation": see paragraph 27 of his judgment. The issue, therefore, was whether the nature of the property offered rendered it unsuitable rather than any question as to whether the duty was immediate and unqualified. Auld LJ reviewed the authorities on suitability which he considered "suggest a number of basic propositions for the criteria of suitability": see paragraph 33. The first three of these concerned matters relevant to suitability such as the needs of the person to whom the accommodation is offered, the range, nature and location of the accommodation as well as its condition and the likely length of occupation. The fourth matter referred to in paragraph 38 was:

> "… where it is shown that a local authority housing authority has been doing all that it could, the court would not make an order to force it to do the impossible. Its duty was to secure the availability of accommodation within a reasonable period of time, the reasonableness of that period depending on the circumstances of each case and on what accommodation was available. In *Ex p. Begum*, Collins J. said at 186:
>
> > "…Parliament had not qualified the duty in any way: it could have done. However, the situation is not quite so desperate as might be thought. While the duty exists, no court will enforce it unreasonably. Mr Luba [counsel for the applicant] accepts that it would be unreasonable for an applicant to seek mandamus within a few days of the duty arising if it were clear that the council was doing all that it could, nor, it is discretion, would a court make such an order. Indeed, permission would probably be refused."

86. It is correct that the second sentence of that paragraph, read in isolation, appears to suggest that the duty is to secure accommodation within a reasonable time. However, I do not consider that that is a decision on the meaning of section 193(2) which binds

this Court. First, the issue in the case concerned the suitability of conventional accommodation, rather than caravan sites, for Gypsies. The issue did not concern the nature of the duty and in particular whether it was an immediate and unqualified duty. That is further made apparent in that Auld LJ was setting out a series of propositions suggested by the case law. It was not necessary for the Court to reach a decision on the question of whether the duty was an immediate duty to secure suitable accommodation, or a duty to secure it within a reasonable time, in order to dispose of the appeal. Secondly, paragraph 38 of the judgment needs to be read with care. The second sentence, read in isolation, appears to refer to the content of the duty. The opening sentence, and the citation that appears immediately after the second sentence are both concerned with the approach of the courts to granting mandatory orders to enforce a duty which has arisen; not to the question of whether the duty is only one to secure accommodation within a reasonable time. I do not consider, therefore, that the decision in *Codona* does bind this Court to find that the duty is to secure suitable accommodation within a reasonable time.

87. The second case relied upon by Birmingham is *Slattery*. That case, again, involved the question of whether the section 193 duty owed to a Traveller who lived with her son in a caravan could be discharged by the provision of conventional bricks and mortar. The relevant ground of appeal in *Slattery* was that the county court judge had been wrong to conclude that he was bound by the decision in *Sheridan v Basildon Borough Council* [2012] EWCA Civ 335, [2012] HLR 454 to find that a local housing authority were not prevented from relying on the absence of available caravan site accommodation by reason of the authority's own alleged failure to exercise their own statutory powers to provide such sites. Counsel for the appellants in that case submitted that it was implicit in paragraph 38 of Auld LJ's judgment in *Codona* that the suitability of accommodation may depend upon whether a local housing authority had been doing all that it could. That, it was submitted, may involve a reviewing officer who is considering the question of suitability under section 204 of the 1996 Act reviewing whether the authority had done all it could to provide caravan sites for Travellers. Counsel submitted that the decision in *Sheridan*, which held that a reviewing officer was not required to consider the adequacy of the authority's policies on site provision for Travellers, was inconsistent with *Codona.* It was in that context that Briggs LJ said at paragraph 32 of his judgment in *Slattery* that:

> "32. I do not read [38] of Auld L.J.'s judgment in the *Codona* case in that way at all. In my view it is concerned with the predicament of a housing authority which arises where it becomes apparent that it has no accommodation immediately available with which to satisfy even the *Wednesbury* minimum test for suitability. In such circumstances the court will give the housing authority a reasonable period of time to find it, by acquisition, conversion, repair or in another suitable manner. It is not concerned with the prior question whether any available property meets the *Wednesbury* minimum."

88. That decision does not bind this Court to find that section 193(2) imposes a duty to secure that accommodation is available within a reasonable period of time. First, that was not the issue that the Court in *Slattery* was deciding. Rather it was dealing with the relevance of the alleged failure of a housing authority to exercise its statutory

powers to provide caravan sites in deciding whether the offer of conventional 'bricks and mortar' accommodation was suitable for a Traveller. Secondly, paragraph 32 of *Slattery* is again dealing with observations on when a court will grant a remedy to enforce the duty. That appears from the reference to "the court giving the housing authority a reasonable time".

89. The next authorities are the decision of this Court in *R (Aweys and others) v Birmingham City Council* [2008] EWCA Civ 48, [2008] 1 WLR 2305 and the decision of the House of Lords in the same case, by then known as *Ali v Birmingham City Council*. In that case, the applicants for housing were all people who were homeless because it was not reasonable for them to continue to occupy their current accommodation because of reasons such as overcrowding. Birmingham accepted that they were each owed a duty under section 193(2) of the 1996 Act. Birmingham adopted a policy of distinguishing between those who had no physical accommodation at all (referred to as street homeless) and those who were occupying accommodation which it was not reasonable for them to continue to occupy (referred to as the homeless left at home). Birmingham secured short term or temporary accommodation for the former group, that is, those who were street homeless. Birmingham did not secure short term or temporary accommodation for the latter group but left them in their existing accommodation notwithstanding the fact that it was not reasonable for them to continue occupying that accommodation.

90. In the Court of Appeal, Ward LJ identified the issue that he considered it was necessary to decide in the following terms at paragraph 36 of his judgment:

> "… is it a lawful discharge of the council's duty under section 193(2) to leave a homeless family in the accommodation they were occupying in circumstances where they were found to be homeless because it would not be reasonable for them to continue to occupy those very premises?"

91. Ward LJ answered that question in the negative. He concluded that if a person cannot reasonably be expected to continue to occupy his present accommodation, and is therefore treated as not having accommodation under section 175 of the 1996 Act, those premises could not be treated as accommodation for the purposes of section 193(2). Leaving a person in those premises, therefore, would not be a lawful discharge of the duty to secure that accommodation is available because those premises were not accommodation for the purposes of Part VII of the 1996 Act: see paragraphs 37 to 40 of the judgment of Ward LJ. In reaching that conclusion, Ward LJ stated that he did not consider it necessary to consider issues such as the scope of the duty under section 193(2), when it arose and what time, if any, was to be afforded to the housing authority to find the accommodation before they were in breach of section 193(2): see paragraphs 35 to 36 of his judgment.

92. Arden LJ agreed with the judgment of Ward LJ on the issue subject to one qualification. She did consider that it was necessary to decide another issue in order to resolve the appeal, namely whether the local housing authority had an interval of time to secure accommodation that would satisfy its duty under section 193(2). Arden LJ held that she was not bound by the decision in *Codona* to find that a local authority had a reasonable time within which to secure that accommodation is available. Her conclusion is expressed in paragraph 65 of her judgment in the following terms:

> "65. In my judgment, the key point is that section 193(2) is expressed in terms of producing a result, namely securing accommodation to be made available. Because the duty is expressed in terms of securing a result, and the context is homelessness, which of its nature requires some urgent action, I do not consider that there can properly be an implication into the statute that it is sufficient to comply with the duty imposed by section 193(2) within a reasonable time. However, I would not (at least without further argument) rule out the possibility that the court may decline to make a mandatory order against a local authority to perform its duty to secure accommodation for an applicant in a case where the local authority is placed in what is in effect an impossible situation: see *Ex p Begum* ."

93. Smith LJ agreed with both judgments. By that, I understand her to have agreed with the judgment of Ward LJ that it was unlawful for a local housing authority to seek to perform its duty under section 193(2) by securing accommodation for the street homeless but leaving those living in accommodation which it was not reasonable to occupy in that accommodation. Smith LJ is also to be taken as having agreed with Arden LJ that it was necessary to decide whether the housing authority had an interval of time for securing accommodation and that it did not. In those circumstances, there is a majority in the Court of Appeal holding that the duty imposed by section 193(2) is a duty to secure that accommodation is made available and is not a duty to secure that accommodation within a reasonable time.

94. The local housing authority appealed to the House of Lords. Baroness Hale, to whose speech Lord Neuberger contributed, gave the leading speech with which Lord Walker, Lord Hope and Lord Scott agreed. Lord Hope also made further observations (with which Lord Scott agreed) on the nature of the duty under section 193(2).

95. Baroness Hale identified the three issues that arose at paragraph 27 of her speech. The material one for present purposes is the first, namely whether accommodation which it is not reasonable to expect the applicant to occupy can nevertheless be suitable accommodation for the purposes of section 193(2). Before dealing with that issue, however, Baroness Hale dealt with the interpretation of section 175(3) of the 1996 Act. That involved considering the following issue:

> "Does section 175(3) mean that a person is only homeless if she has accommodation which it is not reasonable for her to occupy another night? Or does it mean that she can be homeless if she has accommodation which it is not reasonable for her to continue to occupy for as long as she would occupy it if the local authority did not intervene?"

96. Baroness Hale noted that the courts below had assumed that the former was the case and that section 175(3) of the 1996 Act was only concerned with the reasonableness of the occupation of the premises at the present time. If it were assumed that it was no longer reasonable for the person to stay at the accommodation one more night, then it would not be a lawful discharge of section 193(2) to leave the person in that accommodation. However, Baroness Hale interpreted section 175(3) of the 1996 Act differently. As she explained at paragraphs 36 to 38 of her speech:

> "36. However, the language suggests that both sections 175(3) and 191(1) are looking to the future as well as to the present. They do not say "which it *is* reasonable for him to occupy" or "which it *was* reasonable for him to occupy". They both use the words "continue to". This suggested that they were looking at occupation over time. That suggestion was reinforced by the words "would be" and "would have been". These again suggested an element of looking to the future as well as to the present. They contrasted with section 177(1) which provides that "it is not reasonable" to continue to occupy accommodation where there is a risk of violence.
>
> "37. These linguistic reasons are reinforced by the policy of the Act. The words defined in section 175 are "homeless" and "threatened with homelessness". The aim is to provide help to people who have lost the homes to which they were entitled and where they could be expected to stay. Section 175(3) was introduced for a case like the Puhlhofers (*R v Hillingdon London Borough Council, Ex p Puhlhofer [1986] AC 484*), who could no doubt have been expected to stay a little while longer in their cramped accommodation, but not for the length of time that they would have to stay there if the local authority did not intervene.
>
> 38. In the Birmingham case, this interpretation has the advantage that the council can accept that a family is homeless even though they can actually get by where they are for a little while longer. The council can begin the hunt for more suitable accommodation for them. Otherwise the council would have to reject the application until the family could not stay there any longer. The likely result would be that the family would have to go into very short-term (even bed and breakfast) accommodation, which is highly unsatisfactory."

97. Baroness Hale then referred the observations of Lord Hoffmann in *R v Brent London Council, Ex p. Awua* [1996] AC 55 at page 68 that:

> "there is nothing in the Act to say that a local authority cannot take the view that a person can reasonably be expected to continue to occupy accommodation which is temporary … the extent to which the accommodation is physically suitable, so that it would be reasonable for a person to continue to occupy it, must be related to the time for which he has been there and is expected to stay."

98. Baroness Hale said at paragraph 41 to 42 that:

> "41….Those observations were directed to the question of when it ceases to be reasonable for a person to continue to occupy accommodation in the context of the meaning of

> "accommodation", but they apply equally to the point at issue here.
>
> 42. Given that an authority can satisfy their "full" housing duty under section 193(2) by providing temporary accommodation (which must of course be followed by the provision of further accommodation, so long as the section 193(2) duty survives), these observations clearly do not only apply to section 188. They emphasise that accommodation which may be unreasonable for a person to occupy for a long period may be reasonable for him to occupy for a short period. Accordingly, there will be cases where an applicant occupies accommodation which (a) it would not be reasonable for him to continue to occupy on a relatively long-term basis, which he would have to do if the authority did not accept him as homeless, but (b) it would not be unreasonable to expect him to continue to occupy for a short period while the authority investigate his application and rights, and even thereafter while they look for accommodation to satisfy their continuing section 193 duty."

99. It was against that background that Baroness Hale then set out her conclusions on the interpretation of section 175 of the 1996 Act, and the implication of that interpretation for the section 193(2) duty. At paragraphs 46 to 51, she said this:

> "46. However, another tool is now available and in our view it is proper for a local authority to decide that it would not be reasonable for a person to continue to occupy the accommodation which is available to him or her, even if it is reasonable for that person to occupy it for a little while longer, if it would not be reasonable for the person to continue to occupy the accommodation for as long as he or she will have to do so unless the authority take action.
>
> 47. This does not mean that Birmingham were entitled to leave these families where they were indefinitely. Obviously, there would come a point where they could not continue to occupy for another night and the council would have to act immediately. But there is more to it than that. It does not follow that, because that point has not yet been reached, the accommodation is "suitable" for the family within the meaning of section 206(1) . There are degrees of suitability. What is suitable for occupation in the short term may not be suitable for occupation in the medium term, and what is suitable for occupation in the medium term may not be suitable for occupation in the longer term. The council seem to have thought that they could discharge their duty under section 193(2) by putting these families on the waiting list for permanent council accommodation under their Part VI allocation scheme. But the duty to secure that suitable accommodation is available for a homeless family under section 193(2) is quite separate from the allocation of council

housing under Part VI. There are many different ways of discharging it, and if a council house is provided, this does not create a secure tenancy unless the council decides that it should. As we have already pointed out, the suitability of a place can be linked to the time that a person is expected to live there. Suitability for the purpose of section 193(2) does not imply permanence or security of tenure. Accommodation under section 193(2) is another kind of staging post, along the way to permanent accommodation in either the public or the private sector.

48. Hence Birmingham were entitled to decide that these families were homeless even though they could stay where they were for a little while. But they were not entitled to leave them there indefinitely. There was bound to come a time when their accommodation could no longer be described as "suitable" in the discharge of the duty under section 193(2).

49. It may be that, in some, or conceivably all, of the Birmingham cases, a critical examination of the facts would establish that the council were at some point in breach of their duty under Part VII of the 1996 Act. Thus the time it has taken to find Mr Ali suitable accommodation may well be beyond what is defensible. While the council were entitled in principle to leave the families in their current accommodation for a period notwithstanding that it was accepted that that accommodation "would [not] be reasonable for [them and their families] to continue to occupy" (section 175(3)), it must be a question, which turns on the particular facts, whether, in any particular case, the period was simply too long. However, the basis upon which the applicants in the Birmingham cases argued their claims (and succeeded before Collins J and the Court of Appeal) meant that it was unnecessary to consider the detailed facts of their respective cases. Accordingly, once that line of argument is rejected, there is no longer any basis for a decision in their favour.

50. It is right to face up to the practical implications of this conclusion. First, there is the approach to be adopted by a court, when considering the question whether a local housing authority have left an applicant who occupies "accommodation which it would [not] be reasonable for him to continue to occupy" in that accommodation for too long a period. The question is of course primarily one for the authority, and a court should normally be slow to accept that the authority have left an applicant in his unsatisfactory accommodation too long. In a place such as Birmingham, there are many families in unsatisfactory accommodation, severe constraints on budgets and personnel, and a very limited number of satisfactory properties for large families and those with disabilities. It

> would be wrong to ignore those pressures when deciding whether, in a particular case, an authority had left an applicant in her present accommodation for an unacceptably long period.
>
> 51. None the less, there will be cases where the court ought to step in and require an authority to offer alternative accommodation, or at least to declare that they are in breach of their duty so long as they fail to do so. While one must take into account the practical realities of the situation in which authorities find themselves, one cannot overlook the fact that Parliament has imposed on them clear duties to the homeless, including those occupying unsuitable accommodation. In some cases, the situation of a particular applicant in her present accommodation may be so bad, or her occupation may have continued for so long, that the court will conclude that enough is enough."

100. At paragraph 64, Baroness Hale concludes that she would allow Birmingham's appeal:

> "to the extent that it is lawful for them to decide that an applicant is homeless because it is not reasonable for him to remain in his present accommodation indefinitely but to leave him there for the short term. We would not agree that it is lawful to leave such families where they are until a house becomes available under the council's allocation scheme. The present accommodation may become unsuitable before then. We would make a declaration to that effect."

101. Analysing the speech, the basis for Baroness Hale's decision for allowing the appeal is that a person may be homeless for the purpose of section 175 of the 1996 Act if he is in accommodation which it is reasonable for him to occupy at present, albeit that at some stage in the future it will cease to be reasonable for him to occupy. Given that, a local housing authority would not necessarily be in breach of section 193(2) of the 1996 Act by leaving a person who is homeless in his present accommodation. The reason is that it may become unreasonable for him to continue to occupy that accommodation in the medium or longer term but it is not necessarily unreasonable for him to occupy the accommodation at present. A local housing authority would not therefore necessarily be in breach of section 193(2) by leaving a person in his present accommodation as the accommodation may be suitable in the short term.

102. That in my judgment is the *ratio decidendi* of the decision. That is the issue that Baroness Hale (with whom the other members of the House agreed) decided in order to dispose of the appeal. Strictly, Baroness Hale did not reach a decision on the separate question of whether, once it is unreasonable for a person to continue to occupy his current accommodation, the duty in section 193(2) is to secure suitable accommodation immediately or whether the duty is to secure accommodation within a reasonable time.

103. As a minimum, the remainder of the speech of Baroness Hale is consistent with the position that once a person's current accommodation is unsuitable, then the local

authority must immediately secure that other, suitable accommodation is secured (even if that accommodation is only provided on a temporary basis). On one reading, Baroness Hale's speech may in fact go further and it may be implicit that the authority must secure alternative accommodation which is suitable for the time being, once the current accommodation ceases to be suitable. That is the interpretation that Linden J. gave in *M v Newham* at paragraph 93 of his judgment and the Judge in the present case at paragraph 225 of her judgment.

104. I do not consider that the decision of Baroness Hale to allow Birmingham's appeal is only consistent with an interpretation of section 193(2) which provides that a local housing authority is under a duty to secure that suitable accommodation is available within a reasonable period of time. I appreciate that at least in one case (that of Mr Ali) the local housing authority had decided that the current accommodation was in fact unsuitable (not that it was suitable for the short term but would become unsuitable in the longer term). But it is clear from paragraph 49 of Baroness Hale's speech that she was considering the issue of principle given the way that the case had been argued. The local housing authority's appeal succeeded because, as a matter of principle it could be a lawful means of discharging the section 193(2) duty to leave a person in his current accommodation if it were reasonable for him to continue to occupy it in the short term, albeit that it might cease to be reasonable to continue to do so in the longer term. Whether that point had been reached in any particular case would depend upon the facts. As Baroness Hale observed at paragraph 49 of her speech it may be that in some, or possibly all of the six individual cases, "a critical examination of the facts would establish that the council were at some point in breach of their duty" under section 193(2) (and Mr Ali's case might well have been one). But Baroness Hale did not consider it necessary to analyse the facts of the individual cases.

105. In those circumstances, the ratio of the decision of Baroness Hale in *Ali* is to be found at paragraph 46 of her speech. A person may be homeless within the meaning of section 175(3) of the 1996 Act even if it is reasonable for him to continue to occupy the accommodation currently available to him in the short term if the local housing authority are satisfied that it would not be reasonable for him to continue to occupy that accommodation in the longer term. That was the principle with which the other members of the House of Lords agreed. That is the principle which is binding on this Court. The House of Lords did not decide the issue in this case, that is whether on a proper interpretation of section 193(2) of the 1996 Act, the duty of the local authority is to secure that suitable accommodation is available immediately the current accommodation becomes unsuitable or within a reasonable period of time from when the current accommodation becomes unsuitable.

106. It is correct that Lord Hope, with whom Lord Scott agreed, expressed the clear view that the position described by Auld LJ in paragraph 36 of his judgment in *Codona* is to be preferred to interpretation of the duty given by Arden LJ (with which Smith LJ agreed) in *Aweys*. The observations of Lord Hope are not, however, binding on this Court.

107. Against that background, the question arises as to whether this Court is bound by the decision of the majority of the Court of Appeal in *Aweys*. That is the only decision capable of binding this court. In the absence of a decision of the House of Lords or Supreme Court, the instinctive assumption is that the decision of the majority of the

Court of Appeal in *Aweys* is binding upon this Court. However, Taylor LJ (as he then was), with whom the other members of the Court agreed, held that the Court of Appeal was not bound by a decision on a point where the House of Lords subsequently indicated that the case should be decided on a different basis: see *R v Secretary of State for the Home Department ex p. Al-Mehdawi* [1989] 2 WLR 603. If that were correct, the decision of the Court of Appeal in *Aweys* would be persuasive but not binding. I would, in any event, follow the decision of a majority of this Court on the interpretation of a statutory duty where that decision had not been overruled on appeal, at least unless I were satisfied that the decision was wrong. I am not satisfied that the decision was wrong. Indeed, as is clear from my analysis of the statutory provisions, I am satisfied that the decision of Arden LJ, with whom Smith LJ agreed, is correct on the interpretation of section 193(2) of the 1996 Act. That decision has not been overruled by the House of Lords and there is nothing in the decision of the majority of the House of Lords which is inconsistent with it. For those reasons, I would adopt the interpretation given by the majority of the Court of Appeal in *Aweys*.

Conclusion on the First Issue

108. The duty under section 193(2) is a duty to secure that suitable accommodation is available. That duty arises once the criteria in section 193(1) are met. The duty is an immediate, non-deferrable, unqualified duty to secure that suitable accommodation is available. What is "suitable" will depend upon a number of factors. Furthermore, accommodation may be suitable in the short term even if that particular accommodation would not be suitable in the medium or long term. If the duty is owed, and particular accommodation ceases to be suitable, the local housing authority is under a duty to secure that other suitable accommodation is available (whether or not that is also only suitable in the short term) until the duty in section 193(2) comes to an end. I would dismiss the appeal on ground 1.

THE SECOND ISSUE – THE LAWFULNESS OF BIRMINGHAM'S SYSTEM

109. This issue concerns the system adopted by Birmingham to fulfil its duty under section 193(2) of the 1996 Act. In essence, Birmingham placed applicants to whom the duty was owed on a waiting list, the PML, and matched them with suitably-sized properties becoming available so that the person who had been longest on the list was allocated that property.

110. Mr Straker for Birmingham accepts that if the Judge was correct to find that the section 193(2) duty is an immediate, non-deferrable duty, rather than a duty to secure that accommodation is available within a reasonable time, then Birmingham's system was unlawful. However, he submitted that the Judge erred in declaring in addition that the PML irrationally failed to distinguish between persons in suitable and unsuitable accommodation. He submitted that Birmingham matched properties to applicants and therefore there was no element of irrationality in that approach. Further he submitted that the Judge erred in finding that Birmingham had failed to meet its obligations under section 149 of the 2010 Act. That was an obligation to have due regard to certain matters, including disability. Birmingham had done so.

111. Mr Nabi submitted that the Judge was correct for the reasons that she gave.

Discussion

112. For the reasons given above, it was not lawful for Birmingham to place applicants who were owed a duty under section 193(2) *and* whose current accommodation had already been determined to be unsuitable on a waiting list while they took a reasonable time to find alternative accommodation which was suitable. Once Birmingham decided that the current accommodation occupied by a person to whom the duty under section 193(2) was owed was unsuitable, it had an immediate duty to secure that alternative, suitable accommodation was available.

113. Furthermore, the Judge was entitled on the evidence to conclude that Birmingham was operating an unlawful system in that it failed to distinguish between persons who were in suitable and unsuitable accommodation. The evidence was that the waiting list operated by an officer matching applicants against properties as they became available. In cases not involving adapted properties, the matching involved simply identifying the number of bedrooms available at the property and then allocating that to the person who needed that number of bedrooms and who had been on the waiting list for the longest period of time. There was no attempt, on the evidence available, to assess whether the person who was next on the list for a property with a particular number of bedrooms was in accommodation which was suitable in the short term as compared with a person who may have been on the waiting list for a shorter period of time but whose current accommodation was unsuitable. As the Judge said, a proportion of the people on the waiting list were in accommodation which was suitable in the short term, albeit that it would not be suitable in the longer term. Birmingham was meeting its duty under section 193(2) in respect of those people. Where people were currently in accommodation which Birmingham had decided was unsuitable (even in the short term), Birmingham was not discharging its duties to them. A system which failed to differentiate between those two groups and allocated properties by reference to length of time on a waiting list was not a lawful means of discharging the section 193(2) duty.

114. The duty under section 149 of the 2010 Act is a duty to have due regard to the need to eliminate discrimination prohibited by the 2010 Act and to advance equality of opportunity and foster good relations between persons who share a protected characteristic and those who do not. Discrimination on grounds of disability is prohibited and disability is a protected characteristic (see sections 6 and 13 of the 2010 Act). The duty is a duty "to have due regard to" certain matters not a duty to achieve a particular result. There are a number of ways in which a public body could demonstrate that it had had due regard to such matters in the discharge of its functions. It may have carried out an equality impact assessment (although it is not required to do so). That assessment, or other documentary evidence, may demonstrate that a public body has had due regard to the need to the matters referred to in section 149 of the 2010 Act, or that may be apparent from the decision itself or the surrounding circumstances. In the present case, there was no equality impact assessment and no other documentary evidence drawn to the attention of the Judge demonstrating that Birmingham had had due regard to matters arising out of disability. The nature of the system, which involved matching properties based on time on the waiting list, did not of itself demonstrate that Birmingham had had regard to the impact on a disabled person of the period of time spent on the waiting list waiting for suitable accommodation. In those circumstances, the Judge was also entitled to find that Birmingham had not established that it had had due regard to the

matters referred to in section 149 of the 2010 Act. For all those reasons, I would dismiss the appeal on ground 2.

THE THIRD ISSUE – WAIVER OF ACCOMMODATION

Submissions

115. It is convenient to deal with ground 5 next. In essence, Mr Straker submitted that the Judge was wrong to find that Birmingham was in breach of its duty in the case of Mr Al-Shameri as he had indicated that he preferred to stay in his current accommodation whilst Birmingham looked for suitable accommodation for him. He submitted that the Judge was wrong to find that Birmingham had not adequately informed him of his right to have accommodation secured for him and he had waived that right as appeared from the 27 April 2018 letter. Mr Nabi accepted that an individual could waive his right to accommodation but submitted that a waiver had to be fully informed and consent given at the time that the housing authority accepted the duty under section 193(2) of the 1996 Act. Here the judge was correct to find that Mr Al-Shameri had not been informed, or consented to, accommodation not being secured for him under the section 193(2) duty. Rather he had only indicated that he wished to stay in his current accommodation and not have accommodation secured under the interim duty in section 188.

Discussion

116. Section 188 of the 1996 Act imposes an interim duty where the local authority have reason to believe that a person may be homeless, eligible for assistance and have a priority need. The authority must then investigate whether or not any duty is owed and, in the interim, must secure that accommodation is available for the applicant's occupation. An individual may prefer to stay in his current occupation, or stay with family and friends rather than have accommodation secured for him under the interim duty in section 188 and await the outcome of the housing authority's inquiries. That may be a preferable course of action for the applicant for a number of reasons. Interim accommodation may be bed and breakfast accommodation whereas his current accommodation, although inadequate, may be preferable to that. Or an individual may have an assured tenancy of a property and be reluctant to give that up and move into bed and breakfast accommodation before he knows whether or not the local housing authority will be satisfied that duties are owed to him. In that context, the courts have recognised that a local housing authority will not be in breach of its section 188 duty if a person prefers to stay in his current accommodation rather than move to interim accommodation secured by the local housing authority. As Hickinbottom J. put it in *R (Edwards) v Birmingham City Council* [2016] EWHC 173 (Admin), [2016] HLR 11 at paragraph 105:

> "However, so long as the applicant is aware that he is entitled to interim accommodation until a decision is made on the homeless application—and so can make an informed initial decision, and knows that he can return to the Council at any time to request interim accommodation—there is nothing objectionable in this."

117. The parties accept that, in principle, a housing authority may also not ben breach of its duty under section 193(2) if the individual indicates that he prefers to stay in his current accommodation rather than have the authority secure accommodation for him. That again may make sense, at least in the short term. It is recognised that the section 193(2) duty may be performed by the provision of accommodation which is suitable in the short term, followed by the provision of other accommodation which is suitable for the medium or longer term before the duty is brought to an end by the offer of permanent accommodation (i.e. secure Part VI accommodation or an assured tenancy in the private sector). In the initial stages, an individual may well prefer to stay in his existing accommodation rather than move, for the short term, to accommodation secured for him by the local housing authority. However, the individual must be in a position to give a fully informed consent, as recognised by Arden LJ at paragraph 67 of her judgment in *Aweys.* Furthermore, the section 193(2) duty remains in existence and if the individual indicates that he no longer wishes to remain in the current accommodation, the housing authority must then secure that suitable accommodation is available for his occupation.

118. In the present case, the Judge was entitled to find on the evidence that Mr Al-Shameri had not indicated that he wished to remain in his current accommodation rather than have suitable accommodation secured for him under section 193(2) of the 1996 Act. He had indicated that he would prefer to stay in his current accommodation rather than be provided with interim accommodation under section 188 pending the outcome of Birmingham's inquiries. He was never asked whether he wished to remain there once Birmingham had accepted that they owed him a duty under section 193(2). Indeed, the letter of 27 April 2018 was the letter in which Birmingham accepted that it owed a duty to Mr Al-Shameri under section 193(2). It was that letter in which Mr Al-Shameri was told that, so far as Birmingham was concerned, he had chosen to remain in his current accommodation rather than have accommodation secured for him under section 193(2). But Mr Al-Shameri had not indicated that he would wish to remain there if Birmingham accepted that they owed him the full duty under section 193(2).

119. Furthermore, the Judge was entitled to find that the evidence was that, on 30 January 2018, Mr Al-Shameri had been told what type of accommodation he would be provided with under section 188 (and that may have been bed and breakfast accommodation). His wife had an assured tenancy and it is understandable that he did not wish to give that up to move into interim accommodation. The Judge was entitled on the evidence to find that Mr Al-Shameri was not adequately informed about what the position would be now that Birmingham accepted it owed him a duty under section 193(2) which would only come to an end when an offer of permanent suitable accommodation was made. The Judge was right, therefore to hold that Birmingham was in breach of its duty under section 193(2) from 23 April 2018 until it did offer suitable accommodation.

THE FOURTH ISSUE – CHANGES IN ASSESSMENT OF SUITABILITY

120. The fourth issue concerns the question of whether a housing authority which has decided that a person's current accommodation is unsuitable, can subsequently reach a different decision and conclude that it is suitable. The issue does not in fact arise in the present case, as the Judge recognised, as Birmingham has not in fact taken a fresh decision on the suitability of the accommodation. However, the Judge expressed the view, obiter, that a local housing authority would not be able to change its mind and

decide that accommodation was suitable once it had previously decided on a review under section 202 of the 1996 Act that it was unsuitable.

121. This is a matter which should be decided in a case where the issue actually arises for decision. However, I would not want it to be assumed that the obiter dicta of the Judge are correct. It is true that once a local housing authority decides that a person satisfies the qualifying criteria under section 193(2), that is he is homeless, eligible for assistance, has a priority need, and is not homeless intentionally, it cannot change that decision. It lacks power, or authority to do so, and is *functus officio* for the reasons explained by Peter Jackson LJ in *R (Sambotin) v Brent London Borough Council* [2018] EWCA Civ 1826, [2018] PTSR 371. However, that may not be the position in relation to the way in which the section 193(2) duty is performed.

122. The section 193(2) duty arises once the criteria are satisfied and remains in operation until brought to an end by one of the events prescribed in section 193 itself. During that period, the housing authority will have to provide suitable accommodation. What is suitable may differ in the short, medium and long term. Furthermore, there may be changes which may affect the suitability of the accommodation being provided under section 193(2). It may be that an additional child is born, making a house even more overcrowded. Or a person's disabilities may worsen. Those matters may render accommodation that might otherwise have been suitable in the short term unsuitable. Conversely, matters may improve. One or more of the people in the household may move out, that may ease the overcrowding and that may affect the suitability of the accommodation in the short term. Given the continuing nature of the duty, and the circumstances, it may be incorrect to take the view that the local housing authority is "*functus*" and is unable to address changes when considering the suitability of the accommodation it is providing as part of the process of discharging its section 193(2) duty. There may be reasons, however, why it may be contrary to the statutory provisions in section 204 of the 1996 Act governing reviews of decisions for local housing authorities to reach a decision on the suitability of accommodation that differs from the review decision. It may be that a fresh decision can only brought about by a particular method, such as making an offer of the accommodation again on the basis that it is now suitable, which may attract a right of review as the Judge considered possible at paragraph 283 of her judgment. We have not had full argument on those statutory provisions.

123. In those circumstances, this issue is better decided in a case where it arises for decision. Then there will be a proper factual basis against which to consider the issue. There will be full argument on questions such as the concept of an authority being *functus* and on the meaning and significance of the statutory provisions, including those governing statutory reviews. I would not want a court, however, to proceed on the basis that the obiter dicta in the present case are the correct starting point. The matter will need to be considered afresh if it arises for determination.

THE FIFTH ISSUE – THE DISCRETION TO REFUSE A MANDATORY ORDER

Submissions

124. The principal issue in the second appeal concerns the proper approach of the court to the grant of a mandatory order to compel a local housing authority to secure suitable accommodation for the individual. The Deputy Judge declined, in the exercise of his

discretion, to grant a mandatory order. Conversely, in the first appeal, Birmingham challenges the making of a mandatory order requiring it to secure suitable accommodation for Mr Ahmed within 12 weeks.

125. Mr Westgate Q.C., with Ms Steinhardt, for Mrs Imam in the second appeal submitted that the Deputy Judge was wrong in principle to refuse to make a mandatory order. This was a case where there was a long-standing breach of duty with no end in sight. In those circumstances, the court's fundamental constitutional role was to uphold the law as established by Parliament and it was for Croydon to demonstrate with cogent and compelling reasons, based on evidence, why such an order should not be made. He submitted that the Deputy Judge was wrong to approach the issue on the basis of the lack of evidence demonstrating that "enough was enough" (per Baroness Hale in *Ali*) or that the conditions were "intolerable" (per Lord Hope in *Ali).* Mr Westgate submitted that the Deputy Judge had, effectively and impermissibly, placed the burden on the appellant to produce evidence to show why a mandatory order should be granted and then relied on the lack of evidence from Mrs Imam about that as justifying the refusal of a mandatory order. The courts should only refuse a remedy to enforce a duty where a local housing authority, who bore the burden, demonstrated that it had cogent reasons for failing to comply with this duty. The Deputy Judge further erred by having regard to budgetary constraints and limited financial resources when refusing to grant a mandatory order.

126. Furthermore, Mr Westgate submitted that there was inadequate evidence from Croydon to explain why Croydon-owned properties had to be used for Part VI allocations rather than being used to fulfil the duties under Part VII or why private sector property could not be purchased and adapted if necessary. Croydon had also failed to consider using out of borough accommodation. The Deputy Judge had been wrong in law if and insofar as he decided that a local housing authority could not purchase, lease or adapt a property with a view to that property being leased to a particular individual under Part VII.

127. Mr Rutledge Q.C. for Croydon submitted that public law remedies are discretionary. In deciding whether to grant a mandatory order, a court would consider whether a local housing authority was attempting in good faith to discharge its duties, whether the failure to discharge the duty resulted from circumstances over which the authority had no control, and the competing rights of others. Mr Rutledge relied upon *R v Bristol Corporation, Ex p. Hendy* [1974] 1 WLR 498 as establishing those propositions. A court ought to have regard to others who had been waiting for a longer period of time for the allocation of the necessarily limited number of properties available to Croydon.

128. In the first appeal, Mr Straker submitted that the Judge was wrong to grant a mandatory order. He submitted that the test was not one of whether it was impossible for the housing authority to secure that accommodation is available rather the issue was whether the authority had taken all reasonable steps. The Judge erred by asking whether it would be unreasonably difficult for Birmingham to comply with the order. The Judge should have had regard to the fact that Birmingham (which had been allocated the responsibility for managing its housing stock by Parliament) wished to ensure that its stock of housing for Part VI allocations was not unduly depleted by using that stock for Part VII accommodation. The Judge failed to have regard to housing considerations across the Birmingham area and the resources available to

Birmingham. Mr Nabi submitted that the Judge was entitled to grant a mandatory order for the reasons that she gave.

Discussion

129. The courts may grant an appropriate remedy to enforce a statutory duty owed by a public body to an individual. The remedies available include a mandatory order requiring the local authority to comply with the duty within a prescribed period. Frequently, however, a court may choose to grant a declaration, relying upon the public body concerned to comply with the declaration and fulfil its duty: see *Craig v Her Majesty's Advocate* [2022] UKSC 6, [2022] 1 WLR 1270 at paragraphs 45 to 46. Public law remedies, including a mandatory order, are discretionary remedies.

130. The starting point is the context of these appeals. They involve a failure to comply with a statutory duty owed to a homeless person to secure that suitable accommodation is available for occupation by that person and his or her family. Before that duty arises, the authority will already have taken into account general housing conditions in their area, the limits on their housing stock and limits on their resources when deciding whether it is reasonable for the individual to continue to occupy accommodation or in deciding whether the person's current accommodation is suitable in the short or longer term. The issue of granting a mandatory order will only arise when the housing authority has decided that the individual's current accommodation is not suitable even in the short term. Croydon and Birmingham accept that that is the situation in relation to Mrs Imam and Mr Ahmed respectively. They accept that it is not reasonable for either of them to occupy their current accommodation (so that they are homeless within the meaning of section 175(3) of the 1996 Act) and that their current accommodation is unsuitable even for short term occupation. In the case of Mrs Imam, Croydon accepted in June 2015 that Mrs Imam's accommodation was unsuitable. It had accepted that it was in breach of its statutory duty for almost five years before a claim for judicial review was brought and for almost six years by the time the claim was heard by the Deputy Judge. In the case of Mr Ahmed, the duty had been owed and not fulfilled for approximately 16 months at the time of the hearing before the Judge.

131. In general terms, a range of factors may be relevant to whether it is appropriate for a court to grant a mandatory order to compel compliance with the section 193(2) duty. These include the nature of the accommodation and the extent to which it is unsuitable, and the impact on the living conditions of the homeless person and his family. They include the length of time that the homeless person has been left in unsuitable accommodation and the likelihood of suitable accommodation being secured in the relatively near future as that may mean that no mandatory order is required. See generally the non-exhaustive list of factors set out in the judgment of Scott Baker J in *R (Khan) v London Borough of Newham* [2001] EWHC Admin 589 at paragraphs 8 to 14. Resources and financial constraints on the housing authority are relevant to whether it is reasonable for a person to continue to occupy accommodation or in assessing whether the current accommodation is suitable. Once a duty is owed, however, and once the current accommodation is found to be unsuitable, financial constraints cannot justify non-compliance with the duty imposed by Parliament and would not of itself justify refusing to grant an appropriate order intended to bring about compliance with the duty.

132. A particular difficulty arises where the local housing authority considers that it is not possible for it to secure that suitable accommodation is available. In those circumstances, a court will have regard to whether the local housing authority has taken all reasonable steps to secure that suitable accommodation is available. A court will expect a local housing authority to address with sufficiently detailed evidence the steps it has taken, and the reasons why suitable accommodation has not been forthcoming. References to the general difficulties facing housing authorities, or the lack of availability of suitable properties, may not persuade a court that a local housing authority has taken all reasonable steps particularly, when there has, for example, been a lengthy period of non-compliance with the duty, or where the accommodation falls so far below any level of suitability that more immediate action might be expected.

133. In that regard, the courts have used various expressions to describe the circumstances in which it may be appropriate for a court to decline to grant a mandatory order in this context. The courts have said that "no court will enforce the duty unreasonably" (see per Collins J in *Begum* at page 816). They have referred to not making "an order to force [the local housing authority] to do the impossible" (see per Auld LJ at paragraph 38 of his judgment in *Codona*) or not making an order which would place the housing authority "in what is in effect an impossible situation" (per Arden LJ at paragraph 65 of her judgment in *Aweys*). I also bear in mind the *obiter dicta* of Scarman LJ (as he then was) in *Hendy* to the effect that where there was evidence that an authority was doing all that it honestly and honourably could to meet its duty and its failure to do so arose out of circumstances outside its control, then it may not be appropriate for a court to force an authority to do what it could not do or only do at the expense of others with equal rights.

134. I consider that the correct approach is to consider whether the local housing authority has taken all reasonable steps to perform the duty. If it has done so, and has not been able to secure suitable accommodation, that may be a good indication that it may not be appropriate to grant a mandatory order as it may not be possible to secure suitable accommodation within a specified time. A local housing authority can, however, be expected to demonstrate what steps it has taken and what the difficulties are. It is unlikely to be sufficient to refer generally to the demand for housing or the shortage of accommodation. The authority may need to explain, for example, the number of properties of the particular type in question (such as houses with particular adaptations or with a particular number of bedrooms) it has available and why it is not possible or appropriate to use those for the grant of (unsecured and therefore non-permanent) accommodation under Part VII. It may, for example, have a number of properties that it would like to use for allocating to applicants on its waiting list for Part VI accommodation. It can be expected to explain why it is not using those properties to ensure that its Part VII duties are met. This is not to say that the local housing authority must make a final offer of a secure tenancy of accommodation to a homeless person. Rather, given that the duty under section 193(2) will continue and may be met by the provision of accommodation on a short or long term basis (until it comes to an end, for example, by the making a final offer of Part VI accommodation), an authority may need to explain why it is not using its housing stock to secure accommodation that is suitable on a non-permanent basis to meet its Part VII duties.

135. In my judgment, the test for, or approach to, granting a mandatory order, is not one of whether it is intolerable for the individual to occupy the premises or whether enough is enough. It is correct that Lord Hope used the word "intolerable" in *Ali* and appeared to do so when considering whether it would be appropriate to grant a mandatory order. If the situation in a particular case has reached the level of intolerability, that may be a powerful indication that a mandatory order is called for. I do not, however, understand Lord Hope to have intended to lay down a requirement that, as a minimum, it must be intolerable for a person to have to continue to occupy his present accommodation before a mandatory order would be granted to enforce the section 193(2) duty.

136. It is also correct that Baroness Hale referred in *Ali* to the general situation in relation to housing in a particular area, severe constraints on budgets and a limited number of satisfactory properties for very large families and those with disabilities. She considered that those factors were relevant to the question of whether a housing authority had left an applicant in his present accommodation for too long. She referred to the situation of a particular applicant in his current accommodation being so bad or having continued for so long that "enough is enough". Those words however, were used in the context of whether the duty was owed (that, is whether the person was homeless because he was in accommodation that it was not reasonable for him to continue to occupy). Such considerations may also be relevant to whether his current accommodation is suitable. Baroness Hale was not, however, addressing the question of whether a court should grant a mandatory order once it was established that a duty was owed. Indeed, at paragraph 64, Baroness Hale expressly declined to enter into the debate about the criteria governing the grant of mandatory relief in homelessness cases.

137. I do not regard either phrase, that is "intolerable" or "enough is enough", therefore, as identifying the circumstances in which the grant of a mandatory order would be appropriate. It is preferable, rather, to focus on whether the housing authority has done all it reasonably can in the circumstances to secure suitable accommodation of the sort needed as a factor relevant to the grant of a mandatory order. I accept, however, that the fact that there are a limited number of satisfactory properties available of the type needed (for example houses capable of accommodating large families or persons with particular disabilities) may be relevant to whether the housing authority has done all it reasonably can to secure suitable accommodation. For the reasons given at paragraph 131 above, I do not accept that resources are relevant to the specific issue of whether it is appropriate to grant a mandatory order to ensure compliance with the duty once it is established that the duty is owed.

138. Against that background, I turn then to the decision of the Deputy Judge in Mrs Imam's case. The primary considerations he took into account are set out at paragraph 81 of his judgment and his overall conclusion on those factors is at paragraph 82. The Deputy Judge was entitled to have regard to the length of time that Mrs Imam had been waiting for suitable accommodation. He was also entitled to have regard to the fact that it was unlikely that a suitable property would be forthcoming and to treat that as a factor which enhanced the case for granting a mandatory order. He was also entitled to have regard to the extent to which the property was unsuitable. In that regard, the property had a number of positive features; Mrs Imam could access it using her wheelchair via a ramp, it had a lift which enabled her to gain access to the

two floors of the property, its location was suitable and it was not overcrowded. The feature that rendered it unsuitable was the fact that there was no toilet on the upstairs floor.

139. I also consider that the Deputy Judge was entitled to have regard to all the available evidence as to the effects of the unsuitable accommodation on Mrs Imam's day to day living. In that regard, he referred to the evidence from 2015 indicating that Mrs Imam could not always access the bathroom on the ground floor at night in time and she had suffered accidents which she had found humiliating and distressing. He was entitled to find on all the evidence that the conditions were not having an extremely serious effect on Mrs Imam as a factor in considering whether to grant mandatory relief.

140. References to whether the situation was "intolerable" or "enough is enough" are, as I have indicated, unhelpful ways of dealing with this question and they do not reflect a minimum threshold that must be crossed before it is appropriate to grant a mandatory order. It was, therefore, unhelpful to refer to those concepts. Furthermore, it was perhaps inapt for the Deputy Judge to have expressed matters in terms of Mrs Imam not having established that the conditions were having a serious effect on her. As Mrs Imam had established that Croydon was in breach of its duty, it was, strictly, for Croydon to demonstrate reasons why an appropriate remedy such as a mandatory order should not be granted. But the Deputy Judge was entitled to have regard to all the evidence that was before him, whether from Croydon or Mrs Imam, and to reach a judgment on the impact of the unsuitable accommodation on Mrs Imam and her family. That said, a court should not lose sight of the fact that Croydon itself had already decided in 2015 that the property was not suitable because of the lack of an upstairs toilet. Overall, however, I would not have treated the fact that the Deputy Judge had regard to those matters as establishing that he had erred in deciding not to grant a mandatory order in the present case.

141. I do however regard the Deputy Judge as having erred in the following regards. First, I would not regard budgetary constraints as relevant to whether a mandatory order is appropriate once a housing authority has accepted that a person is homeless and his current accommodation is unsuitable. I accept that the limited number of suitable properties available may be relevant in assessing whether a local housing authority has done all it reasonably can. But constraints on resources are not a reason for not complying with a duty imposed by Parliament. It is clear from paragraph 82 that the Deputy Judge considered that the limited resources available to Croydon was a significant factor in his decision to refuse a mandatory order.

142. Secondly, the Deputy Judge erred in his analysis of the steps taken by Croydon to fulfil its duty. In this case, almost six years had passed and the duty was not being performed. In those circumstances, the local housing authority did need to provide evidence that it had taken all reasonable steps to secure suitable accommodation and either it had not been possible to secure it or that there were other reasons why, in this case, it would be inappropriate to grant a mandatory order (such as, potentially, the unfairness to other people owed the section 193(2) duty who had been in unsuitable accommodation longer). The Deputy Judge said at paragraph 81(ii) of his judgment that he had accepted the evidence of Mr Beasley, Croydon's operations manager for allocations, that Croydon was doing "what it reasonably can", consistent with its limited resources and the correct application of its policies, to secure suitable accommodation. That evidence, however, was very general. Mr Beasley says that

there is a limited number of wheel-chair accessible properties available. He explains how those were allocated under Part VI and confirmed that Mrs Imam was considered for those properties in accordance with her position on the Part VI waiting list given her assessed needs. He confirms that Mrs Imam was also considered for any suitable properties that were to be allocated under Part VII (having regard to policy on Part VII allocations that, broadly, suitable accommodation should be allocated to those waiting longest but with a discretion to depart from that policy in appropriate cases).

143. One issue that Croydon needed to address in this case, however, was whether there were any suitable properties available to Croydon that it could use to secure suitable accommodation under Part VII (that is, without Mrs Imam being offered a secure tenancy under Part VI). That would ensure that Croydon was performing its duty by securing that suitable accommodation was available albeit by the grant of a non-secured tenancy and so on a non-permanent basis. That would not involve giving priority on the Part VI list to those who were homeless as they would not be offered a secure tenancy of the accommodation. Rather it would involve using accommodation which might otherwise be allocated under a secure tenancy under Part VI to meet, at least for the moment, the duties owed under Part VII of the 1996 Act including the duty under section 193(2). Mr Beasley's evidence, however, deals cumulatively with the position in relation to persons on the housing register for Part VI accommodation and those to whom duties are owed under Part VII. He explains that there are 111 households on the housing register who require wheelchair adapted accommodation, identifies that Mrs Imam is in Band 3 and, given her priority and the date she was placed on the waiting list, she is currently number 16 on the waiting list for Part VI accommodation. He indicates that some properties are kept for allocation for permanent accommodation under Part VI and some for non-permanent occupation under Part VII and Mrs Imam has been considered for properties under both heads. That evidence, however, does not address the question of why housing stock was being used for permanent allocation under Part VI rather than being used to meet its statutory obligations under Part VII. It does not explain whether any of the wheelchair accessible properties allocated under Part VI could have been used to secure non-permanent but suitable accommodation for a person such as Mrs Imam to whom a duty was owed under section 193(2).

144. Mr Rutledge was at pains to stress that Part VI of the 1996 Act requires property to be allocated according to an allocations scheme. That scheme must ensure that reasonable preference is given to persons who are homeless and those who are owed a duty under section 193(2). He stressed that it would not be appropriate or fair to depart from that scheme and allocate property to persons such as Mrs Imam when others were entitled to a higher preference. I understand that submission, but regard must be paid, however, to the way in which Part VI operates and the differences between the duties under Part VI and Part VII. It is important not to confuse the housing authority's duty under Part VI with its duty under Part VII (see per Baroness Hale at paragraph 14 of her speech in *Ali*). The allocation under Part VI is intended to lead to the allocation of permanent accommodation in the form of a secure tenancy. Part VII is different. So long as the section 193(2) duty applies, that duty requires the housing authority to secure that suitable accommodation is available. That duty would end if the applicant is made a final offer of suitable accommodation under Part VI. If that position has not been reached, and the duty has not been brought to an end in that way, the housing authority is still obliged, so long as the section 193(2) duty applies,

to secure that some suitable accommodation is provided. In Mrs Imam's case the housing authority needed to explain what steps it has taken to secure that suitable accommodation is available albeit on a non-permanent basis and without granting a secure tenancy of property under Part VI. Put simply, it needed to address why it is not using housing stock which could be used under Part VI to meet its different duties under Part VII.

145. Similarly, Mr Beasley's evidence indicates that it would be expensive to purchase properties for the 15 people ahead of Mrs Imam on the housing register as well as Mrs Imam. The evidence indicates that it would be necessary either to purchase properties for all 16 to avoid a breach of Croydon's allocation scheme (which is correct so far as Part VI accommodation is concerned) or to give priority to Mrs Imam above those on the waiting list for Part VI accommodation. The difficulty with that evidence again, is that it does not focus on those who are owed duties under Part VII. It may well be that, if there a number of people waiting for suitable Part VII accommodation, it may be unfair to make a mandatory order which results in one person taking priority over a person who has been waiting longer for Part VII accommodation (and may result in a breach of Croydon's policies on the allocation of Part VII accommodation). Mr Beasley's evidence, however, does not indicate how many of the persons needing wheelchair accommodation are persons owed a duty under section 193(2) and who are currently in unsuitable accommodation. That group of persons may be a far more limited number. The evidence does not address specifically whether Croydon has tried to purchase or lease accommodation for that group of persons and, if so, why Croydon had been unable to resolve the problem by those means if there was no other way of complying with the section 193(2) duty.

146. I should deal with two further points. First, I do not consider that, on the facts of this case, the Deputy Judge erred in his consideration of the fact that Croydon had not considered securing accommodation outside its borough. The evidence was that Mrs Imam wanted to remain in the area and a local housing authority is required to secure accommodation within its district in so far as reasonably practicable. If it were not reasonably practicable to secure accommodation within its area, it may be that Croydon would have to consider securing alternative accommodation elsewhere as the need to comply with the statutory duty may well outweigh considerations such as the fact that Mrs Imam's children attend local schools or that Mrs Imam and her family have a network of support in the area.

147. Secondly, I do not consider that the Deputy Judge erred in refusing a mandatory order because he considered that the local authority could not acquire property with a view to allocating it to Mrs Imam under Part VII. It is clear from paragraph 62 that the Deputy Judge accepted that property could be purchased and used either for Part VI or Part VII purposes. He considered that it would not be appropriate to depart from the policies on Part VII accommodation (which, broadly, provided that those who had been waiting longest for such accommodation should be allocated it first) as explained at paragraph 81(vii) of his judgment. It is clear from paragraph 81(vi) of his judgment that the Deputy Judge was dealing with a narrower point in that sub-paragraph. He noted that it was accepted that Mrs Imam was no longer seeking to be granted permanent accommodation under Part VI. The Deputy Judge then explained why the grant of a secure tenancy under Part VI would not have been an appropriate solution as it would have been unfair to those higher up the waiting list for Part VI

accommodation than Mrs Imam. He does not treat that as a reason why, in appropriate circumstances, accommodation could not be used for non-permanent Part VII accommodation. I do not regard this criticism of the judgment as being made out.

148. In all the circumstances, however, the Deputy Judge erred on the facts of this case in concluding that budgetary constraints were relevant to whether to grant a mandatory order to enforce the statutory duty and in accepting that Croydon was doing all that it reasonably could, consistent with its policies on Part VII accommodation, to secure suitable accommodation for Mrs Imam. The evidence before him did not address that latter issue with sufficient detail to enable him to reach that conclusion. Given that the Deputy Judge erred in his consideration of the question of a mandatory order, paragraph 1 of the order dismissing the claim on ground 1 (breach of duty of section 193(2) and the failure to secure that suitable accommodation is available) must be set aside.

149. Both Croydon and Mrs Imam have applied for permission to adduce fresh evidence. In all the circumstances, given the wishes of both parties to adduce fresh evidence, and given the passage of time since the claim was issued, the sensible course of action is to allow the appeal in relation to ground 1 of the claim and remit that matter to the High Court for consideration on the evidence then available.

150. In the Birmingham case, the Judge carefully considered the position of Mr Ahmed. The duty had been owed to him for 16 months by the date of the hearing. The Judge carefully assessed the impact of the lack of suitable accommodation on Mr Ahmed and his family. The unsuitability arose from overcrowding and its impact was made more severe because one of Mr Ahmed's sons had epilepsy and autism. Those were all factors that the Judge was entitled to take into account. The Judge understood that Birmingham was seeking to avoid using its own stock of housing for use as temporary, or non-permanent accommodation provided under Part VII. She, however, considered correctly that this was to fail to appreciate the unqualified nature of the duties under section 193(2) of the 1996 as compared with the duties under Part VI. Birmingham had not contended that it would be impossible for it to comply with a mandatory order and the Judge considered that it would not be unreasonably difficult for it do so. In my judgment, the wording used by the Judge does not indicate that she adopted the wrong test. She considered that the impact on Mr Ahmed and his family, and the time that Birmingham had been in breach, pointed to the grant of a mandatory order to ensure that the duty was complied with. Birmingham could comply with the duty and it would not be impossible, or unreasonably difficult, to do so. In other words, Birmingham had not taken all reasonable steps to comply with its duty and, if it did take reasonable steps to do so, it would be able to comply without unreasonable difficulty. The Judge adopted the correct approach and was entitled to reach that conclusion on the material before her. I would dismiss the appeal against the grant of a mandatory order in the case of Mr Ahmed.

CONCLUSION

151. For those reasons, I would dismiss the appeal in the Birmingham case. The Judge correctly held that once a local housing authority accepts that a duty is owed under section 193(2), and that the applicant's current accommodation is unsuitable, it is under an immediate and unqualified duty to secure that suitable accommodation is available. The duty is not a duty to secure that suitable accommodation is made

available within a reasonable time. The conclusion that Birmingham was in breach of its section 193(2) duty in three of the cases in this appeal was the result of the fact that Birmingham had already accepted that the respondents' current accommodation was unsuitable. The system operated by Birmingham of placing persons to whom the section 193(2) duty was owed on a waiting list until suitable accommodation became available was unlawful. The Judge was entitled to grant a mandatory order in the case of Mr Ahmed and to grant declarations that there had been breaches in the other cases. The Judge was also entitled to find that, in the fourth case, Mr Al-Shameri had not waived his right to have suitable accommodation secured for him and his family.

152. I would allow the appeal in the Croydon case as the Deputy Judge wrongly had regard to budgetary constraints and wrongly approached the question of whether Croydon had taken all reasonable steps to ensure that it complied with its duty under section 193(2) such that it would be inappropriate to grant a mandatory order in the circumstances of the case. I would remit the matter to the High Court for reconsideration.

Peter Jackson LJ

153. I agree with both judgments.

Underhill LJ

154. I agree with Lewis LJ's proposed disposal of the appeals before us and with his reasoning. I have brief observations only about the first and fifth issues.

155. As to the first issue, I agree with Lewis LJ that the law is correctly stated by Arden LJ in the first three sentences of para. 65 of her judgment in *Aweys*, which he quotes at para. 92 above. There may be a question whether we are positively bound by what she says (though I have some doubts about the authority of the *Al-Mehdawi* case to which he refers at para. 107 – see para. 173 of my judgment in *FS Cairo (Nile Plaza) LLC v Brownlie* [2020] EWCA Civ 996, [2021] 2 All ER 605); but I agree with him in any event that it is right. It is worth emphasising, however, that the conclusion that the duty is "immediate, unqualified and non-deferrable" does not impose an impossible burden on local housing authorities. The duty is to secure that "suitable" accommodation is available; and, as Lewis LJ says at paras. 81 and 82 (and as I agree is supported by the reasoning of the majority in *Ali*), what is suitable is liable to be affected by a variety of factors. In particular, the requirements of suitability in the longer term may be substantially more demanding than in the short term, where an authority is responding to an immediate situation of homelessness. It may perhaps be that if that had been properly appreciated Birmingham's decision letters in some or all of the Respondents' cases would have been differently expressed, but that is water under the bridge.

156. As to the fifth issue, the headline proposition that a mandatory order was required in circumstances where Mrs Imam had been living in unsuitable accommodation for (at the date of the hearing) almost six years is at first sight compelling. But when the facts are assessed in detail, as the Deputy Judge did, the situation is not quite so straightforward. There are points to be made in Croydon's defence, and not all the criticisms of the Deputy Judge's reasoning advanced by Mr Westgate are justified. But I am persuaded that he did err in the particular respects identified by Lewis LJ

and that the appropriate course is for the case to be remitted in the way proposed by him.

157. Finally, I would not want it to be thought that the Court is unaware of the burden placed on very many local housing authorities by the need to comply with their duties under Part VII of the 1996 Act, in circumstances where housing may be in extremely short supply, particularly for applicants with large families or particular needs, and where the authority's financial resources are seriously constrained. I have no doubt that officials generally do their conscientious best in making what are often very difficult decisions; but errors of law will inevitably sometimes be made in this complex area, and it is the duty of the Court to intervene where that occurs.