Neutral Citation Number: [2019] EWCA Civ 1944

Case No: B5/2018/2701

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
HH Judge Saggerson
EC40CL193

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 November 2019

Before :

LORD JUSTICE PATTEN
LADY JUSTICE ASPLIN
and
SIR RUPERT JACKSON

- -

Between :

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF WALTHAM FOREST — **Appellant**

- and –

SALEH — **Respondent**

- -
- -

Mr Nicholas Grundy QC and **Ms Victoria Osler** (instructed by **The London Borough of Waltham Forest**) for the **Appellant**
Ben Chataway (instructed by **SA Law Chambers Solicitors**) for the **Respondent**

Hearing date : 8 October 2019

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Approved Judgment

Lord Justice Patten :

1. This is an appeal by the London Borough of Waltham Forest ("the Council") against a decision of HH Judge Saggerson made on 18 October 2018 on an appeal under s.204 of the Housing Act 1996 ("HA 1996"). The central issue on this appeal is whether, in conducting a review of a homelessness decision under s.202 HA 1996, the review officer must reconsider the decision in the light of all relevant circumstances at the date of the review or is limited to a reconsideration of the facts as they stood at the date of the original decision. The particular issue in this case is whether the review officer, in reconsidering a decision to provide accommodation for Mr Saleh, the respondent, and his family outside the Council's own district, ought to have taken into account the availability as at the date of review of any suitable accommodation either within or closer to that district.

2. In August 2014 Mr Saleh applied to the Council for housing under Part 7 HA 1996 on the basis that he and his family were homeless. He has six children and had been living in privately rented accommodation in Walthamstow from about 2000. The Council accepted that Mr Saleh was in priority need and had not become homeless intentionally so that he was owed the full housing duty under s.193. The Council was therefore obliged to secure that accommodation was available for occupation by him and his family (see s.193(2)) and that such accommodation was suitable: see s.206(1). But in discharging these functions the Council may in certain circumstances secure the provision of accommodation outside their own Local Housing Authority district ("LHA"). Section 208 provides:

> "(1) So far as reasonably practicable a local housing authority shall in discharging their housing functions under this Part secure that accommodation is available for the occupation of the applicant in their district.
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> (2) If they secure that accommodation is available for the occupation of the applicant outside their district, they shall give notice to the local housing authority in whose district the accommodation is situated."

3. Once the Council had accepted that it owed Mr Saleh and his family a s.193 duty they were placed into emergency accommodation in Hackney. This was in August 2014. They occupied this accommodation until October 2014 when the Council secured temporary accommodation for them at 116 London Road, Romford. In the meantime, Mr Saleh's daughter, Sara, had begun school in Walthamstow.

4. In October 2015 Mr Saleh's mother came to live at 116 London Road and Mr Saleh then began to challenge the suitability of the accommodation on the ground, *inter alia*, that it was too small. The Council accepted this in February 2016 and on 28 February 2017 they offered Mr Saleh temporary accommodation at 179 Little Ilford Lane which is in the London Borough of Newham, outside the Council's own district. Mr Saleh accepted the offer but later in August 2017 he completed a "Disability and Health Questionnaire" on behalf of his daughter, Sara, and requested that his family be re-housed within the Council's district so that they could be "as close as possible to [Sara's] school, family, friends and hospital".

5. Sara suffers from Type 1 diabetes which has on occasions necessitated hospital treatment. She has also suffered episodes of incontinence during her journey to and from school. Each journey takes up to one hour.

6. On 26 October 2017 the Council informed Mr Saleh that having considered the information contained in the questionnaire it still considered that the accommodation at 179 Little Ilford Lane remained suitable for him and his family. Mr Saleh requested a review of the decision as provided for under s.202 HA 1996. So far as material, this states (as amended):

> "(1) An applicant has the right to request a review of—
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> (a) any decision of a local housing authority as to his eligibility for assistance,
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> (b) any decision of a local housing authority as to what duty (if any) is owed to him under sections 190 to 193 and 195 and 196 (duties to persons found to be homeless or threatened with homelessness),
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> (c) any decision of a local housing authority to notify another authority under section 198(1) (referral of cases),
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> (d) any decision under section 198(5) whether the conditions are met for the referral of his case,
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> (e) any decision under section 200(3) or (4) (decision as to duty owed to applicant whose case is considered for referral or referred),
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> (f) any decision of a local housing authority as to the suitability of accommodation offered to him in discharge of their duty under any of the provisions mentioned in paragraph (b) or (e) or as to the suitability of accommodation offered to him as mentioned in section 193(7), or
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> (g) any decision of a local housing authority as to the suitability of accommodation offered to him by way of a private rented sector offer (within the meaning of section 193).
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> (1A) An applicant who is offered accommodation as mentioned in section 193(5), (7) or (7AA) may under subsection (1)(f) or (as the case may be) (g) request a review of the suitability of the accommodation offered to him whether or not he has accepted the offer.
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> (2) There is no right to request a review of the decision reached on an earlier review.

> (3) A request for review must be made before the end of the period of 21 days beginning with the day on which he is notified of the authority's decision or such longer period as the authority may in writing allow.
>
> (4) On a request being duly made to them, the authority or authorities concerned shall review their decision."

7. In his request for a review, made through Shelter, Mr Saleh relied principally upon the impact on Sara of the journey between 179 Little Ilford Lane and her school in Walthamstow. This, it was said, rendered the accommodation unsuitable. The request for review stated:

> "I would like to bring to the attention of the [Council] the recent judgment from the Supreme Court of *Nzolameso v City of Westminster* … Under section 208(1) [of HA1996] the [Council] have a statutory duty to provide accommodation in their own area "so far as reasonably practicable.
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> We are instructed that no investigations were carried out to demonstrate any consideration of Mr Saleh's household's circumstances have been taken into account.
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> …
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> Paragraph 19 of the judgment in *Nzolameso* states that: "The effect, therefore, is that [LHAs] have a statutory duty to accommodate within their area so far as this is reasonably practicable.
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> 'Reasonable practicability' imports a stronger duty than simply being reasonable. But if it is not reasonably practicable to accommodate "in borough", they must generally, and where possible, try to place the household as close as possible to where they were previously living.
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> Conclusions:
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> I believe that … 179 Little Ilford Lane is not suitable for the needs of [Mr Saleh] and in particular … Sara.
>
> Sara has Type 1 diabetes and has provided supporting medical evidence regarding a move closer to school and hospital.
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> I ask the [Council] overturns their decision that the accommodation is suitable and carefully consider [Mr Saleh's] household's circumstances before offering further temporary accommodation."

8. There was a telephone conversation between Mr Saleh and the review officer (Ms Kristine Ross) on 19 June 2018 but on 26 June 2018 the review officer notified Mr Saleh that, having reviewed the decision and considered the published Housing Act

guidance and the decision in *Nzolameso v City of Westminster CC* [2015] UKSC 22 ("*Nzolameso*"), she was satisfied that the accommodation at 179 Little Ilford Lane was in all respects suitable for him and his family.

9. Many of the factors considered in the decision letter are not directly relevant to the issues raised on this appeal. But in the part of the letter which responds to Mr Saleh's submission that the Council has a duty under s.208(1) to provide accommodation within its district so far as reasonably practicable, the review officer refers to the need (recognised in the Homeless Code of Guidance) for local authorities to have in place policies for procuring sufficient units of temporary accommodation and for prioritising the allocation of in-district accommodation at times when the supply is inadequate to meet demand. Her letter goes on:

> "… In March 2017, when you were offered accommodation within the Borough of Newham, [the Council] had both such policies in place. … The … policy which prevailed at the time you were offered 179 little Ilford Lane does not differ substantially from the current one. It listed groups of households who needed to be prioritised for in-Borough accommodation or close to Borough placement, inter alia those working in the Borough, those with one or more children on a child protection plan, or attending a special school as well as those with severe mental health problems or those with one or more children at a crucial stage of their education.
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> …
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> … The housing stock constraints described above are a highly relevant factor in assessing the suitability of ... 179 Little Ilford Lane. It is my opinion that when this accommodation was offered to you the [Council] gave appropriate weight to your circumstances in particular the location of your children's schools and your place of work. It is clear that by offering you accommodation near to its own Borough the [Council] gave you household priority over other households."

10. What the review officer did not consider was whether, at the time of the review, any suitable accommodation was available within or closer to the Council's district. Mr Saleh appealed to the County Court under s.204 HA 1996 on this and a number of other grounds including that the review decision was made in breach of regulation 8(2) of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 ("the 1999 Regulations") or was otherwise procedurally unfair.

11. In his judgment following the hearing of the appeal, Judge Saggerson held that the failure of the review officer to consider the availability at the date of review of other suitable accommodation within or closer to the Council's own district was an error of law which vitiated the review decision. He said:

> "[5] The criticism of the Review Officer is that the test that has been applied is the test as to the availability of suitable accommodation, at the date the original offer of the

> accommodation was made. That is likely to be the appropriate time to apply the test in cases where an Appellant has refused the original offer of out-of-borough accommodation, but it is not the proper test where the offer has been accepted. Where an offer has been accepted, as it has in this case for whatever reason, the appropriate time at which the Review Officer has to consider the availability and suitability of out-of-borough alternative accommodation must be at the date of the review."

12. But he rejected the ground of appeal based on an alleged breach of the 1999 Regulations or on procedural unfairness.

13. With the permission of McCombe LJ, the Council now appeals against the judge's decision regarding the date for consideration of the availability of suitable accommodation and Mr Saleh challenges his rejection of the arguments based on the 1999 Regulations and procedural unfairness.

14. Although he does not say so, the statement of principle contained in [5] of the judgment of Judge Saggerson quoted above is based on a passage from the judgment of Waller LJ in the decision of this Court in the case of *Omar v Westminster City Council* [2008] HLR 36 ("*Omar*"). But before I come to the authorities, it is necessary to say a little more about the statutory framework which governs homelessness decisions of this kind and, in particular, the provision of out-of-district accommodation.

15. The full housing duty which the Council owed to Mr Saleh under s.193(2) HA 1996 was satisfied by securing that suitable accommodation was available for his occupation. This can include an offer of accommodation by a private landlord in the form of what is defined as a private rented sector offer which means an assured shorthold tenancy for a period of at least 12 months: see s.193(7AA)-(7AC). Mr Grundy QC for the Council made the point that once an applicant accepts an offer of a tenancy for this period of time and so becomes contractually bound to the private landlord for its duration the right to seek a review of the offer under s.202 may be of limited value. In some cases this may be so, although, as this case demonstrates, review decisions sometimes take considerable periods of time to complete. But this point is of no real assistance in addressing the question raised on this appeal. The nature of a review under s.202 in a case where the applicant has accepted the accommodation offered is one of general application and is not dependent on whether the accommodation provided is or is not the property of a private landlord. But, as I shall explain shortly, the ability of hard-pressed local authorities within the London areas to secure privately owned accommodation sometimes a considerable distance outside their districts has led to housing guidance on out-of-district placements which is highly material to this appeal.

16. The full housing duty prescribed by s.193(2) must be performed in compliance with the supplementary provisions contained in ss.205-210 HA 1996. These provisions enable housing authorities to discharge their functions by making out-of-area placements where the provision of accommodation within their districts is not reasonably practicable (s.208(1)) and, as I have said, to discharge their functions through arrangements with private landlords. But the core obligation of securing accommodation that is suitable applies in all cases. This is confirmed by s.206(1) which provides:

> "(1) A local housing authority may discharge their housing functions under this Part only in the following ways—
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> (a) by securing that suitable accommodation provided by them is available,
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> (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. There is no definition of suitability in Part 7 of HA 1996 but the case law has identified a number of considerations which may be relevant to the housing authority's consideration of any particular application. What follows is not an exhaustive summary but does, I think, identify a number of the key components in any decision:

(1) The accommodation must be suitable in relation to the applicant and to all members of the applicant's household normally residing with the applicant. This requires an assessment of the needs and reasonable requirements of the applicant and his or her family and the location of the proposed accommodation may also be relevant to that assessment: see *R (ex parte Sacupima) v Newham LBC* [2001] 1 WLR 563 ("*Sacupima*") at page 575;

(2) There may be degrees of suitability depending on the particular housing duty which falls to be performed. In their judgment in *R (on the application of Aweys) v Birmingham City Council* [2009] UKHL 36 ("*Birmingham*"), Lady Hale and Lord Neuberger said (at [18]):

> "Whether the authority are securing interim accommodation under section 188(1) pending a decision, or securing accommodation after the decision has been made under section 190(2) or 193(2), they may provide the accommodation themselves or secure that it is provided by someone else. However, the accommodation secured has to be "suitable" (1996 Act, s 206(1)). In deciding what is "suitable" the council must "have regard" to Parts 9 and 10 of the Housing Act 1985 and Parts 1 to 4 of the Housing Act 2004 (which relate to slum clearance and over-crowding) and also to matters specified by the Secretary of State (1996 Act, s 210(1) and (2)). Clearly, however, what is regarded as suitable for discharging the interim duty may be rather different from what is regarded as suitable for discharging the more open-ended duty in section 193(2); but what is suitable for discharging the "full" duty in section 193(2) does not have to be long life accommodation with security of tenure such as would arise if the family were allocated the tenancy of a council house under the council's allocation policy determined in accordance with Part 6 of the 1996 Act. It is expressly provided that a person who is secured accommodation

> under Part 7 of the 1996 Act does not become a secure tenant unless the council say so (Housing Act 1985, Sched 1, para 4)."

And at [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 6 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 6. 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."

(3) It follows that accommodation which was, when provided, suitable may cease to be suitable depending on the changing needs and circumstances of the household and the duration of their intended period of occupation. In *Kannan v Newham LBC* [2019] HLR 22, Lewison LJ (referring to the judgment in *Birmingham*) said (at [6]):

> "What is clear from that case is that the mere passage of time may turn accommodation that was suitable for the short term into accommodation that is no longer suitable. Lady Hale said so in terms at [48]. In considering whether accommodation is or remains suitable, a housing authority must consider not only the length of time for which the applicant has been there, but also the time for which he is expected to stay: Lord Hope at [3]; Lord Scott at [5]; Lady Hale at [41] and [47]. Clearly this requires some degree of looking to the future."

18. A local housing authority is required by s.182(1) HA 1996 to "have regard to such guidance as may from time to time be given by the Secretary of State". The Secretary of State is also empowered by s.210(2) to make orders specifying:

> "(a) circumstances in which accommodation is or is not to be regarded as suitable for a person, and
>
> (b) matters to be taken into account or disregarded in determining whether accommodation is suitable for a person."

19. The 2006 Homelessness Code of Guidance for Local Authorities ("the 2006 Code") issued by the Department of Communities and Local Government made explicit reference to location as being a factor relevant to suitability. Paragraph 17.41 states:

> "The location of the accommodation will be relevant to suitability and the suitability of the location for all the members of the household will have to be considered. Where, for example, applicants are in paid employment account will need to be taken of their need to reach their normal workplace from the accommodation secured. The Secretary of State recommends that local authorities take into account the need to minimise disruption to the education of young people, particularly at critical points in time such as close to taking GCSE examinations. Housing authorities should avoid placing applicants in isolated accommodation away from public transport, shops and other facilities, and, wherever possible, secure accommodation that is as close as possible to where they were previously living, so they can retain established links with schools, doctors, social workers and other key services and support essential to the well-being of the household."

20. In 2012, during the passage of the Localism Bill, the Government carried out a consultation exercise on a proposed new order dealing with the issue of suitability in the context of the difficulties experienced by local authorities in providing accommodation for homeless applicants within their own district. The purpose of the consultation was to consider whether additional protections were necessary and how this might be done. The consultation exercise included the provision of temporary accommodation and the use of private rented sector accommodation. In the consultation paper on the proposed order (at [39]) the Department stated:

> "Homeless households may not always be able to stay in their previous neighbourhoods. However the Government considers that it is not acceptable for local authorities to make compulsory placements automatically hundreds of miles away, without having proper regard for the disruption this may cause to those households. Section 208(1) of the Housing Act 1996 provides that local authorities must in discharging their housing functions in relation to homelessness secure accommodation within their own district so far as reasonably practicable. The current legal framework is set out in the box."

21. Following this consultation exercise, the Secretary of State made the Homelessness (Suitability of Accommodation) (England) Order 2012 ("the 2012 Order"). Article 2 is concerned with the issue of location:

> "2. In determining whether accommodation is suitable for a person, the local housing authority must take into account the location of the accommodation, including—
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> (a) where the accommodation is situated outside the district of the local housing authority, the distance of the accommodation from the district of the authority;
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> (b) the significance of any disruption which would be caused by the location of the accommodation to the employment, caring responsibilities or education of the person or members of the person's household;
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> (c) the proximity and accessibility of the accommodation to medical facilities and other support which—
>
> (i) are currently used by or provided to the person or members of the person's household; and
>
> (ii) are essential to the well-being of the person or members of the person's household; and
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> (d) the proximity and accessibility of the accommodation to local services, amenities and transport."

22. These provisions were supplemented by guidance (see Supplementary Guidance on the homelessness changes in the Localism Act 2011 and on the Homelessness (Suitability of Accommodation) (England) Order 2012) ("the 2012 Supplementary Guidance") which stated in [47]-[48]:

> "[47] Location of accommodation is relevant to suitability. Existing guidance on this aspect is set out at paragraph 17.41 of the Homelessness Code of Guidance offers. The suitability of the location for all the members of the Household must be considered by the authority. Section 208(1) of the 1996 Act requires that authorities shall, in discharging their housing functions under Part 7 of the 1996 Act, in so far as is reasonably practicable, secure accommodation within the authority's own district.
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> [48] Where it is not possible to secure accommodation within district and an authority has secured accommodation outside their district, the authority is required to take into account the distance of the accommodation from the district of the authority. Where accommodation which is otherwise suitable and affordable is available nearer to the authority's district than the accommodation which has been secured, the accommodation which it has secured is not likely to be suitable unless the authority has a justifiable reason or the applicant has specified a preference."

23. The current form of guidance is that contained in the 2018 Homelessness Code of Guidance for Local Authorities ("the 2018 Code") which was issued with the coming into force of the Homelessness Reduction Act 2017. The version of the 2018 Code in force at the time of the review decision in this case was version 2. The following paragraphs are particularly relevant:

> "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.
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> …
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> 17.46 The suitability of the location for all the members of the household must be considered by the authority. Section 208(1) of the 1996 Act requires that authorities shall, in discharging their housing functions under Part 7 of the 1996 Act, in so far as is reasonably practicable, secure accommodation within the authority's own district.
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> 17.47 Where it is not reasonably practicable to secure accommodation within district and an authority has secured accommodation outside their district, the housing authority is required to take into account the distance of that accommodation from the district of the authority. Where accommodation which is otherwise suitable and affordable is available nearer to the authority's district than the accommodation which it has secured, the accommodation which it has secured is not likely to be suitable unless the applicant has specified a preference.
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> 17.48 Generally, where possible, housing authorities should try to secure accommodation that is as close as possible to where an applicant was previously living. Securing accommodation for an applicant in a different location can cause difficulties for some applicants. Where possible the authority should seek to retain established links with schools, doctors, social workers and other key services and support.
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> ….
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> 17.57 Housing authorities, particularly those that find it necessary to make out of district placements, are advised to develop policies for the procurement and allocation of temporary accommodation which will help to ensure suitability requirements are met. This would provide helpful guidance for staff responsible for identifying and making offers of accommodation, and would make local

> arrangements, and the challenges involved with sourcing accommodation, clearer to applicants."

24. It is apparent both from Article 2 of the 2012 Order and from [17.46]-[17.48] of the 2018 Code that where the local housing authority proposes to allocate accommodation outside its district in order to perform its s.193(2) duty, it must have regard both to the distance of the accommodation from the district and the effect on the links of members of the applicant's household with schools and other services when assessing suitability. It seems to me that this will necessarily bring into focus as a relevant consideration the issue of whether other suitable accommodation may at the time of the decision be available either within or closer to the authority's district and whether the existence of such accommodation means that the other accommodation is in those circumstances to be regarded as unsuitable even if, in the absence of other suitable accommodation, it could be said to meet the needs of the applicant and his or her family.

25. On one view the condition of suitability might be said to require the housing authority to be satisfied that the accommodation reached a minimum standard of suitability for the particular household even if it was not ideal. There is some support for this view in the cases. In *Sacupima* at first instance (see [2001] 33 HLR 1) Dyson J said:

> "23. Suitability is not an absolute concept. As was said by Henry J. (and has been said in other cases), there can be different standards of suitability. Accommodation can range from an applicant's dream house to something which is only just adequate to meet his or her housing needs. Both are suitable. It is a matter for the judgment of the authority to decide what accommodation on this spectrum of suitable accommodation to select. It has been said many times that the court will be very slow to impugn the performance by a housing authority of its functions in relation to homeless persons: see *R. v. Hillingdon LBC, ex p. Puhlhofer* [1986] A.C. 484 at 518, and *R. v. Haringey LBC, ex p. Karaman* [1996] 29 H.L.R. 366 at 375–376….
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> 24. The question nevertheless remains, to what extent can lack of resources be taken into account in determining suitability? I agree with what Collins J. said in *R. v. Newham LBC, ex p. Ojuri (No. 3)* (1998) 31 H.L.R. 452 at 461. Although financial constraints and limited housing stock are matters that can be taken into account in determining suitability,
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> > "there is a minimum and one must look at the needs and circumstances of the particular family and decide what is suitable for them, and there will be a line to be drawn below which the standard of accommodation cannot fall".
>
> If the accommodation falls below that line, and is accommodation which no reasonable authority could consider to be suitable to the needs of the applicant, then the decision will be struck down, and an appeal to the resources argument will be of no avail.

> …
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> 28. The court should be extremely slow to criticise the priorities that a local housing authority accords to different claims on its housing stock. Nor should it normally be necessary to do so. For the reasons that I have already given, there is an unqualified obligation to provide suitable accommodation under sections 188 and 193. There is a minimum standard of suitability below which the accommodation cannot fall. Provided that what is secured does not fall below that standard, it is immaterial that, if the authority had used less of its stock to house persons on its waiting list, it could have provided a particular Part VII applicant with accommodation of a higher standard of suitability. Likewise as regards the possible use, or increased use, of accommodation in the private sector."

26. But [48] of the 2012 Supplementary Guidance makes it clear that where accommodation which is also suitable exists closer to the housing authority's district it is likely, all other things being equal, to displace on grounds of suitability other available accommodation which is further away. To that extent, the housing authority is required to carry out a comparative exercise. This is now confirmed by [17.47] and [17.48] of the 2018 Code which incorporates not only the guidance which appeared in [48] of the 2012 Supplementary Guidance but also the effect of various intervening decisions, in particular that of the Supreme Court in *Nzolameso*.

27. A feature of HA 1996 which remains unchanged is that the right of review granted to an applicant under s.202(1) does not in terms apply to a decision of the housing authority to provide accommodation outside its district under s.208(2). Under s.202(1)(f) the applicant is limited to seeking a review of the decision of the authority:

> "(f) … as to the suitability of accommodation offered to him in discharge of their duty under any of the provisions mentioned in paragraph (b) or (e) or as to the suitability of accommodation offered to him as mentioned in section 193(7), or
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> (g) any decision of a local housing authority as to the suitability of accommodation offered to him by way of a private rented sector offer (within the meaning of section 193)."

28. But location is, as I have explained, a relevant factor in any assessment of suitability and in *Nzolameso* the Supreme Court addressed the scope of the power to make out-of-district placements under s.208 and how such decisions might be challenged on grounds of suitability. Having set out the provisions of the 2012 Order and [48] and [49] of the 2012 Supplementary Guidance, Lady Hale said this:

> "19. The effect, therefore, is that local authorities have a statutory duty to accommodate within their area so far as this is reasonably practicable. "Reasonable practicability" imports a stronger duty than simply being reasonable. But if it is not reasonably practicable to accommodate "in borough", they must generally, and where possible, try to place the household as close

> as possible to where they were previously living. There will be some cases where this does not apply, for example where there are clear benefits in placing the applicant outside the district, because of domestic violence or to break links with negative influences within the district, and others where the applicant does not mind where she goes or actively wants to move out of the area. The combined effect of the 2012 Order and the Supplementary Guidance changes, and was meant to change, the legal landscape as it was when previous cases dealing with an "out of borough" placement policy, such *as R. (Yumsak) v Enfield London Borough Council* [2002] EWHC 280 (Admin); [2003] H.L.R. 1 and *R. (Calgin) v Enfield London Borough Council* [2005] EWHC 1716 (Admin); [2006] H.L.R. 58, were decided.
>
> 20. An applicant who is dissatisfied with any of the local authority's decisions listed in s.202(1) of the Act can request a review of that decision. The decisions listed do not in terms include a decision to place "out of borough" despite s.208(1). But they do include, at (f), any decision of a local housing authority as to the suitability of accommodation offered in discharge of their duty under, inter alia, s.193(2). They also include, at (b), any decision as to what duty (if any) is owed, inter alia, under s.193(2). It is common ground that (b) includes a decision that the duty is no longer owed because it has been discharged."

29. She then considered the criticism made of the housing authority's decision in that case which was that it had failed to consider the availability of other accommodation in or closer to its own district:

> "36. The Secretary of State has, of course, made no submissions as to the effect of these criticisms in this particular case. Mr Peacock, on behalf of the Local Authority, does not dispute the applicable principles but has valiantly tried to defend the decision letter. But it is apparent that this decision suffers from all of those defects and more. There is little to suggest that serious consideration was given to the authority's obligations before the decision was taken to offer the property in Bletchley. At that stage, the temporary lettings team knew little more than what was on the homelessness application form. This did not ask any questions aimed at assessing how practicable it would be for the family to move out of the area. Nor were any inquiries made to see whether school places would be available in Bletchley and what the appellant's particular medical conditions required. Those inquiries were only made after the decision had been taken. The review decision is based on the premise that, because of the general shortage of available housing in the borough, the authority could offer accommodation anywhere else, unless the applicant could show that it was necessary for her and her family

> to remain in Westminster. There was no indication of the accommodation available in Westminster and why that had not been offered to her. There was no indication of the accommodation available near to Westminster, or even in the whole of Greater London, and why that had not been offered to her. There was, indeed, no indication that the reviewing officer had recognised that, if it was not reasonably practicable to offer accommodation in Westminster, there was an obligation to offer it as close by as possible."

30. The effect of this decision is that an applicant who is offered accommodation outside the authority's district may seek a review of the decision on grounds of suitability even though a decision to exercise the power contained in s.208(2) is not included in the list of reviewable decisions under s.202. In exercising its powers under s.208 the authority is required to consider the issues of whether it is reasonably practicable to provide accommodation within the district and, if not, whether the available out-of-district accommodation is suitable. Whilst a challenge to a decision on the first of those issues may have to be brought by way of judicial review, the second is within s.202(1)(f) even though it involves an exercise of the s.208(2) power. All housing decisions made in order to comply with the duty under s.193(2) must involve the provision of accommodation which is suitable and s.202(1)(f) is comprehensive in its application to them.

31. The principal issue on this appeal is whether the need for the housing authority to investigate whether other suitable accommodation exists closer to or within its own district applies not only to the authority when it makes the original housing decision but also to the officer who conducts the review of suitability under s.202(1). It is, as I said earlier, common ground that no such investigation took place at the review stage in this case.

32. As stated in [17.8] of the 2018 Code, there is a continuing duty on the part of the housing authority to keep the suitability of accommodation under review. This was made clear by the House of Lords in the *Birmingham* case in the context of short-term or temporary accommodation and [17.8] of the 2018 Code now expresses the obligation in more general terms. Mr Grundy accepts that the duty is a continuing one. But he contends that the courts should be wary of increasing the administrative burdens on local housing authorities and that the guidance on location contained in [48]-[49] of the 2012 Supplementary Guidance (and now [17.47]-[17.48] of the 2018 Code) should be read as limited in its application to the time when the original offer is made. If it is to be applied as part of a rolling review of the suitability of accommodation which has been offered and accepted then this would lead, he says, to the accommodation moving in and out of suitability depending on the availability of alternative accommodation from time to time. It would, he says, make the task of local housing authorities administratively complex if not impossible and lead to obvious disruption.

33. I have some sympathy with the argument that the burden on local housing authorities should not be unnecessarily increased. But it is not possible to read [17.47]-[17.48] of the 2018 Code as limited in this way. Nor has the Council adduced any evidence to demonstrate that it would be impracticable or unduly difficult for the review officer to take into consideration the present state of available accommodation within its district. We are concerned only with whether the review of an original housing decision

involving an out-of-district placement (which clearly ought to take into account the availability of other suitable accommodation within or closer to the authority's district) similarly involves a consideration of whether other suitable accommodation closer to or within the district has become available as at the date of review. This issue is not free of authority. In *Mohamed v Hammersmith and Fulham London Borough Council* [2002] 1 AC 547 the House of Lords confirmed that an inquiry by a housing authority under s.184(2) HA 1996 as to whether the applicant "has" a connection with the district of another local authority fell to be carried out by the review officer at the date of the review decision. The review was not limited to the circumstances existing at the date of the original decision. At [26] Lord Slynn of Hadley said:

> "The decision of the reviewing officer is at large both as to the facts (ie as to whether the three conditions in section 198(2) of the Act are satisfied) and as to the exercise of the discretion to refer. He is not simply considering whether the initial decision was right on the material before it at the date it was made. He may have regard to information relevant to the period before the first decision but only obtained thereafter and to matters occurring after the initial decision."

34. The same approach was taken by this Court in *Omar* in relation to a review of the suitability of the proposed accommodation. At [25] Waller LJ said:

> "Before turning to the authorities, I have asked myself what I would think should be the proper approach so that I can then see whether the authorities point in the same or a different direction. It seems to me that the question of what facts may be taken into account on the review will depend on what is being reviewed and must, unless there is some compelling legislative provision which dictates to the contrary, be dictated by what fairness requires. Common sense may often dictate the taking into account of facts as at the date of review. So, for example, if accommodation is still available, because the homeless person has taken up the offer and in that context asked for a review, it makes sense to look at the matter as at the date of review when the accommodation is still available. But if accommodation has been offered and rejected and the council has taken the decision that it has fulfilled its duty and so no longer makes available that property or any property, it does not seem fair on either the homeless person or the council to look at the matter at the date of review. The question in such cases, it seems to me, ought to be whether the council was correct in taking the view that it had offered suitable property; and that can only be fairly tested by reference to the circumstances as they existed as at the date of that decision."

35. Judge Saggerson directed himself in accordance with this decision.

36. The decision in *Omar* was followed in *Abed v City of Westminster* [2011] EWCA Civ 1406 where Lloyd LJ considered whether a failure by the housing authority to make all

the necessary inquiries as part of its original decision on suitability could be cured by a re-consideration of all relevant matters as part of the review. At [28]-[29] he said:

> "28. In my judgment these show that the review process, which is as Lord Slynn said an administrative process, is a continuation or a replacement for the initial decision-making process. It is therefore in a sense analogous to what would have been the result if under the old procedure the judicial review application had been brought and the administrative court had quashed the original decision and required the local authority to come to a fresh decision. If such a process had then been taken the inadequacy or even unlawfulness of the original decision would have been nothing to the point. Likewise under the present regime, for which the review is a matter of right for the disappointed applicant, it seems to me that while of course any point may be taken in the course of the review as to what was or was not said at the stage of the original offer, what really matters is for the issues of substance to be addressed in the course of the review, and to be properly addressed.
>
> 29. Accordingly even if the local authority failed in its duty to make proper inquiries on the issues relevant to suitability of the accommodation before making an offer, in my judgment the remedy for a disappointed applicant is to exercise the right of review. The applicant thereby has a second chance to have the matter properly considered with the fullest opportunity for representations to be made and a fresh duty on the local authority to make proper inquiries. Only if the result of that process is flawed so as to be wrong in law is there any further recourse by way of appeal section 204...".

37. Finally, I should refer for completeness to the later decision of this Court in *Temur v Hackney LBC* [2014] HLR 39 where the issue was whether the review officer was entitled to reach a decision on the review that was adverse to the applicant on different grounds from the original decision. The housing authority had decided that the applicant was not in priority need but on review the officer decided that the applicant was not homeless because by the date of the review she had acquired accommodation which it was reasonable for her to occupy. Jackson LJ (at [34]-[35]) said:

> "34. The reviewer is required to reach his decision by reference to the state of affairs at the date of his decision: see *Mohamed v Hammersmith and Fulham* LBC [2001] UKHL 57; [2002] 1 A.C. 547; *Banks v Kingston upon Thames RLBC* [2008] EWCA Civ 1443; [2009] H.L.R. 29; *NJ v Wandsworth LBC* [2013] EWCA Civ 1373*;* [2014] H.L.R. 6. There is only one issue which calls for historical research by the reviewing officer. That concerns whether the applicant, if homeless, became homeless intentionally: see *Din v Wandsworth LBC* [1983] 1 A.C. 657; *Haile v London Borough of Waltham Forest* [2014] EWCA Civ 792. That issue is of no relevance to the present appeal.

> 35. It is far from unusual for circumstances to change between the date of the original decision and the date of the review decision. Those changes may be for better or for worse. If the applicant becomes disabled or acquires more dependents, then he/she may secure a more favourable decision on review. On the other hand the applicant may enjoy good fortune, for example by marrying someone who owns a spacious property. In the latter case it would be absurd to say that a hard pressed local authority is obliged to treat such a person as still being homeless."

38. Lewison LJ said:

> "79. I take the word "review" as being, in this context, equivalent to "reconsider". Thus on a straightforward reading of s.202(1) what the authority is being asked to do is to reconsider the question what duty (if any) is owed to him under those sections. I do not see this as in any way incompatible with s.202(5) which requires the authority, on a request being made, to "review their decision". The authority will review their decision by reconsidering what duty (if any) is owed to the applicant.
>
> …
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> 85. First, as Mr Rutledge submitted, the description of the authority's duties is expressed in the present tense. The duties arise where the authority are satisfied that the applicant "is" homeless. Likewise the question for the authority on review is what duty (if any) "is" owed to the applicant under Pt 7. Secondly, binding case law is to the contrary. In *Mohamed v Hammersmith and Fulham LBC* [2001] UKHL 57; [2002] 1 A.C. 547 the House of Lords held that events subsequent to the application could be taken into account on the review. As Lord Slynn put it the decision of the reviewing officer "is at large" as to the facts. Thirdly, reg.8(2) is procedural only. It cannot dictate the scope of the review mandated by the statute. Fourthly, policy considerations dictate the same result. Social housing is a valuable resource. If, after the original decision, but before the review, the applicant ceases to be homeless it would be extraordinary if the authority still had a duty which, in terms, is confined to those who are homeless or threatened with homelessness."

39. It seems to me that, consistently with these authorities, we should treat the obligation of the Council to review its decision to secure accommodation for Mr Saleh at 179 Little Ilford Lane as requiring it to reconsider that decision in the light of all material circumstances at the date of review including the availability of suitable accommodation either within or closer to its district and the school which his daughter attends.

40. Since it is common ground that the review officer did not do this, it follows that the judge was right to allow Mr Saleh's appeal and to set her decision aside. I would therefore dismiss this appeal. In these circumstances, it is unnecessary to deal with the issues which arise on the respondent's notice.

Lady Justice Asplin :

41. I agree.

Sir Rupert Jackson :

42. I also agree.