Neutral Citation Number: [2022] EWCA Civ 112

Case No: B5/2021/0571

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT STOKE ON TRENT
His Honor Judge Rawlings
G00SQ548

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 February 2022

Before:

LADY JUSTICE KING
LADY JUSTICE ASPLIN
and
MR JUSTICE FRANCIS

- -

Between:

LISA PALEY	**Claimant/ Appellant**
- and -	
THE LONDON BOROUGH OF WALTHAM FOREST	**Defendant/ Respondent**

- -
- -

Jocelyn Hughes (instructed by **Dicksons Solicitors**) for the **Appellant**
Nicholas Grundy QC and Michael Mullin (instructed by **Waltham Forest Council**) for the **Respondent**

Hearing date: 30 November 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:00am on 4 February 2022.

Lady Justice King:

Introduction

1. This is a second appeal from an order made by HHJ Rawlings on 7 September 2020 whereby he dismissed the appeal of the appellant Lisa Paley ("Ms Paley") against the decision of Waltham Forest Borough Council ("the local authority") to offer Ms Paley accommodation in Stoke-on-Trent in order to bring to an end their main housing duty under s 193(2) of the Housing Act 1996 (HA 1996).

2. The issue before the court is whether, upon a correct application of judicial review principles, the local authority made proper inquiries and conducted an appropriate objective assessment of the affordability of a private rental property offered to Ms Paley sufficient to discharge their duty to rehouse her pursuant to s 193(2) HA 1996.

3. Permission to bring this second appeal was granted by Arnold LJ on 5 July 2021 on the basis that not only does the appeal have a real prospect of success, but it raises important points of principle of practice concerning the inquiries which local authorities must make when determining whether or not a person is intentionally homeless.

4. For the reasons set out in more detail later in this judgment, the appeal will be allowed, this court having concluded that the local authority failed to make a proper assessment of the affordability of the out of borough property they offered to Ms Paley in the purported discharge of their duty to provide her and her children with suitable accommodation.

Background

5. The background can be set out shortly. Ms Paley is a single parent with four children now aged 21, 15, 14 and 5 years. The father of the three younger children is a man who has played no part in these proceedings.

6. Ms Paley lived in Waltham Forest for 35 years until 31 August 2016, when she was evicted following the service upon her of a section 21 Housing Act 1996 ("HA 1988") notice in circumstances when her landlord wished to sell the privately rented property in which she and the children had lived for 8 years.

7. Ms Paley subsequently presented to the Local Authority as homeless and in November 2016, the family was placed in temporary accommodation in Bexley. On 3 June 2017, the local authority accepted that it owed Ms Paley a full housing duty under s 193(2) HA 1996, a duty commonly known as the 'main homelessness duty'.

8. On 4 November 2019, the discretionary housing payments which were being made to Ms Paley came to an end leaving a shortfall in her weekly budget. As a consequence, she accrued significant rent arrears in relation to the temporary accommodation in Bexley.

9. As the accommodation in Bexley was temporary, in order for the local authority to discharge its duty to bring to an end its main homelessness duty under s 193(2) HA 1996, they had to provide adequate accommodation for Ms Paley, suitable for her long term housing needs.

The s193(2) HA 1996 duty

10. Before considering whether, contrary to the submissions made on her behalf, the property offered to Ms Paley discharged the main housing duty of the local authority, it is useful to identify the nature of the duty and the obligations which underpin it.

11. Part VII of the HA 1996 is entitled 'Homelessness'. Under section 193, if the local authority is satisfied that the applicant is homeless, eligible for assistance, has a priority need and it is not satisfied that the applicant is intentionally homeless, then the local authority will ordinarily owe him or her under s 193(2) HA 1996, the main housing duty to secure accommodation for his or her occupation. That duty continues until one of the events at s 193(5) – (7AA) occurs.

12. In Ms Paley's case, the local authority offered her accommodation in the private rental sector so the relevant provision bringing the local authority's duty to an end is s 193(7AA) HA 1996:

> "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.
>
> (7A) The matters are—
>
> (a) the possible consequence of refusal or acceptance of the offer, and
>
> (b) that the applicant has the right to request a review of the suitability of the accommodation and
>
> (c) in a case which is not a restricted case, the effect under section 195A of a further application to a local housing authority within two years of acceptance of the offer.
>
> (7AC)……
>
> (7F) The local housing authority shall not-
>
> 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."

13. It follows therefore that the local authority must not approve a privately rented property unless it is suitable for the applicant. Suitability includes both the location of the property and its affordability. If the property is not suitable, then by virtue of s 206 (1)(b), the main housing duty will not be discharged. By s 208(1) HA 1996 the local authority shall, so far as is reasonably practicable, secure accommodation in the district of the applicant.

14. In discharging its duties the under the HA 1996, the local authority functions are also covered by section 11(2) Children Act 2004 ('CA 2004') which requires *inter alia,* a housing authority to ensure that they discharge their functions 'having regard to the need to safeguard and promote the welfare of children' and that any services provided by another person pursuant to arrangements made in the discharge of their functions are 'provided having regard to that need'.

15. By section 182(1) the local authority is obliged to have regard to such guidance as may from time to time be given by the Secretary of State.

16. In the present appeal the focus is on two matters each of which relate to the suitability of the property offered to Ms Paley; namely its location and its affordability.

Location

17. It goes without saying that Ms Paley, as a single mother with four children who had lived all her life in a particular area of London, wished to remain in that locality. The importance of people remaining in their area is recognised in s 208(1) HA1996, which imposes a statutory duty on local authorities to provide accommodation for a homeless person in their own area "so far as [is] reasonably practicable".

18. Due to the serious housing shortage in London, out of borough placements have become increasingly common. During the passage of what subsequently became the Localism Act 2011, it became apparent that some local authorities were placing families a considerable distance from their home area. In recognition of this problem, the Secretary of State made it a statutory obligation to take into account the location of accommodation when determining suitability. This was incorporated into the Homelessness (Suitability of Accommodation) (England) Order 2012 ("the 2012 Order") which provides as follows:

> "Matters to be taken into account in determining whether accommodation is suitable for a person
>
> **2.** In determining whether accommodation is suitable for a person, the local housing authority must take into account the location of the accommodation, including—
>
> (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;
>
> (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;
>
> (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
>
> (d) the proximity and accessibility of the accommodation to local services, amenities and transport."

19. The obligation to secure housing as close as possible to where the family had been previously living was further strengthened in the "Supplementary Guidance on the homeless changes in the Localism Act 2011". This not only required, at para 49, the local authorities to try to secure accommodation 'as close as possible to where an applicant was previously living' but also to seek 'where possible' to retain established links including 'support'.

20. The Supreme Court considered the duties placed upon local authorities in out of borough placements in *Nzolameso v Westminster* [2015] UKSC 22; [2015] 2 All ER 942. Baroness Hale, having traced through the development of the duties of local authorities in relation to out of borough placements, said:

> "[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] HLR 1, and *R (Calgin) v Enfield London Borough Council* [2005] EWHC 1716 (Admin), [2006] HLR 4, were decided."

21. Baroness Hale also examined the role of s 11(2) CA 2004 when consideration is given as to the suitability of accommodation. At para [27] she emphasised the requirement of the local authority to have regard to the need to safeguard and promote the welfare of

any children in the household. The suitability of a property to meet their needs is, she said, a 'key component in its suitability generally'. She went on:

> "[27]…..In my view, it is not enough for the decision-maker simply to ask whether any of the children are approaching GCSE or other externally assessed examinations. Disruption to their education and other support networks may be actively harmful to their social and educational development, but the authority also have to have regard to the need to promote, as well as to safeguard, their welfare. The decision maker should identify the principal needs of the children, both individually and collectively, and have regard to the need to safeguard and promote them when making the decision.
>
> [28] However, section 11 does not in terms require that the children's welfare should be the paramount or even a primary consideration."

22. Baroness Hale was not, however, oblivious to the challenges faced by housing authorities and in that context said:

> "[30] It is also the case that there will almost always be children affected by decisions about where to accommodate households to which the main homelessness duty is owed. Such households must, by definition, be in priority need, and most households are in priority need because they include minor children. The local authority may have the invidious task of choosing which household with children is to be offered a particular unit of accommodation. This does not absolve the authority from having regard to the need to safeguard and promote the welfare of each individual child in each individual household, but it does point towards the need to explain the choices made, preferably by reference to published policies setting out how this will be done."

Affordability

23. Location is not the only matter which will inform the suitability of a property. The Homelessness (Suitability of Accommodation) Order 1996/3204 ("the 1996 Order") specifies at Article 2 that affordability is a matter which must be taken into account when determining whether accommodation is suitable. The Article goes on to set out a list of matters to be considered which include the financial resources of the applicant at (a), the costs in respect of the accommodation (in this case rent) at (b) and at (d), "that person's reasonable living costs".

24. There is further assistance for local authorities to be found in Chapter 17 of the statutory Homeless Code of Guidance for Local Authorities 2018 ("the 2018 Code"). Affordability is dealt with at 17.45 and 17.46. Para 17.46 elaborates by saying that 'Housing costs should not be regarded as affordable if the applicant would be left with

a residual income which is insufficient to meet these essential needs'. Those 'basic essentials' it says, include 'food, clothing, heating, transport and other essentials specific to their circumstances'.

25. Para 17.46 goes on to say:

> "Housing authorities may be guided by Universal Credit standard allowances when assessing the income that an applicant will require to meet essential needs aside from housing costs, but should ensure that the wishes, needs and circumstances of the applicant and their household are taken into account. The wider context of the applicant's particular circumstances should be considered when considering their household expenditure especially when these are higher than might be expected."

26. The Supreme Court considered the issue of affordability in *Samuels v Birmingham City Council* [2019] UKSC 28. Although that case was one concerning intentional homelessness, it is common ground that the approach is the same regardless of whether consideration is being given to whether it was reasonable for a person to continue to live in accommodation, or as to whether proposed accommodation was, when offered to the applicant, suitable by reference to its affordability.

27. Lord Carnwath emphasised at [34] that the assessment of reasonable living expenses requires an objective assessment and cannot depend simply on the subjective view of the case officer. Importantly he said at [36] that " the question was not whether, faced with that shortfall, she could bridge the gap; but what were her reasonable living expenses (other than rent), that being determined having regard to both her needs and those of the children, including the promotion of their welfare".

28. Shortly before the present appeal was heard, the Court of Appeal considered the issue of affordability in *Patel v London Borough of Hackney* [2021] EWCA Civ 897. *("Patel")*. In his judgment Sir Nicholas Patten sets out the proper approach to both the 1996 Order and the 2018 Code. He said:

> "12. The guidance contained in the 2018 Code is not of course statutory and does not displace the provisions of HA 1996 or of article 2 of the Order. But local housing authorities are required by s. 182 HA 1996 to have regard to such guidance when exercising their statutory functions in relation to homelessness and paragraph 17.46 of the guidance was obviously intended to provide some directions as to how the issue of affordability should be addressed in terms of what the applicant should be able to provide for himself and his family out of his available income and other financial resources whilst still continuing to pay the rent.
>
> 13. Part of the argument advanced in support of Mr Patel's appeal has majored on there being an inconsistency between the language of article 2 ("reasonable living expenses") and the references in paragraph 17.46 of the 2018 Code to the applicant being left with a residual income sufficient to meet the "essential

> needs" of him and his family. I am not convinced about this. It seems to me that paragraph 17.46 is no more than an elaboration of what level of expenditure it should be reasonable to take into account in deciding whether the accommodation was affordable. *The statutory criterion of reasonable living expenses directs an enquiry into the needs of the particular applicant and his family and imposes an objective standard for determining whether any expenditure relied on to prove that the accommodation was unaffordable should be taken into account.* Loss of accommodation through the non-payment of rent requires an explanation which must satisfy a test of reasonableness. This cannot be satisfied simply by reference to how the applicant has chosen to spend the money available to him at the relevant time. *The statutory test requires the local housing authority to determine what in the particular case was a reasonable level of expenditure and the guidance in the Code suggests that this should be measured by what the applicant requires in order to provide as a minimum standard the basic essentials of life*."
>
> (my emphasis)

29. In *Patel*, the applicant had taken issue with the calculations of the reviewing officer and had written challenging them, setting out in particular why a figure for the future replacement of white goods should have been included in the calculation. The reviewing officer recalculated his figures but excluded the proposed figure for white goods. Sir Nicholas said:

> "32. Re-calculations of income and expenditure of this kind are routine in many homelessness applications. They must be evidence-based and have regard to the points raised by the applicant but in many cases there will be inadequate or incomplete documentation to support particular items, or the amounts claimed will be inconsistent with some of the documentation which is disclosed. The present case is no exception. Mr Patel's own assessment of his income was found to be too low when compared with the bank statements; some of his estimates of expenditure were rejected as excessive; but others were in fact increased by the housing officer who considered them to be too low and unrealistic. Provided that the officer making the assessment has paid due regard to the relevant guidance and has reached a conclusion open to him or her on the material available then there are no grounds for interfering with the decision which is reached. It is not for the County Court on a statutory appeal on a point of law under s. 204 HA 1996 to review the multifactorial assessment which the housing or the review officer has carried out. Unless it can be shown that the officer materially misdirected himself or failed to take relevant matters into account there is no error of law."

30. Sir Nicholas concluded that as there had been an overstated weekly liability for rent but that the reviewing officer had considerably increased the allowance for shopping over

that which the applicant had originally claimed; the reviewing officer's assessment that there was sufficient flexibility in the budget to allow for the occasional expenditure on the replacement of white goods was a conclusion properly open to him on the information he had.

Housing Act 1996 appeals

31. Following the making of an offer of accommodation by the local authority, the homeless person can request a review under section 202(1) HA 1996 which procedure is governed by the Homelessness (Review Procedure etc.) Regulations 2018. Section 203 (4) HA 1996 imposes a duty on the reviewing officer to give reasons if he decides to confirm the original decision.

32. Section 204(1) HA 1996 confers thereafter, the right to appeal to the county court on 'any point of law arising from the decision or, as the case may be, the original decision'. This was held by the House of Lords in *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5; [2003] 1 AC 430 at [7] to mean that the court must apply the principles of judicial review to such an appeal and the judge must conduct the same analysis as would 'ordinarily and properly be conducted by a careful and competent judge determining an application for judicial review'.

33. Brooke LJ considered the proper approach of an appeal court to reviews which have been conducted under sections 202 and 203 HA 1996 in *Cramp v Hastings* [2005] H.L.R. 48. Of particular relevance on the facts of this case, Brooke LJ said:

> "14 ….the review procedure gives the applicant and/or another person on his behalf the opportunity of making representations about the elements of the original decision that dissatisfy them, and of course they may suggest that further inquiries ought to have been made on particular aspects of the case. In *Surdonja v Ealing LBC* [2000] 2 All ER 597, 607 Henry LJ described "review" as the appropriate word for the act of submitting for examination and revision an inquisitorial administrative decision affecting the applicant's most basic social requirement. Given the full-scale nature of the review, a court whose powers are limited to considering points of law should now be even more hesitant than the High Court was encouraged to be at the time of *Ex p. Bayani* if the appellant's ground of appeal relates to a matter which the reviewing officer was never invited to consider and which was not an obvious matter that he should have considered."

34. At para 68 Brooke LJ concluded by saying that "The duty to decide what inquiries are necessary rests on [the reviewing officer], and her decision will be a lawful decision unless no reasonable council could have reached the same decision on the available material".

35. More recently, in *Alibkhiet v Brent LBC* [2018] EWCA Civ 2742; [2019] HLR 15 at [38], the Court of Appeal repeated its earlier warnings of the dangers of the 'judicialisation of claims to welfare services':

> "38. A court must be wary about imposing onerous duties on housing authorities struggling to cope with the number of applications they receive from the homeless, in the context of a severe housing shortage and overstretched financial and staffing resources."

36. In summary therefore, this court must approach this appeal on judicial review principles with the danger highlighted in *Alibkhiet v Brent LBC* well in mind.

The Stoke Property

37. To return then to the facts of this appeal. On 9 July 2019 Ms Paley completed a document called the Accommodation Needs Form. This is a standard form which on its front page has a table headed 'Affordability'. It includes amongst Ms Paley's listed outgoings: £29.50 a week for bus fares and £8.00 per week for taxis. The financial difficulties Ms Paley had fallen into whilst in temporary accommodation were reflected in her debt repayments which were listed as: 'Judgment debt £35 weekly' and 'Equita debt £20 as weekly. Bailiff'.

38. On the form Ms Paley also confirmed that none of the children had exams coming up, were not known to social services or were subject to any child protection issues.

39. On 15 January 2020 Mr Hussain, the senior private lettings officer at the council, spoke to Ms Paley. Counsel Ms Hughes, on behalf of Ms Paley, suggested that this conversation was no more than Mr Hussain simply confirming that nothing in the circumstances of Ms Paley had changed. I do not accept that that can have been the case. Having read the lengthy review letter referred to in more detail later in this judgment, it seems clear that, whilst not a full scale formal interview, this conversation was more detailed than as suggested by Ms Hughes and clearly involved Ms Paley providing some updating information, being given the opportunity to respond to the questions of the housing officer and to provide him with any additional information she felt to be relevant.

40. On 16 January 2020 Ms Paley received an offer letter from the local authority saying that 'after careful consideration of your circumstances, the council has decided to bring the duty under s193(2) to an end by arranging an offer of an assured shorthold tenancy in the private sector with a fixed term of 24 months.'

41. The property offered to Ms Paley was a flat in Stoke-on-Trent in Staffordshire, some 161 miles outside the local authority area. The offer letter runs to 6 closely-written pages and refers in detail to those matters found in the statutory guidance and in the 2012 Order.

42. The letter dealt at length with the suitability of Stoke as the location, highlighting the difficulty in procuring accommodation for applicants such as Ms Paley who are subject to the benefits cap and saying that that is why she was offered a property in Stoke,

where rents are more affordable. The letter identifies local amenities, confirms the availability of places at local schools, and offers help in completing application forms.

43. The letter also considered the affordability of the accommodation saying that on the basis of the information provided on 15 January 2020 (the telephone conversation) it had been concluded that the accommodation was affordable having considered the cost of rent and other expenditure on the property compared to Ms Paley's income and specifically "the outgoings which are needed for you to feed and clothe yourself and your household; to heat and light the property and to cover all other reasonable living expenses."

44. Finally the letter referred to s11(2) Children Act 1989 saying that they were satisfied that the particular needs and welfare of the children had not been compromised or that there existed serious concerns to the welfare of the children due to the household being placed in Stoke-on-Trent.

45. Unsurprisingly, Ms Paley was, in equal measures surprised and distressed at the prospect of being moved to a completely different part of the country. On 6 February 2020 she therefore sent a request for a review under section 202 HA 1996 to the local authority via the Citizens Advice Bureau ("the CAB") together with a request for a copy of her housing file.

46. The CAB housing caseworker, having discussed the situation with Ms Paley, wrote to the local authority to provide submissions in support of the requested review. The grounds of challenge related to both location and affordability. Reference was made to the undesirability of the children moving schools again, they already having had the disruption of moving schools when the family moved to Bexley. The submission explained that Ms Paley had weekly contact with her family 'whom she relied on for both practical and emotional support' and who often, as Ms Paley was a single parent, helped with childcare. By way of an example, reference was made to an occasion when Ms Paley's brother drove her daughter to hospital following an accident.

47. So far as affordability was concerned, the submission highlighted that the rent was £144.04 a week but that because of the benefit cap, Ms Paley's housing benefit would be reduced from £144.04 a week to £97.42 a week, leaving her to make up the shortfall of £48.10 from her other benefits (at that stage in the form of income support, child benefit and tax credits).

48. Disclosure of the housing file to Ms Paley and the CAB showed that in January 2020, by which time Ms Paley's state benefits were paid in the form of universal credit, the local authority had revisited the figures which had been previously provided by Ms Paley in July 2019 on her Accommodation Needs Form. The schedule completed by a 'private sector officer', and upon which it based its assessment as to the affordability of the Stoke property, was as follows:

	January 2020 Assessment: Area of finance	**Amount Per Week**
Income	Universal credit	£395.31
Totals		**£395.31**

Outgoings	Rent	£144.04
	Council tax	£4.58
	Public transport	-
	Sky/digital TV	£11.07
	Mobile phone	£9.92
	Gas	£20.00
	Electricity	£20.00
	Other household fuel	£10.00
	Household shopping	£115.00
	Other	£50.00
	Debts:	
	Loan repayments	-
	Other debt repayments	-
Subtotal		
Totals with Stoke rent		**£384.61**

49. It was on the basis of these figures that the local authority concluded that the Stoke property was affordable because, as per their table, Ms Paley had a 'surplus' of £10.70 per week. This was in the context of Ms Paley's 2019 figures for utilities and shopping having been rounded down, there now being no allowance whatsoever for public transport (£37.50 per the 2019 budget), and nothing included as a contribution towards the repayment of her debts (£55 per the 2019 budget). Instead, a figure of £50 per week was put in the calculation as 'Other', which would have to cover all of the family's clothing, transport, and school requirements, and all other reasonable outgoings for this family of five, as well as the servicing of her debts. It should be remembered that in addition to these omissions, £48 (or £46) a week of Ms Paley's universal credit, which benefit had been calculated by reference to her reasonable living expenses, was to be re-routed from household expenditure to rent.

50. On 1 April 2020 the local authority replied to Ms Paley submissions pursuant to the Homelessness (Review Procedure etc) Regulations 2018, by way of a 'Minded to Letter'. The letter indicated that, having considered the submissions made on her behalf, they were likely to find that adequate inquiries were made, that the reasoning was clear and the offer was one a reasonable authority would be expected to make. The purpose of such a letter is to give the applicant an opportunity to comment and/or refute the evidence which has led to the provisional conclusion.

51. On 14 April 2020, the CAB once again responded on Ms Paley's behalf. Whilst they had not received any further comments from Ms Paley, they once again pressed home the argument that the property was simply unaffordable and that after paying the shortfall of £46.62 the remaining benefits were insufficient for her to live on. The fact that the property in Stoke is less unaffordable than the property in which she was living in Bexley, does not, the CAB said, make the Stoke property affordable.

52. The letter highlighted that the council officers' subjective view is at odds with the reasoning of the Supreme Court in *Samuels* and the proper question is whether the household expenses are objectively at a reasonable level.

The Review Decision

53. The review decision was dated 29 April 2020. It is a lengthy document, much of it clearly in boilerplate form in order to conform to the guidance and statutory duties. For the purposes of this appeal it is necessary only to consider the reasoning in relation to location and affordability.

54. Ms Addow, the Review Officer, set out details of the amenities near to the property. Specifically, she identified that there is a bus stop 3 minutes from the property, that the railway station is 30 minutes away and that the shopping mall, many of the shops and the bank are 'a 15 minute journey on public transport'. She concluded in this respect therefore that Ms Paley would have 'minimal difficulty' in living in the area and 'travelling to obtain medical care, groceries and accessing [your] finances'.

55. In the review it was accepted by Mrs Addow that living 161 miles from Waltham Forest would reduce the amount of visits Ms Paley could make to family and friends, and that therefore visits would have to be planned 'in terms of affordable train fares'. Ms Addow went on to say that, as the journey is 2 hours by public transport and a 4-hour drive, it is a 'reasonable journey to make'. She went on to highlight that the cost of an advance train ticket to Walthamstow station would be £56 for 2 adults and 3 children and that it would be significantly cheaper by coach.

56. Ms Addow asserted that the Accommodation Needs Form, the Affordability Assessment and the Benefit entitlement were, together, evidence that the property was affordable.

57. Ms Addow concluded by saying that the offer of the Stoke property was suitable in terms of affordability, distance, location and size and was reasonable given Ms Paley's circumstances.

The Appeal

58. On 20 May 2020, Ms Paley lodged an appeal against the review decision of the local authority under s 204 HA 1996 on the basis of 10 grounds. The appeal was unsuccessful on all 10 grounds and ultimately dismissed by His Honour Judge Rawlings. Ms Paley was given permission to appeal in this second Appeal on two grounds:

> Ground 1:
> The Appellant seeks to appeal the finding that the right to make submissions in support of a request for reconsideration, constitutes any/reasonable inquiries, sufficient to satisfy the Respondent's duties.
>
> Ground 2:
> The Appellant seeks to appeal the finding that an affordability exercise can ever be conducted properly where figures are prepared without the Appellant's input.
>
> Further, or in the alternative, the Appellant seeks to appeal the finding that an affordability exercise is deemed to have been conducted properly, in circumstances where an appellant does not challenge the Respondent's figures when raising a request for a reconsideration; alternatively, that it is insufficient for an appellant to raise the issue of affordability, generally.

Reasonable Inquiries

59. It is common ground that by virtue of s 184(1) HA 1996 the legal obligation on a local authority is to make 'such inquiries as are necessary'. It is however for the local authority to determine the scope of those inquiries, and as Brooke LJ said at para 58 of *Cramp* there will be a successful challenge on a point of law only if the judge of the county court considered that 'no reasonable council could have failed to regard as necessary the further inquiries'. The court will not intervene merely because further inquiries would have been sensible or desirable.

60. In the present case the reviewing officer had read all the material which had been made available and had spoken to Ms Paley on the telephone. The inquiries the reviewing officer had made in relation to location had gone beyond a mere box ticking exercise in respect of s 11(2) CA 2004 and had not been limited simply to ensuring that the children were not approaching critical exams.

61. In my judgment, the way the ground of appeal is drafted rather misses the point. Whilst the right to make submissions in support of a request for reconsideration is not intended to be a substitute for the local authority's obligation to make inquiries, it forms a proper part of their inquiry process through the use of the 'minded to' letter which is designed to demonstrate their current thinking, and is used as means of seeking any additional information from the applicant which may inform or lead to further investigation by them in circumstances where they had otherwise carried out a sufficient inquiry.

62. Ms Paley said in terms that she did not want to leave the area as she depended on her family for her immediate assistance for childcare and support. At no time in that document, or subsequently, did she even mention the children's father, let alone make any suggestion that the children spent part of their time with him or, as was put in the skeleton argument for the first time, that they 'enjoyed a close relationship with their father who lives and works in London' and that once the family moved to Stoke, the children would be forced to 'discontinue their weekly visits with their father'. Ms Hughes argued that the local authority should have specifically enquired about the children's father and asked whether he had any role in their lives. She submitted, more specifically, that the right of an applicant to make additional submissions at the review stage is not sufficient to discharge the local authority's duty to make inquiries. The duty was not satisfied as the local authority had failed to make any specific requests for information.

63. In oral submissions Ms Hughes drew back from the heavy reliance placed upon the children's apparent relationship with their father which is seen in the skeleton argument, saying now that she had picked the father's place in the lives of children by way of an example of the necessity of the local authority proactively to make inquiries of the applicant. Ms Hughes conceded that she had no detailed instructions as to the relationship of the children with the father, and in particular whether the children stayed overnight with their father. The submission shifted in emphasis therefore to one which said that, a s 202 HA 1996 review does not as a matter of law, satisfy the duty of a local authority to make inquiries. Such a review, she submits, has the effect of transferring the burden away from the local authority and in doing so fails to require the local authority to make specific and separate welfare related inquiries in relation to their s

11(2) CA 2004 duties. Further Ms Hughes says, such an approach fails to take into account that an applicant is not obliged to provide any submissions.

64. In my judgment, the whole of the process, including the right to make submissions by the applicant, is part of the discharge by the local authority of their duty. The 'minded to' letter is proactive, the local authority is making further inquiries. The 'minded to' letter tells the applicant about the inquiries to date, and that, having considered the applicant's submissions, they are minded to maintain the decision they have reached based on those inquiries. The effect of the minded to letter is that before finalising that decision, the applicant is given a further opportunity to inform the local authority of any other areas which should be further investigated.

65. Moving to the particulars of the present case, there is simply no basis for asserting that no reasonable local authority could have failed to make further inquiries whether in relation to the children's biological fathers or otherwise. At no stage, either in her original application, the telephone call or her review submissions, did Ms Paley mention that the father of some of the children had any role in their lives. On the contrary, she specifically identified her family members as being the important people in the lives of herself and her children. In my judgment, an important and enduring relationship with an absent, but local, parent would undoubtedly be a relevant consideration for a local authority to take into account when deciding upon the suitability of an out of borough placement. It is clear however, that it was not a matter Ms Paley thought to be of significance, she not having mentioned it at either the application or the review stage, Ms Hughes was unable to identify any other inquiry which the local authority should have made in relation to location save that there was, she says, insufficient information as to the impact on the children of a further change of school.

66. In my judgment this ground of appeal is on the facts of the case, bound to fail. As Brooke LJ said in *Cramp*, the court should be hesitant indeed to find that there has been an error of law in circumstances where the reviewing officer was never invited to consider a matter now relied upon by the applicant.

Affordability

67. The local authority submit that they had applied the proper test and had thereafter concluded, by reference to an objective assessment of Ms Paley's household expenses determined at a reasonable level, that the Stoke property was affordable. Ms Hughes for her part submits that when put into judicial review terms, there was an error of law in that no affordability assessment should take place without direct input from the applicant and that in any event no reasonable authority could on any objective assessment have concluded that the Stoke property was affordable.

68. The judge did not agree with Ms Hughes' analysis. He concluded at para 33 of his judgment that the reviewing officer was not in error because Ms Paley had not suggested at the appeal below that the figures were inaccurate and that she 'ought to have done so'. It was, the judge said, appropriate to assess affordability on the updated figures, particularly as Ms Paley was now in receipt of universal credit. The judge held that in those circumstances he was not satisfied that it was 'wrong for the respondent, in the Review decision to base affordability upon the January 2020 financial assessment, rather than the out of date financial information contained in the ANF.'

69. Mr Grundy QC, on behalf of the local authority submitted in bald terms in his skeleton argument submitted that the local authority had been entitled to rely on the January 2020 affordability assessment that they had carried out. He did not in his skeleton argument engage with the content of that assessment. In oral submissions, Mr Grundy submitted that it was in any event, unreasonable for Ms Paley to have any transport costs within her budget given that one of the schools which was able to offer a place to one of the children was within half an hour's walk from the property.

70. Such a starting point, namely that Ms Paley has no need of any transport costs, is somewhat bold when it is recollected that the 2012 Order specifically requires local authorities to take into account 'accessibility of accommodation to local services, amenities and transport' and that the 2018 Code includes at 17.46, 'transport' in its list of 'basic essentials'. This is all the more the case given the detail with which the reviewing officer had engaged, even to the extent of having priced rail fares, recognising Ms Paley's inevitable need to use public transport whether for her day-to-day needs or in order to visit her family on occasion. Conversely it should be noted that unlike the reviewing officer in *Patel*, Ms Addow did not actively engage with the budget put together in January 2020 and which budget was integral to her decision.

71. Whilst it may indeed be right, for the reasons given below, for a local authority to have relied upon an updated assessment prepared without the specific input of an applicant, that does not relieve the local authority from their obligation to rely only upon an assessment which is prepared in accordance with the 1996 Order and 2018 Code and which, as was highlighted in *Patel* 'direct[ed] an enquiry into the needs of the particular applicant and [her] family and impose[d] an objective standard for determining whether any expenditure relied on to prove that the accommodation was unaffordable [had] be[en] taken into account'

72. In my view, both the local authority (and subsequently the judge) fell into error in this respect as, putting it in the terms of the alternative formulation of Ground 2 of the Grounds of Appeal, they each wrongly approached the determination of affordability on the basis that 'an affordability exercise is deemed to have been conducted properly in circumstances where an appellant does not challenge the Respondent's figures when raising a request for a reconsideration.'

73. Had the reviewing officer critically considered the assessment upon which affordability was in large part to be determined, it is hard to see how she would have reached the conclusion that she did. For example, in my judgment, such a narrow approach to transport costs in relation to a single parent with no car, cannot against the backdrop of the following matters, be judged to be a reasonable assessment on any objective basis.

    i) Whilst a 30 minute walk to school might be reasonable on one view, it wholly deprives Ms Paley, as a mother, from choosing a school (for a child who has already moved once) by reference to the suitability of that school for her child. Even if one adopts the 'cutting one's cloth approach', it still ignores the fact that there may be numerous perfectly sensible reasons why, from time to time, a child would need to get the bus to school, for example if on occasion they had a great deal to carry, or in terrible weather so they were not soaked when they got to school, or in the winter walking home for half an hour in the dark after any after school activities

ii) In justifying an offer of a property 161 miles away from her home area, the local authority specifically spelt out that Ms Paley would be able to visit her family in Waltham Forest as it was under 2 hours by public transport. Even if undertaken by night bus and not all the family went, that is a significant public transport cost and the duty imposed upon the local authority includes the need to ensure that applicants can maintain links with family and friends and their old support network

iii) The local authority themselves refer to the shops and bank being 15 minutes away by bus, how else is Ms Paley to get the shopping for a family of five home from one of the cheaper supermarkets other than by public transport or taxi?

74. It is further submitted, somewhat incoherently by the local authority, that it is not a reasonable expense for Ms Paley to service her debts, either at all or at the rates which have been determined by the courts, as Mr Grundy submitted, no court could expect her to be able to pay at such a rate. I note that repayment of debts (other than maintenance payments) are not specifically included in either the 1996 Order or the 2018 Code. The 2018 Code allows for such contingencies; saying, again at para 17.46 that the 'applicant's particular circumstances should be considered when considering their household expenditure especially when these are higher than might be expected'.

75. In my judgment whilst Mr Grundy may well be right as to the amount Ms Paley pays each week to service these debts, the fact remains however that these are judgment debts. Perhaps it would be reasonable to expect Ms Paley to go back to the court to ask for a reduction in the weekly amounts she has to pay, but it is highly likely that Ms Paley will still be required to pay something, even if 'only' £5 or £10 a week, an amount which is still a substantial sum given her income

76. Further as set out at paragraph 17.46 of the Code (see [25] above), the local authority may be guided by the universal credit standard allowances when assessing the income an applicant will require in order to meet essential needs outside housing costs. Nowhere is that reflected in the affordability assessment carried out by the local authority, even though it was specifically drawn to their attention in the CAB response to the review. The effect of the benefit cap is such that a figure of £48 (or £46) has been deducted from the essential needs aspect of Ms Paley's universal credit as a consequence of the shortfall in the amount allocated towards payment of rent. The Supreme Court dismissed a challenge to the legality of the benefit cap in R (on the application of DA and others) v Secretary of State for Work and Pensions [2019] UKSC 21.In my judgment however, the fact that the government is permitted in law to impose such a cap, does not mean that a local authority can simply ignore its impact when assessing the affordability of a property.

77. The issue of affordability is of critical importance. It is quite understood that the reality for anyone living on universal credit is that there will be very little, if any, flex in the budget. A budget that will not, however objectively, cover what the local authority themselves described as "the outgoings which are needed for you to feed and clothe yourself and your household; to heat and light the property and to cover all other reasonable living expenses" is simply unsustainable and leads inevitably to rent arrears, likely eviction and, as a consequence, the applicant being deemed intentionally homeless. A local authority is acting irrationally if, in order to make the figures work, they simply omit expenditure which on any objective view would be reasonable for the

particular applicant who is in receipt of universal credit, to incur in order to meet her objectively reasonable responsibilities and liabilities.

78. Ms Hughes submitted that no reasonable authority can conduct an affordability exercise where the figures are prepared without the applicant's input and, that as the figures found on the housing file were prepared without any input from Ms Paley, that failure amounted to an error of law. The local authority approach the issue from the other direction saying that they were entitled to rely on their assessed figures when Ms Paley failed to submit an updated budget or specifically to engage in response to the 'minded to' letter.

79. Applying judicial review principles, whilst Ms Paley is in a far less strong position to challenge an affordability assessment, having failed to provide updated figures or to challenge the figures which became available upon disclosure of her housing file, the fact remains that the local authority have, as was said in *Patel*, to conduct an objective enquiry into the needs of the particular applicant and his or her family.

80. The local authority had Ms Paley's July 2019 budget. In the replacement budget, they simply took out the debt and public transport items expenditure which in themselves came to significantly more than the figure of £50 described as 'other' in their budget and which, if paid, would leave nothing for clothing or any of the other basic but inevitable exigencies of life.

81. In my judgment the review process is carefully crafted to give applicants a full opportunity to engage in and challenge the process by which a property is deemed to be suitable for him or her. Applicants undoubtedly do not help themselves if they fail to engage fully in the process, but it would be wholly unrealistic to make the lawfulness of the assessment of affordability dependant on the direct input of the applicant upon the affordability exercise.

82. An applicant must be given the opportunity to be involved at the various stages of the process, but if that applicant fails in whole or part to provide input, then providing they have been given that opportunity and the local authority engage in an objective evidence-based assessment of affordability relevant to the particular applicant, the local authority will not be susceptible to challenge. In my judgment they failed to do so in Ms Paley's case.

83. Sir Nicholas Patten recognised the realities of life in his judgment (see [28] above) as he said, "re-calculations of income and expenditure of this kind are routine in many homelessness applications. They must be evidence-based and have regard to the points raised by the applicant but, in many cases there will be inadequate or incomplete documentation to support particular items, or the amounts claimed will be inconsistent with some of the documentation which is disclosed".

84. In my judgment the local authority failed to prepare a budget by reference to the needs of this particular applicant and failed to pay due regard to the 1996 Order and the 2018 Code. Far from there being sufficient flexibility in the budget to allow, for example, routine but frugal use of public transport and the occasional visit to her family, the affordability budget provided by the local authority was inevitably going to plunge Ms Paley even further into debt and as a consequence, to put her and her children at risk of once again being rendered homeless. This time however, she would be deemed to be

intentionally homeless, the Stoke property having been determined to have been affordable and the main housing duty thereby discharged. The global un-itemised figure of £50 a week identified as 'other' could not begin to cover Ms Paley's reasonable expenses no matter how modest the level upon which they were calculated.

85. No one underestimates the profound difficulties faced by local housing authorities in finding suitable accommodation for those people to whom they owe a main housing duty. But there has been a proper recognition of the equally significant impact on families moved from their settled local area to the other end of the country where rents are cheaper than those in London. As, however, the CAB said in their response to the review, just because a property is less unaffordable than a property in London, that does not mean that it is affordable.

86. It follows that in my judgment the local authority failed to take relevant matters into account in determining whether the property was affordable and in my judgment, no reasonable authority could on any objective assessment of the budget prepared in January 2020 and set out at para [48] above, have concluded that the Stoke property was affordable and as a consequence, I would allow the appeal on Ground 2.

Conclusion

87. It follows therefore that: (i) the appeal in relation to Ground 1: the reasonableness of the inquiries made by the local authority is dismissed and (ii) the appeal in relation to Ground 2, the approach of the local authority to the affordability exercise is allowed, the local authority having wrongly deemed the affordability exercise to have been conducted properly in absence of a specific challenge to the figures by Ms Paley.

Postscript

88. Ms Paley and the children did not settle in Stoke and have relocated back to the south of England where they are presently living in privately rented accommodation.

89. The local authority submitted that the appeal should not have been pursued. It is, they suggested, academic given that Ms Paley and the children are no longer living in the house in question. Ms Hughes explained that that is not the case, and that a successful appeal in respect of 'affordability' means that the local authority had not discharged their main housing duty in providing the Stoke property. The importance of that for this family, Ms Hughes says, is that the local authority have as a consequence, still to satisfy their s193(2) HA 1996 duty, either by way of conducting a proper affordability assessment, and/or by identifying an alternative affordable property. For so long as they fail to do so, Ms Paley's decision to leave the Stoke property cannot result in a finding by the local authority that she is intentionally homeless with all the attendant adverse consequences of such an outcome.

Lady Justice Asplin:

90. I agree.

Mr Justice Francis:

91. I also agree.