



Landmark judgment on the main homeless duty: R (Elkundi) v Birmingham and R (Imam) v Croydon

12 May 2022



**The main housing duty - Elkundi v
Birmingham City Council
Zia Nabi**

Section 193(2) – the main housing duty

(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.

What was Birmingham's case?

- Section 193 (2) required housing authorities to secure that accommodation is **available within a reasonable time** of the duty arising
- The reasonableness of the period depended on the circumstances of the case and the accommodation available
- It did not require the provision of accommodation immediately the duty arose as the statute used the word “shall”
- Parliament intended that the authority would make arrangements for the provision of accommodation **in the future**.

What did the court decide?

- The duty is non-deferrable
- The duty is an immediate and unqualified duty to secure that suitable accommodation **is available** for occupation
- It is not a duty to ensure that that accommodation will become available within a reasonable period of time

What is suitable accommodation?

- Suitability is a flexible concept.
- Different accommodation may be provided at different times to ensure that the duty is being performed .
- What is suitable may evolve or change over time depending on all the circumstances.
- If authority decides that the accommodation that is currently being occupied is unsuitable, then it must immediately provide other accommodation which is suitable until the main housing duty comes to an end.

Can you waive your right to suitable accommodation?

- Yes

BUT

- only if applicant is placed in a position to give fully informed consent
- If applicant subsequently changes their mind, the authority must then secure that suitable accommodation is available for their occupation
- On the facts, Mr Al-Shameri had not waived his right to suitable accommodation.

Was Birmingham's system unlawful?

YES

- It placed applicants who were owed the duty *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
- it failed to distinguish between persons who were in suitable and unsuitable accommodation
- it breached its obligations under the public sector equality duty because there was no evidence that Birmingham had had regard to the impact on a disabled person of the period of time spent on the waiting list for suitable accommodation.

Can unsuitable accommodation be subsequently said to be suitable?

- Not an issue that arose on the facts of any of the appeals.
- Steyn J's obiter decision that authority would be functus not approved. Needs to be argued out in a case where it was necessary for decision.
- It may be that a fresh decision could only be brought about by making an offer of the accommodation again on the basis that it was now suitable, which may attract a right of review.

Did the judge err in granting mandatory relief?

NO

- Duty had been owed to Mr. Ahmed for 16 months.
- Judge had carefully assessed the impact of the lack of suitable accommodation on Mr Ahmed and his family.
- Judge had determined that it was not unreasonably difficult for Birmingham to comply with a mandatory order

Does the judgment say anything else?

- It is good practice for a local housing authority to have a policy explaining how properties are allocated to homeless applicants.



IMAM V LB CROYDON

12 May 2022

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Timeline

- Ms Imam (RI) a wheelchair user with 3 children.
- October 2014 moved into 3 bed property with adaptations. Only bathroom on ground floor. RI sometimes unable to reach toilet during night.
- 5 June 2015 LBC accept that not suitable.
- 5 March 2000 claim for mandatory injunction.
- 26 March 2021 Deputy Judge decision

Judge's reasons [67]

- Length of time waiting 5 years.
- Seriousness of breach – property had some positive features. No evidence that “intolerable or “enough was enough”.
- General shortage of accommodation.
- LBC limited resources projected overspend £67m.
- Unfairness to those on Part VI the waiting list above R1.
- Unfairness to Part VII applicants who had been waiting longer.

Issues in the CA

- Appellant – Rule of law required LBC to adduce compelling evidence why no order should be made. Not for applicant to show that “intolerable”. Budgetary considerations not relevant.
- Respondent – Remedy discretionary. Court can consider if authority attempting in good faith to discharge its duties and whether failure to do so results from matters outside its control. Fairness to others waiting for accommodation is relevant.

The correct approach

- Mandatory Order is discretionary but when refused it is because the court relies on the LA to fulfil its duty [129].
- Starting point that authority is in breach of statutory duty. A decision on unsuitability has already taken housing conditions into account [130]. Court should not “lose sight” of that [140].
- Burden is on the authority to show why an order should not be made [140-142].
- “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” [131, 137, 141].
- Has the authority “taken all reasonable steps to perform the duty” [134].
- Test is not whether the position is “intolerable” or “enough is enough” [135-7].

But relevant factors [131, 138-9]

- extent of unsuitability,
- length of time waiting
- impact on Claimant
- likelihood of compliance in near future.
- LA may be able to decide not to use its Part VI stock or all of it for Part VII purposes [134, 143-4].
- Unfairness to others waiting longer [142].
- Limited number of suitable properties [141].

What must an authority show?

- It has taken all reasonable steps [132].
- The more significant the breach the more detailed the evidence needs to be [132].
- General references to demand and shortage not enough [134, 142].
- Must address specific numbers of properties and why not used [134].
- Why Part VI stock not used [143].
- Why property cannot be purchased or leased to meet specific needs [145]. May include out of Borough [146].

Key issues

- How can resources not being relevant be reconciled with the factors that can be considered?
- Lack of deference to LA's own assessment?
- Duties trump powers. Part VI vs Part VII.



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Q&A